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To Sanction or Not to Sanction: Why Arguing Against the Court’s Precedent is Not an Automatic Rule 11 Violation according to Hunter v. Earth-Grains Co. Bakery

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TO SANCTION OR NOT TO SANCTION: WHY ARGUING AGAINST THE COURT'S PRECEDENT IS NOT AN AUTOMATIC RULE 11 VIOLATION ACCORDING TO HUNTER v. EARTHGRAINS CO. BAKERY*1

I. INTRODUCTION

Monetary sanctions, stricken pleadings, reprimand, or a five-year suspension from the practice of law—each is a potential punishment for violation of the Federal Rules of Civil Procedure Rule 11.2 Not to be taken lightly, a severe Rule 11 sanction can ruin an attorney's career. Even a minor Rule 11 sanction can devastate an attorney's reputation in the profession. Generally, Rule 11 provides that attorneys must avoid filing frivolous pleadings and have evidentiary support for all factual contentions.3 Violations of this "frivolous pleadings" rule can lead to monetary fines or sanctions by the court.4

What exactly does it take to warrant a fine or sanction, and what factors do appellate courts look at when evaluating a lower court's sanction on appeal? Hunter v. Earthgrains Co. Bakery provides answers to these questions and an excellent analysis of the Rule 11 sanctioning process.5 Hunter is distinctive among Rule 11 cases

* The author would like to thank Professor Thomas P. Anderson for his helpful insights regarding the civil procedure issues discussed herein.
2. FED. R. CIV. P. 11 provides, in pertinent part:
   (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,. . .(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
3. Id.
4. FED. R. CIV. P. 11(c)(2).
because the sanctioned attorney did not argue a false claim or frivolously pursue a material fact, but instead merely advocated against the precedent of the Fourth Circuit.6

II. HUNTER v. EARTGRAINS CO. BAKERY7

On February 24, 1997, Pamela A. Hunter, along with co-counsel N. Clifton Cannon and Charlene E. Bell, represented a group of bakery workers from Charlotte, North Carolina in a class action lawsuit against their employer, Earthgrains Company Bakery.8 This class action suit ("First Lawsuit") alleged that Earthgrains violated Title VII of the Civil Rights Act of 1964 and made fraudulent misrepresentations when closing its Charlotte bakery.9 Although plaintiffs filed suit in the Superior Court of Mecklenburg County, Earthgrains promptly removed the case to federal court in the Western District of North Carolina.10

After a narrowing of the issues, the crux of the plaintiffs’ class action suit was that: (1) "a pattern and practice of racial discrimination existed" at the Charlotte bakery; (2) the workers at the Charlotte bakery were "more skilled" and underpaid compared to workers at other Earthgrains’ locations; (3) the Charlotte bakery’s workforce was "predominantly African-American," while Earthgrains’ other bakeries employed predominantly white workers; and (4) Earthgrains represented the Charlotte bakery would remain open and subsequently closed the Charlotte location.11

Earthgrains denied these allegations and moved for summary judgment contending that its "Charlotte employees were bound to arbitrate their Title VII claims under their collective bargaining agreement ("Earthgrains CBA")."12 In response, plaintiffs asserted that the Earthgrains CBA "did not apply to the Title VII claims at issue."13 By the order entered April 22, 1998, "the district court awarded summary judgment to Earthgrains", concluding that plaintiffs were obligated to

6. See id.
7. Id.
8. Id. at 147-48.
9. Id. at 148.
10. Id.
11. Id.
12. Id. at 148. In its answer, Earthgrains also contended “that plaintiffs had failed to establish a prima facie case of racial discrimination; [and even if discrimination was shown,] plaintiffs had failed to rebut Earthgrains’ evidence of legitimate, nondiscriminatory reasons for closing its Charlotte bakery.” These contentions, while argued, are not pertinent to the Rule 11 issues.
13. Id.
arbitrate under the Earthgrains CBA. In addition, the district court
included a "sua sponte directive that plaintiffs' lawyers show cause
why Rule 11 sanctions should not be imposed for their conduct in the
First Lawsuit." On May 6, 1998, the plaintiffs' lawyers responded to
the Order, seeking reconsideration of the summary judgment decision
and requesting a stay of the Show Cause Order until the summary
judgment matter was resolved. On July 21, 1998, reconsideration of
the summary judgment was denied. Over the next two years, plain-
tiffs' counsel, Pamela Hunter, filed two additional lawsuits against
Earthgrains based on the same factual allegations. On April 21,
1999, the Fourth Circuit Court of Appeals affirmed the summary judg-
ment grant in favor of Earthgrains in the First Lawsuit.

Although seemingly resolving the issue of liability, from May 1998
to June 2000, no action was taken on the Show Cause Order. However, on June 16, 2000, Earthgrains filed a "Motion for Rule 11 Sanctions Pursuant to Show Cause Order" in district court. The motion asserted that even though the Fourth Circuit had affirmed Earthgrains' summary judgment motion, plaintiffs' lawyers still filed "two subse-
quent lawsuits on the same facts." On October 23, 2000, the district
court ruled on the motion, finding Hunter's, Cannon's, and Bell's
behavior to be in violation of Rule 11. As a result, Hunter was barred
from the practice of law in the Western District of North Carolina for
five years. The district court based its ruling on the facts that Hunter
argued contrary to the court's legal precedent set forth in Austin v.
Owens-Brockway Glass Container, Inc., had exercised a lack of judg-

14. Id. at 148-49 The district court also sided with Earthgrains, accepting the
proffered nondiscriminatory reasons for closing the Charlotte bakery and that plaintiff
failed to establish a prima facie case of discrimination.
15. Id. at 149.
16. Id.
17. Id.
18. Id. The second lawsuit, filed February 9, 1999, alleged the tort of fraudulent
misrepresentation and was voluntarily dismissed. The third lawsuit, filed May 3,
2000, again alleged fraudulent misrepresentation under state law and was remanded
to state court.
19. Hunter, 281 F.3d at 149.
20. Id. at 149.
21. Id.
22. Id.
23. Id. at 150. The order under review was Williams v. Earthgrains Co. Bakery,
24. Id. at 150. Attorneys Cannon and Bell received a reprimand instructing them
to "be conscious of and strictly abide by the provisions of Rule 11 in the future."
ment and skill, and had been sanctioned by the same court eleven years earlier. 25

III. FEDERAL RULE 11: APPELLATE STANDARD OF REVIEW AND POLICY

In Hunter, the Fourth Circuit considered the various policies supporting Rule 11 and the proper appellate review of a Rule 11 sanction. 26 Following existing precedent, the Fourth Circuit reviewed Hunter's Rule 11 sanctions under an abuse of discretion standard. 27 A district court abuses its discretion when it bases a ruling on an erroneous view of the law or a "clearly erroneous" view of the evidence. 28 Therefore, "an error of law by a district court is by definition an abuse of discretion." 29

The circuit court stressed that "the primary purpose of [Rule 11] sanctions against counsel is not to compensate the prevailing party, but to "‘deter further litigation abuse.'" 30 In fact, when monetary sanctions are enforced, the money should be paid to the court as a penalty, not to the opposing counsel who may have raised the Rule 11 issue. 31 At times, even a simple reprimand satisfies as a sufficient sanction. 32

The district court in Hunter failed to follow this policy of deterrence. 33 The district court's sanction was not "limited to what is sufficient to deter repetition of such conduct." 34 Given the facts of this case, even if Hunter's anti-precedent argument had warranted a Rule 11 sanction, the five-year bar from practice in the Western District of North Carolina was clearly excessive. The district court's sanction appeared punitive, going far beyond the intended Rule 11 policy of deterred repetition.

25. Id. See also, Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). The basic holding in Austin established that arbitration of Title VII and discrimination claims was mandatory under a collective bargaining agreement, an agreement to arbitrate was enforceable, and a plaintiff could not sue before attempting to arbitrate.

26. Hunter, 281 F.3d at 144.


28. Id.

29. Hunter, 281 F.3d at 150 (citing Cooter & Gell, 496 U.S. at 405; United States v. Pearce, 191 F.3d 488, 492 (4th Cir. 1999)).

30. Id. at 151 (quoting In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990)).


32. Id. In this case, a reprimand was given to Hunter's co-counsel in the First Lawsuit. Hunter was the only attorney who appealed the sanction. Thus, all discussion pertaining to the Rule 11 issues refers only to Hunter.

33. Hunter, 281 F.3d at 151.

34. FED. R. CIV. P. 11(c).
The procedures surrounding the filing of a Rule 11 motion also are aimed at a policy of deterrence, adding a safe harbor provision before filing.35 In Hunter, the circuit court focused heavily on the federally enacted twenty-one day "safe harbor" provision.36 Under the safe harbor provision, the movant must serve the offending counsel with a filing-ready motion, as notice, twenty-one days prior to filing the motion with the court.37 This notice period is intended to give the accused party time to correct their alleged misconduct before the Rule 11 motion is filed and sanctions are imposed.38 In fact, the Fourth Circuit so appreciates the benefits of the safe harbor rule that it cited with approval three other circuits (6th, 9th, and 10th) that recently mandated safe harbor compliance.39 By mandating the use of the safe harbor provision, the Fourth Circuit should help eliminate Rule 11 sanctions, as litigants can use the opportunity to amend any alleged misconduct prior to the imposed sanctions.

Critics of the safe harbor provision may contend that the provision encourages frivolous pleadings by providing undeserving attorneys with an escape hatch. However, the safe harbor also protects those attorneys who make good faith, but unfounded, pleadings, and does not by itself promote uninformed and ignorant advocacy. Further, an ethical attorney should not have his or her career ruined by a severe Rule 11 sanction simply because the attorney made an untimely mistake.

IV. FEDERAL RULE 11: TIMELINESS

Hunter raises serious issues surrounding the timeliness of Earthgrains' Rule 11 motion.40 The district court's Show Cause Order was issued in April 1998.41 However, the Sanctions Order was not issued until October 2000—a delay of two and a half years.42 While sanctions may be imposed when a case is no longer pending, the inordinate delay here contravened the rule's purpose.43 The clear purpose of Rule 11 is to deter further frivolous litigation claims by the sanctioned attor-
Rule 11 motions must be "served promptly after the inappropriate paper is filed, and, if delayed too long, [it] may be viewed as untimely." A two year-old warning regarding a Rule 11 infraction does little to convey the gravity of an attorney's actions. Hunter itself states that "although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate that there would be a lengthy delay prior to their imposition."

For example, in Simmerman v. Corino, the Third Circuit reversed a district court's Rule 11 sanction because the order was issued three months after the entry of final order. Similarly, in Prosser v. Prosser, the court followed Simmerman and invalidated a sanction entered thirty months after the final order. The Simmerman court echoed the policy discussion in Hunter. "[Rule 11] is ill served when sanctions are delayed. During the course of a delay, memories can fade and, importantly, attorneys and parties may continue to misbehave because they do not have the benefit of disciplinary guidance from the court."

In Hunter, Earthgrains waited fourteen months after the Fourth Circuit affirmed summary judgment before moving for Rule 11 sanctions. From April 1999 to June 2000, Earthgrains did nothing to pursue Rule 11 sanctions. The court in Kunstler established an obligation for one to "notify [its] opponent and the court of [its] intention to pursue sanctions at the earliest possible date." Not only did Earthgrains fail to pursue action at the earliest possible date, but its fourteen-month delay clearly was inexcusable when compared with the time period established in Simmerman. Accordingly, the Fourth Circuit found Earthgrains' delay inexcusable despite the fact that Hunter asserted no prejudice. The circuit court made clear that policy controls the rule, and Rule 11's "exemplary function is ill served when sanctions are delayed."

44. FED. R. Civ. P. 11.
45. Hunter, 281 F.3d at 152 (citing Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 384 (5th Cir. 1997)).
46. Hunter, 281 F.3d at 152 (citing Cooter & Gell, 496 U.S. at 398).
47. Simmerman v. Corino, 27 F.3d 58 (3rd Cir. 1994).
48. Prosser v. Prosser, 186 F.3d 403 (3rd Cir. 1999).
49. Prosser, 186 F.3d at 406.
50. Hunter, 281 F.3d at 152.
51. Id.
52. In re Kunstler, 914 F.2d 505, 513 (4th Cir. 1990).
54. Hunter, 281 F.3d at 152.
55. Hunter, 281 F.3d at 152 (citing Prosser, 186 F.3d at 405).
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V. FEDERAL RULE 11: SANCTION STANDARDS

The primary reason for the suspension of Hunter was "that she advanced a frivolous legal position in the First Lawsuit." The district court order found Hunter's legal assertions to be "utter nonsense" and "paradigmatic of a frivolous legal contention." The Fourth Circuit reiterated, however, that arguing a legal position is only actionable under Rule 11 if, under "reasonable objectiveness," a reasonable attorney in a similar position could not have believed the action to be legally justified. The Fourth Circuit described the Rule 11 reasonableness standard in In re Sargent when stating, "a legal position violates Rule 11 if it has absolutely no chance of success under the existing precedent." Thus, an attorney's argument can be ineffectively pled and quickly meet dismissal, but not merit a Rule 11 sanction.

The Hunter court pointed out that Rule 11 is not intended to "stifle the exuberant spirit of skilled advocacy" or limit a creative approach by ambitious counsel. Even the use of ambiguous or inconsequential facts may draw a dismissal, but not punishment. In full, only the absence of legal or factual basis, coupled with no reasonable objectiveness, will merit a Rule 11 sanction.

VI. MS. HUNTER'S SANCTION IN LIGHT OF FOURTH CIRCUIT PRECEDENT

The principle question raised in Hunter v. Earthgrains Co. Bakery was whether counsel's advocacy directly against the precedent of the Fourth Circuit was enough to merit a five-year suspension. The legal precedent at issue concerned the interpretation of collective bargaining agreements and whether they required arbitration of federal discrimination claims. The Fourth Circuit precedent on collective bargaining agreements was established through the court's holding in Austin v. Owens-Brockway Glass Container, Inc.

56. Id. at 153.
57. Id. at 152.
58. Id. at 153.
60. Hunter, 281 F.3d at 144.
61. Id. at 153.
62. Id.
63. Id.
64. See Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th Cir. 2002).
In Austin, the plaintiff filed suit, alleging violations of Title VII and the Americans with Disabilities Act. Defendant answered the suit claiming the two parties were bound under a collective bargaining agreement requiring the arbitration of all gender and discrimination based grievances. The Austin court held that specific language was not needed in collective bargaining agreements to mandate arbitration. As a result of Austin, the Fourth Circuit's precedent was as follows: (1) arbitration of Title VII and discrimination claims was mandatory under a collective bargaining agreement; (2) an agreement to arbitrate was enforceable; and (3) a plaintiff could not sue before attempting arbitration.

Reviewing the Hunter facts in light of the Austin holding, it seems clear that Hunter argued against established legal precedent, right? Well, not exactly. In light of recent case law and sister circuit holdings, the district court in Hunter failed in its research and analysis of the Fourth Circuit's precedent in this area. The Fourth Circuit, however, did research Hunter's claims and analyzed the established collective bargaining agreement precedent.

At the time the Show Cause Order was issued by the district court, the Fourth Circuit stood alone in its interpretation of the collective bargaining arbitration issue. On April 22, 1998, six circuits already held contrary to the Fourth Circuit's holding in Austin concerning whether a collective bargaining agreement could waive an employee's statutory right to raise a Title VII cause of action.

For example, the Second Circuit in Tran v. Tran reversed a prior decision that required arbitration, finding that the plaintiffs were not required to seek arbitration prior to presenting the merits of their claims in a lawsuit. The Sixth Circuit followed a similar course in Penny v. United Parcel Service, holding that "an employee whose only obligation to arbitrate is contained in a collective bargaining agreement retains the right to obtain judicial determination of his rights." In Varner v. National Super Markets, Inc., the Eighth Circuit allowed the

66. Id. at 877.
67. Id. at 877-81.
68. Hunter, 281 F.3d at 154 (citing Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996)).
70. See id.. See also Hunter v. Earthgrains Co. Bakery, 281 F.3d 144 (4th Cir. 2002).
72. Id.
73. Tran v. Tran, 54 F.3d 115 (2nd Cir. 1995).
plaintiff to pursue a Title VII claim in a judicial forum under an established collective bargaining agreement. The Seventh Circuit also rejected the Fourth Circuit's Austin decision and adopted the majority view in Pryner v. Tractor Supply Co. The Tenth Circuit joined the majority in Harrison v. Eddy Potash, Inc., holding that arbitration was not necessarily mandatory under a collective bargaining agreement containing an arbitration clause. The Eleventh Circuit followed suit in Brisentine v. Stone & Webster Engineering Corporation, holding that a "mandatory arbitration clause [in a collective bargaining agreement] does not bar litigation of a federal statutory claim." Finally, the Ninth Circuit held contrary to the Fourth Circuit in a 1998 decision, Duffield v. Robertson Stephens & Co. Duffield held in part "that under the Civil Rights Act of 1991 employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court." Ultimately, the Fourth Circuit stood alone in its position that plaintiffs were required to arbitrate their Title VII grievances under a collective bargaining agreement.

VII. THE CIRCUIT SPLIT: WHY IS THE FOURTH CIRCUIT ALL ALONE?

Further analysis than that provided in Hunter is necessary to fully understand the split in the circuits, why the Fourth Circuit stands alone in its interpretation, and how this all relates to the Rule 11 sanctions in Hunter. The legal precedent in controversy was whether collective bargaining agreements containing general language require arbitration of individual's statutory claims, such as those arising under Title VII and the Age Discrimination in Employment Act (ADEA). The interpretation of two United States Supreme Court cases created the initial split, Alexander v. Gardner-Denver Co. and Gilmer v. Interstate/Johnson Lane Corp.

Alexander involved an African-American employee who filed a grievance over the nondiscrimination clause in his collective bargaining agreement after being fired. An arbitration hearing was held, but

76. Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997).
77. Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997).
80. Id. at 1190.
81. Hunter, 281 F.3d at 154.
Alexander's grievance was denied without any mention of the discrimination claim. Alexander subsequently filed a Title VII action based on the facts of his discrimination grievance. Upon reaching the United States Supreme Court, the Court reasoned that Alexander's statutory right to trial under Title VII was not deterred by his earlier submission to arbitration. The Court found that "in enacting Title VII, Congress had granted individual employees a nonwaivable public law right to equal employment opportunities that was separate and distinct from the rights created through collective bargaining." Because Congress granted access to the courts and because arbitration procedures provided an inadequate arena for the enforcement of Title VII rights, the Court found that disputes regarding such rights should be heard by the courts.

Gilmer was heard seventeen years later and involved Gilmer's employment as a manager of financial services. As part of his employment, Gilmer signed a provision agreeing to arbitrate any disagreement that arose under New York Stock Exchange rules. The rules provided for arbitration dealing with termination of employment between a registered representative (Gilmer) and a member organization (Interstate/Johnson Lane). Because Gilmer was 62-years old at the time of his termination, he alleged a violation of the ADEA. Upon reaching the United States Supreme Court, the Court held that Gilmer was obligated to arbitrate his claim and rejected Gilmer's contentions that arbitration would deprive him of access to the courts under Alexander. However, the Court distinguished Gilmer from Alexander, noting that Alexander's arbitration provision was contained in a collective bargaining agreement while Gilmer's was merely contained in an individual application for registration as a securities dealer.

By understanding the facts of Alexander and Gilmer, it becomes apparent where the Fourth Circuit strayed in its application and interpretation of the two cases. The split arose as circuits decided whether

84. Id. at 42.
85. Id. at 43.
86. Id.
90. Id. at 23.
91. Id.
92. Id. at 23-4.
93. Id. at 35.
Gilmer overruled Alexander. Only the Fourth Circuit, through its Austin decision, interpreted Gilmer as controlling, and, thus, is the only circuit that requires compliance with a collective bargaining agreement's arbitration clause before filing suit in federal court. All other circuits continue to follow Alexander and allow for judicial review of Title VII or AEDA claims regardless of arbitration clauses within collective bargaining agreements. In Bitner v. Burlington Northern, a district court from the Tenth Circuit held that, "there is nothing in Gilmer to suggest that the Court abandoned or even reconsidered its efforts to protect individual statutory rights from the give-and-take of the collective-bargaining process."

Why did other circuits find so differently from the Fourth Circuit? It appears that the majority of courts recognized the context in which the Alexander and Gilmer arbitration clauses arose. In Alexander, the arbitration clause was contained in a collective bargaining agreement, while in Gilmer, the clause arose out of an individual application. The key factor the majority of courts realized is that a collective bargaining agreement contains the concerns of a group as a whole. Therefore, a conflict could easily surface between union interests and individual interests. Thus, the collective bargaining agreement "seeks to vindicate [one's] contractual right[s]... but does not assert [one's] 'independent statutory rights accorded by Congress.'" According to the majority, individuals in a collective bargaining agreement remain free to have their individual statutory rights tried by a court. In contrast, Gilmer signed an individual employment contract, not a collective bargaining agreement. As a result, Gilmer bound both his contractual and individual statutory rights under the single individual employment contract.

95. Harrison v. Eddy Potash, Inc. 112 F.3d 1437 (10th Cir. 1997).
96. Id. at 1453.
97. Id.
99. Harrison, 112 F.3d at 1453.
100. Id.
102. Harrison, 112 F.3d at 1454 (quoting Alexander, 415 U.S. at 94).
104. Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Brisentine v. Stone & Webster Eng’g Corp., 117 F.3d 519 (11th Cir. 1997).
Evidently, the Fourth Circuit did not view the contextual differences between *Gilmer* and *Alexander* as warranting a distinction between the two cases. As a result, the Fourth Circuit fully adopted the *Gilmer* decision and enforced arbitration clauses for all agreements, both collective and individual.\(^{105}\) Meanwhile, other circuits recognized that the context of an arbitration clause is determinative of whether individual statutory rights must be arbitrated or tried by the courts.

**VIII. Analysis of Hunter's Sanction**

Hunter was sanctioned by the district court for arguing against the Fourth Circuit's precedent regarding arbitration clauses within collective bargaining agreements.\(^{106}\) At oral argument, Hunter relied on the Supreme Court's holding in *Alexander*.\(^{107}\) However, Hunter's argument was weakened significantly because she failed to argue that six other circuits already recognized *Alexander* as controlling.\(^{108}\) What Hunter argued was that the general language of the arbitration clause was not sufficiently specific to require arbitration.\(^{109}\)

Unconvinced by Hunter's arguments, the district court agreed with Earthgrains that the collective bargaining agreement's language "not to illegally discriminate" compelled arbitration of the Title VII claim under *Austin*.\(^{110}\) Thus, the district court based its suspension of Hunter largely on the legal contention held in *Austin*.\(^{111}\) The Fourth Circuit, however, through investigation of the legal precedents at hand, recognized a "good faith basis for Ms. Hunter to assert the position she propounded."\(^{112}\) In light of the sister circuits' contrary holdings, the Fourth Circuit recognized that Hunter's legal claims had a possibility of success under existing case law.

Hunter's stance was supported further by a subsequent United States Supreme Court decision.\(^{113}\) On November 16, 1998, the Supreme Court decided in *Wright v. Universal Maritime Service Corporation* that for a collective bargaining agreement to waive an individual's statutory claims, the agreement must "contain a clear and
unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination."114 The Supreme Court further held that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective bargaining agreement]."115 However, the biggest development supporting Hunter's argument was the Court's holding that the Wright decision explicitly distinguished Gilmer.116 In Wright, the court noted that the Gilmer holding reflected an individual's waiver of individual rights, rather than a union's waiver of the rights of represented employees.117 Interestingly, this was the exact distinction recognized by the majority of circuit courts prior to Wright. As a result of Wright, the district court in Hunter was not only following a legal position held uniquely by the Fourth Circuit, it was advocating a legal precedent in direct conflict with the United States Supreme Court.118

Through the combination of these factors, Hunter was clearly "entitled...to maintain that Austin was incorrectly decided."119 Also, a district court abuses its discretion if it bases its ruling on "an erroneous view of the law."120 The district court abused its erroneously applied the law that led to the sanctioning of Hunter.121 The Fourth Circuit stated that despite Hunter's weak advocacy, which ignored the circuit court split and the Wright decision, Hunter's lack of thoroughness did not render her legal position frivolous.122 The fact that Hunter's advocacy was unconvincing does not dispel the fact that her case was well-grounded and, thus, undeserving of court sanction under Rule 11.123

114. Id. at 155 (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 82 (1998)).
116. Id.
117. Id.
118. Hunter, 281 F.3d at 155-56. Of interest is that amidst the litigation of Rule 11 sanctions and precedent arguments in Hunter, the Fourth Circuit in Carson v. Giant Food Inc., 175 F.3d 325 (4th Cir. 1999), actually followed suit with Wright holding that general language is not enough under a collective bargaining agreement to waive access to the courts when asserting individual statutory discrimination claims. Although Ms. Hunter's First Lawsuit brought in 1997 is not cited in Carson, perhaps it helped the Fourth Circuit realize a need for change in its precedent.
119. Hunter, 281 F.3d at 156.
120. Cooter & Gell, 496 U.S. at 405 (1990).
121. Hunter, 281 F.3d at 156-57.
122. Id. at 157.
123. Hunter, 281 F.3d at 144.
The Fourth Circuit concluded by dispelling Earthgrains' contention that Hunter's sanction should stand because she filed the two additional lawsuits relating to the case after summary judgment.\footnote{124} The Fourth Circuit followed the policy behind Rule 11 when it stated that "Rule 11 sanctions are properly applied only to cases before the court, not to cases in other courts."\footnote{125} Thus, the Fourth Circuit had no say in whether Hunter's other lawsuits merited any Rule 11 attention. The court also discredited the district court's assertion that Hunter exercised a lack of judgment and skill.\footnote{126} Except for the collective bargaining dispute, the court found no other area where Hunter could be charged with lack of judgment and skill, and since Hunter was found to be correct in her assertion of the arbitration issue, there was no deficiency.\footnote{127} Finally, the Fourth Circuit addressed the district court's finding that a previous 1989 sanction involving Hunter rendered support for its sanction decision.\footnote{128} The court held that since the first lawsuit warranted no cause for sanctions, the prior sanction was irrelevant to the present case.\footnote{129} Consequently, the Fourth Circuit vacated Hunter's suspension from practice in the Western District of North Carolina.\footnote{130}

IX. NORTH CAROLINA VS. FEDERAL RULES: THE EFFECT OF HUNTER'S REMOVAL TO FEDERAL COURT

Early in the case, Earthgrains removed the case from the Superior Court of Mecklenburg County to federal court in the Western District of North Carolina.\footnote{131} While the removal was most likely a routine request to obtain a neutral forum, the effect of removal resulted in different interpretations of the Rule 11 issues in Hunter. The removal changed the interpretation of Rule 11 because the North Carolina Rules of Civil Procedure Rule 11 and the Federal Rules of Civil Procedure Rule 11 are different in several aspects.\footnote{132}

Perhaps the greatest Rule 11 difference, and one that impacted Hunter, is the standard by which an attorney's argument is reviewed.

\footnote{124. Id.}
\footnote{125. Hunter, 281 F.3d at 157 n.19 (quoting Woodard v. STP Corp., 170 F.3d 1043, 1045 (11th Cir. 1999)).}
\footnote{126. Hunter, 281 F.3d at 157.}
\footnote{127. Id.}
\footnote{128. Id. In Lyles v. K Mart Corp., Hunter was sanctioned for failure to conduct an adequate prefiling inquiry under Rule 11. 703 F. Supp. 435 (W.D.N.C. 1989).}
\footnote{129. Hunter, 281 F.3d at 157.}
\footnote{130. Id.}
\footnote{131. Id. at 147.}
\footnote{132. FED. R. CIV. P. 11; N.C. R. CIV. P. 11.}
Under the Federal Rules of Civil Procedure, a court views counsel's argument under a "non-frivolous" standard. 133 "Non-frivolous," as interpreted by courts, is an objective standard that asks what a reasonable attorney in like circumstances would have believed to be legally justified. 134 The district court viewed Hunter's argument based on what it believed a reasonable attorney would have done in light of the bakery workers' position against Earthgrains.

However, under the North Carolina Rules, counsel's argument is viewed with a subjective standard of good faith compliance. 135 The language of the North Carolina rule states that an attorney must believe that "to the best of his knowledge, information and belief . . . [that his argument] . . . is well grounded in fact and is warranted by existing law." 136 Essentially, North Carolina abides by the "empty-head pure-heart" analysis for its Rule 11 sanctions. 137 This subjective standard means that so long as an attorney honestly believes that his or her argument is legitimate, Rule 11 sanctions will not follow. 138 Thus, North Carolina reviews the specific attorney's beliefs, while the federal assessment views the issue from a reasonable attorney's perspective. Had her case remained in state court, Hunter likely would have satisfied the North Carolina subjective standard.

When viewed in comparison to the Federal objective standard, the ineffectiveness of the North Carolina subjective standard is exposed. The North Carolina rule appears to allow virtually any pleading to pass without Rule 11 punishment. Such a lenient subjective standard works against the policy of Rule 11.

North Carolina is less able to deter frivolous pleading because its subjective standard establishes such a low bar, which allows attorneys to escape sanctions. Moreover, how does a court determine that an attorney actually has an "empty-head, pure-heart pleading?" North Carolina should consider examining the policy behind Rule 11 to determine whether an objective standard would better serve the rule's purpose.

Another Rule 11 difference that surfaced in Hunter was the appellate court standard of review. Under the federal system, all Rule 11

sanctions are reviewed on appeal using an abuse of discretion standard of review. In contrast, North Carolina Rule 11 sanctions are reviewed using a de novo standard. Because of this, the Fourth Circuit is much less likely to overturn a trial court's holding than is the North Carolina Court of Appeals. However, Hunter provided a very unique case, since "an error of law is by definition an abuse of discretion." Hunter provides a rare example of where the abuse of discretion standard can produce a reversal of the district court.

Yet another difference between Federal and North Carolina Rule 11 is that North Carolina does not provide for a twenty-one day safe harbor period. Ordinarily, Federal Rule 11 requires compliance with the twenty-one day safe harbor provision, however, Hunter is an example where the federal rules do not require compliance with the safe harbor provision. In federal cases, any Rule 11 accusation made by the court sua sponte in the form of a Show Cause Order does not require satisfaction of the twenty-one day safe harbor rule. The reasoning is simple. The purpose of the safe harbor provision is to allow the attorney to remedy any alleged misconduct before the opposing side files a motion with the court. When a Rule 11 action is initiated sua sponte, however, the issue is already before the court and a safe harbor time period is unnecessary. As stated in Sutton v. American Federation, "the 21 day safe harbor provision does not apply to those situations where the court sua sponte issues a Rule to Show Cause." The Hunter court agreed, declaring that "a sua sponte show cause order deprives a lawyer against whom it is directed of the mandatory twenty-one day 'safe harbor' provision." Therefore, despite the fact that North Carolina has no safe harbor and the Federal Rules enact the protective provision, Earthgrains' removal to federal court made no dif-

141. Hunter, 281 F.3d at 150.
142. Fed. R. Civ. P. 11 advisory committee's notes. In Hunter, the sua sponte order refers to the court itself recognizing the need for Rule 11 discussion and sanctions, not the opposing party. While in Hunter the opposing counsel did themselves raise a Rule 11 motion, their motion was based off the district court's original sua sponte Show Cause Order. Earthgrains' motion was entitled, "Motion for Rule 11 Sanctions Pursuant to Show Cause Order."
145. Id.
146. Hunter, 281 F.3d at 151.
ference in *Hunter*, as the sua sponte order caused the existence of a safe harbor to be irrelevant.147

A final distinction between Federal and North Carolina Rule 11 is the “may” versus “shall” distinction.148 Once a federal court determines that an attorney has violated Rule 11, the court “may . . . impose an appropriate sanction.”149 Once a North Carolina state court establishes a Rule 11 violation, however, the rule mandates that “the court . . . shall impose . . . an appropriate sanction.”150 Accordingly, even after a clear Rule 11 violation, federal courts still have discretion whether to administer sanctions;151 once a North Carolina court establishes a Rule 11 violation, it is required to administer the appropriate sanction.152 *Hunter* did not demonstrate the “may” versus “shall” distinction, as the district court administered Hunter’s sanction despite the option not to under the federal “may” standard.153

While the North Carolina and Federal Rules of Civil Procedure Rule 11 differ, the distinctions expose a well-thought-out structure for both jurisdictions. Initially, the North Carolina “shall” sanction language appears harsh given the damage a Rule 11 sanction can do to an attorney’s career.154 To mitigate this harshness, North Carolina reviews such sanctions with a de novo standard of review.155 At the appellate level, the sanctioned attorney is afforded a full review of the facts surrounding the sanction and has the opportunity to have the sanction overturned.156 On the other hand, while the federal “may” language only serves to sanctions some, the appellate courts effectively rubber-stamp sanctions using an abuse of discretion standard of review.157 Thus, Federal Rule 11 filters sanctions at the trial court level with its “may” language, while North Carolina Rule 11 filters sanctions at the appellate level with a de novo standard of review.158 Although pieces of the North Carolina or Federal Rule 11 may appear

149. FED. R. CIV. P. 11(b)(c).
150. N.C. R. CIV. P. 11(a).
151. FED. R. CIV. P. 11.
152. N.C. R. CIV. P. 11.
153. See *Hunter v. Earthgrains Company Bakery*, 281 F.3d 144 (4th Cir. 2002); FED. R. CIV. P. 11.
158. FED. R. CIV. P. 11; N.C. R. CIV. P. 11.
better than the other, when viewed as a whole, the two rules serve essentially the same purpose.

X. **Precedent: Is Arguing Against A Court's Established Opinion Wrong?**

Throughout *Hunter*, the court analyzed whether a court's established precedent is open to discussion.\(^{159}\) Although the district court treated Hunter's precedent challenge as taboo, the Fourth Circuit investigated areas both within and outside of the court's precedent, opening the issue for discussion.\(^{160}\) In conjunction with its decision to vacate Hunter's sanction, the Fourth Circuit approved the analysis of its sister circuits, stating "Ms. Hunter under Rule 11(b)(2) was plainly entitled to maintain [her position]."\(^{161}\) What the Fourth Circuit did was open its analysis to include positions both inside and outside of the Fourth Circuit's precedent.

In fact, in a previous decision, the Fourth Circuit found directly in favor of valid precedent challenges.\(^ {162}\) In *Blue v. United States Department of the Army*, the Fourth Circuit found that "the fact that a civil rights litigant pressed a legal position which courts had previously rejected was not thought to constitute a species of sanctionable conduct."\(^ {163}\) The language in *Blue* speaks directly to the Hunter's situation, as both cases dealt primarily with a Title VII violation.\(^ {164}\) *Blue* went on to support arguments against precedent by citing the famous United States Supreme Court case, *Brown v. Board of Education*.\(^ {165}\) The *Blue* court reasoned that had precedent been absolute, counsel who brought the case in *Brown v. Board of Education* might have been thought to engage in sanctionable conduct by arguing a claim in direct conflict with the established precedent in *Plessy v. Ferguson*.\(^ {166}\) Imagine how the landscape of American society would have suffered had the Supreme Court in *Brown* stuck stubbornly to the Court's precedent in *Plessy*.

Another important factor affecting precedent is the dynamic nature of cultures and citizens. Precedent established by one genera-

\(^{159}\) See generally Hunter v. Earthgrains Co. Bakery 281 F.3d 144 (4th Cir. 2002).
\(^{160}\) Id.
\(^{161}\) Id. at 157.
\(^{162}\) Blue v. United States Dep't of the Army, 914 F.2d 525 (4th Cir. 1990).
\(^{163}\) Id. at 534.
\(^{164}\) See id.; *Plessy v. Ferguson*, 163 U.S. 537 (1896).
tion often speaks directly against the best wishes of a later generation. For example, neither the Brown decision, nor the entire civil rights movement, would likely have occurred but for the United States Supreme Courts' willingness to assess and reverse its established precedents. "Merely because the authorities at a particular point in time believed an argument [to be] frivolous is no reason it should not be asserted." 167

XI. CONCLUSION: DOES HUNTER MAKE GOOD CASE LAW FOR THE FOURTH CIRCUIT?

Upon review, Hunter establishes excellent case law for a number of reasons. Principally, Hunter illustrates that a court's precedent is not supreme and can be open to debate. However, Hunter still alerts counsel to the fact that a precedent argument must be legitimate and, under the Federal Rules, "non-frivolous." 168 The effect of Hunter leaves open the opportunity for zealous advocacy, yet still enforces the intended policy of Rule 11.

Secondly, Hunter establishes a thorough record of the Fourth Circuit's struggle with collective bargaining agreements and individual statutory rights. Taken in conjunction with the recent Carson v. Giant Food, Inc. holding, Hunter will help join the Fourth Circuit with the majority, thus eliminating all future uncertainty regarding individual rights under a collective bargaining agreement.169

Third, the decision in Hunter illustrates several procedural issues regarding Rule 11. Perhaps most noteworthy are the explanation of sua sponte show cause orders and the analysis of Rule 11 sanctions using the abuse of discretion standard of review. Furthermore, because the case was removed, Hunter provides a contrast between the North Carolina and Federal Rule 11 standards.

In Hunter, the Fourth Circuit analyzed and reversed a Rule 11 sanction, helped clarify Fourth Circuit precedent, and opened the door for valid precedent challenges in the future. Ultimately, Hunter v.

168. FED. R. Civ. P. 11 advisory committee's notes. In Smith v. Blue Cross & Blue Shield United, the Seventh Circuit actually affirmed an attorney's Rule 11 sanction because his argument against precedent was overtly frivolous in relation to Seventh Circuit precedent. 959 F.2d 655 (7th Cir. 1992).
Earthgrains Co. Bakery illustrates the dynamic nature of case law and the duty of the courts to understand when the time is ripe to alter precedent.

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