IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 15-10583

BYRON STEVEN WILLIS,

Petitioner-Appellant

versus

PUBLIX SUPER MARKETS, INC.,

Respondent-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA (TAMPA DIVISION)

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure, Appellant submits that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) Byron Steven Willis (Appellant)

2) Patrick Michael Megaro, Esq. (Attorney for Appellant)

3) Appeals Law Group (law firm representing Appellant)

4) Luis A. Santos, Esq. (Attorney for Appellee)

5) Tammie L. Rattray, Esq. (Attorney for Appellee)

6) Hon. James S. Moody, JR. (U.S. District Judge)

7) Hon. Thomas G. Wilson (U.S. Magistrate Judge)

/s/ Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument on this matter, as the claims raised in this appeal concern the breadth and scope of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. Accordingly, counsel believes that oral discussion of the facts and applicable precedent would assist the Court in determining a just resolution.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 636(c)(3), as an appeal from the granting of a summary judgment in the United States District Court for the Middle District of Florida, Tampa Division. A Notice of Appeal was timely filed in accordance with Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

This appeal brings up the following issues for this Court's review: (1) whether there were genuine issues of disputed material facts that precluded summary judgment where the District Court based its decision upon credibility determinations in favor of the Appellee's evidence over Appellant's evidence; (2) whether the lack of meaningful and complete discovery precludes summary judgment; and (3) whether Appellant set forth a legally sufficient claim of employment discrimination under Title VII of the Civil Rights Act.

STATEMENT OF THE CASE

This is an action for employment discrimination pursuant to Title VII of the Civil Rights Act of 1964. Appellant Byron Willis initially filed suit in the United States District Court for the Middle District of Florida, Tampa Division, raising several claims against his former employer, Appellee Publix Super Markets, Inc., as follows: Count I alleges discrimination based on race under Title VII of the Civil Rights Act of 1964 ("Title VII"); Count II alleges retaliation under Title VII; Count III alleges race discrimination under 42 U.S.C. § 1981 ("section 1981"); and Count IV alleges negligent training supervision, and retention.

Appellant Byron Willis appeals from an order of the United States District Court for the Middle District of Florida, Tampa Division, entered on January 26, 2015, granting summary judgment in favor of the Appellee, Publix Super Markets, Inc., and dismissing his case. Appellant timely filed a Notice of Appeal on February 10, 2015. (Document 33). This appeal follows.

STATEMENT OF THE FACTS

On or about October 29, 1996, Byron Willis began to work as a Publix employee at its Lakeland Return Center. (Document 24, PageID 98). In 1997, Willis sustained a work related injury to his lower back while working at the Lakeland Return Center. (Document 1, PageID 3). Willis continued to work fulltime and without restrictions. (Id.) In January 2000, Willis began to experience a hostile work environment; he began to receive minor, unmerited warnings and write-ups. (Document 1, PageID 3). During his nearly sixteen (16) years of employment with Publix, Willis never ascended above his initial starting pay for new hires at the Lakeland Return Center. (Document 1, PageID 3). During his tenure at Publix, he performed duties of several other positions with pay rates well over and above the starting position held by Byron Willis. (Id.) He also reported discriminatory conduct "all the time" because he was passed over for promotional opportunities based on his race. (Document 24, PageID 107). Since June of 2008, new management has oversaw the daily operations. (Document 24, PageID 107). Willis had reported the complaints to the former Distribution Managers James Driskell and Mark Shaia. (Document 24, PageID 107). James Driskell resigned on June 1, 2008. (Document 24, PageID 107). Mark Shaia was demoted and transferred to the Orlando Pharmacy Warehouse on May 1, 2011. Issues of why these parties no longer work at the Lakeland Return Center are not known at this time.

On or about August 2, 2012, Willis was given two oral counselings and a separate written reprimand stemming from an incident that occurred on July 21, 2012. (Document 6, PageID 28). Specifically, Willis was accused of damaging company property (Scrubber L9011) by running the Scrubber L0911 into a railing and into a garbage container which resulted in damage to both the scrubber and a garbage can. (Document 6, PageID 28). It was further alleged that Willis did not clean up the area properly nor did he report the incident. (Document 6, PageID 28). However, during the written disciplinary counseling Willis attempted to write on one of the statement forms that "this is not right," Jason Bamberger, the (Department Superintendent) pulled the paper from Willis' hand and said, ["I hear you like to fight these things. Human Resources have already been contacted, it will not do you any good."] (Document 1, PageID 3). After this incident, Willis contacted Support Associate Relations Specialist, Rina Harrell, on August 2, 2012, to discuss the Associate Counseling Statements. (Id.) Willis attempted to show the pictures to Harrell, but she refused to look at the pictures or physically visit the scene of the alleged incident. (Id.)

During the investigation into the matter, it was alleged that Willis had surreptitiously captured voice recordings of various investigatory meetings. (Document 24, PageID 103). Willis asked if he could speak with Harrell's supervisor but was told "No." (Document 24, PageID 103). On August 14, 2012,

Harrell met Willis at the warehouse to follow-up and continue the investigation into the Associate Counseling Statements. (Document 24, PageID 103). Harrell advised Willis that her supervisor agreed with the disciplinary action. On August 17, 2012, Bamberger, the (Department Superintendent) and Adams (Publix Warehouse Department Head) confronted Willis and instructed him to wait in Bamberger's office until he and Adams returned. (Document 24, PageID 104). Willis was asked if he recorded audio of previous conversations regarding the incident that occurred on August 2, 2012. (Id.) Willis denied having recorded any audio but admitted to taking photographs of the alleged damaged to the Scrubber and the area surrounding the scene of where this incident occurred. (Id.) Willis was also asked if he had his cell phone with him and he replied "yes." (Document 1, PageID 4). Willis then removed his phone from his pocket, turned it on and offered it to Bamberger and Adams for inspection. (Id.) However, Willis was informed by Bamberger and Adams that inspection was not necessary. (Id.)

Subsequently, Willis was terminated for allegedly violating Publix policy relating to dishonesty during the investigation into the Scrubber accident matter. (Id.) Willis has asserted that other people (non-blacks) have engaged in comparable conduct to that which serves as the basis for his termination.

Depositions were taken upon which Willis was unrepresented and there was no opportunity to inquire or cross-examine the Appellees (Publix Super Markets)

witnesses in regards to this case. Nor did Willis present any witnesses at the deposition.

SUMMARY OF ARGUMENT

The trial court erred in granting the Appellee's motion for summary judgment where discovery was incomplete, the District Court's decision was based upon a credibility determination in favor of the Appellee's evidence over the Appellant's evidence, and where Appellant established a prima facie case of discrimination.

As a result of the foregoing, summary judgment was premature and improper, and reversal is required.

ARGUMENT AND CITATIONS OF AUTHORITY

A. Standard of Review

A district court's order granting summary judgment is reviewed de novo. Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005). In undertaking such a review, the court "view[s] the record and draw[s] all reasonable inferences in the light most favorable to the non-moving party." Johnson, 405 F.3d at 1217. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Broad. Music, Inc. v. Evie's Tavern Ellenton, Inc., 772 F.3d 1254 (11th Cir. 2014).

B. Argument on the Merits

BECAUSE THERE WERE GENUINE ISSUES OF DISPUTED MATERIAL FACT, SUMMARY JUDGMENT WAS IMPROPER AS A MATTER OF LAW

A prerequisite for making a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is for the movant to establish that the undisputed facts entitle it to judgment as a matter of law. F.R.C.P. 56(a). Summary judgment is only appropriate where, viewing the evidence in the light most favorable to the non-moving party, "the record before the district court shows that there is no genuine issue as to any material fact" such that the movant is entitled to judgment as a matter of law. Welding Services, Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007). If there is any evidence in the record from which a reasonable inference could

be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper. Mize v. Jefferson City Board of Education, 93 F.3d 739, 743(11th Cir. 1996). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Hoffman v. Allied Corp., 912 F.2d 1379 (11th Cir. 1990).

A. The District Court Made a Credibility Determination in Crediting the Statements of Appellee's Witnesses Over the Appellant's Statements

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[I]n ruling on a motion for summary judgment, **"[t]he evidence of the nonmovant is to be believed**, and all justifiable inferences are to be drawn in his favor." Tolan v. Cotton, ___ U.S. ___, 134 S.Ct. 1861, 1863 (2014) (emphasis added), quoting Anderson, supra.

Here, the District Court failed to follow the mandate of the Supreme Court. Instead of crediting Appellant's (the non-movant) deposition testimony and his evidence, the District Court credited the evidence submitted by the moving party, the Appellee.

There is a genuine issue as to a material fact as to whether Willis made complaints of disparate treatment to supervisors in the past. Willis testified that he did make these complaints in the past. In response, the Appellee submitted evidence that no such records of any such prior complaints existed. Whether or not Appellant made such prior complaints was a disputed issue of material fact, and a credibility determination, one which the District Court resolved in favor of the Appellee.

In ruling against Appellant, the District Court held that "Willis has offered no credible evidence to call into question the truth of Publix's proffered reason. More important, Willis has pointed to no credible evidence that Publix's true reason for terminating Willis was based on Willis' race." (Document 28, PageID 362).

Because the District Court's determination rested upon a credibility determination, an issue that could only be resolved by the trier-of-fact at trial, this Court should reverse and remand.

B. Because Discovery Was Incomplete, Appellant Was Denied the Opportunity to Develop Evidence to Present In Opposition to Summary Judgment; As a Result, Summary Judgment was Premature

This Court has held that where an order granting summary judgment is based upon an incomplete record because discovery has not been completed, reversal is required. See Baron Services, Inc. v. Media Weather Innovations, LLC, 717 F.3d 907 (11th Cir. 2013); Smith v. Florida Department of Corrections, 713 F.3d 1059 (11th Cir. 2013).

Here, Appellant, a pro se litigant, twice sought to compel discovery in the District Court. (Document 20, PageID 82, Document 22, PageID 90). A review of those motions indicate that he information that Appellant sought was highly relevant; he requested his personnel files, his co-workers personnel files, telephone records, his own time card records, and various other records pertaining to his claims of discrimination. Both times, the District Court denied his motion, leaving this pro se litigant at an extreme disadvantage. Having denied his requests for relevant and discoverable material, the District Court then went on to rule that because Appellant failed to present supportive evidence of his claims, summary judgment was warranted, a theme repeated several times throughout its decision. (Document 28, PageID 360-364). This was erroneous, and requires reversal. See Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981) (holding that the district court abused its discretion, under the circumstances in that case, in failing to afford a pro se civil rights litigant a meaningful opportunity to remedy the defects in his summary judgment materials).

C. Appellant Presented Prima Facie Evidence of Discrimination So As to Warrant the Case to Be Submitted to the Trier of Fact

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Under 42 U.S.C. § 1981, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State ... to make and enforce contracts, to sue, be parties,

give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....” 42 U.S.C. § 1981(a), Coar v. Pemco Aeroplex, Inc., 372 Fed. App'x 1 (11th Cir. 2010).

A plaintiff may establish a prima facie case of discrimination through direct or circumstantial evidence. See Jackson v. Rooms To Go, Inc., 2008 WL 2824814, (M.D. Fla. 2008). A plaintiff must show that comparator employees are “involved in or accused of the same or similar misconduct” in order for those employees to be “similarly situated” to the plaintiff. Holifield v. Reno, 115 F.3d 1555 (11th Cir.1997). “If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present.” Coar v. Pemco Aeroplex, Inc., 372 Fed.Appx 1 (11th Cir. 2010).

Willis can (and did) show that he is (1) a member of a protected class; (2) he was subjected to an adverse employment action; (3) Publix treated similarly situated employees who are not members of Willis’ class more favorably; and (4) Willis was qualified for the job or job benefit at issue. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also Floyd v. Fed. Express Corp., 423 Fed. Appx. 924 (11th Cir. 2011); Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836 (11th Cir. 2000).

“Where the evidence does not fit neatly into the classic prima facie case formula ... a prima facie case of disparate treatment can still be established by any proof of actions taken by the employer” that shows a “discriminatory animus,”

where "in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." Schoenfeld v. Babbitt, 168 F.3d 1257 (11th Cir.1999) (quotations and alteration omitted; Coar v. Pemco Aeroplex, Inc., 372 F. App'x 1 (11th Cir. 2010)).

Here, Appellant's position was that he was discriminated against and disciplined differently than other employees similarly situated, and this discipline was in retaliation for complaining about discriminatory treatment. At his deposition, Appellant identified at least two other employees who engaged in the same conduct as Appellant, but were not treated similarly. Appellant also asserted that his disciplinary actions were the result of retaliatory treatment based upon his complaints and his prior back injury. Accordingly, he set forth a prima facie claim of employment discrimination that should have gone to a jury. This Court must reverse as a result.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, this Court should reverse the order of the District Court granting summary judgment in favor of the Appellee, and remand this case with instructions to deny the motion for summary judgment, order further discovery, and grant such other and further relief as this Court may deem just, proper and equitable.

Dated: Orlando, Florida
April 20, 2015

/s/ Patrick Michael Megaro
Patrick Michael Megaro, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font. The word count of this brief is 3,268 words.

/s/ Patrick Michael Megaro
Patrick Michael Megaro, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties via CM/ECF on April 20, 2015.

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