In The

# United States Court of Appeals

For The District of Columbia Circuit

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Nos. 15-7003 and 15-7008

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Kathy Radtke *et al.*,

*Plaintiffs-Appellants*,

v.

Lifecare Management Partners *et al.*

*Defendants-Appellees.*

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Appeal from the United States District Court for the District of Columbia
(Hon. John Facciola, Magistrate Judge)

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**Brief on Behalf of the Metropolitan Washington Employment Lawyers Association, Maryland Employment Lawyers Association, Washington Lawyers' Committee for Civil Rights and Urban Affairs, D.C. Employment Justice Center, and the Public Justice Center as *Amici Curiae* on Behalf of Plaintiffs-Appellants, Supporting Reversal**

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## Interest of *Amici Curiae*

**The Metropolitan Washington Employment Lawyers Association** ("MWELA"), a professional association of over 370 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), which is the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes. MWELA members represent clients in many minimum-wage, overtime, and wage payment cases under Federal and State law in the metropolitan area. Their ability to obtain relief for their clients is dependent on the award of reasonable and fully compensatory fees that allow them to continue taking cases on behalf of persons who are often the lowest-earning employees in the area.

**The Maryland Employment Lawyers Association** (MELA), a local affiliate of the National Employment Lawyers' Association, is comprised of more than 100 attorneys who represent individuals under federal and state laws that protect the interests of employees in receiving their full wages earned for their work performed, including the Fair Labor Standards Act, Maryland, and District of Columbia wage laws. The purpose of MELA is to bring into close association employee advocates and attorneys in order to promote the efficiency of the legal system and fair and equal treatment under the law. MELA has an interest in this case because its outcome may determine whether counsel prosecuting FLSA and

state wage law claims are effectively incentivized and fully and appropriately compensated for advocating on behalf of workers who have been denied payment under the FLSA and state law. Because the outcome of this case will have a direct impact upon the ability of MELA members and their clients to protect employees' interest in receiving the full fruits of their labors, MELA has a specific interest in the fair resolution of the issues presented in this appeal.

**The Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation. In furtherance of this mission, the Washington Lawyers' Committee represents victims of wage and hour violations in individual, class, and collective actions in state and federal courts. *See*, *e.g.*, *Ayala v. Tito Contrs., Inc.*, 82 F. Supp. 3d 279 (D.D.C March 4, 2015); *Montoya v. S.C.C.P. Painting Contrs., Inc.*, 530 F. Supp. 2d 746 (D. Md. 2008); *Granados v. Hann & Hann, Inc.*, No. 8:08-cv-01206 (D. Md.); *Pachina v. Chanticleer of Frederick, Inc.*, No 1:07-cv-03235 (D. Md.). From these cases, the Washington Lawyers' Committee has amassed expertise in issues arising under state and federal wage and hour laws, as well as in awards of attorneys' fees to prevailing plaintiffs in civil rights cases generally. The Washington Lawyers' Committee has also filed amici curiae briefs in cases involving awards of attorneys' fees under state and federal wage and hour laws.

*See*, *e.g.*, *Barufaldi v. Ocean City*, 434 Md. 381 (Md. Ct. Spec. App. 2013); *Jackson v. Estelle's Place, LLC*, 391 F. Appx. 239 (4th Cir. 2010) (unpublished).

**The D.C. Employment Justice Center** (EJC) is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. In its fifteen-year existence, the EJC has directly handled or referred to private counsel hundreds of FLSA and/or Maryland wage law cases. The private attorneys with whom we communicate tell us, with near universality, that they want to be compensated fairly for the reasonable fees they incur in pursuit of such cases. By approving of a proportionality analysis in decisions on attorneys' fees for FLSA and Maryland wage law cases, this Court risks injecting substantial uncertainty into the process by which we refer these cases, and by which attorneys decide to take these cases. Such a marked deviation from the FLSA's strong focus on private enforcement could cause attorneys to turn down important but potentially time-consuming wage-and-hour litigation, and would leave many of the low-income workers we serve with no place to turn. We strongly urge this Court to reverse the magistrate judge's decision in this case.

**The Public Justice Center** (PJC), a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to promoting the rights of low-wage workers. Towards that end, the PJC has represented thousands of employees seeking to recover unpaid wages from their employers through collective and/or class actions under the Fair Labor Standards Act (FLSA) and state wage and hour laws. *See, e.g.*, *Martinez v. Capitol Drywall, Inc.*, 2014 WL 6983443 (D. Md. Dec. 9, 2014); *Quiroz v. Wilhelm Commercial Builders, Inc.*, 2011 WL 5826677 (D. Md. Nov. 17, 2011); *In re Tyson Foods, Inc., Fair Labor Standards Act Litigation*, MDL Docket No. 1854 (M.D. Ga.); *Fox v. Tyson Foods, Inc.*, No. 4:99-CV-1612-VEH, 2009 WL 9541256 (N.D. Ala. Feb. 17, 2009) and 2006 WL 6012784 (N.D. Ala. Nov. 15, 2006); *Trotter v. Perdue Farms, Inc.*, 2001 WL 1002448, 144 Lab. Cas. ¶ 34,364 (D. Del. Aug. 16, 2001); *Heath v. Purdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000). The PJC has an interest in this case because its outcome may determine whether successful FLSA litigation remains an effective tool, as Congress intended, for making whole low-wage workers who have been denied payment and encouraging unscrupulous employers to comply with the law.

*Amici* believe that reasonable and fully compensatory fees are essential for local workers to be able to continue to obtain competent counsel who are capable of overcoming what are often hard-fought defenses and a determination not to

settle the cases. The lower court's decision overlooked the defendant's role in the failure to reach settlement, and overlooked the intensity of the defenses plaintiff's counsel had to overcome. If this decision is affirmed, it will send a clear signal that defendants may effectively penalize employees' counsel for the defendant's intransigence, defendants throughout this area will respond, and capable counsel will turn their efforts elsewhere and leave deserving workers without counsel, contrary to the intent of Congress.

**Statement Pursuant to Rule 29(c), Fed. R. App. P.**

Pursuant to Rule 29(c), Fed. R. App. P., *amici* states that:

(A) *Amici* alone authored the entire brief, and no attorney for a party authored any part of the brief;

(B) Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting the brief, exclusive of the dues counsel on each side have paid for their membership in *amicus* MWELA; and

(C) No person, other than the *amici curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

## Circuit Rule 26.1 Disclosure Statement

*Amici* do not have any parent companies or subsidiaries, and no publicly-held company has any ownership interest in any *amicus*.

## Summary of Argument

The award of reasonably compensatory attorneys' fees are essential to the ability of ordinary people to obtain competent counsel who will be able to overcome the hurdles and obstacles set up by employers who have misclassified employees and failed to pay them the proper amounts, and are equally essential to enforcing the other laws in which Congress or the Maryland General Assembly have provided fee-shifting provisions.

The legislative purpose of these provisions is to ensure access to the courts for persons harmed by violations of the statutes with these provisions. This purpose is particularly strong with the Fair Labor Standards Act, 29 U.S.C. § 216(b).

The purpose of these statutes will be frustrated unless fee awards are reasonably compensatory. Rules of decision that merely focus on the proportionality between the clients' recovery and the fee claim violate the legislative purpose because they ignore the steps reasonably necessary to achieve that result.

In particular, it is critical that a fee-awarding court examine the aggressiveness of the defense that the plaintiff had to overcome. Defendants that leave no stone unturned, no obstacle unerected, and no hurdle ignored, act within their rights but cannot then complain that it cost much additional time and expense to overcome their efforts.

Similarly, rules of decision that pluck from the air a factor asserted without record support to have prolonged the litigation, such as the plaintiffs' failure to provide a precise estimate of their losses until late in the litigation, is inherently speculative and flawed as a rule of decision. The lower court's speculative assumption based on its experience in mediating cases runs counter to the experience of the attorneys pursuing such cases, which is that defendants refusing to make offers or making minimal offers, are the primary obstacles to settlement, and that the plaintiff's inability to come up with a precise figure has no effect on the ability to settle a case where the low range of settlement values is clear. The lower court's denial of a reasonably compensatory fee on that basis will drive competent counsel away from the representation of the low-wage workers with whom the Federal and State legislatures were primarily concerned, rather than attracting them as the fee-shifting provisions require.

In particular, it violates the purpose of fee-shifting provisions to deny a reasonably compensatory fee to plaintiffs because a case has not settled, without examining the evidence as to the defendants' settlement offers, if any.

## Argument

### A. The Number of Private Fair Labor Standards Act Cases Filed Annually Shows that Fee-Award Standards Are Important

The Administrative Office of the U.S. Courts publishes quarterly editions of statistics related to case filings, showing among other things the numbers of cases brought by the U.S. government, and those brought privately, under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA"). The most recent report is for the twelve months ending March 31, 2015, downloaded on October 23, 2015, from the link at http://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2015/03/31. Page 3 of this report (Table C-2), attached hereto at 1a, shows that the U.S. government brought only 158 cases nationally in the twelve months ending March 31, 2015. In contrast, a total of 7,902 private FLSA lawsuits were filed in the same period in Federal courts and an unknown number in State courts. Of the total 8,060 FLSA enforcement cases brought in Federal courts during this period, 98.0% were brought by private plaintiffs.[1]

[1] Calculations of counsel.

If inadequate fee awards threaten the availability of counsel capable of overcoming the often strenuous defenses in these cases, most of the enforcement activity under the FLSA will be threatened.

The Administrative Office does not provide a similar breakdown by judicial District. Table C-3 is broken down by judicial District, but only shows the number of Labor suits filed. *Amici* downloaded this report on October 23, 2015 from the link at http://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2015/03/31. Page 2 of this report, attached hereto at 2a, shows that 145 privately brought "Labor" suits were filed among the 1,150 private civil actions filed in the U.S. District Court for the District of Columbia in the twelve months ending March 31, 2015.

In addition, the decision of this Court will affect all of the fee-award litigation of the courts in this Circuit, under both Federal and State (or District) law.

Resolution of the proper standard for FLSA fee awards is therefore important to the public interest, as well as to the business of the courts in this Circuit.

## B. The Purpose of Fee-Award Statutes is to Make Capable Counsel Available to Enforce the Rights Granted by Congress

### 1. Private Enforcement Will Cease Without Reasonably Compensatory Fee Awards

*Hall v. Cole*, 412 U.S. 1, 13 (1973), a case under the Labor-Management Reporting and Disclosure Act of 1959, § 102, 29 U.S.C. § 412, quoted with approval from the decision of the court of appeals, 462 F.2d 777 (2d Cir. 1972):

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. ... An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." 462 F.2d, at 780—781.

This identical purpose of fee-award legislation was articulated in the legislative history of the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. § 1988. The Senate Report stated:

> … There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rept. No. 94–1011, p. 6 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5913.

### 2. To Achieve Their Purpose of Encouraging Private Enforcement, Fee Awards Must Be Sufficient to Attract Competent Counsel

S. Rept. No. 94–1011, p. 6, identified four fee-award decisions applying what it said were the standards that should be applied under Section 1988, and stated: "These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." The Supreme Court quoted this language with approval in *Blum v. Stenson*, 465 U.S. 886, 897 (1984).

The Supreme Court has emphasized that the purpose of fee-award provisions is "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Subsequently, the Supreme Court made clear the purpose of Section 1988:

> … Congress enacted § 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. …

*City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986).

"Effective access" requires not only counsel, but counsel who know what they are doing. Counsel who know what they are doing have a choice of fields of law in which to practice, and will leave a non-remunerative field for one that is more remunerative. Fee awards that are not reasonably compensatory have in our experience led members to work in other fields of employment law practice.

A fee award meeting the Congressional purpose should be sufficient to attract capable counsel. A "'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

Maryland law is similar. *Friolo v. Frankel*, 403 Md. 443, 457, 942 A.2d 1242, 1250 (Md. 2008) (*Friolo II*), held that the purpose of Maryland's fee-shifting statutes is to ensure that individuals have access to counsel. The court added:

> Critical to the achievement of this goal is providing a mechanism, here, the fee shifting statute, and an incentive, based on a realistic expectation of reasonable compensation, for attorneys to agree to take on wage dispute cases, even where the dollar amount of the potential recovery may be relatively small.[13]
>
> [13] During testimony on the House Bill that ultimately resulted in the Payment Law as it exists today, the "Executive Director of the Maryland Volunteer Lawyers Service reported that the majority of the claims [under the then-existing Payment Law] were on behalf of low income people and involved between $150 and $200." *Friolo v. Frankel*, 373 Md. 501, 517, 819 A.2d 354, 363 (2003).

403 Md. at 457-58, 942 A.2d at 1250.

The District of Columbia follows the same approach with respect to fee-shifting statutes, so the decision in this case will affect cases under D.C. law as well:

> … On the other hand, it is important that attorneys who are willing to take on civil rights and other public interest work are adequately compensated, or it will be difficult to find competent counsel to handle this important job. The goal is to attract competent counsel for these cases, but not to provide them with windfalls. …

*Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007) (citations omitted); *accord*, *Tenants of 710 Jefferson Street, NW v. District of Columbia Rental Housing Comm'n*, --- A.3d ----, 2015 WL 4965919 (D.C. Aug. 20, 2015) (*not yet released for publication*) at p. *6.

### 3. These Considerations Are Even Stronger Under the Fair Labor Standards Act Than Under Other Legislation

Unlike most fee-shifting provisions, the FLSA makes fee awards to prevailing plaintiffs *mandatory*, without room for judicial discretion in denying a fee, and makes *no* provision for a prevailing defendant to be awarded fees. 29 U.S.C. § 216(b) states in part: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The American Bar Association's Section of Labor and Employment Law publishes a frequently cited treatise, THE FAIR LABOR STANDARDS ACT, 2D ED. (ELLEN KEARNS, ED.) (Bloomberg BNA 2010), which explains the purpose of the FLSA fee-award provision:

> An express purpose of the Act is to rectify and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living" for workers. Congress's mandate to the courts to award attorneys' fees and costs to all successful FLSA plaintiffs was intended as an incentive for private litigants to act as "private attorneys general" to vindicate their FLSA rights in the courts. Moreover, by shifting the responsibility for a successful plaintiff's attorneys' fees to the employer, "Congress intended that the/wronged employee should receive his full wages ... without incurring any expense for legal fees or costs."

II THE FAIR LABOR STANDARDS ACT at 18-172 (footnotes omitted).

### C. Reductions in the Lodestar Based on Mere Lack of Proportionality Between the Relief Obtained and the Fees Requested Violates the Congressional Purpose in Enacting Fee-Award Legislation

The primacy of lodestar analysis in Federal law on fee-shifting is so well-established that it needs no citation. Maryland law is similar. *Friolo v. Frankel*, 373 Md. 501, 504-05, 819 A.2d 354, 356 (Md. 2003) (*Friolo I*), held that the lodestar approach was to be used in fee-shifting cases in Maryland, subject to appropriate case-specific adjustments.

The lower court accepted plaintiffs' requested lodestar of $255,898.80, approving both the number of hours expended as reasonable, the 20% of hours counsel had suggested not be compensable, and the hourly rates requested. Memorandum Opinion, JA 38. Its error lay in stating that the lodestar is "a presumptive starting place for the fee award analysis," *id.*, and then reducing the fees far below a reasonably compensatory level primarily because, in hindsight, the lower court believed that the low recovery did not justify the effort. *Id.*, JA 38-46.

Such an analysis is fundamentally wrong. The lower court had already accepted plaintiffs' counsel's hours as reasonable and thus compensable, and had already approved the hourly rates sought, necessarily approving the skill levels used. There is no justification for a further reduction of reasonable hours and reasonable rates for matters already subsumed within the accepted lodestar. *Cf.*

*City of Burlington v. Dague*, 505 U.S. 557, 562-63 (1992), cautioning against "double counting" by adjusting a lodestar by a factor already subsumed within the lodestar; *Perdue*, 559 U.S. at 553; *Blum*, 465 U.S. at 901; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 566 (1986) ("In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.").

While the above cases rejected enhancements to the lodestar because of exceptional success or superior quality of counsel's performance, their principle applies equally to reductions in the lodestar merely because of proportionality. *City of Riverside v. Rivera*, 477 U.S. at 574 ("We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.") (plurality opinion).

This Court applied *Rivera* properly in *Williams v. First Government Mortgage and Investors Corp.*, 225 F.3d 738, 747 (D.C. Cir. 2000):[2]

> Given the public policy interests served by the CPPA, *see DeBerry*, 743 A.2d at 703, we decline to read a "rule of proportionality" into that statute. Such a rule "would make it difficult, if not impossible, for individuals with meritorious ... claims but relatively small potential damages

[2] The full citation is *DeBerry v. First Government Mortgage & Investors Corp.*, 170 F.3d 1105 (D.C. Cir. 1999), *amended*, 225 F.3d 752 (D.C. Cir. 2000).

> to obtain redress from the courts." *Rivera*, 477 U.S. at 578, 106 S.Ct. 2686 (plurality opinion).

The lower court's approach is not consistent with *Williams*.

### D. The Lower Court Erred in Reducing the Lodestar Without Considering the Aggressiveness of the Defendant's Defense

The aggressiveness of the defense is the primary driver of the efforts reasonably required by plaintiff's counsel in order to obtain a recovery. In *Copeland v. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980), this Court stated:

> We do not, of course, criticize the defendant's attorneys for skillful and thorough representation of their client. The government's defense of this suit may well have been a model of effective advocacy. That, however, is not the point. The government's contentious litigation strategy forced the plaintiff to respond in kind. The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.

(Footnote omitted.) Similarly, the First Circuit held in *Lipsett v. Blanco*, 975 F.2d 934, 939 (1st Cir. 1992):

> This case was bitterly contested. Appellants mounted a Stalingrad defense, resisting Lipsett at every turn and forcing her to win her hard-earned victory from rock to rock and from tree to tree. Since a litigant's staffing needs often vary in direct proportion to the ferocity of her adversaries' handling of the case, this factor weighs heavily in the balance.

The Seventh Circuit has recently explained how the fees expended can rise to be worth far more than the relief at stake, and why these fees must still be awarded, so that the fee-award provisions work as Congress intended. *Cuff v. Trans States Holdings, Inc.*, 768 F.3d 605, 610-11 (7th Cir. 2014), affirmed a $325,000 fee award on an FMLA interference claim where the plaintiff recovered

less than $50,000, because the defendants' overly aggressive litigation tactics justified the high award. The court explained:

> The ratio certainly seems high. Rational people do not set out to invest $325,000 in order to obtain $50,000. But then Cuff's lawyers surely did not expect at the outset of this case to invest that much legal time in its pursuit. Sometimes events during the litigation change the calculus, and a lawyer must avoid the sunk-cost fallacy. If, after spending $25,000 in legal time, a lawyer is confronted with a defense that will cost $30,000 to defeat, counsel will not say: "It is irrational to spend $55,000 to get $50,000." The $25,000 is sunk; if the suit is abandoned the recovery will be zero, so the right question is whether it is reasonable to spend $30,000 more to get $50,000, and the answer is yes. Suppose the same thing happens over and over in a suit, with one unexpected development after another raising the costs without raising the expected recovery. It can be reasonable to meet each of these events by investing more, even though an analysis that looks only at the bottom line ($325,000 invested to get $50,000) makes the total seem unreasonable.
>
> * * *
>
> Fee-shifting statutes such as § 2617(a)(3) are designed to prevent the potentially high costs of litigation from stifling justified claims. Without such a statute, defendants might have said to Cuff at the outset: "We concede violating your rights under the Act, and we also concede that your loss is $50,000, but we plan to wage an all-out defense that will cost at least $200,000 to overcome. You might as well capitulate, because you will lose on net." A business that can establish a reputation for intransigence may end up not paying damages and not having to defend all that often either, because if a prevailing party who litigates to victory gets only a small award of fees the next would-be victim will see that litigation is futile and the employer won't have to repeat the costly defense. That's why we held in *BCS Services, Inc. v. BG Investments, Inc.*, 728 F.3d 633 (7th Cir. 2013), that ***hyperaggressive defendants who drive up the expense of litigation must pay the full costs, even if legal fees seem excessive in retrospect.*** …

(Emphasis supplied.)

Here, the lower court looked primarily at the bottom line, without analyzing the defendants' actions, and thus erred in awarding a fee that was not reasonably compensable.

The effect of the lower court's ruling is that it will be much harder for low-wage workers to obtain counsel to represent them in FLSA and Maryland wage cases because the maximum recovery will never be very large, and the lower court's ruling will strongly incentivize defendants to grind plaintiffs down in a "Stalingrad defense" war of attrition.

Capable counsel among our members will work in other fields of the law, or will bring cases only on behalf of high-wage workers or collective actions and class actions, rather than taking and winning the low-wage individual cases that Congress particularly wanted to be brought, in order to avoid the losses required by the lower court's ruling.

The lower court's ruling thus cannot be reconciled with the purposes of fee-award legislation or with the commands of the Supreme Court that fee awards be sufficient to attract capable counsel.

### E. The Lower Court Erred in Reducing the Lodestar Without Considering Plaintiffs' Efforts to Settle the Case, and Defendants' Rejection of Settlement

The lower court justified its very large reduction in the lodestar on plaintiffs' failure to provide an accurate damages calculation until late in the case, JA 41-46,

but nowhere explained why this made a difference in this case. Its opinion does not state that defendants ever made any form of settlement offer conditioned on getting some kind of calculation, or ever made any substantial offer that was not accepted by plaintiffs because of the lack of an adequate calculation. The timing of a damages calculation is untethered to any record of any consequence.

As in many misclassification cases, we understand that the employer kept no record of the time worked by the plaintiffs. This required plaintiffs to reconstruct their hours to the best of their abilities. While it is not easy to calculate an exact figure in this situation—indeed, which hours to count was an issue only decided at trial—it is fairly clear that there was never a large amount at stake herein. Both sides knew that the likely recovery was somewhere between zero and a high four-figure or low five-figure amount. That should be enough for any defendant interested in settlement to begin negotiations and make offers.

The lower court's assumption that a reasonable defendant was powerless to settle a case without a precise figure has no basis in the record or in reality. Cases are settled all the time when the precise amounts at stake are uncertain. They are often settled when both sides understand that coming up with any precise figure will cost more in time and effort than it is worth.

We submit that it was error for the lower court to lay on plaintiffs all the blame for the absence of a settlement, without focusing equal attention on the

defendant's actions with respect to settlement, and to justify a large reduction in the lodestar based on such a one-sided analysis.

It is the collective experience of our members that precise calculations of damages are seldom useful in bringing about settlements, that rough estimates are often essential, that settlements take place when defendants are willing to provide their own estimates with explanations, and that above all settlements take place when defendants start making offers and require plaintiffs to make choices between birds in the hand and possible fatter birds not in hand. The refusal of defendants to make any offers, or their insistence on making minimal offers, will prevent settlements regardless of how strenuously plaintiffs' attorneys try to resolve the cases.

Federal law generally considers the defendant's willingness to make settlement offers to be important. Rule 68, Fed. R. Civ. P., was enacted to incentivize defendants to make such offers and require plaintiffs to "think very hard" about whether to accept them. "To be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates." *Marek v. Chesny*, 473 U.S. 1, 11 (1985). The Court held that this was just as appropriate in a fee-shifting case as in other cases. *Id.*

Even outside the confines of Rule 68, "courts may consider a plaintiff's refusal of a settlement offer as one of several proportionality factors guiding their exercise of discretion under § 2000e-5(g)(2)(B), and the district court may do so here on remand." *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1337 (4th Cir. 1996). *Accord*, *Lohman v. Duryea Borough*, 574 F.3d 163, 168-69 (3d Cir. 2009), *cert. denied*, 560 U.S. 926 (2010) (50% reduction in fee award proper where plaintiff rejected informal, non-Rule 68 offer more than six times what the jury awarded); *McKelvey v. Secretary of U.S. Army*, 768 F.3d 491, 495 (6th Cir. 2014) (reduction in fee award proper in light of rejected settlement offer); *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011) (same).

In *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1083-84 (10th Cir. 1998), the Tenth Circuit disagreed with *Sheppard*, saying that plaintiff's rejection of a non-Rule 68 settlement offer should not affect her entitlement to fees: "Congress therefore clearly did not intend a district court to reduce a mixed motives plaintiff's fee award on the basis of a rejected pretrial settlement." *Id.* at 1084. However, *Gudenkauf*, *Sheppard*, and the above cases are all impossible to reconcile with the lower court's approach here, which blamed plaintiffs for the failure of the case to settle without considering the defendant's willingness or unwillingness to settle.

Maryland law also requires an examination of both sides' settlement positions. *Friolo v. Frankel*, 438 Md. 304, 325-27, 91 A.3d 1156, 1169-70 (Md. 2014) (*Friolo III*), citing some of the above cases, stated: "We accept the proposition that a party should not be permitted to increase a fee award by prolonging the litigation as a result of making unreasonable settlement demands or rejecting reasonable settlement offers." 438 Md. at 325, 91 A.3d at 1169.[3]

## Conclusion

For the reasons stated above, *amici* respectfully requests that the Court reverse the lower court for following erroneous legal standards and abusing its discretion, and remand the case for further proceedings in light of its opinion.

Respectfully submitted,

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[3] D.C. law might be different on this topic. *Lively* held that an estimate of attorneys' fees in a settlement letter should not be considered on the issue of the lodestar. 930 A.2d at 994.

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Dated: October 27, 2015

## Certificate of Service

I certify that I have this 27th day of October served the foregoing brief electronically on the below-listed counsel of record for the parties through the Court's ECF system, and that I will on October 28, 2014 also place two copies of the brief in the mail, postage prepaid, addressed to them as follows:

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## Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,265 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point type.

/s/ Richard Talbot Seymour

Attorney for *Amici Curiae*

Dated: October 27, 2015

# UNITED STATES COURT OF APPEALS
# DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

**Case Caption:** Kathy Radtke et al.,

v.

Lifecare Management Partners et al.

**Case No:** 15-7003 and 15-7008

## ENTRY OF APPEARANCE

### Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

○ Appellant(s)/Petitioner(s) ○ Appellee(s)/Respondent(s) ○ Intervenor(s) ◉ Amicus Curiae

| | |
|---|---|
| Metropolitan Washington Employment Lawyers | Public Justice Center |
| Maryland Employment Lawyers Association | |
| Washington Lawyers' Committee for Civil Right | |
| D.C. Employment Justice Center | |
| Names of Parties | Names of Parties |

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.
**Names of non-member attorneys listed above will not be entered on the court's docket.**
Applications for admission are available on the court's web site at http://www.cadc.uscourts.gov/

## Certificate of Service

I certify that I have this 27th day of October served the foregoing entry of appearance form electronically on the below-listed counsel of record for the parties through the Court's ECF system, as follows:

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