No. 11-7011

In the United States Court of Appeals
for the District of Columbia Circuit

NIAMKE KEYS and SHERRI SIMS,

Plaintiffs-Appellants,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia (No. 1:01-CV-02619)
The Honorable Royce C. Lamberth

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellants and Urging Reversal

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DATED: November 29, 2012

Certificate as to Parties, Rulings, and Related Cases

(A) **Parties and Amici.** Except for the Metropolitan Washington Employment Lawyers Association, appearing as *amicus curiae* on behalf of Plaintiffs-Appellants, all parties appearing before the district court and in this Court are listed in the Brief of Appellants.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief of Appellants.

(C) **Related Cases.** This case has not previously been before this Court. There are no related cases.

Rule 29(c)(1) Corporate Disclosure Statement

The Metropolitan Washington Employment Lawyers Association is an association. It does not have any corporate parent. It does not have any stock, and therefore no publicly held company owns 10% or more of the stock of this *amicus*.

Rule 29(c)(5) Statement

No party or party's counsel authored or funded this brief, and no person other than *amicus curiae* covered the printing costs of the brief.

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MWELA Metropolitan Washington Employment Lawyers Association

INTEREST OF *AMICUS CURIAE*

The Metropolitan Washington Employment Lawyers Association (MWELA) submits the following pursuant to D.C. Cir. R. App. P. 29(b).

MWELA, founded in 1991, is an affiliate of the National Employment Lawyers Association, an organization of attorneys, primarily counsel for employees, who specialize in employment law. MWELA currently has over 310 members, including attorneys specializing in employment law and law student members. MWELA conducts an annual one-day CLE conference, attended by about 140 members and guests, and holds periodic seminars on employment law issues. MWELA also works with the U.S. District Court for the District of Columbia and the D.C. Superior Court, as well as with agencies such as the U.S. Equal Employment Opportunity Commission and the U.S. Merit Systems Protection Board, to encourage prompt and just resolution of employment disputes.

MWELA has frequently submitted *amicus curiae* briefs in cases of interest to this Court, the Fourth Circuit, the D.C. Court of Appeals, and the U.S. District Court for the District of Columbia. *See, e.g.*, *Ponce v. Billington*, 679 F.3d 840 (D.C. Cir. 2012); *Talavera v. Shah*, 638 F.3d 303 (D.C. Cir. 2011); *Solomon v. Vilsack*, 628 F.3d 555 (D.C. Cir. 2010); *Barbour v. WMATA*, 374 F.3d 1161 (D.C. Cir. 2004); *Trout v. Secretary of Navy*, 317 F.3d 286 (D.C. Cir. 2003).

MWELA seeks to participate in this appeal as an *amicus* to address

Appellant's first issue on appeal, because its members, who litigate and try employment discrimination cases, have an interest in the proper application of Rule 41 and other sources of authority in governing the conduct of trials, thereby ensuring a trial on the merits of their client's claims.

SUMMARY OF ARGUMENT

Sanctions are an important tool in managing civil litigation, including employment discrimination cases. However, sanctions can be misused by imposing the most drastic, case-ending sanctions without proper consideration of whether lesser sanctions would appropriately address the challenged conduct, thereby properly allowing the parties to have their day in court.

MWELA respectfully submits that this Court should, consistent with its prior precedent, confirm the law governing Rule 41 sanctions by holding that it was reversible error for the district court to have dismissed an employment discrimination complaint based upon conduct at trial without proper consideration of lesser sanctions, such as a curative or limiting instruction, thereby allowing the jury to judge the merits of the employment discrimination claims.

ARGUMENT

I. Dismissal under Rule 41 Is a Draconian, Last-Resort Remedy.

This Court has long and consistently held that while Rule 41 allows the district court the discretion to dismiss a case if "the plaintiff fails to prosecute or to

comply with these rules or a court order," *see* Rule 41(b), Fed. R. Civ. P., such a dismissal is a draconian remedy that must be sparingly applied, and only when lesser sanctions would not be sufficient. Instead, this Court has enunciated a clear preference for disposition on the merits. *See Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (given the "drastic nature" of a case-terminating sanction, "which deprives a party completely of its day in court," the "disposition of cases on the merits is generally favored"); *Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1072 (D.C. Cir. 1986) ("our system favors the disposition of cases on the merits"); *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 373-74 (D.C. Cir. 1980) ("An abuse of discretion need not be glaring to justify reversal, modern federal practice favoring trials on the merits"); *accord Hassenflu v. Pyke*, 491 F.3d 1094, 1095 (5th Cir. 1974) (*per curiam*) ("Dismissal of the complaint with prejudice is essentially punishing the appellants. Dismissal effectively denies them an opportunity to maintain their action.").

This rationale is particularly appropriate in employment discrimination cases, where Congress has established a remedial scheme that designates the employee, not just the EEOC, as a means for vindicating important policies that prohibit discrimination. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978), the Supreme Court explained that the plaintiff in a discrimination case is "the chosen instrument of Congress to vindicate 'a policy that Congress

considered of the highest priority.'" (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)); *accord Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) ("Congress decided, therefore, to rely primarily on 'private suits in which, the Solicitor General [has noted,] the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'") (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972)).

As Judge Posner noted, discrimination lawsuits serve important objectives of deterrence and compensation, yet dismissal improperly defeats those objectives:

> A civil rights tort suit (the present case), like other tort suits, has from a social standpoint two objectives. One is deterrence. Tort law backs up criminal law (or maybe vice versa); it is a regulatory regime designed to prevent harmful behavior by attaching a financial sanction to it. **The deterrent objective is defeated if a suit is dismissed for failure to prosecute; the defendant walks away scot free even if he did in fact commit the tort for which the plaintiff is suing**.

Ball v. Chicago, 2 F.3d 752, 757 (7th Cir. 1993) (citing *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) and *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123 (D.C. Cir. 1977)) (emphasis added).

In 1977, this Court, in addressing a Rule 41 dismissal, concluded that the "trial-court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions." *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123 (D.C. Cir. 1977) (remanding).

In the ensuing decades, this Court has remained true to *Jackson*, consistently holding that it was reversible error to dismiss a case under Rule 41 where less severe sanctions had not been explored:

> The law of this circuit partakes of the general view that dismissal is an extremely harsh sanction and may be reversed when discretion is abused. **Since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success**.

Trakas v. Quality Brands, Inc., 759 F.2d 185, 186-87 (D.C. Cir. 1985) (emphasis added) (citing *Jackson*, 569 F.2d at 123, and *Camps v. C & P Telephone Co.*, 692 F.2d 120, 123-24 (D.C. Cir. 1981)); *accord Peterson v. Archstone Communities, LLC*, 637 F.3d 416, 419 (D.C. Cir. 2011) ("Nor did the court try 'less dire alternatives' before resorting to dismissal."); *Gardner v. United States*, 211 F.3d 1305, 1308 (D.C. Cir. 2000) ("… we have made it clear that, 'under certain circumstances, dismissal may be an unduly severe sanction for a single episode of misconduct.'") (quoting *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990)); *Shea*, 795 F.2d at 1072 ("we hold that the District Court abused its discretion in refusing to reinstate Shea's cause of action, without having first explored less drastic sanctions").

This Court's firmly-held position that dismissal is a drastic remedy, only to be taken as a last resort, is consistent with that of other circuits:

> [T]he federal courts have held fairly consistently that, except in

> extreme circumstances, a court should first resort to the wide range of lesser sanctions that it may impose upon a litigant or the litigant's attorney, or both, before ordering a dismissal with prejudice.

See Wright & Miller, *Federal Practice and Procedure: Civil 3d*, § 2369, at 625 (2008) (collecting cases).

II. Dismissal under Rule 41 Is Only Warranted if One of Three "Not Easily Met" Justifications is Satisfied.

Given the drastic nature of dismissal under Rule 41, this Court has consistently held that dismissal is only warranted if one of three justifications is met, yet those justifications are difficult to satisfy:

> Our past decisions reveal three basic justifications for dismissing an action because of counsel's misconduct. First, dismissal is necessary at times because the other party in the case has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case. Second, dismissal may be appropriate where resort to any less drastic sanctions would not mitigate the severe burden that the misconduct has placed on the judicial system. Finally, dismissal may, on certain occasions, serve as an ultimate sanction, aimed at punishing abuses of the system and deterring future misconduct.

Shea, 795 F.2d at 1074; *accord Gardner*, 211 F.3d at 1309 ("There are three basic justifications for dismissal because of attorney misconduct: (1) prejudice to the other party; (2) failure of alternative sanctions to mitigate the severe burden that the misconduct has placed on the judicial system; and (3) deterrence of future misconduct.").

This Court has recognized that these three justifications are a very high threshold, one that is difficult to satisfy:

> **These justifications are not easily met**. Prejudice, for instance, must be "so severe[] as to make it unfair to require the other party to proceed with the case." *Id*. [*Shea*, 795 F.2d at 1074.] Similarly, a malfeasant party places a severe burden on the judicial system if "the court [is required] to expend considerable judicial resources in the future in addition to those it has already wasted, thereby inconveniencing many other innocent litigants in the presentation of *their* cases." 795 F.2d at 1075-76. The final rationale, deterrence, justifies dismissals when there is some indication that the client or attorney consciously fails to comply with a court order cognizant of the drastic ramifications. *See id*. at 1078.

Gardner, 211 F.3d at 1309 (emphasis added) (quoting *Shea*).

Therefore, before sanctioning a plaintiff through a dismissal under Rule 41, the district court is required to show that one of the three "not easily met" justifications is satisfied. As this Court noted in *Bonds*:

> The choice of sanction should be guided by the "concept of proportionality" between offense and sanction. Particularly in the context of litigation-ending sanctions, we have insisted that "'since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success' or would obviously prove futile."

Bonds v. District of Columbia, 93 F.3d 801, 808 (D.C. Cir. 1996) (quoting *Shea*, 795 F.3d at 1075).

III. This Court Has Similarly Held that Case-Ending Sanctions under Other Provisions of the Federal Rules are Improper.

This Court's strongly held disfavor of case-ending sanctions under Rule 41 is consistent with its disfavor of comparable sanctions under other provisions of the Federal Rules of Civil Procedure. Thus, this Court held that it was reversible error for the district court to enter a default judgment in the plaintiff's favor under Rule 37, Fed. R. Civ. P., since a lesser sanction should have been considered in two employment discrimination cases. *Webb*, 146 F.3d at 971-72; *Bonds*, 93 F.3d at 807-09. Critically, this Court applied the *Shea* standard for Rule 41 dismissals to a default judgment under Rule 37. *Webb*, 146 F.3d at 971.

This Court has also applied the *Shea* standard in holding that it was reversible error to enter a default judgment as a sanction under the district court's inherent authority. *Webb*, 146 F.3d at 971-76 (applying *Shea*); *see also Shepherd v. American Broadcasting Companies*, 62 F.3d 1469, 1480 (D.C. Cir. 1995) ("For all of these reasons, before we can sustain a default judgment in Ms. Shepherd's favor, the district court not only must find the misconduct by clear and convincing evidence, but also must articulate a reasoned rejection of lesser sanctions.").

Thus, regardless of whether the district court enters a case-terminating sanction in favor of the plaintiff (as in *Bonds*, *Shepherd*, and *Webb*), or in favor of the defendant (as in *Gardner*, *Jackson*, *Peterson*, *Shea*, and *Trakas*), the district

court must consider whether a lesser sanction would be appropriate, and must find that one of the three "not easily met" justifications has been satisfied. This Court, in the aforementioned eight cases, concluded that the district court had erred in imposing case-terminating sanctions without having considered lesser sanctions, since the "not easily met" justifications had not been satisfied.

MWELA joins appellants in submitting that this Court should similarly find that the district court here erred in not considering lesser sanctions, since the heightened justifications for dismissal under Rule 41 had not been satisfied.

IV. Curative or Limiting Instructions are a Potential Alternative to Dismissal Under Rule 41 for Alleged Conduct at Trial.

In its role as amicus, MWELA is not in a position to declare that any particular lesser sanction would have been appropriate. However, MWELA notes that the Appellants have taken the position that a curative instruction could have been appropriately considered if the district court believed that their counsel exceeded the scope of permissible testimony when eliciting certain testimony on re-direct of Ms. Keys, after counsel believed that WMATA had opened the door to that testimony during the cross-examination of Ms. Keys. *See* Appellants' Br., at 15. MWELA thus briefly discusses the utility of curative or limiting instructions as a lesser sanction under Rule 41.

This Court has long recognized, usually in the criminal context, the value of

a curative or limiting instruction to address alleged misconduct at trial. *See United States v. Wilson*, 240 F.3d 39, 45 (D.C. Cir. 2001) (district court properly gave "the standard limiting instructions" to address prosecutor's misstatement during closing argument); *United States v. Gartmon*, 146 F.3d 1015, 1027 (D.C. Cir. 1998) (same).

Curative or limiting instructions are also proper to address evidentiary concerns at trial. *See Desmond v. Mukasey*, 530 F.3d 944, 966 (D.C. Cir. 2008) (in employment discrimination case, district court properly gave limiting instruction on scope of evidence); *United States v. Whitmore*, 359 F.3d 609, 621 (D.C. Cir. 2004) (holding that district court erred in prohibiting cross-examination of a witness, since it "could have adequately guarded against any risk of unfair prejudice or undue delay . . . by giving limiting instructions to the jury . . .").

The Fourth Circuit, in a personal injury case, similarly held that the district court properly addressed misconduct at trial through curative instructions:

> Despite the bungling, Richardson's trial counsel's misconduct was not so egregious as to warrant the severe sanction of dismissal. The district court reprimanded Richardson's counsel after each misstep, and when necessary, instructed the jury to disregard his inappropriate questions and comments. The district court concluded that, by taking these actions, it had "adequately dealt with counsel's behavior," and we agree.

Richardson v. Boddie-Noell Enterprises, Inc., 78 Fed. Appx. 883, 889 (4th Cir. 2003) (*per curiam*) (citations omitted) (affirming judgment in plaintiff's favor).

The rationale is that a jury is presumed to follow the district court's instructions. Hence, the use of curative or limiting instructions strikes a proper balance in allowing the parties to have their day in court while adequately addressing concerns that a party (or the court) may have about counsel's conduct or the evidence presented at trial. Here, too, curative or limiting instructions are an appropriate device that the district court in this case could have used under Rule 41, in lieu of dismissal, to address any concerns about counsel's conduct at trial.

CONCLUSION

For the foregoing reasons, and as set forth in Appellants' Brief, this Court should hold that it was reversible error for the district court to dismiss the employment discrimination complaint based upon conduct at trial, without proper consideration of lesser sanctions, such as a curative or limiting instruction, thereby allowing the jury to decide the merits of the discrimination claims.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and D.C. Cir. Rule 32(a)(7) because the brief contains 2,602 words, less than half the length permissible for the principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and D.C. Cir. Rule 32(a)(1) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

/s/ Alan R. Kabat

Alan R. Kabat

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association was served on all parties on this 29th day of November, 2012, by this Court's electronic case filing system and by electronic mail, with a copy to follow by first class mail to:

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