Case Number 07-5264

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Theodore R. Lucas

Appellant,

-vs-

Margaret Spellings, In her official capacity as Secretary, U.S. Department of Education, her agents and successors

Appellees.

On Appeal from the United States District Court
for the District of Columbia
Case Number 01 CV 02393

FINAL BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING APPELLANTS AND URGING REVERSAL

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Corporate Disclosure Statement

The National Employment Lawyers Association (NELA) is a non-profit corporation. It has no parent corporation, and no other corporations have any ownership in NELA.

Certificate as to Parties, Rulings and Related Cases

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant. References to the rulings at issue appear in the Brief for Appellant.

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Statement of Interest of Amicus Curiae

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes.[1] NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

As an organization focused on protecting the interests of employees who are treated illegally, NELA has an abiding interest in ensuring that sanctions against such workers and their lawyers are not routinely issued, but rather are reserved only for egregious cases. The aim of NELA's amicus participation has been to highlight not just the legal issues presented in a given case, but also the practical effect and impact of the decision in that case on access to the Courts for people who have been unlawfully treated, as well as for their advocates in litigation.

[1] Pursuant to FRAP 29(a), all parties have consented to the filing of this amicus brief.

NELA has an interest in this case to secure open courts for claims of unlawful discrimination. The purpose of sanctions is to deter genuine abuses. When sanctions are used against plaintiffs who have raised a serious claim, then the sanctions hinder the public policy of encouraging private actions to enforce civil rights laws. When the sanctions are issued without clear evidence of abuse, the deterrent affect instead targets those with legitimate claims.

Jurisdictional Statement

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

Did the district court abuse its discretion by imposing sanctions under Rule 11 of the Federal Rules of Civil Procedure where the record lacks the extraordinary conditions that would warrant such sanctions?

Statement of the Case

Appellant Theodore R. Lucas filed his original complaint in the District Court in 2001, alleging age discrimination. After receiving defendant's motion for summary judgment (Apx. 2000) and plaintiff's

opposition (Apx. 2352), the court below, sua sponte, issued an order to plaintiff's counsel to show cause why sanctions should not be imposed pursuant to Rule 11 of the Federal Rules of Civil Procedure (FRCP). Apx. 73. Plaintiff's counsel responded to the order. Apx. 1000. The court then imposed sanctions against plaintiff's counsel in the amount of $3,000 pursuant to Rule 11. *Lucas v. Spelling*, 408 F.Supp.2d 8 (D.D.C. 2006), Apx. 124. The magistrate judge later overruled defendant's motion for summary judgment. *Lucas v. Spelling*, 435 F.Supp.2d 165 (D.D.C. 2006), Apx. 143, 160.

Appellants filed this timely appeal.

Statement of the Facts

Amicus adopts appellant's statement of the facts.

Summary of the Argument

Inferences are the core tool in proving employment discrimination claims. Attorneys have to use inferences to argue that employers are concealing unlawful and discriminatory animus. The magistrate judge's imposition of sanctions in this case is particularly troubling, as the opinion below is focused on how plaintiff's counsel made arguments that are rooted

in inferences. Plaintiff's counsel expressed no intention to deceive, and made no attempt to conceal the true facts from which the inferences were sought. Rather, plaintiff's counsel was fulfilling the special role that Congress ordained for plaintiffs in discrimination cases. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978).

Sanctions are not warranted here. Plaintiff's counsel had an objectively reasonable basis to bring this action and to oppose summary judgment. Plaintiff's counsel could not reasonably have foreseen the court's reaction to arguments based on inferences, and the imposition of sanctions is an abuse of discretion when the record presented bases for the challenged inferences. This is not an example of egregious abuse of the legal process, and sua sponte sanctions are not warranted under Rule 11. Amicus urges this Court to require a finding of bad faith or its equivalent before allowing sanctions issued on the initiative of the judicial officer. If sanctions were warranted, nonmonetary sanctions would have been sufficient, and the court below abused its discretion in failing to pursue adequate non-monetary options.

Standard of Review

The standard of review on appeal in an attorneys' fees case is abuse of discretion. *Christiansburg*, 434 U.S. at 421; *LaPrade v. Kidder Peabody &*

Co., 146 F.3d 899, 904 (D.C.Cir.1998). A district court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, U.S. 496 U.S. 384, 405 (1990).

Questions of intent are questions of fact, *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), even when the finding of fact is based on inferences from other facts. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Questions of law are reviewed *de novo*. *ASA Investerings P'ship v. Commissioner*, 201 F.3d 505, 511 (DC Cir), cert. denied, 121 S.Ct. 171 (2000).

Law & Argument

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING SANCTIONS UNDER RULE 11 WHERE COUNSEL'S MATERIAL ASSERTIONS WERE SUPPORTED BY SUFFICIENT FACTS AND THE EXTRAORDINARY CONDITIONS THAT WOULD WARRANT SANCTIONS ARE LACKING.

A. Sanctions May Be Imposed On Civil Rights Plaintiffs Only If No Arguable Basis Exists For The Claims.

An award of attorney's fees against a plaintiff in a civil rights action is "an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir.

1986). A contrary approach would have a chilling effect on plaintiffs seeking to vindicate civil rights. The Supreme Court made this clear in *Christiansburg*, noting that assessing attorney's fees against non-prevailing civil rights plaintiffs "simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement [of Title VII];" therefore, such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Christiansburg*, 434 U.S at 421, 422. The court in this case imposed sanctions in connection with a summary judgment motion that it actually overruled. A case that survives summary judgment cannot be the type of "unreasonable, frivolous, meritless or vexatious" action that warrants the imposition of sanctions. Indeed, as *Christiansburg* explains, even losing summary judgment, in and of itself, does not mean that the case was frivolous, unreasonable, or without foundation:

> [I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious

> one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Christiansburg, 434 U.S. at 421-22.

In *Christiansburg*, the Supreme Court explained that the plaintiff in a Title VII case is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* at 418 (quoting *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968)).

Imposing sanctions on non-prevailing civil rights plaintiffs has an undeniable chilling effect. In *Riddle v. Egensperger*, 266 F.3d 542, 547, 551-52 (6th Cir. 2001), the Court said:

> A potential plaintiff's fear of an increased risk of being assessed attorney fees . . . would create a disincentive to the enforcement of civil rights laws and would have a chilling effect on a plaintiff who seeks to enforce his/her civil rights, especially against a government official. . . . [T]he District Court cannot engage in *post hoc* analysis based on their findings in favor of Defendants . . .. This type of hindsight analysis discourages individual citizens from bringing suits to enforce their civil rights.

Judge Clay concurred, stating, "[i]t is rare that civil rights cases are based on direct evidence; instead, these cases are developed and ultimately decided on circumstantial evidence . . . ." *Id*. at 557-58 (internal citations omitted).

Judge Clay was concerned that sanctions, "may ultimately dissuade future civil rights plaintiffs from proceeding with potentially meritorious claims, thus stifling the enforcement of the civil rights statutes contrary to congressional intent." *Id.*

The proper inquiry, thus, is whether the record was "devoid of any evidence" to support the plaintiffs' claims. *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 184 (6th Cir. 1985). Lucas' survival of summary judgment shows sanctions are not appropriate here.

B. Sanctions Are Inappropriate When They Are Applied to One Argument or Sub-Argument in Support of an Otherwise Valid Motion or Memorandum.

Rule 11 applies by virtue of an attorney's signature on a motion or pleading. Accordingly, sanctions are available when that paper, as a whole, is frivolous. *Golden Eagle Distributing Co. v. Burroughs Corp*., 801 F.2d 1531, 1541 (9th Cir. 1986); *Balmer v. HCA, Inc.*, 423 F.3d 606, 617 (6th Cir. 2005) (reversing fee award in Title VII action; "in this circuit attorneys' fees may not be awarded to defendants where the plaintiff has asserted at least one non-frivolous claim."). In *Golden Eagle*, Judge Schroeder noted a particular concern for parsing an attorney's argument to see if the attorney properly identified which arguments were based on existing law and which on an argument to modify or advance the law. Such parsing would tend to

"create a conflict between a lawyer's duty zealously to represent his client . . . and the lawyer's own interest in avoiding rebuke," and so would threaten to chill attorney enthusiasm and creativity, a danger the Advisory Committee sought to avoid. 801 F.2d at 1540.

"There is a significant difference between making a weak argument with little chance of success . . . and making a frivolous argument with no chance of success. . . . [I]t is only the latter that permits defendants to recover attorney's fees . . .." *Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999)(under 42 U.S.C. § 1988). Accord, *Balmer*, 423 F.3d at 617.

C. Sanctions Are Particularly Inappropriate In Cases Where Motive Is Central.

Sanctions are particularly unsuitable in cases, such as this one, that involve difficult, interrelated questions of motive and causation. Discerning a defendant's motives presents an "elusive factual question," *Singfield v. Akron Metropolitan Housing Authority*, 389 F.3d 555, 564 (6th Cir. 2004), quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1981), that generally does not lend itself to any conclusive determination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (recognizing that determining motive is "sensitive and difficult," in that "there will seldom be 'eyewitness' testimony as to the employer's mental processes'").

Here, the district court abused its discretion by engaging in just the kind of *post hoc* analysis that the Supreme Court criticized in *Christiansburg Garment*. *See also*, *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.,* 815 F.2d 391, 401 (6th Cir. 1987); *Salkil v. Mt. Sterling Twp. Police Dept.*, 458 F.3d 520 (6th Cir. 2006). Lucas survived summary judgment. That shows evidentiary support for his claims. Sanctions are not appropriate for opposing summary judgment here. Accord *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424, 427 (7th Cir. 1992).

II. PLAINTIFF'S ASSERTIONS OF UNLAWFUL MOTIVE BASED ON INFERENCES SUPPORT HIS DISCRIMINATION CLAIM, ARE NOT FRIVOLOUS, UNREASONABLE, OR WITHOUT FOUNDATION, AND DO NOT SUPPORT THE IMPOSITION OF SANCTIONS.

A. Inferences are central to proving unlawful discrimination.

It is the rare set of facts that offers a "smoking gun." Given employers' efforts to "bullet-proof" the work place – something that often masks rather than eliminates discrimination – the direct evidence case has become a prime candidate for the endangered species list. In *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074 (3d Cir. 1996), the court articulates what might be obvious: "It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other

words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind." *Id*. at 1081-82.

Considering circumstantial evidence is therefore necessary to root out all cases of intentional discrimination. Discrimination may be found in suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. *Giacoletto*, 954 F.2d 424; *Holland v. Jefferson National Life Ins. Co*., 883 F.2d 1307, 1314-15 (7th Cir. 1989). Judge Posner has explained that this is the most common type of evidence in an intentional discrimination case, now that employers have taught their supervisory employees not to create evidence of discriminatory beliefs or attitudes:

> So, the defendant argues, the plaintiff was required to present evidence that the defendant had acknowledged that it discriminates against pregnant women. This is wrong. It merges what we called direct evidence of discriminatory intent with the first kind of circumstantial evidence, the kind that consists of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff. For it is not true that to get over the hurdle of summary judgment a plaintiff must produce the equivalent of an admission of guilt by the defendant. All that is required is evidence from which a rational trier of fact could reasonably infer that the defendant had fired the plaintiff because the latter was a member of a protected class, in this case the class of pregnant women.

Troupe v. The May Department Stores Co., 20 F.3d 734, 737 (7th Cir. 1994). Circumstantial evidence by definition does not on its face establish discriminatory animus, but does allow a factfinder to draw a **reasonable inference** that discrimination occurred. *See Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (en banc).

The Supreme Court has recognized that in the face of an employer's direct denials of discriminatory intent, such circumstantial evidence is "not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003).

As noted in the Court's opinion for *Int'l Brotherhood of Teamsters v. U.S*., 431 U.S. 324, 335, n. 15 (1977), an unlawful motive can sometimes be inferred from the mere fact of differences in treatment. Indeed, it is the plaintiff's job to use such circumstantial evidence to create an inference that the employment decision was based on a prohibited factor. *Id.* at 358.

Considerations of context and available inferences are key tools throughout the federal law enforcement scheme. In *United States v. Arzivu*, 534 U.S. 266 (2002), Justice Rehnquist admonishes the lower courts for examining each factor surrounding an investigatory stop in isolation: the totality of circumstances must be reviewed to evaluate the question of reasonable suspicion. Only by viewing the totality of the circumstances

could the court give due weight to the factual inferences drawn by the border patrol agent in deciding to conduct the stop. Thus, the courts recognize that officers and government officials regularly rely on inferences, drawn from seemingly unrelated facts, to determine when they have sufficient basis to invade an individual's liberty interests. Advocates who challenge employment discrimination are similarly able to detect when disparate facts provide a basis for a discrimination claim, and it is appropriate to allow them to make claims based on such inferences.

The Supreme Court applied similar reasoning in the employment case of *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 82 (1998). Oncale suffered egregious harassment from male co-workers and brought a "same-sex" sexual harassment case that ultimately found its way to the Supreme Court. In the opinion of the Court, Justice Scalia explained:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Id. at 82. *See also Andrews v. City of Philadelphia,* 895 F.2d 1469, 1484 (3d Cir.1990)("A play cannot be understood on the basis of some of its scenes

but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario"); *Burns v. McGregor Electronic Indus*, 955 F.2d 559, 564 (8th Cir. 1992)(the court "should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode"; rather, "[t]he trier of fact must keep in mind that … the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes"); *O'Rourke v. City of Providence,* 235 F.3d 713, 730 (1st Cir. 2001)(by refusing to accept the totality of circumstances examination, a court "robs the incidents of their cumulative effect" and "ignores reality"). In the ADEA case of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993), the Court made the critical point that employer decisions "'based in large part on stereotypes unsupported by objective fact,'" are "the *essence* of what Congress sought to prohibit in the ADEA," (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)).

Here, the district court too readily found frivolous the plaintiff's assertions based on inferences, without recognizing the central value of inferences in employment discrimination cases.

B. Sanctions are not an appropriate response to arguments based on inferences.

Amended Rule 11 provides that lawyers may make arguments they believe to be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . ." FED. R. CIV. P. 11(b)(2). The signature of an attorney now certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support . . . ." FED. R. CIV. P. 11(b).

In the typical discrimination case, plaintiff's counsel is required to allege and prove that an opposing party acted with unlawful motive. Counsel must plead and prove that, "defendant acted against plaintiff on account of his age [or race, gender, etc.]." For the reasons stated above, this is ordinarily shown through inferences. Requiring counsel to identify each inference, where all are derived from the evidence, constitutes an unnecessary and improper obstruction to counsel's core work of arguing the case. Counsel's routine inferential task scarcely represents the "unique" conduct required to impose sanctions. *Tareco Prop., Inc. v. Morriss*, 321 F.3d 545, 550 (6th Cir. 2003).

Here, the magistrate judge concluded that certain of Mr. Karl's

statements were "false", 408 F. Supp. 2d at 13, but he did so by failing to recognize that those statements were based on inferences. It would be false to say, "the decision maker admitted denying Lucas the promotion on account of his age," when the decision maker made no such admission. It is quite another matter to say, "the decision maker denied Lucas the promotion on account of his age," when the factual basis for this claim is made clear on the record, the claim is predicated on that factual basis, and the grounds for the inference are stated. The latter is not deceptive, and represents appropriate and usual advocacy in the practice of civil rights law enforcement.

The first statement the magistrate judge singled out for sanctions was the following: "*Examination of the interview notes certainly supports a finding that Ms. Berry was given the interview questions and appropriate answers in her possession prior to her interview.*" The magistrate judge rejected Mr. Karl's inference that the following conclusion could be drawn from the notes in conjunction with other record evidence:

> But, it is one thing to say that if one looks at the notes, one would certainly see that Berry had the questions and answers beforehand and another to say that, if one saw the notes and saw how well Berry did in conjunction with all the other evidence bearing on her performance, one might draw the inference that she was so well prepared that she must have had the questions and answers in advance. The latter is a inference that is based on a speculation; that one does well on an exam or

> in an interview may be explained by one's competence and honest preparation. It is speculation to infer that because one did well, one must have cheated.

Id. at 14.

But Mr. Karl did not claim that Berry and the defendant "must have" cheated. He posited an inference ("certainly supports a finding") that is well within the range of conclusions a reasonable fact finder could reach based on the data. Not to allow such an argument would reduce legal writing and advocacy into a dry mechanical process that saps out the passion for ridding our country of unlawful discrimination. Mr. Karl fairly represented the record. He did not hide the fact that he was reasoning from facts to a conclusion. His argument is well within bounds.

The magistrate judge next faults Mr. Karl for stating, "*[t]he agency never explains why there was no educational requirement necessary to qualify for the promotion.*" The magistrate judge contends that this statement is false since defendant answered an interrogatory stating the requirements for this position were derived "from the Qualification Standards for General Schedule Positions promulgated for government-wide use by the Office of Personnel Management (OPM Qualification Standards)." *Id.* at 15. This response lacks the detail that one might anticipate in understanding a manager's motive for not including an educational requirement. In another

denial of promotion case, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981), the Supreme Court held that an employer's explanation of its assertedly legitimate reason for its action "must be clear and reasonably specific," so that "the plaintiff is afforded a 'full and fair opportunity' to demonstrate pretext." *Id*. at 255-56. When comparing the *Burdine* standard with the employer's interrogatory answer here, one may fairly argue that the employer has still not given any meaningful reason why it required no education for the promotion.

In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the Black plaintiff was rejected in favor of white applicants for four promotions in the defendant's bank. The bank had not developed precise or formal selection criteria for the positions, but instead relied on the subjective judgment of white supervisors. Justice O'Connor held that "[i]f an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Id*. at 990-91. That the magistrate judge would sanction counsel for making the claim that an interrogatory answer does not explain the employer's motive leaves plaintiff's counsel in peril of sanctions just for doing his job.

The magistrate judge goes further to fault Mr. Karl for explaining his argument in response to the show cause order. The magistrate judge acknowledged Mr. Karl's explanation that the interrogatory response was inadequate, then faults him for conceding that the employer provided an explanation. This court's approach is unreasonable, trapping plaintiff's lawyers who necessarily must delve into the murky world of an opponent's motivations.

The next statement sanctioned by the magistrate judge is, "*Dr. Fairley directed that the requirements of the job, the Knowledge, Skills and Abilities ('KSA's') be watered down. At Dr. Fairley's direction, the objective requirements, the KSA's for the job, were changed to de-emphasize the knowledge requirement in order to make Ms. Berry appear to be qualified.*" This is a classic example of an inference-based argument. Mr. Karl does not make any false claim about what Dr. Fairley said or did, but rather lays out an inference that his actions, having the consequence of promoting an unprotected applicant, intended their logical consequence. That Dr. Fairley modified the requirements for a promotion in a way that favored one applicant is an appropriate fact for the trier of facts to consider, under the *Teamsters* standard, in evaluating whether Dr. Fairley did so for the purpose of aiding that candidate. The decision about whether to draw this inference

is one the trier of fact must make after considering all the evidence. The magistrate judge further faults Mr. Karl for failing to acknowledge that Dr. Fairley did not admit knowing that Ms. Berry was going to apply. However, that Dr. Fairley modified the KSA in a way favorable to Ms. Berry is a fact the trier of fact may use to infer such knowledge.

The fourth statement for which the magistrate judge sanctioned Mr. Karl is, "*Plaintiff has no knowledge as to whether or not Ms. Braxton actually reviewed each candidate's SF-171*." The magistrate judge notes that Ms. Braxton testified to plaintiff's counsel that she did review each SF-171, and that Mr. Karl admitted that this statement was a drafting error. 408 F.Supp2d at 17. The magistrate judge acknowledged that this statement was, "not of the magnitude and seriousness of the other statements that have so troubled me," and indeed implicitly recognized that the statement is technically true since Mr. Lucas did not have knowledge of Ms. Braxton's review. That this statement is really inconsequential to the analysis of whether unlawful discrimination occurred did not stop this sanctions juggernaut, but it should have.

The fifth sanctioned statement is, "*Dr. Fairley refused to respond to the interrogatories from the EEO investigator and refused to turn over the notes during the first stages of the administrative process.*" Acknowledging

that there was a period of time during the agency's EEO investigation in which Dr. Fairley reneged on a promise to turn over his notes, the magistrate judge accepted Mr. Fairley's explanation that the reneging resulted from privacy concerns that were ultimately resolved. The magistrate judge's first basis for sanctioning this statement is that the word "the" could refer to all the notes, and there was no dispute that Dr. Fairley did immediately release his notes of his interview with plaintiff, Lucas. However, in this context, the words "the notes" refer to the notes that Dr. Fairley initially refused to release. The magistrate judge improperly sanctions Mr. Karl for a meaning not fairly derived from what Mr. Karl wrote. Second, the magistrate judge concludes it was improper to say that Dr. Fairley "refused" to respond when he was instead deferring to his counsel's privacy review. Still, there is no dispute that Dr. Fairley initially promised to release the notes, and then made a fully conscious, albeit temporary, decision not to. The magistrate judge is really quibbling with Mr. Karl's analysis of fully disclosed underlying facts. Such is not the stuff of sanctions. The opinion below disagrees, saying:

> That Fairley refused to hand over the notes and that he refused to respond to the interrogatories-are both declaratory sentences. That one might deduce a motive from those statements is merely an argument. That Karl defends himself on the grounds that the two are the same thing establishes just how little he understands the obligations that Rule 11 imposes.

408 F.Supp.2d at 18.

Arguing that certain facts point to unlawful motive is the core of employment discrimination practice. As such, Mr. Karl's arguments are well within bounds. While discussing this issue, the opinion quotes another of Mr. Karl's arguments as follows: "*There is circumstantial evidence sufficient to create an inference that the interview notes were manufactured after the fact to justify a decision previously made on discriminatory grounds*." The opinion acknowledges that this statement is clearly identified as an inference from circumstantial evidence, and that the evidence would permit this inference along with other possible inferences. Still, the magistrate judge concludes:

> That line of "reasoning" has as much substance as a house of cards. Thanks to this fallacy, it is permissible, in Karl's view, to equate a fact-that Fairley did not take contemporaneous notes-with a conclusion-that Fairley concocted notes afterwards to hide his preference for Berry because she was younger than plaintiff.

408 F.Supp.2d at 19. The magistrate judge's analysis here relies only on the "the nature of the legal arguments made by Karl" -- in breach of the opinion's early promise not to do so -- a ground that cannot support sanctions.

The sixth sanctioned statement is, "*[S]ince the agency destroyed the documents allegedly criticizing Mr. Lucas, the court should bar any oral testimony where the underlying documents were destroyed. The agency*

must have destroyed these documents in order to deprive Mr. Lucas of the opportunity to cross examine witnesses regarding those alleged complaints." The magistrate judge prefaces this section of the opinion with a recap of his finding that no documents were destroyed and that there was no evidence of any such destruction. The magistrate judge notes how Mr. Karl, "marshals the evidence that calls into question whether there were any such complaints but does not even attempt to defend his assertion that the agency destroyed documents." *Id.* That evidence, recounted in fn 14, includes Dr. Fairley's deposition testimony that at one time he thought he had a folder related to this case that was trashed when he retired, but he later found out that he did not have such a folder. Dr. Fairley testified that he discovered the folder was given to General Counsel. In response to the show cause order, Mr. Karl agreed that his assertion that the agency destroyed documents criticizing his client "was not adequately supported by the record." The magistrate judge stops the analysis of this issue here, and does not consider if any harm flowed from Mr. Karl's original statement, before it was retracted.

The seventh sanctioned statement was, "*Ms. Berry also admits that she lacked a comprehensive knowledge of the workings of the OCR Electronic Library, despite defendant's assertion to the contrary.*" Ms. Berry testified that she was not invited to some meetings because

representatives of the enforcement offices attended them and the topics of these meetings were technical. The magistrate judge understood this when ruling on summary judgment. 408 F.Supp.2d at 20. The opinion below states that Mr. Karl should have said, "Ms. Berry did not attend meetings at which technical matters were discussed." The opinion considers the difference between the two statements to be "a giant gap." They are only an example of different, supportable analyses applied to the same data.

Other disputed statements address the complexity of Ms. Berry's prior work, Ms. Berry's deposition testimony on direct and redirect about being congratulated at her interview (before Mr. Lucas was interviewed), whether a panel member's submission of a proxy makes the panel decision less than unanimous, whether co-worker Mr. Besner tried to intimidated Mr. Powell or union representative Mr. Miller, and whether Mr. Besner's assistance to Ms. Berry included feeding her the interview questions. These disputes continue the pattern of faulting Mr. Karl for making arguments based on inferences, failing to accept Mr. Karl's explanations, and making giant gaps out of inconsequential details. None are the type of egregious misconduct that warrants sanctions.

Mr. Karl's arguments sufficed to preclude summary judgment and certainly make plaintiff's claim of a pattern of exclusion and differential

treatment non-frivolous. If plaintiff's counsel did not present the claims well, that does not make them frivolous. Issues do not have to be raised by the best method to preserve them. *Stewart & Stevenson Services, Inc. v. Pickard*, 749 F.2d 635 (11th Cir. 1984). During discussion of the "refused" issue, the magistrate judge jibes, "I am afraid that Karl's counsel has caught Karl's disease." 408 F.Supp.2d at 18. This is a statement that calls into question whether the magistrate judge adequately respected the judgment of Congress in enacting the ADEA. To the extent that such a comment deters other lawyers from pursuing anti-discrimination claims the way Mr. Karl did (408 F.Supp.2d at 26), it is particularly troubling.

C. Public policy would be served by requiring a finding of bad faith before imposition of monetary sanctions pursuant to judicial initiative under Rule 11(c).

The opinion below strains to find a legal basis to impose sanctions without making any finding of bad faith on the part of the sanctioned attorney. 408 F.Supp.2d 10-11. The trial court reviewed its inherent authority and passed on this basis precisely because it would have to find that attorney Karl acted in bad faith. An enlightened view of the sua sponte branch of Rule 11(c)(2) would require such a finding of bad faith when a judicial officer seeks to impose sanctions under procedural circumstances

that deprive the attorney of the "safe harbor" provision for sanctions sought by an opposing party.

In *In re Pennie & Edmonds LLP*, the Second Circuit found that, "[t]he absence of a 'safe harbor' opportunity to reconsider risks shift[s] the balance to the detriment of the adversary process." 323 F.3d 86, 91 (2d Cir. 2003). Combined with a warning by the Advisory Committee that court-initiated sanction proceedings should only be used in egregious situations, "adversary process" was minimized by requiring that counsel's action be in subjective bad faith. Conceding that the use of an objective standard "would deter some submissions deserving condemnation," the court concluded that the district court's:

> application of an "objectively unreasonable" standard, in the absence of either an explicit "safe harbor" protection or [similar protection], risks more damage to the robust functioning of the adversary process than the benefit it would achieve.

Id.

See also Kaplan v. DaimlerChrysler A.G., 331 F.3d 1251, 1255–56 (11th Cir. 2003) (agreeing with *Pennie* but finding it unnecessary to determine the *mens rea* issue); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) (sua sponte Rule 11 sanctions must be reviewed "with particular stringency") (quoting *United Nat'l Ins. Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001)).

A requirement that courts find bad faith before imposing sanctions would bring Rule 11(c)(2) in line with the standards for the courts' use of their inherent power. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (assessment of fees under inherent power limited to those "who willfully abuse judicial processes"). A specific finding of bad faith must "precede any sanction under the court's inherent powers." *Id.* at 766.

In this Circuit, it is unsettled whether 28 U.S.C. § 1927 should be construed to impose liability for reckless conduct or read to incorporate a subjective bad faith requirement. *See LaPrade v. Kidder Peabody & Co.* 146 F.3d 899, 905 (D.C. Cir. 1998), *cert. denied,* 525 U.S. 1071 (1999). This case affords an opportunity to bring this Circuit in line with those that do require bad faith or its equivalent before the imposition of any sanctions initiated by a judicial officer. In *Peterson v. BMI Refractories*, 124 F.3d 1386, 1395 (11th Cir. 1997), a panel of the Eleventh Circuit concluded that "there is little case law in th[e] circuit concerning the standards applicable to the award of sanctions under § 1927." The court read the statute to only require a court to make its own determination as to what was "unreasonable and vexatious" and "multiplies the proceedings." *Id.* at 1396. In *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544 (11th Cir. 1993) (quoting *Avirgan v. Hill*, 932 F.2d 1572, 1582 (11th Cir. 1991)), however, a panel concluded that

the statute only applied to those attorneys "who willfully abuse the judicial process by conduct tantamount to bad faith." A recent opinion adopts the higher subjective standard. *See Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003) (describing the statute in terms of "willful abuse" and "conduct tantamount to bad faith"); *see also Norelus v. Denny's Inc.*, 457 F.3d 1180 (11th Cir. 2006); *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F2d 1163, 1167 (7th Cir. 1968) (conduct must be so "unreasonable and vexatious" as to warrant a finding that counsel engaged in a "serious and studied disregard for the orderly processes of justice.").

The court below distinguished *Pennie* on the basis of the nature of the sanction imposed. 408 F.Supp.2d 8, at 11. But in the *Pennie* case, the type of sanction awarded was not material to the panel's conclusion that sua sponte Rule 11 sanctions must be founded on a finding of bad faith. The decision below draws a distinction that makes no difference. The trial court below alternatively cites with approval the First Circuit's opinion in *Young v. City of Providence,* 404 F.3d 33, 39 (1st Cir.2005). In *Young*, the court did not need to address the *Pennie* decision to conclude that the attorney's conduct there should not be subject to sanctions. In *Young*, the court noted that, "courts ought not invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they

made unfounded objections, weak arguments, and dubious factual claims." 404 F.3d at 39-40. The court then reversed the sanction at issue after concluding that counsel's statements were not false. The court found that counsel's memorandum eventually explained that basis for its claims, and therefore did not violate Rule 11. 404 F.3d at 40-41.

The 1993 amendments were adopted precisely to limit an acknowledged excess of satellite litigation over Rule 11 issues spawned by the 1983 amendments, by significantly raising the threshold for successful Rule 11 motions. *See, e.g.,* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 100 n.17 (2001):

> [T]he 1983 amendment to Rule 11, the federal sanctioning provision, … was intended "to put teeth" into the sanctioning rule. It certainly did. In the ensuing decade, the federal courts were inundated with Rule 11 petitions and sanctions. The outrage of the practicing bar to the amended Rule 11 finally led to further amendment of Rule 11 in 1993, thereby providing a "safe harbor" for alleged attorney improprieties. The 1993 amendments did the trick. I am very willing to suggest that the 1993 Rule 11 amendments are a fine example of a good rulemaking.

Thus the *Young* precedent does not support the sanctions at issue here.

Limiting judicially initiated sanctions to cases of bad faith abuse of the judicial process would serve both judicial economy, and appropriately limit this type of satellite litigation to those cases that are truly egregious.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED MONETARY SANCTIONS BASED ON A NEW

STANDARD REQUIRING IDENTIFICATION OF FACTUAL ALLEGATIONS BASED ON INFERENCES, WHEN NON-MONETARY SANCTIONS WOULD HAVE BEEN ADEQUATE TO ANNOUNCE THE NEW STANDARD.

When imposing sanctions, judges are to consider "directives of a nonmonetary nature. . . ." FED. R. CIV. P. 11(c)(2). Alternatives referred to in the Notes include "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; . . . [or] referring the matter to disciplinary authorities." FED. R. CIV. P. 11 advisory committee's note to 1993 amendment. The 1993 amendments require that sanctions be limited to that which is "sufficient to deter." Fed.R.Civ.Pro 11(c)(2). The directive comes from the "least severe sanction adequate" test put in place by *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 878 (5th Cir.1988) (en banc). Rule 11 was amended to de-emphasize the use of fees as a sanction. GEORGENE M. VAIRO, RULE 11 SANCTIONS 708 (ABA 2004)(new Rule 11 "has as its primary purpose the deterrence of frivolous conduct [and to] de-emphasize the use of an award of attorney's fees and expenses as a sanction."). It would be better if sanctions had a basis other than a judicial officer's computation of his own pay in an opinion. Reference 408 F.Supp.2d. at 26; *see also Holland v. Williams Mountain Coal Company,* 496 F.3d 670 (D.C. Cir. 2007) (reversing a finding of "bad faith" by the same Magistrate Judge).

Nonmonetary sanctions would be better in this respect.

Conclusion

Since inferences are central to arguing the typical discrimination case, public policy requires plaintiff's counsel to make arguments based on inferences. The district court's imposition of sanctions here is the polar opposite of what is required by public policy. The amicus asks that the judgment be reversed and the sanction order vacated.

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Certificate of Service

Two true and accurate copies of the foregoing Brief of Amicus Curiae National Employment Lawyers Association in Support of Appellant and Urging Reversal was served on this 6th day of October, upon the following, by First Class United States Mail, postage prepaid:

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