No. _____

In the Supreme Court of the United States

Burdette D. Lowe,
Petitioner,

v.

Delta Airlines Inc.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Burdette D. Lowe, *pro se*
P.O. 92421
Atlanta, GA 30314
(678)570-7721

QUESTIONS PRESENTED

INTRODUCTION STATEMENT

I alleged I was fired after I retired. The Defendant admitted they terminated me after I retired; in their Appeal Response Brief. The Appeal Court issued a sua sponte dismissal citing failure to state a claim and failure to request to amend the complaint. Under 42 U.S. Code §12203 ADA and Section 2000e-3(a) of Title VII it is unlawful for an employer to retaliate against an employee for opposing employer's unlawful action or participating in the EEOC process.

Article VI Clause 2 of the U.S. Constitution established the "Constitution and laws of the United States...shall be the supreme law of the land...and the judges in every state shall be bound thereby..."

Federal Rules of Civil Procedure (FRCP) Rule 1 provides, "These rules govern the procedures in all civil actions and proceedings in the U.S. district courts...They should be construed, administered, and employed by the court and the parties...of every action and proceeding."

The Due Process clause of the Fourteenth Amendments provide U.S. Citizens substantive and procedural due process protection that assures courts operate within the law and provide fair procedures.

In *Lytle v. Household Manufacturing, Inc.* this Court unanimously ruled that when factually overlapping 'legal' and 'equitable' claims are joined together in the same action, the Seventh Amendment requires that the former be adjudicated first (by a jury); and that when legal claims triable to a jury are erroneously dismissed,

relitigation of the entire action is "essential to vindicating the [plaintiff's] Seventh Amendment rights." *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990).

The Supreme Court held "[*P*]*rima facie*...is an evidentiary standard, not a pleading requirement...This Court has never indicated that the requirements for establishing a *prima facie* case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

When deciding the viability of an ADA *pro se* disability-related occupational injury civil complaint under a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, The Questions Are:

1. Whether it is proper for lower courts to issue dismissal decisions by omitting essential facts and misconstruing factual allegations, and creating decisions not supported by the record. And do they have the authority to create a new pleading standard, and use criteria, and arguments that are contrary to Federal Rules of Civil Procedures, Supreme Court precedents, Federal Laws, and Equal Employment Opportunity Commission Guides and Manuals.
2. Whether it is proper for Appeal Courts to ignore a defendant's admission of committing a wrongdoing alleged. And whether frivolous motions to dismiss are proper instead of answering the complaint as FRCP Rule 12(b) requires.
3. Whether it is proper for decisions that are contrary to Federal authorities be unpublished and elude review. And whether such decisions commit or give the appearance of fraud upon the Court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decisions of the United States Court of Appeals for the Eleventh Circuit decided on April 4, 2018. A timely filed Petition for Rehearing *en banc* was denied on June 6, 2018. A copy of the Order denying rehearing appears at Appendix D.

Jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED – PLEASE SEE APPENDIX M the Primary Statues are:

Title VII Civil Rights Act of 1964 as Amended and Americans With Disabilities Act (ADA) as Amended in the U.S.C. Vol. 42 Section 2000e

STATEMENT OF THE CASE

A. Brief History

I was an excellent Flight Attendant with multiple commendations from passengers and fellow employees and had perfect attendance. On April 22, 2006 I sustained a disability-related occupational injury known as Occupational Induced Asthma-Reactive Airways Dysfunction Syndrome (R.A.D.S) that resulted from inhaling toxic chemicals from a halon fire extinguisher (red bottle) that subsequently caused Post Traumatic Stress Disorder (PTSD), depression, and anxiety. Because of the accident, I am no longer able to breathe without fear, my sleep is disrupted, concentrating is difficult, and other manifestations affect my well-being. Shortly after the accident, the Defendant refused to allow me to go to the Mayo Clinic to the only expert I was able to find who knew about R.A.D.S. In December 2006 my mental health provider took me off work. In 2007, I began a contractual five-year Medical Disability Leave.

In January 2012 the Defendant required me to return to full-duty or face termination at the end of the leave. A short time later, the Defendant wanted me to resign during a mediation conference. I asked them to consider reasonable accommodation or retirement they denied both requests. I went home devastated to face the pending termination.

After the Defendant's refusal to initiate a reasonable accommodation process was included in F. Williams', the Minnesota QRC (Qualified Rehabilitation Consultant) monthly report to the MN Department of Labor Worker's Compensation Division, the Defendant allowed the reasonable accommodation interactive dialog. I

wrote a letter to the R. Anderson, the CEO asking for intervention to cease what I perceived as harassing behavior because of constant misinformation and distortions of the truth and the effect on my compromised psychological condition.

I wrote to Mr. Anderson a few times in 2012 and another in 2013, however, nothing changed. The distortion of facts/harassment/retaliation have continued into these proceedings. My mental health provider, Dr. T. Orme as well as my request for his participation in the reasonable accommodation interactive process were denied. My request for an advocate to participate was also denied. Thus, in May 2012 I was required to participate alone with six individuals representing the Defendant's interest. In June 2012, only days after learning of Dr. Orme's untimely death I was required to participate in the second, and the last interactive process the Defendant allowed, this time with five people representing the Defendant's interest.

The Defendant wanted me to disregard Dr. Orme's instructions as well as compete for jobs outside my department, they refused my request for access to consider non-flying special assignment Flight Attendant positions. During the meeting I became overwhelmed and broke down crying. Shortly after that day, the Defendant agreed to allow time for me to find a new mental health provider.

In August I notified the Defendant of the new mental provider, Dr. E. Fresh. In September, Ms. Williams also notified them. In September, the Defendant through their insurer refused to pay the new mental health provider. The lack of payment caused my mental health treatment to stop again. This was the second of three interruptions because of the Defendant's actions.

In October 2012, about nine months of the first threatening letter, I received another letter, threatening termination.

In November 2012 my mental health treatment was reinstated, and the Defendant was provided a status letter. The threats of termination and the pattern of excessive misrepresentations, outright deceits, and the Defendant breaking their promises again weighed heavily on my mind and became too much for my compromised psychological state. On April 22, 2013, the seven-year anniversary of my injury, I sent another letter to the R. Anderson, CEO explaining my experiences and again asking for his intervention (Vol. III p. 88-93 Doc. 25-1) and (Vol. V p. 40).

Termination, dishonesties, and other harassment were all I could think about. I had to face the fact, the Defendant's constant deception, retaliation, attempts to terminate me, not willing to properly accommodate me, and inaction were not going to stop: And forced me into a constructive discharge retirement.

In May 2013, I requested to retire. Although the agreed retirement date was July 30, 2013, L. Nimpson, of Human Resources refused to provide me with the Defendant's written retirement and continuous years and interruption of service policies. Instead Nimpson continuously reiterated and sent the vacation policy. And the Defendant continued to only offer Workers' Compensation Settlement Agreements requiring me to resign and waive federal rights and protections to resolve the workers' compensation claim.

One of my advocates, H. Huyler, Esq. also reached out to R. Anderson with five other Delta individuals Cc'd in a letter dated May 27, 2013 asking for intervention

because the of the continuous "incorrect, and incomplete information as well as discrepancies" and confusion regarding my employment status.[1]

Huyler, sent another letter dated July 15, 2013. This time to the Defendant's legal counsel S. Clarke, again asking for intervention because, "she is still experiencing no responses, inconsistent responses, and/or initial responses that are eventually modified/changed."[2] With about 15 days left until the agreed upon retirement date, the Defendant: 1) had offered limited assistance to clear up the controversy surrounding the method the Defendant used to calculate length of service; 2) the retirements benefits had not been clarified or resolved; and 3) unlawful Workers' Compensation Settlement Agreement was still presented.[3]

I retired July 30, 2013 and received a confirmation email of my retirement status, sent at 6:45 pm, "Because you did not meet the age requirement for retire pass travel *at the time of your retirement*, you are not eligible for pass travel."[4]

L. Nimpson's age requirement was not true. The Defendant refused to accommodate and provide me the fringe benefits allowed under the new pass-travel policy which had changed in November 2010, three years prior to my retirement. The new policy states, "Retiree Eligibility-In order to receive pass travel privilege moving forward, employees must have at least 25 years of consecutive service with Delta or

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[1] Appeal Appendix Vol. I p. 201-202 Doc. 16-8

[2] *Id.* p. 203-204

[3] *Id.*

[4] Vol. I p. 177 Doc. 16-5

Northwest [Airlines] (without regards to your age at retirement)"[5]

In addition to the psychological harassment and the instances listed here, I experienced other Federal violations at the hands of the Defendant.[6] After I retired, I learned the Defendant has an Unpaid Approved Disability Leave, which I was eligible because of the disability-related occupational injury.[7] Under the Disability Leave, Flight Attendants are eligible to retire, receive retiree pass travel benefits, healthcare and other benefits.[8]

The experiences led to filing charges with the Equal Employment Opportunity Commission (EEOC) on August 20, 2013.

On October 31, 2013, three months after I retired the Defendant again presented me with an unlawful Workers' Compensation Settlement Agreement. I could not and did not sign.[9] Approximately eight days later, the Defendant's third incident of causing my mental health treatment interruption occurred. Via a letter, on November 8, 2013, the Defendant through their insurer stop my mental health treatment.

On January 28, 2014, I learned I had been terminated and not retired through a letter I found in my workers' compensation file.[10] The correspondence dated

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[5] Vol. I p.192 Doc. 16-6

[6] Incidents were compiled in Vol. III p. 124-139 Doc. 37-4 and Doc. 37-5 p. 125- 146

[7] Vol. I p. 182-193 Doc. 16-6

[8] *Id.* p. 187

[9] Vol. I p. 194-200 Doc. 16-7

[10] Vol. I p. 175 Doc. 16-4

October 18, 2013 was from the Defendant's workers compensation lawyer to my former workers' compensation lawyer. The letter stated, "I have now learned that there was a coding error when entering information in Delta's records. In fact, Ms. Lowe is resigned effective 7/30/13."[11] The Defendant did not and has not directly contacted me about any problems with my retirement.

An EEOC post-charge retaliation claim was filed on February 4, 2013, citing retaliation and termination for opposing the Defendant's unlawful actions and for participating in the EEOC process, for filing Worker's Compensation claim, and complaining to the CEO.

B. Relevant Proceedings Below

Because I received the Right to Sue Notices at different times, two Federal cases were filed in the order received. Which meant the post-charge retaliation Charge No.410-2014-01851 ("2014" Charge) was filed first and was placed on the Federal Docket as Case No. 1:16-cv-3717-TWT the instant case. And, the original EEOC Charge No. 410-2013-05826 ("2013" Charge) became Federal Case No. 1:16-cv-RSW-JSA.

Both charges were initially filed using the N. District of GA Complaint Form. In case 3717 under Nature of the Case an 'X' was marked for retaliation and another for termination, for opposing and participating in protected activities[12] and included

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[11] *Id.*

[12] Vol. I p. 23 Doc. 3

a factual allegation, "my retirement was changed without explanation to 'resignation' termination."[13] The Defendant did not address the retaliation and termination allegations. Instead they filed a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim asserting, "However, she alleges no form of discrimination by Title VII...Plaintiff next alleges that Delta denied a reasonable accommodation request...and then retaliated against her for making that request...."[14] Title VII contains an anti-retaliation provision prohibits employers from retaliating against *any* employee who have opposed an unlawful employment practice or participating in the EEOC process.[15]

Within about a week of filing the post-charge complaint, I filed the original EEOC charge, alleging retaliation, harassment, and other charges. The cases were assigned to two different District Judges. The Defendant also filed a Motion to Dismiss the second federal case.

A First Amended Complaint (FAC)[16] with attachments, was filed in case 3717, the instant case. The Magistrate Ordered a Second Amended Complaint (SAC) be filed under the 3717 case. (*App.* F) The SAC consisted of combining the two cases into one, under the post-charge retaliation claim instead of the original EEOC claim.

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[13] *Id.* p. 26

[14] Vol. I p. 39 Doc. 9

[15] Title VII Section 704(a)

[16] Vol. I p. 128-204 Doc. 16 – 16:8

The original EEOC case was dismissed without prejudice.[17] Due to a family emergency I requested an extension of time to filing the combined SAC complaint. The Magistrate Ordered the Defendant to file a response Motion if they opposed. The Defendant filed a Motion against extending time to file the SAC, arguing the SAC was late and therefore should not be accepted.[18]

The Magistrate issued an Order granting the extension of time holding, "this amended complaint will not be deemed the operative complaint in this case to which any response is due unless and until after the Court has ruled on the Plaintiff's Motion for Extension in the Plaintiff's favor."(*App.* H)

The SAC was timely filed (*App.* J) as well as a Reply Brief in opposition to the Defendant's Opposition for the Emergency Extension of Time. The Reply Brief included a request for a Rule 60(b) relief.[19]

The Magistrate issued an Order holding the request for Extension of Time in abeyance and would consider the Rule 60 request in relationship to the merits of the SAC. He also ordered, regarding timeliness, that without prior leave of the court, he "...wishes only to hear about whether the allegations of the Complaint would satisfy applicable pleading standards and survive a motion to dismiss on the merits under Rule 12(b)(6)."(*App.* I p. 6) The Defendant filed a Brief of Opposition to proceeding with the SAC, citing timeliness and proceeding with SAC would be futile because the

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[17] *Id.* p. 3

[18] Vol. II p. 141-150 Doc. 23

[19] Vol. III p. 103-119 Doc. 26

SAC 1) "blatantly violates this Court's Order"; 2) is an "impermissible shotgun pleading"; and 3) "each of them [the claims] fails to state a cause of action."[20]

I argued the SAC should not be dismissed and must be looked at as a whole; that factual allegations must be taken as true; the FRCP does not contain a heighten pleading standard for employment discrimination complaints; notice pleading Rule 8(a)(2) was appropriate; and the *prima facia* criteria the Defendant was using was an improper pleading standard.

No procedural hearings or conferences were held.

The Magistrate issued a Final Report and Recommendation (R&R) dismissing the case for two different reasons.(*App.* C) The conflicting reasons were on the: 1) first page, the complaint was "dismissed for Plaintiff's failure to follow a court order to re-plead with a Complaint that states a viable claim." and 2) the last page states, "the proposed Second Amended Complaint [25] not be permitted to proceed, both as untimely and futile. It is Further Recommended that this Case be Dismissed with Prejudice for the reasons stated above." *Id.*

I was granted an extension of time and did file timely Objections. The Objections included objections to errors and or omissions of facts and legal findings; objections regarding timeliness; objection to 'shotgun' classification and higher pleading standard. And objections to the omission of the facts connected with my

[20] (Vol. III p 164-192 Doc. 31)

disability and objection to the omission of the Defendant's pattern of Distorted Truth and Psychological Harassment.[21]

The Defendant did not file Objections to the R&R. The Defendant filed a Response to my objections. The District Court Order adopted the Magistrate's R&R in full. A timely Appeal of the dismissal was filed with the Eleventh Circuit U.S. Court of Appeals. The Appeal Case No. 15-13579 FF.

Oral Argument was requested; however, no notification was issued regarding the oral argument request.

Although, the Appeals Court concluded, the District Court erred, regarding the timeliness of the SAC and the SAC should be afforded Rule 60(b) mistake relief and accepted as timely filed, they held the error was harmless because the SAC failed to state a viable claim and my failure to request permission to amend the complaint.(*App.* A p. 3-5)

A Petition of Rehearing *en banc,* was timely filed. Local Rules require the three-panel judges who drafted the dismissal to decide whether to grant the rehearing. The request was denied.

REASON FOR GRANTING THE PETITION

I. The Decisions In this Case Are So Far Departed From The Accepted And Usual Course Of Judicial Proceedings...As To Call For An Exercise Of This Court's Supervisory Power:

[21] Vol. IV p. 124-139 Doc. 37-4

When Appeals Courts' decisions are so far departed from the accepted and usual course of judicial proceedings and sanctions the same by lower courts they interfere with the unity of the courts decisions, undermines this Court's authority, and put public welfare at stake.

The supremacy clause of the U.S. Constitution (Article VI, Clause 2) established the "Constitution, and the laws of United States ... shall be the supreme law of the land ... and the judges in every state shall be bound thereby ..."

The Constitution provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour...." Article III, Section I

Federal Rules of Civil Procedures (FRCP) Rule 1 provides, "These rules govern the procedure in all civil actions and proceedings in the United States district courts....They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

This Court reiterated factual allegations in a complaint must be taken as true at the dismissal stage.[22] In *Erickson v. Pardus,* this Court in quoting *Twombly* held, "Specific facts are not necessary; the statement need only, 'give the defendant fair notice of what the...claim is and the grounds which its rests.' *Bell Atlantic Corp. v.*

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[22] *Bell Atlantic, Corp. v. Twombly,* 550 U.S. at 555 (citing *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1(2002)

Twombly, 550 U.S. ___, (slip op., 7-8)(quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)".[23] And, direct evidence attached to the complaint and in the record moves a complaint beyond conclusory.[24]

Requiring a plaintiff to plead *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) *prima facie* at the pleading stage is inappropriate. Although the Appeals Court acknowledged in a footnote that *McDonnell Douglas,* is an evidentiary standard and it was improper to dismiss ERISA and ADA discrimination claims using the *Douglass* standard, the court did not find the lowers courts had abused their discretion and did not reverse the dismissals. (*App.* A p. 9 footnote 2)

In this case, the lower courts decisions have sanctioned the invalidating of the judicial machinery of the United States, through the denial of due process and federal rights and protections. Moreover, Federal Rules and Laws, EEOC Enforcement Guidance and EEOC Compliance Manual, Supreme Court and Congressional authority that keep employment rulings in national unity have been compromised.

The Appeals Court sanctioning the dismissal of the SAC utilizing improper legal and factual findings require the Supreme Court's scrutiny and authority.

A. A Legal Claim Conjoined with Equity Claim Require Jury Trial – *Lytle v. Household Manufacturing, Inc.*, (1990) COUNT II

In *Lytle v. Household Manufacturing, Inc.*, the Supreme Court unanimously ruled that when factually overlapping 'legal' and 'equitable' claims are joined together

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[23] *Erickson v.* Pardus, 551 U.S.___(2007)

[24] *Id.*

in the same action, the Seventh Amendment requires that the former be adjudicated first (by a jury); and that when legal claims triable to a jury are erroneously dismissed, relitigation of the entire action is "essential to vindicating the [plaintiff's] Seventh Amendment rights."[25]

Even though, Count II is a legal claim, based on being fired after I retired with over 25-years of continuous service, the Appeals Court adopted the R&R's misinterpretation of SAC. The R&R opinioned in Footnote 14 the basis of the Defendant's outrageous conduct was because of their harassing me with unlawful settlement agreements, "For much the same reasons, the Plaintiff fails to show the sort of extreme and outrageous conduct that is required to support a state law claim for intentional infliction of distress."(*App.* A p. 266)

B. Courts Have A Responsibility To Keep The System's Effective Operation Secure

When faced with evidence that signed documents have not been used as the rules intended judicial action is required, "Courts currently appear...The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation."[26]

Moreover, this Court held in *Chambers v. NASCO, Inc.*, when faced with fraud upon the court, it is necessary to "imposed sanctions for the fraud he perpetrated on

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[25] *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990)

[26] Rule 11 Note 1983 ¶14

the court and the bad faith he displayed toward both NASCO and the court throughout the litigation." *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)

And, "Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)" *Id.* and the sanctioning scheme in the statutes and rules does not displace the court's inherent power to impose sanctions for bad faith conduct. *Id.*

SAC COUNT I Retaliatory Discharge/Termination ¶113 states, "Plaintiff was fired. Plaintiff's retirement was changed to a termination under the guise of a coding error resignation by the Defendant after she retired." (*App.* J p. 41) The factual allegation in ¶111 states "Plaintiff asked to retire. Plaintiff could not and did [not] orally agree or sign any agreement waiving legal rights and protections or to resign. Plaintiff did not initiate or agree to a resignation; therefore, Plaintiff contends she was fired." (*App.* J p. 40)

Although the Defendant has filed motions to dismiss and a Brief that the SAC should not be allowed to proceed for failure to state a claim, and admitted terminating me, "Before terminating her...we redesignated her as resigned"[27] in their Appeal Response Brief. The Appeals Court responded to the Defendant' admission of committing the termination action alleged in COUNTS I and II with a *sua sponte* dismissal of the complaint for failure to state a claim.

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[27] Defendant's Appeal Response Brief p. 46-47

The Appeal decision compromises the systems effective operation:

1) The Defendant did not file a response admitting to committing the wrong doing until they filed their Appeal Response Brief, contradicting a Rule 12 requirement, "Every defense to a claim for relief in a pleading must be asserted in the responsive pleading if one is required." Rule 12(b);

2) and conflicts with Rules 11 signed "Representations to the court...is[are] not being presented for any improper purpose...the claims and defenses are warranted by existing law...the denials of factual contentions are warranted on the evidence..."FRCP 11(b)(1)(2)(1);

3) as well as Rule 60, when faced with "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."[28] Lower courts have an inherent authority to grant relief and "entertain an independent action to relieve a party from a judgement, order, or proceeding...[and]set aside judgement for fraud upon the court."[29]

and 4) sanctioned violation of the anti-retaliation provision of 42 U.S.C. §12203, which provides, "(a) No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."

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[28] Rule 60(b)(3)

[29] Rule 60(d)(1)(3)

Additionally, the Appeals Court opinion regarding my retirement is not supported by the record, "However, Lowe attached, as an exhibit to her complaint, a letter from a Delta employee...Lowe was not old enough to retire and did not possess the minimum...years of service." Though not cited, the letter in question is from the Defendant's legal counsel, not Human Resources (*App.* N p. 175-176)

The email, from L. Nimpson of Human Resources, attached to the letter, states, "Because you do not meet the age requirement for retire pass travel *at the time of your retirement...*"[30] (*Id.* p. 177) The decision also disregards the Defendant refusal to provide information needed to enjoy the benefit of retirement.

C. Direct Evidence Moves a Complaint Beyond Conclusory - *Erickson v. Pardus*, 551 U.S. 89 (2007)

Although the Supreme Court ruled in *Erickson v. Pardus*, "[plaintiff] bolstered his claim[s] by making specific allegations in documents attached to the complaint and in later filings." The heart of this resolve is that, relevant evidence is admissible if attached to the complaint and in the record and direct evidence moves a complaint beyond conclusionary.[31]

Contrary to the *Erickson* decision, the rulings in these proceeding have adopted a new standard not found in Rule 10"...A copy of a written instrument that is an exhibit part of the pleading for all purposes."[32] or Supreme Court controlling

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[30] Vol. I p 177-181 Doc. 16-6

[31] *Id. Erickson* at 87

[32] FRCP Rule 10(c)

precedents. The Appeals Court adopted the R&R opinion, "When evaluating a motion to dismiss under Rule 12(b)(6), the Court cannot consider matters outside of the pleadings..." (*App.* C p. 17)

Even using the R&R's rational, the decisions below did not consider documents attached to the complaints and were included in the Appeal Appendix in FAC (Vol. I p. 154-204 Docs. 16-2 thru 16-8) and the SAC (Vol. III p. 88 – 102 Docs. 25-1 to 25-3).

The decisions in this case disregarded important documents attached to the complaints and in the record.

D. Creating a New Pleading Standard is Improper - *Tracey L. Johnson et. al v. City of Shelby Mississippi,* 574 U.S.___2014)

In *Tracey L. Johnson, et. al. v. City of Shelby, Mississippi,* the Supreme Court held "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief, Fed. Rule of Civil Procedure 8(a)(2)...." *Tracey L. Johnson, et. al. v. City of Shelby, Mississippi,* 574 U.S.___2014.

This Court went on to cite, *Swierkiewicz v. Sorema,* N.A., 534 U.S. 506, 512 (2002) (imposing a "heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)." *Id.*

Contrary to the *Johnson* decision and FRCP Rule 1, the Appeals Court adopted a new pleading standard when the R&R opinioned combining the two cases "require[d] the Plaintiff to provide a factual basis for her claims under the standards of *Iqbal*[33] and *Twombly*. Plaintiff failed to comply with that order as explained above."

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[33] *Ashcroft v. Iqbal,* 556 U.S. at 662 (2009)

(*App.* C p. 43)

Additionally, the decisions disregard FRCP authority by omitting FRCP 8(a)(2) notice-pleading criteria in totality, and created a new standard, the sole implementation of *Iqbal's and Twombly's* 'plausibility' as the proper pleading standard. Notice-pleading was affirmed in both *Twombly* and *Iqbal* and argued by me in 1) The Petition for Rehearing *en banc* (4/25/2018 p. 14-15); 2) The Appeal Initial Brief (9/19/2017 p. 22-23); and in 3) Objections to the R&R (Vol. IV p. 92-97 Doc. 37-2). The Appeals Court's decision sanctioned the lower courts adoption of a new pleading standard, sole use of 'plausibility standard' to review and dismiss COUNTS II, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, and XVI.

E. *Prima Facie* is an Evidentiary Standard, Not A Pleading Requirement, *Swierkiewicz v. Sorema N.A.*, No. 00—1853 (2002)

This Court reminded lower courts in *Swierkiewicz v. Sorema N.A.* that "The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement..." *Swierkiewicz v. Sorema N.A.*, No.00-1853 (2002) and "This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." (*Id.*) And "In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* (citing *McDonnell Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (May 1973)

Contrary to FRCP 8(a)(2) and Supreme Court precedents, the Appeals Court sanctioned the lower courts' dismissals of COUNTS I, III, IV, V for failure to establish a *prima facie* case, "Plaintiff fails in any of her various complaints or proposed complaints to allege facts that would plausibly support a *prima facie* case of retaliation and it would therefore be futile to allow further amendment to those claims by way of the proposed Second Amended Complaint." (*App.* C p. 36)

The Appeals Court addressed *prima facie* claims in footnote 2. (*App.* A p. 9)

The decisions disregarded the arguments presented that *prima facie* is an evidentiary standard and not improper pleading standard, the Objections to the R&R and the Appeal Court Initial Brief.

F. Harassment Requires a Reasonable Person In the Plaintiff's Position - *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)

In *Harris v. Forklift Sys., Inc.*, the Supreme Court in addressing the issue of whether the conduct "must seriously affect an employee's psychological well-being or lead the plaintiff to suffer injury" to prove hostile environment harassment. The Court adopted a requirement a plaintiff must show a defendant's conduct to be both objectively and subjectively hostile or abusive based upon a reasonable person, "[w]hether an environment is "hostile" or "abusive can be determined only by looking as all the circumstances..." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, at 23 (1993)

The Supreme Court determined in *Oncale v. Sundowner Offshore Servs., Inc.*, "the objective severity of harassment should be judged from the perspective of a

reasonable person in the plaintiff's position, considering 'all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)

The record as a whole contains documents and includes a complied list of SAC paragraphs which illustrate harassment and my experiences: The Objections to the R&R contain 1) 'Objections to Omission of Facts Connected With Plaintiff's Disability'; 2) 'Objection to The R&R Omission of Defendant's Pattern of Distortion of the Truth; 3) Psychological Harassment'[34]; and 4) a letter to R. Anderson, CEO documenting the emotional impact of the experiences.[35]

The Appeals Court omitted the above illustrations and reduced their harassment analysis and decision to "However, she never gave any specifics as to what Delta did to create such an environment other than offering settlement to her, which, in Lowe's view were harassing because they required her to waive her rights to sue Delta under ADA or Title VII of the Civil Rights Act and refusing to allow her physician to attend settlement negotiations with her." (*App.* A p. 10) The Court concluded, "This is not enough to set forth a plausible claim." (*Id.*)

The Court did not take all the factual allegations as true, as this Court held in *Twombly*. Moreover, without all the circumstance of my experiences considered, the 'reasonable person' doctrine standard could not be properly applied.

G. Reasonable Accommodation and the Continuous Violation Doctrine - *National Railroad Passenger Corp. v.* Morgan, 536 U.S. 101, 114 (2002)

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[34] Vol. IV p. 124-139 Doc. 37-4

[35] *Id.* p. 140-146 Doc. 37-5

In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court held the timeliness of a charge depends on whether it involves a discrete act or a hostile work environment. *National Railroad Passenger Corp. v.* Morgan, 536 U.S. 101, 114 (2002)

The EEOC in alignment with this Court's *Morgan* decision states, "Because the incidents that make up a hostile work environment claim "collectively constitute one 'unlawful employment practice,'" the entire claim is actionable, as long as at least one incident that is part of the claim occurred within the filing period...."[36]

29 C.F.R. §1630.2 (o) provides, "The term reasonable accommodation means...Modifications or adjustments to the work environment...Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment..."[37]

This case contains a hostile work environment that culminated into a constructive discharge retirement as well as documented 1) pattern of harassment claims[38]; 2) the April 22, 2013 request for the CEO to intervene to cease the harassment SAC; 3) the multiple requests in May/June 2013 to L. Nimpson of Human Resources, for information so I could enjoy the benefits employment of retirement; 4) letters written on May 27, 2013 and July 15, 2013[39] requesting assistance so I could

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[36] Hostile Work Environment Claims, §2-IV.C 'When Can A Discriminatory Act Be Challenged' EEOC New Compliance Manual: Section 2 Threshold Issues; *Id.* at 117

[37] 29 C.F.R. §1630.2 (o)(1)(ii)(iii)

[38] Vol. IV p. 124-139 Doc. 37-4

[39] Vol. III p. 201-204 Doc. 16-8

enjoy the employment benefit of retirement SAC (*App.* J p. 34 ¶86-87); 5) daily failure to accommodate me under their Unpaid Approved Disability Leave and the new 2010 pass-travel policies, which I qualified.[40]; and my compromised psychological state.

Contrary to the Supreme Court precedent and the New EEOC Compliance Manual, and the record, the Appeals Court in adopting the R&R, relied on a 'discrete act' instead of the 'hostile work environment continuous violation' in finding that the reasonable accommodation claims were untimely, "First, from these alleged facts, any claims premised on Defendants' failure to offer reasonable accommodations are untimely because the operative facts occurred more than 180 days before her first EEOC charge on August 20, 2013...According to the pleading, Plaintiff made her only specific request for accommodation in May and June 2012, which were rejected"[41] The continuous violation doctrine is applicable in this case.

H. COUNT SEVEN – Failure to Initiate The Interactive Process

29 C.F.R. §1630.2(o) provides "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process..." 29 C.F.R. §1630.2(o)(3)

Notice was given under COUNT SEVEN of the SAC ¶200 "Defendant did refuse Plaintiff's request to be considered for reasonable accommodation and [to] begin the accommodation process." Contrary to *Twombly* the lower courts did not take this factual allegation as true and considered it conclusionary.

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[40] Vol. I p. 182-194 Doc. 16-6

[41] Vol. IV p. 20 Doc. 33

It is difficult to tell from the decisions if this COUNT was addressed. Because it is ADA related, the claim was broadly dismissed with all the other ADA claim for failure to state a plausible ADA claim.

I. Settlement Agreements That Interfere With and or Stop an On-going EEOC Investigation is Prohibited - Attorney General Civil Action: *EEOC v. Baker & Taylor, Inc.*, 1:13-cv-03729 (N.D. IL July 10, 2013)

The Attorney General by Civil Action, 42 U.S.C. Sec. 2000e-6 [Section 707] in *EEOC v. Baker & Taylor, Inc.,* issued a consent decree deciding, forcing employees to sign unlawfully broad and unenforceable employment releases is prohibited. And conditioning separations on such agreements is unlawful because they interfere with employees' exercising EEOC rights and protections. *EEOC v. Baker & Taylor, Inc.,* 1:13-cv-03729 (N.D. IL July 10, 2013)

Additionally, under the ADA "It shall be unlawful to coerce...or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed...any right granted or protected by this chapter." 42 U.S.C. §12203(b)

Title VII provides, *All* employees regardless of race, color, religion, sex, and national origin have rights and are protections under 42 U.S.C. §2000e-3 [Section 704] of Title VII of the Civil Rights Act of 1964 as amended. The Act also prohibits coercing, intimidating, threatening, or interfering with exercising or enjoying Federal statutory rights and protections. And "*oppose any practice* made an unlawful employment practice by this subchapter, *or because* he has *made a charge*, testified,

assisted, *or participated in any manner in an investigation*, proceeding, or hearing under this subchapter.[42]

The Commission asserted two grounds for its position. First, the EEOC stated that "interference with these protected rights is contrary to public policy." *Id.* Second, the EEOC asserted that "the anti-retaliation provisions of the civil rights statutes prohibit such conduct." *Id.*

The Appeal Appendix contains a copy of the Defendant's Workers' Compensation Settlement Agreement attached to the First Amended Complaint. As a condition to resolving my workers' compensation claim, on October 31, 2013, three months after I retired, the stipulations included: 1) changing my retirement status to resignation. The Agreement specifically stated, "Lowe was employed by Delta until the date she signed this Release."[43] 2) Dropping the EEOC charge/investigation that was in progress, "Lowe hereby releases, acquits, withdraws, retracts and forever discharges any and all claims, lawsuits...against Delta Airlines."[44] 3) Agreeing to waive other non-waivable Federal rights "This Release includes, but is not limited to all claims, manners of actions, causes of action which arise under the Title VII of the Civil Rights Act of 1964, as amended...The Americans with Disabilities Act, as amended; The Rehabilitation Act of 1973, as amended..."[45] And 4) the decision

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[42] SEC. 2000e-3(a) [Section 704]; and The EEOC Enforcement Guidance: Nonwaivable Rights

[43] *Id.* p. 194

[44] *Id. 195*

[45] *Id.*

contradicts 42 U.S.C. §12203 of ADA and 42 U.S.C. §2000e-3 Section 704.

The Appeals Court adopted the lower courts' position that "...a litigant can offer whatever settlement terms it wants." (*App.* A p. 11) The decision was not based on Federal Statutes, Supreme Court precedents, EEOC Enforcement and disregarded *Erickson's* direct evidence in the record, Congress' intent regarding the provisions to the statutes.

J. COUNT TEN – Failure to Engage In Good Faith Interactive Process

In *Twombly,* this Court provided that all factual allegations must be taken as true. Although, COUNT TEN of the *SAC* ¶221-226 contains six paragraphs (*App.* J p. 67-68) that provided notice of incidents which reflect failure to engage in good faith interactive process, the Appeals Court in adopting the R&R opinioned the "Plaintiff, however, does not allege facts suggesting that Defendant was unwilling or otherwise failed to engage in a good faith interactive process." (*App.* C p. 24) The grounds for the dismissal are not supported by the record and contrary to *Twombly.*

K. COUNT ELEVEN – Failure to Engage In Good-Faith and Fair Dealings

Employment relationships create implied covenants/contracts. The Defendant indicated I was eligible to retire and could retire. They broke the agreement after I retired and had complained to the CEO, filed EEOC charges, opposed to signing an unlawful settlement agreement. This is a common law legal claim that requires a jury trial. *Id. Lytle*

L. COUNT TWELVE – Disability Discrimination

Because this COUNT was not individually addressed and intermingled with discrimination discussions with failure to provide reasonable accommodation and interactive process, it is difficult to adequately assess the R&R. (*App.* C p. 21-25)

The dismissal seems to be due to the *prima facie* requirement, "Second, the claim is not supported by the facts alleged. To establish a *prima facie* case of disability-based discrimination under ADA..." (*Id.* p. 21)

M. COUNT THIRTEEN – Discrimination For Engaging in Protected Activity

The decisions in these proceedings did not specifically identify this COUNT, thus making it difficult to truly assess the reason why it was dismissed except for possibly the improper *prima facie* standard the R&R required.

N. COUNT FOURTEEN A Pre-ADA Case is Not Applicable to an ADA case: Private Actions are Allowed Under the Rehabilitation Act of 1973, BARNES v. GORMAN 536 U.S.___(2002)

In *Kay Barns Etc. et al. v. Jeffrey Gorman* this Court affirmed private actions are allowed "Section §504 of the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding, including private organizations, 29 U.S.C. §794(b)(3). Both provisions are enforceable through private causes of action." *Kay Barnes, Etc. et al. v. Jeffrey Gorman*, 536, U.S.___(2002)

The lower courts in agreement with the Defendant cited and declared dismissal because "Her Rehabilitation Act claim could not succeed because the Rehabilitation Act does not contain a standalone private right of action. *Rogers v. Frito-Lay, Inc.*,

611 F.2d 1074, 1078 (5th Cir. 1980)" (*App.* A p. 7)

Rogers is a pre-ADA case and not applicable to these proceedings. The Americans with Disability Act was initially adopted by Congress in 1990, ten years after *Rogers v. Frito-Lay, Inc.*, (5th Cir. 1980). The adaptation of *Rogers* is contrary to Federal Statue 42 U.S.C. §12101 the Americans With Disabilities Act as Amended in 2008, Supreme Court precedent and Defendant's using the same case is contrary to Rule 11 making a filing for improper use and not supported by existing law.[46]

O. COUNT FIFTEEN – Disparte Treatment ADA - §12112

The decisions below did not individually address this Count. It was included in the blanket dismissal of all ADA claims under *McDonnell Douglas prima facie* standard or *Twombly's* plausibility.

P. COUNT SIXTEEN – ERISA Interference – 29 U.S.C. §1002(1) §510

This Court ruled *McDonnell Douglas' prima facie* is an improper pleading standard. The R&R dismissed this Count because of failure to establish *prima facie.*

Although the factual allegation under COUNT FIFTEEN of the SAC ¶274 states, "When Defendant interfered by going against their own disabled workers' policy and changed her NWA Disability Leave status to Approved/Unapproved Medical Leave instead of Disability Leave without merit, it interfered with the Plaintiff's rights to ERISA benefits including and not limited to dental, medical, vision and other unknown retiree benefits." (*App.* J p. 78) The Appeals Court misconstrued factual allegations and contrary to *Erickson* disregarded the

[46] Rule 11(b)(1)(2)(4)

Defendant's Unpaid Disability Leave policy which I was eligible (Vol. I p. 182-193 Doc. 16-6).

The Appeals Court opinioned the factual allegations "were alleged in a conclusory manner...never specified those benefits in detail...or specified why Delta's classification of her leave status was 'without merit' or otherwise improper." (*App.* A p. 9) and therefore, "her claims lack the specificity necessary to make out a plausible discrimination claim. Therefore, the Magistrate Judge's application of the *McDonnell Douglas* framework was harmless." Because there is direct evidence documenting the policy, it is not clear what 'conclusory manner' means and why Rule 12(e) more definitive statement was not sufficient.

Q. *De Novo* Determination – Findings that Are Contrary to law or Clearly Erroneous Must Be Modified or Set Aside

28 U.S.C. §636 requires that "...A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."[47] For nondispositive matters, Rule 72 provides, "...The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law."[48]

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[47] 28 U.S.C. §636(b)(1)

[48] Rule 72(a)

And for dispositive motions "A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent..."[49] "The district judge must determine *de novo* any part of the Magistrate Judge's disposition that has been properly objected to...."[50]

Contrary to Rule 72 (a)(b)(1) No proceedings were held and the district judge did not set aside parts of the order that are clearly contrary to law and factually erroneous.

Despite numerous objections including non-ADA, the District Court's *de novo* determination sole conclusion was, "None of the Plaintiff's Objections to the Report and Recommendation show that the Plaintiff alleged facts showing a plausible claim for relief under the Americans' With Disabilities Act." (*App.* B) The *de novo* determination omission of legal errors as well as clear error factual mistakes makes the *de novo* determination unclear.

R. Securing and Maintaining Uniformity of The Court Decisions Require en banc consideration-Local Rules Must Not Take Away Rights FRAP Permit

Federal Rules of Appellate Procedures (FRAP) Rule 35 provide, "(a) An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's

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[49] Rule 72(b)(1)

[50] Rule 72(b)(3)

decisions; or (2) the proceeding involved a question of exception importance."[51]

Additionally, FRAP Rule 47 states: **Notes of Advisory Committee on Rules—1995 Amendment** provide, *"Subdivision (a)...*It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." Contrary to FRAP 47, in the Eleventh Circuit, an unpublished decision is denied rights provisioned under FRAP 35. Eleventh Circuit Local Rule states:

> Matters Not Considered En Banc. A petition for rehearing en banc tendered with respect to any of the following orders will not be considered by the court en banc, but will be referred as a motion for reconsideration to the judge or panel that entered the order sought to be reheard: (b) Any order dismissing an appeal that is not published..." 11th Cir. R. 35-4 (*App.* I)

Although the decisions in these proceedings have broken the uniformity of the Court's decisions, the Petition For Rehearing *En Banc* was denied.

Additionally, the Appeals Court did not address the argument that in a 2014 case the same district judge in these proceedings held, "Generally, notice pleading is all that is required for a valid complaint...Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93)" *Stidham v. United States,* No. 1:13-cv-1093-TWT (N.D. GA Jan. 2, 2014) Contrary to the 2014 case, in these proceeding, the district judge required the sole use of 'plausibility standard'.

The Appeals Court did not address why a different pleading standard was required for the instant proceedings.

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[51] FRAP 35(a)

S. Leave To Amend Is Statutory – Conflicting Dismissal Findings

FRCP Rule 15 provides, "...the court should freely give leave when justice so requires." Rule 15(a)(2)

The Appeals Court held, the dismissal was proper because "Lowe waived any objection to the Court's dismissal with prejudice on the ground that further amendment would be futile." The decision misinterprets Appeal Initial Brief, which argues the viability of the SAC and specifically states why each COUNT should not be dismissed. And, disregards Objections to R&R Finding that proceeding with the SAC would be futile (Vol. 4 p. 18, 20, 22-23 Doc. 37 and p. 90-110 Doc. 37-2).

The Decision did not address the R&R had two different dismissal findings, one the front and another on last page.

II. NATIONAL IMPORTANCE

A. Undermining Higher Judicial Authority

Decisions that undermine judicial authority are of national concern and importance because they strike at the heart of Democracy and the American justice system. Not only do such decisions disrupt the desired uniformity of the legal process, the actions promote suspiciousness of our legal system. Article III, Section I of the U.S. Constitution, established the Supreme Court, the highest court in our Great Country, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Thus, this Court has the authority to require proper interpretation and enforcement of the FRCP and Federal Laws to ensure consistency and respect of

judicial system and authority by both litigants and officers of the court throughout the nation.

When lower courts disregard Federal Rules, Laws, and the Supreme Court's Authority and *pro se* non-prisoner civil litigants filing *in forma pauperis* with meritorious complaints are denied due process and must go all the way to the Supreme Court in a last attempt to achieve 14th Amendment Due Process clause something is seriously erroneous with our Nation's adjudication process. The Due Process provisions, provides U.S. citizens with substantive and procedural due process protection, "All persons born or naturalized in the United States...No State shall make or enforce any law which shall abridge the privileges...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." which assures courts operate within the law and provide fair procedures.

It is a major concern when a Circuit achieves an 81% dismissal rate of its discrimination cases. In December 2013, three years before filing any documents in the Northern District of GA Federal Court, Amanda A. Farahany, an attorney wrote an article in the Atlanta Journal Constitution, the major newspaper in Atlanta. (*App.* M) The article highlights a study initiated because of witnessing 11th Circuit judicial conduct of "good cases being dismissed in federal court that serves Atlanta and the north Georgia region..." The findings were:

> 81% of discrimination cases were dismissed in full, and 94 percent of the case had some claims dismissed. Sexual and racial harassment cases were worse: 100 percent of racial harassment and all but one sexual harassment cases were dismissed. The problem is not isolated

> to Georgia. Other studies have shown that nationwide, employment discrimination cases are dismissed at higher rates.[52]

These findings reveal the seriousness and urgency of this Court's review of the decisions below that by all accounts affect the nation.

Misuse of the judicial machine by officers of the court interrupt the unity of the court and deny meritorious complaints access to justice, requires this Court's intervention and the creation of national intervention and standard. The way to get to the heart of any matter, is to talk directly with the people involved, this would allow additional contextualization, from the reasonable person standard. A review of the record in the instant case will provide a view of judicial adjudication that according to the article is occurring in lower courts across America.

Unpublished decisions compound the issue. When decisions that are so far away from the judicial expectations and requirement are unpublished there is a greater unlikelihood of receiving Supreme Court scrutiny and review.

The time is ripe for review of the issue and the impacts it is having on the unity of the courts and the ability to circumvent justice by not publishing decisions that are contrary to law and Supreme Court precedents and tying up this Court's time with meritorious Complaints. Decisions that are contrary to Federal Laws – Statutes and Constitution and Supreme Court precedents should be published. Because publishing creates checks and balance and helps to remind all parties the Constitution is the law

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[52] Farahany, Amanda A., 'Preserve Right To Jury Trial', in the Atlanta Journal Constitution, [December 6, 2013], p. A 16.

and the Supreme Court is not only the highest Court, it is the entrusted gatekeeper, that will ensure judicial continuity.

B. Disability-Related Occupational Injury-EEOC Enforcement Guidance Workers' Compensation and The ADA

In that I am a *pro se* plaintiff, with limited access to legal data bases, I was unsuccessful in locating a case which the Supreme Court has made EEOC disability-related occupational injury[53] decisions that includes requirements laid out in the EEOC Enforcement Guidance: Workers' Compensation and ADA and other Enforcement Guides.[54] These requirements are essential when determining the merits of disability-related occupational injury employee's complaint.

Although contained in the record, the decisions in these proceeding disregarded the EEOC Notice and issued decisions contrary to the requirements expressed in the Enforcement Notice. Workers who become disabled as the result of a work-related accident have similar but different guidelines than other ADA disabled individuals.[55] For instance, the 'essential function requirement' under ADA

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[53] An individual with a disability may have an occupational injury that has nothing to do with the disability. The term "disability-related occupational injury" is used herein when the ADA and workers' compensation statutes apply simultaneously, i.e., where there is a connection between an occupational injury and a disability as defined by the ADA. EEOC Enforcement Guidance: Workers' Compensation footnote #(9). (Vol. II 153-173 Doc. 16-2)

[54] *Id.*

[55] *Id.*

statute 28 U.S.C. 12111 is not appropriate for individuals who become disabled because of a work accident. Question number #22 of the Workers' Compensation and The ADA provides, "Must an employer reassign an employee who is no longer able to perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability-related occupational injury?"

Answer "**Yes.** Where an employee can no longer perform the essential functions of his/her original position, with or without a reasonable accommodation, because of a disability-related occupational injury, an employer must reassign him/her to an equivalent vacant position for which s/he is qualified, absent undue hardship.[25][56] If no equivalent vacant position (in terms of pay, status, etc.) exists, then the employee must be reassigned to a lower graded position for which s/he is qualified, absent undue hardship."[57]

Your Honors, individuals who sustain a disability-related occupational injury lives are often turn inside out. Life becomes very different and difficult. All levels of their existence can be affected: physically, mentally, emotionally, financially, and in many cases spiritually. This case represents an opportunity for this Court to follow-out the essence of Congress' intent of 2008 ADA amendment. 42 U.S.C. §12101, Subchapter I Employment states in part:

> (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so

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[56] *Id.*

[57] *Id.*

because of prejudice, antiquates attitudes, or the failure to remove societal and institutional barriers.[58]

C. *Twombly's* 'plausibility' concept requires this Court's reconsideration.

Although the Supreme Court has not deviated from FRCP 8(a)(2) "notice" as the required standard, there are officers of the court that are using 'substantive plausibility' as the sole standard. Plausibility can be subjective, depending on the officers of the court involved in the proceedings, the same set of factual allegations may be deemed plausible and proceed or 'non-plausible' dismissal that leads down a never-ending legal rabbit-hole until it reaches the Supreme Court.

Tracey L. Johnson et al. v. City of Shelby Mississippi, Erickson v. Pardus, and the instant case where *pro se* meritorious complaint were dismissed thru the misuse of the Rules. The trend is going to continue unless this Court intercedes.

Your honors, how do *pro se* litigants receive the legal guarantees, rights and protections of authorities guiding our judicial system, when there are holes in the system that make it easy to bury meritorious complaints? How can plausibility be shown if faced with officers of the court determined not to see it? Because plausibility is not a FRCP requirement, *pro se* litigants attempting to draft a complaint have no idea about an additional requirement and what exactly 'plausibility' is and looks like in relationship to facts.

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[58] 42 U.S.C. §12101

CONCLUSION

Decisions that undermine Federal Rules, Laws, and Supreme Court authority effect public policy and trust and interrupt the uniformity of decisions. These proceedings demonstrate how p*ro se* civil litigants with meritorious complaints is systematically denied due process. They also reveal a gap between EEOC Enforcement Guidance: Workers' Compensation and the ADA in relationship with employees who sustain a disability-related occupational injury. I humbly request this Court to please use its discretionary authority and grant a *Writ of Certiorari.*

If this Court is unable to grant a Writ, I ask that as a matter of law the decision below be vacated in part, the Rule 60(b) request affirmed, any COUNTS entitled to default judgement be granted, and the remainder remanded. And I ask the Court to please keep a watchful eye out on any future proceedings that would be necessary in this case.

Humbly and Respectfully submitted,

Burdette D. Lowe

Burdette D. Lowe, *pro se*

P.O. Box 92421

Atlanta, GA 30314

(678)570-7721

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