18-6792

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER WAYNE
FILLMORE,

Petitioner,

v.

INDIANA BELL
TELEPHONE CO. INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court affirmed, and the Seventh Circuit agreed, that both Respondent ("Indiana Bell") and Petitioner ("Fillmore") submitted "sparse" – or, rather, insufficient – evidence in their respective cross motions for summary judgment. In light of this, the District Court granted, and the Seventh Circuit affirmed, summary judgment for Indiana Bell. This is patently unjust. Additionally, it is an act that can not only be seen as counterintuitive to other equitable remedies available, but one that is also in conflict with the decisions made in their circuit alone, among others. Before moving forward, it is also important to note another unique distinction established between both parties (specifically: regarding representation and resources) and how it is essential – and, thus, applies – to the questions presented below.

Firstly, it can be all but presumed that Indiana Bell made a concerted effort of providing insufficient evidence when submitting their summary judgment briefing, as explained below. This is despite essentially holding all of the discovery submitted in the record, either provided to Fillmore or used to their own end (i.e., Fillmore's disciplinary actions and other company records, emails, cell phone records, transcripts from meetings, GPS logs, etc.), in addition to the two declarations provided by key witnesses. All of which could have easily brought a preponderance of evidence that Fillmore would have had a challenging time overcoming. This is further underscored by the fact that Indiana Bell has been adequately represented below by two veteran attorneys, whose combined years of experience and practice of law nearly spans Fillmore's entire lifetime. Despite this, again, the Court felt that their evidence was lacking.

Conversely, Fillmore – who is and at all times has appeared in this matter in pro per; and, additionally, is a layman, non-practitioner who was faced with no other recourse than to essentially learn as he goes – unwittingly submitted a lack of sufficient evidence based on his inherent ignorance of the law, rules of evidence, and opposing counsel's alleged obfuscation with discovery, among other things. (*To be fair, Fillmore recognizes that this, in and of itself, does not form the basis of an excuse; however, it is a mitigating factor that he believes was not taken into contemplation by the Courts, especially when considering the following.*)

Notwithstanding this immediate point, during the interim after summary judgment had been fully briefed but well before a ruling issued, Fillmore independently (and, relatively expediently) discovered, acknowledged, and attempted to cure his lack of evidentiary weight by way of a declaration in support of his claims. Thus, on two distinct occasions – once in a Fed. R. 56(e)(1) motion just over two months into the District Court's deliberation (but four (4) months before a ruling) and then again in a Fed. R. 60 motion for reconsideration immediately thereafter – the District Court rejected Fillmore's relatively timely and lawfully supported efforts to supplement his summary judgment briefing with information that wasn't prejudiced to Indiana Bell – as it was essentially assertions that had been maintained in preceding pleadings – and, for at least one occasion, in more than enough time for them to rebut the information therein.

Likewise, the Courts also rejected an alternate argument presented by Fillmore that representations regarding the abovementioned point made in his complaint and elsewhere in the record were not valid as evidence for the

purposes of his cross-motion. They do not go into great detail for this reasoning, but it can be perhaps inferred that it is because of Fillmore's failure to expressly cite such materials in his briefings. In spite of this, their reasoning is summarily rebutted by several Federal and Local Rules – not to mention cases in their district alone, all of which Fillmore pointedly cited – that would've easily given the Court discretion to consider Fillmore's representations as evidence, notwithstanding.

In sum, Fillmore respectfully asks the Supreme Court to consider the following questions:

If summary judgment should be affirmed for Indiana Bell who, according to the Courts below, had submitted insufficient evidence therefor?

Additionally, was it reasonable for the Court to reject Fillmore's factually and lawfully supported – and, relatively timely – motion to supplement his summary judgment motion, with evidence which would have indeed given him the preponderance of such needed to prevail?

Lastly – and in conjunction with the forgoing – notwithstanding failing to expressly cite thereto, should the Courts have considered Fillmore assertions in his complaint, among other places in the record, for the purposes of his cross-motion for summary judgment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix C to the petition and is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals initially decided this case was June 29, 2018. When Fillmore had not received notice of the above filing – as he was granted by the Court status of an electronic filer – on July 23, 2018 he filed an emergency motion to recall the Court's mandate attesting to the above facts. The motion was approved, and Fillmore then fled a motion for rehearing and rehearing en banc on August 6, 2018.

His timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 23, 2018, and a copy of the order denying rehearing appears at Appendix D.

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

STATUTORY PROVISIONS INVOLVED

Based on the Petitioner's layman and therefore limited knowledge of the law, relevant statutory provisions involved in this matter, if any, are not known to him.

STATEMENT OF THE CASE

Christopher Wayne Fillmore respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

I. Introduction

Again, to be clear, the Courts pointedly noted that both Fillmore and Indiana Bell produced insufficient evidence in their respective summary judgment motions. The Seventh Circuit stated that "the evidence [both parties] submitted was sparse"; [App. C] *and such was not merely ancillary evidence non-determinative of the outcome of summary judgment...*

In fact, the element in question served as the impetus of Fillmore's retaliation claims arising under Title VII[1] and §1981. Specifically, the assertion that on January 27, 2015, Fillmore had a brief and contentious meeting with his next level supervisor, Lisa Brantley; wherein, he attempted to report alleged racial (or, some other form of) discrimination from his immediate supervisor, Thomas Koepp.

On that basis, it is important to note that the Seventh Circuit has clarified that "'[p]rotected activity' is 'some step in opposition to a form of discrimination that the statute prohibits.'"[2] "It's not necessary that the employee opposed a practice that is actually prohibited by Title

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[1] The Court should note that Fillmore's Title VII claim is not being contested here, as it was dismissed in the District Court as untimely.

[2] *Ferrill v. Oak Creek-Franklin Joint Sch. Dist.*, 860F.3d 494, 501 (7th Cir. 2017) (*quoting O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011).

VII; the employee need only have a good-faith and *reasonable* belief that he is opposing unlawful conduct."[3]

In this case, Fillmore pointed to his meeting with Brantley as the requisite "step in opposition to a form of discrimination that the statute prohibits." Fillmore also went on to state in the record (and the Court accepted as fact up until this very point [App. A]) that the above-mentioned meeting was cut short by a visibly agitated Brantley. After which, in the subsequent days, under an apparent retaliatory animus, she surveilled Fillmore for the express purpose of creating a disciplinary action which ultimately led to his suspension/termination.

Thus, viewing the facts in the light most favorable to him, it is clear to glean Fillmore's reasonable and good-faith belief that his opposition to unlawful conduct against Koepp through the above meeting; especially when considering that Fillmore met with Brantley after just having served a suspension given by Koepp. Additionally, Fillmore mentions in the record that aside from the aforementioned suspension, Koepp is also the very same person responsible for a protracted line of punishments given to him in the ten to eleven months since becoming a subordinate of his. Again, all of which formed the good-faith and reasonable belief that he was opposing some form of unlawful conduct when addressing Brantley on January 27, 2015.

Therefore, even though the Court declined to go into the weeds regarding what was or wasn't said between Fillmore and Brantley (as they did) and accepted that a meeting occurred (as they did) right on the heels of an action that was under the good-faith belief to be

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[3] *Ferrill*, 860 F.3d at 501 (citations omitted, emphasis in original)).

unlawful and, additionally, Brantley appeared agitated in the time thereafter, the Court had a vested interest in assuming for the sake of argument that this was enough to qualify as opposition to a form of discrimination prohibited by Title VII and §1981; from which, retaliation reasonably flowed therefrom.

The Seventh Circuit – much like the District Court – has also misapprehended a significant distinction established between the two parties. Unlike Indiana Bell – who made a concerted effort of failing to submit evidence supporting and/or affirmatively denying the above assertions made by Fillmore in either Brantley's (most importantly) or Koepp's declarations (which effectively made them silent on this issue) – among other things, Fillmore submitted a declaration specifically to that effect. Twice. The District Court failed to accept his evidence. Twice.

In fact – and, in accordance with his alternate argument – the abovementioned was perhaps one of the most consistent facts maintained by Fillmore throughout the proceedings; as such could be found in his thrice-amended complaint, among other places. The Seventh Circuit held in *Carson v. Bethlehem Steel Corp.*,[4] that "[a]ny demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes." Given all of the forgoing factors, the District Court was more than compelled to accept Fillmore's version of events.

Furthermore, the Seventh Circuit's failure to review the record – rife with such evidence – de novo[5] also proved fatal to Fillmore's appeal. In doing so, they would've taken into

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[4] 82 F.3d 157 (7th Cir. 1996).

[5] *Swetlik v. Crawford*, 738 F.3d 818, 826 (7th Cir.2013).

consideration the factual record as a whole and gleaned such material issues that remained in controversy. Accordingly, as affirmed in *Rowe v. Gibson*,[6] even if not taking into consideration his declaration, Fillmore resting on his complaint – as he at one time all but explicitly did – was sufficient evidence in support of his opposition to Indiana Bell's summary judgment. Notwithstanding his failure to expressly cite such evidence, the District Court – under the precedent established in *Carson*, *Rowe*, and the authority of Fed. R. 56(c)(3), where they "may consider other materials in the record" that were not cited – could have easily referred to this pleading(s) to substantiate such a key material fact (after all, there was "sparse" evidence from which to mine; thus, there would not have been such an endeavor of "scouring the record" to find it) but they expressly chose not to.

To that end, and especially in light of the Courts acknowledging the apparent shortfall of evidence from both sides, it would have been incumbent for the District Court to instruct Fillmore – and, to that extent, Indiana Bell – within the context of Fed. R. 56(e)(1), to substantiate this one material fact that had supposedly remained unsupported and weighed the evidence thereby. *This would have been demonstrably equitable and thus in the interest of justice.*

Additionally, since Indiana Bell was first to raise the claim/defense in their briefing (albeit in a cursory manner and while also, mind you, failing to produce evidence in support thereof) that Fillmore did not complain about discrimination to Brantley, he wasn't even

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[6] 798 F.3d 622, 627 (7th Cir. 2015) (holding that a pro se[']s] attestations in his verified complaint ... constitute competent evidence at summary judgment and "must be credited").

obligated to rebut with "affidavits or other similar materials," because they first failed to meet their burden of proof; as further explained below.

Despite all of this, and in an act that remains inexplicable, the District Court accepted the fact that the mutually-affirmed January 27, 2015, meeting between Fillmore and Brantley occurred[7] and ruled in favor of Indiana Bell.

In sum, despite the opinions of the Courts below, there wasn't this 50/50 split of insufficient evidence proffered by both parties (which, again, even if this was the case, demonstrably, neither party proved their case by a preponderance thereof, and thus neither should have been allowed to prevail on summary judgement); there was a conscientious suppression made by Indiana Bell and a willful attempt to supplement made by Fillmore. Thus, Fillmore prays this Court consider this petition for review and remand.

II. Proceedings Below and Facts Therein

1. Fillmore filed this action in the District Court on February 2, 2016, for retaliation arising under 42 U.S.C. §2000e et al., ("Title VII") 42 U.S.C. 1981, ("§1981") and several relevant state-law claims.

2. In his pleadings before the District Court, Fillmore maintained that he was suspended from, and eventually terminated of, his employment by Indiana Bell on February 3, and March 11, 2015, respectively; further stating that the forgoing actions were a direct result of a brief and contentious meeting between he and second-level supervisor, Lisa

[7] A fact that was, mind you, only found in the pleadings (i.e., among other places: Fillmore's complaint). Why, then – especially given the circumstances – if they drew such a conclusion from those resources, would they not take it a step further and also accept Fillmore's account found in these same sources?

Brantley, that occurred on January 27, 2015. In this meeting, Fillmore maintains that he attempted to complain to Brantley about suffering from retaliatory or some other form of discrimination from his immediate supervisor (and, Brantley's subordinate) Thomas Koepp.

3. In their response, Indiana Bell confirmed that Fillmore was suspended and subsequently terminated by Brantley. Similarly, they acknowledged that a meeting between the two indeed took place on January 27, 2015. However, after offering a halfhearted effort to dispute that Fillmore's "informal comments" to Brantley were not within the scope of protected activity, they also theorized alternate versions of what may have occurred and was said therein (theories that were never sworn-to by Brantley in an affidavit or declaration; and, moreover, those which were subsequently abandoned by the time Indiana Bell filed their summary judgment briefing). The crux of the case then became whether Fillmore's meeting with Brantley constituted protected activity and thus served as the nexus of his suspension/termination and his claim of retaliation therefrom.

4. In January of 2017, the District Court opened summary judgment briefing.

5. In Indiana Bell's briefing, they began by challenging the procedural grounds of this matter; chiefly contesting that Fillmore's Title VII claim was time-barred. However, they also asserted their justification for Fillmore's termination was legitimate and nondiscriminatory, citing his disciplinary record (from Koepp) as evidence; declarations from both Koepp and Brantley also served to substantiate their defense.[8] Additionally,

[8] Notably absent from Brantley's declaration, though, is a direct admission or denial regarding what had occurred between she

Indiana Bell argued that on the basis of his admitted "attempt," Fillmore failed to establish that he complained about discrimination to Brantley.[9]

6. Fillmore, in his cross-motion briefing, conferred the uncontested suspension/termination and implicitly relied on the forgoing pleadings to substantiate his contention regarding his complaint to Brantley. In addition to reasserting his inability to effectively complain to Ms. Brantley due to her actions, he also cited Seventh Circuit cases remanded, in part, under the "no magic words" doctrine.[10]

7. In late March of 2017, summary judgment had been fully briefed.

8. However, on June 5, 2017, upon gaining an after-aquired understanding of the importance of submitting declarations and affidavits thereto and, thus, feeling as though he needed to substantiate his briefing with more evidence in support thereof, Fillmore moved the District Court, pursuant to Fed. Rule 56(e), leave to supplement the record with his declaration. Therein, he merely reiterated the details of his meeting between himself and Brantley on January 27, 2015.

9. On June 29, 2017, Fillmore's motion was denied on the basis that his submission was untimely, prejudicial, and, according to the District Court, were things that had already been stated "or should have been stated"

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and Fillmore in that January 27, meeting.

[9] However, and again, they offered no countering argument or, as acknowledged by the District Court, cited no evidence of support in that respect.

[10] There are no "magic words" required to bring complaints within the protection of Title VII, *see Sitar v. Indiana Dep't of Transp.*, 344 F.3d at 727 (7th Cir. 2003), and because acts about which an individual complains need not actually violate Title VII for complaints themselves to be protected. *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d at 771 (7th Cir. 2008).

before then.

10. On September 22, 2017, the District Court ruled in favor of Indiana Bell; in part, dismissing Fillmore's Title VII retaliation claim on the basis that it was time-barred. Furthermore, they acknowledged that the January 27, 2015, meeting between Fillmore and Brantley occurred, but not what was or wasn't said therein. From which, they found that Fillmore had not established proof that he complained to Brantley under his §1981 claim of retaliation (and, equally, that Indiana Bell had not established proof that he did not complain). Moreover, they dismissed without prejudice his state-law claims, electing not to exercise jurisdiction.

11. On October 4, 2017, Fillmore then filed a Fed. Rule 60 motion, appending a slightly revised version of his declaration which maintained the same facts and allegations he has stated in the prior version and, again, elsewhere in the record. In his motion, Plaintiff contended that the forgoing should've been initially accepted and considered, as doing so would've, at minimum, created a genuine issue of material fact on one of the elements in his surviving §1981 retaliation claim[11] and, thus, foreclosed summary judgment for Indiana Bell.

12. On November 9, 2017, the District Court denied Fillmore's motion; stating, among other things, that he was apprised of, and thus strictly held to, the local district's standards of summary judgment briefing well beforehand,

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[11] The only element – of the three required to make a prima-facie showing of retaliation (*See.* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm) – that remained in controversy; as the adverse action (suspension/termination) was uncontested, and causation could be established by, among other things, the timing of a week spanning between Plaintiff's complaint and his suspension (January 27, 2015 – February 3, 2015).

and he would not get "another bite at the apple."

13. On November 16, 2017, Fillmore filed an appeal with the Seventh Circuit. Therein, he challenged a number of issues; notably, his reliance on his pleadings as evidence in his cross-motion substantiating details of the forgoing meeting between he and Brantley. Alternatively, he also posited the submission of his declaration pursuant to the abovementioned Federal Rules that should've been considered.

14. On February 14, 2018, Indiana Bell filed a response brief challenging those arguments.

15. On February 27, 2018, Fillmore submitted a reply brief.

16. On June 29, 2018, the Seventh Circuit Filed a nonprecedential disposition per curiam affirming the District Court's decision. (This is, mind you, despite also affirming the District Court's assertion that Indiana Bell submitted insufficient evidence in support of their summary judgment motion.)

17. On August 6, 2018, Fillmore directly challenged this assertion in a petition for rehearing and rehearing en banc.

18. On August 22, 2018, the Seventh Circuit denied Fillmore's petition.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS IN THE SEVENTH'S OWN CIRCUIT, AMONG OTHERS, REGARDING FUNDAMENTAL ISSUES OF SUMMARY JUDGMENT

It is worth establishing, firstly, that "the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment."[12] The Seventh Circuit further qualified this notion in *Hatcher v. Board of Trustees of Southern Illinois Univ.*;[13] stating that: "The plaintiff must include enough details about the subject matter of a case to present a story that holds together, but the proper question to ask is 'could these things have happened, not did they happen.'"[14] Having established such a tenable threshold, it would seem next to impossible for Fillmore – notwithstanding his lay experience of the law – to have been unsuccessful. Thus, in holding summary judgment for Indiana Bell, the Seventh Circuit's decision in this case created a conflict with their own standard, among others.

A. The Seventh Circuit Overlooks The Supreme Court's Ruling In *Celotex*

The Court in *Modrowski v. Pigatto*,[15] noted that Fed. R. Civ. P. 56 imposes an initial burden of production on the summary judgment movant. And, while both parties were movants in this matter, Indiana Bell was ordered by the District Court to proceed first. Thus it was incumbent for

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[12] *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (quoting *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000)).

[13] 829 F.3d 531, 535 (7th Cir. 2016).

[14] See, e.g., *Carlson v. CSX Transp.*, Inc. 758 F.3d 819, 826–27 (7th Cir. 2014) (citing *Swanson v. Citibank*, N.A., 614 F.3d 400, 404–05 (7th Cir. 2010) (emphasis added)).

[15] 2013 WL 1395696 (7th Cir. 2013)

them to "meet the initial burden by either (1) producing affirmative evidence that negates an essential element of the plaintiff's claim; or (2) asserting that the plaintiff failed to produce sufficient evidence to establish an essential element of their claim."[16] Indiana Bell did neither.

Furthermore, IN Local Rule 56-1(e) specifically stated that Indiana Bell was required to "support each fact the[y] assert[] in a brief with a citation to a discovery response, a deposition, an affidavit, or other admissible evidence." Again, they had the initial burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings and they did not. Their glaring omission of the point raised in their briefing thus left them open to be refuted by Fillmore by merely pointing out their deficiency; which is what he effectively demonstrated in his cross-motion brief, among other places.

The Supreme Court explained in *Celotex Corp. v. Catrett,*[17] that a party can obtain for summary judgment when its opponent has no evidence to support an element of the opponent's case. Thus, when moving for summary judgment on the ground that a party has no evidence for an element of its claim, they need only point to the deficiency; which is enough to trigger a party's duty to present evidence or an explanation of what specific further evidence is needed in discovery.

Accordingly, the Supreme Court in *Adickes v. S.H. Kress & Co.,*[18] reversed a grant of *summary judgment* in favor of the defendant because they "failed to carry its burden of showing the absence of any genuine issue of fact."[19] According to the District Court, and affirmed by the Seventh

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[16] *Id.*
[17] 477 U.S. 317 (1986).
[18] 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).
[19] *Id.* at 153, 90 S.Ct. 1598.

Circuit, Indiana Bell – through their "sparse" evidence – did not meet this burden.

To summarize: It was Indiana Bell's burden to produce such evidence that Fillmore did not complain of discrimination of any kind, as they so asserted in their brief. They did not. In response, Fillmore pointed out this deficiency, among other things. Apropos, in their reply, Indiana Bell had a duty then to present such evidence or an explanation of what further evidence was needed for discovery. They did not. Thus, under the *Celotex* standard, Indiana Bell was not only precluded to summary judgment in their favor, it is evident that Fillmore was indeed entitled therefor.

Again, Indiana Bell asserted in their briefs that Fillmore did not complain about discrimination, however, there is nothing they provided to substantiate that fact, nor do they cite to any other admissible evidence in the record in support thereof. By failing to do so, they should not have been entitled to summary judgment.

B. The Seventh Circuit Fails To Comprehend The Implications Of Cross-Motioning

The Seventh Circuit in *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Engineers*,[20] states that "[t]he existence of cross-motions for summary judgment does not . . . imply that there are no genuine issues of material fact."[21]

Specifically,

"[p]arties have different burdens of proof with respect to particular facts; different legal theories will have an effect on which facts are material; and the process of taking the facts in the light most favorable to the non-movant, first for one side and then for the other, may highlight the point

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[20] 335 F.3d 643, 647 (7th Cir. 2003).

[21] *Id.* at 648.

that neither side has enough to prevail without a trial."[22]

The District Court readily accepted as fact the first of three elements required in Fillmore's §1981 retaliation claim: the indisputable adverse employment action. With the other elements intertwined – as temporal proximity causation was linked to his protected activity[23] – what they wound up not accepting is either Fillmore's averment that he engaged in protected activity or Indiana Bell's denials thereto. Their contention was that neither side presented respective evidence in support thereof. If taking that as true, then essentially neither side proved their prima facie case which would've entitled them summary judgment in their favor.

In this situation, it would have been incumbent for the District Court to: (a) either examine such evidence from the pleadings[24] (b) enjoin both parties to produce further evidence to that effect,[25] and/or (c) dismiss both motions and allow the case to proceed to trial on account of a disputable material fact existing. The District Court did none of these. Instead, they granted summary judgment in favor of Indiana Bell despite them failing to support a legally required rebuttable presumption. This alone requires their judgment to be reversed.

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[22] *Id.*

[23] Which, on that note, the Court also accepted as true that a meeting between Fillmore and Brantley occurred – where he would have indeed been able to engage in protected activity, this is even before taking into consideration the substance thereby.

[24] Pursuant to Fed. R. 56(c)(3). Because, as shown, both sides effectively used their pleadings to substantiate a disputable material fact. And also, the precedent set in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, & 324 (1986), where "summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'"

[25] Pursuant to Fed. R. 56(e)(1).

C. The Seventh Circuit Rejected Their Own Standard As To A Party's Representations In Their Briefs As Evidence In Summary Judgment

The Seventh Circuit in *United States v. One Heckler-Koch Rifle*,[26] held that: "For purposes of summary judgment, the [Court] has treated representations . . . in a brief as admissions even though not contained in a pleading or affidavit."[27] Again, Fillmore had asserted ad nauseam – including in his summary judgment briefing – that he had a short and contentious meeting with Brantley on January 27, 2015; wherein, he attempted to allege racial – or some other form of – discrimination from his supervisor, Koepp. And, again, the District Court accepted up to the assertion that the meeting occurred. Which makes it unfathomable, and contrary to their own standard, that they would not only reject the details therein, but favorably award Indiana Bell, who has nearly remained silent on the issue.

D. The Seventh Circuit Rejected The Standard Established Below Regarding Handling A Party Who Submits Evidence After Summary Judgment Has Been Briefed

Fed. Rule 56(e) states that, "If a party fails to properly support or address a fact . . . the court may give an opportunity to properly support or address a fact."[28] Again, just over two months after summary judgment had been briefed, Fillmore both acknowledged his (at the time, perceived) failure to properly support the fact that he complained to Brantley and moved to amend the record with his declaration thereby.

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[26] 629 F.2d 1250, 1253 (7th Cir.1980).

[27] *Id.*

[28] *See* Fed. R. Civ. P. 56(e)(1).

Again, given that there was this apparent lack, it would've been incumbent for them to allow such evidence to be considered. Thus, the District Court's rejection of Fillmore's attempt at correcting this lack doesn't comport with the jurisprudence established not only in their own circuit, but in the surrounding Circuits; as shown.

i. The Fifth Circuit

Similarly, the plaintiff in *Wilson v. Sysco Food Services of Dallas, Inc.*[29] submitted an affidavit in opposition to the defendants' summary judgment motion approximately two months after the court-established deadline for submitting her opposing brief. Rather than attempting to reply to the plaintiff's affidavit, the defendants moved to strike the affidavit on the grounds that it was untimely.

The *Wilson* court held that Rule 56(c) permitted the nonmoving party to submit its affidavits in opposition to the motion up until the day before the hearing. Because no hearing on the defendants' summary judgment motion had been scheduled when the plaintiff submitted her affidavit the court held that the affidavit was timely and could be considered in deciding the motion.

As noted here, there was no hearing scheduled. Additionally, Fillmore's submission was made approximately two months after the motion was fully briefed; nevertheless, well *before* judgment was given and within a reasonable amount of time for Indiana Bell to respond. Furthermore, they were not ambushed with facts that were not already known so there was no prejudice whatsoever.

ii. The Sixth Circuit

Granted, whether to allow the record to be supplemented by an untimely filed affidavit

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[29] 940 F. Supp. 1003 (N.D. Tex. 1996).

generally lies within the discretion of the district court;[30] however, in *Hooks*, the district court accepted a memorandum with supporting affidavit in opposition to the defendants' motion for summary judgment filed by the plaintiff *after* they had entered an order granting the defendants' motion.[31] The defendants contended that because the plaintiff's affidavit was untimely filed, it could not be considered by the district court.[32]

After noting the abovementioned general principle that it is within the district court's discretion whether to consider untimely filed affidavits, the court held that the plaintiff's affidavit was properly before the court based on the facts before it.[33] Thus, in this matter, the District Court contention that Fillmore's declaration was untimely was not substantive grounds for denying its admission into record; as doing so made it inconsistent with the jurisprudence established in the Sixth Circuit.

iii. The Seventh Circuit

And finally, in a more pointed example: in *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan*,[34] the plaintiff (in this case) argued that the district court improperly considered the defendants' supplemental affidavit in support of their summary judgment motion.[35] The plaintiff asserted that a party moving for summary judgment must produce all of its evidence at the time its motion is filed.[36]

The Seventh Circuit rejected the plaintiff's argument and affirmed the district court's

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[30] *See Hooks v. Hooks*, 771 F.2d 935, 946 (6th Cir. 1985) (citations omitted).
[31] *See Id.* at 939.
[32] Supra, at 939-40.
[33] *See Id.*
[34] 97 F.2d 521 (7th Cir. 1986).
[35] *See Id.* at 524, 529 n.l.
[36] *Id.* at 529 n.1.

decision for the defendant, stating without elaboration that Rule 56(e) authorizes courts to permit summary judgment affidavits to be supplemented.[37] Moreover, since Fed. R. 56(e) contains no explicit excusable neglect requirement, it may provide a somewhat more permissive and predictable procedural mechanism for such actions.[38]

Accordingly, since, chiefly, Fillmore's declaration did not propose new facts, such an admission, as succinctly stated in *Olsen v. Marshall Ilsley Corp.*,[39] would've been the most equitable recourse in consideration of competing prejudice and efficiency interests. In *Olsen*, the Seventh Circuit held:

> *"[T]o the extent that the affidavits were used to rebut . . . opposition to [a] motion, the affidavits will be considered. To the extent they were used in an attempt to propose new facts, they will be ignored. In this way, neither side is prejudiced; defendants are given the opportunity to respond to assertions made by plaintiff, but plaintiff is not left in the precarious position of being unable to respond to . . . facts."*[40]

Again, Indiana Bell was not prejudiced in the slightest by Fillmore attaching his declaration to his motion for summary judgment. Every fact derived therefrom on

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[37] *See Id.* at 523, 529 n.1, 536; cf. *In re Jackson*, 92 B.R. 987, 992 (Bankr. E.D. Pa. 1988) ([T]he provision of F.R. Civ. P. 56(e) expressly allowing affidavits to be supplemented, causes us to conclude that all competent evidence submitted to the court should be considered in deciding a motion for summary judgment, whether submitted initially or [as here, almost two months after the fact].).

[38] *Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, N.V.*, 28 F. Supp. 2d 126, 130 (S.D.N.Y. 1998) ("Rule 56(e) grants [courts] the discretion to permit the filing of . . . supplemental materials and does not specify when that permission must be granted.")

[39] 267 F.3d 597 (7th Cir. 2000).

[40] *Id.* at *1 (declining to strike defendant's untimely affidavits and affirming summary judgment). *See also Mills v. Barreto*, No. 3:03CV735, 2004 WL 3335448, at *3 (E.D. Va. Mar. 8, 2004) ("[S]ummary judgment may be granted based on facts developed . . . [in] supplemental affidavits.")

which he intended to rely was cited within his brief supporting the motion, among other places. Thus, Indiana Bell was fully aware of its contents and could have submitted contradictory evidence with their response, if they had any. This is especially true when the record shows their submitted affidavits from, chiefly, Brantley.

In sum, no reasonable person would agree with the District Court's decision to deny Fillmore's twice-attempt to supplement the record with his declaration, as it did not prejudice Indiana Bell by proposing new facts or alternate theories, and its timeliness was relatively expedient (despite almost being a non-factor) considering, among other things, that Fillmore – in his capacity as a pro se party – was "learning as he goes" to competently litigate his federal case. Furthermore, the District Court acknowledging that the elements therein were "things that were already said" in his forgoing pleadings demonstrates their awareness of such existing in their realm of conscious but making the equally conscientious decision not to consider them in the context of summary judgment.

II. THIS COURT SHOULD REVERSE THE SEVENTH CIRCUIT'S DECISION

It cannot be overstated that the Seventh Circuit held that both Fillmore and Indiana Bell submitted insufficient evidence in support of their summary judgment motions. Thus, going by this base opinion, neither party was entitled to summary judgment in their favor. Despite numerous cases and law offering guidance toward a more equitable and just resolution, what resulted was patently inequitable. On that basis, this court should reverse the decision that has been carried over by the Seventh Circuit.

A. Under A Proper Standard, Fillmore's Evidence Justifies A Trial On The Merits

Fillmore essentially did not prevail in summary judgment due to a technical default. The Seventh – like many other Circuits – comports with the jurisprudence that a case be tried "on the merits rather than [disposed] on technicalities."[41] Affirming this decision as is, is in direct contrast to this sentiment. Under a de novo review – which the Court declined to exercise – it is apparent that Fillmore's case has enough merit to warrant further examination by a trier of the fact. Again, he was but a hairsbreadth away from creating a genuine issue of material fact that would've precluded summary judgment in favor of Indiana Bell. The record below demonstrated that such was present in not only his cross-motion arguments, but it also could have been substantiated in his proffered declaration, had the District Court accepted it in the first place.

Alternatively, evaluated under a correct legal standard, Fillmore's evidence was more than sufficient to raise a genuine issue of material fact for summary judgement. Most significantly, it is undisputed that his reporting (abridged as it was and not legally cognizant as it should have been) constituted protected activity, and Brantley's actions therefrom were retaliatory in nature.[42]

Accordingly, much of Fillmore's evidence also surrounded the 'suspicious timing' of his termination, for instance, which could've

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[41] *Woods v. Indiana University-Perdue University Indianapolis, et al.*, 996 F.2d 880 (7th Cir., 1993).

[42] The Seventh Circuit in *Morgan v. SVT, LLC* No. 12-3589 (7th Cir., 2013) offers further clarification on the matter; wherein, they state that: "The plaintiff resisting summary judgment, ... is only required to 'produce enough evidence, whether direct or circumstantial, to permit the trier of fact to find that his employer took an adverse action against him ... .'"

provided circumstantial evidence linking the termination to the meeting with Brantley. This is especially true when it is undisputed that Brantley met with Fillmore who was also responsible for suspending him shortly thereafter (six days). The events in the above case are strikingly similar to *McClendon v. Ind. Sugars, Inc.*;[43] where, a sequence of events over a few days between employee's filing of complaint and his discharge established prima facie case of retaliation.

CONCLUSION

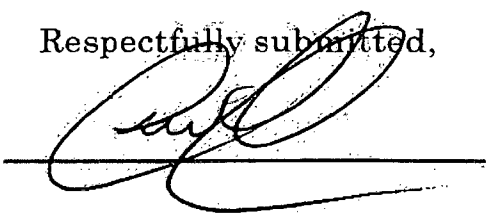
There is no question that Fillmore has been severely disadvantaged from the beginning of these proceedings. He is a non-practitioner who was tasked with learning and correctly applying the law concurrently with litigating his claim, all whilst ensuring this was within the applicable statute of limitations, among other things. Applying the law is a science. One which requires more than a passing intake of the relevant rules and laws to even begin to master, let alone practice.

Despite this, Fillmore not only made a valiant showing as a layperson, but he also wound up proving the merits of his claim (technical errors notwithstanding). Conversely, Indiana Bell, through concerted effort, did not. It is time that a court made such a distinction.

[43] 108 F.3d 789, 796-97 (7th Cir. 1997).

WHEREFORE, the petition for writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,



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