19-378

No: 19-

In the

Supreme Court of the United States

Alfred Lam; Paula Leiato; *et al,*

Petitioners-Plaintiffs,

vs.

City & County of San Francisco;
San Francisco Juvenile Probation Department, *et al,*

Respondents-Defendants,

On Petition for Certiorari to the United States Supreme Court from the Court of Appeals for the Ninth Circuit

Ninth Circuit Court No: 16-16559
U.S.D.C. No: 4:10-cv-04641 PJH
Northern District of California

PETITION FOR A WRIT OF CERTIORARI

Alfred Lam, Paula Leiato
P.O. Box 16376,
San Francisco, CA 94116
(415) 992-0071
In Pro Per

QUESTIONS PRESENTED

1. Whether the federal court abused its discretion granting costs to Respondents-Defendants despite their unclean hands and without any consideration of the public interest?

2. May a Federal Court ever grant a motion for relief from judgment under FRCP 59(b) in a case involving legal error?

PARTIES TO THE PROCEEDING

1) Alfred Lam, Paula Leiato, *et al,*
Petitioners-Plaintiffs,

2) City & County of San Francisco,
San Francisco Juvenile Probation Department,
et al.
Respondents-Defendants,

RELATED CASES

1) Alfred Lam, Paula Leiato; *et al,* v. City & County of San Francisco; *et al,* San Francisco Juvenile Probation Department; [No:17-15208] Ninth Circuit Court of Appeal, currently pending writ of certiorari.

2) Alfred Lam, Paula Leiato; *et al,* v. City & County of San Francisco; *et al,* San Francisco Juvenile Probation Department; [No:16-15596] Ninth Circuit Court of Appeal, currently pending writ of certiorari.

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PETITION FOR WRIT OF CERTIORAR

Petitioners Alfred Lam and Paula Leiato respectfully petition for a writ of certiorari to review the judgment of the United States District Court Northern District of California.

OPINIONS BELOW

The opinion of the United States District Court was rendered on May 19, 2016; reconsideration was denied on July 18, 2016 and again on August 2, 2016. The 9th Circuit affirmed on March 18, 2019; rehearing was denied on April 19, 2019.

JURISDICTION

The Supreme Court has Article 3 Section 2 jurisdiction to review the decisions of the 9th Circuit and federal district courts. The Ninth Circuit had jurisdiction pursuant to 28 USC 1291.

RELEVANT STATUTES AND RULES

Title VII, FRCP 54; 28 U.S.C. § 1920

Pursuant to Rule 59(b) as warranted, allows a party to seek relief from a final judgment for "(1) Grounds for a New Trial. The court may, on motion, grant a new trial on all or some of the issues – and to any party – as follows: (b) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

STATEMENT OF THE CASE

Both petitioners (Alfred Lam and Paula Leiato) are pro se civil rights plaintiffs, working as Juvenile Hall Counselors for the San Francisco Juvenile Probation Department, City and County of San Francisco.

Petitioners advanced discrimination claims based upon direct and circumstantial evidence (disparate treatment and impact). The statistical data provided supports Plaintiff's claims. The racial composition at the CCSF's Juvenile Justice Center ("JJC") or Juvenile Hall ("JH"), where Petitioners worked from 2008-2013 is as follows: the Director is African American; approximately 2/3 of the senior or mid-level jobs are held by African Americans, approximately 2/3 of the low-level supervisor jobs are held by African Americans, the majority of entry level counselors were African Americans, while approximately 10% of these positions were held by individuals in the Asian Pacific American ("APA") category. There have been no APAs in any of the above supervisory *positions for over the entire sixty (60) year history of JJC*[1].

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[1] According to 2010 census data, the Bay Area's race demographics were as follows: White 52.5%, Black or African American 6.7%, Asian 23.3%. San Francisco's demographics were, similarly, White 48.5%, Black or African American 6.1%, andAsian33.3%,http://www.bayareacensus.ca.gov/bayarea.htm. The Asian population in San Francisco has risen slightly since that time.

The employer respondents-defendants were the prevailing parties in this case. Upon the district court ruling in favor of the respondents-defendants (City & County of San Francisco), City filed a bill of costs to the court clerk.

A. ARGUMENT

Given the constraints of writs of certiorari, petitioners can only address in a summary fashion to their unfair treatment in the litigation. Petitioners objected to costs generally and also argued that the fees were excessive, particularly in view of respondents' misconduct during the litigation. Respondents' took extraordinary steps to impede discovery, producing no documents at all in response to requests for production or FOIA claims, in circumstances where spoliation appeared very likely. Respondents provided scores of 'I don't know' and 'I don't recall' responses at deposition, and settled out with a single plaintiff without the knowledge or approval of other plaintiffs. Petitioners also documented their unusual hardships, which included their counsel's conviction for manslaughter in 2014, leaving them to fend for themselves. Petitioners also argued that the imposition of such costs would deter other potential discrimination plaintiffs, and cited to respondents-defendants' unclean hands, which in this case included defendants' counsel requesting and obtaining work product from pro se plaintiffs, in violation of California's ethical requirements.

On May 19, 2016 [*see Appendix A*] the district court ruled and made adjustment of one of two sets

of "deposition expedited fees" claimed by respondents.

Petitioners contend the court erred in determining that respondents were entitled to costs, and in failing to explicitly consider the nature of Title VII litigation in its decision. The district court also abused its discretion by failing to adequately consider petitioner's unusual hardships, unequal litigating posture, and respondents' litigation misconduct.

B. District Court Proceedings

On May 19, 2016, the district court's "Order granting in part and denying in part to review taxation of costs"[see Appendix A], the district court did make the ruling of adjusting or reducing the costs of one set of "expedited transcript costs"; however, forgot to adjust or reduce the other set of depositions. Petitioners timely filed the motion for reconsideration pursuant to Rule 59.

On or about July 18 and August 18, 2016, the district court denied petitioners' "motion for reconsideration as being untimely" without considering petitioners' material facts and circumstances.

C. Ninth Circuit Proceedings

On or about March 18, 2019, the Ninth Circuit affirmed the judgment and dismissed the appeal because it was not timely filed. In reaching that

conclusion, the court never properly considered the combination of the timely motions filed by petitioners for reconsideration based upon the material facts of the district court and thus forgot to adjust the other set of "expedited costs of deposition" and overpayment (Respondents pay $3867.30 and Petitioners pay $850), which presented a tax of almost 4 ½ times that of the same costs paid by petitioners. Thus, it is logical to assume this would have significantly reduced the "bill of costs", which would have to be paid by the petitioners.

On or about April 19, 2019, the Ninth Circuit denied petitioners timely petition for rehearing. This petition is as follows:

REASONS FOR GRANTING PETITION

A. Factors Relevant to Cost Award

District courts may consider a variety of factors in determining whether to exercise their discretion to deny costs to the prevailing party, factors all or which are applicable to Petitioners, *Assoc. of Mexican-American Educators v. California, 231 F.3d 572, 593 (2000);* including the losing party's limited financial resources, *National Org. for Women v. Bank of Cal., 680 F.2d 1291, 1294 (9th Cir.1982);* misconduct by the prevailing party, *National Info. Servs. Inc., v. TRW, Inc., 51 F.3d 1470 1472 (9th Cir. 1995);* the importance of the issues, *Assoc. of Mexican-American Educators v. California, 231 F.3d 572, 593 (2000);* the importance and complexity of the issues, *Id.;* the merit of the plaintiff's case,

even if the plaintiff loses, *Id.*; and the chilling effect of imposing high costs on future civil rights litigants, *Stanley v. University of Southern California, (9th Cir. 1999) 178 F. 3d 1069, 1079.*

In *Stanley, supra at 1080,* the 9th Circuit stated "[T]he imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights litigation in this area. While we reject *Stanley's* claims, we also note that they raise important issues and that the answers were far from obvious. Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)."*

In *Stanley,* the court of appeals ruled that the district court abused its discretion by its "failure to consider...the chilling effect of imposing such high costs on future civil rights litigants", *Id.*

The Order, [Appendix A], provides no evidence that the court considered Petitioner's status as Civil Rights litigants. In any event, the court failed to articulate any such reasons.

In *Save Our Valley v. Sound Transit, (9th Circuit 2003) 335 F. 3d 932,* the 9th Circuit held that a district court must "specify reasons" for its refusal to tax costs to the losing party, though not where it taxes costs to the losing party *Id.* at 935 [citing *Assoc. of Mexican-American Educators v. California, 231 F.3d 572, 591 (9th Cir.2000); Subscription Television, Inc. v.*

Southern Cal. Theatre Owners Ass'n, 576 F.2d 230, 234 (9th Cir.1978)], reasoning that where a court declines to award costs it "deviates from normal practice" and therefore must "explain why a case is not ordinary" *Id. at 945, and even suggesting that* "[t]he requirement that district courts give reasons for denying costs flows logically from the presumption in favor of costs that is embodied in the text of the rule", *Id.,* as though the judicially made rule could simply be deduced.

Of course 'normal practice' is to apply the law with an eye to general rules and their applicable exceptions. The existence of the civil rights exception should nullify the ordinary presumption.

As the Court observed in *Albemarle Paper Co. et al. v. Moody Et Al., 422 U.S. 405 (1975),* "The purpose of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers." "The statute was designed to make race irrelevant in the employment market," *Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).*

Congress and the Court have made it clear that the removal of discrimination in the workplace is a matter of extraordinary importance. Petitioners believe that it is not too much to ask that a district court articulate its reasons for imposing costs on civil rights litigants under such circumstances --and indeed that current case law favors such a modified approach.

Departing from 'normal practice' is also appropriate where the law is murky, as civil rights plaintiffs cannot be faulted for any failure to evaluate the case properly, and haphazard adjudication already creates serious disincentives for bringing Title VII cases. See, e.g., *Tristin K. Green, Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment under Title VII, 87 Calif. L. Rev. 983 (1999); Kenneth R. Davis, The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases, 61 Brook. L. Rev. 703 (1995), and Henry L. Chambers Jr., The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It? 74 La. L. Rev. (2014).*

As to this point, see *Barnes v. GenCorp Inc. (1990) 896 F.2d 1457:* "Appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." While unobjectionable as far as it goes, there is no hint here as to what might constitute appropriate statistical data. See also *Segar v. Smith, 238 U.S. App. D.C. 103, 738 F.2d 1249, 1274 (D.C.Cir. 1984), cert. denied, 471 U.S. 1115 (1985),* in which the court stated that "the statistics must show a significant disparity and eliminate the most common nondiscriminatory explanations for the disparity", which borders on an empty formalism. If the courts cannot articulate a standard civil rights plaintiffs can understand, such plaintiffs should not be assessed costs.

An array of such vagaries was evident in this case, where the court analyzed discrimination against individuals in supervisory positions, as opposed to, say, individuals in acting supervisory positions, or more widespread discrimination in the company.

The broadest construal of a discrimination claim, probably beyond that permitted by any court, might involve a general claim of discrimination by the employer untethered to any set of employees. An extremely narrow construal might distinguish claims of failure to promote from claims of failure to assign the plaintiff to acting supervisory positions, such that evidence of the former would not count in any evaluation of the second claim. The narrow approach reflects a rather absurd predisposition to believe that a failure to promote claim--for example--can only be proven by showing a prejudicial pattern in that narrow category of employment. It cannot be the case, on this reasoning, that general evidence of discriminatory practices or discriminatory attitudes can prove the specific claim.

The case also involved, as discrimination cases sometimes do, a set of alleged discriminatory acts. The court evaluated these discretely, without any attempt to evaluate these acts in context. For example, the court evaluated Lam's claim that the City discriminated against him by delaying approval of a vacation request in complete isolation from other allegations in the case. The delay, coupled with numerous other facts, can and in this case probably do add up to proof of discrimination. The failure of this discrete form of analysis can be seen in the

following analogy. The mere fact that a person has a gun does not mean they are involved in criminal behavior. The mere fact that a person is running across the street does not mean that they are involved in criminal behavior. The fact that a person is carrying a valuable piece of jewelry does not mean that they are involved in criminal behavior. Though when the discrete analysis is rejected and common sense is employed, the fact that a person is running across the street carrying a gun and a valuable piece of jewelry adds up to something quite different.

The complexity of the analysis of course creates a predicament for Title VII litigants. Such considerations support a modified approach to costs, where civil rights plaintiffs fail to prevail. There is a lack of uniformity as to what sorts of factors are relevant to costs awards. See *Teague v. Bakker, 35 F.3d 978, 997 (4th Cir.1994)* (good faith & close case warrant departure from general rule); *White & White, Inc. v. American Hosp. Supply Corp., 786 F.2d 728, 733 (6th Cir.1986)* (good faith relevant though in itself insufficient) *United States Plywood Corp. v. General Plywood Corp., 370 F.2d 500 (6th Cir.1966)* (difficulty of case justified denial of costs). In accord with the 9th Circuit law as to relevant factors in cost assessments, the Seventh Circuit has suggested, in dictum, that the denial of costs might be appropriate in cases that present "landmark issues of national importance." *Popeil Bros. v. Schick Elec., Inc., 516 F.2d 772, 776 (7th Cir.1975);* see also *Delta Air Lines, Inc. v. Colbert, 692 F.2d 489, 490 (7th Cir.1982)* (colorable claims plus significant costs in itself warrants denial of costs in civil rights case).

B. The District Court Ignored the Proscriptions of 28 U.S.C. § 1920

In this case, as in many other cases, the district court did not even attempt to carefully apply 28 U.S.C. § 1920, which provides that federal courts may tax as costs..."(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case". Defendants of course only utilized a fraction of the matters discussed in deposition at their summary judgment motion and made no showing as to the necessity of such costs in their Opposition. Though by its terms §1920 places the burden of justification directly on the prevailing party, and in that regard runs contrary to virtually all case law statements awarding costs reflexively.

C. Any Case Involving Spoliation by The Prevailing Party Should At a Minimum Be Deemed a Close Case

The suit was filed in 2010. Plaintiffs filed an FOIA request in December, 2014 seeking 'any and all records relating to' each Plaintiff. In its response CCSF acknowledged destroying the records long after the litigation commenced, essentially admitting that it had committed spoliation.

When evidence is spoiled, a court has the authority to impose a sanction. *Schmid v. Milwaukee Electric Tool Corp., 13 F.3d 76, 78 (3d Cir. 1994).* Such sanctions can include: (1) an adverse inference to be

drawn against the spoliator; (2) dismissal with prejudice; or (3) suppression of evidence.

A party's duty to preserve attaches at the commencement of an action, see *Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998).* In *Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006),* the court noted, because "the relevance of ... [destroyed] documents cannot be clearly ascertained because the documents no longer exist," a party "can hardly assert any presumption of irrelevance as to the destroyed documents." As Judge Breyer put it in *Nation-wide Check Corp. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir.1982),* "the evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the document."

The court evaluated the motion without any analysis of the spoliation claim, though Petitioners believe that the government's actions should have resulted in the denial of summary judgment and yielded a conclusive presumption in a costs motion that the case was close. The same result could have been reached by applying the doctrine of unclean hands to Defendants. Here Defendants' spoliation was truly cost free.

D. Erred by District Court

In reaching that conclusion, the ninth circuit never properly considered the combination of the timely motions filed by petitioners for reconsideration based upon the material facts of the district court and thus forgot to adjust the other set of "expedited costs of deposition" and overpayment (respondents pay $3867.30 and petitioners pay $850), which presented a tax of almost 4 ½ times that of the same costs paid by petitioners.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: August 15, 2019.

Respectfully submitted,

ALFRED LAM, PAULA LEIATO
P.O. Box 16376,
San Francisco, CA 94116
(415) 992-0071
In Pro Per

SUPREME COURT OF THE
UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543–0001

I declare under penalty of perjury that the foregoing is true and correct.

August 15, 2019

/"s"/ Alfred Lam, Paula Leiato
ALFRED LAM PAULA LEIATO