Pace Law Review

Volume 2
Issue 2 *Summer 1982*

Article 7

June 1982

The Application of an Offer of Judgment in a Title VII Suit

Margaret M. Lyons

Follow this and additional works at: https://digitalcommons.pace.edu/plr

Recommended Citation
Margaret M. Lyons, *The Application of an Offer of Judgment in a Title VII Suit* , 2 Pace L. Rev. 331 (1982)
DOI: https://doi.org/10.58948/2331-3528.1674
Available at: https://digitalcommons.pace.edu/plr/vol2/iss2/7

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The Application of An Offer of Judgment in a Title VII Suit

I. Introduction

In the federal courts, the results of a pre-trial offer of judgment are governed by Rule 68 of the Federal Rules of Civil Procedure.[1] The Rule provides that if the offeree, usually the plaintiff, refuses an offer made by the offeror, usually the defendant, and he continues with the suit and is granted a judgment less favorable than the offer, the plaintiff must pay the defendant's costs.

In *Delta Air Lines, Inc., v. August*,[2] the Supreme Court held that the Rule does not encompass a judgment *against* the offeree.[3] Therefore, Rule 68 is inapplicable when the plaintiff-offeree loses completely.[4] Two problems arise from this decision: First, the Court places a plaintiff who receives a partial judgment in a worse financial position than a plaintiff who loses

---

1. Rule 68 Provides in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissable except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer
>
> . . . .

FED. R. CIV. P.68.

2. 450 U.S. 346 (1981).

3. *Id.* at 348 (emphasis in original).

4. *Id.* at 352. Previously, courts were willing to consider the application of Rule 68 even in situations where the plaintiff-offeree had received an adverse judgment. For example, in Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 503-04 (N.D. Cal. 1980), a case involving a losing plaintiff, the court held that Rule 68 should not be applied. The basis of the decision was the policy of encouraging class action suits alleging racial discrimination. *See* Dual v. Cleland 79 F.R.D. 696 (D.D.C. 1978), a case also involving an adverse decision for the plaintiff, but where the court ordered the plaintiff to pay defendant's costs, even though it was a Title VII action.

completely; second, the decision will be difficult to apply when a plaintiff is offered and rejects only monetary relief, but the court awards only injunctive relief.

Part II of this note sets forth the legal background of the case. Part III discusses the Supreme Court's decision and Part IV analyzes the Court's reasoning. Part V contains the conclusion that the Supreme Court approached the issue of a Rule 68 offer in a backward manner. Instead of first examining whether an offer was made within the terms of the Rule, the Court waited until the litigation was concluded to determine whether the Rule applied to this situation. Although the applicability of the Rule cannot be determined under either approach until the final judgment, there should be some guidelines to determine whether there was an initial bona fide offer sufficient to trigger Rule 68 at the conclusion of litigation. The Supreme Court, in effect, applies the Rule to untrue offers creating unfair results.

II. The Legal Background of the Case

In this case Rosemary August alleged that she had been fired from her job as a flight attendant because of her racial origin.[5] She sought "reinstatement, back pay, benefits, other equitable relief, and attorneys' fees and costs. . . ."[6] Delta Airlines offered her "$450, including costs and attorneys' fees accrued to date. . ."[7] Upon rejection of this offer by Ms. August, the case proceeded to trial.

The district court held that Ms. August had failed to prove racial discrimination.[8] Judgment was entered in favor of the de-

---

5. August v. Delta Air Lines, Inc., 600 F.2d 699, 700 (7th Cir. 1979). Her claim was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976) which provides in part:

> (a) Employers. It shall be an unlawful employment practice for an employer -
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2 (1976).

6. August v. Delta Air Lines, Inc., 600 F.2d at 700.

7. *Id.*

8. August v. Delta Air Lines, Inc., No. 78-2312 (N.D. Ill. 1979). The court of appeals affirmed the district court's decision relating to the Title VII claim. August v. Delta Air Lines, Inc., 600 F.2d 699 (7th Cir. 1979).

fendant, but each party was ordered to bear its own litigation costs.[9] Thereupon, the defendant filed a motion for costs incurred as of the date of the Rule 68 offer.[10] The district court denied the motion.[11]

The defendant on appeal argued that Rule 68 should be applied in this case because the Rule provides an incentive for settlement of suits by depriving the judge of his Rule 54(d)[12] discretion to award costs. Once an offer of judgment is made a losing plaintiff automatically would be denied the possibility of an award of costs.

The court of appeals affirmed on the basis that the $450 offer was in bad faith since the plaintiff's alleged damages, including attorneys' fees and costs, were over $20,000.[13] The court stated that allowing a defendant to make a minimal bad faith offer to avoid paying costs would subvert the purpose of Rule 68.[14] Although insufficient to meet the burden of proof for the discrimination claim, the evidence demonstrated that there was some racial bias and Ms. August's claim was not frivolous.[15] The Court of Appeals for the Seventh Circuit, noting the important social policies[16] involved in Title VII cases, was also concerned that awarding costs when the offer was nominal would discourage Title VII lawsuits.

On review, the Supreme Court affirmed the decision of the

---

9. August v. Delta Air Lines, Inc., No. 78-2312 (N.D. Ill. 1979).

10. *Id.*

11. *Id.*

12. Rule 54(d) provides in relevant part: "[E]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . . ." FED. R. CIV. P. 54(d).

13. August v. Delta Air Lines, Inc., 600 F.2d at 701-02.

14. The Court stated:

> [T]he Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff . . . .
>
> If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs. The useful vitality of Rule 68 would be damaged.

Id. at 701. (footnote omitted).

15. *Id.*

16. In this context the court noted, "Title VII embodies a basic national policy given a high priority by Congress . . . . We do not propose to permit a technical interpretation of a procedural rule to chill the pursuit of that high objective." *Id.*

court of appeals solely on the basis that the question presented by the defendant was not raised in the lower court and, therefore, was not properly before the Supreme Court.[17] In the body of the opinion it is abundantly clear, however, that the Supreme Court would have reversed the court of appeals, if the issue had been properly presented; the Court is specific in stating that Rule 68 does not apply to situations similar to that of Ms. August, where the plaintiff-offeree has a judgment entered against him and in favor of the defendant-offeror.[18] The Court reached this decision based upon a plain language reading of the Rule and upon consideration of the Rule's purpose and history.

Rule 68 is a coercive rule, intended "to encourage settlement and avoid protracted litigation."[19] Under it a party defending a claim may make an offer of judgment. If the other party refuses and the final judgment is less favorable than the offer, the offeree is liable for any costs accruing after the date of the offer.[20]

Rule 68 has survived since its passage in 1938[21] with only minor changes to the text, none affecting the part of the Rule interpreted in *August*.[22] While the idea behind the Rule was new to federal practice when it was first proposed in 1937, it was not a totally new concept. The advisory committee's notes to the Rule cited to three state statutes as examples of the Rule's application: Minnesota, Montana and New York.[23] These statutes

---

17. The Court stated: "[A]lthough defendant's petition for certiorari presented the question of the district judge's abuse of discretion in denying defendants (sic) costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us." Delta Air Lines, Inc. v. August, 450 U.S. at 362.

18. The Court remarked, "[i]t therefore is simply inapplicable to this case because it was the defendant that obtained the judgment." *Id.* at 352.

19. 5 F.R.D. 433, 483 note (1946). *See* Report on the Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 483 note (1946); Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240 (W.D. La. 1949), *aff'd in part and rev'd in part on other grounds*, 181 F.2d 320, 320 (5th Cir. 1950); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 68.02 (2d ed. 1980).

20. The relevant part of Rule 68 is: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer . . . ." FED. R. CIV. P. 68.

21. Rule 68 was proposed in 1937, *see* 1 F.R.D. CXXXIV (1937), and enacted a year later. 28 U.S.C. § 723c (1976).

22. *See* 5 F.R.D. 482-83 (1946); 39 F.R.D. 126 (1966).

23. *See* Notes to the Rules of Civil Procedure for the District Courts of the United States, at 63 (March 1938) (citing 2 MINN. STAT. § 9323 (Mason 1927); 4 MONT. REV.

imposed costs on a plaintiff who rejected a settlement offer and then did not obtain a judgment more favorable than the offer.[24] This practice was also firmly established in equity courts prior to the Federal Rule.[25] The rule in equity was that a party who sues vexatiously may be denied costs after he has refused an of-

---

CODE ANN. § 9770 (1935); N.Y. CIV. PRAC. ACT § 177 (Cahill 1937)).

24. The texts of the three state statutes are set out below.

The Minnesota statute provides:

> At least ten days before the term at which any civil action shall stand for the trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor.

2 MINN. STAT. § 9323 (Mason 1927).

The Montana statute provides:

> The defendant may, at any time before trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer.

4 MONT. REV. CODE ANN. § 9770 (1935). The New York statute provides:

> Before the trial, the defendant may serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there be two or more defendants, and the action can be severed, a like offer may be made by one or more defendants against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serve upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance be not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

N.Y. CIV. PRAC. ACT § 177 (Cahill 1937).

These states also had statutes similar to the current Federal Rule 54(d); they differed from the Federal Rule only in that recovery of costs was mandatory for the prevailing party. *See, e.g.*, 2 MINN. STAT. §§ 9471-73 (Mason 1927); 4 MONT. REV. CODE ANN. §§ 9787-88 (1935); and N.Y. CIV. PRAC. ACT §§ 1470-75 (Thompson 1939).

25. *See, e.g.*, McCloskey v. Bowden, 89 A. 528 (N.J. Ch. 1914), cited with approval in Crutcher v. Joyce, 146 F.2d 518, 520 (10th Cir. 1945).

fer of settlement and then recovers no more than the offer.[26]

For the Rule to be applied by the courts, the offer of judgment must be timely,[27] unconditional,[28] definite,[29] and inclusive of costs then accrued.[30] If the offeree rejected an offer which met these prerequisities and if the judgment was less favorable than the offer,[31] the operation of Rule 68 was mandatory.[32]

---

26. The court in McCloskey v. Bowden, 89 A. 528 (N.J. ch. 1914), explained the rule as follows:

> The rule works *e converso*, and, as the complainant may recover costs against the defendant who has been warned to do his duty before suit brought, so a complainant who has received a bona fide offer of a proper settlement before bringing suit, but who brings suit more or less vexatiously, will not, in a court of conscience, where the matter is discretionary, be allowed either costs or counsel fee against a defendant who is adjudged to pay practically the sum which, before the bringing of the suit, he had accounted for and offered to pay.

Id. at 529.

27. The offer must be made at least ten days before trial begins. *See* Cover v. Chicago Eye Shield Co., 136 F.2d 374, 375 (7th Cir.), *cert. denied*, 320 U.S. 749 (1943) (construing "before the trial begins"); Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218 (N.D. Ohio 1969) (construing "At any time more than 10 days before the trial begins").

28. *See* 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 68.04 (2d ed. 1980). *See, e.g.*, Pinckney v. Childs, 20 N.Y. Super. (Bosworth 7) 660 (1860). In this case the defendant made an offer whereby payment was conditioned on default of notes which plaintiff accepted as payment for the offer. The Court stated,

> [i]n this case the offer was made expressly subject to the provisions of another instrument or agreement, and dependent upon the question whether or not a default had been made in the payment of certain promissory notes other than those mentioned in the complaint; matters which could only be determined by testimony, by judicial action, which the clerk, a mere ministerial officer, could not take. The judgment is therefore not irregular only, but void, and should be vacated.

Id. at 663-64. *See also* Report of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, No. 80-94, N.Y.L.J. at 2, col. 2. This Committee determined that settlement offers conditioned on the waiver of statutory fees are "unethical in actions arising under civil rights and civil liberties statutes." *Id.*

29. *See* Tansey v. Transcontinental & W. Air, Inc., 97 F. Supp. 458 (D.D.C. 1949). The court noted "defendant's offer of judgment does not specify a definite sum to be entered as judgment which plaintiff can either accept or reject and therefore the offer will not prevent consideration by the court of plaintiff's costs hereinafter incurred." *Id.* at 459.

30. *See* Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978). The court stated, "Rule 68 requires that an offer of judgment include payment of costs then accrued. In civil rights actions attorney's fees can constitute part of the costs." *Id.* at 1260.

31. The Supreme Court has held in Delta Air Lines, Inc. v. August, 450 U.S. at 351, that "judgment not more favorable than the offer" means that there must be some form of positive recovery by the offeree. *Id.* Previously courts had dealt with an offer of judgment even if the offeree lost. *See, e.g.*, Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978).

32. *See* Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978); Mr. Hanger, Inc. v. Cut Rate

Recently one court has been more willing to allow the operation of Rule 68 to be discretionary. For example, strong public policy favors a less strict application of the Rule in the context of racial discrimination. An element of discretion was introduced in *Gay v. Waiter's and Dairy Lunchmen's Union, Local No. 30.*[33] The court in *Gay* allowed the award of costs to be in the discretion of the judge in a class action suit where racial discrimination was alleged, partly because "strong Congressional policy favors the availability of federal remedies for employment discrimination."[34] This element of discretion had been noted in the lower court decision of *August* which read a reasonableness requirement into the Rule.[35]

III. Decision of the Court

A. *Majority*

The Court's analysis in *August* turned on what it considered to be the threshold question: "[W]hether Rule 68 has any application to a case in which judgment is entered against the plaintiff-offeree and in favor of the defendant-offeror."[36] Writing for the majority,[37] Justice Stevens concluded that the Rule was not applicable since the judgment was in favor of the defendant.[38]

Plastic Hangers, Inc., 63 F.R.D. 607, 610 (E.D.N.Y. 1974).

33. 86 F.R.D. 500 (N.D. Cal. 1980). In *Gay*, the issue was whether a class representative, alleging racial discrimination, should be asked to make a decision to accept or reject the offer required by Rule 68. The court held that a class representative should not be required to make such a decision since it involved an "inherent conflict of interest." *Id.* at 503. This conflict arose because the class representative was forced to weigh his best interests against the best interests of the class; yet it is his duty to protect the interests of the class.

34. *Id.* at 506. Since *Gay* involved a non-settling offeree who obtained a take nothing judgment, it is now implicitly overruled by the *August* decision. According to *August*, Rule 68 would not come into operation in such a case. Thus, there is no need to look to public policy to justify a departure from the mandatory language of the rule.

35. August v. Delta Air Lines, Inc., 600 F.2d at 702.

36. Delta Air Lines, Inc. v. August, 450 U.S. at 350.

37. *Id.* at 347. Justice Stevens, joined by Justices Brennan, White, Marshall and Blackmun delivered the majority opinion. Justice Powell filed a concurring opinion. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice Stewart joined.

38. The Court stated:

> [I]f we limit our analysis to the text of the rule itself, it is clear that it applies only to offers made by the defendant and only to judgments obtained by the plaintiff. It therefore is simply inapplicable to this case because it was the defen-

Thus, since Ms. August lost at trial, costs could not be imposed upon her under Rule 68.

The Court reached its decision through a three-sided approach to the problem. It examined first the plain language of the Rule; then the purpose of the Rule; and finally its history. The Court stated that the plain meaning of the language of the Rule was that it was meant to apply only to situations where the plaintiff obtained a favorable judgment. "Because the rule obviously contemplates that a 'judgment taken' against a defendant is one favorable to the plaintiff, it follows that a judgment 'obtained' by the plaintiff is also a favorable one."[39] The Rule could not, therefore, apply to Ms. August's situation since as a losing plaintiff-offeree she had not obtained a judgment "more favorable than the offer."[40]

Next the Court considered the purpose behind the Rule, to encourage settlement of claims. According to this Court the Rule should only be applied to situations where it would act as an incentive to settle; for example, it would be appropriate for those plaintiffs whose recovery is probable, but the amount is uncertain.[41] Additionally, because of the traditional method of assessing costs to the victorious party, there would be little practical need to apply the Rule to situations where a nonsettling plaintiff loses.

> Because costs are *usually* assessed against the losing party, liability for costs is a normal incident of defeat. Therefore, a nonsettling plaintiff does not run the risk of suffering additional burdens that do not ordinarily attend a defeat and Rule 68 would provide little, if any, additional incentive if it were applied when the plaintiff loses.[42]

The Court noted that while this was the usual method of awarding costs, the district judge retained his discretion under Rule 54(d) to award costs to any party regardless of the outcome of the suit.[43]

---

dant that obtained the judgment.

Id. at 352.

39. *Id.* at 351.

40. FED. R. CIV. P. 68.

41. Delta Air Lines, Inc. v. August, 450 U.S. at 352.

42. *Id.* (emphasis added).

43. *See supra* note 12.

Justice Stevens rejected, however, the defendant's argument that Rule 68 encourages settlement in all cases by depriving the trial judge of his discretion to award costs under Rule 54(d), stating that such a thesis would require a schizophrenic reading of the Rules.

> Thus any defendant, by performing the meaningless act of making a nominal settlement offer, could eliminate the trial judge's discretion under Rule 54(d). We cannot reasonably conclude that the drafters of the Federal Rules intended on the one hand affirmatively to grant the district judge discretion to deny costs to the prevailing party under Rule 54(d) and then on the other hand to give defendants - and only defendants - the power to take away that discretion by performing a token act.[44]

The Court continued by saying that Rule 68 was not slanted in favor of defendants, but was "evenhanded in its operation."[45] Thus the Court declined to follow the lower court which had read a reasonableness requirement into the Rule in order to frustrate defendants' ability to control the discretion of district judges. The Supreme Court stated that "a literal interpretation totally avoids the problem of sham offers, because such an offer will serve no purpose . . . ."[46]

Next the Court looked at the history of the Rule, noting that it was an outgrowth of the equitable practice of denying costs to a plaintiff "when he sues *vexatiously* after refusing an offer of settlement."[47] The Court compared Rule 68 to similar state statutes on which Rule 68 was modeled,[48] indicating that the purpose of these statutes and Rule 68 was to "penalize prevailing plaintiffs who had rejected reasonable settlement offers without good cause."[49] Finally, the Court noted that defense lawyers had not yet developed the practice of misusing Rule 68 to their advantage. Nominal settlement offers are not a wide-

---

44. Delta Air Lines, Inc. v. August, 450 U.S. at 353 (footnote omitted).

45. *Id.* at 354.

46. *Id.* at 355.

47. *Id.* at 356, quoting C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 3001 at 56 (1973) (emphasis added).

48. These state statutes were: 2 MINN. STAT. § 9323 (Mason 1927); 4 MONT. REV. CODE ANN. § 9770 (1935); N.Y. CIV. PRAC. ACT § 177 (Cahill 1937). *See supra* note 24 for the text of these state statutes.

49. Delta Air Lines, Inc. v. August, 450 U.S. at 358.

spread means by defendants to avoid costs. This is evidence, the Court reasoned, that the Rule has been read by practitioners consistently with its plain language.[50]

B. *Concurrence*

Justice Powell disagreed with the majority's reasoning but agreed with the result. He stated that Rule 68 did not apply because of the failure to make a proper offer,[51] not because of the failure to meet the threshold requirement set out by the majority.[52]

Justice Powell believed that the offer should have included reaonable attorneys' fees accrued to the date of the offer.[53] According to Justice Powell the offer should have consisted of two parts: the first proposing specific substantive relief, either monetary or injunctive; the second consisting of a cost provision, including attorneys' fees.[54] The award of attorneys' fees in Title VII is within the court's discretion if the offer is accepted.[55] In a Title VII suit, the court, not bound by the attorney's bill, looks at two factors: "the time expended and a reasonable hourly rate for that time."[56] Under this standard the offer of judgment in *August* could not have included attorneys' fees, and was thus not a proper offer.[57]

---

50. *Id.* at 360 (footnote omitted).

51. "I do not think that the terms of the offer made in this case constituted a proper offer of judgment within the scope of Rule 68." *Id.* at 362 (Powell, J., concurring).

52. *Id.* at 350. *See supra* text accompanying note 36.

53. Under Title VII a prevailing plaintiff will recover reasonable attorneys' fees as part of the costs. 42 U.S.C. § 2000e-5(k) (1976). *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-02 (1968). As Justice Powell stated:

> A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows, therefore, that the "costs" component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorneys' fees accrued to the date of the offer. *Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (Colo. 1978) (offer of $10, inclusive of costs, interest, and attorneys' fees was "fatally defective because it excludes attorneys' fees then accrued").

Delta Air Lines, Inc. v. August, 450 U.S. at 363.

54. *Id.* at 365 (Powell, J., concurring).

55. *Id.*

56. *Id.* (footnote omitted).

57. *Id.*

C. *Dissent*

Justice Rehnquist disagreed with the majority's reasoning and conclusion. Initially, he argued that the Court did not even address the question that was certified.[58] He then attacked the Court's interpretation of Rule 68, finding that the offeree, even though losing on the merits, did obtain a judgment.[59] He noted that the majority's construction of the Rule so as not to include a take-nothing judgment within the term "judgment," virtually cut it adrift from the remaining related portions of the Federal Rules of Civil Procedure,[60] and was inconsistent with the Rule's history of including judgments against a party.[61] The majority's view was further criticized for creating the effect of putting a nonsettling plaintiff who loses in a better position than a plaintiff who obtains a judgment smaller than the offer; Justice Rehnquist felt that this result was not intended by the Rules.[62]

Justice Rehnquist indicated that the majority's analogy to similar state statutes should not be applied to the Federal Rules, for in these states the statute governing the recovery of costs by prevailing defendants was mandatory,[63] unlike Rule 54(d), and thus presented a different pattern of the award of court costs than under federal practice.[64] The state statutes similar to Rules

---

58. The question certified to the Court was "[w]hether the Court of Appeals erred in nullifying a clear and unambiguous mandatory imposition of costs under Rule 68?" *Id.* at 3 (Rehnquist, J., dissenting). The question addressed by the majority, however, was "whether the words 'judgment obtained by the offeree' as used in that Rule should be construed to encompass a judgment *against* the offeree as well as a judgment *in favor* of the offeree." *Id.* at 366 (emphasis in original).

59. "The term 'judgment' is defined in Rule 54(a) of the Federal Rules of Civil Procedure to mean 'a decree and any order from which an appeal lies.' Unquestionably, respondent 'obtained' an 'order from which an appeal lies' when the District Court entered its judgment in this case." *Id.* at 370-71 (Rehnquist, J., dissenting).

60. *Id.* at 371 (Rehnquist, J., dissenting).

61. *Id.*

62. *Id.* at 379-80 (Rehnquist, J., dissenting).

63. *See, e.g.*, 4 MONT. REV. CODE ANN. §§ 9787-88 (1935); 2 MINN. STAT. § 9471 (Mason 1927); and N.Y. CIV. PRAC. ACT §§ 1470-75 (Thompson 1939).

64. Justice Rehnquist reasoned:

> As a result, the state cases cited by the Court do not address the situation in which a defendant has prevailed on the merits because in that situation the shifting of costs was mandatory under state law. It is, therefore, difficult for me to understand how it can be argued that Congress, seeking to pattern Rule 68 after the procedure used in these three states, could possibly have intended to immunize plaintiffs from the operation of the Rule and the concomitant costs it imposes

54(d) and 68 both require a plaintiff who wins, but for an amount less than the offer, to pay the losing defendant's costs. But because of the state statutes' mandatory practice and the Federal Rules' discretionary practice of awarding costs[65] to the prevailing party, there is a situation, however, left uncovered by analogizing the state statutes to the Federal Rules. The defendant in federal court who wins on the merits after having his offer refused may still have costs awarded to the plaintiff through the exercise of the court's discretion under Rule 54(d). This is a situation that does not occur under the state statutes. Thus, according to Justice Rehnquist, because the two situations are not similar, there is a basic flaw in the logic of the analogy, and the court should not have based its decision in part on this argument.

The dissent then took exception with Justice Powell's argument that a proper offer should include a flexible provision for attorneys' fees as part of the costs. According to Justice Rehnquist, the history of Rule 68 shows no intention to depart from the common meaning of costs, which did not include attorneys' fees.[66] He argued that if Congress wanted attorneys' fees recovered, it would have stated so specifically in the Rule.[67] Because some statutes include attorneys' fees as costs while others do not, he was also concerned that if the components of costs were determined by the terms of the statute underlying the law suit, there would be inconsistent results.[68]

---

simply because they lost their cases on the merits.

Id. at 373-74 (Rehnquist, J., dissenting).

65. *See* FED. R. CIV. P. 54(d).

66. Delta Air Lines, Inc. v. August, 450 U.S. at 377 (Rehnquist, J., dissenting).

67. Justice Rehnquist stated, "[t]he legislative history of Rule 68 indicates no intent to deviate from the common meaning of costs and this conclusion is bolstered by the fact that when the authors of the rules intended that attorneys' fees be recovered, such fees were specifically mentioned." *Id.* (Rehnquist, J., dissenting). *See, e.g.*, Federal Rule 37 which allows "reasonable expenses . . . . including attorneys' fees, as a sanction for discovery abuses." FED. R. CIV. P. 37.

68. Conceivably a plaintiff could bring an action under a statute including attorneys' fees as costs and obtain a judgment less than the rejected offer, and then be subjected to costs including attorneys' fees. Another plaintiff could bring an action under a statute which did not include attorneys' fees and receive a judgment less than the rejected offer, but only have to pay the costs which did not include attorneys' fees. *See, e.g.*, Roadway Express v. Piper U.S., 447 U.S. 752 S. (1980), where the Court held that actions under 28 U.S.C. § 1927 do not include attorneys' fees.

Finally, Justice Rehnquist was concerned that including attorneys' fees in costs could lead to a problem in cases brought under Title VII.[69] Title VII permits a winning defendant to be awarded costs only if the plaintiff's case was frivolous.[70] The majority's interpretation of Rule 68 however, requires that the defendant be awarded costs if the judgment obtained by the plaintiff is less favorable than the offer. The dissent was concerned that "this could seriously undermine the purposes behind the attorney's fees provisions of the Civil Rights Act . . . ."[71]

IV. Analysis

The majority found that the threshold question in a Rule 68 case is whether a judgment entered against the plaintiff and in favor of the defendant was less favorable than the offer, thereby falling within the ambit of Rule 68.[72] But a logical analysis first requires a determination of whether there was a good faith offer[73] and whether it was refused. Thus, the analysis should be a three step approach:

(1) Was there a good faith offer?
(2) Was this offer refused?
(3) Was the judgment obtained less favorable than the offer?

Before reaching the question which the majority considers "threshold", there are thus two preliminary questions which must be answered.

The second question is one of fact: either the offer was accepted or refused. Within this apparently simple question lie more complex issues. For example, was an offer "accepted" if the offeree only agreed to one part of a multi-part offer? What happens if a counter-offer made by the original offeree is never accepted by the offeror? Does the counter-offer constitute some form of acceptance or is the offeror now placed in a position similar to the offeree in that he will be liable for costs incurred after

---

69. *See supra* note 5 for text of applicable statute.

70. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978); Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968). *See supra* note 53.

71. Delta Air Lines, Inc. v. August, 450 U.S. at 378 (Rehnquist, J., dissenting).

72. *Id.* at 350.

73. *See* August v. Delta Air Lines, Inc., 600 F.2d at 702.

the date of the counter-offer? A situation can easily be imagined where all of these questions would have to be addressed: A defendant-offeror makes an offer which consists of monetary and injunctive relief; the plaintiff-offeree accepts the monetary portion but refuses the injunctive part and makes a counter-offer that it will settle if some additional injunctive relief is given. This is a situation which may come before a court, but the Supreme Court's decision in *August* gives no guidance on how that court should deal with this problem.

The first question requires a determination of whether an offer was reasonable or a sham. If the offer was so clearly frivolous that the plaintiff had to reject it, the Rule should not be triggered at all. Applying the Rule in such a case would be contrary to its purpose of encouraging the settlement of litigation.[74] A sham offer would not encourage settlement; in fact it might discourage settlement by antagonizing the offeree.[75]

The Court in *August*, by focusing on the third question, has sidestepped the fundamental issue. The third question should not be considered until the other two questions have been answered.

In addition to its misplaced focus, the majority's reasoning has several flaws. The first flaw is its conclusory attitude. Justice Stevens stated with finality that the Rule is not intended to apply to situations in which the plaintiff loses. In reaching this conclusion he merely declared that "because the rule obviously contemplates that a 'judgment taken' against a defendant is one favorable to the plaintiff, it follows that a judgment 'obtained' by the plaintiff is also a favorable one."[76] The Rule does not set out this maxim, however, and the statement does not automatically flow from it.

The Court also stressed that the Rule does not impose additional burdens on the non-settling unsuccessful plaintiff, since costs are usually assessed against the losing party anyway.[77] This

---

74. *Id.*

75. The Seventh Circuit Court of Appeals stated, "[u]nrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation." *Id.* at 701.

76. Delta Air Lines, Inc. v. August, 450 U.S. at 351. No cases or other authority are cited by the Supreme Court in support of this statement.

77. *See supra* note 31 and accompanying text.

argument ignores the purpose of Rule 68, to encourage settlements by removing the Judge's Rule 54(d) discretion in awarding costs.[78] Without Rule 68, the losing plaintiff might still be able to avoid paying costs because the judge, in his discretion, may determine which party will be awarded costs.

A more important question involves the burden placed on a non-settling plaintiff who wins a partial recovery or a recovery less than the offer of judgment. According to the majority's decision, the plaintiff is subject to the Rule upon winning anything and is therefore placed in a worse position than a plaintiff who loses and is not subject to the Rule. This is an unfair result, since the mere fact of winning some relief shows merit in the offeree's claim; that offeree is penalized, however, by having to pay the offeror's costs from the time of the offer. An offeree who loses completely pays nothing. In the latter situation an inference may be drawn that the offeree's claim was without merit. In light of the Rule's purpose to encourage settlement of suits[79] it seems fairer to apply it to an offeree bringing a frivolous suit, rather than to an offeree who shows some merit by winning a partial judgment.

The Court also posits that the Rule is evenhanded in its operation.[80] "We can conceive of no reason why defendants—and not plaintiffs — should be given an entirely risk-free method of denying trial judges the discretion that Rule 54(d) confers regardless of the outcome of the litigation."[81] But this is exactly what the operation of the Rule is intended to do. It is the defendant who usually makes the offer and thus the Rule, on its face, can only work to the defendant's advantage. The defendant risks nothing by making the offer; instead, the defendant stops the running of costs from the time of the offer thereby providing

78. Rule 54 was promulgated in 1937, enacted the next year, and since amended several times. Before Rule 54, the prevailing party in an action at law would recover costs as of right unless a statute provided otherwise. In equity costs were awarded to either party in the court's discretion. *See* 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.70[3] (2d ed. 1980) (citing *In re* Peterson, 253 U.S. 300 (1920); Newton v. Consolidated Gas Co. of New York, 265 U.S. 78 (1924)). For text of Rule 54(d) *see supra* note 12. *See supra* discussion in text and accompanying notes 21-34.

79. *See supra* note 19 and accompanying text.

80. Delta Air Lines, Inc. v. August, 450 U.S. at 354.

81. *Id.* at 354-55 (footnote omitted).

himself with a form of insurance.[82]

The Court argued that a sham or token offer has no practical consequence in a Rule 68 situation.[83] The argument was that a defendant would not gain anything by making a token offer,[84] presumably because the plaintiff would be more likely to obtain a judgment greater than a token offer yet not greater than a reasonable offer. But this overlooks defendants' practices in making offers. Usually a defendant will make the lowest feasible offer, hoping that it will be accepted but secure in the knowledge that, if rejected, he has still prevented costs from being assessed against him.[85] While professing that reasonableness is not an issue, the Court in the same paragraph set up a basis for inquiring into the reasonableness of an offer:

> But it is hardly fair or even-handed to make the plaintiff's rejection of an utterly frivolous settlement offer a watershed event that transforms a prevailing defendant's right to costs in the discretion of the trial judge into an absolute right to recover the costs incurred after the offer was made.[86]

If the Supreme Court truly considered reasonableness a factor,[87] then the decision of the court of appeals was correct because it reached its decision using reasonableness as one of its standards.[88] The Supreme Court, while holding that reasonableness

---

82. *See id.* at 353.

83. *Id.* at 352.

84. *Id.*

85. In a footnote the Court expands this argument: "Moreover, because the defendant's settlement offer is admissible at a proceeding to determine costs, a defendant could use a reasonable settlement offer as a means of influencing the judge's discretion to award costs under Rule 54(d)." *Id.* at 356 n. 16.

It is true that a defendant will use the rejected settlement offer to establish the burden of costs, but that does not mean that in making the offer the defendant will tailor it to this future interest.

86. *Id.* (footnote omitted).

87. As the Court stated: "If a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered." *Id.* The Court again introduced a reasonableness standard when referring to the three state statutes which the Court compared with Rule 68: "Therefore the only purpose served by these state offer of judgment rules was to penalize prevailing plaintiffs who had rejected *reasonable* settlement offers without good cause." *Id.* at 358 (emphasis added) (footnote omitted).

88. The court of appeals concluded by holding:

> In a Title VII case the trial judge may exercise his discretion and allow costs

is not a proper consideration, seemed to permit judges to use their discretion in assessing reasonableness. Furthermore, the methods of assessing reasonableness are not described, possibly leading to great discrepancy between lower courts.

The Court's final argument was that since lawyers have not developed the habit of seeking costs under Rule 68 by making sham offers, the Rule has been interpreted as not including sham offers.[89] This argument fails because it ignores the history of the Rule, which is that it has been applied mandatorily by the courts until recently when a reasonableness requirement was read into it.[90] Lawyers were safe in making any offer, even a sham one, knowing that the issue of reasonableness of the offer would not be litigated. There may have been many instances of sham offers being made but they would not reach the court since the outcome was already predetermined: The Rule must be applied if the pre-conditions were met regardless of the reasonableness of the offer.

The dispute between Justices Powell and Rehnquist centered on the definition of costs. Justice Powell believed that costs should include attorneys' fees in a Title VII case because that statute so allows. As Justice Rehnquist observed, however, linking the award of attorneys' fees to the underlying statute would lead to inconsistent results in each case.[91]

A situation not considered by the Court is that of mixed relief, in which a plaintiff asks for monetary and injunctive relief, but is offered only money and receives an injunction in his favor. The problem involves balancing two different types of relief. The court must set some monetary value to the injunction in order to compare it with the pecuniary offer.[92] This is a diffi-

---

under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some *reasonable relationship in amount to the issues, litigation and expenses anticipated and involved in the case.*

August v. Delta Air Lines, Inc., 600 F.2d at 702 (emphasis added).

89. Delta Air Lines, Inc. v. August, 450 U.S. at 360.

90. *See, e.g.*, Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp. 201 (E.D. La. 1975).

91. *See generally* Malvern, *The "Offer of Judgment Rule" in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 GOLDEN GATE L. REV. 963, 973-78 (1980).

92. *See id.* at 969-72.

cult and unrealistic task involving too many subjective variables, and, by its very nature, requiring much judicial time. For example, consider this situation: Ms. August seeks not only reinstatement and back pay[93] but also damages; Delta Airlines makes an offer of $50,000 in damages but no equitable relief; Ms. August rejects this offer and continues with the suit; her final recovery is for $12,000 in back pay and reinstatement to her job but no damages. Contrary to Rule 68's purpose of facilitating the speedy settlement of suits, this process of determining whether the judgment obtained at trial is less favorable than the offer is necessarily lengthy. Thus, in a mixed relief case, the *August* decision frustrates the Rule's purpose.

V. Conclusion

As a result of *August*, the Supreme Court has turned Rule 68 into a potentially unjust Rule. The Rule works to the advantage of nonsettling offerees who are most in need of chastisement; those whose suits were so lacking in merit that they obtained no judgment at all. At the same time nonsettling offerees whose case had some merit are penalized solely for winning an amount less than the offer. Moreover, the Court failed to address the problems inherent in a mixed relief claim.

The Rule was intended to "encourage settlement and avoid protracted litigation"[94] in all cases. It was not supposed to be unfair in its operation by singling out one type of offeree for special treatment over another. Nevertheless, the Court has encouraged only the settlement of colorable claims while encouraging the litigation of frivolous claims.

Margaret M. Lyons

93. *See supra* text accompanying note 6.

94. 5 F.R.D. 433, 483 note (1946). *See supra* note 19 and accompanying text.