

1 and this idea that we have to show a change in the legal
2 relationship between the parties, the -- the first thing
3 that Buckhannon says is the paradigm of a -- a case
4 where there's been a prevailing party is where a
5 judgment has been entered. It only goes on to talk
6 about this other more complicated stuff about legal
7 relationships when it's talking about things plaintiffs
8 win short of a judgment. But there's nothing in
9 Buckhannon that says a judgment can't be treated as a
10 basis for a prevailing party.

11 Now, to the extent it matters what the
12 nature of the dismissal here was -- and I don't know
13 that it should, but if it does -- I'd point out that any
14 uncertainty about the nature of the dismissal here
15 arises from the fact that the government never made any
16 argument in the courts below that the distinction made
17 any difference. And, indeed, it contradicted the very
18 point it's now making. It said to the Eighth Circuit --
19 and this is on page 11 in our reply brief in the
20 footnote -- it said, quote, "The court recognized
21 dismissal as a severe remedy and acknowledged it would
22 result in dozens of potentially meritorious sexual
23 harassment claims never seeing the inside of a
24 courtroom."

25 JUSTICE GINSBURG: It said it may -- may

1 result, not would result.

2 MR. SMITH: No, no. This is -- I'm reading
3 their quote from their brief where they left out the
4 word "may" because they thought that it didn't make a
5 difference. That they knew at the time and understood,
6 or at least believed, she was referring to the fact that
7 these individual women might be able to litigate their
8 own claims. But they recognized over and over again in
9 the courts below that the "may" didn't mean that the
10 EEOC could come back and litigate, that they were
11 precluded. That's why they filed their Rule 60 motion
12 five years later.

13 Now, to the extent there was an argument
14 that we shouldn't get all these fees, we should maybe
15 get a little bit of fees because we should have raised
16 the issue early on, the problem here precisely was the
17 class action. The two are tied together, and they were
18 both, Judge Reed found, frivolous, the argument that
19 there was a pattern of practice here, and then the
20 argument that they could go on and litigate on behalf of
21 the individuals once the class action washed out.
22 They're -- they're part of a package. But until --

23 JUSTICE GINSBURG: Did she hold that they
24 would have to investigate and conciliate each individual
25 claim?

1 MR. SMITH: She said that where there is not
2 a valid pattern or practice. I don't think there's
3 anything in -- in the court's decision that suggests you
4 can never conciliate a class claim. The court so held
5 in General Telephone. She cites the case. I don't know
6 that the judge was intending to -- to second-guess this
7 Court's decision in General Telephone about how pattern
8 and practice cases are litigated. The question is where
9 you don't have any kind of a policy or -- or standard
10 operating procedure. You have a handful of individual
11 stories, or maybe a large number of individual stories.
12 How do you conciliate those? And the answer she gave
13 was you have to conciliate them one by one, just --
14 or -- or you're bypassing the statutory procedure and
15 the statutory policy.

16 JUSTICE SOTOMAYOR: What is the rule that
17 you would like us to announce? When is it right to
18 award prevailing defendants attorneys' fees?

19 MR. SMITH: When they --

20 JUSTICE SOTOMAYOR: What would be your rule?

21 MR. SMITH: When they've won a judgment and
22 prevailed, and where the --

23 JUSTICE SOTOMAYOR: It doesn't matter with
24 or without prejudice?

25 MR. SMITH: I would -- I would think that

1 that should not be in the rule, that that ought to be
2 something within the discretion of the district judge
3 for a lot of the reasons we've been discussing here.
4 And where the -- the claim that -- that was dismissed
5 was frivolous or unreasonable or without foundation
6 under Christiansburg. And that that, therefore, caused
7 costs to be incurred as occurred here. And, you know, I
8 don't see any reason why you would want to add
9 additional constraints.

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 11:06 a.m., the case in the
14 above-entitled matter was submitted.)

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