No. 20-95

IN THE

Supreme Court of the United States

CAROLYN HICKS-WASHINGTON,
Petitioner,

v.

THE HOUSING AUTHORITY OF THE CITY OF FORT LAUDERDALE,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

Mrs. Carolyn Hicks-Washington
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QUESTIONS PRESENTED FOR REVIEW:

Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and other federal and state antidiscrimination laws make it unlawful for an employer to treat individuals differently in the terms and conditions of employment and/or take adverse employment decisions because of their race, color, sex, age and/or membership in other protected categories. In the 21st century, the operation of biases and prejudices are not always blatant, but as we all bear witness, various forms of discrimination are alive and well throughout American society.

Given the realities of institutionalized racism, the well-documented "conservative judicial agenda" that has taken place since the Reagan administration and the historical, as well as modern-day, underrepresentation of federal judges of color on the bench, the pyramid of evidence supports that this glaring disparate impact, specifically against African Americans litigants, from having the merits of their civil rights cases decided by a jury, is not "accidental" or "due to chance." As a result, Hicks-Washington's petition presents the following questions:

1. Do the actions of federal judges Federico A. Moreno, Barry S. Seltzer and various appellate court judges in the Eleventh Circuit constitute a conspiracy to interfere and deprive Hicks-Washington of her constitutional and civil rights under the color of law?
2. If "federal courts were entrusted with ultimate enforcement responsibility" of Title VII, is it a constitutional violation of due process for the federal court to conclude that a petitioner failed to "exhaust administrative remedies" if the EEOC refused to conduct a complete investigation into all of the petitioner's claims of discrimination?
3. Is it a constitutional violation of due process for the court to deny claims of race, color and sex discrimination under Section 1981 and/or the FRCA for "failure to exhaust administrative remedies" if there are no "administrative remedies" to exhaust under the statutes in question?

4. If a decisionmaker states to employees on more than one occasion that they are "getting older" and inquire about their replacements before terminating them months later, does this constitute direct and/or circumstantial evidence of age discrimination?
5. Under the ADEA, is it unconstitutional to conclude that a person can only be discriminated against "because of" their age if they have membership in other protected categories?
6. Due to the realities of institutionalized racism and racism being a learned behavior, can any person classified as "white" living in the United States be given the presumption of not harboring racial biases?

Ancillary Questions:

1. Can federal judges be allowed to ignore the realities of institutionalized white racism and/or implicit racial biases in race-based employment discrimination or civil rights cases?
2. Can a federal judge be impartial if s/he ignores and/or downplays the realities of institutionalized and individual white racism in a civil rights or employment discrimination case involving African Americans?
3. Does the historical and present-day overrepresentation of whites as Article III federal judges reflect the judiciary's inherent racism as an institution?
4. Is it racist to deny and/or ignore the realities of institutionalized white racism in the United States of America?
5. Is a federal judge acting in a "judicial capacity" if s/he intentionally violates the Judicial Code of Conduct, his or her Oath of Office and/or the U.S. Constitution to achieve an outcome not grounded in fact or law?
6. Is "race" a scientific reality or a myth?
7. Is the doctrine of absolute judicial immunity unconstitutional if it allows Article III federal judges intentionally violate his/her Oath of Office and the Judicial Code of Conduct and act above our nation's antidiscrimination laws?

PARTIES TO THE PROCEEDING:

Petitioner is Carolyn Hicks-Washington ("Hicks-Washington").

Respondent is the Housing Authority for the City of Fort Lauderdale ("HACFL").

CORPORATE DISCLOSURE STATEMENT:

Not applicable.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE IN THIS COURT:

Not applicable.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests a writ of certiorari to review the legally erroneous judgment of the United States Court of Appeals for the Eleventh Circuit.

REPORTS OF THE OPINIONS AND ORDERS:

The decision of the court of appeals is reprinted in **Appendix A** to the Appendix to the Petition ("App.") and their denial of the Petitioner's Motion for Reconsideration is reprinted at **Appendix B**. The district court's opinion granting the HACFL's motion for summary judgment is reprinted at **Appendix C** and magistrate judge Seltzer's third Report & Recommendation is reprinted at **Appendix D**. The district court's opinion partially granting the HACFL's second Motion to Dismiss is reprinted at **Appendix E** and magistrate judge Seltzer's second Report & Recommendation is reprinted at **Appendix F**. The district court's opinion dismissing the Petitioner's Complaint and asking her to amend is reprinted at **Appendix G** and magistrate judge Seltzer's first Report & Recommendation is reprinted at **Appendix H**.

JURISDICTION:

On February 12, 2020, the Eleventh Circuit denied Hicks-Washington's July 8, 2019 appeal of district judge Moreno's May 31, 2019 Order granting summary judgment in favor of the HACFL. On March 4, 2020, Hicks-Washington filed a Petition for Rehearing and on April 23, 2020, the Eleventh Circuit denied the appeal in less than three sentences. Pursuant to Rule 13.1, this petition is timely filed and filed under this Court's Rule 11. As a result, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE:

The Fifth Amendment to the United States Constitution provides that no one shall be "deprived of life, liberty or property without due process of law."

The Fourteenth Amendment to the United States Constitution guarantees all citizens "equal protection under the laws."

STATUTES INVOLVED IN THE CASE:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. makes it unlawful for an employer to:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981") states, in part, that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

Under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, et seq. ("ADEA"), it is unlawful for an employer to:

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age "

Under the Florida Civil Rights Act of 1992, Fla. Stat. Ann. § 760.01-11 ("FCRA"), it is unlawful for an employer to:

(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.
(b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

PROCEDURAL HISTORY OF THE CASE:

Carolyn Hicks-Washington is an African American woman over the age of 55. With more than 30 years of experience working in public housing, the Petitioner was a veteran in her field. Before she began employment with the Housing Authority for the City of Fort Lauderdale on August 10, 2005, she worked in a management capacity at various housing authorities across multiple states throughout the South and had never been evaluated negatively or terminated. During her final years of employment in that field, she was promoted and served as the HACFL's Assistant Director of Assisted Housing. On November 13, 2015, she and her supervisor, Veronica Lopez – a Hispanic woman over the age of 55 – were abruptly terminated by Executive Director Tam English – a white male over the age of 55.

At the time of termination, Hicks-Washington was told by English that the reason for her termination was because the company wanted to "move in another direction." However, in the months leading to their termination, English made comments that Hicks-Washington and Lopez were "getting older" and sought names of individuals from within the company that would be able to replace them. After being terminated, Hicks-Washington applied on two separate occasions for the Director position and was not given an opportunity to interview. It was later learned while the case was being investigated by the EEOC, English sought to replace Hicks-Washington and Lopez with his friend, Barbara Baer – a white woman over the age of 55 – but could not immediately do so because she'd been found guilty of "theft of public funds" while serving as a Director of a housing authority in Arkansas. As a result, English hired two women until Baer could assume the position, and promoted a former employee who did not meet the minimum requirements for the job after Baer was terminated less than six months on the job. Each of these women were substantially younger than Hicks-Washington and Lopez.

Prior to taking legal action, Hicks-Washington wrote more than two letters to the HACFL's human resources personnel and its board of directors, requesting that they conduct an investigation into the conditions surrounding her termination. She explicitly informed them that she had reason to believe she was terminated because of her race, color, sex and/or age and that her termination violated federal and state antidiscrimination laws. Since no resolution occurred, Mrs. Hicks-Washington initiated a complaint with the Equal Employment Opportunity Commission (the

"EEOC") on April 16, 2016, alleging claims of race, color, sex and age discrimination. She was informed by EEOC investigator Michael Mathelier that she would not be able to pursue claims of race, color and sex discrimination, which was later reflected in the Charge of Discrimination he wrote. Per the advice of her son, Hicks-Washington objected to Mathelier's decision, but signed the from to prevent harmful delay and continued to raise claims of race, color and sex discrimination throughout the remainder of the proceeding.

In response to the Petitioner's intake questionnaire, the HACFL argued for the first time, through its original attorneys at BlueRock Legal, P.A., that Hicks-Washington, as well as her supervisor Mrs. Lopez, were terminated because they displayed "poor leadership" and had a "harsh" and "oppressive" management style, which resulted in a high rate of turnover for the company each year. After failing to conduct an impartial investigation into all of Hicks-Washington's claims of discrimination, the EEOC issued a Notice and Right to Sue letter on March 30, 2018.

On June 27, 2018, the Petitioner initiated a lawsuit against the HACFL and its Executive Director, Tam English, for intentionally engaging in employment practices that discriminated against her based upon her race, color, sex and age. Federal judges Seltzer and Moreno were assigned to preside over the case. On February 26, 2019, the District Court granted the HACFL's Motion to Dismiss and dismissed seven out of the Petitioner eight claims. Dkt. 46. The Petitioner filed a Fed. R. Civ. P. 59(e) Motion for Reconsideration on March 18, 2019. Dkts. 55-57, and Judge Moreno denied Mrs. Washington's motion on April 30, 2019. Dkt. 68. On May 28,

2019, the Petitioner filed a Motion to Stay the Proceeding, Dkt. 75, and two days later, on May 31, 2019, Judge Moreno issued his Final Order, adopting Judge Seltzer's recommendations and dismissing the Petitioner's remaining claim of age discrimination and closing the case. Dkt. 79. He concluded that the "Plaintiff ha[d] failed to produce the significantly probative evidence that is required to rebut Defendant's legitimate, nondiscriminatory reasons for her termination and avoid summary judgment." pg. 4.

On July 8, 2019, the Petitioner filed a Brief seeking for the Eleventh Circuit to transfer her appeal, or in the alternative, vacate the legally erroneous decisions of magistrate judge Seltzer and district judge Moreno. Given the tri-state's history with white racism and current racial/political makeup of the court, Hicks-Washington sought for her appeal to be transferred to a more racially and politically diverse circuit. On May 1, 2020, circuit judges Jordan, Newsom and Fay denied Hicks-Washington's appeal, mirroring the same conclusions by the district court. ***See*** **Appendix A.** On March 4, 2020, Hicks-Washington filed a Motion for Rehearing En Banc and sought for a second time, the transfer of her appeal and/or for all prior decisions favorable to the HACFL and their counsel to be vacated. In a two-sentence decision denying Hicks-Washington's petition, it stated that "no judge in regular active service on the Court have requested that the Court be polled on rehearing en banc." ***See*** **Appendix B.**

Pursuant to Supreme Court Rule 11(c), the Eleventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this

Court." Additionally, this petition complies with Supreme Court Rule 11(a) because the decisions of the Eleventh Circuit "conflict with the decision[s] of [ ]other United States court of appeals on the same important matter" and "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." (emphasis added)

ARGUMENTS

I. DECISIONS OF LOWER COURT ARE ERRONEOUS AS BOTH A MATTER OF FACT AND LAW

Since the Eleventh Circuit *en banc* refused to review the legal errors made by federal judges Seltzer, Moreno, Jordan, Newsom and Fay, Hicks-Washington presents those arguments to the justices of the Supreme Court and prays that this manifest injustice be corrected.

A. INTENTIONAL SUBSTANTIVE ERRORS:

Due to the fact that most plaintiffs lack direct evidence of discrimination, most employment discrimination cases are decided using what is known as the McDonnell Douglas tripartite framework. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This procedural device is used to prove discrimination through a process of elimination. It focuses on disproving the most obvious legitimate bases for an adverse employment decision, and then allowing the finder of fact to infer that the decision had an illegal motive. Since every case is unique, the "McDonnell Douglas *prima facie*

case does not account for every act of discrimination that Title VII seeks to redress."[1] The tripartite formula is also not an "inflexible rule" nor meant to be applied rigidly. Teamsters v. United States, 431 U.S. 324, 358 (1977).

The following facts constituted the elements of the Petitioner's *prima facie* case of discrimination based on race, color, sex and/or age: 1. She is an African American woman over the age of 50; 2. She and her supervisor, another woman of color over the age of 50, were repeatedly told by the Executive Director Tam English – a white male over the age of 50 – that they were "getting older" in the months leading to their termination and inquired about their replacement; 3. English originally meant to replace them with his friend Barbara Baer – a white woman four years older than the Petitioner – as Director and former two-time employee Anita Flores as Intake Coordinator[2]; 4. Despite her position being eliminated, she was not given the ability to transfer to another department like some of her non-black counterparts (e.g. Ayala, Flores, Valdes); 5. the Petitioner applied for the Director position on two separate occasions and never received a call back although the HACFL hired a total of four similarly situated and/or lesser qualified women within a two-year period.[3]

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[1] Zac Pestine. "Securing Title VII's Purpose: Ensuring That We Have All of the Puzzle Pieces to Solve Employment Discrimination Claims." 2016. https://www.laborandemploymentcollege.org/images/pdfs/October2016newsletter/UnconsciousBiasDiscrimination.pdf.

[2] Mrs. Hicks-Washington's Assistant Director position included the role of Intake Coordinator and Public Housing Supervisor. The Petitioner was terminated on November 13, 2015 and Flores was allegedly rehired for the third time as Intake Coordinator in or around November 16, 2015. The HACFL's original counsel stated that Flores was originally rehired as the "Community Manager."

[3] After Mrs. Hicks-Washington submitted her first application on November 23, 2015, Beatriz Cuenca-Barberio (Hispanic) and Medina Johnson (African American) were hired. Following the second time the Petitioner submitted her application on March 5, 2017, Barbara Baer (Caucasian) and Anita Flores (Hispanic) were hired. Each time the Petitioner applied for this position and was overlooked for someone similarly and/or less qualified than her, this constitutes a new and/or continuing act of discrimination based on race, color, sex and/or age. Three out of the four women were more than 6

Hicks-Washington identified five separate adverse employment decisions taken against her by the HACFL and English. The first being when she was terminated on November 13, 2015, and the second through fifth times were initiated each time someone lesser qualified and/or younger was hired for the Director position. Proof of discriminatory motive is "critical, although it can in some situations be inferred from the mere fact of differences in treatment." Teamsters at 335-336 n 15.

1. Claims of Race and Color Discrimination: Since the district and appellate courts erroneously concluded that the Petitioner "failed to exhaust her administrative remedies," they claimed to not have jurisdiction to decide the Petitioner's claims of race, color and sex discrimination under Title VII, Section 1981 and the FCRA. However, they still used their judicial opinions to discuss why even if they did have jurisdiction, her claims would have still been denied.

The lower courts concluded that based on the fact that the "first" person hired for the Director position was an African American woman named Medina Johnson, that the HACFL did not discriminate against her based on her race and/or color. It cannot be disputed however that the HACFL originally intended to hire English's friend Baer for the position, but she had been put in jail for "theft of public funds" and couldn't immediately assume the position. *See* **Appendix I.** If English expressed on more than one occasion to two women of color that their age was a reason for his decision to replace them – not their alleged "harsh" or "oppressive" management style

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years younger than the Petitioner, with the current Interim Director, Anita Flores, being a 2x former employee who has no college degree, lacks comparable professional work experience as the Petitioner, was written up at least twice for behavior, and was under the age of 40 at the time of promotion.

that was leading to "high turnover" – but then hired a white woman who was in or around the same age as those women of color, then this clearly constitutes individual disparate treatment based on race and/or color. Also, if during this case, the HACFL claimed that they terminated the Petitioner because she had a "harsh" and "oppressive" management style but sought to replace her with women who actually displayed those qualities (e.g. Baer, Flores), then that further establishes individual disparate treatment based on race and/or color.

Since Baer was temporarily unavailable, they had no choice than to hire someone else. The Court failed to realize that the hiring of an African American woman does not weaken the Petitioner's claim of race and color discrimination because she was hired **after** the Petitioner gave the HACFL notice that she believed her termination was due to, in part, her race and/or color. Therefore, the HACFL's decision to hire a substantially younger African American woman was calculated and meant as an offensive move that would appear to weaken the Petitioner's claims in court. That is supported by the fact that as soon as Baer was no longer on probation and could leave the state of Kansas, Johnson resigned and she assumed the Director position at the HACFL.

After Baer was terminated after being on the job for less than seven months, the HACFL replaced Baer with an even lesser qualified, Hispanic woman named Anita Flores. Flores was a two-time, former employee that had been written up more than once for her unprofessional conduct and had even intentionally destroyed company property. The Eleventh Circuit made no mention of Flores in their decision.

Little to no discussion was also given to Hicks-Washington's claims of discrimination under the theory of disparate impact. Under this theory of discrimination, a person or employer engaging in a discriminatory employment practice, policy or procedure doesn't have to intentionally discriminatory. Due to the fact that racism is embedded into the DNA of American culture, there can be no presumption given to those classified as "white" that they are not racist or don't harbor any racial biases. The employment practice identified by the Petitioner as causing a disparate impact was the HACFL's strong reliance on English's highly subjective and arbitrary decision-making, especially since he was never compelled to attend any diversity trainings or workshops concerning antidiscrimination in the workplace. English's background (white male born before Title VII's passage, Republican, etc.) and more importantly, his hiring and promotion decisions discussed in paragraphs 158 through 159 in the Plaintiff's Amended Complaint, support that they are tainted with racial biases and prejudices – consciously and/or unconsciously – and this has created a glaring disparate impact against qualified African Americans from being hired, promoted and/or retained in meaningful positions throughout the workplace like their white counterparts.

The HACFL and their counsel never demonstrated that the challenged employment practice was "job related for the position in question and consistent with business necessity." Either way, the Petitioner can identify an alternative employment practices that would have a less undesirable discriminatory effect and also serve the employer's needs (e.g. objective hiring criteria). As long as English

remains CEO and his white male privilege continues to go unchecked, this problem will continue to persist, which is why the Petitioner is also entitled to affirmative relief.

And while the district court stated that they did not have jurisdiction to decide claims of race, color and sex discrimination, they allowed the Petitioner to complete discovery and did not bar the Petitioner from seeking documents related to those claims.

2. Claims of Sex Discrimination: Both courts refused to acknowledge and address the Petitioner's sex discrimination claims entirely and they used the "failure to exhaust administrative remedies" as a pretext to do so. As demonstrated in the next subsection, the court did have jurisdiction to decide all of the Petitioner's claims. Hicks-Washington's claims are largely predicated on the fact that English terminated two women of color because they were "getting older," but didn't hold men in senior management positions to the same standard. Most of the other males in positions within senior management were also over the age of 55, and English would never believe that his age acted as a barrier for him to perform the duties of his job successfully. Nearly five years after Hicks-Washington was terminated, many, if not all, are still working for the HACFL If their age doesn't prevent them from performing their job, then the same can be said for women. Since that was not the reality, this establishes clear individual disparate treatment based on sex.

3. Age Discrimination Claims Were Supported By Direct and Circumstantial Evidence and Creates Genuine Issues of Material Fact: Although the district court

judges tried to pretend for the first half of the case that the Petitioner hadn't presented a *prima facie* case of discrimination in her "shotgun" Complaint, the Eleventh Circuit correctly acknowledged that Hicks-Washington "undisputedly" established a *prima facie* case of age discrimination. They did, however, err in, concluding like the district court, that English's ageist statements did not constitute direct and/or circumstantial evidence of discrimination, as well as determining that no discrimination took place after applying the McDonnell Douglas tripartite framework.

The Petitioner has maintained that in the months leading to their termination, CEO Tam English told two women of color over the age of 50, on more than one occasion, that they were "getting older" and inquired who would replace them. Per the recommendations of Judge Seltzer, Judge Moreno concluded 10 days before trial was scheduled to commence, that the "Plaintiff has not established direct evidence of age discrimination" and stated that "even if [English's 'getting older' comments] were said, they do not rise to the requisite level to establish direct evidence of discrimination." pg. 2. As stated by the Eleventh Circuit: "ADEA liability depends on whether age actually motivated the employer's decision, i.e., 'the plaintiff's age must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome,'" (*citing* Chapman v. AI Transport, 229 F.3d 1012, 1024 (11th Cir. 2000)), and it is without question that English's decision to terminate the Petitioner and her supervisor were consciously motivated, in part, by their age – not their alleged "harsh" and "oppressive" management style.

On page 8 of his third Report, Judge Seltzer concluded: "Not only has [the] Defendant denied the remarks that Plaintiff attributes to the Executive Director [Tam English], but the nature of the alleged remarks do not rise to the requisite level to establish direct evidence of discrimination." The HACFL never explicitly denied the fact that English made these comments they submitted their Answer to the Plaintiff's Complaint. □□ 165, 167, 171. The first time the Defendant's counsel explicitly denied this fact, was in response to the Plaintiff's Local Rule 56.1 Statement of Facts. Dkt. 53. However, these statements should be compared with their initial responses before the EEOC. English and the Appellee's former counsel emphatically denied that any such statements were ever made. On page seven of the Defendant's Position Statement to EEOC, they stated: "The [Petitioner's] claim in the charge that Mr. English ever said to the [Petitioner] that she was 'getting older' or anything to that effect is a simple falsehood. The [Petitioner] simply fabricated that claim. There is absolutely no evidence that Mr. English ever considered the [Petitioner's] age." (emphasis added) *See* **Appendix J**. In this present litigation, the HACFL new counsel have never accused the Petitioner of "fabricat[ing]" her claim and instead, advanced the frivolous argument that English's statements don't constitute direct evidence of age discrimination because they were made in the context of "succession planning." Dkt. 15. Regardless of the context, if the statements were repeatedly made by the Executive Director, then they do rise to the requisite level of direct evidence of discrimination.

Judge Seltzer further demonstrates his bias in his defense of the HACFL and its counsel by stating: "[The] [HACFL] explains that these statements were made to ensure that all appropriate staff were being trained sufficiently in advance to become future managers [DE 53, ¶¶ 28-30]." [pg. 8-9]. How can the HACFL's attorneys "explain" the meaning of statements they denied were made? They are lying and the lower courts have turned a blind eye to direct evidence of age discrimination since it automatically warrants a judgment in favor of the Plaintiff and/or a jury trial.

Seltzer distinguished Van Voorhis v. Hillsborough Cty. Bd. of Cty. Comm'rs, 512 F.3d 1296 (11th Cir. 2008) (a supervisor's statements that he "didn't want to hire any old pilots" and was not going to interview applicants because "he didn't want to hire an old pilot" were held to be direct evidence of age discrimination) and Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354 (11th Cir. 1999) (a decisionmaker's comments that "the company needed...young men...to be promoted" did not constitute direct evidence of age discrimination), and "found that there was no direct evidence of age discrimination because English's alleged comments did not rise to level required." The Eleventh Circuit ignored its own precedent in order to affirm the district court's decision. For many reasons, the lower courts' decisions are erroneous as a matter of fact and law.

The facts of Damon are not the same as the ones presented in this case. For one, the statements in question ("what the company needed was aggressive young men like [D'Angelo] to be promoted") were stated after the employee was terminated to the younger replacement. Additionally, even though the Court stated that the

comment did not constitute direct evidence of age discrimination, they did say it was "probative circumstantial evidence of [the decisionmaker's] state of mind" and "reverse[d] the order of summary judgment and remand[ed] [the case] for trial" because there were "genuine issues of material fact." The Eleventh Circuit also stated that an example of a blatant remark that constituted "direct evidence would be a management memorandum saying, 'Fire Earley – he is too old.'"

In Van Voorhis, the appellate court concluded that "Van Voorhis presented both direct evidence of discrimination on the basis of age and evidence of an adverse employment action" and reversed the district court's decision and remanded the case for further proceedings consistent with the court's opinion. The Eleventh Circuit should reach the same conclusion that it did in Van Voorhis with regards to classifying English's comments as direct evidence of age discrimination. In conclusion, Damon and Van Voorhis actually support that English's repeated ageist statements constitutes evidence that is probative of discrimination, and should not have been ignored with malice and/or reckless disregard. In both cases, the Eleventh Circuit reversed the district judge's decision granting summary judgment in favor of the employer and the same outcome should have happened in this case.

Although the court refused to discuss Baer in the proper context of Hicks-Washington's claims of race and/or color discrimination, the Court discussed Baer to diminish the Petitioner's age discrimination claims since she was four years older than the Petitioner. When English's comments are properly acknowledged and considered by the finder of fact, then his hiring decisions post-Petitioner's

termination do not negate the fact that English was conscious of Mrs. Lopez and the Petitioner's ages when he decided to terminate them.

After ignoring direct evidence of age discrimination, the panel judges narrowly applied the McDonnell Douglas tripartite framework and stated: "While some of the people hired for the Director position were indeed younger than Hicks-Washington, the person that filled the position in 2017 [Baer] was four years older than she was. Furthermore, neither the other candidates' ages nor English's alleged comments showed that the Authority's reasons were pretextual."[4] Order, pg. 16. The Eleventh Circuit does not discuss "the other candidates' ages" or that they were "substantially younger" than the Petitioner. *See e.g.,* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996).

Although the HACFL's counsel argued that Barberio is over the age of 40, her exact age is unknown due to the fact that the HACFL would not provide this information to the Petitioner during discovery. Johnson was 43 years old at the time she was hired and is nearly 13 years younger than Hicks-Washington. *See* Carter v. DecisionOne Corp., 122 F.3d 997, 1003 (11th Cir. 1997) (holding that plaintiff aged 42, who was replaced by employee aged 39, met the "substantially younger" replacement requirement under ADEA) (*citing* Carter v. City of Miami, 870 F.2d 578, 582-83 (11th Cir. 1989)); Liebman v. Metro. Life Ins. Co., No. 14-13197 (11th Cir. Dec. 18, 2015) (both individuals were over the age of 40 but a seven-year age difference

[4] The Eleventh Circuit mentions Baer in the context of Petitioner's age discrimination claims because Baer was four years older. They fail to acknowledge that hiring Baer supports Petitioner's claims of individual disparate treatment based on race and/or color.

was significant enough to raise an inference of age discrimination). The current Director, a Hispanic woman named Anita Flores, was under the age of 40 when she was promoted to the position, does not have a high school diploma and was written up at least twice for her unprofessional conduct while previously employed at the HACFL. That constitutes clear individual disparate treatment based on race, color and age.

4. Retaliation: Immediately after being terminated, Hicks-Washington wrote more than one letter to the HACFL's board of directors, asking for them to investigate the circumstances surrounding her discharge. These letters gave the HACFL notice that Hicks-Washington believed that her termination was unlawful and motivated by her race, color, sex and/or age. Any hiring decision for the Director position was made after the HACFL had been informed of accusation, so if the company hired individuals who shared the same protected characteristics as Hicks-Washington, it doesn't negate the fact that the adverse employment decisions taken against her were unlawful. Additionally, the HACFL's claims that Hicks-Washington had a "harsh" or "oppressive" management style that led to the company's high turnover is defamatory. Hicks-Washington's original complaint included a claim of defamation, but the Court recommended that she dismiss this claim. Either way, these claims about Hicks-Washington are knowingly false and cannot be accepted as true since Hicks-Washington has raised compelling arguments to demonstrate that the non-discriminatory reasons proffered for her termination are not true. Retaliation occurred after Hicks-Washington submitted letters to HR and the board of directors,

seeking an investigation into her termination and alleging that her termination violated our nation's antidiscrimination laws. Each time the HACFL hired someone lesser qualified and/or substantially younger than the Petitioner, this constitutes retaliation. Raising false and defamatory claims against the Petitioner also constitutes retaliation because the HACFL is paying its attorneys to make false claims about the Petitioner in violation of Fed. R. Civ. P. 11.

5. Refusing to Allow an Impartial Jury to Decide "Genuine Issues of Material Fact" Constitutes A Violation of Constitutional and Civil Rights: Once a plaintiff's *prima facie* case has been established, there is a presumption of discrimination, and the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged employment actions. McDonnell at 802-804. If such a showing is made, the presumption disappears, and the burden shifts back to the plaintiff, who survives summary judgment if s/he is able to demonstrate that the articulated reason was merely a pretext for intentional discrimination Id. Pretext is a "dishonest explanation. It's a lie, rather than an oddity or error." O'Regan v. Arbitration Forums, Inc., 264 F.3d 975, 983 (7th Cir. 2001). In order to show pretext, the plaintiff must show both that the employer's explanation was false, and that discrimination was the real reason for his decision. Brooks v. Cty. Comm'n of Jefferson Cty., Ala., 446 F.3d 1160, 1163 (11th Cir. 2006). In Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, (2000, the Supreme Court noted that evidence disproving the employer's explanation is "simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive," since

"once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation."

Throughout the case, the HACFL's counsel argued that even if Hicks-Washington could establish a *prima facie* case of discrimination, they had legitimate, non-discriminatory, non-retaliatory reasons for firing her, specifically a need to "reduc[e] employee turnover, improv[e] employee morale, and facilitat[e] a stable workforce," because she had an "oppressive" management style and could not keep a stable staff. The company further argued that Hicks-Washington was unable to rebut its articulated reasons for terminating her, failing to prove that those reasons were pretextual and to show that age discrimination was a "but for" cause of her termination. Both the district and appellate courts agreed.

The Defendant first introduced the argument that Mrs. Washington had a "harsh" and "oppressive" management style and "poor leadership" in their February 2, 2017 Position Statement to the EEOC. On page two, they stated: "The [Petitioner] and her supervisor were terminated from employment at the same time and for the same reasons. The [Petitioner] could not keep a stable staff of competent personnel in the department. Hicks-Washington had an oppressive management style and, for several years, employees had resigned from the department citing the way that they had been treated by her. Employee turnover in the department was extreme during the last year of her employment. The [Petitioner] was terminated on November 13, 2015. Since then, turnover has moderated." On page 3, they state: "[Mrs. Washington] exhibited a harsh and overbearing management style and inability to get along with

the subordinate employees in the department. She was known to berate employees, make sarcastic and demeaning comments and deliver criticism harshly." In response to the Petitioner's claims of failure to rehire, the HACFL stated: "The [HACFL] had just terminated the [Petitioner] for all the reasons set forth above. The [HACFL] was certainly not going to 'promote' her by rehiring her to an even higher management position after just having terminating her." pg. 7. To support this argument, the HACFL former counsel presented as evidence all of Mrs. Washington's evaluations over a ten-year period, four Exit Interviews from former HACFL employees that worked under Hicks-Washington and a chart naming the employees who resigned or were terminated[5] from 2007 to 2015.

a. Termination: Over the last four and a half years, the HACFL has provided a number of different reasons as to why Mrs. Washington was terminated. On the date of Hicks-Washington's termination, English told her that she and Mrs. Lopez were being terminated because the company wanted to "move in another direction." In or around December 15, 2015, the HACFL submitted its response to the Florida Department of Economic Opportunity Reemployment Assistance Program. On page two, the Defendant's response to the question, "What was the primary reason for the claimant's discharge?," Andrea Ayala of Human Resources responded "agency reorganization." In response to the question, "Was the claimant discharged for a violation of a rule or policy?," Ayala replied, "No." After a complaint was filed with

[5] The chart did not distinguish between those who resigned and those who were terminated. Terminated employees should not have been included and the Petitioner cannot be blamed for employees who were terminated.

the EEOC, the HACFL's narrative for the Petitioner's termination drastically changed.

b. "Poor Leadership" and "Harsh" Management Style: Hicks-Washington has maintained that she did not harbor a "harsh" or "oppressive" management style. Since she is her own legal counsel, defending herself against false and defamatory statements does not mean she's being biased or subjective. The evaluations that the HACFL presented to the court actually demonstrate that ~~Mrs.~~ Hicks-Washington was an excellent leader and team player, hence the reason she was promoted multiple times throughout her employment and received numerous raises. The HACFL and its counsel have acknowledged that the Petitioner's evaluations are "mostly positive." For example, more than one of her evaluations state that "her outlook [was] generally positive," she "[made] every effort to make herself accessible to her subordinates," that she "display[ed] very good verbal skills, communicating clearly and concisely" and that she "listen[ed] and comprehend[ed] well." [2009-2010, 2010-2011, 2013-2014 Evaluations]. It is perfectly normal for some employees to dislike their boss – whether justified or not. The 4 Exit Interviews are "statistically insignificant" because it demonstrates that less than 4% of the employees Mrs. Hicks-Washington supervised over a ten-year period had something negative to say about her management style or leadership abilities. Additionally, English came by the Petitioner's office regularly and never once communicated to the Petitioner that he thought she had a "harsh" and "oppressive" management style. He did however, in the months leading to her termination, tell her and her supervisor that they were getting older and inquired as

to who from the company could replace them. Hicks-Washington also presented statements from former co-workers, who praised her and her management skills.

c. Company Turnover: Based on the imaginary story created by the HACFL's counsel, they argued that due to the Petitioner and Mrs. Lopez's "harsh" and "oppressive" management style, that they were the primary reason for company's high rate of turnover. The Petitioner also demonstrated that very little of the company's turnover was attributable to her. According to documents provided by the Defendant, 60 HACFL employees were terminated or resigned between 2007 and November 6, 2015. The HACFL failed to distinguish between the employees that quit and the employees that were terminated from her department.[6] The one position responsible for the HACFL's high rate of turnover came from the Occupancy Specialists. This was a low-wage, data entry position which was filled mostly by individuals with high school diplomas. The Occupancy Specialist position has had a high rate of turnover before, during and after Hicks-Washington's employment at the HACFL. The Petitioner was not involved in the hiring of Occupancy Specialists – HR's Andrea Ayala screened applicants for interviewing. From 2009 to 2015, the Plaintiff did not directly supervise the Occupancy Specialists. They were supervised by the Occupancy Supervisors (Raquel Brutus-Thomas, Shane White, Anita Flores and Willie Mosley) – not the Petitioner. Between 2007-2015, 35 out of the 60 employees or 58% of employees who left the company held the "Occupancy Specialist" position. In 2008, three employees from the HACFL left the company and they were

[6] The Petitioner requested this discoverable information during discovery and the HACFL and their counsel refused to produce it.

all Occupancy Specialists (100%). In 2010, three out of the four employees (75%) who left the company were Occupancy Specialists. In 2014, seven employees from the HACFL left the company and they were all Occupancy Specialists (100%). The pattern is clear and the Petitioner's management style had nothing to do with these employees leaving the company in high numbers. Lastly, the HACFL argued that the turnover rate decreased once the Petitioner left the company. They have provided no documents to support their claim, but the company has had a high rate of turnover for its Director position given that within a two-year period, four people were hired while Mrs. Lopez was the Director for more than a decade.

When deciding a motion for summary judgment, the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. Reeves at 150. "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Clemons v. Dougherty Cty., Ga., 684 F.2d 1365, 1369 (11th Cir. 1982).

Both parties submitted their motions for summary judgment on February 25, 2019, Dkt. 44-45 & 47-48, but the Petitioner's pleading was not entered onto the docket until a few days later. One day after the Appellee's motion was entered onto the docket, Judge Moreno issued an Order adopting Judge Seltzer's recommendation and dismissed seven out of the Petitioner's eight claims. Dkt. 46. Although the Petitioner submitted her objections to Judge Seltzer's report on February 11, 2019, Dkts. 37-38, Judge Moreno falsely stated in his Order that neither party filed objections. As a result, Judge Moreno's adopted all of Judge Seltzer's recommendations without conducting a de novo review.

The Petitioner's Complaint established a *prima facie* plus pretext case of race, sex and age-based discrimination by presenting a "convincing mosaic" of circumstantial evidence. A "convincing mosaic" may be shown by evidence that demonstrates, among other things, (1) "suspicious timing, ambiguous statements..., and other bits and pieces from which an inference of discriminatory intent might be drawn," (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual. Silverman v. Board of Educ. of City of Chi., 637 F.3d 729, 733-34 (7th Cir. 2011). The panel state on page 16: "Hicks-Washington's arguments on appeal would lead us to impermissibly second-guess the wisdom of the Authority's decision." (emphasis added) The "second-guess" language is used in decisions mostly by ideologically conservative federal judges who try to narrowly apply our nation's antidiscrimination laws. The Court cannot allow a party to avoid producing discoverable evidence which would prove the Petitioner's claims,

then say that they can't "second-guess" the reasons why the employer made an adverse employment decision. The law is clear that if there are "genuine issues of material fact," the Court must dismiss a party's motion for summary judgment and allow for a jury trial if one was sought. Thus any "second-guess[ing]" should be done by the jury because the Petitioner has identified numerous genuine issues of material fact throughout the case.

The HACFL's actions are no different than the numerous "Karens" and other "white" people who intentionally make false claims to the police about black people. In this situation however, the police are now men in black robes. Instead of remaining impartial and abiding by the Judicial Code of Conduct, the federal judges in this case ignored any and all evidence unfavorable to the HACFL and believed to be true all things negative about Hicks-Washington. As demonstrated in *Rights on Trial,* vilifying the worker and relying on the "persistence of nefarious stereotypes of disadvantaged groups"[7] seems to be the modus operandi of employment civil rights defense attorneys to create the illusion that the worker's behavior justified their termination. Chapter 9 discussing how defense attorneys rely on stereotyping, and ultimately "reinscribe the very hierarchies the law was designed to attack."[8] What's worse is that the District Court has issued a final decision which believed these things to be true – despite a pyramid of evidence demonstrating otherwise. Just because an employer is able to state "legitimate, nondiscriminatory reasons" after going on a

[7] Ellen Berrey, Robert L. Nelson and Laura Beth Nielsen, *Rights On Trial: How Workplace Discrimination Law Perpetuates Inequality*, pg. 13, 19. (2017).
[8] Id. at pgs. 226-258.

fishing expedition, doesn't mean that they are being truthful. Since the Petitioner showed that the employer's arguments are pretextual and that impermissible factors more likely than not influenced the adverse employment decision(s), then genuine issues of material fact exist, and an impartial jury should decide the merits of those claims.

If the petitioner has demonstrated that the employer's articulated nondiscriminatory reasons for taking an adverse employment decision is pretextual, then the Court must "second-guess" the employer's stated reasons and allow an impartial jury to decide issues of material fact. An employer can simply lie about an employee's work performance or reason for adverse employment decision, provide documents which create the illusion of truth and be let off the hook – even when the decisionmaker makes explicitly discriminatory remarks. The evidence they have presented to support their "legitimate, non-discriminatory reasons" for terminating does not support that they had an "honest belief" that these two, hardworking women of color had an "oppressive" and/or "harsh" management style that was the primary cause of the turnover, particularly high in lower status, lower paying jobs.

Ultimately, an impartial jury should determine whether or not Hicks-Washington harbored a "harsh" and "oppressive" management style, whether English's goal of replacing two women of color for a white woman with a fresh criminal record was indicative of his racial bias, whether or not English's comments were indicative of his ageist bias to name a few and whether English's subjective decisionmaking has and is causing a disparate impact against qualified African

Americans from enjoying the same terms and conditions of employment as their white counterparts.

It is blatantly clear that judge Moreno erred in concluding that the Petitioner "failed to produce the significantly probative evidence that is required to rebut Defendant's legitimate, nondiscriminatory reasons for her termination and avoid summary judgment." Before these legally erroneous final decisions were made, Hicks-Washington sought for both federal district court judges to disqualify themselves due to the appearance and/or their actual bias, prejudice, impropriety and partiality in favor of the Defendants and their counsel. Hicks-Washington sought their disqualification because both federal judges made a numerous of procedural decisions that violated Hicks-Washington's constitutional right to due process and equal protection under the law. For most subsections, the Petitioner will state the legal arguments and/or legal conclusions of HACFL's counsel and federal judges, then the Petitioner will present the facts that were omitted from the legal opinions.

B. <u>INTENTIONAL PROCEDURAL ERRORS:</u>

The procedural errors discussed below were designed to chip away at the substance of the Petitioner's claims and ultimately prevent an impartial jury from deciding the merits of her case – a violation of the Petitioner's constitutional rights under the 5th and 14th Amendments.

1. <u>Hicks-Washington Did Not Fail to "Exhaust Administrative Remedies":</u> On page 4 in their Motion to Dismiss, the HACFL falsely argued: "Counts I, II, III, VII and VIII, which are based on her 'race, color and/or sex'... are barred in their entirety

because they were not the subject of Plaintiff's EEOC Charge." In Judge Seltzer's second Report & Recommendation, he concluded on page 6, "The Charge of Discrimination clearly states that Plaintiff's claims were based upon age discrimination and nothing else. The Charge contains no information or factual allegations from which a claim of discrimination based upon sex, race, or color could be construed to be like, related to, or growing out of the stated charges of age discrimination. Likewise, nothing alleged in the Charge of Discrimination could support a finding that Plaintiff raised a charge of retaliation with the EEOC. Plaintiff's claims of discrimination based upon sex, race, color and retaliation in violation of Title VII are, therefore, barred."

On pages 2 through 4 of Hicks-Washington's Petition for Rehearing, she summarized the facts demonstrating that she did not fail to "exhaust administrative remedies." The Plaintiff specifically included a section in her Complaint regarding the EEOC's mishandling of her compliant. Hicks-Washington included a section in her Complaint to discuss the EEOC's failure to properly investigate all of her claims and expected any impartial finder of fact not to hold her accountable for the EEOC's mistakes. Hicks-Washington's arguments were buttressed by the fact that the EEOC's own language supports that investigator Michael Mathelier did not properly conduct an investigation. Hicks-Washington has maintained throughout the entirety of this case that after she filed her Intake Questionnaire, EEOC investigator Michael Mathelier told her that she was not able to pursue claims of race, color and sex discrimination. Based on this information and to prevent harmful delay, Hicks-

Washington signed to the Charge of Discrimination and continued to raise claims of discrimination based on race, color and sex. In numerous pleadings, during the mediation and in conversations with EEOC Director Michael Farrell, Hicks-Washington and her son sought for claims of race, color and sex discrimination to be added to her complaint, especially after Hicks-Washington learned that the HACFL hired Barbara Baer – a white woman over the age of 55 who been arrested and jailed for theft of public funds – had been hired as Director. Hicks-Washington believed that English's decision to terminate her was discriminatory, but Baer's appointment to the Director position helped to establish Hicks-Washington's claims of individual disparate treatment, as well as show that her termination was motivated in part by her race and/or color.

The Petitioner showed that: (1.) her initial complaint to the EEOC listed categories of discrimination as race, color, sex and age, (2.) EEOC investigator Michael Mathelier told her she could only pursue claims of age discrimination; (3.) the Petitioner signed the EEOC Charge written by Mathelier[9] but continued to raise claims of race, color and sex discrimination throughout the entirety of the EEOC's handling of the complaint, and (4.) the Petitioner's son spoke to the Director Michael Farrell on her behalf, asking for claims of race, color and sex discrimination to be reinstated and they refused before issuing a Right to Sue letter. These facts have never been disputed. Mrs. Washington also gave notice to the HACFL numerous times before filing a complaint with the EEOC, alleging that her race, color, perceived

[9] Mathelier is not a lawyer and EEOC should not be engaging in practices that deprive and/or deny individuals of their civil and constitutional rights.

national origin, sex and/or age played a "motivating factor" in the adverse employment decisions (e.g. termination) taken against Hicks-Washington by English and the HACFL, so she would not have narrowed her claims only to age discrimination unless Mathelier told her to do so.

The Petitioner presented additional evidence to the Eleventh Circuit – from the EEOC's own website – which further supported that the EEOC did not properly investigate all of her claims. It is well established the courts – and not the EEOC – have been vested with the final responsibility for statutory enforcement of our nation's antidiscrimination laws through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief. *See, e.g.,* Kremer v. Chemical Constr. Corp., 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII). In Forehand v. Fla. State Hosp., 89 F.3d 1562, 1571 (11th Cir. 1996), the Eleventh Circuit held that "any deficiency in the EEOC's performance of its duties should not adversely affect a plaintiff's right to sue" and in Gregory v. Ga. Dep't of Human Res., 355 F.3d 1277, 1279 (11th Cir. 2004) stated that "the scope of an EEOC complaint should not be strictly interpreted." Yet, in this case, the federal judges made no mention of these cases and ignored their own precedent.

2. **"Failure to Exhaust Administrative Remedies" Pursuant to Title VII Is Not Applicable to Claims of Race and Color Discrimination Under Section 1981 and FCRA:** There has been a deliberate attempt by both the district and appellate courts to avoid a discussion of Section 1981. On page 12, the panel judges conclude: "Because

she clearly failed to exhaust her administrative remedies with respect to any claims other than age discrimination, she could not bring her Title VII claims for race, color, or sex discrimination in federal court." In footnote 7 on page 12, the panel judges write: "Hicks-Washington argues for the first time in her reply brief that her 42 U.S.C. § 1981 and retaliation claims were not subject to the same procedural requirements of administrative exhaustion. Those arguments were not properly raised and therefore are considered abandoned." This is not true because on numerous times before the district court, the Petitioner raised the argument that the procedural requirements under Title VII have no bearing on filing a claim of race, color, sex and/or age under Section 1981 and/or the Florida Civil Rights Act ("FCRA"). This is not true. On October 17, 2018, the Petitioner raised the argument for the first time in her Motion for More Definite Statement, or in the alternative, Fed. R. Civ. P. 50 Motion for Judgment [Dkt. 18] – in response to Judge Seltzer's October 19, 2018 R&R. Dkt. 21. The Appellee's counsel even conceded to this fact in their October 30, 2018 pleading. Dkt. 24. Even if the Petitioner had not demonstrated due diligence and failed to "exhaust [her] administration remedies" pursuant to Title VII, it has absolutely no effect on her claims of race and color discrimination under Section 1981 and the FCRA, as well as no effect on her claims of sex discrimination under the FCRA. As a result, claims of race, color and/or sex discrimination under Section 1981 and the FCRA cannot be dismissed for "failure to exhaust administrative remedies." Although the Petitioner should even be wasting her time discussing this issue, her arguments were further supported by WestLaw. It states: "Section 1981 does not

require an individual to exhaust administrative remedies by filing a charge before any government agency and waiting for that charge to be adjudicated or released before proceeding to court."[10] This non-issue was made into an issue by the HACFL's counsel and the federal judges presiding over this case, and is further proof that the federal judges conspired to deprive the Petitioner of her constitutional and civil rights under the color of law.

3. State Claims of Age Discrimination Cannot Be Denied Since Federal Claims Were Allowed to Be Litigated: Judge Seltzer recommended dismissing the Petitioner's age discrimination claim under the FCRA, but allowed the claim to stand under the ADEA. Judge Moreno adopted Judge Seltzer's recommendation. Since both claims are predicated on the same facts and the court had jurisdiction to decide claims under each statute. Dismissing the state equivalent of a federal law is another clear violation of due process and equal protection under the law.

4. It Is A Violation of Due Process To Allow Discovery on Claims the Court Later Says It Does Not Have the Jurisdiction to Decide: While the district court ultimately concluded that it did not have jurisdiction to decide claims of race, color and sex discrimination, the Court allowed Hicks-Washington to conduct discovery on all claims raised in her Amended Complaint. This issue, as well as many others, could've been addressed during a Fed. R. Civ. P. 16 pretrial conference, but judge Moreno refused to allow one. He also refused to have an oral hearing or provide an

[10] "Section 1981 of the Civil Rights Act of 1866 (Section 1981)." Thomas Reuters Practical Law. https://content.next.westlaw.com/Document/I0f9fc015ef0811e28578f7ccc38dcbee/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

opportunity for any of the parties to speak under oath. This is further demonstration that this legal proceeding was a complete and total sham.

5. HACFL and its Counsel's Unethical Discovery Abuses Cannot Be Ignored: Due to highly unethical conduct of Appellee's counsel during discovery, the Petitioner submitted four motions to compel and sought sanctions for their intentional discovery abuses. Dkts. 18, 28, 35 & 39. Eleventh Circuit judges, like district court judges Seltzer and Moreno, refused to hold the Appellees and their legal counsel accountable for their bad faith conduct during discovery. The Petitioner identified four distinct discovery abuses committed by the HACFL and their counsel and no adverse disciplinary actions were taken against them by the Court, although the Petitioner filed Motions to Compel and sought sanctions. Instead of punishing the HACFL and their counsel for their contumacious and dilatory conduct, it actually worked to their benefit.

6. Additional Violations of Due Process: On pages 43-45 of the Petitioner's Brief, Hicks-Washington included a list of other procedural violations committed by the district court. *See* Appendix K.

II. ACTIONS OF FEDERAL JUDGES VIOLATE THE JUDICIAL CODE OF CONDUCT AND CONSTITUTES A LARGER CONSPIRACY TO DEPRIVE AFRICAN AMERICANS OF THEIR CONSTITUTIONAL AND CIVIL RIGHTS UNDER THE COLOR OF LAW:

From day one, Hicks-Washington has pursued this case in extreme good-faith and has been penalized by the lower courts for seeking to enforce our nation's antidiscrimination laws. In violation of Canons 1, 2 and 3 of the Judicial Code of Conduct, their Oaths of Office and the U.S. Constitution, Judges Seltzer, Moreno and

appellate judges repeatedly ignored the facts and compelling evidence presented by the Petitioner, as well as narrowly construed the law, so that their decisions would always be favorable to the HACFL and its current legal counsel at Rumberger, Kirk & Caldwell.

The Petitioner sought their disqualification and/or requested to transfer her appeal, but the courts refused. In order to show the appearance of and/or the existence of actual bias, prejudice, partiality and impropriety and demonstrate that federal judges engaged in highly unethical conduct unbecoming of a U.S. federal judge, the Petitioner relied on a number of different sources, including but not limited to: their biographies, articles detailing the "conservative judicial agenda" that has taken place since the passage of Civil Rights Act of 1964, and most importantly, their judicial opinions. The Petitioner also relied heavily on the statutory language of our nation's antidiscrimination laws, considerable case law, law articles and will reference three books throughout this brief, *Rights On Trial: How Workplace Discrimination Law Perpetuates Inequality* (2017) by Ellen Berrey, Robert L. Nelson and Laura Beth Nielsen, *Unequal: How America's Courts Undermine Discrimination Law* (2017) by Sandra F. Sperino and Suja A. Thomas and *Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law* (2017) by Tristin K. Green,[11] to further demonstrate that the unconscionable outcome of this case, as well as the dismal state of employment civil rights law as a whole, are not accidental or due to chance.

[11] None of these authors are black.

Instead of acting as impartial men in black robes, Judges Seltzer and Moreno acted as legal counsel for the Respondent and their counsel. No matter how much compelling evidence was presented to support the Petitioner's legal arguments, the Court did not care and simply regurgitated the arguments advanced by the Respondent's counsel. Federal judges know that our nation's antidiscrimination statutes are to be construed "liberally," the legal frameworks discussed throughout this case are not to be applied rigidly or narrowly, and that "genuine issues of material fact" should be decided by an impartial jury. Although they know the law states this, they are also aware that over the last four decades, the justices on the Supreme Court have played a major role in eviscerating the Civil Rights Act of 1964.

The personal lives and the political party of the presiding judges are important in understanding how a conclusion was reached. From a race and gender standpoint, both individuals are male and are non-black. Judge Seltzer classifies himself as "white" and Judge Moreno is Hispanic. Interestingly, Judge Moreno was not born in the U.S. He was born in Caracas, Venezuela and moved to this country at the age of 12. One of the contributing factors leading to <u>less than</u> 6% of employment discrimination cases making it to an impartial jury,[12] has been the "conservative judicial agenda" that has taken place since the 1980s.[13] The 40 year effort largely by

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[12] Sean Captain. "Workers Win Only 1% of Federal Civil Rights Lawsuits At Trial." FastCompany. July 31, 2017. https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits.

[13] *See e.g.,* Charlie Savage. "Appeals Courts Pushed By Right By Bush Choices." New York Times. October 28, 2008. http://www.nytimes.com/2008/10/29/us/29judges.html; Joe L. Selig. The Reagan Justice Department and Civil Rights: What Went Wrong? 1985 U. Ill. L. Rev. 785 (1985); Jules Lobel and Barbara Wolvovitz. The Enforcement of Civil Rights Statutes: The Reagan Administration's Record. 9 Black L. J. 252 (1986); Neil A. Lewis. "The 1992 Campaign; Selection of Conservative Judges Insures a President's Legacy." New York Times. July 1, 1992. http://www.nytimes.com/1992/07/01/us/the-1992-campaign-selection-of-conservative-judges-insures-

white male, Republican Presidents[14] to fill the bench with ideologically conservative, predominately white male federal judges who are "hostile" to civil rights and black litigants, has been well documented.[15] Not surprisingly, Judge Moreno was appointed by the late Republican President George H. W. Bush in 1990.

"[T]he conservative turn in the federal judiciary from the 1980s onward resulted in significant retrenchment in what constitutes an actionable employment discrimination claim."[16] "The last thirty years...have seen the Supreme Court and other appellate court decisions begin to limit the scope of antidiscrimination law, often in invisible ways. Judicial retrenchment has limited what constitutes discrimination, increased the difficulty of a discrimination claim getting to trial, and made discrimination more difficult to prove in court."[17] According to Green, "Over the past several decades, the courts have driven the law in a dramatic turn toward

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a-president-slegacy.html; A. Leon Higginbotham. "The Case of the Missing Black Judges." New York Times. July 29, 1992. http://www.nytimes.com/1992/07/29/opinion/the-case-of-the-missingblackjudges.html; Elisabeth Bumiller. "Bush Vows to Seek Conservative Judges." New York Times. March 29, 2002. http://www.nytimes.com/2002/03/29/us/bush-vows-to-seek-conservative-judges.html; David Lauter. "Civil Rights Bill Vetoed By Bush." Los Angeles Times. October 23, 1990. http://articles.latimes.com/1990-10-23/news/mn-2961_1_civilrights-leaders; Lisa Michelle Elman, David Schkade and Cass R. Sunstein. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation," University of Chicago. September 2003; Julian E. Zelinger. "How Conservatives Won the Battle Over the Courts." The Atlantic. July 7, 2018. "https://www.theatlantic.com/ideas/archive/2018/07/how-conservatives-won-the-battle-over-the-courts/564533/; Jeffrey Toobin. "The Conservative Pipeline to the Supreme Court." The New Yorker. April 17, 2017. https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court; Carrie Johnson. "Wave of Young Judges Pushed by McConnell Will Be 'Ruling for Decades to Come.'" NPR. July 2, 2020. https://www.npr.org/2020/07/02/886285772/trump-and-mcconnell-via-swath-of-judges-will-affect-u-s-law-for-decades.

[14] Max Ehrenfreund."Researchers Have Found Strong Evidence That Racism Helps the GOP Win." The Washington Post. March 3, 2016. https://www.washingtonpost.com/news/wonk/wp/2016/03/03/researchers-have-found-strong-evidence-that-racism-helps-the-gop-win.

[15] Berrey. pgs. 29-45.

[16] Berrey. pg. 34.

[17] Berrey. pg. 36.

protecting employers from liability for discrimination." [18] Even though the law has always been on Hicks-Washington's side, it is clear that as an African American woman and *pro se* litigant, she never had a fair chance at receiving justice and redress for the unlawful acts committed against her by English and the HACFL.

Procedural motions like motions to dismiss and motions for summary judgment,[19] are also being used to help judges chip away at employee's claims of discrimination. By doing so, judges are "regularly invad[ing] the province of the jury, evaluating cases in ways that favor employers, even when the evidence suggests discrimination."[20] "Federal judges do not apply the traditional rules of litigation to discrimination cases. Instead, judges have created a new set of rules. These rules are not neutral. They favor employers and disfavor workers."[21] "Typically, judges decide legal issues, and when there is a dispute about facts, the jury decides. Federal judges are not supposed to pick winners and losers in cases where the facts are contested. If a case presents facts suggesting discrimination, a jury should decide the outcome. If a case is a close call, it is supposed to go to a jury."[22]

Our nation cannot live up to its ideals and achieve a society free from discrimination, because there are a large number of men and women in positions of

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[18] Green. pg. 1. 2017.
[19] Hon. Mark W. Bennett. From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four Decade Experience. 57 N.Y.L. Sch. L. Rev.685, 686 (2012–2013). ("Summary judgment abuse and overuse occurs in all types of cases, but is especially magnified in employment discrimination cases. This problem is exacerbated by the daily ritual of appellate courts affirming summary judgment grants to employers, often without comment, at a rate that far exceeds any other substantive area of federal law.").
[20] Sperino. pg. x. 2017.
[21] Sperino. pg. 4. 2017.
[22] Sperino. pg. 4. 2017.

power doing everything to maintain and perpetuate the inequality that exists in our society today. Despite Title VII being the result of the black-led civil rights movement, research has shown that white women have been the biggest beneficiaries of the statutes.[23] Even more troubling is the fact that although the statute was amended in 1991 to allow for jury trials and punitive damages for claims of intentional discrimination, less than 6 percent of litigants today have their employment civil rights claims decided by an impartial jury.

It is well-settled that, "[N]o man in this country is so high that that he is above the law." United States v. Hastings, 681 F.2d 706, 711 (11th Cir. 1982). Federal judges are not exempt. United States v. Isaacs, 493 F.2d 1124, 1144 (7th Cir. 1974). Although federal judges are afforded judicial immunity for decisions made within their judicial capacity, this immunity is not absolute – especially if one has engaged a conspiracy to deprive an African American of their rights under the color of law in violation of the Ku Klux Klan Act of 1871.

Whether you like it or not, global white supremacy (racism) will be eradicated and the world will be rid of the man-made virus known as racism. It's important to note that all of the decisions made in this case were rendered before protests swept the nation after the unjust killings of unarmed men and women like Breonna Taylor and George Floyd. As each day passes, it becomes blatantly clear that racism and all

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[23] Donald Tomaskovic-Devey and Kevin Stainback. "Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces since the Civil Rights Act." *The Annals of the American Academy of Political and Social Science* Vol. 609, Race, Ethnicity, and Inequality in the U.S. Labor Market: Critical Issues in the New Millennium (Jan., 2007).

forms of inequality cannot be ignored in our highly race conscious society. It is also clear that the days of blacks allowing non-blacks to deprive us of our God-given, human and constitutional rights are numbered. As so many facets of our society grapple with the realities of institutionalized and individual white racism, the Supreme Court and our nation's entire judicial system must do the same. Each federal judge that conspired to deprive the Petitioner of her constitutional, human and civil rights under the color of law must be held accountable for their highly unethical and unconstitutional actions and all decisions rendered by them must be vitiated.

CONCLUSION:

For the foregoing reasons, the Petitioner respectfully asks that the Supreme Court of the United States grant this petition for a writ of certiorari and vitiate all decisions rendered by the federal judges in both the Southern District of Florida and the Eleventh Circuit.

Respectfully submitted,

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