No. 11-1925

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

BOBBY L. HURT and SUE R. HURT,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULE:

LEGISLATIVE HISTORY:

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case is an appeal of an award of attorneys' fees to defendants pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. The action was brought by the United States under the Fair Housing Act, 42 U.S.C. 3601 *et seq.* (FHA), against Bobby and Sue Hurt. The United States alleged that Bobby Hurt, as manager of several mobile home parks in Arkansas, engaged in a pattern or practice of discrimination by sexually harassing female tenants. A jury found for the defendants.

Defendants filed a motion for $271,500 in attorneys' fees under EAJA, which the district court granted in part and denied in part. The court concluded that because the government presented ten alleged victims for whom the Hurts had to provide a defense, but only four presented credible claims, defendants were entitled to 60 percent of their fees, *i.e.*, the percentage of alleged victims for whom the United States did not have a reasonable basis in law and fact. Therefore, the court reduced defendants' requested fees (as adjusted for other reasons) by 40 percent, resulting in an award of attorneys' fees against the government of $142,905. The United States is appealing this award of attorneys' fees.

The United States believes that oral argument would assist this Court in resolving the underlying legal issues relevant to the district court's application of EAJA to this case, and that 15 minutes per side would be appropriate.

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STATEMENT OF JURISDICTION

The United States brought this suit to enforce provisions of the Fair Housing Act, 42 U.S.C. 3601 *et seq.* (FHA). The district court had jurisdiction under 28 U.S.C. 1331 and 1345, and 42 U.S.C. 3614(a). The district court entered an order on March 4, 2011, granting in part defendants' motion for attorneys' fees under the

Equal Access to Justice Act, 28 U.S.C. 2412 (EAJA).[1] U.S. App'x 376-383.[2] A notice of appeal was timely filed on April 28, 2011. U.S. App'x 384-385. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE AND APPOSITE CASES

Whether, in this action alleging a pattern or practice of discrimination under the Fair Housing Act, the district court erred in awarding defendants attorneys' fees under the Equal Access to Justice Act on the ground that the United States' position was not substantially justified.

Commissioner, INS v. *Jean*, 496 U.S. 154 (1990)

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)

EEOC v. *Liberal R-II School District*, 314 F.3d 920 (8th Cir. 2002)

United States v. *Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010)

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[1] A copy of the district court's order is in the Addendum to this brief.

[2] Citations to "U.S. App'x __" refer to pages in the Appendix for the United States as Appellant filed by the United States in this appeal. Citations to "Tr. __" are to page numbers in the transcript of the jury trial; however, because certain portions of the trial were not originally transcribed, citations to "Supp. Tr. __" are to page numbers in the separately numbered portion of the trial transcript that falls between pages 502 and 503 of the trial transcript. See district court docket entries R. 207, 208, 209, 210 (sequentially numbered four-volume trial transcript); R. 212 (supplemental transcript to Volume 3).

STATEMENT OF THE CASE

On March 13, 2009, the United States filed suit against Bobby and Sue Hurt for violations of the Fair Housing Act. U.S. App'x 16-21. The complaint alleged that between 2000 and 2008 Bobby Hurt subjected female tenants and prospective tenants to discrimination on the basis of sex, "including severe, pervasive, and unwelcome sexual harassment." U.S. App'x 17-18. On June 25, 2010, defendants moved for partial summary judgment. U.S. App'x 22-24. Defendants principally argued that the United States' claims as to the majority of the aggrieved parties were barred by the statute of limitations. U.S. App'x 22. On August 18, 2010, the district court denied the motion. U.S. App'x 147-153.

A four-day jury trial began on November 16, 2010. The United States presented testimony of eight women who stated that they were sexually harassed by Bobby Hurt. At the close of the government's evidence, defendants moved for a directed verdict. Supp. Tr. 2-54; Tr. 503-515. The district court denied the motion, with the exception of the government's damages claim for one of the aggrieved persons (Kathleen Anderson) and its claim for punitive damages against Sue Hurt. Supp. Tr. 45; Tr. 508. At the close of all the evidence, the defendants renewed their motion for a directed verdict, which the court again denied. Tr. 537-538. The court also denied the government's motion for judgment as a matter of law on all claims. Tr. 539.

On November 19, 2010, the jury returned a verdict for the defendants. U.S. App'x 205-210. On November 29, 2010, the district court entered final judgment for the defendants. U.S. App'x 211.

On December 3, 2010, defendants filed a motion for $271,550 in attorneys' fees under EAJA, which the United States opposed. U.S. App'x 212-214, 280-302. On March 4, 2011, the district court granted in part, and denied in part, defendants' motion, awarding defendants $142,905 in attorneys' fees. U.S. App'x 376-383.

On April 28, 2011, the United States filed a timely notice of appeal of the district court's March 4, 2011, order. U.S. App'x 384-385.

STATEMENT OF THE FACTS

1. On March 13, 2009, the United States filed suit against the Hurts for violations of the FHA. U.S. App'x 16-21. The complaint alleged that between 2000 and 2008 Bobby Hurt subjected female tenants and prospective tenants to discrimination on the basis of sex, "including severe, pervasive, and unwelcome sexual harassment." U.S. App'x 17-18. The complaint alleged that the sexual harassment included: unwanted verbal sexual advances, unwanted sexual touching, conditioning the provision of housing on submission to sexual advances, and granting or denying housing benefits based on sex. U.S. App'x 18. The complaint also alleged that Sue Hurt – as the owner of several of the mobile home

parks managed by her husband – was liable for his discriminatory conduct because he was acting as her agent, and she knew or should have known of the conduct and failed to take reasonable preventive or corrective measures. U.S. App'x 18. The complaint alleged that defendants' conduct constituted a pattern or practice of discrimination and a denial to a group of persons of rights granted by the FHA. See 42 U.S.C. 3614(a) (authorizing the Attorney General to bring "pattern or practice cases" for the denial of rights granted by the FHA). The United States sought declaratory and injunctive relief, monetary damages for each aggrieved person, and a civil penalty. U.S. App'x 19-20; see 42 U.S.C. 3614(d)(1) (relief which may be granted in a pattern or practice case).

2. On June 25, 2010, defendants moved for partial summary judgment. U.S. App'x 22-24. Defendants principally argued that the United States' claims as to the majority of the aggrieved persons were barred by the statute of limitations. U.S. App'x 22. They also asserted that the United States failed to provide proof of the damages sustained by the aggrieved parties, and Sue Hurt should be dismissed because there was no evidence she was aware of her husband's alleged conduct. U.S. App'x 22-23.

The United States filed an opposition, summarizing in detail the testimony it would present at trial by the women Bobby Hurt sexually harassed, and asserting that "[t]his pattern or practice of sexual harassment lasted from 1998 until 2008,

and each of the victims was a tenant at the Defendants' properties during this period." U.S. App'x 107. The United States argued that its claim for monetary damages was timely because the action was filed within three years of the discovery of the unlawful conduct. U.S. App'x 126-128. It also argued that the complaint alleged a pattern or practice of discrimination, which is a question for the jury, and that "[m]any victims will testify that Defendant Hurt sexually harassed them." U.S. App'x 130. Finally, the United States asserted that defendants were not entitled to summary judgment on damages for the alleged victims, and there were material questions of fact regarding Sue Hurt's liability. U.S. App'x 132-145.

On August 18, 2010, the district court denied the motion. U.S. App'x 147-153. The court agreed with the United States that a three-year statute of limitations applied to the damages claim and runs from the time when the Attorney General first reasonably knew of the allegations, and stated that a fact issue remained as to when the Attorney General received such notice. U.S. App'x 150-151. The court also found that the victims' testimony could be the basis for damages, and therefore rejected the argument that the government failed to provide evidence of the damages it seeks. U.S. App'x 151-152. Finally, the court found that there were factual issues concerning Sue Hurt's knowledge of the alleged harassment, precluding summary judgment. U.S. App'x 152-153.

3. A four-day jury trial began on November 16, 2010. U.S. App'x 13. The United States presented testimony of eight women who stated that they were sexually harassed by Bobby Hurt.[3] As a general matter, each victim testified that Bobby Hurt either created a hostile housing environment or engaged in quid pro quo sexual harassment. In addition, the United States presented testimony from a former manager of another trailer park (Jay Alexander) who stated that Bobby Hurt gave him tips on collecting rent, including suggesting that if a tenant did not pay he could get sexual favors. Tr. 157.

At the close of the government's evidence, defendants moved for a directed verdict. Supp. Tr. 2-54; Tr. 503-515. Defendants again argued that the damages claims for the aggrieved persons (except for Amber Brown) were barred by the statute of limitations,[4] and that Sue Hurt could not be liable for her husband's

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[3] These women were: Shana Nester, Tina Johnson, Angela Way, Louise Hurd, Sherry Peters, Patricia Kimbrough, Kathleen Anderson, and Amber Brown. See generally U.S. App'x 27-28. At various times prior to trial, the United States identified other women who it asserted were victims of Bobby Hurt's sexual harassment, but who were not called as witnesses at trial. One such woman, Melanie Manes, was deposed by defendants, but the United States subsequently dropped her as an aggrieved party. U.S. App'x 27-28, 31, 271 n.4. Another woman, Chantrell Warren, was subpoenaed for deposition by defendants, but did not appear. U.S. App'x 27 n.1.

[4] Defendants also argued that if the claims on behalf of some of the individuals are dismissed, there would not be "a sufficient number of events left to form a pattern or practice." Supp. Tr. 17.

actions. Supp. Tr. 2-17, 37-42. Defendants also challenged the basis for damages for each alleged victim, arguing that some of the alleged conduct was too innocuous to constitute sexual harassment or not linked to the rental of a dwelling. Supp. Tr. 18-36. Defendants further argued that they were entitled to a directed verdict on all claims for punitive damages. Supp. Tr. 44-52.

The United States responded that the case involved a single claim for damages, and that the statute of limitations runs from when the United States first learned of the pattern or practice of discrimination. Supp. Tr. 5-17. At the same time, the United States acknowledged that each aggrieved person had to establish her own claim to damages. Supp. Tr. 15. The United States also argued that Sue Hurt was vicariously liable for Bobby Hurt's discrimination (Supp. Tr. 37-38, 41-45), and agreed that a claim for punitive damages with regard to one victim (Kathleen Anderson) was not appropriate (Tr. 503).

The district court denied the motion, with the exception of the government's claim for damages for Kathleen Anderson and its claim for punitive damages against Sue Hurt. Tr. 508; Supp. Tr. 45.[5] With regard to defendants' statute of

[5] The court indicated that the evidence regarding Anderson – that Bobby Hurt touched her shoulder and pulled her toward him while stating that they could work something out regarding her rent (see Tr. 443-444, 448-449) – did not rise to the level of actionable sexual harassment, and that punitive damages against Sue

(continued…)

limitations argument, the court stated that "it's a close case * * * [s]o I'd rather err and let the jury hear it than [for] me [to] dispose of it at this point." Tr. 508. In denying the motion with regard to the damages claims for each aggrieved party (other than Anderson), the court noted, for example, that with respect to Shana Nester, the evidence presented a jury question whether Bobby Hurt actions "related to housing" when, among other incidents, he walked into her trailer when she was taking a shower and masturbated in front of her. Supp. Tr. 21. With regard to Angela Way, the court noted that Bobby Hurt watched her in the shower and touched her breasts when he came to her trailer to collect rent. Supp. Tr. 34-35. Similarly, with regard to Sherry Peters, the court noted that when Bobby Hurt came to her trailer to fix the heater he exposed himself and suggested that if she needed help with the rent they could take out in trade, adding "so that's quid pro quo if he says that." Supp. Tr. 36-37. With respect to Louise Hurd, the court noted her testimony that he told her if she wanted her lights turned back on, she had to sleep with him. Supp. Tr. 32-33. With regard to Amber Brown, defendants acknowledged that "if what she says is true, that he promised her a house for sex, then that's a jury question." Supp. Tr. 20. The court also rejected defendants'

(…continued)
Hurt were not appropriate for a claim based on vicarious liability. Tr. 508; Supp. Tr. 44-45.

argument that if the claims on behalf of some aggrieved persons were dismissed, there would not be a sufficient number of discriminatory events to constitute a pattern or practice, stating that "even if I find that * * * several of these victims cannot receive individual damages or damages themselves, that doesn't necessarily mean that they were not a part of the pattern or practice." Supp. Tr. 17-18.

At the close of all the evidence, the defendants renewed their motion for a directed verdict, which the court again denied without further elaboration. Tr. 537-538. The court also denied the government's motion for judgment as a matter of law on all claims. Tr. 539. As a result, the government's pattern or practice claim went to the jury based on the testimony of eight alleged victims.[6]

On November 19, 2010, the jury returned a verdict for the defendants. U.S. App'x 154-161. Pursuant to the verdict form, the jury found that defendants did not "engage[] in a pattern or practice of * * * discrimination of female tenants, or * * * den[y] to a group of persons rights granted or protected by the Fair Housing Act." U.S. App'x 205-210. On November 29, 2010, the district court entered final

[6] Although the district court dismissed Kathleen Anderson's claim for damages, the court permitted her testimony to go to the jury in determining whether the United States had established a pattern or practice of discrimination. See U.S. App'x 202 (jury instruction No. 26).

judgment for the defendants and dismissed the United States' claim. U.S. App'x 211.

4. On December 3, 2010, defendants filed a motion for $271,550 in attorneys' fees under EAJA.[7] U.S. App'x 212-214. Defendants argued that the position of the United States was not substantially justified because, in part, the claims on behalf of all victims but one (Amber Brown) were barred by the statute of limitations; the government originally named 14 aggrieved parties but only 7 reached the jury; several of the alleged victims "were clearly lying"; and the testimony of others demonstrated "a total lack of reliability" that did not provide a reasonable basis for the litigation. U.S. App'x 269-274. The United States responded by summarizing the testimony of the eight women who testified about Bobby Hurt's conduct and asserted that their testimony, along with other evidence presented at trial, constituted substantial evidence that Bobby Hurt engaged in a pattern or practice of discrimination, *i.e.*, either quid pro quo sexual harassment or the creation of a hostile housing environment. U.S. App'x 295-296. The United States also noted that the court denied the defendants' motion for partial summary judgment and two motions for a directed verdict. U.S. App'x 285-289. Further, the United States noted that the case turned on the jury's factual and credibility

[7] Defendants also sought $16,008.51 in costs and expenses. U.S. App'x 212-214. The United States is not challenging the award of costs.

determinations, which were subject to different interpretations, and the fact that the jury found for the defendants was not determinative. U.S. App'x 285, 293-294.[8]

5. On March 4, 2011, the district court granted in part, and denied in part, defendants' motion for attorneys' fees. U.S. App'x 376-383. The court concluded that because "there was no doubt that some of these victims were not credible," and "someone representing the government should have realized that a number of the alleged victims were simply not telling the truth," pursuing claims "on behalf of these alleged victims was not justified." U.S. App'x 379. Therefore, the court concluded, the defendants should be reimbursed "for some portion of the attorneys' fees they incurred in defending this case." U.S. App'x 379. In determining that amount, the court concluded that the trial testimony indicated that the government had a reasonable basis to bring claims on behalf of four women (Nester, Johnson, Way, and Kimbrough), but that the government had "no basis in law and fact to pursue claims on behalf of" four other women (Hurd, Peters, Brown, and Anderson). U.S. App'x 379. The court also found that because the government initially identified two other women as potential victims (Manes and

[8] In addition, the United States noted that at one point the jury indicated to the trial judge that it was deadlocked. See U.S. App'x 282.

Warren), "thus causing the Hurts to take their depositions, the Hurts must be reimbursed for the time spent investigating their claims." U.S. App'x 379-380.[9]

The court therefore concluded that because the government presented "ten alleged victims for whom the Hurts had to provide a defense," but "four presented claims having a reasonable basis in law and fact," defendants were entitled 60 percent of their fees, *i.e.*, the percentage of alleged victims for whom the United States did not have reasonable basis in law and fact. U.S. App'x 382. Therefore, the court reduced defendants' requested fees, as adjusted,[10] by 40 percent, resulting in an award of attorneys' fees against the government of $142,905.

On April 28, 2011, the United States filed a notice of appeal of the district court's March 4, 2011, order. U.S. App'x 384-385.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in awarding defendants attorneys' fees. Properly applying EAJA to this record, it is clear that the position of the United States was substantially justified. The district court's order granting attorneys' fees should therefore be reversed.

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[9] As noted above (footnote 3), Warren did not appear at her deposition.

[10] The court first found that the defendants' request for attorneys' fees should be reduced by 15% for charges the court found to be unreasonable. U.S. App'x 381-382.

1. Under EAJA, attorneys' fees are generally awarded to a prevailing party (other than the United States) "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. 2412(d)(1)(A). This standard requires the government to show that its position was justified "to a degree that could satisfy a reasonable person"; *i.e.*, that it had a "reasonable basis in both law and fact." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). The directed verdict standard allows claims to go to the jury only if a reasonable juror could rule for the government. Where, as here, the government presents sufficient evidence at trial to survive a motion for a directed verdict and create a jury issue, the position of the United States is necessarily substantially justified. If a reasonable juror could find for the government, it follows that the government's position – even if it does not ultimately prevail – had a "reasonable basis in both law and fact." This conclusion is reflected in decisions of this Court and others recognizing that the position of the United States will be substantially justified where sufficient evidence was presented to support a verdict in the government's favor, or the case primarily involves factual questions for the jury. This is particularly so where, as here, the factual questions turn on determinations of witness credibility. For this reason alone, the district court's award of fees should be reversed.

2. In any event, the district court committed two additional reversible errors in applying EAJA's "substantially justified" standard to the government's case and

awarding fees to the defendants. First, the court failed to recognize that the appropriate inquiry under EAJA is whether the action *as a whole* was "substantially justified." Courts have made clear that this determination is a single finding, based on the totality of the circumstances. Therefore, the court erred by basing its award of attorneys' fees on its evaluation, in isolation, of the credibility of each aggrieved person who testified, and its determination that the government's position was justified with respect to some witnesses but not others. Second, the court similarly erred by failing to recognize that a pattern or practice case, by its very nature, is a single claim, not a collection of individual claims. Thus, there was no valid reason for the court to parse the credibility of each victim and award fees on a pro rata basis for those individual claims the court found not to be credible. It follows that, because the district court found that the claims of four of the victims were credible and presented questions of fact and veracity for the jury, the court should have concluded that, taken as a whole, the United States' pattern or practice claim was substantially justified.

ARGUMENT

THE UNITED STATES' CLAIM OF A PATTERN OR PRACTICE OF DISCRIMINATION WAS SUBSTANTIALLY JUSTIFIED

A. Standard Of Review

This Court reviews an award of attorneys' fees under EAJA for abuse of discretion. See, *e.g.*, *United States Dep't of Labor* v. *Rapid Robert's, Inc.*, 130

F.3d 345, 347 (8th Cir. 1998); *Friends of Boundary Water Wilderness* v. *Thomas*, 53 F.3d 881, 884-886 (8th Cir. 1995). Under this standard, the Court reviews conclusions of law related to the award of fees *de novo*, and findings of fact under the clearly erroneous standard. *Rapid Robert's, Inc.*, 130 F.3d at 347.

B. The District Court Abused Its Discretion In Awarding Defendants Attorneys' Fees Under EAJA

The Fair Housing Act contains a fee-shifting provision that allows "the prevailing party," other than the United States, "reasonable attorney's fee[s]" to the extent provided in 28 U.S.C. 2412 (EAJA). See 42 U.S.C. 3614(d)(2) (applicable to enforcement actions by the Attorney General). Under EAJA, as relevant here, a court "shall award to a prevailing party other than the United States" attorneys' fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).[11]

[11] A different provision of the FHA addressing enforcement actions by private parties also provides for an award of attorneys' fees. See 42 U.S.C. 3613(c)(2). That provision does not incorporate the EAJA standards, which apply only to actions where the United States is a party. As a general matter, a prevailing *defendant* in an action by a private party may recover attorneys' fees "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." See, *e.g.*, *Claiborne* v. *Wisdom*, 414 F.3d 715, 719-720 (7th Cir. 2005) (quoting *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 n.2 (1983)); *Bryant Woods Inn, Inc.* v. *Howard Cnty.*, 124 F.3d 597, 606-607 (4th Cir. 1997); *Brooks* v. *Center Park Assocs.*, 33 F.3d 585, 587 (6th Cir. 1994).

"Substantially justified" does not mean "justified to a high degree, but rather justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks omitted). The Supreme Court explained that this standard "is no different from * * * 'reasonable basis both in law and fact,'" rejecting the argument that the standard requires a showing of "more than mere reasonableness." *Id*. at 565, 568. The Court also made clear that a position can be substantially justified even if it is not correct, as long as a reasonable person could think it correct. *Id.* at 566 n.2. Likewise, the mere fact that the government does not prevail does not mean that its position was not substantially justified. "Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." *Id.* at 569; see also *Scarborough* v. *Principi*, 541 U.S. 401, 415 (2004) ("Congress did not * * * want the substantially justified standard to be read to raise a presumption that the Government position was not substantially justified simply because it lost the case.") (citation and internal quotation marks omitted); *Wilfong* v. *United States*, 991 F.2d 359, 364 (7th Cir. 1993) (rejecting award of attorneys' fees where the district court's only valid explanation for its award was the jury verdict, stating that "we are mindful that the government's position can be justified even if ultimately rejected by the court or jury"). This Circuit has applied

these standards in numerous cases. See, *e.g.*, *Bah* v. *Cangemi*, 548 F.3d 680, 683-684 (8th Cir. 2008) (summarizing applicable standard for awarding fees under *Pierce*); *Goad* v. *Barnhart*, 398 F.3d 1021, 1025 (8th Cir. 2005) (same); *Herman* v. *Schwent*, 177 F.3d 1063, 1065 (8th Cir. 1999) (same).[12]

1. Because The Court Denied The Defendants' Motions For A Directed Verdict, The Position Of The United States Necessarily Was Substantially Justified

Where, as here, the government presents sufficient evidence at trial to survive a motion for a directed verdict and create a jury issue, the position of the United States is necessarily substantially justified. In ruling on a motion for a directed verdict, the court must determine whether the government presented sufficient evidence to allow a reasonable juror to find for the government. See, *e.g.*, *Porous Media Corp.* v. *Pall Corp.*, 186 F.3d 1077, 1080 (8th Cir. 1999) (motion for directed verdict denied if reasonable jurors could find for the non-moving party); Fed. R. Civ. P. 50(a) (court may grant judgment as a matter of law

[12] See also H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 (1980) ("The test of whether or not a Government action is substantially justified [under EAJA] is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis in law and fact, no award will be made. * * * The standard, however, should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.").

if, after party presents its evidence at trial, "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party"). If the evidence is sufficient to permit a reasonable juror to find for the government, it necessarily follows that the government's position had a reasonable basis in law and fact, even if the government did not prevail. As the Seventh Circuit has stated, "[b]ecause the government's evidence, if credited by the trier of fact, was sufficient to support a verdict in its favor, there necessarily was a reasonable basis in fact for the government's position." *Wilfong*, 991 F.2d at 369.

Consistent with this view, this Court has stated that where the government "has presented sufficient direct evidence of * * * discrimination to avoid summary judgment," the government was "substantially justified" in bringing the case and therefore an award of attorneys' fees was inappropriate under EAJA. *EEOC* v. *Liberal R-II Sch. Dist.*, 314 F.3d 920, 926 (8th Cir. 2002) (age discrimination case). And, recently, the Seventh Circuit concluded that "consistent with this [substantially justified] standard, there is a presumption that a government case strong enough to survive both a motion to dismiss and a motion for summary judgment is substantially justified." *United States* v. *Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (7th Cir. 2010). The court explained that "[g]iven the Supreme Court's insistence in its recent *Bell Atlantic* and *Iqbal*

decisions[13] that a case must be dismissed if the complaint does not appear to have a substantial basis, and given that summary judgment resolves cases that though not frivolous would not persuade a reasonable jury, a case that is allowed to go all the way to trial is likely to be a toss-up." *Ibid.* (internal citations omitted).[14] *A fortiori*, where the court denies a defendant's motion for a directed verdict, thereby sending the case to the jury to decide, the government's position necessarily is reasonable and substantially justified. In this case, the district court denied the defendants' motions for a directed verdict both at the close of the government's case, and at the close of all the evidence. See pp. 8-11, *supra*. In this circumstance, the court erred in ruling that the United States' case was not "substantially justified" under EAJA.

This conclusion is also supported by decisions recognizing "that where a case involves primarily factual questions, this court has found that the government's position was substantially justified." *Bale Chevrolet Co.* v. *United States*, 620 F. 3d 868, 873 (8th Cir. 2010) (noting that the case "turn[ed] on factual

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[13] *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007).

[14] The court in *Thouvenot* noted that in rare circumstances a court could find that a claim was nevertheless not substantially justified, *e.g.*, if "something * * * emerge[d] at trial that showed that the government really had no case at all" or if "on reflection" the court determined that it "erred grievously" in refusing to grant the motion to dismiss or motion for summary judgment. 596 F.3d at 382.

determinations concerning [private plaintiff's] knowledge and actions"). In this regard, many jury trial cases are, ultimately, "he-said, she-said" cases, or otherwise turn on credibility determinations. Courts have made clear that such cases will usually be deemed substantially justified, regardless of the ultimate outcome. In *Wilfong*, for example, the court stated that when resolution of a case largely hinges on determinations of witness credibility, it is an abuse of discretion to find that the position of the United States is not substantially justified. 991 F.2d at 368; see also *Kaffenberger* v. *United States*, 314 F.3d 944, 960 (8th Cir. 2003) (jury resolution of factual dispute against the United States does not mean that the government's position is not substantially justified).

The district court therefore committed reversible error by treating its own disbelief of certain witnesses (*i.e.*, its own credibility determinations) as a ground for concluding that the government's position was not substantially justified. Because the district court denied defendants' motions for a directed verdict, thus finding that there was a triable issue for the jury, the position of the United States was necessarily substantially justified. For this reason alone, the district court's order should be reversed.

2. The District Court Erred By Failing To Treat The United States' Pattern Or Practice Claim As A Single Claim

In any event, the district court also committed reversible error in viewing this pattern or practice case as constituting only separate, unrelated damages claims

for each victim, and thereby parsing the reasonableness of the government's case victim-by-victim in ruling upon defendants' EAJA motion.

First, the Supreme Court has made clear that the "substantially justified" determination is a "single finding"; *i.e.*, "only one threshold determination for the entire civil action is to be made." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 159-160 (1990). In other words, EAJA "favors treating a case as an inclusive whole, rather than as atomized line-items." *Id.* at 161-162. The Court found textual support for this conclusion in the language of EAJA, which refers to "the position of the United States" in the singular, suggesting "that the court need make only one finding about the justification of that position." *Jean*, 496 U.S. at 159. This means that the court must both consider the reasonableness of the government's position during prelitigation and at trial, and "look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation." *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir.), cert. denied, 510 U.S. 864 (1993); see also *ibid.* (EAJA analysis requires a "broadly focused analysis that * * * reject[s] the view that *any* unreasonable position taken by the government in the course of litigation automatically opens the door to an EAJA fee award"). Consistent with these principles, this Court has recognized that a court must consider the totality of the circumstances in

determining whether the position of the United States was substantially justified. *Herring* v. *United States*, 781 F.2d 119, 121-122 (8th Cir. 1986); see also *Cody* v. *Caterisano*, 631 F.3d 136, 141 (4th Cir. 2011); *Williams* v. *Astrue*, 600 F.3d 299, 302 (3d Cir. 2009); *Dye* v. *Astrue*, 244 F. App'x 222, 223-224 (10th Cir. 2007). The district court's victim-by-victim approach is fundamentally at odds with its obligation to view the case as "an inclusive whole." *Jean*, 496 U.S. at 161-162. [15]

Second, the district court's analysis misconstrued the nature of a pattern or practice claim under 42 U.SC. 3614(a).[16] In *International Brotherhood of*

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[15] The Supreme Court's recent attorneys' fee case – arising under a different fee-shifting statute, 42 U.S.C. 1988 – is not to the contrary. See *Fox* v. *Vice*, No. 10-114, 2011 WL 2175211 (June 6, 2011). In that case, the Supreme Court held that where plaintiff has asserted both frivolous and non-frivolous claims, a prevailing defendant may recover attorneys' fees under Section 1988 only for those incurred solely because of the frivolous allegations. The Court neither addressed nor cited EAJA, which stands apart from other attorneys' fees statutes, with its own body of caselaw addressing its mandate that the court "*shall* award to a prevailing party other than the United States" attorneys' fees "unless the court finds that *the position of the United States* was substantially justified." 28 U.S.C. 2412(d)(1)(A) (emphasis added). See *Principi*, 541 U.S at 414-423; *Jean*, 496 U.S. at 158-166; *Pierce*, 487 U.S. at 563-569; see generally *Brickwood Contractors, Inc.* v. *United States*, 288 F.3d 1371, 1377-1379 (Fed. Cir. 2002) (discussing EAJA and other fee-shifting statutes), cert. denied, 537 U.S. 1106 (2003).

[16] Other federal civil rights statutes, in addition to the FHA, authorize the government to bring pattern or practice discrimination cases. See 42 U.S.C. 2000e-6(a) (employment discrimination under Title VII); 42 U.S.C. 12188(b) (Title III of the Americans with Disabilities Act of 1990). "Pattern or practice" is "not intended as a term of art, and the words reflect only their usual meaning."

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Teamsters v. *United States*, 431 U.S. 324, 360 (1977), the Court explained that "the plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by [the defendant]." In this regard, in addressing the government's burden at the liability stage of a Title VII case, the Court stated that "[i]ts burden is to establish a prima facie case that such a policy existed"; if the employer fails to rebut the presumption, "a trial court may then conclude that a violation has occurred and determine the appropriate remedy." *Id.* at 360-361. The question of individual relief arises after "it has been proved that the employer has followed an employment policy of unlawful discrimination." *Id*. at 361.

These principles apply with equal force to FHA cases. For example, in *United States* v. *Big D Enterprises, Inc.*, 184 F.3d 924, 930 (8th Cir. 1999), cert. denied, 529 U.S. 1018 (2000), where the government alleged that an apartment complex's owner denied rental applications on the basis of race, this Court stated

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International Bhd. of Teamsters v. *United States*, 431 U.S. 324, 336 n.16 (1977) (Title VII case). Quoting the legislative history of Title VII, the Court stated that a "pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice, if for example, * * * a company repeatedly and regularly engaged in acts prohibited by the statute." *Ibid.* (quoting 110 Cong. Rec. 14,270 (1964) (remarks of Senator Humphrey)).

that proving a pattern or practice of discrimination "requires the government to show that the defendant engaged in discriminatory activity as a matter of standard operating procedure," citing *Teamsters*. The court concluded that, given the testimony of some of the apartment managers and three victims, "it is apparent that the government conclusively demonstrated a pattern and practice of discrimination against black housing applicants." *Id*. at 931. In *United States* v. *Balistrieri*, 981 F.2d 916 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993), the court held that the government established a pattern or practice of discrimination based on evidence of six instances where blacks were treated less favorably than whites in the rental of an apartment. The court noted that a "finding of pattern is a factual finding, and each case must stand on its own facts," and the evidence was sufficient to establish that the discrimination was more than a sporadic occurrence. *Id.* at 930.[17] See also *United States* v. *Mitchell*, 580 F.2d 789, 791-792 (5th Cir. 1978) (defendants' systematically steering black tenants to distinct section of the apartment complex was not an isolated event but established a pattern or practice); *United States* v. *Di Mucci*, 879 F.2d 1488, 1492, 1496-1499 (7th Cir. 1989) (discussing *Teamsters* and

[17] The court also stated that cases like *Teamsters*, and other Title VII cases, "are relevant to the meaning of 'pattern or practice' in a housing discrimination case." *Balistrieri*, 981 F.2d at 929 n.2.

concluding that six incidents of a refusal to rent to black apartment seekers established a pattern or practice of discrimination under the FHA).

Moreover, the FHA authorizes the Attorney General to bring suit on behalf of individuals or, through pattern or practice claims, groups. See 42 U.S.C. 3610(g)(2)(A), 3612(o), 3614(a). In either case, the court may award monetary damages "to persons aggrieved." 42 U.S.C. 3614(d)(1)(B) (including damages for aggrieved persons as one type of "relief" for a pattern or practice claim by the government). As noted above, to establish liability in a pattern or practice case the government must show that the defendant engaged in a regular policy or practice of unlawful discrimination, *i.e.*, "that such a policy existed," not that each victim "for whom it will ultimately seek relief was a victim of the . . . discriminatory policy." *United States* v. *Indigo Invs., LLC*, No. 1:09CV376, 2010 WL 4718897, at *3 (S.D. Miss. Nov. 15, 2010) (quoting *Teamsters*, 431 U.S. at 360; FHA case rejecting argument that at liability stage government had to prove a prima facie case of discrimination as to each individual aggrieved person). Once liability is established – *i.e.*, that there was a pattern or practice – the determination is made of the appropriate damages or other relief for each aggrieved party.

Therefore, a pattern or practice case, by its very nature, is one claim challenging a policy; it is not a collection of individual claims. See *United States* v. *Veal*, 365 F. Supp. 2d 1034, 1040 n.3 (W.D. Mo. 2004) (noting in a pattern or

practice FHA case that "there is only *one* plaintiff in this case – the United States"). Of course, the existence of the policy may be established by showing individual acts of discrimination, but that does not change the nature of the cause of action. Nor is there a minimum number of incidents that must be proven to establish a pattern or practice. See, *e.g.*, *United States* v. *Pelzer Reality Co.*, 484 F.2d 438 445 (5th Cir. 1973) (realtor's three violations of the FHA constituted a pattern or practice). Once the government proves that there was a pattern or practice, individual relief is addressed, and the evidence must support that each aggrieved person suffered harm.

It follows that, in resolving defendants' EAJA motion, the district court improperly viewed this case as consisting of the claims of ten individual victims, each of which were to be separately assessed, rather than as a case presenting a single pattern or practice claim. Therefore, the district court failed to properly assess whether the United States had a reasonable basis in law and fact to believe that defendants had engaged in a pattern or practice of sexual harassment in violation of the FHA.[18] Looking at the case as a whole, because the district court found that the claims of sexual harassment of four of the victims were credible and

[18] The jury instructions and the verdict form reflect that the jury ruled on a single pattern or practice claim. See U.S. App'x 185-186, 196-197 (jury instructions Nos. 11 and 21); U.S. App'x 205-210 (verdict form).

presented questions of fact for the jury to decide, the court should have concluded that the United States' pattern or practice claim was substantially justified and denied defendants' request for attorneys' fees in its entirety. See U.S. App'x 379 (the trial testimony of Nester, Johnson, Way, and Kimbrough "indicated that there was a reasonable basis in law and fact for the government to bring claims on their behalf"); see also Supp. Tr. 17 ("even if I find that * * * several of these victims cannot receive individual damages * * *, that doesn't necessarily mean that they were not a part of the pattern or practice"). The fact that the jury may not have agreed that there was a pattern or practice – or, more accurately, that the government may not have established by a preponderance of the evidence that there was – is not, as noted above, dispositive.[19]

In sum, the district court fundamentally erred, for purposes of EAJA, by treating the United States' pattern or practice action as one presenting the separate and unrelated claims of ten individual claimants – *i.e.*, as "atomized line-items" – and evaluating in isolation the credibility of each aggrieved party who testified. As a result, the district court's award of 60 percent of the defendants' requested fees – representing the percentage of alleged victims that the court found to be not

[19] Indeed, the jury could have found for the defendants on some basis other than the veracity of some or all of the tenants who testified. For example, the jury instructions permitted the jury to find for the defendants on the basis of the statute of limitations. See U.S. App'x 195 (jury instruction No. 20).

credible – was erroneous, and the court abused its discretion in awarding attorney's fees under EAJA on that basis.

CONCLUSION

The district court's order granting attorneys' fees should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 6,979 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: June 17, 2011

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I hereby certify that on June 17, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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