19-478

No. 19-____

In the Supreme Court of the United States

AMADOU SOWE,

Petitioner,

v.

PALL CORPORATION,

Respondents

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

PETITION FOR WRIT OF CERTIORARI

AMADOU SOWE
PETITIONER PRO SE
113 BURLEIGH DRIVE
ITHACA, NY 14850
(607) 257-3130

OCTOBER 7, 2019

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QUESTIONS PRESENTED

In preparation for summary judgement the defendant seeking summary judgment provided a list of Statement of Material Facts. The plaintiff replied along with a corresponding list of counter statement of facts. For example if the defendant statement was the manager gave the employee two documents: a separation Agreement, a chart containing job titles and ages of eligible and ineligible employees. The plaintiff's counter statement was that the manager gave the plaintiff a separation Agreement, a chart containing job titles and ages of eligible and ineligible employees, and a letter. In addition, the counter statement of the plaintiff was sworn under penalty of perjury using 28 U.S.C. § 1746. The judge considered the Plaintiff's counter statements not compliant with Local Rule 7.1(a)(3) and hence Deemed the Defendant statements admitted.

Question 1:

Even though the Plaintiff's counter statement is not accepted because of local rule violation, can the Plaintiff's counter statement still be used to show lack of compliance with OWBPA statute simply because the counter statement is sworn under penalty of perjury using 28 U.S.C. § 1746?

Starting with the 2010 F.R.C.P. 56 or Summary Judgment amendment, a formal affidavit is no longer needed for summary judgement purposes. *See* Summary Judgement committee notes on rules-2010 amendment, subdivision (c)(4). 28 U.S.C. § 1746 allows a written unsworn declaration, certificate, verification, or statement subscribed in proper form as true under

penalty of perjury to substitute for an affidavit. This was used in the declaration of Melanie Carr (App.33a). The district court judge deemed the Defendant's statements admitted because the Plaintiff's counter statements did not comply with Local Rule 7.1.(a)(3). In the interest of justice, it at this time the judge should have checked to make sure the Defendant provided a valid affidavit since the Local Role 7.1.(a)(3) does not allow declaration statements.

Question 2:

Does the Melanie Carr sworn declaration apply to just the first statement in the list or does it apply to all 8 statements?

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit

No. 18-2695

Amadou Sowe v. Pall Corporation

Decision Date: July 9, 2019

United States District Court Northern District of New York

No. 3:17-CV-449

Amadou Sowe v. Pall Corporation

Decision Date: August 14, 2018

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PETITION FOR WRIT OF CERTIORARI

Amadou Sowe, a former employee of Pall Corporation, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision by the United States Court of Appeals for the Second Circuit in *Sowe v. Pall Corp.* affirming the district court ruling was made on July 9, 2019. (App.1a) The district court's ruling granting summary judgment to Pall Corp. was made on August 14, 2018. (App.9a) .

JURISDICTION

This petition has been filed within 90 days of the decision of the Second Circuit on July 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(a).

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const., amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state 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.

STATEMENT OF THE CASE

The Older Worker Benefits Protection Act (OWBPA), 29 U.S.C. § 629(f), "is designed to protect the rights and benefits of older workers." *Oubre v. Entergy Ops., Inc.,* 522 U.S. 422, 427 (1998). In analyzing whether a question of fact exists, the court construes the evidence in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Specifically, the OWBPA provides that an individual may not waive a claim under the ADEA "unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). To be considered "knowing and voluntary" the waiver must comport with minimal requirements usually list A through H, *see* 29 U.S.C.

§ 629(f). The violations that will be addressed will center primarily on the following:

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; . . .
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or
>
> (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;
>
> (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-
>
> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job

classification or organizational unit who are not eligible or selected for the program.

The statement of the case will be broken in three sections: Impact of Denmark Letter on 29 U.S.C. § 629(f)(1)(F)(ii), Impact of Melanie Carr's Declaration on 29 U.S.C. § 629(f)(1)(H) and Impact of 28 U.S.C. § 1746.

A. Impact of Denmark Letter on 29 U.S.C. § 629(f)(1)(F)(ii)

In Plaintiff's situation the OWBPA required him to be given at least 45 days in accordance with 29 U.S.C. § 629(f)(1)(F)(ii) above to either reject or accept the separation Agreement.

The district court's decision was that the Plaintiff had more than 45 days, *see* (App.24a). The second Circuit Court's decision was that Plaintiff was given 54 days. They arrived at 54 days based on the return date of February 15, 2016 written in the Separation Agreement. What they failed to realize is that the return date of February 15, 2016 was based on the "separation Date" specified as January 1, 2016 right in the same separation agreement in the paragraph titled Separation of Employment, ¶ 1. Based on this separation date, Plaintiff was given 45 days not 54 days. The demographic chart memo or RIF-memo has another separation Date as December 31, 2015. The separation Agreement can be found in the Second Circuit as document 45 (supplemental Appendix) starting on page (SA101) whilst the RIF-memo starts on page (SA113). Plaintiff's claim that he was given 37 days instead of the 45 days mandated by OWBPA was based on these reasons:

(1) Return signed agreement to "Employer (Attn: Pamela Denmark, Human Resource Manager)". Plaintiff knew the difference between this quoted phrase and "Employer (c/o Pamela Denmark, Human Recourse Manager)". Where c/o stands for "in care of". The U.S. postal service know the difference too. When Attn: is used in this context the signed agreement had to be delivered to the intended recipient, Pamela Denmark for the Employer. On the other hand when c/o is used, the intended recipient is Employer through Pamela Denmark.

(2) The Denmark Letter (App.31a), instructed Plaintiff specific to deliver the signed Agreement to Ms. Denmark within 45 days from the date of receipt of the Agreement which was December 23, 2015. The letter specifically stated that Plaintiff had 45 days contradicting the district judge (App.24a), second circuit (App.4a) and the Defendant ¶ 40 of (App.39a).

(3) Melanie Carr declaration, ¶ 8 (App.35a), stated that Ms. Denmark's position was eliminated effective Monday February 1, 2016. Plaintiff turned in the signed separation on Friday, January 29, 2016 (document 45, page SA103) since Pamela Denmark was not going to be at the office on Monday February 1, 2016.

(4) In (App. 39a, ¶ 40) the Defendant's material facts indicated that Plaintiff was given 54 days, the Plaintiff's response was considered

non-compliant with local rule 7.1(a)(3) and hence Defendant's material facts were deemed admitted.

(5) During Mr. Sowe's deposition on November 8, 2017 the defense lawyer introduced this letter as exhibit 3, the Denmark letter. The reference to this letter can be found on page (SA48) in document 45 (Supplemental Appendix). A copy of the letter is on (App. 31a). The defense did not turn this letter to the district court as part of the records.

The above reasons and the discussions above seem to indicate that the Denmark Letter is in the heart of this dispute, the materiality of which the Plaintiff cannot judge. In analyzing whether a question of fact exists, the court construes the evidence in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Based on this case, it is surprising that the district court judge invoked "Deemed Admitted" under local rules instead of other options to the "Deemed Admitted" one that can be found in:

In the F.R.C.P. 56 or Summary Judgment Committee Notes on Rules—2010 Amendment subsection e(1):

> recognizes that the court may afford an opportunity to properly support or address the fact. In many circumstances this opportunity will be the court's preferred first step; and

F.R.C.P. 56(c)(3):

> Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

B. Impact of Melanie Carr's Declaration on 29 U.S.C. § 629(f)(1)(H)

The last paragraph of the district judge's decision (App.25a) is very bothersome. The information in (Carr Decl, ¶ 3) should have been provided to the Plaintiff on Dec 23 2015 instead of June 15, 2018 for it to satisfy the following clause in 29 U.S.C. § 629 (f)(1)(H):

> "the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—"

None of the information in (Carr Decl, ¶ 3) was given to the Plaintiff at the commencement of the period (December 23, 2015) specified in F.

In *Butcher v. Gerber Products Co.*, 8 F. Supp. 2d 307 (S.D.N.Y. 1998) (as a matter of law and public policy, an employer is allowed only one chance to conform to the requirements of OWBPA and cannot "cure" a defective release by issuing a letter to employees containing OWBPA-required information that was omitted from their separation agreements and request that they either "reaffirm" their acceptance or "revoke" the release). Currently, the use of un-contested facts originating from affidavit whose sole purpose is to correct defective agreements should be stopped. In a way this is another way to "cure" a defective waiver.

C. Impact of 28 U.S.C. § 1746

By taking a close look at the summary judgement rule F.R.C.P 56(c), an instruction on how to use a colon correctly emerges. Every time there is a colon followed by a list, the items in the list are separated by a semicolon. This is true for all the items in the list except for the last one. The last one is ended with a period. Here are the examples from Rule 56: Rule 56 (c) (1); and Rule 56 (d); and Rule 56 (e); and Rule 56 (f).

The Melanie Carr declaration starts with the following statement, (*see* App.33a):

> MELANIE CARR, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury that the following is true and correct:

The fact that this statement used "is" instead of "are" indicates that only the first item in the list is properly sworn. So items 2 through item 8 are not part of a sworn affidavit under penalty of perjury. The Appendix of the Appellant on page (A130) and (A132) provided to the second circuit can be found the components of a properly sworn statement of the Plaintiff's errata sheet to the deposition transcript taken on November 8, 2017, the pertinent parts are reproduced below:

> Plaintiff, Amadou Sowe, pursuant to 28 U.S.C.§ 1746, declares under penalty of perjury as follows:

After having defined the list, then we end with the following:

> I, Amadou Sowe, declare under penalty of

perjury that the foregoing is true and correct.

Then conclude with the following:

Executed on December 19, 2017 . Signature

While this may not be the only way properly execute 28 U.S.C. § 1746, the Melanie Carr declaration was not properly sworn and hence the judge should not have accepted it as an affidavit. But Local Rule 7.1(a)(3) only accepts affidavits. Therefore the statements that are not properly sworn should not allowed.

REASONS FOR GRANTING THE WRIT

One reason for granting:

The 1937 advisory Committee notes of F.R.C.P. 56 or Summary Judgment Rule showed 5,600 application for the rule for the first nine years of existence in New York county. It is thus an important tool that should be used consistently. But, in *Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000) the Second Circuit affirmed the grant of summary judgment based upon uncontested assertions in the moving party's Rule 56.1 statement.

However, in one recent case, *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001), it held that a court cannot grant summary judgment to the movant based upon uncontested material statements of fact unless those statements are supported by evidence in the record. permitting a movant to rely upon uncontested assertions contained in a Rule 56.1 state-

ment in order to side-step Rule 56 would "be tantamount to the tail wagging the dog."

The voluminous problems encountered in this current case of *Sowe v. Pall Corp.* as written in the Statements the case have convinced the plaintiff that the Supreme Court should step in to correct the injustice that the Plaintiff went through.

CONCLUSION

For the foregoing reasons, Mr. Sowe respectfully requests that this Court issue a writ of certiorari to review the judgment of the Alaska Court of Appeals.

DATED this 6th day of October, 2019.

Respectfully submitted,

AMADOU SOWE
PETITIONER PRO SE
113 BURLEIGH DRIVE
ITHACA, NY 14850
607-257-3130

OCTOBER 7, 2019