**APPEAL NO. 11-1258**

In The

# United States Court of Appeals

For The Fourth Circuit

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**THOMAS J. GAGLIARDO,**

***Appellant,***

***and***

**DEBORAH ASHTON PARSONS,**

***Plaintiff,***

***v.***

**PENINSULA REGIONAL MEDICAL CENTER,**

***Defendant-Appellee.***

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On Appeal from the United States District Court for the District of Maryland at Baltimore in No. 08-CV-3255 (Hon. Marvin J. Garbis, Senior Judge)

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## BRIEF OF AMICUS CURIAE METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT SEEKING REVERSAL OF DISTRICT COURT

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## CORPORATE DISCLOSURE STATEMENT

The Metropolitan Washington Employment Lawyers Association (MWELA) is an association.

MWLEA is not a publicly held corporation or other publicly held entity. It does not have any corporate parent.

MWELA does not have any stock, and no publicly held company owns 10% or more of the stock of this amicus.

MWELA knows of no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

This case does not arise out of a bankruptcy proceeding.

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## STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The Metropolitan Washington Employment Lawyers Association (MWELA) submits the following pursuant to FRAP 29(c). Founded in 1991, MWELA is a professional association and is a local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA is comprised of more than 300 members who represent employees in employment and civil rights litigation in Virginia, Maryland and Washington, D.C., including active litigation within this circuit. MWELA's purpose is to bring into close association employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the United States Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

MWELA has an interest in the disposition of this case because it involves issues central to the enforcement of state and federal discrimination or retaliation cases in which its members are involved, as well as the proper functioning of our dual federal-state court system. There are two principal issues that MWLEA seeks to focus attention in its brief. The first relates to the scope of "excess" fees that may be awarded pursuant to § 1927, specifically whether the district court erred in

awarding fees as a sanction for work performed in connection with the pursuit of §1927 sanctions. The second issue is whether it is appropriate to sanction a lawyer pursuant to 28 U.S.C. §1927 when that counsel moves to dismiss voluntarily, and with prejudice, federal civil rights claims in order to pursue related state law claims in state court. These issues are of particular interest to MWELA and its members, as they regularly are faced with the possibility of pursuing federal and state law discrimination and retaliation claims in federal and state courts in the circuit.

On August 22, 2011, MWELA filed a motion for leave to participate as *amicus curiae*. Undersigned counsel certifies pursuant to FRAP 29(c)(5) that no party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief.

## STATEMENT OF FACTS AND PROCEEDINGS BELOW

Amicus MWELA sets forth here relevant facts relating to its arguments below. A more complete version of events is set forth in Appellant's brief.

Deborah Ashton Parsons had a dispute with her former employer, Peninsula Regional Medical Center (PRMC). *See generally* DCt. Doc. 1 (Complaint). Ms. Parsons believed PRMC discriminated against her on the basis of her disability and retaliated against her in violation of federal and state law. *See generally id.*

Ms. Parsons filed a charge of discrimination with the Equal Employment Opportunity Commission. DCt. Doc. 1. This was done in pursuit of her administrative remedies, a prerequisite before filing suit.

The Americans With Disabilities Act (ADA) requires an aggrieved individual to file a charge of discrimination with the EEOC prior to filing suit. *See* 42 U.S.C. § 12117(a) (adopting enforcement mechanisms of Title VII of the Civil Rights Act of 1964, including 42 U.S.C. §§ 2000e-5(b), (e) and (f)). Once that charging party receives a notice of right to sue from the EEOC, she has 90 days to file suit. *See* 42 U.S.C. § 2000e-5(f)(1).

The Maryland disability discrimination statute requires an aggrieved individual bringing a private lawsuit to exhaust administrative remedies. *See* Maryland Code, State Government, § 20-1013(a). This may be accomplished, among other ways, by filing a charge of discrimination with the EEOC. *Id.*, §§ 20-

1004(c)(2), 20-1013(a)(1). However, that individual must wait 180 days after filing such a charge with the EEOC before filing her state law claim. *Id.*, § 20-1013(a)(2). Unlike the ADA, the Maryland statute allows an individual up to two years to file a lawsuit under state law. *Id.*, § 20-1013(a)(3). Venue for such Maryland state law suits lies in the circuit court for the county where the alleged unlawful employment practice occurred. *Id.*, § 20-1013(b).

Ms. Parsons received a notice of right to sue from the EEOC in September 2008. DCt. Doc. 1, at ¶10. She filed a three count complaint in the United States District Court for the District of Maryland on December 3, 2008, alleging failure to accommodate, retaliation and discrimination based on her disability in violation of the ADA. *See generally* DCt. Doc. 1. PRMC waived service of this federal lawsuit and answered the complaint in late February 2009. DCt. Docs. 3, 4.

On July 3, 2009, Ms. Parsons moved the district court to stay her case. DCt. Doc. 10. She alerted the district court of the unique Maryland exhaustion requirements and informed the district court that she intended to file an action in Maryland state court, given that 180 days had passed since she filed her EEOC charge. *Id.* at 2. Ms. Parsons also stated that "[u]pon assertion of jurisdiction by a Maryland Circuit Court[,] Plaintiff will dismiss the Complaint in this matter." *Id.* (emphasis added). The stay was granted. DCt. Doc. 11.

Ms. Parsons filed her state law complaint in the Circuit Court for Wicomico County, Maryland pursuant to the Code of Maryland, State Government Article, Section 20-601, *et seq*., which was given Case Number 22-C-09-001326. *See* DCt. Doc. 24.[1] Ms. Parsons attempted service on the corporate representative, but it failed. *Id.* In December 2009, counsel for PRMC stated that it would accept service of the Maryland Circuit Court case. *Id.*

Ms. Parsons then moved to dismiss her federal complaint without prejudice shortly thereafter, in January 2010. *Id.* PRMC opposed the dismissal, insisting it be a dismissal with prejudice. DCt. Doc. 25, at 7, ¶27. Ms. Parsons then agreed to dismiss her federal claims with prejudice. DCt. Doc. 29.

The district court held a hearing on the requested dismissal and issued an order granting a dismissal with prejudice on May 3, 2010, pursuant to Fed. R. Civ. P. 41(a)(2). *See* DCt. Docs. 32 (hearing transcript), 37 (order). The May 3, 2010 Order noted that PRMC was a "prevailing party" and stated that PRMC "may file a motion, with supporting documentation and case law, seeking an award of costs, and, if appropriate, reasonable fees under the ADA." DCt. Doc. 37, at 11 (citing cost and fee provision of ADA, 42 U.S.C. § 12205). No terms and conditions were attached to the Rule 41(a)(2) dismissal order. *See id.*

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[1] The docket for the state court case may be accessed at: http://casesearch.courts.state.md.us/inquiry/inquiryDetail.jis?caseId=22C09001326&detailLoc=CC.

PRMC sought costs and fees.[2] Going beyond the district court's invitation to seek, if appropriate, fees under the ADA, PRMC sought fees not only under the ADA, but also pursuant to the district court's inherent authority and 28 U.S.C. § 1927. *See* DCt. Doc. 40.

The district court denied PRMC's request for fees against Ms. Parsons under the ADA, but granted PRMC's request for fees against Appellant Gagliardo pursuant to 28 U.S.C. § 1927. DCt. Doc. 43, at 3-5. The district court did not hold a hearing as to the request for fees under § 1927. The district court instead apparently relied on its previous dismissal ruling as a basis for its decision to award sanctions under § 1927. DCt. Doc. 43, at 4 ("In the Memorandum and Order Re: Dismissal [Document 37], the Court set forth the 'history' of Plaintiff's counsel's behavior in regard to the instant case. This history need not be repeated herein. It suffices to reiterate that the Court finds that Plaintiff's counsel unreasonably and vexatiously, and in bad faith, multiplied the proceedings in this case.").

The district court made no further factual findings or legal analysis as to why § 1927 sanctions were appropriate, other than its reliance on the prior dismissal

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[2] PRMC separately filed a bill of costs under Rule 54(d), *see* DCt. Doc. 39, in addition to its request for fees. *See* DCt. Doc. 40. This appeal concerns only the award of fees as a sanction under 28 U.S.C. § 1927. Accordingly, the district court's award of $4,706.35 in costs pursuant to Rule 54(d) or 28 U.S.C. § 1920 is not discussed further. *See* DCt. Doc. 43, at 2-3.

order. Yet, the May 3, 2010 dismissal order (DCt. Doc. 37) has a factual error in that it asserts that "Plaintiff's counsel allowed the July 31, 2009 date to pass without . . . filing the state court case . . ." Moreover, and importantly as will be discussed below, the bulk of the district court's dismissal order chastised Appellant for discovery-related issues. DCt. Doc. 37, at 2-4. In its order granting fees against Appellant, the district court specified that "[t]he sanctions award under § 1927 is not for all costs and legal fees incurred by Defendant, but only those costs and fees that may be properly attributed to Plaintiff's counsel's actions that unnecessarily and vexatiously protracted the litigation." DCt. Doc. 43, at 5. The district court permitted briefing on the amount of the sanctions award. *See* DCt. Doc. 43, at 5-6.

PRMC sought fees totaling $31,053.25 for work broken into three categories: "failure to cooperate with discovery; the events leading up to and including resolution of Plaintiff's Rule 41(a) Motion to Voluntarily Withdraw Complaint; and PRMC's pursuit of sanctions." DCt. Doc. 44 at 1. The alleged failure to cooperate with discovery fees amounted to $6,755.50. *See* DCt. Doc. 44-2. The fees sought on matters relating to the Rule 41(a) dismissal totaled $14,784.75.

PRMC sought fees of $9,513.00 associated with its pursuit of sanctions.[3] Plaintiff opposed, specifically objecting to each of the three areas that PRMC was claiming fees. *See* DCt. Doc. 47.

The district court, without conducting a hearing, granted fees in part and denied them in part. DCt. Doc. 49, at 3-4. The district court awarded PRMC fees associated with its pursuit of sanctions, including preparation of the sanctions motion and its statement of fees, but reduced them by $640. *See id.*, at 3-4. The district court denied PRMC $6,755.50 in claimed fees associated with discovery-related matters. *Id.*, at 4-5.[4] The district court awarded all other requested fees. *Id.*, at 6. The district court issued no specific factual findings or legal analysis. As such, it is difficult to parse the precise reasons for imposing the sanctions. Notably, discovery-related fees, the apparent basis for the § 1927 award, were denied. The district court may have felt that Appellant should not have filed a motion to dismiss the federal complaint. The district court also may have acted under the mistaken belief that the Maryland state court action was not filed as Appellant said he would. See DCt. Doc. 43, at 4 (referencing "history" as articulated in Doc. 37).

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[3] Undersigned counsel recognizes that the above figures total $20 more than sought by PRMC, but cannot discern the error, whether it lies in PRMC's fee breakdown or in undersigned counsel's calculations.

[4] Because the district court denied sanctions for the discovery-related issues, the discovery issues are not addressed herein.

The district court imposed a total sanction against Appellant Gagliardo in the amount of $23,657.75. *See* DCt. Doc. 49, at 6. The district court entered judgment on the sanctions award in favor of PRMC and against Appellant Gagliardo, including post-judgment interest. *See* DCt. Doc. 50.

This timely appeal followed.

## ARGUMENT

### I. THE AWARD UNDER 28 U.S.C. § 1927 IS IMPROPER.

Section 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C.A. § 1927. Section 1927 is to be construed strictly. *See In re Crescent City Estates, LLC*, 588 F.3d 822, 826 (4th Cir. 2009) ("Because fee-shifting statutes are in derogation of the common law, courts are obligated to construe them strictly") (internal quotations omitted), *cert. denied*, 130 S. Ct. 3278 (2010). Section 1927 is "concerned only with limiting the abuse of court processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980). A court considering the propriety of a § 1927 award must focus "on the conduct of the litigation and not on its merits." *DeBauche v. Trani*, 191 F.3d 499, 511 (4th Cir.1999).

Section 1927 has three components. First, the attorney against whom sanctions are sought must engage in "unreasonable and vexatious" conduct. Second, that "unreasonable and vexatious" conduct must be conduct that "multiplies the proceedings." Finally, there is a causal element relating to fees —— an award must only be for the "excess" costs, expenses and attorneys' fees (here, only fees are at issue) reasonably incurred "because of" the improper conduct.

As to the "unreasonable and vexatious" prong, § 1927 requires "a finding of counsel's bad faith as a precondition to the imposition of fees." *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 411 n.14 (4th Cir. 1999) (internal quotations omitted); *see also Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 1184, 1191 (3d Cir. 1989) ("before a court can order the imposition of attorneys' fees under § 1927, it must find willful bad faith on the part of the offending attorney"). As to the "multipl[y] the proceedings" element, this Court in *DeBauche* concluded "as a matter of law that the filing of a single complaint cannot be held to have multiplied the proceedings unreasonably and vexatiously and therefore that § 1927 cannot be employed to impose sanctions." 191 F.3d at 511-12. Finally, as to the causal prong, "where the violation consists of unreasonably or vexatiously multiplying the litigation, the sanction should reflect only the costs or fees incurred in <u>responding to</u> those proceedings that are found to be unreasonable or vexatious." *Topalian v. Ehrman*, 3 F.3d 931, 937 (5th Cir. 1993)) (emphasis added); *see also*, *Pac. Dunlop*

*Holdings, Inc. v. Barosh*, 22 F.3d 113, 120 (7th Cir. 1994) ("The legislative history of the 1980 amendment to section 1927 states that when an attorney violates § 1927 and causes the other parties to incur 'expenses and fees *that otherwise would not have [been] incurred*...,' then he/she should personally satisfy the excess costs attributable to such conduct.") (ellipsis and emphasis in original).

A party seeking sanctions under § 1927 has a duty to mitigate those expenses, by correlating its response, in hours and funds expended, to the merit of the claims, as well as by giving notice to the court and the offending party promptly upon discovering the sanctionable conduct. *Topalian*, 3 F.3d at 937. The moving party bears the burden of demonstrating entitlement to attorneys' fees, as well as the reasonableness of the specific fees requested. *See Morris v. Wachovia Securities*, 448 F.3d 268, 284 (4th Cir. 2006) (Rule 11 context). A request for fees is "deficient on its face" where the moving party fails to specify the specific fees and costs that are attributable to opposing counsel's bad faith conduct. *See id.* at 283.

Review on appeal is for abuse of discretion. *Miltier v. Beorn*, 896 F.2d 848, 855 (4th Cir. 1990). "Abuse of discretion" is defined as a definite and firm conviction that the trial court committed a clear error of judgment; such an error occurs where the district court relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard. *See Morris*, 448 F.3d at 277.

## II. THE DISTRICT COURT ERRED IN AWARDING DEFENDANT-APPELLEE PRMC FEES ASSOCIATED WITH ITS PURSUIT OF SECTION 1927 SANCTIONS.

Appellant Gagliardo asserted that the district court should not award fees as a sanction associated with Defendant-Appellee PRMC's prosecution of its fees motion. *See* DCt. Doc. 49, at 3. The district court, as a sanction against Appellant, nonetheless awarded PRMC its fees attributable to the time devoted to the preparation of the Motion for Fees [Doc. 40] and Statement of Excess Fees [Doc. 44], a total of 35.5 hours (though some hours were awarded at a reduced rate). *See id.*, at 3-4. This is error constituting an abuse of discretion for two reasons.

First, PRMC's motion for fees was denied in part. *See* DCt. Doc. 43, at 3-4. PRMC did not separate those fees associated with the successful portion of the fee motion from those fees expended on their unsuccessful efforts. *See* DCt. Doc. 44-2, at 5. Section 1927 creates liability for liability only for "*excess* costs, expenses, and attorney fees" triggered by the attorney's vexatious behavior, 28 U.S.C. § 1927. It is not a general fee shifting statute allowing an award for the total expenses of the litigation not directly resulting from the improper conduct. *See Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991); *Coleman v. Frierson*, 607 F.Supp. 1578, 1583 (N.D. Ill. 1985). The district court should have denied fees associated with the preparation of the fee motion and petition because PRMC did not allocate those fees that supposedly were directly attributable to the alleged offending conduct. *See Coleman*, 607 F.Supp. at 1583. And in these

circumstances, PRMC's fees associated with its losing portion of the fee motion under the ADA are not "excess" fees reasonably incurred because of unreasonable and vexatious conduct within the meaning of § 1927.

Second, and more fundamentally, allowing fees in these circumstances is precluded by this Court's precedent. In *Blue v. U.S. Dep't of Army*, 914 F.2d 525, 548-49 (4th Cir. 1990), this Court reversed the sanction of an award of fees associated with the prosecution of the sanctions motion where there was no misconduct associated with the sanctions motion and hearing. *Blue* involved a Title VII lawsuit in which the district court had imposed sanctions on the plaintiffs and their counsel under several theories, including 28 U.S.C. § 1927. *Id*. at 530. This Court decided to "set aside the sanctions arising out of the prosecution of the sanctions hearing with respect to counsel" because there was "no sanctionable conduct in the attorneys' opposition to the sanctions motions." *Id*. at 549. (The *Blue* court did affirm the award of sanctions against plaintiffs for their conduct in committing perjury at the sanctions hearing. *Id.*)

This Court in *Blue* reasoned that "[l]itigants should be able to defend themselves from the imposition of sanctions without incurring additional sanctions." *Id*. at 548. *See also*, *Introcaso v. Cunningham*, 857 F.2d 965, 970 (4th Cir. 1988) (holding in sanctions appeal under Rule 11 and § 1988 that "the sanction appears to encompass litigation activity and associated expenses for

defendant's motion for attorney's fees under § 1988 and Rule 11 . . . If actually included in fixing the amount of the sanction, these items should not have been allowed even if they stemmed from the signing of a pleading, motion or other paper proscribed by Rule 11."); *Topalian*, 3 F.3d at 937 ("where the violation consists of unreasonably or vexatiously multiplying the litigation, the sanction should reflect only the costs or fees incurred in *responding to* those proceedings that are found to be unreasonable or vexatious.") (emphasis added).

MWELA recognizes that "fees-on-fees" are allowable and should be awarded under civil rights fee shifting statutes. This is, in part, because such fee shifting statutes are intended to make a party whole from the illegal conduct and to encourage private counsel to take such cases to accomplish a public policy. As such, the fees are considered an award in conjunction with the judgment as part of the litigation resulting from the illegally-proven conduct. In short, it is part of the relief derived from the merits of the claim.

By contrast, Section 1927 and other sanctions statutes, like Rule 11, allow an award against an attorney (not a party) and is not relief associated with the claim. It is a sanction associated with bad faith conduct. These sanction statutes generally require notice and an opportunity to be heard. *See*, *e.g.*, *Johnson v. Cherry*, 422 F.3d 540, 549 (7th Cir. 2005) ("The imposition of sanctions requires that the party to be sanctioned receive notice of the possible sanction and the opportunity to be

heard.") (internal punctuation omitted); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96-97 (2d Cir. 1997) (holding that "a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter"); *Baulch v. Johns*, 70 F.3d 813, 817 (5th Cir. 1995) ("§ 1927 sanctions should not be assessed without fair notice and without giving the attorney an opportunity to respond"). *Cf. Chambers v. NASCO*, 501 U.S. 32, 40, 50 (1991) (approving sanction of attorneys' fees on trial court's inherent power, but only "after full briefing and a hearing," and noting that due process requirements apply to such sanctions); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (stating that notice and opportunity to be heard are generally required before awarding attorneys' fees as sanction). The plain language of Section 1927 further requires that the fees awarded be directly attributable to the conduct that triggered the sanction. See 28 U.S.C. § 1927 (allowing an award of "excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.") (emphasis added).

An award of fees for bad faith conduct under § 1927 should not include the fees associated with the motion or hearing (as this Court held in *Blue*, where, of course, the offending conduct is not part of the motion or hearing process), as such fees are not directly attributable to the offending conduct, but rather result from a choice by the moving party to pursue the sanctions route and the requirement for

notice and an opportunity to be heard. *See Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384 (1990); *Topalian*, 3 F.3d at 937 (fees should only be awarded for time spent "responding to" improper conduct). Disallowing fees in this regard ensures sanctions petitions cannot be used as an *in terrorem* tactic by forcing opposing counsel to knuckle under due to the threat of having to pay fees associated with the motion and fee petition if opposing counsel puts up an appropriate defense.

Just as in *Blue* and *Introcaso*, fees associated with the preparation and pursuit of the sanctions motion should not have been awarded by the district court against Appellant. This Court should vacate the district court's order and judgment.

## III. THE DISTRICT COURT ERRED IN AWARDING DEFENDANT-APPELLEE PRMC FEES ASSOCIATED WITH PLAINTIFF'S MOTION TO DISMISS.

This Court should vacate the award of fees associated with the motion to dismiss because the district court's decision constitutes an abuse of discretion for three reasons.

First, there is no finding of bad faith in filing the motion to dismiss, nor should one be found. This is because "once an attorney expressly informs the court of a proposed course of conduct which does not violate a rule of procedure, local rule, court order, or case law, and the district court does not indicate any disapproval, then it is objectively reasonable for the attorney to proceed in the manner made known to the court." *Pac. Dunlop Holdings, Inc.*, 22 F.3d at 119. Here, Appellant told the district court that Ms. Parsons would file a state court

action and that "[u]pon assertion of jurisdiction by a Maryland Circuit Court[,] Plaintiff will dismiss the Complaint in this matter." DCt. Doc. 10, at 2 (emphasis added). The district court did not indicate any disapproval to that course of conduct. Indeed, it granted the requested stay to allow Ms. Parsons to file her state law complaint, which she did. And, to the extent the district court awarded sanctions by relying on its belief, as asserted in the May 3, 2010 dismissal order (DCt. Doc. 37), that "Plaintiff's counsel allowed the July 31, 2009 date to pass without . . . filing the state court case . . .," then this constitutes an abuse of discretion requiring reversal. *See Morris*, 448 F.3d at 277 (defining abuse of discretion as including a district court relying on clearly erroneous factual findings).

Bad faith also does not exist because discrimination claims may be pursued in both federal and state courts. *See Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990). The Supreme Court in *Yellow Frieght* unanimously held that state courts have concurrent jurisdiction over Title VII cases. *Id*. at 826. "Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of such a provision is strong, and arguably sufficient, evidence that Congress had no such intent." *Id*. at 823. Given that the ADA adopts Title VII's relevant enforcement mechanisms,

that holding is applicable here to a suit involving the ADA. *See* 42 U.S.C. § 12117(a).

Moreover, there is normally nothing improper about pursuing the same claim in both state and federal courts when those courts have concurrent jurisdiction. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Supreme Court recognized that, where the ordinary abstention doctrines are not applicable, a federal court's decision whether or not to defer to an ongoing state court proceeding "rests on considerations of '(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id*. at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co*., 342 U.S. 180, 183 (1952)). *See also Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 8-9 (1983) (*Colorado River* doctrine may justify staying an action, as well as dismissing it). The Supreme Court specifically recognized that "[g]enerally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River*, 424 U.S. at 817 (emphasis added) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). This, of course, has particular force where, as here (*i.e.*, the definition of disability under Maryland law appears to differ from the ADA's definition), there may be a difference between the underlying causes of action. *Cf. Smith v. Bayer*

*Corp.*, ___ U.S. ___, 131 S.Ct. 2368, (2011) (reversing federal court's injunction issued under Anti-Injunction Act preventing further prosecution of parallel state court class action proceedings as class action where the issue the federal court decided was not the same as the one presented in the state tribunal).

If sanctions are upheld relating to the filing of the motion to dismiss to pursue the state claims in state court, then all plaintiffs will have an obligation to file any subsequent related case in federal court if there is a pending claim in federal court. That rides roughshod over the right to file in state court on state law claims. Such a ruling acts as a one-way fulcrum to send nearly all state and federal discrimination and retaliation claims to federal court. There generally are three options to bringing such claims (assuming is not forced to forego either state or federal claims in order not to risk being sanctioned): 1) assert the state law and federal law claims in federal court; 2) assert the state law and federal law claims in state court (but the federal claims subject the case to removal to federal court); and 3) assert the state law claims in state court and the federal law claims in federal court. If, under the district court's apparent reasoning, one is required not to assert state law claims in state court after first asserting federal claims in federal court (even though the federal claims, due to exhaustion or statute of limitations requirements, had to be filed first), then persons who have been discriminated or retaliated against in violation of state law must give up their right to pursue that

claim in state court. Our federal system, with an appropriate respect for federal-state relations — including that states have an interest in interpreting their own laws and protecting their own citizens — should not countenance such a result.[5]

Secondly, the district court's decision constitutes and abuse of discretion because Appellant did not "multipl[y] the proceedings" via the motion to dismiss as required by § 1927. In fact, Appellant reduced the proceedings. Filing a motion to dismiss to terminate proceedings simply does not fit within § 1927's requirement that an attorney "multipl[y] the proceedings." The conduct that is alleged to be unreasonable and vexatious did not multiply the proceedings.

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[5] Even if the district court believed that the federal case should not have been brought at all, though it did not appear to state that as a basis and its fee award does not correspond to that as a basis, then sanctions related to the motion to dismiss are still improper, as there has not been a finding of bad faith. The purpose of Section 1927 is "to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (internal citations omitted). But a court cannot find unreasonableness or vexatiousness "without a clear showing that, after becoming aware of the lack of merit of a client's cause, the attorney thereafter multiplies the proceedings." *Patterson v. United Steelworkers of America*, 381 F. Supp. 2d 718, 722 (N.D. Ohio 2005). *See also*, *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006) ("litigation is not an 'exact science': Lawyers cannot preordain which claims will carry the day and which will be treated less favorably.").

The sanction issued below is not based on any finding about whether Ms. Parson's claim of discrimination did or did not have merit when filed. As such, it cannot be said that the claim was frivolous or lacking in merit when filed.

Thirdly, the fees requested by PRMC should not have been awarded because PRMC has not shown that those supposed "excess" fees were caused by any improper conduct. Without showing that it otherwise would have incurred these fees directly as a result of improper conduct, PRMC is not entitled to a sanction award. *See Pac. Dunlop Holdings, Inc.*, 22 F.3d at 120. For the reasons stated above, there can be no improper conduct under § 1927 in this case when counsel moves to dismiss the federal action. As such, the fees PRMC seeks in regard to the motion to dismiss are not "excess" fees within the meaning of § 1927 and should not have been awarded.

In sum, the district court's award to PRMC of its fees associated with the motion to dismiss constitutes an abuse of discretion in the circumstances of this case.

## CONCLUSION

For the foregoing reasons, *amicus,* the Metropolitan Washington Employment Lawyers Association, respectfully submits that this Court should vacate the order and judgment of the district court awarding fees to PRMC and against Appellant under 28 U.S.C. § 1927.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [ X ] this brief contains **5,158** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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Dated: 8/22/11

/s/ John R. Ates
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## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August 2011, I caused two copies of the foregoing brief to be served on the following by placing them in a postage pre-paid envelope addressed to the following and depositing that into a U.S. Postal Service mailbox:

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I further certify that on this 22nd day of August, 2011, I caused the required eight bound copies of the foregoing brief to be filed with the Clerk of the Court by placing them in a postage pre-paid envelope addressed to the clerk and depositing that into a U.S. Postal Service mailbox.

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