

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of May, two thousand nine.

PRESENT: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE REENA RAGGI,
Circuit Judges,
HONORABLE JANE A. RESTANI,
*Judge.**

WILLIAM T. PERKS,
Plaintiff-Appellant,
v.

TOWN OF HUNTINGTON** and
SUSAN SCARPATI-REILLY, as Councilwoman for
the Town of Huntington and Individually,

No. 08-2123-cv

Defendants-Appellees.

* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

** The Clerk of Court is directed to amend the official caption in this case as noted to reflect the correct name of Defendant-Appellee Town of Huntington.

APPEARING FOR APPELLANT: EDWARD J. YULE, Northport, New York.

APPEARING FOR APPELLEES: ERNEST R. STOLZER, Bond, Schoeneck & King, PLLC, Garden City, New York.

Appeal from the United States District Court for the Eastern District of New York
(Joanna Seybert, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND
DECREED that the amended judgment of the district court, entered on March 31, 2008, is
AFFIRMED.

In this employment discrimination action, plaintiff William T. Perks appeals from that part of a judgment requiring him to pay the costs of defendants Town of Huntington and Susan Scarpati-Reilly in procuring a shared, single copy of daily trial transcripts, an amount totaling \$50,668.32. We review a district court's order taxing costs pursuant to Federal Rule of Civil Procedure 54(d)(1) for abuse of discretion. See Whitfield v. Scully, 241 F.3d 264, 269 (2d Cir. 2001). In doing so, we assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

Perks argues that the district court abused its discretion because daily trial transcripts were unnecessary for defendants' use in the case. See 28 U.S.C. § 1920(2) (providing that "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case" may be taxed); E.D.N.Y. R. 54.1(c)(1); Galella v. Onassis, 487 F.2d 986, 999 (2d Cir.

1973) (holding that award of “premium cost of daily transcripts” requires showing of “necessity – beyond the mere convenience of counsel”). Because the district court’s finding of necessity is reasonably supported by the record, we identify no abuse of discretion in the challenged award. See Perks v. Town of Huntington, No. 99 Civ. 4811, at 9 (E.D.N.Y. Mar. 31, 2008) (identifying “extraordinary circumstances” supporting procurement of daily transcripts).

The record indicates that both the district court and defendants relied extensively on daily transcripts to determine which documents had been admitted into evidence, to recall prior testimony, to resolve confusion over plaintiff’s legal theories, and to prepare the jury charge. See Syracuse Broad. Corp. v. Newhouse, 319 F.2d 683, 690 (2d Cir. 1963) (concluding no abuse of discretion in award of daily transcript costs in light of “blurred issues” and “mass of evidence” introduced). Defendants also depended on daily transcripts during cross examination to impeach Perks’s credibility, a crucial issue in this case. Under these circumstances, detailed more specifically in the district court’s 16-page memorandum, we identify no error in the factual finding that daily trial transcripts were “necessarily obtained” by defendants “for use in the case.” 28 U.S.C. § 1920(2).

Perks nevertheless contends that the district court abused its discretion by failing to take account of his limited financial means when taxing the costs of the daily trial transcripts. Specifically, he argues that his trial testimony concerning his post-retirement expenses was

sufficient to demonstrate financial hardship. We are not persuaded. “[I]ndigency per se does not automatically preclude an award of costs,” and “the losing party has the burden to show that costs should not be imposed.” Whitfield v. Scully, 241 F.3d at 270. Perks has not met that burden where the only evidence to support his claim of financial hardship is testimony that he is retired and incurs an unspecified amount of expenses.

Finally, Perks submits that taxation of costs should be “sparingly approved” where a plaintiff brings non-frivolous claims of sexual harassment. Pl. Br. at 19. We decline to recognize such a claim-based exception to the general rule of governing cost awards. See Whitfield v. Scully, 241 F.3d at 270 (“[B]ecause Rule 54(d) allows costs ‘as of course,’ such an award against the losing party is the normal rule obtaining in civil litigation, not an exception.”). The district court having specifically found that daily transcripts were necessary for use during trial, and that finding being supported by the record, we identify no abuse of discretion in the challenged award.

We have considered Perks’s other arguments on appeal and conclude that they are without merit. Accordingly, we AFFIRM the amended judgment of the district court.

FOR THE COURT:
CATHERINE O’HAGAN WOLFE, Clerk of Court

By: _____