

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-22572-CIV-KING/O'SULLIVAN

AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS; AMERICAN FEDERATION OF
STATE, COUNTY AND LOCAL EMPLOYEES,
AFL-CIO; FLORIDA PUBLIC EMPLOYEES COUNCIL
79, AFSCME, AFL-CIO; AND SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Plaintiffs,

v.

KURT S. BROWNING, Secretary of State of Florida,

Defendant.

**SECRETARY OF STATE'S REPLY TO PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION FOR COSTS AND ATTACHED BILL OF COSTS**

Defendant Kurt S. Browning, in his official capacity as Florida Secretary of State (the "Secretary"), respectfully submits this reply to Plaintiffs' Opposition to Defendants' Motion for Costs and Attached Bill of Costs (doc. 344).

There Is No Basis for the Categorical Denial of Costs

Plaintiffs first invite the Court to deny the Secretary's request for costs in its entirety. Specifically, Plaintiffs suggest that their claims presented "issues of public importance" and a "close or difficult legal question," (*id.* at 3), and that this is legally sufficient to overcome the "strong presumption" which, under Federal Rule of Civil Procedure 54(d), supports an award of costs to the prevailing party, *see Mathews v.*

Crosby, 480 F.3d 1265, 1276 (11th Cir. 2007). In support of this position, Plaintiffs rely on inapposite cases from other jurisdictions and ignore the law of this Circuit. Indeed, the only case Plaintiffs cite from within this Circuit involved a request for costs under a completely different standard in a completely different context.

Haddon Zia v. Medical Staffing Network, Inc., 336 F. Supp. 2d 1306, 1310 (S.D. Fla. 2004), is the only case Plaintiffs cite from within this Circuit in support of their position that costs may be categorically denied where a plaintiffs' claims presented a close legal question. But the request for costs in *Haddon Zia* did not even arise under Rule 54(d). In *Haddon Zia*, the Court granted a motion to remand and then entertained the movant's request for attorney's fees and costs pursuant to 28 U.S.C. § 1447(c), which provides that an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Unlike Rule 54(d), Section 1447(c) allows an award of fees and costs only in extreme cases—cases "where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Bauknight v. Monroe County, Fla.*, 446 F.3d 1327, 1329 (11th Cir. 2006) (citing *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 132 (2005)). Under this standard, the Court in *Haddon Zia* declined to award fees and costs because removal presented a "close legal question." *Id.* at 1310. In other words, removal was objectively reasonable.

The present case is not a removal case, and the Secretary's request for fees is not founded on Section 1447(c). Federal law contains many provisions awarding fees and costs in different circumstances, and the standards applicable to each are not migratory.

Because the taxation of costs here arises under Rule 54(d)—not Section 1447(c)—Plaintiffs may not rely on *Haddon Zia* to reach their desired result.

In fact, the standard under Rule 54(d) is essentially the reverse of the Section 1447(c) standard. The Eleventh Circuit has held that Rule 54(d) creates a “strong presumption” in favor of the prevailing party. *Mathews*, 480 F.3d at 1276. Indeed, in this Circuit,¹ the denial of costs under Rule 54(d) “is in the nature of a penalty” and can be decreed only “for some defection on [the prevailing party’s] part in the course of the litigation.” *Chapman v. AI Transport*, 229 F.3d 1012, 1039 (11th Cir. 2000); *accord Walters v. Roadway Exp., Inc.*, 557 F.2d 521, 526 (5th Cir. 1977)² (“[T]he language of [Rule 54(d)] reasonably bears the intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome that presumption . . . (since) denial of costs . . . is in the nature of a penalty for some defection on his part in the course of the litigation.”) (quoting *Popeil Brothers v. Schick Electric, Inc.*, 516 F.2d 772, 775 (7th Cir. 1975)). *Smith v. Vaughn*, 171 F.R.D. 323, 326 (M.D. Fla. 1997) (“There is a presumption that prevailing parties will receive costs unless the losing party demonstrates some fault, misconduct, default, or action worthy of penalty on the

¹ Other Circuits follow the same rule. *See, e.g., Cherry v. Champion Int’l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999) (“[O]nly misconduct by the prevailing party worthy of a penalty . . . or the losing party’s inability to pay will suffice to justify denying costs.”); *Congreg. of the Passion, Holy Cross Province v. Touche, Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1998) (same).

² Decisions of the Fifth Circuit Court of Appeals issued before October 1, 1981, are binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

prevailing side.”).³ Thus, to overcome the Secretary’s prima facie entitlement to costs under Rule 54(d), Plaintiffs must point to some “defection” or “misconduct” on the Secretary’s part, and the closeness of the legal question or the complexity of the issues is not an appropriate basis for the denial of costs.⁴ Because Plaintiffs cannot identify any misconduct on the Secretary’s part that would operate as a forfeiture of his presumptive right of recovery, the Court must deny Plaintiffs’ request for a categorical denial of costs.

³ The remaining cases on which Plaintiffs rely are equally unpersuasive. In fact, in *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004), the Court did not deny costs as Plaintiffs claim, but affirmed the District Court’s taxation of costs despite the fact that the case presented a “close and difficult question” and that the non-prevailing plaintiffs—two individuals—were indigent. The Court applied the Eleventh Circuit’s standard, explaining that “the denial of costs is in the nature of a severe penalty, and there must be some apparent reason to penalize the prevailing party if costs are to be denied.” *Id.* (marks omitted). The plaintiffs, the Court found, failed to carry their burden to show “why [the defendant] should be penalized.” *Id.* And even in jurisdictions that do not require a showing of malfeasance on the part of the prevailing party as a prerequisite to the denial of costs, the considerations advanced by Plaintiffs are only lesser factors in a broader, equitable analysis, and are not in themselves dispositive. Thus, in *Association of Mexican-American Educators v. California*, 231 F.3d 572, 593 (9th Cir. 2000), and *United States ex rel. Pickens v. GLR Constructors, Inc.*, 196 F.R.D. 69, 77 (S.D. Ohio 2000), the plaintiffs, though unsuccessful on the merits of their claims, in practice achieved a substantial part of the relief they had sought. In *Association of Mexican-American Educators*, the defendant “substantially altered” the employment examination challenged by the plaintiffs, 231 F.3d at 593, and, in *Pickens*, based on the non-prevailing party’s conduct, “hundreds of thousands of dollars were returned to the United States Treasury and a polluter of the Ohio River was convicted,” 196 F.R.D. at 77. Here, by contrast, all of Plaintiffs’ claims were disposed of in the Secretary’s favor, and none of the relief sought by Plaintiffs came to pass.

⁴ Nor did Plaintiffs’ claims in fact raise close or complex legal questions. All but one of Plaintiffs’ claims were dismissed prior to trial, and the remaining claim followed a well established legal path. Plaintiffs suggest that because issues of fact remained and the claim proceeded to trial, it must necessarily have been close and complex, but this is not so. If it were, Rule 54(d) would never support an award of costs to a party that prevails at trial—a proposition that finds no support in precedent. And, in point of complexity, Plaintiffs’ sole claim that proceeded to trial bore no resemblance to the claims in *White & White, Inc. v. American Hospital Supply Corp.*, 786 F.2d 728 (6th Cir. 1986), which was a complicated antitrust action.

The Costs Sought by the Secretary Are Recoverable under Section 1920

Plaintiffs next ask the Court to disallow particular costs claimed by the Secretary. First, Plaintiffs urge the Court simply to disregard *Cullens v. Georgia Department of Transportation*, 29 F.3d 1489, 1494 (11th Cir. 1994), and, contrary to its plain dictate, to deny the recovery of expenses incurred for attorney travel. Notably, Plaintiffs do not dispute that *Cullens* expressly authorizes the recovery of travel expenses pursuant to Section 1920, but instead suggest that this Court need not follow *Cullens* because it may be “anomalous.” (Doc. 344 at 7 n.1.) Their pejorative characterization notwithstanding, *Cullens* is binding precedent and the law of this Circuit. The “binding precedent rule affords a court no . . . discretion [to depart from precedent] where a higher court has already decided the issue before it.” *Johnson v. DeSoto County Board of Comm’rs*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996). Thus, a “district court cannot ignore binding precedent with which it may disagree.” *Corn v. City of Lauderdale Lakes*, 771 F. Supp. 1557, 1571 (S.D. Fla. 1991) (citing *United States v. DeFabritus*, 605 F. Supp. 1538, 1544 (S.D.N.Y.1985)), *aff’d in part, rev’d in part on other grounds*, 997 F.2d 1369 (11th Cir. 1993). In fact, under the “emphatic” and “firmly established” prior precedent rule, the Eleventh Circuit itself is bound to adhere to its own precedents, even “despite explicit disagreement,” until overruled by an *en banc* panel. *Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir. 1998). These principles promote the stability, consistency, and predictability of judicial decisions throughout this Circuit.

This Court, therefore, is required to follow the Eleventh Circuit’s unambiguous conclusion that “travel expenses are appropriate expenses under § 1920 to the extent they

are reasonable.” *Cullens*, 29 F.3d at 1494. Accordingly, in *Price v. United Technologies Corp.*, No. 99-8152-CIV, 2001 WL 36085163, at *3 (S.D. Fla. July 21, 2001), the Court rejected the argument that “travel costs are not compensable under 28 U.S.C. § 1920,” noting instead that “the Eleventh Circuit Court of Appeals held that reasonable travel expenses are taxable under § 1920.” Concluding that the claimed travel expenses were reasonable, the Court taxed them to the non-prevailing party. *Id.* Similarly, in *Joseph v. Publix Super Markets, Inc.*, No. 00-7327-CIV, 2004 WL 5563673, at *6 (S.D. Fla. Mar. 29, 2004), *aff’d in part, rev’d in part on other grounds*, 151 Fed.Appx. 760 (11th Cir. 2005), this Court, citing *Cullens*, recognized that “travel expenses are appropriate under 28 U.S.C. § 1920 to the extent that they are reasonable.” It declined to tax travel costs, however, because the prevailing party had failed to establish their reasonableness. Here, Plaintiffs do not contest the reasonableness of the travel costs claimed by the Secretary. Indeed, the total costs claimed by the Secretary, including travel expenses, equal about one percent of the approximately \$3,500,000.00 in fees and costs which Plaintiffs, had they prevailed, were prepared to charge to Florida taxpayers. *See* doc. 304 at 8 ¶ 34.

Pro hac vice fees are also properly awardable. Unlike the cases cited by Plaintiffs, such fees were reasonably and necessarily incurred in this case. Plaintiffs selected the Southern District as their forum, while the Secretary’s counsel—who have defended various related challenges to the Florida Election Code, including several brought by Plaintiffs and their counsel—are located in Tallahassee. Hiring separate Miami counsel would have involved additional costs in familiarizing new counsel with the issues related to this litigation. But with litigation pending in Miami, the Secretary

was forced to pay for the special admission of counsel to the Southern District. Under these circumstances, the payment of *pro hac vice* fees was eminently reasonable. *See, e.g., Davis v. Puritan-Bennett Corp.*, 923 F. Supp. 179 (D. Kan. 1996) (“Plaintiff selected the forum and compelled defendant to defend itself in this district. The Court finds that the [award of *pro hac vice* fees] is appropriate under § 1920(1).”).

The Court should also reject Plaintiffs’ unsupported invitation to parse the progress of this litigation and deny costs related to an interlocutory appeal because Plaintiffs prevailed on the appellate issue. (Doc. 344 at 8-9.) Neither the text of Rule 54(d) nor applicable precedent supports Plaintiffs’ position that costs associated with an interlocutory appeal are not taxable where the party that ultimately prevails in the litigation was unsuccessful as to the interlocutory appeal—or that such costs are any less taxable than costs associated with interim rulings by the trial court on which the party that ultimately prevails was unsuccessful. Rather, Rule 54(d) awards costs “to the prevailing party” without qualification. Because the Secretary was the prevailing party and the costs associated with the interlocutory appeal are within the sphere of costs taxable pursuant to Section 1920, they should be allowed.

Finally, the payment to the Florida State Archives was a payment for “copies of papers necessarily obtained for use in the case” and is therefore taxable pursuant to 28 U.S.C. § 1920(4).

WHEREFORE, the Secretary requests the entry of an order awarding costs.

Respectfully submitted, this 22nd day of May, 2008.

/s/ Allen Winsor

Peter Antonacci
Florida Bar No. 280690
Allen Winsor
Florida Bar No. 016295
GRAYROBINSON, P.A.
Post Office Box 11189
Tallahassee, Florida 32302-3189
Phone: 850-577-9090
Fax: 850-577-3311
E-Mail: pva@gray-robinson.com
awinsor@gray-robinson.com

Attorneys for the Secretary of State

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 22, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Allen Winsor

Peter Antonacci

Florida Bar No. 280690

Allen Winsor

Florida Bar No. 016295

GRAYROBINSON, P.A.

Post Office Box 11189

Tallahassee, Florida 32302-3189

Telephone: 850-577-9090

Facsimile: 850-577-3311

E-Mail: pva@gray-robinson.com

awinsor@gray-robinson.com

Attorneys for the Secretary of State

SERVICE LIST

Diaz, et al. v. Kurt S. Browning, Secretary of State of Florida
Case No. 04-22572-CIV-KING/O'SULLIVAN
United States District Court, Southern District of Florida

Mary Jill Hanson
email: mjhanson@hpjlaw.com
Hanson, Perry & Jensen, P.A.
400 Executive Center Drive, Suite 207
West Palm Beach, Florida 33401
Phone: 561-686-6550
Fax: 561-686-2802
Attorney for Plaintiffs
Service via Notice of Electronic Filing

David Becker
email: dbecker@pfaw.org
People for the American Way Foundation
2000 M. Street, Suite 400
Washington, DC 20036
Phone: 202-467-4999
Fax: 202-293-2672
Attorney for Plaintiffs
Service via United States Mail

Judith A. Browne
Sheila Y. Thomas & Elizabeth Westfall
email: ewestfall@advancementproject.org
Advancement Project
1730 M. Street, NW, Suite 910
Washington, DC 20036
Phone: 202-728-9557
Fax: 202-728-9558
Attorneys for Plaintiffs
Service via United States Mail

Jonathan P. Hiatt
email: jhiatt@aflcio.org
AFL-CIO
815 Sixteenth Street, NW
Washington, DC 20006
Phone: 202-637-5053
Fax: 202-637-5323
Attorney for Plaintiffs
Service via United States Mail

Judith A. Scott
John J. Sullivan
email: sullivaj@seiu.org
SEIU, 1313 L. Street, NW
Washington, DC 20005
Phone: 202-898-3453
Fax: 202-898-3323
Attorneys for Plaintiffs
Service via United States Mail

Manny Anon, Jr.
email: m_anon@afscmeffl.org
Florida Public Employees Council 79
3064 Highland Oaks Terrace
Tallahassee, Florida 32301
Phone: 222-0842
Fax: 224-6926
Attorney for Plaintiffs
Service via United States Mail

Michael Halberstam
Sarah Kroll-Rosenbaum
Thomas P. Abt
email: mhalberstam@paulweiss.com
skroll-rosenbaum@paulweiss.com
tabt@paulweiss.com
Paul, Weiss, Rifkind, Wharton, Garrison,
LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: 212-373-3000
Fax: 202-492-0111
Attorneys for Plaintiffs
Service via Notice of Electronic Filing