

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
Administrative Law Court

Deborah Brooks Durden, Administrative Law Judge

Case No. 12-ALJ-22-0439-AP

Marcus Wider,

Respondent,

v.

South Carolina Department of
Employment and Workforce,
and KB Enterprises, Inc.

Defendants,

Of whom South Carolina
Department of Employment
and Workforce is

Appellant.

**RESPONDENT'S REPLY TO APPELLANT'S RETURN IN OPPOSITION TO
RESPONDENT'S MOTION FOR COSTS**

Counsel for Respondent Marcus Wider submits this Reply to Appellant's Return in Opposition to Respondent's Motion for Costs pursuant to Rule 222 and Rule 240, SCACR. The position of the South Carolina Department of Employment and Workforce that non-profit legal aid organizations cannot recover attorney's fees is meritless for the reasons stated below.

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ARGUMENT

IT IS WELL ESTABLISHED UNDER BOTH STATUTORY LAW AND COURT PRECEDENT THAT ATTORNEY'S FEES ARE RECOVERABLE BY NON-PROFIT LEGAL AID LAW FIRMS REGARDLESS OF WHETHER THE REPRESENTED PARTY IS DIRECTLY RESPONSIBLE FOR PAYING SUCH FEES.

Rule 222(a), SCACR, provides that “[u]nless otherwise ordered by the appellate court or agreed by the parties, costs shall be taxed against the Appellant when the appeal is dismissed or judgment on appeal is affirmed.” On April 9, 2014, this Court affirmed the Administrative Law Court’s order upon a finding that the Department’s decision was unsupported by substantial evidence and that remand would be futile because the record did not contain evidence from which a finding of discharge could be made. The Court’s decision was unanimous and unambiguous. Respondent made a Motion for Costs seeking attorney’s fees of \$1,000 under Rule 222(b), SCACR, the amount set by the South Carolina Supreme Court’s July 24, 1997 Order.

South Carolina Legal Services (SCLS) is this state’s only statewide legal aid law firm. Its mission is to provide civil legal services to protect the rights and represent the interests of low-income South Carolinians. Federal law empowers SCLS to seek attorney’s fees in the cases it undertakes. On December 16, 2009, President Obama signed the Consolidated Appropriations Act of 2010. Public Law 111-117: Section 533 of the law eliminated a statutory restriction adopted in 1996 that had prevented federally funded legal service attorneys from requesting and receiving attorney’s fees. On February 11, 2010 the Legal Services Corporation, which administers federal legal services grants and promulgates regulations for legal service grantees, issued an Interim Final Rule (75 FR 6816) and Comments repealing its regulatory prohibitions on grantees recovering attorney’s fees. The Interim Rule was made a Final Rule effective April 26, 2010. Accordingly, SCLS is fully authorized by federal law and regulation to seek attorney’s fees when such fees are available.

Courts, including the United States Supreme Court, have long recognized the ability of non-profit legal aid organizations to recover attorney's fees. *See Blum v. Stenson*, 465 U.S. 886, 890 (U.S. 1984) (ruling on calculation of attorney's fees to Legal Aid Society representing persons unable to afford a lawyer); *Cornella v. Schweiker*, 728 F.2d 978 (8th Cir. 1984) (holding attorney's fees properly awarded under EAJA notwithstanding that party was represented by pro bono counsel); *Swann v. Charlotte-Mecklenburg Board of Ed.*, 66 F.R.D. 483, 486 (1975) ("in other civil rights cases where counsel fees have been awarded, the courts have held that reasonable fees should be granted regardless of whether the individual plaintiffs were obligated to pay any fees and regardless of whether the attorneys were salaried employees of a legal aid agency.") (internal citation omitted); *McManama v. Lukhard*, 464 F. Supp. 38 (W.D. Va. 1978) (finding that in deciding whether to award attorney's fees to a successful Plaintiff, the court should not be influenced by the fact that counsel was employed by a federally-funded legal services project); *Torres v. Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975) (in which attorneys' fees were awarded under 42 U.S.C. 1973 l(e) to the Puerto Rican Legal Defense Fund); *Maplewood Management, Inc. v. Best*, 143 A.D.2d 978, 533 N.Y.S.2d 612 (N.Y. App. Div. 1988) (reinstating award of attorney's fees for *pro bono* representation by legal services attorney in successful eviction defense).

As the Fifth Circuit squarely held in *Fairley v. Patterson*, a reapportionment case, whether an attorney charges a fee or has an agreement that the organization that employs him will receive any awarded attorney's fees are not bases on which to deny or limit attorneys' fees or expenses. 493 F.2d 598, 607 (5th Cir. 1974). Moreover, the rate to be used in calculating such awards is to be the same as would be used if defendants were represented by private counsel. "Congress did not intend the calculation of the fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Blum*, 465 U.S.

at 894. “It is in the interest of the public that such law firms be awarded reasonable attorney’s fees to be computed in the traditional manner when its counsel performs legal services otherwise entitling them to the award of attorney’s fees.” *Blum*, 465 U.S. at 895.

The South Carolina Court of Appeals has also recognized that a nonprofit legal aid law firm can recover attorney’s fees. In *Prevatte v. Asbury Arms*, this Court found that a tenant represented by SCLS’s predecessor entity, Palmetto Legal Services, was entitled to an award of attorney’s fees as a matter of right as a prevailing party in a suit over the landlord’s withholding of a security deposit. 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990).¹ South Carolina courts routinely award attorney’s fees to SCLS attorneys in domestic matters, as well as under various statutory causes of action such as the Residential Landlord and Tenant Act, the Payment of Wages Act, and the Unfair Trade Practices Act.

The Department’s reliance upon *Williamson v. Middleton* is misplaced, as that case did not involve a non-profit legal aid law firm. 383 S.C. 490, 681 S.E.2d 867 (2009). Middleton’s attorney worked at a private, for-profit law firm. There is no indication that Middleton was indigent and unable to afford an attorney. His attorney testified that Middleton incurred no fees. The attorney simply handled the case free-of-charge as a personal favor to a friend. In contrast, SCLS is a non-profit legal-aid law firm that handles cases in the public interest. SCLS receives limited grant funding from various sources, including the federal Legal Services Corporation, the South Carolina Bar Foundation, United Way, and others. SCLS is the only available source of legal representation for most of the 856,938 South Carolinians in poverty.² The limited resources of SCLS are dwarfed by the substantial need of low-income South Carolinians for access to

1 Phillip M. Creel, counsel for Prevatte, has worked as an attorney for SCLS and its predecessor, Palmetto Legal Services, since 1986.

2 Bishaw, Alemayehu. “Poverty: 2010 and 2011” *American Community Survey Briefs*, <http://www.census.gov/prod/2012pubs/acsbr11-01.pdf> (accessed June 9, 2014).

representation to protect their legal rights and alleviate the deleterious effects of poverty. The Department's meritless appeal has caused SCLS to incur substantial costs in the form of lost opportunities to assist other low-income persons. Had the court awarded attorney's fees in *Middleton*, it would have financially benefited that attorney and his firm. Should this Court award attorney's fees in the present case, those funds would benefit the public interest by supporting representation of low-income South Carolinians.

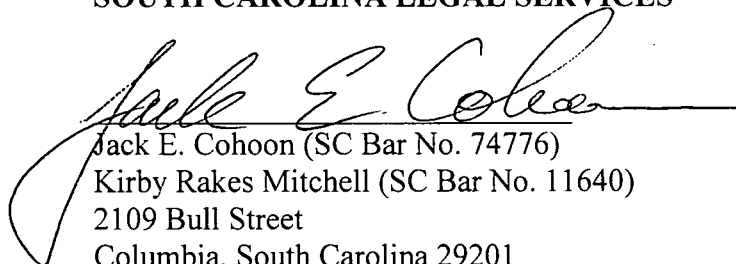
The Department's argument, carried to its logical conclusion, is that no public interest law firm can recover attorney's fees. And yet, courts all over the United States recognize the strong public interest supporting the award of attorney's fees to non-profit legal aid programs and routinely award attorney's fees in such cases. *See Blum, Cornella, Swann, McManama, Torres, Maplewood, Fairley, and Prevatte, supra* at 3 and 4. Numerous state and federal laws provide for attorney's fees to prevailing parties in order to discourage unwarranted or undesirable behavior. The Department's assertion that public interest law firms cannot recover attorney's fees, should it be accepted by this Court, would provide a generous windfall to slumlords, abusive debt collectors, employers who improperly withhold wages, and sundry other malfeasants.

Contrary to the Department's claim, its position in this case was not based upon well-reasoned arguments supported by established case law. This case involved no novel legal issue. This case arose as a result of the Department's own flawed agency decision which failed to make a specific finding that Wider did anything which should result in a disqualification for benefits. The Department pursued this appeal against an indigent South Carolina worker even though, as the lower court correctly recognized, "there is no evidence in the record to support a finding that [Wider] was discharged for cause," R. at 1, a conclusion that this Court affirmed. It is not unjust or unreasonable to expect the Department to defray the costs of responding to its appeal.

CONCLUSION

SCLS has incurred substantial costs in lost opportunities to represent other low-income South Carolinians in order to respond to the Department's appeal. This and other courts have long recognized that non-profit legal aid law firms may recover attorney's fees. Counsel for Respondent Marcus Wider request that this Court find that SCLS, a non-profit legal aid law firm, may recover attorney's fees in appropriate cases regardless of whether the individual party is obligated to pay a fee. Respondent's counsel seeks an order that Appellant pay Respondent costs in the amount of \$1,000 pursuant to Rule 222, SCACR, and for such other and further relief as this Court deems just and appropriate.

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June 9, 2014

Columbia, S.C.

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