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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 99-40557

OSCAR GUERRA, Plaintiff - Appellant

v.

CELANESE CORPORATION AND
CELANESE CHEMICAL CORPORATION, Defendants - Appellees

Case No. 99-40547

EULOGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES, Plaintiffs – Appellants

v.

ARTHUR BROTHERS, INC., Defendant – Appellee

On Appeal from the United States District Court
For the Southern District of Texas - Corpus Christi Division
The Honorable Ricardo J. Hinojosa - United States District Judge

BRIEF OF APPELLEES, CELANESE CORPORATION AND CELANESE CHEMICAL CORPORATION

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99-40547

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

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Also, the individual plaintiffs are Messrs. Eulogio Mireles, Bartolo Mendiola, and the Estates of Francisco Gonzalez and Oscar Guerra, of Kingsville, Texas.

STATEMENT REGARDING ORAL ARGUMENT

Appellees neither request oral argument in this case pursuant to Local Rule 28.2.4, nor believe that oral argument would be proper. The standard governing this Court's review of this case is abuse of discretion, which can be determined upon consideration of a review of the record in this Court, the analysis by United States District Judge Richard Hinojosa and this Court's prior opinion. While Appellants suggest that oral argument is necessary in this "appeal from summary judgment," such statement ignores the true nature of this appeal. This is not a review of summary judgment, which also does not require oral argument. Rather, the question this Court must answer is whether an "abuse of discretion" occurred, which determination clearly does not require oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Celanese Chemical Corporation, Celanese Corporation make the following disclosure statement. Celanese Chemical Corporation and Celanese Corporation are wholly owned by the parent company, Celanese A. G., which was formed on October 25, 1999.

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STATEMENT OF JURISDICTION

Celanese Corporation and Celanese Chemical Corporation does not have a substantial disagreement with Appellants' statement regarding the jurisdiction of these cases and the status of the two final orders entered by the district court, made the subject of this consolidated appeal.

STATEMENT OF THE ISSUE

The District Court, following this Court's direction from its opinion of August 14, 1997, properly analyzed each case in reaching its determination of the amount of attorneys' fees, costs and expenses awarded in its March 30, 1999, Orders.

Based on the analysis of the factual issues involved, and considering applicable law, the District Court did not abuse its discretion in entering its March 30, 1999, Orders, which awarded Appellants a reasonable award of attorneys' fees and costs and expenses allowed by statute.

STATEMENT OF THE CASE

I. Instant Case.

These consolidated appeals challenge the award of attorneys' fees and costs and the manner in which the district court reached its result. They do *not* challenge or concern the failure of the district court to make findings favorable to Appellants on the "joint employer" question; therefore, the discussion of this

matter is not dispositive here. What is dispositive is the district court's adherence to this Court's opinion, its analysis of the history of this litigation and its finding of attorneys' fees.

II. Overview of Past Factual and Procedural Background.

Appellants filed these cases over twenty (20) years ago claiming that Celanese Corporation, Celanese Chemical Corporation ("Celanese") and Arthur Brothers, Inc. ("ABI") were discriminatory in their employment practices at a chemical plant located in Bishop, Texas. They attempted to prove their theory by utilizing a questionable statistical analysis, upon which they never obtained any favorable finding or ruling by this Court or the district court below.

The first case filed was C.A. 76-134, *Mireles v. Arthur Brothers, Inc.* Celanese was never joined in this action and the three cases were never consolidated for purposes other than procedural matters; however, in 1993, it paid to three individual plaintiffs, the sum of $24,000.00 in an effort to end the protracted litigation, along with settlements tendered by Arthur Brothers. The second and third cases were C.A. No. 80-115, *Oscar Guerra v. Celanese and Arthur Brothers, Inc.* and C.A. No. C-80-049, *Israel Trevino, et al v. Celanese Corporation, Celanese Chemical Corporation and Arthur Brothers, Inc.* Celanese paid only $12,500.00 to settle *Guerra*. The *Trevino* case is not the subject of this

appeal.[1] However, while there was a significant amount of activity that took place in the context of that case, the attorneys' fees issue was addressed in that Release and Settlement Agreement and Appellants' discussion of the issues in that are not dispositive in the instant appeal. In fact, Celanese asserts that Appellants' repeated references to and discussion of the litigation and "staunch" defense in the*Trevino* case demonstrates why the district court was correct to award the fees it did and to deny Appellants' exorbitant fee request in *Mireles* and *Guerra.*

Ultimately, Appellants were unsuccessful in securing a favorable finding on the "joint employer" issue, which required them to prove not only that Celanese and Arthur Brothers were "joint employers," but also that the employment practices were discriminatory. They failed on both elements of proof. In fact, while Appellants have continued to assert otherwise, the record reflects that there was *no change* in the employment practices at Celanese after these lawsuits were filed. Affidavit of Kenneth R. Davis; (Mireles R., Vol. 4, #263, p. 246 at 324.)

However, given the failure of Appellants to obtain a ruling on the "joint employer" issue, Appellants' failure to prove discriminatory conduct, and the span of time that Appellants allowed these cases to languish on the docket (for example,

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1 In its August 24, 1997, opinion, this Court affirmed Celanese's position and the ruling of the district court below that, because the Trevino Release and Settlement Agreement encompassed the issue of attorneys' fees, it was a final judgment which could not be the subject of an appeal. Accordingly, as will be shown below, all activities occurring in that case should not be considered by this Court in the context of this appeal of the *Mireles* and *Guerra* cases only.

no request for trial or other rulings from 1983-1991), in accordance with the district court's request that the cases be resolved, the defendants settled with Appellants in 1993 and 1994. As stated earlier, the Release and Settlement Agreement with Israel Trevino contained a resolution of the attorneys' fees issue.

Not until 1995, did Appellants request that the district court award attorneys' fees and costs. The district court initially found that Mireles and Guerra were not "prevailing parties" and awarded no fees or costs. It also found the attorneys' fees issue was final in *Trevino.* This Court affirmed the district court's finding in *Trevino* and reversed and remanded for consideration of an award in*Mireles* and *Guerra,* with instructions to determine a reasonable attorneys' fees, which, quoting *Farrar*, could be "...a low fee or no fee." (Fifth Circuit Opinion, p. 7, 9)

Judge Hinojosa followed the mandate of this Court and entered Orders on March 30, 1999, awarding attorneys' fees in the amount of $9,600.00 in*Mireles* and $5,000.00 in *Guerra,* plus costs and expenses allowed by statute.

In this appeal Appellants again challenge the district court's well-reasoned award of attorneys' fees; however, nowhere in their Brief is there evidence that the district court abused its discretion in awarding reasonable attorneys' fees and denying the exorbitant award of fees, costs and expenses requested by Appellants. Rather, Appellants' Brief is yet another rehash of past procedural history and their "spin" on the "joint employer" issue, none of which demonstrates that Judge

Hinojosa abused his discretion, the only matter to be considered by this Court. As will be shown below, many of their arguments support the district court's analysis; accordingly, the March 30, 1999, orders must be affirmed.

STANDARD OF REVIEW

This Court's standard of review is abuse of discretion. *Hadley v. VAM PTS,* 44 F.3d 372, 375 (5th Cir. 1995);*Exxon Corp. v. Burglin*, 4 F.3d 1294, 1302 (5th Cir. 1993). Because the record demonstrates careful consideration by the district court of the factual and legal issues involved in each individual case, Appellants have failed to meet their burden to demonstrate how Judge Hinojosa abused his discretion. Only where there is a definite and firm belief that the district court committed errors of law or may completely erroneous assessments of the evidence, may this Court find an abuse of discretion. *E.g.*, *Chaves v. M/V MEDINA STAR*, 47 F.3d 153, 156 (5th Cir. 1995); *Conkling v. Turner*, 18 F.3d 1285, 1293 (5th Cir. 1994). There is no error shown with respect to Judge Hinojosa's rulings. *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993). Accordingly, the orders awarding attorneys' fees and limited costs must be affirmed.

SUMMARY OF ARGUMENT

The district court followed this Court's instructions and awarded reasonable attorneys' fees, costs and expenses, allowed by statute. Appellants assert that the district court abused its discretion by failing to follow both *Farrar v. Hobby,* 506

U.S. 103, 113 S. Ct. 566, 121 L.Ed. 494 (1992) and *Johnson v. Georgia Highway Express, Inc.* 488 F.2d 714 (5th Cir. 1975). This argument is without merit. The Supreme Court has stated that the district court ***need not*** arrive at a lodestar or delve into the *Johnson* factors if the relief a plaintiff seeks does not materially alter the legal relationship between the parties. In fact, the Court holds, and the district court recited at the hearing in conformance with this court's opinion, "Having considered the amount and nature of damages awarded, the Court *may lawfully award low fees or no fees without reciting the 12 factors* bearing on reasonableness, or multiplying the number of hours reasonably expended by a reasonable hourly rate. In some circumstances, even a plaintiff who normally prevails under Section 1988, should receive no attorneys fees at all." *Farrar*, 113 S.Ct. at 574-575 (Emphasis added); (Mireles R. 340; Guerra R. 191).

Stated another way, the critical issue that must be answered first is whether the plaintiff in the employment discrimination case was successful in causing the defendant, because of the lawsuit, to materially alter the legal relationship between the parties. Appellants failed on this threshold consideration. Nevertheless, consistent with their prior positions in these cases, they totally ignore the law and continue to insist that their request is valid and that it is either the district court's or the defendants' fault that this litigation has ended in the manner in which it has.

For example, Appellants argue at length, as they have before, that because

"Defendant succeeded in *causing* the District Court to commit several errors early in the litigation..." and "Using "Stalingrad" tactics, defendants delayed hearing on the central joint employer issue for 18 years", they are entitled to attorneys' fees. (Appellants' Brief, p. 29)(Emphasis added) This argument is ludicrous. Not only did Celanese in any way prevent or hinder the district court from entering any order, but also Celanese did not use "tactics" of any kind in "delaying" a hearing on the joint employer issue; rather, Appellants failed to pursue and obtain a favorable finding, a failure they seek now to impose on Celanese. In short, Appellants seek relief in the award of attorneys' fees for Celanese's successful defense of these cases, rather than an award predicated on Appellants' successes, a result that turns jurisprudence on its head.

Appellants also complain that the district court failed to hold an evidentiary hearing. First, no evidentiary hearing is required. Second, it is important to recite the words of Appellants' counsel which deferred to the briefing and exhibits on file: to wit: "We will rely on the record, the pleadings, the dates. We submit we've met out burden under *Johnson* in both the law and evidence admitted and request the Court award reasonable attorneys fees." (Guerra R., Vol. 10, 191; Mireles R., Vol. 20, 340). Third, Appellants' counsel refused to abide by at least four (4) straightforward orders of the district court to provide a coherent fee request which sets forth the legal and factual bases for the request and which

contains substantiating documentation. Yet, Appellants instead refused to present a coherent request and filed unsubstantiated documents, not tied to specific legal work in each case and, yet, the briefing requests well over one million dollars! This request also includes a request for the time it took to prepare the request, as well as the time to attend the hearings, the vast majority of which was in contravention to the district court's order and which would not have been required had Appellants complied with Judge Hinojosa's requests.

In sum, the district court did what this Court required following *Farrar* and its Orders should be affirmed.

ARGUMENT

I. Nominal Recovery.

A plaintiff prevails if the relief obtained, through judgment or settlement, materially alters the defendant's behavior in a way directly benefiting the plaintiff. *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L.Ed. 494 (1992); *Watkins,* 7 F.3d at 456. To attain prevailing party status in the absence of a judgment, a plaintiff must establish *two* elements: (1) that the goal of the litigation was achieved, and (2) that the suit itself caused the defendant to remedy the complained of conditions. *Pembroke v. Wood County, Tex.*, 981 F.2d 225 (5th Cir. 1993); *Associated Bldrs. & Cont. v. Orleans Parish Sch. Bd.*, 919 F.2d 374 (5th Cir. 1990). Appellants here fail on both counts.

The *lawsuit* must be a substantial factor or a significant catalyst in motivating the defendant to end its illegal behavior. *Watkins*, 7 F.3d at 456; *Hennigan v. Ouachita Parish School Board,*749 F.2d 1148, 1153 (5th Cir. 1985); *Posada v. Lamb County*, 716 F.2d 1066 (5th Cir. 1983). The "catalyst" rule is alive and well in the Fifth Circuit. *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993).

After a plaintiff successfully shows *both* these elements (which has not been done here), the burden of proof shifts to the defendant, who can challenge the entitlement by showing that its conduct was a wholly gratuitous response to a lawsuit that lacked colorable merit. *Associated Bldrs. & Cont.*, 919 F.2d at 378; *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148 (5th Cir. 1985).

As is shown herein, Appellants are unable to meet their burden of proof to establish that, as prevailing parties, they were able to materially alter the legal relationship between the parties.

Appellants argue that the three cases (including *Trevino,* which is not on appeal here) should be viewed "as a whole" before that determination can be made. This is not a meritorious position. There was no order of consolidation, other than for purposes of the hearing on the joint employer issue and for prehearing procedures and filing. (Trevino R. 391; Guerra R. 368, Mireles R. 493). Each case has individual procedural backgrounds concerning the parties involved, pretrial

procedure, and ultimate settlement. Consequently, the district court was correct to review each case on its individual merits and to review the applicable law in determining that the overall nominal monetary award paid to plaintiffs in settlement, justified the attorneys' fees set forth in its orders. (Mireles R. 340; Guerra R. 191).

II. Status of the Parties.

Appellants claim they were successful in forcing defendants to alter the legal relationship between the parties and were successful on the "joint employer" issue, citing to this Court evidence from their "expert," Dr. Yancey.[2] Such evidence is not properly before this Court because the settlements preclude reconsideration of this issue and because Plaintiffs did not challenge the failure of the district court to make a joint employer ruling in their favor. These arguments are waived and the *only* issue before this Court is whether the district court abused its discretion in awarding no attorneys' fees, costs and expenses, based upon the record in these cases.

Assuming, for the sake of argument, however, that this "evidence" could be considered, it fails because the evidence is at least conflicting on this point and, Celanese asserts, dispositive on the issue that no employment practices changed as

[2] They failed to mention that Celanese offered the testimony of Robert Regan, Norman Coulter and Larry Smith, by video deposition, to rebut this testimony, as well as the Affidavit of Kenneth R. Davis. (Guerra R., Vol. 9, p. 83)

a result of the lawsuits and settlements. See: Affidavit of Kenneth R. Davis, Human Resources Manager for the Celanese facility in Bishop, Texas. (Mireles R., Vol. 4, #263, p. 246 at 324.) As Mr. Davis sets out more fully in his affidavit, Celanese has never changed its employment practices and policies as a result of the lawsuits brought by Eulogio Mireles, Bartolo Mendiola, Francisco Gonzales, Israel Trevino, and Oscar Guerra except to prohibit the hiring of contract workers as employees at the Bishop facility.[3] Therefore, none of these lawsuits prompted Celanese to remedy any alleged discrimination. Because Guerra failed to establish either that the goal of this lawsuit was achieved or that the lawsuit caused Celanese to remedy any alleged discrimination, he did not establish himself as a prevailing party entitled to attorneys' fees.

Appellants also attempt to mislead this Court by continuing to set forth the amount of *total* settlements, including the *Trevino* case (not at issue here) and including the payments made by ABI. Such trickery must not be allowed. The amount of settlements paid by Celanese that are relevant to the district court's award of attorneys fees is $36,500.00. As such, Appellants' request for $1.4 million dollars is 3000% greater than the settlements paid! Certainly it is a request that cannot be substantiated under the applicable law.

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3 Appellants incorrectly stated that Arthur Brothers recalled Trevino (whose case is not at issue here) after he filed his suit. However, Trevino was recalled in 1974, after only a thirty (30) day layoff, which was six (6) years *prior* to the filing of his lawsuit.

Even if "joint employer" were an issue on appeal, which it clearly is not, the "evidence" supplied by Dr. Yancey does not warrant a reversal of the attorneys' fees question because it does not show any abuse of discretion by the district court and does not go to the issue of discrimination.[4] Appellants repeatedly ignore what their burden was: specifically, to prove discriminatory conduct on the part of Celanese and ABI, by way of their "joint employer" theory, on which they were not successful. And they ignore their burden today; that is to demonstrate that this award of attorneys' fees was the result of an abuse of discretion.

III. *Johnson v. Georgia Highway Express* Factors.

Even if Farrar and this Court's August, 24, 1997, opinion required an analysis under *Johnson*, which it does not, Appellants' argument for outlandishly excessive attorneys' fees fails.

The burden is on the fee applicant to prove the reasonableness of the number of hours expended on his "prevailing claim." *von Clarke v. Butler*, 916 F.2d 255 (5th Cir. 1990), citing *LeRoy v. City of Houston*, 831 F.2d 576, 586 (5th Cir. 1987). Appellants have not met this burden.

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4 Further, even if this were to be considered, Dr. Yancey's testimony is objectionable on its face as it does not meet the requirements in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 469 (1993). (Guerra R., Vol. 9, 63-79, 81, 84-85) His methodology was untested and he was clearly not a recognized expert in this field.

While there is no burden on the opposing party to make specific objection or to show that the hours were unreasonable, Celanese, in fact, demonstrated to the district court why the attorneys' fee award requested by Appellants is improper. Each factor set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) will be discussed below. A review of each mandates and affirmance of the district court's orders.

A. Time and Labor Required.

Appellants assert that Celanese's rigorous defense supports their claim for fees. There is no logic in that statement. The defense mounted by Celanese was in response to Appellants' theory, which found no support in fact. Appellants even state on p. 29 and p. 47 of their Brief that after the first *Trevino* appeal and the February, 1993, hearing, 4600 hours of time had already been expended. This statement demonstrates that the bulk of time and labor was devoted to reversing the initial *Trevino* rulings. This is critical because the *Trevino* settlement included a settlement of attorneys' fees; hence any award of fees based on the handling of that case is wholly improper and not in conformity with this Court's prior opinion.

These cases involve simple employment discrimination claims that were ultimately unsuccessful. The most significant determinant of whether hours were reasonably expended is the overall relief obtained as a result of the expenditure of time. *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983); *City of Riverside v. Rivera*,

106 S. Ct. 2686 (1986); *Alberti v. Sheriff of Harris County*, 688 F. Supp. 1176 (S.D. Tex. 1987) *aff'd*, 896 F.2d 927 (5th Cir. 1990). So long as the time expended by counsel in prosecuting the litigation reflected sound legal judgment under the circumstances and produced sufficient satisfactory results, the time is deemed to have been reasonably expended to justify an award of attorneys' fees. *Alberti*, 688 F. Supp at 1187. Appellants were altogether unsuccessful and settlements were minimal. In fact, Appellants' counsel failed to exercise reasonable billing judgment. *See: Zabkowicz v. Westbend Co. Div. Dart. Indus.*, 789 F.2d 540 (7th Cir. 1986).

B. Novelty and Difficulty of the Questions; Undesirability.

These were simple, straightforward, employment discrimination cases. That defendant hired able counsel is irrelevant to the claims for attorneys' fees. Additionally, the minute results achieved did not involve the resolution of any novel or difficult questions. In particular, the case law surrounding the joint employer issue is substantial and the requirements to establish the joint employer relationship are well settled. *See*: *Rivas v. Federacion de Asociaciones Pecuarias*, 929 F.2d 814 (1st Cir. 1990); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986); *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983); *Guzman v. El Paso Natural Gas Co.*, 756 F. Supp. 994 (W.D. Tex. 1990).

The only "novel" issue in this litigation was Appellants' decision to attempt to establish the joint employer relationship through an unqualified expert who utilized an untested, computer assisted analysis. The majority of expenses and costs associated with this litigation are directly related to that decision and subsequent analysis by Dr. Yancey. Appellants failed to follow these cases in presenting proof and obtaining a favorable joint employer finding and a finding of discrimination. *See*: 701 F.2d at 404. Appellants cannot now recover for those fees and expenses.

C. Skill Requisite to Perform the Legal Service Properly; Experience and Reputation of the Attorneys Involved.

Even if this were a complicated case requiring a great degree of skill in order to establish a joint employer relationship between ABI and Celanese, Appellants never prevailed on the joint employer issue. Moreover, the only claims remaining when Plaintiffs did settle with Celanese were simple employment discrimination claims in which the applicable law has been well settled for a number of years. Consequently, resolution of these claims did not require a great degree of legal skill. Further, there is no showing and no affirmative ruling that counsel was able to effectuate an alteration of the legal relationship of the parties; consequently, the experience of the attorneys had no effect on the overall outcome, which was wholly unsuccessful.

D. The Preclusion of Other Employment.

Appellants failed to identify specific instances where their representation of other clients in substantial legal matters which would otherwise have been available to them was foreclosed because of conflicts of interests that would have occurred from the representation of Plaintiffs. *See*: *Alberti*, 688 F. Supp. at 1189. Moreover, Appellants failed to identify specific instances in which the time requirements of this litigation precluded counsel for Appellants from representing other clients because they were required to work on this litigation and, therefore, were unable to use the time for other purposes. *Id.* Finally, counsel for Appellants were either employed by or billing their services to an organization which is dedicated to protecting the legal rights of the indigent, namely Texas Rural Legal Aid. Consequently, this factor does not apply to counsel for Appellants. *Major v. Treen*, 700 F. Supp. 1422 (E.D. La. 1988); *Loewen v. Turnip Seed*, 505 F. Supp. 512 (N.D. Miss. 1980).

Additionally, the Fifth Circuit has held that "absent unusual exceptions... (which Celanese asserts are not present) it is patently "redundant" and "unnecessary" for a private attorney (such as Mr. Horton) to participate in the litigation of claims simultaneously being pursued by the government-paid attorneys of the EEOC, in this case the agency-paid attorneys or TRLA, whose function it is to handle cases of exactly this nature. *EEOC v. Clear Lake Dodge*,

25 F.3d 265, 272 (5th Cir. 1994). If at all, Mr. Horton should only be compensated at a reduced rate for the value, if any, he added to the case as handled by TRLA. In the alternative, if Mr. Horton's services were of primary "benefit" to plaintiffs, then TRLA's services were redundant and unnecessary and should not be compensated.

E. The Customary Fee; Whether the Fee is Fixed or Contingent.

The court must determine the lodestar after assessing the customary fee for each attorney. *Alberti*, 688 F. Supp. at 1190. In *Shipes v. Trinity Industries*, 987 F.2d 311 (5th Cir. 1993), the court held that the contingent nature of the case cannot serve as a basis for enhancement of attorneys' fees awarded to prevailing plaintiffs under traditional fee-shifting provisions. Consequently, whether the fee is fixed or contingent is no longer a consideration in determining the adjustment to the lodestar.

F. Time Limitations Imposed by the Client.

The length of time that this litigation was pending, Appellants' counsels' delay of approximately eight years (1983 - 1991) in pursuing this litigation, as well as the numerous continuances that Appellants' counsel obtained in this litigation, suggest that there were no time limitations imposed on Appellants' counsel in this case. Moreover, if the Court had not revived this litigation in 1991, the litigation could have remained dormant forever.

G. The Amount Involved and the Results Obtained.

It is at this factor that Appellants most seriously mischaracterize the facts of this litigation. Plaintiffs indicate that their goals in this litigation were to obtain equitable relief and damages for alleged employment discrimination. With regard to their results, Appellants recovered from Celanese in these two cases only $36,500.00.

H. Similar Awards.

Further support for affirmance of the district court's award is Appellants' failure to discuss similar awards. Appellees will show, as they did in the court below with no rebuttal from Appellants, that such analysis demonstrates why Appellant's abuse of discretion challenge must be denied.

In *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041 (5th Cir. 1998), the plaintiff was awarded approximately $12,000.00 in actual damages and there was evidence of other important findings in relation to discriminatory acts and practices. The court also awarded $81,000.00 in attorneys' fees (reducing plaintiff's request by about one-third). On appeal defendant challenged the underlying findings and the award of attorneys' fees. The Fifth Circuit *reversed* the award of fees, pointing to the fact that the fee award was over ***six and one-half times*** *the amount of damages* awarded and that she sought over ***twenty-six times*** *the amount of actual da*mages. (In the instant case, plaintiffs' attorneys seek over ***forty times*** *the amount paid in*

settlement.) Of additional note in *Migis*, was the stinging dissent filed by Justice Barksdale wherein she questioned where was "reasonableness" in the award of attorneys' fees where there were such minimal damages, a settlement offered that was rejected and an outlandish request for fees. Such, large awards, she stated, were never the purpose of Title VII. Accordingly, if ***six and one half times*** was unreasonable under the facts of that case where Plaintiff actually obtained relief, clearly, ***forty times** is patently **unreasonable.***

Lastly, and most recently, in *Jason v. Houston Independent School District*, 158 F.3d 205 (5th Cir. 1998), a case involving attorneys' fees under the Individuals with Disabilities Education Act (IDEA), Jason was successful on three of nineteen issues he raised with respect to special education programs. The Court reduced the overall award of attorneys' fees because of the limited success obtained and because a majority of the fee claim was not related to the successful claims; accordingly, the Court found the fees excessive, a result that must be reached in this case.

Similarly, cases in other circuits support Appellees and the district court. *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997) cert. denied, 118 S.Ct 183 (1997) held that, in a case where the plaintiff prevails, but receives only *de minimis* relief and achieves only technical success, the court is permitted to bypass the general rule requiring calculation of a lodestar and may establish a low fee *or no*

fee at all, citing *Morales v. City of San Rafael*, 96 F.3d 359, 362-63(9th Cir. 1996)(interpreting *Farrar*.) In *Hashimoto*, the plaintiff sued the Navy for race and gender discrimination. The district court awarded $300,000.00 in plaintiff's first trial, but the district court vacated the award and ordered a new trial. In the second trial, the district court awarded $280,000.00, but the district court vacated the award again. The district court then issued findings on fact and conclusions of law based upon the evidence admitted in the second trial. It found that no discrimination had occurred and that plaintiff's retaliation claim was meritless. Nevertheless, the court awarded additional attorney's fees and costs *on the retaliation claim* to the extent that the fees and costs related to enforcement of the EEOC's award of attorney's fees in the administrative process. Defendant appealed the award. The court affirmed the award of those limited fees and costs in the amount of $30,000.00.

In *Troy v. Bay State Computer Group*, 141 F.3d 378 (1st Cir. 1998), plaintiff brought a gender discrimination claim against her former employer. The district court ordered $90,000.00 for back pay and $99,584.91 for attorney's fees. The First Circuit reformed the judgment and reduced the award of back pay to $29,300.00. Defendants argued that the amount of attorneys' fees was excessive in light of the reformed amount of damages. The court agreed and remanded for a fresh determination. "One element that a district court considers in awarding fees is

the actual amount of compensatory damages recovered, although it may be only one of many factors." 141 F.3d at 384 (citing *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694 (1986) (plurality opinion).

The Southern District of New York awarded $336,778.88 in attorneys' fees to a plaintiff who had prevailed on her sex and age discrimination, sexual harassment and retalitation claims. The award of actual damages for those claims was $320,000.00 in back pay and $1,250,000.00 in punitive damages. She requested $597,000.00 in fees, which were reduced by twenty-five percent. *Greenbaum v. Svenska Handelsbanken*, 998 F. Supp. 301 (S.D. N.Y. 1998)

The court stated, "Once calculated, the lodestar amount [of attorney's fees] may be modified based on equitable considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the *results obtained*. 998 F. Supp. at 303 (emphasis added)(quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933 (1983)

Next, in *Connaly v. National School Bus Service, Inc.*, 992 F. Supp. 1032 (N.D. Ill. 1998), plaintiff settled the underlying suit for $10,000.00 on the day of trial. She then moved for attorney's fees in the amount of $97,135.85. The court held that the settling plaintiff was a prevailing party (as the Fifth Circuit found in the *Mireles* case), the settlement was more than *de minimis* relief and reduced the lodestar amount to reflect the fact that plaintiff's success in settling case was

minimal and lodestar figure would be further reduced where counsel unreasonably delayed settlement and prolonged litigation only to increase attorneys' fees. The total amount awarded for attorneys' fees was $23,281.16.

The court discussed the three prong test used in the Seventh Circuit to determine whether a recovery is *de minimis* to the extent that attorneys' fees are unwarranted. They then calculated the lodestar amount and reduced it for the reasons above. The court stated:

> "But where the plaintiff achieved only limited success, the district court should award only the amount of fees that is reasonable in relation to the results obtained. Plaintiff's success here was quite minimal, making a fully compensatory award inappropriate. ..." 992 F.Supp. at 1039.

Interestingly, however, Appellants' Brief contains a footnote referencing *Branch-Hines v. Hebert*, 939 F.2d 1311 (5th Cir. 1991), cited for the proposition that there is "no rule of proportionality," and stating that this Court affirmed a $10,098 award of fees on a $4,000 damages award. Both statements are erroneous. In *Branch-Hines*, the actual damages award was determined by this Court to be $7,000 as stipulated by the parties as back pay. Proportionality, this case holds "is an appropriate consideration in the typical case." *Branch-Hines*, 939 F.2d at 1322 (Emphasis added).

Even if Appellants had demonstrated and obtained a favorable finding to support their claim that employment discrimination occurred and that a material

change occurred as a result of this lawsuit, thereby suggesting a court's reliance on *Johnson*, which Celanese has demonstrated is not appropriate, ***none*** of these factors support an award of attorneys' fees for Plaintiffs in this case.

IV. "Expert," Non-Attorney Costs and Expenses Prohibited.

In addition to seeking over $600,00.00 in attorneys' fees, Appellants' attorneys also pursued a claim for additional sums for costs associated with paralegal, clerks, miscellaneous costs and the expenses incurred by their expert witness, Dr. Yancey. Trial witnesses called by the prevailing party are only entitled to $30.00 per day for their services, which costs the district court allowed, upon proof. *International Woodworkers v. Champion Intern.*, 790 F.2d 1174 (5th Cir. 1986); 28 U.S.C. §1291; *Shipes v. Trinity Industries, Inc., supra*. Appellants are not entitled to be reimbursed for the out of court services performed by statistical experts or other computer analysts, unless such costs fall within the statutorily set amounts, which the district court awarded.

Recovery for paralegal costs were properly denied by the district court as well, given the minimal recovery of Appellants, the lack of evidence of the necessity for these additional charges and the exorbitant amount sought. In fact, the only evidence of the nature of the paralegal expenses were in relation to the unsuccessful statistical analysis, not with relation to legal work generally performed by attorneys. Appellants cite *U.S. Football League v. N.F.L.*, 887 F.2d

408 (2nd Cir. 1989) as support for their claims; yet, this case does not support their contention --- yet another example of Appellants' failure to reference appropriate, controlling authority. In fact, *U.S. Football League* allowed the paralegal costs *only* because the legislation under which it sued*required* the *mandatory* award of fees, specifically the Clayton Act, Section 4, which does not adopt the reasoning contained in *Farrar*, *supra*, allowing only a discretionary determination, which was properly determined by the district court.

Similarly, the costs associated with Mr. Ruben Campos, who signed an affidavit stating that Plaintiffs' rates were reasonable and that the issue was complicated, are not recoverable because they are simply expert opinions limited by the above-cited statute and case authority. (Mr. Campos' fee in connection with these opinions was $15,099.89) and, as stated earlier, the recovery of these fees is vested in the discretion of the court, which allowed recovery of costs pursuant to statutory limitations.

V. No Abuse of Discretion.

While Appellants attempt here to re-urge arguments which were unpersuasive in the district court, they have failed to show in this Court any abuse of discretion on the part of the court. To the contrary, in analyzing the history of these cases, as well as the final hearings which formed the basis of the orders entered, it is clear that the district court carefully considered the facts which were

dispositive. Those important factors are: the degree to which Plaintiffs achieved success (none); the amount of the settlements negotiated (minimal); the fact that there was no discrimination proven and no change in policies or procedure of Celanese resulting from this litigation; and, of course, the reasonableness of this outrageous fee request when considered in light of what rational lawyers, using good legal and billing judgment would do in such a case.

The evidence in the record establishes that the district court exercised its discretion within the bounds of the law and arrived at the conclusion that Appellants are entitled to $14,600 in attorneys' fees and costs allowed pursuant to statute, after only $36,500.00 was paid in settlements and there was absolutely no change of any kind in the relationship between the parties and no favorable finding on the employment discrimination claims Appellants asserted.

CONCLUSION

This Court has before it a lengthy record of the district court's decision on the attorneys' fees request, as well as voluminous documents of the past history of the cases, despite the fact that these documents are not dispositive on the abuse of discretion challenge in this appeal. In one of these cases, *Mireles,* Appellants chose novel, unrecognized, statistical methods for linking ABI with Celanese through the "joint employer" theory as the predicate for proving discriminatory conduct. Appellants requested attorneys' fees, costs and expenses in excess of one

million dollars ($1,000,000.00) from Celanese, despite its failure on all the issues in the cases.

A similar strategy was employed in *Guerra.* In that case, after fourteen (14) years of litigation, Celanese settled this case for only $12,500.00. Again, Appellants sought attorneys' fees, costs and expenses of over one million dollars ($1,000,000.00) claiming that Celanese had changed employment practices as a result of this lawsuit. Yet, the district court ably identified the fact that *nothing* had changed as a result of Mr. Guerra's lawsuit. The evidence before the court showed absolutely no change in practice or policy in the critical years at issue. Nonetheless, such a nominal settlement cannot form the basis for such an unreasonable request.

The district court carefully considered each of these cases and the history of each in reaching its decision. (Guerra R., Vol. 10, 191; Mireles R. Vol. 20, 340) Even if the district court had considered the three cases together, as Appellants now argue, the result would have been the same. There was no favorable finding on the "joint employer" theory , there was no proof of any discriminatory conduct by Celanese, and Appellants' claims were not a "substantial factor" or "catalyst" for effectuating any change at the Celanese facility in Bishop, Texas; therefore, the district court's award of attorneys' fees, costs and expenses is proper and should be affirmed.

Finally, and critical to this Court's analysis here, Appellants have wholly failed on setting out for this Court how the district court abused its discretion in arriving at its awards. As evident from Appellants' Brief, there is no citation to or discussion of how the Court failed to follow the guidelines of this Court in the prior appellate opinion and *Farrar*, as well as other controlling authority within the Fifth Circuit. Consequently, they have also failed in their burden on appeal and the district court must be affirmed.

WHEREFORE, Appellees Celanese Corporation and Celanese Chemical Corporation pray that this Court affirm the judgments of the district court below in all respects, in each of the cases involved in this appeal, *Guerra* and *Mireles*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellees and a computer diskette containing a copy of the Brief of Appellees have been sent by United States certified mail, return receipt requested, to the following attorneys and parties of record this 4th day of February, 2000:

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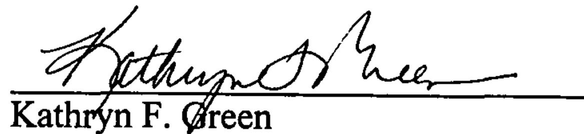


Kathryn F. Green

CERTIFICATE OF COMPLIANCE

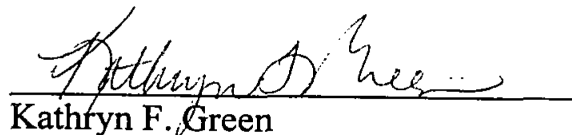
Pursuant to 5th Circuit Rule 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of 5th Circuit Rule 32.2.7(b).

1. Exclusive of the exempted portions of 5th Circuit Rule 32.2.7(b)(3), the brief contains 7,408 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word, in Times New Roman, 14 point font.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

4. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume in 5th Circuit Rule 32.2.7 may result in the Court's striking the brief and imposing sanctions against the person signing the brief.



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