No. 19-745

In The
Supreme Court of the United States

KHALIL WILLIAMS,

Petitioner,

v.

HOUSING OPPORTUNITIES FOR PERSONS WITH EXCEPTIONALITIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Williams properly raised and preserved the issues presented in his Petition, in the appellate proceedings below, such that this Court should now consider those issues.

LIST OF ALL PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all of the parties to the proceedings below.

Housing Opportunities for Persons with Exceptionalities, Inc. (hereinafter referred to as "HOPE") is an Alabama not-for-profit, corporation. It is not a publicly traded corporation, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

PROCEEDINGS IN OTHER COURTS

Williams' Petition adequately describes the proceedings below.

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2. *Williams v. Housing Opportunities for Persons with Exceptionalities, Inc*., 2018 WL 3631695 (N.D. Ala.) (Memorandum Opinion of the District Court granting HOPE's Motion for Summary Judgment).

BASIS FOR JURISDICTION

Williams' Petition adequately describes the basis for jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Williams' Petition adequately describes the statutory provisions at issue.

STATEMENT OF THE CASE

Williams' Petition adequately addresses the issues required at this stage in the proceeding, subject to the following additional and disputed facts.

Williams was employed by HOPE on two separate occasions. (Williams depo., p. 7, l. 25 – p. 28, l. 2). He first went to work for HOPE in the early 2000s and worked about 6 years (to around 2006) at which time he left on his own volition for what he perceived to be a better career opportunity. (Williams depo., p. 8, l. 9-22). He then came back to work at HOPE in 2011 and continued to work there until he was allegedly terminated around May 5, 2016.[1] (Williams depo., p. 11, l. 24 – p. 12, l. 3).

Williams worked as a Direct Care Provider throughout both of his terms of employment with HOPE. (Williams depo., p. 8, l. 3-5). He was also Medication Administration Certified. (Williams depo., p. 19, l. 8 – p. 21, l. 14). His job duties and description were the same throughout both periods of employment. (Williams depo., p. 8, l. 6-8; Defendant's Exhibit 1 to deposition).

During his second period of employment, he was responsible for providing care at a group home for

[1] It should be noted that there is a factual dispute about whether Williams was actually terminated. As will be demonstrated herein, Williams contends that Sokol told him not to return to work. By contrast, Sokol denies that she told Williams not to return to work, and contends he failed to report to work, effectively abandoning his job.

autistic and mentally challenged adults. (Williams depo., p. 22, l. 1-4). He was the only employee that worked at the home when he was on duty. (Williams depo., p. 21, l. 19-22). He was responsible for three residents who needed qualified 24 hour per day, 7 day per week care. (Williams depo., p. 21, l. 23 – p. 22, l. 11). His job duties and responsibilities were critically important to the health and welfare of the residents, who could not survive on their own without it. (Williams depo., p. 22, l. 12-20).

At the time of his alleged termination, Williams was regularly scheduled to work evening shifts on Fridays, Saturdays and Sundays. (Williams depo., p. 18, l. 13 – p. 19, l. 4).

Sokol was responsible for interviewing and hiring Williams on both occasions that he worked at HOPE. (Williams depo., p. 9, l. 21 – p. 10, l. 16; p. 11, l. 24 – p. 12, l. 6). No one else was involved in the decision-making process to hire him on either occasion. (Williams depo., p. 12, l. 7-11).

Sokol was Williams' direct supervisor during both periods of employment. (Williams depo., p. 10, l. 17-19; p. 11, l. 11-18). He did not have any issues with Sokol during his first period of employment. (Williams depo., p. 11, l. 2-21). His performance reviews were performed by Sokol, and all of them were positive. (Williams depo., p. 24, l. 11-18). He was given pay raises. (Williams depo., p. 22, l. 21 – p. 23, l. 6). He was not subjected to an adverse employment action at any time prior to his alleged termination and had no problems

with Sokol prior to his alleged termination. (Williams depo., p. 17, l. 19 – p. 18, l. 12; p. 89, l. 18-22).

Williams believes that his relationship with Sokol suffered as a result of his doing some personal work on Sokol's deck. (Williams depo., p. 76, l. 14 – p. 77, l. 3; p. 90, l. 5-9). Sometime shortly before he was allegedly terminated, Williams submitted a bid to repaint Sokol's deck on her home. (Williams depo., p. 74, l. 11-25; p. 75, l. 16-22). Williams wanted to do this maintenance project to demonstrate to Sokol that he was capable of doing that type of work. (Williams depo., p. 74, l. 17 – p. 75, l. 2). Upon completion of the project, Sokol noted that Williams had not painted the cracks between the deck boards. (Williams depo., p. 79, l. 17 – p. 80, l. 8). When she called this to Williams' attention, he offered to paint between the deck boards for an additional $100.00. (Williams depo., p. 80, l. 5-8). Sokol declined that offer, and paid him the full amount that they had agreed to originally for the job, even though she considered it incomplete. (Williams depo., p. 80, l. 19 – p. 81, l. 12).

Sometime thereafter, Williams received a call from Sokol asking him to cover a shift for another employee on Thursday, May 5, 2016. (Williams depo., p. 24, l. 22 – p. 25, 1. 7). Prior to this, Sokol had asked Williams to cover shifts for others on occasions. (Williams depo., p. 71, l. 23 – p. 72, l. 6). On most occasions, he agreed to cover those shifts. (Williams depo., p. 72, l. 7 – p. 73, l. 12). Williams informed Sokol that he could not work that shift, because his college graduation was scheduled for that evening, and even though the graduation

would be over in time for him to cover the shift, he had plans to celebrate the graduation with family at dinner thereafter. (Williams depo., p. 25, l. 23 – p. 26, l. 6; p. 53, l. 14 – p. 56, l. 15). Williams alleges that Sokol told him that if he did not appear for the Thursday evening shift, he should not come back to work. (Williams depo., p. 29, l. 20 – p. 30, l. 24). Specifically, he testified that: "She said either you come in or don't come back." (Williams depo., p. 30, l. 13-14).[2]

Williams contends that Sokol called him the next day and advised him that she had a piece of paper at the office that he signed agreeing to work overtime if he was available. (Williams depo., p. 31, l. 5-25). He claims that he asked to see the paper. (Williams depo., p. 32, l. 5-7). In his deposition, he gave self-contradictory testimony about Sokol's response to this, first testifying that she denied his request to see the paper stating: "No, you are no longer welcome at this office," but then testifying: "She told me to come on over and we'll read the paper." (Williams depo., p. 32, l. 8-9; p. 32, l. 12-13). Williams then claims that he went to the office, and Sokol read from a piece of paper stating that he would work overtime if available. (Williams depo., p. 32, l. 25 – p. 33, l. 3; p. 36, l. 3-22). He claims that Sokol would not let him see or get a copy of the paper. (Williams depo., p. 37, l. 2 – p. 38, l. 7). During this

[2] HOPE disputes and objects to the factual proposition that Sokol's alleged racially derogatory comment was made contemporaneously with her allegedly terminating Williams. Instead, Williams testified in deposition that he was told by Sokol not to return to work (i.e. he was terminated) the day before Sokol made the alleged racially derogatory statement.

meeting, he claims that Sokol used foul language of a non-racially offensive nature, but also "mumbled . . . under her breath . . . I can't stand your black ass." (Williams depo., p. 36, l. 23 – p. 37, l. 14; p. 39, l. 2-7). Williams testified that he does not believe that Sokol intended for him to hear her say that. (Williams depo., p. 40, l. 2-10).

Further, Williams believes that Sokol was "out of control" at the time she allegedly muttered the racially offensive phrase under her breath. (Williams depo., p. 44, l. 10-15). When asked in deposition if this alleged conduct was out of character, he responded "very much so." (Williams depo., p. 44, l. 16-18). Williams had no further communications or attempted communications with anyone at HOPE about his employment situation after he left the office. (Williams depo., p. 48, l. 17 – p. 49, l. 2).

Thereafter, Williams acknowledges that he did not report to duty for his scheduled shifts on Friday, May 6, 2016 or the following Saturday and Sunday. (Williams depo., p. 50, l. 8-19). He contends that he failed to report to work because he believed that he had been terminated. (Williams depo., p. 50, l. 8-19).

About a week later, Williams picked up his last payroll check from the payroll service and returned his key to the group home. (Williams depo., p. 51, l. 7-11).

The majority of HOPE's workforce is black. (Williams depo., p. 69, l. 20 – p. 70, l. 9).

After Williams failed to show for his regularly scheduled shifts, Sokol filled his position with a black employee. (Defendant's Response to Plaintiff's First Discovery Request, Interrogatory 2; Sokol depo., p. 83, l. 23 – p. 86, l. 20; p. 114, l. 2 – p. 115, l. 10).

SUMMARY OF THE ARGUMENT

HOPE respectfully submits that the issues presented by Williams in his Petition were not properly raised and preserved in the appellate proceedings below, therefore, HOPE objects to Williams raising those issues at this late stage in the process and respectfully submits that this Court should not consider those issues.

HOPE has not attempted to address herein the merits of the legal argument addressed in Williams' Petition. HOPE deems that unnecessary at this point as the issues were not properly raised and preserved in the appellate process below. However, HOPE does not agree with Williams' assertion that the approach utilized by the District Court in the 11th Circuit Court of Appeals and the outcome in this particular case conflicts with any U.S. Supreme Court precedent, including *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), and HOPE reserves the right to respond to these issues in more detail should that become necessary.

ARGUMENT

The issue raised by Williams in his Petition was not properly raised in the proceedings below, and HOPE objects to Williams raising this issue at this late stage in the appellate process. HOPE respectfully submits that this Court should not entertain the issue, and the Petition should be denied.

"A party seeking to raise a claim or issue on appeal must plainly and prominently so indicate. . . . Where a party fails to abide by this simple requirement, he has waived his right to have the court consider that argument." *United States v. Willis*, 649 F.3d 1248, 1254 (11th Cir. 2011). "Any issue that an appellant wants the Court to address should be specifically and clearly identified in the brief . . . Otherwise, the issue – even if properly preserved at trial – will be considered abandoned." *Access Now, Inc. v. Southwest Airlines Co*., 385 F.3d 1324, 1330 (11th Cir. 2004). Issues not clearly designated in the appellant's initial brief are considered abandoned. *Hartsfield v. Lemacks*, 50 F.3d 950, 953 (11th Cir. 1995). A party fails to adequately brief a claim when he does not "plainly and prominently" raise it, "for instance by devoting a discreet section of his argument to those claims." *Cole v. U.S. Att'y Gen*., 712 F.3d 517, 530 (11th Cir. 2013). Merely making a passing reference to an issue or raising it in a perfunctory manner without supporting argument and citation to authority, results in abandonment of the issue. *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1413 n. 7 (11th Cir. 2011). An appellant's brief must include an argument containing appellant's contentions and the

reasons for them, with citations to the authorities and parts of the record on which the appellant relies and "simply stating that an issue exists, without argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal." *Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009). Reference to an issue in the statement of the case or summary of the argument is insufficient. *Cole*, 712 F.3d at 530. Abandonment also occurs when the issue is addressed in the argument section of the brief when references are "mere background" or when they are "buried" within the argument. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 682 (11th Cir. 2014). Mere conclusory allegations and failure to cite authorities to support them result in abandonment. *Sapuppo*, 739 F.3d at 682.

When an appellant fails to properly challenge on appeal one of the grounds on which the District Court based its judgment, she is deemed to have abandoned any challenge to that ground, and it follows that the judgment is due to be affirmed. *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306 (11th Cir. 2012).

This Court generally does "not entertain arguments that were not raised below," as "[i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first incidence." *Star Athletica L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016)).

In his Petition, Williams argues that both the District Court and the Eleventh Circuit Court of Appeals erroneously applied a "'convincing mosaic' approach" in determining that HOPE's Motion for Summary Judgment should be granted. Williams now argues: (1) that there is a split of authority among the Circuits with respect to how circumstantial evidence of discriminatory intent should be evaluated for purposes of summary judgment; (2) that the Eleventh Circuit has adopted an approach which is more burdensome on the Plaintiff than the approach adopted by at least one other Circuit, specifically, the Third Circuit; and (3) that Eleventh Circuit's approach is inconsistent with the Court's holding in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981). Notably, none of the arguments made by Williams in his Petition were properly presented to the Eleventh Circuit.

In analyzing the legal issues presented, the District Court clearly relied upon the "'convincing mosaic' approach," based upon *Smith v. Lockheed-Martin Corp*., 644 F.3d 1321 (11th Cir. 2011). Specifically, the District Court stated:

> Although it is one tool for examining evidence of discriminatory intent, "'the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion' in Title VII cases." *Flowers*, 803 F.3d at 1336 (quoting *Smith v. Lockheed-Martin Corp*., 644 F.3d 1321, 1328 (11th Cir. 2011)). "The critical

> decision that must be made is whether the plaintiff has 'create[d] a triable issue concerning the employer's discriminatory intent.'" *Flowers*, 803 F.3d at 1336 (quoting *Lockheed-Martin Corp*., 644 F.3d at 1328). A convincing mosaic of circumstantial evidence may be sufficient to allow a jury to infer that discriminatory intent motivated an employment decision. *Lockheed-Martin Corp*., 644 F.3d at 1328. "Whatever form it takes, if the circumstantial evidence is sufficient to raise 'a reasonable inference that the employer discriminated against the Plaintiff, summary judgment is improper.'" *Chapter 7 Trustee v. Gate Gourmet, Inc*., 683 F.3d 1249, 1256 (11th Cir. 2012) (quoting *Lockheed-Martin Corp*., 644 F.3d at 1328).

District Court's Memorandum Opinion, Appendix B to Williams' Petition, pp. 22a-23a.

After analyzing the law, the District Court then turned to the facts and further noted: "Mr. Williams attempts to establish discriminatory intent through the mosaic of circumstantial evidence." Id., at p. 24a. The District Court then analyzed the evidence relied upon by Williams and concluded that it was insufficient to establish discriminatory intent.

The District Court's reliance upon the 11th Circuit precedent of *Lockheed-Martin* could not have been clearer. Rather than questioning the validity of 11th Circuit precedent, Williams embraced it and formulated arguments based upon on that precedent, even citing with approval and quoting from *Lockheed-Martin*.

Williams' initial Brief on appeal to the 11th Circuit of Appeals, Appendix A, p. 25. Notably, Williams did not argue in his initial brief that there was a split of authority in the Circuit Courts; that the 11th Circuit's approach was more restrictive than any other Circuit, or that the 11th Circuit's approach was inconsistent with the Court's holding in *Burdine*. In fact, Williams did not even cite or make reference to any authority from any other Circuit or *Burdine*.

The first negative reference to the term "mosaic" in the appellate proceedings appeared in Williams' Reply Brief on appeal to the 11th Circuit, wherein Williams stated:

> **IV. Plaintiff Has Not Sought to Create a "Mosaic"; Sokol's Statement Coupled with the Factual Dispute over Whether He Was Terminated is Enough to Support a Jury Verdict in his Favor.**
>
> Defendant next argues that Plaintiff has not succeeded in presenting sufficient circumstantial evidence because he has not presented a "mosaic," arguing later in its brief that "a single item . . . cannot form a 'mosaic.' " (Def.'s Brief at 21). Defendant takes the metaphor too far. First, Plaintiff has never argued that his evidence be compared to a "mosaic"; it was the trial court that applied that analogy.

Williams Reply Brief in the 11th Circuit Court of Appeals, Appendix B, p. 18. While this argument does not

address the issues now raised by Williams, the 11th Circuit properly dispensed with this untimely argument as follows:

> In his reply brief, Williams argued that we should avoid comparing his evidence to a mosaic. We do not consider arguments raised for the first time in a reply brief. Id. at 682. We note nonetheless that the term "'convincing mosaic' is not a legal test." *Ortiz v. Werner Enters., Inc*., 834 F.3d 760, 764-65 (7th Cir. 2016). Rather, the phrase "was designed as a metaphor to illustrate why courts should not try to differentiate between direct and indirect evidence." Id.

11th Circuit Opinion, Appendix A to Williams' Petition, p. 8a.

As demonstrated by the above, Williams did not properly raise and preserve the issues made the basis of his Petition.

CONCLUSION

HOPE submits that Williams' Petition should be denied.

Respectfully submitted,

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