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OCT - 4 2010

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

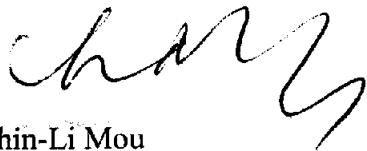
October 4, 2010

Dear Honorable Judge Jeremy Fogel:

This is Chin-Li Mou, and I am writing to you in regard to my civil case against City of San Jose, and the case number is: C07 05740

The Plaintiff also found a case, **MARTHA RIVERA, et al., Plaintiffs, v. NIBCO, Inc., Defendant (701 F. Supp. 2d 1135; 2010 U.S. Dist. LEXIS 27132)**, which stated that an award of costs would have a serious chilling effect on future civil rights litigants who are low income plaintiffs and fight for civil rights [Exhibit – A]. On Page 8 number 3 (II.2.b.3), the Plaintiff's financial resources expressively stated that in the *Mansurian case*, the district court noted that "plaintiffs have not presented evidence of actual indigence," relying instead on the plaintiffs' demonstration "that they are graduate students and recent college graduates with limited financial resources." 566 F. Supp. 2d at 1171." Here, the Plaintiffs have demonstrated that they are low wage workers, employed in hourly jobs, who do not have substantial financial resources. Mou turned in her tax returns and showed that she does not have any income at all. Mou's case is similar to Martha's case in some way because the police woman stated that those high school students were born in USA, but the plaintiff was not due to the fact that she spoke with a non-American accent. The honorable judge agreed with the plaintiff regarding the chilling effect and addressed it in one of his previous orders.

Sincerely Yours,



Chin-Li Mou

Cc: Robert Burchfiel

Exhibit – A

MARTHA RIVERA, et al., Plaintiffs, v. NIBCO, Inc., Defendant.

1:99-CV-06443 OWW SMS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

701 F. Supp. 2d 1135; 2010 U.S. Dist. LEXIS 27132

March 22, 2010, Decided

March 23, 2010, Filed

SUBSEQUENT HISTORY: Decision reached on appeal by Rivera v. Nibco, Inc., 2010 U.S. App. LEXIS 6460 (9th Cir. Cal., Mar. 29, 2010)

PRIOR HISTORY: Rivera v. Nibco, Inc., 2006 U.S. Dist. LEXIS 16967 (E.D. Cal., Mar. 31, 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employees filed a motion for review of the clerk's taxation of costs under Fed. R. Civ. P. 54(d) after a jury returned a verdict in favor of defendant employer in plaintiffs' employment discrimination action under Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act.

OVERVIEW: Plaintiffs argued that the court should exercise its discretion to refuse to award costs based on the factors set forth by the Ninth Circuit in Association of Mexican-American Educators v. State of California (AMAE). As an initial matter, the court rejected defendant's evidentiary objections to the declarations filed by plaintiffs' attorneys. A declaration summarizing wage and earnings information was supported by personal knowledge of the content of discovery responses. Declarations regarding the chilling effect of a cost award and the public importance of the case were relevant under Fed. R. Evid. 401. The court held that an award of costs to defendant would be inequitable under AMAE. The language/national origin claims raised in the case were of substantial public importance. Further, the jury's ultimate rejection of the claims did not undermine the legal and factual complexity of the claims. Also, plaintiffs demonstrated that they did not have substantial financial resources and that there was a significant disparity between the resources of the parties. Finally, the court found that an award of costs would have a serious chilling effect on future civil rights litigants.

OUTCOME: The court granted plaintiffs' motion objecting to the clerk's taxation of costs, and the court directed that defendant shall not recover costs.

CORE TERMS: declaration, financial resources, public importance, national origins, disparity, civil rights, prevailing party, discovery, workplace, chilling effect, civil rights, discovery responses, unsuccessful, taxation, low-wage, clerk's, termination, exhaustive, relevance, losing, settlement, discrimination case, manufacturing plant, class action, immigration status, evidentiary, educational, nonprofit, probable, annual

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

[HN1] A district court reviews the clerk's taxation of costs de novo.

Civil Procedure > Pleading & Practice > Motion Practice > Supporting Memoranda

[HN2] See E.D. Cal. R. 78-230.

Evidence > Relevance > Relevant Evidence

[HN3] Fed. R. Evid. 401 provides that relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The relevance standard is a liberal one.

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

[HN4] Fed. R. Civ. P. 54(d)(1) provides that costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs. By its terms, Rule 54(d)(1) creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs. That discretion is not unlimited. A district court must specify reasons for its refusal to award costs.

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

Evidence > Inferences & Presumptions > Presumptions

[HN5] Fed. R. Civ. P. 54(d) provides simply that costs shall be allowed to the prevailing party unless the district court "otherwise directs." The requirement that district courts give reasons for denying costs flows logically from the presumption in favor of costs that is embodied in the text of the rule; if a district court wishes to depart from that presumption, it must explain why so that the appellate court will be able to determine whether or not the trial court abused its discretion. Rule 54(d)(1) establishes that costs are to be awarded as a matter of course in the ordinary case. The Ninth Circuit's requirement that a district court give reasons for denying costs is, in essence, a requirement that the court explain why a case is not "ordinary" and why, in the circumstances, it would be inappropriate or inequitable to award costs. Misconduct on the part of the prevailing party is one factor that might render a case "extraordinary." But it is not the only such factor.

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > General Overview

Evidence > Inferences & Presumptions > Presumptions

[HN6] In *Association of Mexican-American Educators v. State of California (AMAE)*, the Ninth Circuit did not mean to suggest that the presumption in favor of awarding costs to prevailing parties does not apply to defendants in civil rights actions. Nor was it attempting to create an exhaustive list of "good reasons" for declining to award costs. The Ninth Circuit simply held that the reasons that the district court gave for refusing to award costs in the particular case were appropriate under Fed. R. Civ. P. 54(d)(1) and that, considering those reasons, the district court did not abuse its discretion in refusing to award costs to the defendants. The reasons given in *AMAE* do not constitute an exhaustive list.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

[HN7] One permissible consideration in evaluating whether a cost bill should be denied outright is whether the issues in the case were of substantial public importance.

~~*Labor & Employment Law > Discrimination > National Origin Discrimination > General Overview*~~

[HN8] Language-based discrimination is often closely aligned with national origin discrimination, and has been recognized as being worthy of close scrutiny by the courts.

Civil Procedure > Class Actions > General Overview

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

[HN9] Class action status is not a prerequisite to denial of costs outright.

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

[HN10] A court abuses its discretion when it awards costs against a losing plaintiff without considering the plaintiff's limited financial resources. It is not necessary to find that the plaintiffs in question are currently indigent; rather, the proper inquiry is whether an award of costs might make them so.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview

[HN11] The financial disparity between the parties is a relevant consideration in the denial of a bill of costs.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs > General Overview
Civil Rights Law > Practice & Procedure > Costs & Attorney Fees > General Overview

[HN12] The United States District Court for the Northern District of California's review of the available caselaw applying the Ninth Circuit's decision in *Association of Mexican-American Educators v. State of California (AMAE)*, concluded that, while there are cases in which courts have awarded costs to prevailing defendants in civil rights litigation, those cases involved relatively small awards that did not pose a risk of chilling future litigation. By contrast, larger cost awards have been denied to prevailing defendants based on a combination of reasons cited in *AMAE*.

COUNSEL: [**1] For Martha Rivera, See - Yang, Youa Xiong, Sy Vang, Maria Valdivia, Maria - Ruiz, Maria - Rodriguez, Sara Rivera, Ofelia Rivera, Vath Rattanatay, Maria Navarro, Isidra Murillo, Bao Nhia Moua, Margarita Mendoza, Mai Meemoua, Maria Domitilia Medina, Paula Martinez, Bee Lee, Chhom Chan, Peuang Bounnhong, Eva Arriola, Alicia Alvarez, Mao Her, Plaintiffs: Christopher V. Ho, LEAD ATTORNEY, Legal Aid Society-Employment Law Center, San Francisco, CA; Marielena Hincapie, LEAD ATTORNEY, National Immigration Law Center, Los Angeles, CA; William J. Smith, LEAD ATTORNEY, W. J. Smith & Associates, Fresno, CA.

For Nibco Inc, an Indiana corporation, Defendant: Howard A. Sagaser, LEAD ATTORNEY, Atkinson, Andelson, Loya, Ruud & Romo, Fresno, CA; William C. Hahey, LEAD ATTORNEY, Law Offices of William C. Hahey, Fresno, CA; William J. Smith, LEAD ATTORNEY, W. J. Smith & Associates, Fresno, CA; John P. Kinsey, Michael S. Helsley, Jones Helsley PC, Fresno, CA; Sara Hedgpeth-Harris, Law Office Of Sara Hedgpeth-Harris, Fresno, CA; Sarah Ann Wolfe, Jordan Law Group, San Rafael, CA.

For James Drexinger, Movant: David Malcolm Gilmore, Gilmore Wood Vinnard & Magness, Fresno, CA.

For Joseph Gross, Paul Penerian, [**2] Dennis J Parker, Movants: David Malcolm Gilmore, LEAD ATTORNEY, Gilmore Wood Vinnard & Magness, Fresno, CA.

JUDGES: Oliver W. Wanger, United States District Judge.

OPINION BY: Oliver W. Wanger

OPINION

[*1137] MEMORANDUM DECISION AND RE PLAINTIFFS' MOTION FOR REVIEW OF CLERK'S TAXATION OF COSTS (DOC. 741)

I. INTRODUCTION

This Title VII and FEHA employment discrimination case was tried before a jury starting in October 2008. On November 26, 2008, the Jury returned verdicts in favor of Defendant on all causes of action submitted to them. Doc. 696. On October 7, 2009, the Clerk of Court taxed costs in the amount of \$ 84,434.40. Doc. 739. Plaintiffs, who timely objected to the bill of costs, Doc. 706, now move for review of the Clerk's taxation of costs. Doc. 741.

Plaintiffs first argue that, under *Association of Mexican-American Educators v. State of California*, 231 F.3d 572, 592 (9th Cir. 2000) ("*AMAE*"), the district court should exercise its discretion to refuse to award costs here, because the case involved issues of substantial importance, the losing parties have limited financial resources, there is great economic disparity between Plaintiffs and Defendant, the issues in the case are close and difficult, and the imposition [**3] of high costs may cause a "chilling effect" on future civil rights litigants. In addition, Plaintiffs maintain that the "majority" of the specific costs taxed are not compensable under Federal Rule of Civil Procedure 54(d).

Defendant opposes the motion for review, Doc. 744, and raises a number of evidentiary objections, Docs. 746 & 759. Plaintiffs replied. Doc. 749. The motion was heard March 1, 2010.

II. STANDARD OF DECISION

[HN1] A district court reviews the clerk's taxation of costs de novo. *Lopez v. San Francisco Unified Sch. Dist.*, 385 F. Supp. 2d 981, 1000-1001 (N.D. Cal. 2005).

III. DISCUSSION

A. Evidentiary Objections.

Defendant raises objections to:

- (1) Paragraph 6 of the Declaration of Carole Vigne, Doc. 705, filed December 22, 2008 along with Plaintiffs' objections to Defendant's cost bill, Doc. 706; and
- (2) The Declarations of William R. Tamayo and John T. Affeldt, Docs. 750-756, filed December 7, 2009 along with Plaintiffs' Reply Re: the Motion for Review, Doc. 749.

1. Objections to Paragraph 6 of the Vigne Declaration.

Defendant objects to paragraph 6 of the Declaration of Carole Vigne, one of several attorneys who represented Plaintiffs, which states:

Plaintiffs have limited financial [**4] resources. As evidenced by Plaintiffs' discovery responses related to the mitigation of damages and declarations in support of Plaintiffs' Oppositions, Plaintiffs have either been unemployed, held low-wage jobs, or retired since their layoffs from Defendant NIBCO, Inc. in 1998.

[*1138] Doc. 705 at P6. Nibco first objects that counsel lacks personal knowledge of the matters stated therein under Federal Rule of Evidence 601, asserting that "Plaintiffs have not submitted any evidence concerning their financial resources independent of their claimed historical wages." Doc. 746 at 2.

Defendant ignores that Vigne's Declaration references a wide range of information, including:

- ... information from plaintiffs' sworn discovery responses concerning []:
- 1) the plaintiffs' current wages [],
 - 2) their annual income from all sources for every year from 1999 through 2007;
 - 3) detailed information about their employment after they were fired by Nibco, including:
 - a) a specification of each subsequent employer,
 - b) their dates of subsequent employment,
 - c) their rates of pay, and
 - d) the total wages paid them by each subsequent employer; and
 - 4) plaintiffs' mitigation efforts subsequent to their termination by Nibco.

Doc. 760 [**5] at 1. Counsel had personal knowledge of the content of those discovery responses, which were all verified. Even if, *arguendo*, Vigne's statement itself is inadmissible hearsay, the evidence attached to her declaration speaks for itself and could have been challenged on its merits by Defendant. No contrary evidence was submitted.

Defendant further objects that this paragraph constitutes improper opinion testimony by a lay witness prohibited by Federal Rule of Evidence 701. Defendant overreaches. In summarizing the content of the sworn discovery responses, Vigne is serving a proper role as a fact witness. As attorney for plaintiffs, it is her job to research and present facts underlying the financial condition of plaintiffs. The remainder of the declaration lays the foundation for the discovery responses, which were verified by each plaintiff, to which Defendant raises no objections.

Defendant objections to Paragraph 6 of the Vigne Declaration are OVERRULED.

2. Objections to the Tamayo and Affeldt Declarations.

a. Motion to Strike the Declarations in their Entirety as Untimely.

Local Rule 78-230 provides:

[HN2] The moving party shall file a notice of motion, motion, accompanying briefs, affidavits, [**6] if appropriate, and copies of all documentary evidence that the moving party intends to submit in support of the motion.

Defendant suggests that the Tamayo and Affeldt declarations, filed with Plaintiffs' reply brief, were untimely under Local Rule 78-230 because they were not filed with Plaintiffs' opening brief requesting review of the cost bill.

Defendant's reading of 78-230 is far-fetched, particularly in light of the fact that Plaintiffs filed the Tamayo and Affeldt declarations in response to Defendant's arguments, raised for the first time in opposition, that a cost award would have no chilling effect, that this case had no public importance, and that AMAE, 231 F.3d 572 requires detailed and exhaustive evidentiary proof of plaintiffs' "indigency" or inability to pay costs. Defendant has made no request to file a surreply addressing these declarations.

b. Remaining Objections to the Tamayo and Affeldt Declarations.

(1) Relevance Objections.

Defendant also objects on relevance grounds to paragraphs 4-14 of the Tamayo Declaration and 3-16 of the Affeldt Declaration. [HN3] Federal Rule of Evidence 401 provides [*1139] that "[r]elevant evidence" means "evidence having any tendency to make the existence [**7] of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The relevance standard is a "liberal one." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1179 (9th Cir. 2007).

Paragraphs 4-8 of the Tamayo Declaration express counsel's opinions regarding the vulnerability of low-wage workers to discrimination and the potential deterrence that would be caused by imposing costs upon unsuccessful low-wage litigants in civil rights cases. Paragraphs 9-12 explain the nature of this litigation in the broader context of similar language-based discrimination cases. These statements arguably address the question of whether this case was of "substantial public importance."

Likewise, Paragraphs 3-13 of the Affeldt Declaration offer for the district court's consideration various judicially noticeable documents from the AMAE litigation. Paragraphs 14-16 offer Mr. Affeldt's opinions as to the interpretation of those documents, e.g., that the AMAE court did not require specific evidence that the plaintiffs in those cases were unable to pay costs.

Defendant's relevance objections are OVERRULED.

(2) 702 Objections.

Defendant also objects [**8] to Paragraphs 4-14 of the Tamayo Declaration under Federal rule of Evidence 702, for "lack of foundation" and as "improper opinion evidence." Tamayo declares, among other things, that in the course of his extensive practice experience, he has become familiar with the "challenges of bringing private litigation on behalf of civil rights plaintiffs, notably including those who are low-wage workers or other persons of modest or limited financial means." Doc. 750 at P4. Tamayo opines that "the possibility of being held liable for defendants' costs of suit, in the event they do not prevail, has served to deter many potential plaintiffs from bringing suit on their discrimination claims, even where those claims appear to be supported by evidence...." *Id.* at P5. Tamayo has personal experience sufficient to support these assertions. He is an attorney with considerable experience as counsel for civil rights plaintiffs. Although his statements arguably offer legal opinions, they are also factual in nature. There is no other mechanism by which such evidence may be presented. Defendant's objections are OVERRULED.

B. Would an Award of Costs in This Case be Inequitable Under AMAE?

1. Legal Standard.

The [**9] starting point for any analysis of a challenge to the taxation of costs is [HN4] Federal Rule of Civil Procedure 54(d)(1), which provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." "By its terms, the rule creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs." *AMAE*, 231 F.3d at 591. "That discretion is not unlimited. A district court must 'specify reasons' for its refusal to award costs." *Id.*

In *AMAE*, minority educators alleged that the use of a particular employment test ("CBEST") as a prerequisite to employment in California public schools, violated Title VI and VII of the Civil Rights Act of 1964 because the test had a disproportionate, adverse impact on minority candidates. *Id.* at 578. Following a bench trial, the district court entered judgment in Defendant's favor. *Id.* at 578-79. Defendant subsequently presented the district [*1140] court with a costs bill in the amount of \$ 216,443.67.

The district court denied the costs bill in its entirety, giving the following four reasons:

- (1) the case "involve[s] issues of substantial [**10] public importance," specifically "educational quality, interracial disparities in economic opportunity, and access to positions of social influence";
- (2) there is great economic disparity between Plaintiffs, who are individuals and "small nonprofit educational organizations," and the State of California;
- (3) the issues in the case are close and difficult; and
- (4) Plaintiffs' case, although unsuccessful, had some merit, as evidenced by the [later] modification of the [employment qualification test] to eliminate "higher order" mathematics questions.

Id. at 592 (footnote omitted).

Rejecting defendants' argument that the only proper reason for denying costs to a prevailing party is to punish misconduct by that party, the Ninth Circuit noted that the Circuit "previously ... held that district courts may consider other, nonpunitive reasons for denying costs to a prevailing party." *Id.* (citing *National Org. for Women v. Bank of Cal.*, 680 F.2d 1291, 1294 (9th Cir. 1982)). The Ninth Circuit also saw "no basis for limiting district courts' discretion in the manner that Defendants suggest." *Id.*

The rule itself contains no such limitation; [HN5] it provides simply that costs shall be allowed to the prevailing [**11] party unless the district court "otherwise directs." The requirement that district courts give reasons for denying costs flows logically from the presumption in favor of costs that is embodied in the text of the rule; if a district court wishes to depart from that presumption, it must explain why so that the appellate court will be able to determine whether or not the trial court abused its discretion....

Federal Rule of Civil Procedure 54(d)(1) establishes that costs are to be awarded as a matter of course in the ordinary case. Our requirement that a district court give reasons for denying costs is, in essence, a requirement that the court explain why a case is not "ordinary" and why, in the circumstances, it would be inappropriate or inequitable to award costs. Misconduct on the part of the prevailing party is one factor that might render a case "extraordinary." But it is not the only such factor. Here, the reasons that the district court gave for denying costs reflect what is clear at a glance: This is an extraordinary, and extraordinarily important, case. Plaintiffs are a group of individuals and nonprofit organizations. The record demonstrates that their resources are limited. They [**12] have brought an action that presents issues of the gravest public importance, and the action affects tens of thousands of Californians and the state's public school system as a whole. The issues in the case are close and complex. Although Plaintiffs have not prevailed in this action, their claims are not without merit. Indeed, as the district court pointed out, Defendants substantially altered the [employment test] during the pendency of this litigation. Finally, costs in this case are extraordinarily high. ...[W]e note that divesting district courts of discretion to limit or to refuse such overwhelming costs in important, close, but ultimately unsuccessful civil rights cases like this one might have the regrettable effect of discouraging potential plaintiffs from bringing such cases at all.

[HN6] We do not mean to suggest that the presumption in favor of awarding costs to prevailing parties does not apply to defendants in civil rights actions. Nor are we attempting to create an exhaustive [**1141] list of "good reasons" for declining to award costs. We simply hold that the reasons that the district court gave for refusing to award costs in this case were appropriate under Rule 54(d)(1) and that, considering [**13] those reasons, the court did not abuse its discretion in refusing to award costs to Defendants.

Id. at 592-93. The reasons given in *AMAE* do not constitute an exhaustive list. *Id.* at 593.

2. Were the Issues In the Case of Substantial Public Importance?

[HN7] One permissible consideration in evaluating whether a cost bill should be denied outright is whether the issues in the case were of substantial public importance. *Id.* at 592. In *AMEA*, the Ninth Circuit explained:

[Plaintiffs] have brought an action that presents issues of gravest public importance, and the action affects tens of thousands of Californians and the state's public school system as a whole.

Id. at 593. In addition, *AMEA* resulted in the defendant making substantial changes to the teacher qualification examination given statewide to thousands of people. *Id.*

Defendant attempts to distinguish *AMAE*, arguing that this case is not as important because its impact was limited to "23 Plaintiffs who took a test at a single manufacturing plant in Fresno." Doc. 744 at 5. This description of the case is overly myopic.

In this case Plaintiffs' central claim was that Nibco's administration of certain tests in English only, and subsequent termination [**14] of employees based on the results of those tests, intentionally caused an adverse, disproportionate impact on persons of Hispanic and Asian national origins. [HN8] Language-based discrimination is often closely aligned with national origin discrimination, and has been recognized as being worthy of close scrutiny by the courts. *See, e.g., Yniguez v. Arizonans for Official English*, 69 F.3d 920, 948 (9th Cir. 1995), vacated on other grounds, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) ("Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment"); *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989) ("Accent and national origin are obviously inextricably intertwined in many cases. It would therefore be an easy refuge in this context for an employer unlawfully discriminating against someone based on national origin to state falsely that it was not the person's national origin that caused the employment or promotion problem, but the candidate's inability to measure up to the communications skills demanded by the job. We encourage a very searching [**15] look by the district courts at such a claim.").¹

¹ Defendant's argument that "English-Only" cases typically involve bans on the speaking of languages other than English at all or at certain times in the workplace is unavailing. Plaintiffs never claimed this was such an "English-Only" case. Moreover, just because the claims in this case do not exactly mirror the majority of language-discrimination cases does not make this case insignificant. In fact, a strong argument exists for the contrary proposition.

The U.S. Equal Employment Opportunity Commission, the agency charged by Congress with interpreting and enforcing Title VII, recognizes that language discrimination in the workplace is a serious problem by, among other things, prioritizing efforts against workplace "speak-English only" policies, a form of language discrimination. *See, e.g.,* Doc. 710, Ho Declaration, Exhs. A-C (Sept. 1, 2000 EEOC press release announcing [**1142] settlement of English-only case against a manufacturing plant (stating that "[c]ases involving language issues, accent discrimination, and restrictive language policies or practices are a strategic enforcement priority for the Commission"); Sept. 19, 2000 EEOC press release [**16] announcing settlement of English-only case against a telephone operator service ("Cases involving English-only rules, restrictive language policies, and language or accent discrimination are litigation priorities for the Commission. Employers must refrain from targeting workers for discrimination based on myths, fears, and stereotypes regarding their primary language and country of origin."); April 20, 2001 EEOC press release announcing settlement of class action against a private university concerning workplace English-only rule ("For more than 15 years, the EEOC has taken the firm position that English-only rules run afoul of Title VII ... This settlement should put other employers on notice that the EEOC is committed to rooting out discrimination against low-wage earners, language minorities, and other groups most vulnerable to civil rights abuses", and also noting a nearly 500% increase in English-only charges during 1996-2000 period.)). The EEOC has followed the progress of this litigation since its inception, and sent its attorneys to observe trial proceedings. *See id.* at P5.² This was a significant case involving the disparate impact of English-only proficiency tests in the [**17] workplace on employees who the employer knew to have limited English language skills. The use of such potentially national origin discriminatory tests had the potential to cause the termination of foreign language-speaking employees.

² Plaintiffs place great weight on the fact that, in addition to bringing the case to combat workplace language discrimination, substantial party and judicial resources were devoted to litigating Defendant's vigorous efforts to discover Plaintiffs' immigration status. In 2004, on appeal from the district courts' discovery rulings, the Ninth Circuit rejected Defendant's argument that discovery of Plaintiffs' immigration status was necessary to its defense, becoming the first Court of Appeals to interpret *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002), a decision that called into question whether undocumented workers could assert statutory protections against workplace discrimination. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004). The Ninth Circuit's opinion has been cited in numerous federal court decisions, law review articles, practice guides, and casebooks.

However significant this discovery decision became, Plaintiffs concede that [**18] whether or not immigration status was discoverable was not among the reasons this case was initially brought. Doc. 741 at 5. Moreover, none of the costs being sought by Defendant relate to that discovery dispute, on which Defendants did not prevail. It is not necessary to decide here whether a finding of substantial public importance can be based upon a collateral issue raised as a defense to discovery, as the underlying claims are of substantial public importance on their own.

Defendant's other arguments to the contrary are not persuasive. Defendant's floodgates argument manifestly overstates the risk that in denying its cost bill, every losing plaintiff could conceivably seek to avoid payment of costs in every employment discrimination case. This will not happen, as *AMAE* expressly permits challenges by civil rights litigants to

the imposition of costs and, correspondingly, grants district courts broad discretion to deny costs on a case by case basis.

Defendant also emphasizes that, unlike *AMEA*, this case was not a class action. But, [HN9] class action status is not a prerequisite to denial of costs outright. *See, e.g., Washburn v. Fagan*, 2008 U.S. Dist. LEXIS 13049, 2008 WL 361048 (N.D. Cal. 2008) (Denying costs under [**19] *AMEA* in case brought by a single Plaintiff in an excessive force case against the San Francisco Police Department).

[*1143] The language/national origin claims raised in this case, although ultimately unsuccessful, were of substantial public importance.

3. Plaintiffs' Financial Resources.

[HN10] A court abuses its discretion when it awards costs against a losing plaintiff without considering the plaintiff's limited financial resources. *AMAE*, 231 F.3d at 592; *Stanley v. University of Southern California*, 178 F.3d 1069, 1079-80 (9th Cir. 1999) ("[d]istrict courts should consider the financial resources of the plaintiff and the amount of costs in civil rights cases."). It is not necessary to find that the plaintiffs in question are currently indigent; rather, the proper inquiry is whether an award of costs might make them so. *Stanley*, 178 F.3d at 1079-80 (referring to the possibility that the plaintiff "would be rendered indigent should she be forced to pay" the amount assessed against her); *see also Mansurian v. Board of Regents of the Univ. of California at Davis*, 566 F. Supp. 2d 1168, 1171 (E.D. Cal. 2008) (refusing to award costs against student plaintiffs, noting their "limited financial resources" [**20] and that they were barely able to cover their monthly living expenses).

Defendant points to cases from the Seventh Circuit that place the burden on the losing party to provide the district court with sufficient documentation to support a specific finding that he or she is "incapable of paying the court-imposed costs at this time or in the future," and that this evidence should come in the form of an affidavit or other documentary evidence of both income and assets. *See Rivera v. City of Chicago*, 469 F.3d 631, 635 (7th Cir. 2006). But, in light of *AMAE* and *Mansurian*, Defendant has failed to demonstrate that such a specific standard of proof applies in this circuit. In fact, there was sparse evidence supporting the finding that the *AMAE* plaintiffs had limited financial resources. The dissent specifically noted:

There is no evidence in the record of the exact financial condition of any of the plaintiffs. The majority opinion's conclusion that Plaintiffs have limited resources seems to be inferred from evidence in the record which merely indicates what jobs are held by the individual plaintiffs and the amount of dues the organization plaintiffs receive from their members. The district court [**21] merely found a disparity of resources between the State and the Plaintiffs. Presumably that disparity would almost always exist, regardless of who litigated against the State.

AMAE, 231 F.3d at 599 (Fernandez, J., concurring in part and dissenting in part). Likewise, in *Mansurian*, the district court noted that "plaintiffs have not presented evidence of actual indigence," relying instead on plaintiffs' demonstration "that they are graduate students and recent college graduates with limited financial resources." 566 F. Supp. 2d at 1171.

Here, the Plaintiffs have demonstrated that they are low wage workers, employed in hourly jobs, who do not have substantial financial resources. *See Vigne Declaration*, Doc. 705, PP 5-30. Exhibit A to the Vigne declaration summarizes wage and earnings information for each Plaintiff for a ten year period, produced in discovery; and reveals that most of the Plaintiffs earn less than \$ 20,000 per year, with a handful earning approximately \$ 25,000 per year. In the Fresno metropolitan statistical area, it is probable that the Plaintiffs' average incomes for the past several years would place them in the "low income," if not the "very low income," classifications [**22] used by the U.S. Department of Housing and Urban Development ("HUD").³

³ 2009 Adjusted Home Income Limits, State: California, U.S. Department of HUD, Mar. 2009, available at <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/limits/income/2009/ca.pdf>.

[*1144] Plaintiffs have limited financial resources.

4. Economic Disparity.

[HN11] The financial disparity between the parties is also a relevant consideration. *See AMAE*, 231 F.3d at 592 (denial of costs appropriate where there exists inter alia a great economic disparity between the plaintiffs, who were individuals and small nonprofit educational organizations, and the defendants). It is undisputed that Nibco is a multinational corporation that operates 12 manufacturing plants, and additional "global distribution and plant shipping facilities," in both the United States as well as in Mexico and Poland. In 1999, the last year for which Nibco's annual reports were produced in discovery, its net income surpassed \$ 22 million. Vigne Decl., PP 31-32. In fiscal year 2008, Nibco reported sales of \$ 590.2 million. ⁴

⁴ Nibco Inc. company profile, Hoover's, Inc., 2008, available online at <http://www.answers.com/topic/nibco-inc>. (last visited February [**23] 26, 2010.)

There is significant disparity between the resources of the parties in this case.

5. Were the Issues Close and Difficult?

The district court denied the parties' voluminous cross motions for summary judgment in a detailed, 96-page memorandum decision. Doc. 436. The pretrial proceedings and trial were lengthy and complex. Defendant correctly points out that after a nearly two-month trial, the jury took less than one day to reject Plaintiffs' claims. However, the jury's ultimate rejection of the Plaintiffs' claims does not undermine the legal and factual complexity of the underlying claims and that summary judgment could not be granted.

The case consisted of the testimony of twenty three Plaintiffs and reviewed their employment history and the testing and performance evaluations and policies of the employer, NIBCO, for its Fresno, California plant. NIBCO produced all its records and policies concerning the evaluation and treatment of each Plaintiff and many other employees. The employer offered exhaustive testimony from its supervisors and from human resources officers to explain and justify its treatment and termination Plaintiffs. Extensive expert testimony about linguistics, [**24] employment standards and practices, and economics was offered. Further, the business and financial history of NIBCO's unsuccessful endeavor to acquire and operate the Fresno plant, resulting in significant business losses, was presented to show that NIBCO's layoffs of Plaintiffs were caused by business necessity. This major causation issue was the primary reason Defendant succeeded in persuading the jury that even if language discrimination occurred, a supervening cause, the financial reverses of NIBCO's Fresno operations caused Plaintiffs to lose their jobs.

6. Would an Award of Costs have a Serious "Chilling Effect" on Future Civil Rights Litigants?

[HN12] One district court's recent review of the available caselaw applying *AMAE* concluded that, while there are cases in which courts have awarded costs to prevailing defendants in civil rights litigation,

those cases involved relatively small awards that did not pose a risk of chilling future litigation. *See Save Our Valley v. Sound Trans It*, 335 F.3d 932, 945 (9th Cir. 2003) (\$ 5,310.55); *Estate of Le Blanc v. City of Lindsay*, 2007 U.S. Dist. LEXIS 76428, at *10; 2007 WL 2900515 (E.D. Cal. Sept. 28, 2007) (\$ 8,460.21); *Sorgen v. City of San Francisco*, 2007 U.S. Dist. LEXIS 14489, at *8-10, [**1145] 2007 WL 521235 (N.D. Cal. Feb. 15, 2007) [**25] (\$ 4,987); *Ardalan v. Monterey Institute of Int'l Studies*, 2004 U.S. Dist. LEXIS 18765, at *12-14, 2004 WL 2047593 (N.D. Cal. Sept. 14, 2004) (\$ 2,838.35). By contrast, larger cost awards ... have been denied to prevailing defendants based on a combination of [] reasons [cited in *AMAE*]. *See Mexican-American Educators*, 231 F.3d at 591 (\$ 216,443.67); *Bowoto v. Chevron Corp.*, 2009 U.S. Dist. LEXIS 38174, 2009 WL 1081096, at *2 (N.D. Cal. Apr. 22, 2009) (\$ 485,159.49); *Washburn v. Fagan*, 2008 U.S. Dist. LEXIS 13049, 2008 WL 361048, at *2 (N.D. Cal. Feb. 11, 2008) (\$ 16,268.71).

Darensburg v. Metro. Transp. Com'n, 2009 U.S. Dist. LEXIS 71461, 2009 WL 2392094, *2 (N.D. Cal., Aug. 4, 2009); *see also Mansourian*, 566 F.Supp.2d at 1171-72 (cost award "would lead to a harsh result that could chill student litigants from vindicating important rights under Title IX.").

Defendant argues that there would be no "chilling effect" here because the costs taxed, \$ 84,434.40, be divided among the 23 Plaintiffs in this case, for a total cost of \$ 3,671.06 for each Plaintiff. Defendant cites *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007), in which a group of Hawaiian residents brought a civil rights action challenging state programs, which gave preferential treatment to persons of Hawaiian ancestry [**26] in violation of equal protection principles. The Ninth Circuit upheld the district court's imposition of costs, holding that plaintiffs had not demonstrated that an award of costs, "divided among multiple plaintiffs," amounted to a chilling effect. *Id.* at 1069. *Arakaki* is distinguishable. *Id.* The total cost award in *Arakaki* was \$ 5,300. Divided among the fourteen named Plaintiffs, the plaintiff liability

for costs was less than \$ 400. Moreover, there is no suggestion in *Arkakai*, that those Plaintiffs demonstrated financial extremis.

Here, even imposing the costs bill on a per-plaintiff basis risks a chilling effect. For a low wage-worker, the threat of a \$ 3,600 cost bill, representing approximately 14% of the annual income of Plaintiffs, is a significant disincentive.

IV. CONCLUSION

Plaintiffs' motion objecting to the Clerk's taxation of costs is GRANTED. Defendant shall not recover costs in this case for the reasons stated above.

SO ORDERED

Dated: March 22, 2010

/s/ Oliver W. Wanger

Oliver W. Wanger

United States District Judge