

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

REPLY BRIEF FOR THE UNITED STATES

THOMAS E. PEREZ
Assistant Attorney General

DENNIS J. DIMSEY
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

TABLE OF CONTENTS

| | PAGE |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| INTRODUCTION | 1 |
| ARGUMENT | |
| THE UNITED STATES’ CLAIM OF PATTERN OR PRACTICE DISCRIMINATION IN VIOLATION OF THE FAIR HOUSING ACT WAS SUBSTANTIALLY JUSTIFIED | 2 |
| A. <i>Because The District Court Denied The Defendants’ Motions For A Directed Verdict, The Position Of The United States Necessarily Was Substantially Justified</i> | 5 |
| B. <i>The District Court Erred By Failing To Treat The United States’ Pattern Or Practice Claim As A Single Claim</i> | 7 |
| C. <i>Defendants’ Additional Arguments Supporting Their Assertion That The Position Of The United States Was Not Substantially Justified Are Baseless</i> | 13 |
| CONCLUSION | 21 |
| CERTIFICATE OF COMPLIANCE | |
| CERTIFICATE OF VIRUS SCANNING | |
| CERTIFICATE OF SERVICE | |

TABLE OF AUTHORITIES

| CASES: | PAGE |
|--------------------------------------------------------------------------------------------------|-------------|
| <i>Commissioner, INS v. Jean</i> , 496 U.S. 154 (1990)..... | 8 |
| <i>Pierce v. Underwood</i> , 487 U.S. 552 (1988) | 2-3 |
| <i>United States v. Gavilan Joint Comm. Coll. Dist.</i> , 849 F.2d 1246 (9th Cir. 1988) | 14 |
| STATUTES: | |
| Equal Access to Justice Act (EAJA), 28 U.S.C. 2412..... | 1 |
| 28 U.S.C. 2412(a)(1) | 5 |
| 28 U.S.C. 2412(d)(1)(A)..... | 5 |
| Fair Housing Act (FHA), 42 U.S.C. 3601 <i>et seq.</i> | 1 |
| RULES: | |
| Fed. R. Civ. P. 5(d) | 16 |
| Fed. R. Civ. P. 26(a)(1)..... | 16 |

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-1925

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

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

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 United States alleged that Bobby Hurt, as manager of several mobile home parks in Arkansas, engaged in a pattern or practice of discrimination in violation of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, by sexually harassing female tenants. A jury found for the defendants, and defendants moved for \$271,500 in attorneys' fees. The district court awarded defendants \$142,905.

The district court did not examine the position of the United States as a whole to determine if it was substantially justified, as required under EAJA. Rather, 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 (as adjusted for other reasons), *i.e.*, the percentage of alleged victims for whom the United States did not have a reasonable basis in law and fact. As we argued in our opening brief, 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. Therefore, the district court's order granting attorneys' fees should be reversed.

ARGUMENT

THE UNITED STATES' CLAIM OF PATTERN OR PRACTICE DISCRIMINATION IN VIOLATION OF THE FAIR HOUSING ACT WAS SUBSTANTIALLY JUSTIFIED

There is no dispute over the general standard applicable to the award of attorneys' fees under EAJA. Fees may be awarded only if the position of the United States was not "substantially justified," *i.e.*, not "justified in substance or in the main * * * [or] justified to a degree that could satisfy a reasonable person."

Pierce v. Underwood, 487 U.S. 552, 565 (1988) (internal quotation marks

omitted); see U.S. Br. 16-18; Def. Br. 20-22.¹ In other words, the position of the United States must have a “reasonable basis both in law and fact.” *Pierce*, 487 U.S. at 565. The parties disagree, however, over how this standard is applied in the context of this case; specifically, a single pattern or practice discrimination claim based on the testimony of numerous victims of Bobby Hurt’s alleged sexual harassment as well as corroborating evidence, the denial of defendants’ motion for a directed verdict, a jury verdict for the defendants, and the district court’s finding in connection with the award of attorneys’ fees that the testimony of four of the victims was credible.

We argued in our opening brief that, for several reasons, the district court’s order granting attorneys’ fees should be reversed. First, 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

¹ Citations to “U.S. Br. ___” are to page numbers in the Brief for the United States as Appellant filed in this appeal. Citations to “Def. Br. ___” are to page numbers in defendants-appellees’ brief. Citations to “U.S. App’x ___” refer to pages in the Appendix for the United States as Appellant. Citations to “Def. App’x ___” are to page numbers in the Appendix for Bobby L. Hurt and Sue R. Hurt filed along with defendants-appellees’ brief. Citations to “Tr. ___” are to page numbers in the transcript of the jury trial. 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 U.S. Br. 2 n.2.

follows that the government's position – even if it does not ultimately prevail – had a “reasonable basis in both law and fact.” See U.S. Br. 18-21.

In addition, in applying EAJA's “substantially justified” standard, the court failed to recognize that the appropriate inquiry 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. See U.S. Br. 22-23.

Finally, the court 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. Therefore, there was no basis 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. See U.S. Br. 23-29. 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.²

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

Defendants argue that the notion that a case that survives a motion for summary judgment or a motion for directed verdict is necessarily substantially justified is not correct. Def. Br. 23-26; see U.S. Br. 18-21. The bulk of defendants' argument addresses the denial of their motion for partial summary judgment. They assert that because their motion addressed the statute of limitations, damages, and Sue Hurt's liability, and not the merits of the discrimination claim, the court's denial of the motion "was in no way a finding of 'merit' on any of the government's claims," and therefore not relevant to the "substantially justified" determination. Def. Br. 26.

² As defendants correctly note (Def. Br. 14), the United States does not contest the award of costs. EAJA's "substantially justified" standard does not apply to costs. See 28 U.S.C. 2412(a)(1) & (d)(1)(A). Defendants also correctly note that because we maintain that, properly applying EAJA to this case, the United States was substantially justified in bringing this pattern or practice case, and therefore defendants are not entitled to *any* attorneys' fees, we do not independently contest the amount of fees awarded. At the same time, we note that defendants did not cross-appeal the court's 15 percent reduction in their requested fees for charges the court found to be unreasonable (U.S. App'x 381-382), or the 40 percent reduction in fees reflecting the four aggrieved tenants the court found to be credible.

Defendants misconstrue our argument. We do not rest our argument on the denial of defendants' motion for *summary judgment*. Rather, we argued in our opening brief that "[w]here, 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." U.S. Br. 18 (emphasis added); see also U.S. Br. 21 (summarizing that "[b]ecause 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"). We argued that those decisions finding that the government was substantially justified in bringing the case where it presented sufficient evidence to avoid summary judgment, or where the case turned on credibility determinations, support this conclusion. U.S. Br. 19-21 (citing cases).

Therefore, any limitation in the scope of defendants' motion for partial summary judgment is beside the point. In this case, the denial of defendants' motion for a directed verdict reflected the court's conclusion that the evidence was sufficient to permit a reasonable juror to find for the government. See U.S. Br. 18-19. Indeed, the court made that clear in denying defendants' motion for a directed verdict. In so ruling, the court stated that, with regard to a majority of the aggrieved persons who testified, their testimony, if believed by the jury, could

establish sexual harassment. See U.S. Br. 9. It follows that the position of the United States was necessarily substantially justified.

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

Defendants challenge our arguments that the district court committed reversible error by failing to view the case as a whole in making the “substantially justified” determination, and failing to recognize that a pattern or practice claim of discrimination is *one* claim, not a collection of individual claims. See U.S. Br. 21-28. Defendants make several arguments, none of which has merit.

1. First, defendants take issue with our characterization of the court’s decision awarding attorneys’ fees. They argue that in awarding 60 percent of their fees, the court did not parse individual claims and award fees only for those witnesses who were not credible or against whom the defendants had to defend. Rather, according to defendants, the district court *first* concluded that the lawsuit was not substantially justified, and *then* reduced the requested fees to what it viewed as a reasonable amount. Def. Br. 36; see also Def. Br. 38 (“nothing in the language of the Court’s Order indicates that this [making only one threshold determination for the entire action] was not done”); Def. Br. 17.

This argument is belied by a plain reading of the district court’s order. U.S. App’x 376-383. The court stated:

[T]here was no doubt that some of these victims were not credible.

* * * Therefore, *pursuing claims on behalf of these alleged victims was not justified*, and there is no question that the Hurts should be reasonably reimbursed for some portion of the attorneys' fees they incurred in defending the case. The question is, what is reasonable?

U.S. App'x 379 (emphasis added). Subsequently, the court framed the issue as whether there was "any portion of the government's case for which it had a reasonable basis in law and fact" and, if so, "what portion of the government's case was grounded in law and fact." U.S. App'x 382. The court concluded that the government had a reasonable basis for the claims of four of the women who testified, and therefore defendants were entitled to 60 percent of their requested fees (after some adjustments, not relevant here). U.S. App'x 382. Nowhere in the court's decision is there any discussion of whether the case – *taken as a whole* – was substantially justified; indeed, the court neither mentions this principle nor cites to any of the cases making clear that, under EAJA, the court must look to the totality of the circumstances and make one determination whether the government acted reasonably in bringing the litigation. See U.S. Br. 22-23 (citing cases).³ In

³ Defendants also do not cite to, *e.g.*, the Supreme Court's decision in *Commissioner, INS v. Jean*, 496 U.S. 154 (1990), which states that the "substantially justified" determination is a single finding for the entire action. See U.S. Br. 22-23 (discussing *Jean* and similar cases). Nevertheless, defendants appear to accept that this is the correct standard to be applied, and therefore do not attempt to justify the district court's award of attorneys' fees based on the percentage of aggrieved persons the court found credible. Rather, they simply argue that that is not what the district court did.

sum, the court examined the merits of the each victim's assertion that she was sexually harassed, and awarded attorneys' fees for those victims that the court believed were not credible. This was reversible error.

2. Defendants also argue that the United States waived this argument by not raising it in the district court in its opposition to defendants' motion for attorneys' fees, and therefore preventing the district court from addressing it in the first instance. Def. Br. 36-37. Defendants also recognize the fatal flaw in their own argument – there was no way the United States could have known in advance that the district court would base its award of fees on an erroneous application of EAJA, and in so doing ignore the case law making clear that the EAJA determination is a single determination of reasonableness looking at the case as a whole. See Def. Br. 37 (“the government may claim that it was not aware of the need to make this argument until after the district court’s ruling”). Defendants nevertheless suggest that the United States should have known it was necessary to make this argument because “the primary basis for the Hurt’s entire argument was that the frivolous nature of a large majority of the governments’ witnesses’ claims rendered the entire lawsuit unjustified.” Def. Br. 37. That assertion is not only an

inaccurate description of their arguments in the district court,⁴ but is irrelevant.

The United States was not required to expressly argue in the district court that the court should base its decision on a correct understanding of the law in order to appeal the court's decision on the ground that it failed to correctly apply that law.

3. Defendants further argue that the United States' interpretation of EAJA would lead to the "troubling" conclusion that "if one single claim can be considered justified, the entire lawsuit is justified," *i.e.*, that the government could "bootstrap an infinite number of frivolous claims" to just one reasonable claim and preclude defendants from recovering fees under EAJA. Def. Br. 37. That argument misses the fundamental point that under EAJA the government's case will not be substantially justified if, viewed as a whole, it was not reasonable. Surely a case where there is only one reasonable claim out of many is unlikely to be reasonable, taken as a whole. In any event, that is largely a fact-based inquiry that depends not only on the number of claims presented, but the nature of the case.

⁴ Defendants' brief in support of their motion for attorneys' fees reflects that they were aware of the correct standard for awarding attorneys' fees under EAJA. They asserted, for example, that "Plaintiff's lawsuit was not substantially justified," and therefore they were entitled to all attorneys' fees incurred. U.S. App'x 269. They also addressed "[t]he unreasonableness of pursuing this case through jury verdict," and asserted that "[e]very aggrieved party presented inconsistent testimony." U.S. App'x 269, 273. Defendants' arguments below were therefore addressed to the United States' case as a whole, not just to the government's basis for including the claims of some of the aggrieved women who testified.

The instant case was a pattern or practice case that, as such, presented one claim; in these circumstances, it was legal error to apply EAJA on a pro rata basis based on the number of alleged victims the court found credible.

4. Defendants also argue that, even accepting that four victims were credible, viewing the lawsuit as a whole it was not substantially justified. Def. Br. 38-39. Defendants suggest that, as a matter of “common sense,” a case cannot be substantially justified if only four out of ten aggrieved persons were credible. Def. Br. 39. Defendants also argue that the “fact that this is a pattern and practice case does nothing to alter such a conclusion,” suggesting that if the government “could have established * * * a pattern or policy of discrimination with four individual claims,” it would have done so. Def. Br. 39.

This argument is baseless. Indeed, defendants fail to address the fundamental nature of a pattern or practice case, and the distinction between the government’s proof at the liability stage (proving a pattern or practice) and its proof in determining individual relief for the victims of the discrimination. As we explained in our opening brief, the government must first establish that the discrimination has been a regular policy or procedure followed by the defendants; if it does so – *i.e.*, if it proves a violation – the question of individual relief arises. U.S. Br. 23-26. It follows that the question of which aggrieved persons were credible and which ones were not is likewise relevant in two respects – first, did

the aggrieved persons establish a pattern or practice of discrimination (the single claim presented), and, if so, which aggrieved persons are victims entitled to remedial relief.⁵ In this case, because the jury found that defendants did not engage in a pattern or practice of discrimination (a single finding on the verdict form), it did not have to address the verdict form's individualized questions addressing each aggrieved person who may have been discriminated against and appropriate damages. See U.S. App'x 205-210 (verdict form).

In any event, the court's conclusion that the claims of sexual harassment of four of the victims were credible and presented questions of fact for the jury is sufficient to establish that the United States' pattern or practice claim was substantially justified, *i.e.*, that the United States had a reasonable basis in law and fact for bringing a pattern or practice sexual harassment claim against defendants. The fact that the government presented the testimony of other tenants does not affect this conclusion. Moreover, the district court denied defendants' motion for a directed verdict with regard to the damages claims of seven women, and with respect to several of them (who were *not* among the four that the court later determined were credible) the court noted that their testimony, if believed,

⁵ There, of course, need not be complete congruence in these findings. As the court acknowledged during trial, "even if I find that * * * several of the victims cannot receive individual damages * * *, that doesn't necessarily mean that they were not part of the pattern or practice." Supp. Tr. 17.

established discrimination. See U.S. Br. 9 (noting testimony of Sherry Peters and Louise Hurd).

C. Defendants' Additional Arguments Supporting Their Assertion That The Position Of The United States Was Not Substantially Justified Are Baseless

Defendants reiterate many of the arguments they made to the district court to support their assertion that the position of the United States was not substantially justified. Def. Br. 26-33; see U.S. App'x 269-274 (defendants' brief in support of motion for attorneys' fees). They reassert that the "dubious nature" of the United States' allegations is apparent because: (1) none of the victims complained about the defendants' alleged conduct until the United States solicited victims through advertisements and promises of compensation; (2) all of the alleged incidents but one occurred more than three years before the government filed this lawsuit; (3) all claims but one "were clearly barred by the statute of limitations," but the government did not introduce any evidence to establish equitable tolling; (4) the government pursued its case against Sue Hurt, but her only involvement in the case was that she was an owner of some of the properties; (5) the United States "originally brought this case on behalf of fourteen aggrieved parties," but only seven went to the jury; (6) the government's demands for damages and civil penalties "were unreasonable throughout the litigation"; and (7) the United States "made no effort to evaluate the veracity of their own 'aggrieved parties,'" some of

whom either had prior convictions for perjury, “were clearly lying,” or otherwise lacked veracity. Def. Br. 26-33.

Defendants argue that these factors “demonstrate a total lack of reliability in the testimony and certainly do not provide a reasonable basis in law and fact for the * * * litigation that followed.” Def. Br. 32. These arguments are either factually incorrect, irrelevant to the application of the “substantially justified” standard to the case as a whole (as discussed above), or both.⁶

1. At the outset, we note that several of the victims complained to their family and friends about Bobby Hurt’s conduct, and one of the victims testified that she complained directly to Sue Hurt about her husband’s conduct. See U.S. App’x 289-290; Tr. 385 (testimony of Patricia Kimbrough). Moreover, some of the victims came forward after hearing about the case from other people. See, *e.g.*,

⁶ We also note that defendants suggest that the status of the defendants as a retired couple, 69 and 74 years old (at the time of trial), with health issues, who manage trailer parks to supplement their income, bears on the “substantially justified” determination. See Def. Br. 22. Although it is true that EAJA was intended in part to offset the sometimes strong financial deterrents to contesting government action, see, *e.g.*, *United States v. Gavilan Joint Cmty. Coll. Dist.*, 849 F.2d 1246, 1249 (9th Cir. 1988), this lawsuit was directed at Bobby Hurt’s *conduct* and the requirements of federal anti-discrimination laws. Therefore, the “substantially justified” inquiry must focus on the reasonableness of the government’s legal challenge to that conduct, not defendants’ personal circumstances.

Tr. 63-64 (Tina Johnson).⁷ In addition, the district court denied defendants' motions for summary judgment and directed verdict on the statute of limitations issue, concluding that it was an issue for the jury to decide. Tr. 508; see U.S. App'x 195 (jury instruction No. 20 on statute of limitations).⁸ Further, the case was pursued against Sue Hurt because she was an owner of some of the properties and, as noted above, there was evidence that one of the victims expressly told her about her husband's conduct. Finally, the defendants' disagreement with the United States' claims for damages and civil penalties has no bearing on whether,

⁷ We also note that some of the victims testified that they did not come forward because they were young, scared, unaware of the protections of the FHA, feared retaliation, or did not have anywhere else to go. See, *e.g.*, Tr. 27-28 (testimony of Shana Nester, responding to why she did not call the police concerning Mr. Hurt's conduct); Tr. 63 (testimony of Tina Johnson). That is not uncommon in these kinds of cases. Moreover, we categorically deny that, as defendants assert, aggrieved persons were "personally solicited by the government to assert a claim as an aggrieved party in return for compensation" (Def. Br. 26), and defendants do not cite to any evidence to support this assertion. See U.S. App'x 289 n.5 (government's response to same assertion in district court). Nor did we use "advertisements." We did issue a press release and use informational fliers, both of which are routinely used in our investigations. See Def. App'x 100-101.

⁸ For this reason, defendants' assertions that the United States offered no testimony or proof as to when it knew or should have known of the underlying incidents, and their suggestion that therefore the United States knew that all of the claims for damages (apart from Amber Brown) were barred by the statute of limitations, are misplaced. Def. Br. 24-25, 27, 34; see also Def. Br. 11-12. Moreover, during the parties' arguments at trial addressing defendants' motion for a directed verdict, the court permitted the government to proffer the testimony of the government witness who, if necessary, could testify as to when the government learned about the case. Tr. 510-512.

taken as a whole, the United States was substantially justified in bringing the case; in any event, the amounts sought were not unreasonable. See U.S. App'x 292-293; see generally U.S. App'x 289-294 (United States' response to defendants' arguments in the district court).

2. Defendants' other arguments essentially focus on two points: prior to trial the United States identified 14 potential victims, but the claims of only 7 reached the jury, and the victims' testimony was unbelievable, often inconsistent, and reflected a "total lack of reliability." Def. Br. 29-32; see also Def. Br. 10. Although it is true that via a series of disclosures under Fed. R. Civ. P. 26(a)(1) the United States identified a total of 14 potentially aggrieved persons, defendants give an inaccurate and incomplete picture of how the case proceeded with respect to these individuals.⁹

⁹ Defendants do not identify the 14 aggrieved persons, but we presume they are referring to the United States' disclosures pursuant to Fed. R. Civ. P. 26(a)(1), which requires parties to provide certain information to the other parties in the case, without awaiting a discovery request, including the identity of persons who may be used to support its claims or defenses or who may be a witness at trial. Pursuant to this Rule, the United States made five separate disclosures (between August 14, 2009, and May 3, 2010) to defendants, identifying, *e.g.*, "potential aggrieved persons" who are "likely to have discoverable information that the plaintiff may use to support its claims." Pursuant to Fed. R. Civ. P. 5(d), these disclosures were not filed with the court. Given the purpose of these disclosures, and the nature of a pattern or practice case, defendants repeatedly and incorrectly mischaracterize this case by stating that the United States "filed this action on behalf of fourteen allegedly aggrieved parties." Def. Br. 1; see also Def. Br. 28.

(continued...)

At trial, the United States presented the testimony of eight women. The damages claim of one these women (Kathleen Anderson) was dismissed in response to defendants' motion for a directed verdict. Tr. 508. As a result, the jury could consider the testimony of eight women in determining whether the United States established a pattern or practice of discrimination, but the damages claims for only seven women (assuming the jury found a pattern or practice of discrimination). See U.S. Br. 7-10 & n.6. With regard to the other six individuals identified as potential aggrieved persons, one died over six months prior to trial (Denisa Torno), and the defendants were notified of this fact in March 2010 in the government's second supplemental disclosure. Another (a minor child of one of the victims) was removed from the government's list in the same disclosure because the government concluded that she did not witness any violations of the FHA. One tenant (Carrie Wright) was not further contacted by the government after it completed its investigation and was not deposed. Another (Chantrell Warren) did not appear at her deposition and defendants were notified three months before trial that she would not be called as a witness. The United States

(...continued)

The complaint alleged a single claim of pattern or practice discrimination by subjecting female tenants to sexual harassment; the pretrial disclosures identified *potential* aggrieved persons; and by the time of trial the United States settled on presenting the testimony of eight aggrieved persons.

dropped another tenant (Melanie Manes), whom defendants had deposed, as an aggrieved person prior to trial. Finally, one person was called as a witness at trial by defendants (James Kimbrough).¹⁰

In short, there is nothing unusual in the fact that the list of possible aggrieved persons was fluid throughout pretrial, or that not all potentially aggrieved persons initially identified by the United States during pretrial ultimately testified in support of the government's claim of a pattern or practice of discrimination. It would be the unusual case if *every* person listed in plaintiff's pretrial disclosures testified at trial. In this case, the eight women who testified provided ample evidence of defendants' unlawful conduct and, taken as a whole, compel the conclusion that the United States' claim of a pattern or practice of

¹⁰ Defendants again mischaracterize this case by asserting that Melanie Manes and Chantrell Warren were "voluntarily dismissed" by the government. Def. Br. 10-11, 13. Manes and Warren were not parties in this case, and were not "dismissed." The government simply chose not use them at trial as witnesses to establish the pattern or practice of discrimination, and informed defendants of that fact before trial. With regard to James Kimbrough, he is the husband of Patricia Kimbrough. In one of the government's disclosure reports, he is listed as a potential aggrieved person. The government noted that he may testify about his observations concerning any sexual harassment experienced by his wife. At trial, he was called by the defendants to discredit his wife's testimony concerning Bobby Hurt's sexual harassment. See Tr. 515-536.

sexual harassment – the single claim underlying this case – was substantially justified.¹¹

3. With respect to the victims’ credibility, the district court denied defendants’ motions for a directed verdict (both at the close of the government’s case, and at the close of all of the evidence), and concluded in the attorneys’ fees proceeding that four of the victims were credible. See U.S. App’x 382.¹² Moreover, the jury was initially deadlocked, and the jury’s ultimate verdict for the defendants could have been based on something other than the veracity of some or all of the witnesses. See U.S. Br. 28 n.19 (noting jury instruction on statute of limitations). Finally, as defendants recognize (Def. Br. 33-34), this case primarily turned on questions of fact and presented a classic “he-said, she-said” situation. Contrary to defendants’ suggestion (Def. Br. 33), the view of the United States is not that, for this reason alone, the court *must* have found that the government’s

¹¹ We also note that the fact that the government identified a total of 14 possible aggrieved persons cited in its Rule 26(a)(1) initial disclosures played no part in the district court’s order awarding attorneys’ fees. Indeed, the court did not even mention that fact. Rather, the district court considered the claims of the eight aggrieved women who testified at trial, and two other women (Melanie Manes and Chantrell Warren) identified as potential victims for whom, in the court’s view, the defendants “had to provide a defense.” U.S. App’x 382.

¹² See also Tr. 508 (district court states that “it’s a close case” in denying defendants’ motion for a directed verdict on statute of limitations issue).

case was substantially justified, or that in *any case* where there is a question of fact for the jury the government's case will be substantially justified.¹³ Rather, as we argued in our opening brief, those cases finding that where a case primarily turns on factual questions, the case will usually be deemed to be substantially justified, are both consistent with and support the principle that where the district court denies defendant's motion for a directed verdict, the government's case is necessarily substantially justified under EAJA. See U.S. Br. 20-21 (citing cases).¹⁴

¹³ In this regard, defendants make the incorrect and implausible assertion that, in the view of the United States, "the government can pursue a lawsuit against a helpless citizen using entirely baseless allegations from a single witness, which will obviously be denied by the defendant but which will nevertheless create a question of fact for the jury," thereby permitting the United States to claim that its case was substantially justified because there was an issue of fact. Def. Br. 34-35. Such a scenario is obviously highly unlikely; in any event, courts have numerous means of disposing of clearly baseless claims, including, if the case gets that far, motions for a directed verdict.

¹⁴ Defendants also argue that the United States should have been aware that some its witnesses were lying because the testimony of Angela Way, Shana Nester, and Patricia Kimbrough was inconsistent and "clearly established that at least two of the three victims were lying." Def. Br. 29; see generally Def. Br. 29-30. Defendants further challenge Patricia Kimbrough's credibility by asserting that she filed false affidavits in this case. Def. Br. 31. Defendants ignore the fact that these three witnesses are among the four that the district court, in its order awarding attorneys' fees, concluded presented credible claims. U.S. App'x 379.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief for the United States as Appellant, the district court's order granting attorneys' fees should be reversed.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Thomas E. Chandler
DENNIS J. DIMSEY
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-3192

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 5,272 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 23, 2011

CERTIFICATE OF VIRUS SCANNING

I certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: August 23, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2011, I electronically filed the foregoing
REPLY BRIEF FOR THE UNITED STATES with the Clerk of the Court for the
United States Court of Appeals for the Eighth Circuit by using the appellate
CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and
that service will be accomplished by the appellate CM/ECF system.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney