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CIVIL RIGHTS—ATTORNEYS' FEES

When a Civil Rights Plaintiff Can 'Win' But Not 'Prevail'

BY WILLIAM L. CHARRON

The federal Civil Rights Act directs that a ''prevailing'' plaintiff should recover its reasonable attorneys' fees and costs. When a plaintiff ''prevails,'' however, is the subject of deep uncertainty and conflict among the circuits, which the U.S. Supreme Court has disappointingly elected not to settle.

Most recently, a divided *en banc* 16-judge panel of the U.S. Court of Appeals for the Third Circuit ruled in June 2011, that a plaintiff that had explicitly been told by the district judge that the plaintiff had ''won the case,'' nonetheless had not ''prevailed'' within the meaning of the Civil Rights Act.[1]

In that case, *Singer Management Consultants Inc. v. Anne Milgram*, the district court had awarded the plaintiff an extended temporary restraining order against New Jersey Attorney General Anne Milgram after a hearing on the merits, restraining Milgram's allegedly unconstitutional enforcement of New Jersey's Truth In Music Act[2] against the plaintiff's promotion of live music shows using certain unregistered trademarks.[3] During the subsequent preliminary injunction hearing, the district court openly rejected all of Milgram's arguments on the merits (making such statements as: ''You are truly wrong,'' ''There's no reason for it,'' and ''Well, I fail to see it'' in response to Milgram's arguments) and caused her near the conclusion of that hearing to agree in court to a ''180 degree change in position.''[4] The district court then ''bound'' Milgram to her change in position and retained jurisdiction and continued the preliminary injunction hearing for a period of 19 months to ensure no backsliding by Milgram.[5] The district court finally dismissed the case on mootness grounds, telling the plaintiff that it had ''[i]n effect [ ] won the case'' because Milgram remained permanently bound not to repeat her conduct in similar contexts.[6] Nevertheless, the district court and the Third Circuit held that the plaintiff had not ''prevailed'' within the meaning of the Civil Rights Act such that the plaintiff could recover its attorneys' fees.[7]

Two months after the Third Circuit's decision in *Singer Management*, a Tenth Circuit panel reached a conclusion directly at odds with the reasoning adopted by the Third Circuit.[8] The Supreme Court denied peti-

William Charron is a litigation partner at Pryor Cashman LLP, New York, who practices in general litigation and specializes in entertainment and intellectual property litigation. He is also an adjunct professor of appellate advocacy and legal writing at Columbia Law School.

[1] *Singer Management Consultants Inc. v. Milgram*, 650 F.3d 223, 2011 BL 158084 (3d Cir. 2011) (*en banc*), *cert. denied*, 80 U.S.L.W. 3260 (U.S. Oct. 31, 2011) (No. 11-211).

[2] N.J. Stat. Ann. § 2A:32B-2.

[3] *Singer Management*, 650 F.3d at 225-26. For a discussion of the constitutional arguments raised in *Singer Management*, which included arguments based upon the Supremacy Clause, the Equal Protection Clause, the Taking Clause, and the First Amendment, *see* William L. Charron, *States Turn a Deaf Ear to the Constitution in an Effort to Promote ''Truth In Music''*, 9 VA. SPORTS & ENTM'T L.J. 1 (Fall 2009).

[4] *Singer Management*, 650 F.3d at 226.

[5] *Id.* at 227.

[6] *Id.*

[7] *Id.* at 227-28, 232.

[8] *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1238, 2011 BL 205833 (10th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3506 (U.S. Mar. 5, 2012) (No. 11-829).

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tions for writs of *certiorari* in both cases (*certiorari* was recently denied in the Tenth Circuit's case on March 5, 2012). The question of just when and how a plaintiff may ''prevail'' in a civil rights action, therefore, is currently a function of where in the United States a plaintiff's civil rights have been violated, and where the plaintiff brings suit.

This article analyzes the nature of the circuit split as to the meaning of a ''prevailing'' party and why the Supreme Court should step in and resolve the split in a way that overrules the Third Circuit's reasoning.[9]

The Supreme Court's Current Guidance As to the Meaning of 'Prevailing Party'

The Civil Rights Act of 1965 provides that courts ''may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.''[10] This provision incentivizes citizens to invoke the power of the courts to restrain unconstitutional government intrusions.

In its 2001 ruling in *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court, by a 5-4 decision, explained that ''prevailing party'' status does not vest when a defendant, in response to the mere commencement of a lawsuit, is ''catalyzed'' to voluntarily discontinue its allegedly unconstitutional conduct.[11] Instead, *Buckhannon* holds that court power must actually be exercised through a demonstration of ''judicial imprimatur'' in order for ''prevailing party'' status to vest.[12] In the absence of a ''legal victory'' handed down by a court, a plaintiff does not ''prevail'' within the meaning of a federal statute; if the government actor ''abandons the fray'' of litigation ''voluntarily'' or for reasons having nothing to do with the merits of the case as expressed by a court, then the plaintiff cannot be said to have ''prevailed.''[13]

Buckhannon addressed a claim for prevailing party fees under the Fair Housing Amendments Act of 1988,[14] and the Americans with Disabilities Act of 1990.[15] The plaintiff in that case, a care home operator, sued the state of West Virginia for declaratory and injunctive relief, alleging that West Virginia had imposed inspection demands at odds with federal law.[16] As the case proceeded in discovery, West Virginia enacted a new statute that eliminated the inspection criteria at issue, and the state thus moved to dismiss the case as moot.[17] The district court granted the motion to dismiss and denied the plaintiff's motion for prevailing party fees, which the Fourth Circuit affirmed.[18]

The Fourth Circuit at the time conflicted with a majority of circuits that recognized the so-called ''catalyst theory'' of fee recovery, whereby plaintiffs were awarded their prevailing party fees under federal fee-shifting statutes when the plaintiffs' actions catalyzed the defendants voluntarily to change their conduct, without any binding court orders.[19] The Supreme Court granted a writ of *certiorari* in *Buckhannon* to resolve the circuit split.[20]

Buckhannon rejected the catalyst theory of fee recovery because ''[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.''[21] The court explained that it is not enough to deem a plaintiff as having ''prevailed'' in court if all the plaintiff did was file ''a nonfrivolous but nonetheless potentially meritless lawsuit'' upon which no determination as to the merits was ever made, but which by its existence alone prompted the defendant to change her or his conduct.[22] The difficulty in declaring the plaintiff a ''prevailing'' party in such cases is that, in the absence of a federal court actually flexing its judicial muscle in the plaintiff's favor and finding that the plaintiff's position had ''superiority in legal merit''—which is what ''Congress intended to reward'' by its fee-shifting statutes—it is impossible to conclude that the defendant ''abandoned the fray'' *because* of the action in court.[23]

The U.S. Supreme Court has explained that ''prevailing party'' status does not vest when a defendant, in response to the mere commencement of a lawsuit, is ''catalyzed'' to voluntarily discontinue its allegedly unconstitutional conduct.

The court in *Buckhannon* offered two non-exclusive examples of ''judicial imprimatur'' that would vest a plaintiff with ''prevailing party'' status, including awards of final judgments on the merits and court-ordered consent decrees.[24] In both situations, a *court* would create or sanction a ''material alteration of the legal relationship of the parties'' necessary to declare the plaintiff as having ''prevailed.''[25] In other words, there would be clear proximate cause between the defendant's change in conduct and the actions of a court.

The court's discussion in *Buckhannon* of an earlier Eighth Circuit decision, *Parham v. Southwestern Bell Telephone Co.*,[26] is also instructive.[27] In *Parham*, the district court found that the defendant's conduct at issue was ''probably discriminatory'' on the basis of race,

[9] The author of this article represented the plaintiff in *Singer Management*. This article is based in some measure on the author's petition for a writ of *certiorari*.

[10] 42 U.S.C. § 1988(b).

[11] *See generally* 532 U.S. 598 (2001).

[12] *Id.*

[13] *Id.* at 615 (Scalia, J., concurring) (''prevailing party'' means ''the party that wins the suit or obtains a finding (or an admission) of liability[; . . .] not the party that gets his way because the other side ceases (for whatever reason) its offensive conduct.'').

[14] 42 U.S.C. § 3613(c)(2).

[15] 42 U.S.C. § 12205.

[16] *Buckhannon*, 532 U.S. at 600-01.

[17] *Id.*

[18] *Id.* at 601-02.

[19] *Id.*

[20] *Id.* at 602.

[21] *Id.* at 605.

[22] *Id.* at 605-06.

[23] *Id.* at 616-17.

[24] *Id.* at 604.

[25] *Id.*

[26] 433 F.2d 421 (8th Cir. 1970).

[27] *Buckhannon*, 532 U.S. at 608 n.9 & 617 n.3.

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but the court nonetheless dismissed the action and claim for injunctive relief because the defendant had since changed its conduct.[28] The Eighth Circuit reversed and, finding that the defendant had indeed ''discriminated against blacks in violation of Title VII,'' remanded with instructions for the district court not necessarily to enter an injunction, but to ''retain jurisdiction over the matter for a reasonable period of time to insure the continued implementation of the appellee's policy of equal employment opportunities.''[29] The Eighth Circuit additionally awarded prevailing party fees to the plaintiff.[30]

The Supreme Court in *Buckhannon* found the fee award in *Parham* to be acceptable, even without an injunction order, a final judgment on the merits, or an endorsed consent decree, because the appellate court's order to retain jurisdiction in and of itself constituted a ''material alteration in the legal relationship of the parties as defined by our precedents'' that was predicated on a merits-based finding.[31]

The Supreme Court has revisited *Buckhannon* only once, in its 2007 unanimous ruling in *Sole v. Wyner*.[32] In that case, the plaintiff brought an action under the Civil Rights Act alleging that certain government actors in Florida had violated the plaintiff's First Amendment rights by attempting to ban the plaintiff's anti-war initiative, which was to feature nude individuals posing in the shape of a peace sign.[33] After a ''hasty and abbreviated'' emergency hearing, the district court awarded the plaintiff a preliminary injunction; but, following discovery, the court awarded summary judgment to the defendants and dismissed the plaintiff's complaint, including the plaintiff's request for permanent injunctive relief.[34] The court subsequently awarded the plaintiff prevailing party fees, pursuant to 42 U.S.C. § 1988(b), incurred in connection with the plaintiff's successful efforts to obtain the preliminary injunction, and the Eleventh Circuit affirmed.[35] The Supreme Court, however, reversed.[36]

The Court explained that ''[o]f controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling'' that had awarded a preliminary injunction to the plaintiff.[37] The ''temporary success'' that the plaintiff had received ''rested on a premise the District Court ultimately rejected.''[38] ''At the end of the fray,'' according to the court, the defendants' challenged rule that would have banned the plaintiff's display ''remained intact,'' and the plaintiff ''had gained no enduring 'chang[e] [in] the legal relationship' between herself and the state officials she sued.''[39]

Therefore, the plaintiff in *Sole* was not a ''prevailing party'' under 42 U.S.C. § 1988(b), because ''her initial victory was ephemeral,'' having '' '[won] a battle but los[t] the war.' ''[40] The court was careful to note in conclusion, however, that it ''express[ed] no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may *sometimes* warrant an award of counsel fees.''[41] That unsettled area of law has led to another pronounced circuit split, which the Supreme Court should again resolve.

The Circuit Split Regarding Cases Where Plaintiffs Win Early Injunctive Relief That Result in Defendants Permanently Changing Their Conduct, Without Further Court Orders

The Majority View: There is a stark circuit split as to whether interim injunctive relief can constitute ''judicial imprimatur'' under *Buckhannon*. Most circuits agree that preliminary injunctive or similar relief can vest a plaintiff with ''prevailing party'' status, if such relief produces at least some of the ultimate relief sought on an enduring basis and is thus functionally akin to a final judgment on the merits or a court-ordered consent decree, *i.e.*, the two examples of relief specifically endorsed in *Buckhannon*. This view is shared by the First,[42] Second,[43] Fifth,[44] Sixth,[45] Seventh,[46] Eighth,[47]

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[28] 433 F.2d at 422, 425.

[29] *Id.* at 429.

[30] *Id.* at 429-30.

[31] *Buckhannon*, 532 U.S. at 608 n.9; *accord id.* at 617 n.3 (Scalia, J., concurring) (''[J]urisdiction was retained so that that finding [of discrimination] could be given effect, in the form of injunctive relief, should the defendant ever backslide in its voluntary provision of relief to plaintiffs. Jurisdiction was not retained to determine whether there had been discrimination.'').

[32] 551 U.S. 74, 2007 BL 26479, 75 U.S.L.W. 4394 (2007).

[33] *Id.* at 76.

[34] *Id.* at 78-79, 84.

[35] *Id.* at 81.

[36] *Id.* at 82.

[37] *Id.* at 84-85.

[38] *Id.* at 85.

[39] *Id.* at 86 (citing *Texas State Teachers Association v. Garland Independent School District* , 489 U.S. 782, 792 (1989)).

[40] *Id.* (quoting *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002)).

[41] *Id.* (emphasis supplied).

[42] *Aronov v. Napolitano*, 562 F.3d 84, 90, 2009 BL 79629, 77 U.S.L.W. 1633 (1st Cir. 2009) (*en banc*) (finding that district court order endorsing voluntary stipulation to remand action to U.S. agency, without ever considering merits of action, did not vest plaintiff with ''prevailing party'' status, but explaining: ''We agree with other circuits that the formal label of 'consent decree' need not be attached; it is the reality, not the nomenclature which is at issue. Sometimes the question has been phrased in terms of whether a given court order is the 'functional equivalent of a consent decree'; the better articulation may be to ask whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered consent decree.' '').

[43] *Garcia v. Yonkers School District*, 561 F.3d 97, 102 (2d Cir. 2009) (''[T]he entry of an enforceable judgment, such as a stay or preliminary injunction, may permit the district court to confer prevailing-party status on the plaintiff notwithstanding the absence of a final judgment on the underlying claim'').

[44] *Dearmore v. City of Garland*, 519 F.3d 517, 524, 2008 BL 48526, 76 U.S.L.W. 1550 (5th Cir. 2008) (''to qualify as a prevailing party under § 1988(b), we hold that the plaintiff (1) must win a preliminary injunction, (2) based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits.'').

[45] *McQueary v. Conway*, 614 F.3d 591, 599, 2010 BL 172914 (6th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3399 (U.S. Jan. 10, 2011) (No. 10-569) (''Perhaps, in view of a *preliminary* injunction, success on this type of interim relief *never* suffices . . . . But this approach, clear as it might be, fails to account for fact

Ninth,[48] Tenth,[49] Eleventh,[50] D.C.,[51] and Federal Circuits.[52]

These circuits, although adopting varying precise legal tests to ascertain ''prevailing party'' status, have generally reasoned that the determinative questions in interim relief cases are: (i) did the order at issue make findings on the merits following a meaningful presentation of opposing arguments; (ii) did the order impose more than a brief ''stay-put'' direction until the defendant could be heard on the merits; and (iii) did the order cause the defendant to permanently alter its conduct in a way that mooted the case and provided the plaintiff with at least some of the ultimate relief sought in the complaint.[53] If these conditions are satisfied, then a district court should be found to have given its ''imprimatur'' to the plaintiff's position and to have ''materially altered'' the parties' legal relations, consistent with the dictates of *Buckhannon*, even in the absence of a final judgment or court-ordered consent decree.

The Minority View: The Third and Fourth Circuits disagree with the approach articulated above, based primarily upon the decreased governing burden of proof at the interim relief stage.

The Fourth Circuit adopts the strictest and most enduring rejection of the majority view as to when a plaintiff may ''prevail'' for fee-shifting purposes. In its 2002 decision in *Smyth v. Rivero*, the Fourth Circuit explained:

> While granting such an injunction [a preliminary injunction] does involve an inquiry into the merits of a party's claim, and is, like any court order, 'enforceable,' the merits inquiry in the preliminary injunction context is necessarily abbreviated. . . . The interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an 'enforceable judgment[ ] on the merits' or something akin to one for prevailing party purposes.[54]

Last year, the Third Circuit in *Singer Management* embraced the Fourth Circuit's reasoning. In particular, the Third Circuit explained that ''the determination [accompanying an award of relief] must be merits-based, *. . . and may not be merely a finding of a likelihood of success on the merits*, ...''[55] Because the plaintiff in *Singer Management* obtained its relief—*i.e.*, an extended TRO and the district court's subsequent holding at the conclusion of the preliminary injunction hearing that the attorney general was ''bound'' to her ''180 degree change in position''—at preliminary stages in the case according to a ''likelihood of success'' standard of proof, the Third Circuit found that the plaintiff ''is simply not entitled to attorney's fees.''[56]

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patterns in which the claimant receives everything it asked for in the lawsuit, and all that moots the case is a court-ordered success and the passage of time . . . . In what way are such claimants not prevailing parties? We think they are . . . . The defendants in these cases did not voluntarily change their conduct. An immediately enforceable preliminary injunction compelled them to. And in each instance, the plaintiffs obtained all of the relief they requested once the preliminary injunction served its purpose.'') (citations omitted).

[46] *Dupuy v. Samuels*, 423 F.3d 714, 723 n.4 (7th Cir. 2005) (''To the extent that the Fourth Circuit has adopted a *per se* rule that a preliminary injunction can never serve as a predicate for an interim fee award, we are in respectful disagreement. Instead, we follow the approach of the other circuits outlined earlier.'').

[47] *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006) (''Most of our sister circuits have concluded that some preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status. We are inclined to agree. For example, the grant of a preliminary injunction should confer prevailing party status if it alters the course of a pending administrative proceeding and the party's claim for a permanent injunction is rendered moot by the impact of the preliminary injunction. That type of preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits.'') (citations omitted).

[48] *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (''A preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*.'').

[49] *Kansas Judicial Watch*, 653 F.3d at 1238 (''First, and most fundamental, in order for a preliminary injunction to serve as the basis for prevailing-party status, the injunction must provide at least some relief on the merits of the plaintiff's claim(s). A preliminary injunction provides relief on the merits when it (a) affords relief sought in the plaintiff's complaint and (b) represents an unambiguous indication of probable success on the merits. By contrast, a preliminary injunction does not provide relief on the merits if the district court does not undertake a serious examination of the plaintiff's likelihood of success on the merits but nonetheless grants the preliminary injunction to preserve the status quo because the balance of equities favors the plaintiff. Second, if a preliminary injunction satisfies the relief-on-the-merits requirement, the plaintiff qualifies as a 'prevailing party' even if events outside the control of the plaintiff moot the case. If, however, the preliminary injunction is undone by a subsequent adverse decision on the merits, the plaintiff's transient success in obtaining the injunction does not render the plaintiff a 'prevailing party.' '').

[50] *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356, 2009 BL 6172 (11th Cir. 2009) (''We have stated that 'a preliminary injunction on the merits . . . entitles one to prevailing party status and an award of attorney's fees.' '') (quotation omitted).

[51] *Select Milk Producers Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005) (''[T]he holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make the plaintiff a 'prevailing party' under a fee-shifting statute . . . . *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can *never* transform a party in whose favor the injunction is issued into a 'prevailing party.' '').

[52] *Rice Services Ltd. v. United States*, 405 F.3d 1017, 1027 (Fed. Cir. 2005) (''[I]n order for Rich to achieve 'prevailing party' status from the Dismissal Order, we must conclude that the order was the equivalent of a judgment on the merits or a court-ordered consent decree.'').

[53] *See, e.g.*, *Garcia*, 561 F.3d at 106-07.

[54] 282 F.3d 268, 276-77 (4th Cir. 2002) (citation omitted).

[55] *Singer Management*, 650 F.3d at 230 & nn.4 & 5 (emphasis supplied).

[56] *Id.* at 229-30 (''[T]he 'merits' requirement is difficult to meet in the context of TROs and preliminary injunctions, as the plaintiff in those instances needs only to show a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief. A 'likelihood' does not mean more likely than not.'') (citation omitted).

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Thus, the Third and Fourth Circuits reject the majority circuit view that interim relief awarded at a preliminary stage of a case can vest a plaintiff with ''prevailing party'' status. The Third and Fourth Circuits have contrarily found that the governing ''likelihood of success on the merits'' burden of proof that controls early injunctive relief does not constitute a ''functional equivalent'' satisfaction of *Buckhannon*, because the example embraced by *Buckhannon* of a ''final judgment on the merits'' requires the plaintiff to have met a heavier ''preponderance'' burden of proof.

The Internal Conflict Within Certain Circuits: The Third Circuit's *en banc* decision in *Singer Management* not only reversed an earlier 2-1 panel ruling in that same case,[57] but it also effectively reversed a Third Circuit decision only three years earlier, in *People Against Police Violence v. City of Pittsburgh (''P.A.P.V.'')*.[58]

In *P.A.P.V.*, the Third Circuit had concluded that both preliminary injunctions and TROs can satisfy *Buckhannon*, based on the particular facts presented. In that case, the plaintiffs had challenged the constitutionality of a city ordinance regulating expressive conduct in public forums.[59] At the first hearing on the matter, the city represented that it was no longer enforcing the challenged ordinance and that the city was prepared to draft a revised ordinance.[60] Nevertheless, because the challenged ordinance had not been repealed, the district court granted the plaintiffs a TRO (as the district court had done in *Singer Management*), finding a likelihood on the merits that the ordinance was facially unconstitutional.[61]

At a second hearing, the city presented the district court with a draft revised ordinance.[62] The district court, however, similar to the district court's clear rejection of the attorney general's arguments in *Singer Management*, gave a ''clear signal'' to the city in *P.A.P.V.* that at least one aspect of its draft ordinance would continue to be unconstitutional.[63] Therefore, the district court ''converted its TRO into a preliminary injunction and continued it otherwise unchanged.''[64]

At a third hearing, the city moved to dismiss the action on mootness grounds.[65] The district court denied that motion and continued the preliminary injunction.[66] Thereafter the city enacted a new ordinance ''which, the parties agreed, complied with the Constitution. . . . At that point, the Court lifted the injunction and closed the case with the agreement of the parties.''[67] This was similar to the district court in *Singer Management*, after having continued the preliminary injunction hearing for 19 months, telling the plaintiff that it had ''[i]n effect [] won the case'' because the Attorney General remained ''bound'' by the district court not to enforce New Jersey's Truth In Music Act as she had done against the plaintiff, and dismissing the case on mootness grounds for that reason.[68] Unlike the situation in *Singer Management*, however, the district court in *P.A.P.V.* awarded the plaintiffs their prevailing party fees, and the Third Circuit affirmed.[69]

The Third Circuit in *P.A.P.V.* explained that the ''TRO and preliminary injunction in this case did not simply maintain the status quo [without consideration of the merits of the plaintiffs' claims]. Rather, the injunction afforded plaintiffs virtually all of the substantive relief they sought, albeit initially on an interim basis.''[70] In particular, ''the [district court's] orders prevent plaintiffs from being forced to operate under an unlawful regime—the fundamental goal they sought.''[71] Moreover, the ''plaintiffs achieved precisely what they sought on an enduring basis—the permanent demise of the challenged ordinance, and in its place a system that satisfied plaintiffs' goals.''[72]

There is palpable confusion and conflict not only between the circuits, but internally within a number of circuit courts as well.

The same reasoning applied by the Third Circuit in *P.A.P.V.* could have resolved the ''prevailing party'' issue in the plaintiff's favor in *Singer Management*. The TRO and preliminary injunction that the Third Circuit credited in *P.A.P.V.* as vesting the plaintiffs with ''prevailing party'' status were the products of the same ''likelihood of success'' standard of proof that the Third Circuit later eschewed in *Singer Management*.[73] Nevertheless, even though *Singer Management* confusingly purports not to overrule *P.A.P.V.* and characterizes *P.A.P.V.* as ''an example of that rare situation where a merits-based determination is made at the injunction stage,''[74] the two decisions offer irreconcilable premises concerning the requisite burden of proof applicable to the ''prevailing party'' inquiry.

Two other circuit courts have similarly effectively reversed themselves as to whether interim relief can ever provide a basis for a plaintiff to claim ''prevailing party'' status. In 2003, the Eighth Circuit, in *Christina A. v. Bloomberg*, found that ''*Buckhannon*, as indicated, makes it clear that a party prevails *only* if it receives ei-

[57] *Singer Management Consultants Inc. v. Milgram*, No. 09-2238, 2010 BL 180591 (3d Cir. Aug. 5, 2010), *vacated by*, 619 F.3d 301, 2010 BL 205286 (3d Cir. 2010).
[58] 520 F.3d 226 (3d Cir. 2008).
[59] *Id.* at 228.
[60] *Id.* at 229.
[61] *Id.*
[62] *Id.* at 230.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *See Singer Management*, 650 F.3d at 227.
[69] *P.A.P.V.*, 520 F.3d at 233.
[70] *Id.* at 234.
[71] *Id.* (citations omitted).
[72] *Id.*
[73] *See also Garcia*, 561 F.3d at 106-07 (''a grant of a plaintiff's request for a temporary restraining order may be sufficient grounds to grant attorney's fees to the plaintiff pursuant to 42 U.S.C. § 1988(b).''); *Doe v. Crane*, No. 2-09-cv-04220-NKL, 2010 BL 233037, at *11 (W.D. Mo. Oct. 4, 2010) (''TRO leading to ''judicially sanctioned admission'' by defendant that it could not win on the merits was sufficiently analogous to court-ordered consent decree to justify ''prevailing party'' status); *Sound v. Koller*, No. 09-00409 JMS/KSC, 2010 BL 115694, at *8 (D. Haw. May 19, 2010) (TRO and stipulated continuance of TRO's terms satisfied § 1988(b) because plaintiffs got ''precisely the relief they sought'').
[74] *Singer Management*, 650 F.3d at 229.

ther an enforceable judgment on the merits or a consent decree.''[75] Three years later, however, in *Northern Cheyenne Tribe v. Jackson*, the Eighth Circuit decided to join ''[m]ost of our sister circuits [that] have concluded that some preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status.''[76]

Likewise, in 2010, the Tenth Circuit, in *Lorillard Tobacco Co. v. Engida*, found that '' '[t]he injunction standard of probable success on the merits is not the equivalent to actual success on the merits' '' and thus not a basis to confer ''prevailing party'' status.[77] The next year, however, in *Kansas Judicial Watch*, the Tenth Circuit proclaimed that ''*Buckhannon's* 'judicial imprimatur' requirement does not make preliminary injunctions categorically insufficient to create prevailing-party status.''[78]

Accordingly, there is palpable confusion and conflict not only between the circuits, but internally within a number of circuit courts as well. This conflict needs to be settled by the Supreme Court.

Singer Management Was Wrongly Decided Under *Buckhannon* and *Sole*

The focus by the Third and Fourth Circuits on the decreased burden of proof at the interim relief stage is misplaced in connection with the prevailing party analysis.

The '' 'touchstone of the prevailing party inquiry,' '' as emphasized by the Supreme Court in *Sole*, is '' 'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.' ''[79] Therefore, the focus should not be on *how* the district court came to make its findings and to order the defendant to alter its conduct, but *whether* the district court made merits-based findings—under whatever governing burden of proof—that caused the defendant to materially and permanently alter its conduct and, thus, the parties' legal relations. Unlike most of the circuit courts, the Third and Fourth Circuits have inappropriately focused on the *means* used to effect enduring relief, instead of focusing on the *ends* of whether enduring relief has been afforded *because of* the merits-based findings and actions of a court.

The Supreme Court should clarify that when a court, upon due consideration of opposing arguments, finds and tells a government actor in no uncertain terms that her position is ''wrong,'' and does something to compel that government actor to permanently change her conduct, then the plaintiff should be understood to have ''prevailed.'' At that point ''judicial imprimatur'' exists, and the government actor should no longer be capable of claiming that she will ''voluntarily'' retreat before the court signs a final judgment, simply to avoid consequence under Section 1988(b). The proximate cause of the defendant's decision to surrender at that point would be the conduct of the court, and would not merely be ''catalyzed'' by the existence of the lawsuit alone.

Conclusion

The Third Circuit's decision in *Singer Management* is unduly formalistic, fundamentally unjust, and will encourage mischievous and unaccountable behavior contrary to basic civil rights. A government official should not be permitted to harass a disfavored citizen, and then to ''abandon the fray'' at the last second because it is obvious that a court is going to reject the reasons for the official's conduct and is going to make her stop, without having to pay the plaintiff's attorneys' fees. That is the prescription that Congress intended by its fee-shifting statutes.

In a poetic dissent in *Singer Management* that is bathed in principles of ''judicial philosophy,'' Circuit Judge Ruggero Aldisert aptly observed:

> How a judge interprets the concept of ''judicially sanctioned'' depends on the legal philosophy the judge chooses to espouse. It cannot be seriously debated that the court majority's refusal to grant attorneys' fees in this case will limit future civil rights actions, discouraging the congressional intent to provide attorneys' fees to civil rights plaintiffs under Section 1988. It will discourage settlements, prolong litigation, and make work for overburdened district judges. Defendants will use complications in petitions for Section 1988 attorneys' fees as bargaining tools in negotiations for calculating damages. Members of the majority arrive at their decision by adhering to a philosophy of conceptual jurisprudence, and approach to the law that extends a legal precept to a drily logical extreme, regardless of the results upon society, and a philosophy that has found rejection in our courts for almost 100 years.[80]

The lesson of *Singer Management* is that a civil rights plaintiff should rigidly insist upon added litigation to the point of a formal award of a final judgment on the merits or a court-ordered consent decree, even though the plaintiff could effectively obtain from the district court all of the relief sought through an interim relief award leading to an enduring change in conduct by the defendant. Such unnecessary and redundant litigation could not have been the intended lesson of *Buckhannon*.

There is fundamental illogic in the notion that a civil rights plaintiff can be told by a district court that the plaintiff ''in effect won the case'' but was not the ''prevailing party.'' It is time for the Supreme Court to step in and resolve the conflict among the circuits as to when a plaintiff ''prevails'' under federal statutory fee-shifting law and under *Buckhannon*. In that regard, *Singer Management* should be overturned.

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[75] 315 F.3d 990, 993 (8th Cir. 2003) (citation omitted) (emphasis supplied).

[76] 433 F.3d 1083, 1086 (8th Cir. 2006).

[77] 611 F.3d 1209, 1216-17, 2010 BL 156475 (10th Cir. 2010) (quotation omitted).

[78] 653 F.3d at 1237-38.

[79] 551 U.S. at 82 (quotation and citations omitted).

[80] 650 F.3d at 244 (Aldisert, J., dissenting).

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