No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARQUICE ROBINSON, PETITIONER

v.

MICHAEL HOLMAN, ET AL, RESPONDENTS

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

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Marquice Robinson
6400 Oakley Road Apt #4208
Union City, GA 30291
770-527-6568

RECEIVED
SEP 13 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner states that Petitioner has no parent or publicly held company owning 10% or more of the corporation's stock.

To the Honorable Justice Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Petitioner Marquice Robinson (Petitioner) respectfully requests that the time to file Petitioner's petition for a writ of certiorari be extended for 60 days up to and including Monday, December 9, 2024. The Court of Appeals issued its opinion on June 6, 2024. (*See* Ex. A) and denied panel rehearing and rehearing en banc on July 12, 2024. (*See* Ex. B). Absent an extension of time, the petition would be due on October 10, 2024. Petitioner is filing this application more than ten days before the October 10, 2024, due date for Petitioner's petition for writ of certiorari. (See S. Ct. R. 13.5). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). Respondent, The United States Marshal Service (USMS) does not oppose Petitioner's Application. However, Respondent's Akal Security (Akal) and Michael Holman (Holman) do oppose the application.

BACKGROUND

This case is about preventing circuit splits. Also, this case is about this Court exercising its supervisory power to correct the Court of Appeals deviation from the

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[1] Petitioner respectfully asks this Court to excuse the red numbering in Petitioner's draft petition for a writ of certiorari as the red numbering is being used to help Petitioner identify what documents should go in Petitioner's appendix if Petitioner has to file a writ of certiorari. The red markings will be removed in the final draft copy of Petitioner's petition.

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[2] Petitioner removed the attachments (i.e., Exhibits A-B) from Petitioner's motion to recall... specifically The Eleventh Circuits June 6, 2024 opinion because Petitioner attached to this application The Eleventh Circuits, opinion labeled as Exhibit A. Also, the remaining exhibit attached to Petitioner's motion to recall... is not relevant to this application and, as a result, was removed.

accepted and usual course of judicial proceedings. (*See* Ex. C, Pet'r's. Draft. Pet. at p. 1). The first question is whether The Eleventh Circuit Court of Appeals (The Eleventh Circuit) erred in holding in conflict with The Ninth Circuit Court of Appeals that a violation of a Collective Bargaining Agreement (CBA) is not an adverse employment action. (*Id.*). The Eleventh Circuit Court held that Petitioner's schedule changes that were not subject to change and based on CBA were not material adverse employment actions. (*Id.*). However, to the contrary, its sister circuit, The Ninth Circuit Court of Appeals (The Ninth Circuit), held that a violation of CBA is an adverse employment action. (*Id.* at pp. 1-2).

The second question is whether The Eleventh Circuit erred in holding in conflict with The Federal Circuit Court of Appeals (The Federal Circuit) that judgment on the pleadings can be granted when there are material facts in dispute. (*Id.*). The Eleventh Circuit granted Respondent Michael Holman (Holman) judgment on the pleadings on Petitioner's assault and battery claims when there were material facts in dispute of whether Holman committed the intentional torts and whether Petitioner sustained any injuries. (*Id.*). However, in contrast to its sister circuit The Federal Circuit held if issues of material fact are unresolved in the pleadings, a motion for judgment on the pleadings cannot be granted. (*Id.*).

Importantly, The Eleventh Circuit's actions of granting a party judgment on the pleadings when there are material facts in dispute could cause chaos throughout the federal judicial system because The Eleventh Circuit's decision goes against the guiding principle of federal rules of civil procedure 12(c) that the moving party

[Holman] much show that there are no material facts in dispute and establish law that issues of fact are for a jury to decide when the material facts are in dispute, not the Court, when a jury trial is requested as in Petitioner's case. (*Id.* at p. 9).

The third question is whether The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings when it entered a decision on a state law claim in conflict with the state's law. (*Id* at p. 2.). The Eleventh Circuit found that Holman was not accomplishing the ends of employment, acknowledging that Petitioner presented some evidence of Holman's duties. (*Id.*). However, the law in the State of Georgia specifically highlights that the determination of whether an employee was acting within the scope of employment is a question for the jury when evidence is submitted that demonstrates an employee's duties. (*Id.*).

Notably, The Eleventh Circuit, departing from the accepted and usual course of judicial proceedings that federal courts are to apply state precedent when dealing with state law claims, could have chilling effect on state sovereignty in violation 10th Amendment Section 4 to the US Constitution that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" because federal courts would be able to arbitrarily disregard a state's ability to write, create, and interpret its own laws. (*Id.* at p. 12).

The fourth question is whether The Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings when it viewed the summary judgment record in the light most favorable to the moving party.

(*Id.* at p. 2). The Eleventh Circuit, in its opinion, failed to cite, acknowledge, and apply the summary judgment standard by viewing the facts most favorable to the non-moving party as required by The Federal Rules of Civil Procedure 56(a) and case law. (*Id.*).

The Eleventh Circuit's actions of reviewing the summary judgment record most favorable to the moving parties, Akal, and the USMS and drawing all reasonable inferences in favor of Akal and the USMS as the moving parties could have a chilling effect on summary judgment decisions within the federal court system because it changes the requirements and standards of the Federal Rules of Civil Procedure 56(a) that the moving party [Akal and the USMS] bears the burden to show that there are no material facts in dispute, not the non-moving party [Petitioner]. (*Id.* at p. 14).

REASONS FOR GRANTING AN EXTENSION OF TIME

This Court should grant Petitioner an extension of time because Petitioner has a pending motion to recall the mandate in The Eleventh Circuit.

This Court should grant Petitioner an extension of time because Petitioner has a pending motion to recall the mandate, reconsideration of Petitioner's petition for rehearing en banc, and to stay the mandate in The Eleventh Circuit. Petitioner filed a motion to recall the mandate to prevent injustice because the Eleventh Circuit created unnecessary circuit splits and wholesale departed from the accepted and usual course of judicial proceedings in its June 6, 2024 opinion. (*See* Ex. D). (*See* background above supra). (*see* also Ex. A).

Also, this Court should grant Petitioner an extension of time because if and when The Eleventh Circuit grants Petitioner's motion to recall the mandate, this Court would no longer have jurisdiction pursuant to 28 U.S.C. § 1254(1) as The Eleventh Circuit's June 6, 2024, final opinion would be recalled and the case would under the jurisdiction of The Eleventh Circuit pursuant to 28 U.S.C. § 1291. (*See* Ex. D). (*See* Ex. A).

Additionally, this Court should grant Petitioner an extension of time because if and when The Eleventh Circuit grants Petitioner's motion to recall the mandate, it would render Petitioner's application for an extension of time to file Petitioner's petition for a writ of certiorari in this Court moot. (*See* Ex. D).

Thus, this Court should grant Petitioner an extension of time because Petitioner has a pending motion to recall the mandate, reconsideration of Petitioner's petition for rehearing en banc, and to stay the mandate in The Eleventh Circuit.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the time to file the petition for a writ of certiorari in the above-captioned matter be extended 60 days, up to and including December 9, 2024.

Dated this 10th day of September, 2024.

Respectfully submitted,

/s/ Marquice Robinson, PhD., LLM., JD., MSCJ

Petitioner Marquice Robinson
6400 Oakley Road Apt #4208
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARQUICE ROBINSON, PETITIONER

v.

MICHAEL HOLMAN, ET AL, RESPONDENTS

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

CERTIFICATE OF SERVICE

I, Marquice Robinson, hereby certify that on September 10, 2024, pursuant to Supreme Court Rule 22.2, I mailed three copies of this application for an extension of time to file a writ certiorari by way of USPS priority mail to The Honorable Justice Clarence Thomas. Also, pursuant to Supreme Court Rule 29.3, I served a copy of this application by way of email to the counsels of record listed below per our agreement to accept the service of documents by way of electronic mail.

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Exhibit A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11735

Non-Argument Calendar

MARQUICE D. ROBINSON,

Plaintiff-Appellant,

versus

MICHAEL HOLMAN,
AKAL SECURITY, INC
UNITED STATES MARSHALS SERVICE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

D.C. Docket No. 1:17-cv-03658-WMR

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Marquice Robinson appeals the district court's dismissal of his suit against Akal Security, Inc., the United States Marshals Service ("USMS"), and Michael Holman. We find no error in the district court's orders, and so we affirm.

I.

Robinson was an employee of Akal, which contracted with USMS to provide security for the Richard B. Russell Federal Building in Atlanta, Georgia. He worked as a court security officer for approximately three years before being fired on January 6, 2017. Robinson alleges that during those three years, he and a fellow security officer were harassed because of their sexuality. After complaining to his supervisors, Robinson claims, Akal and USMS retaliated against him in a variety of ways, including by changing his "schedule weekly in an effort to harass him and cause him to violate time rules."

Robinson also claims that he was assaulted by Michael Holman, a lead court security officer. Holman and a supervisor called Robinson into a meeting to discuss his tardiness to work a few days earlier. At this meeting, Robinson claims that Holman, without being provoked, "puff[ed] out his chest" to threaten

Robinson and then struck him in the face, causing Robinson's mouth to bleed.

Robinson—in a counseled complaint—alleged Title VII retaliation claims against Akal and USMS, state-law claims of defamation and false light invasion of privacy against Akal, and state-law claims of battery and assault against both Akal and Holman.[1] Robinson also filed a motion for sanctions for spoliation of evidence against Akal and Holman, arguing that Akal failed to preserve certain audio and video evidence. He later requested leave to add USMS to the motion, which the magistrate judge denied. In a series of orders, the district court granted summary judgment to Akal and USMS on all claims, dismissed Robinson's motion for spoliation sanctions against Akal, and granted Holman judgment on the pleadings. Robinson appealed.

II.

Robinson first argues that the district court erred by denying his sanctions motion for spoliation of evidence. This Court reviews a district court's decision regarding spoliation sanctions for abuse of discretion. *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1177 (11th Cir. 2020). Here, the court had already granted Akal summary judgment on all claims by the time it denied Robinson's motion for sanctions. Because the party to be sanctioned was no longer party to the case, the district court dismissed the motion without

[1] Robinson's counsel subsequently withdrew from the case, and Robinson proceeded po se. On appeal, Robinson does not argue that the district court improperly dismissed his defamation and false light invasion of privacy claims.

prejudice. The district court was careful to avoid prejudicing Robinson's case, allowing Robinson to re-file his arguments as a motion *in limine* if the evidentiary issues had any bearing on the remaining claims. This was not an abuse of discretion, and Robinson cites to no authority establishing otherwise.

Robinson argues that, because Akal failed to respond to the sanctions motion, it abandoned any defense and the district court ought to have granted the motion. But as the moving party, Robinson bore the burden of convincing the court that spoliation sanctions were warranted, and he failed to carry that burden. Robinson also takes issue with the magistrate judge's refusal to let him amend the motion to add arguments against USMS. Again, Robinson cites to no authority suggesting that this was a reversible error. What's more, the magistrate judge afforded Robinson ten extra pages in his summary judgment briefing to make additional spoliation sanctions arguments against Akal and USMS. **Doc. 171.** In sum, the district court properly denied Robinson's motion for sanctions without prejudice.

III.

Robinson next argues that the district court improperly granted summary judgment to both Akal and USMS on Robinson's retaliation claims. On appeal, Robinson argues only that the change to his work schedule was a materially adverse action. Because he does not challenge the district court's conclusion that the remaining actions were not materially adverse, he has forfeited those arguments. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th

Cir. 2008). To prevail on a Title VII retaliation claim, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). That test "capture[s] those (and only those) employer actions serious enough to 'dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 976 (2024) (alteration adopted) (quoting *White*, 548 U.S. at 68). Materially adverse actions must be more than those "petty slights, minor annoyances, and simple lack of good manners" that frequently occur at a workplace. *Terrell v. Sec'y, Dep't of Veterans Affs.*, 98 F.4th 1343, 1356 (11th Cir. 2024) (quoting *White*, 548 U.S. at 68).

Here, Robinson points to only one action as materially adverse. For a period of three months, Robinson's assigned start time frequently varied between 7:45 AM and 8:00 AM, with one week's start time at 9:45 AM—even though he should have always started at 8:00 AM according to the collective bargaining agreement. Robinson claims that Akal intentionally manipulated his work schedule to cause him to be late for work in retaliation for Robinson's complaints about harassment. But Robinson does not argue that he was ever late to work because of those actions. In fact, he has not pointed to any specific way in which the schedule changes caused him any hardship. These minor schedule changes, with nothing more, would not "dissuade a reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 57. As alleged, they are not materially adverse actions.

Because Robinson has not provided enough evidence to create a genuine issue as to whether Akal took any materially adverse action against him, he has failed to show retaliation. *See id.* The district court therefore did not err when it granted summary judgment to Akal on Robinson's Title VII claim. Robinson also makes the same retaliation claims against USMS, arguing that USMS is liable as his joint employer. But even if USMS was his joint employer, Robinson has still failed to provide enough evidence of retaliatory intent to support his claim. So for the same reasons as with Akal, the district court properly granted summary judgment to USMS on Robinson's Title VII claims.

IV.

Robinson next argues that the district court erred when it concluded that Akal was not liable for Holman's alleged assault under the doctrine of *respondeat superior*. We disagree.

Under Georgia law, "[e]very person shall be liable for torts committed by his . . . servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." O.C.G.A. § 51-2-2. "Two elements must be present to render a master liable under respondeat superior: first, the servant must be in furtherance of the master's business; and, second, he must be acting within the scope of his master's business." *Piedmont Hosp., Inc. v. Palladino*, 580 S.E.2d 215, 217 (Ga. 2003) (alteration adopted) (quotation omitted). The employer is not liable if the tort is committed "not in furtherance of the employer's business, but rather for *purely*

personal reasons disconnected from the authorized business of the master." *Id.* (quotation omitted).

Here, Robinson presented insufficient evidence to show that Holman was acting in furtherance and in the scope of his employment when he struck Robinson. The contract between USMS and Akal stated that lead security officers like Holman did "not have full formal supervisory authority and d[id] not directly supervise other employees." Robinson presents some evidence that he argues shows that Holman was his supervisor and was in charge of scheduling. But even if Holman was Robinson's supervisor, there is insufficient evidence to establish that disciplining (let alone striking) Robinson was part of Holman's employment responsibilities. And just because Holman was responsible for scheduling Robinson's shifts does not mean that Holman was "accomplishing the ends of his employment" when he assaulted Robinson. *Waters v. Steak & Ale of Georgia, Inc.*, 527 S.E.2d 592, 595 (Ga. Ct. App. 2000) (quotation omitted).

The district court did not err by granting summary judgment to Akal on the battery and assault claims.

V.

Finally, the district court correctly concluded that Robinson's assault and battery claims against Holman are precluded by the Georgia Workers' Compensation Act.

We review a district court's grant of judgment on the pleadings de novo. *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014). "Judgment on the pleadings is appropriate where

there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001).

The Georgia Workers' Compensation Act is the exclusive remedy for injuries sustained by an employee based on intentional torts committed by a coworker "unless the tortious act was committed for personal reasons unrelated to the conduct of the employer's business." *Webster v. Dodson*, 522 S.E.2d 487, 489 (Ga. Ct. App. 1999) (citing O.C.G.A. §§ 34-9-1(4), 34-9-11(a)). When the complained of injury "arose out of and in the course of" the plaintiff's employment, it did not occur due to "reasons personal to" the plaintiff. *Hennly v. Richardson*, 264 Ga. 355, 356 (1994) (quotation omitted). "An injury arises 'in the course of' employment when it occurs within the period of the employment, at a place where the employee may be in performance of her duties and while she is fulfilling or doing something incidental to those duties." *Id.* And an injury "arises 'out of' the employment when a reasonable person, after considering the circumstances of the employment, would perceive a causal connection between the conditions under which the employee must work and the resulting injury." *Id.*

Accepting all factual allegations in Robinson's amended complaint as true, Robinson's injuries "arose out of and in the course of" his employment. *See id.* Robinson alleges that Holman and a supervisor held a meeting to discuss Robinson's recent tardiness to work. During the course of that meeting, tensions

steadily rose. Robinson argued that Holman was looking at the wrong schedule, and when Holman disagreed, Robinson began to assert that he was being harassed. Holman reacted by physically threatening Robinson, ultimately striking him in the face. Robinson's injuries arose in the course of his employment because they occurred during working hours, at the workplace, and while Robinson was attending a work-related meeting. His injuries also arose "out of" his employment because there is a causal connection between the work meeting and the resulting injuries.

Robinson argues that "the animosity that gave rise to Holman's assault and battery was unrelated to [his] work performance" because Holman "made discriminatory comments about issues personal to [Robinson]" before the assault. But Robinson does not specifically allege any such discriminatory comments by Hollman in his complaint, and his argument on appeal is too conclusory to stand alone. In short, Robinson's injuries are connected to his work such that the Georgia Workers' Compensation Act is the exclusive remedy. *See Webster*, 522 S.E.2d at 489. The district court did not err when it granted Holman judgment on the pleadings.[2]

---

[2] Because Holman is entitled to judgment on the pleadings as a matter of law, it necessarily follows that Robinson is not also entitled to judgment on the pleadings. The court therefore properly denied Robinson's motion for judgment on the pleadings.

* * *

The district court did not err when it dismissed Robinson's claims and denied his motion for sanctions. Accordingly, we **AFFIRM**.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

June 06, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11735-AA
Case Style: Marquice Robinson v. Michael Holman
District Court Docket No: 1:17-cv-03658-WMR

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

July 12, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11735-AA
Case Style: Marquice Robinson v. Michael Holman
District Court Docket No: 1:17-cv-03658-WMR

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11735

MARQUICE D. ROBINSON,

Plaintiff-Appellant,

versus

MICHAEL HOLMAN,
AKAL SECURITY, INC
UNITED STATES MARSHALS SERVICE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:17-cv-03658-WMR

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Exhibit C

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARQUICE ROBINSON, PETITIONER

v.

MICHAEL HOLMAN, ET AL, RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

Marquice Robinson
6400 Oakley Road Apt #4208
Union City, GA 30291
770-527-6568

QUESTIONS PRESENTED

1. Whether The Eleventh Circuit Court of Appeals erred in holding in conflict with The Ninth Circuit Court of Appeals that a violation of collective bargaining agreement is not an adverse employment action.

2. Whether The Eleventh Circuit Court of Appeals erred in holding in conflict with The Federal Circuit Court of Appeals that judgment on the pleadings can be granted when there are material facts in dispute.

3. Whether The Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings when it entered a decision on a state law claim in conflict with the state's law.

4. Whether The Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings when it viewed the summary judgment record most favorable to the moving party.

LIST OF PARTIES

Petitioner (Plaintiff/Appellant in the court of appeals) is Marquice Robinson.

Respondents (Defendants/Appellees in the court of appeals) are Michael Holman, Akal Security, and The United States Marshal Service.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner states that Petitioner has no parent or publicly held company owning 10% or more of the corporation's stock.

RELATED CASES

- *Robinson v. Akal Security*, No. 1:17-cv-03658, U.S. District Court for the Northern District of Georgia. Judgment entered April 24, 2023.
- *Marquice D. Robinson v. Akal Security Inc.*, No. 20-11574, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered June 1, 2020.
- *Marquice D. Robinson v. Akal Security Inc.*, Nos. 20-12143 & 20-1379, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered November 7, 2022.
- *Marquice D. Robinson v. Akal Security Inc.*, No. 23-11735, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered June 6, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for The Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported. (*See* App. A) Prior opinions of the court of appeals are unreported.

The district court's order on judgment on the pleadings and summary judgment are unreported. (*See* App. B, C).

JURISDICTION

The judgment of the court of appeal was entered on June 6, 2024. A petition for rehearing was denied on July 12, 2024. A motion to stay the issuance of the mandate was denied on August 6, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the US Constitution and the Federal Rules of Civil Procedure are reproduced in the appendix. (*See* App. J, K).

STATEMENT OF THE CASE

This case is about preventing circuit splits. Also, this case is about this Court exercising its supervisory power to correct the court appeals deviation from the usual course of judicial proceedings. The first question is whether The Eleventh Circuit Court of Appeals (The Eleventh Circuit) erred in holding in conflict with The Ninth Circuit Court of Appeals that a violation of a Collective Bargaining Agreement (CBA) is not an adverse employment action. The Eleventh Circuit Court held that Petitioner's schedule changes that were not subject to change and based on CBA were not material adverse employment actions. However,

to the contrary, its sister circuit, The Ninth Circuit Court of Appeals (The Ninth Circuit), held that a violation of CBA is an adverse employment action.

The second question is whether The Eleventh Circuit erred in holding in conflict with The Federal Circuit Court of Appeals (The Federal Circuit) that judgment on the pleadings can be granted when there are material facts in dispute. The Eleventh Circuit granted Respondent Michael Holman (Holman) judgment on the pleadings on Petitioner's assault and battery claims when there were material facts in dispute of whether Holman committed the intentional torts and whether Petitioner sustained any injuries. However, in contrast to its sister circuit The Federal Circuit held if issues of material fact are unresolved in the pleadings, a motion for judgment on the pleadings cannot be granted.

The third question is whether The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings when it entered a decision on a state law claim in conflict with the state's law. The Eleventh Circuit found that Holman was not accomplishing the ends of employment, acknowledging that Petitioner presented some evidence of Holman's duties. However, the law in the State of Georgia specifically highlights that the determination of whether an employee was acting within the scope of employment is a question for the jury when evidence is submitted that demonstrates an employee's duties.

The fourth question is whether The Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings when it viewed the summary judgment record in the light most favorable to the moving party. The Eleventh Circuit, in its opinion, failed to cite, acknowledge, and apply the summary judgment standard by viewing the facts most favorable to the non-moving party as required by The Federal Rules of Civil Procedure 56(a) and case law.

A. Background facts

Petitioner was hired in June 2014 as a Special Security Officer (SSO) by Respondent Akal Security (Akal) with the final approval of Petitioner hire for the SSO position decided by the ultimate decision maker in the hiring of Court Security Officers (CSO) SSO Respondent The United States Marshal Service (USMS). (*See* App. H Pet. For Rehearing at p.) (citing Pet. Petition for Rehearing En banc at pp. 2-3). Notably, Akal asked for Petitioner to return to work on the contract having been out since August 23, 2016. (*Id.*). However, the USMS made the unilateral decision to remove Petitioner based on the ultimate control it has over the essential terms and conditions of Petitioner's employment and denied Akal's request and recommendation in which the USMS's letter stated in the relevant part, "USMS does not concur with Akal's proposed disciplinary strategy." (*Id.* at p. 3).

Also, the letter stated in the relevant part, "Effective immediately, [Petitioner] shall be permanently removed from performing under the USMS contract." (*Id.*). Importantly, Akal, the USMS, and Holman changed Plaintiff's contractual bidded work schedule of 0800-1630 in which, pursuant to the CBA between Akal and the CSO union, Petitioner's work schedule was mandated for a year and bound until the next year contractual shift bidding process. (*Id.*).

B. Procedural history

On March 20, 2020, the district court entered a final judgment adopting and approving the Magistrate's Report and Recommendation, but Petitioner had one remaining claim in the district court against Holman. (*See* App. C). Petitioner appealed the district court's March 20, 2020, order to The Eleventh Circuit, but on June 1, 2020, The Eleventh Circuit dismissed and remanded Petitioner's appeal. (*See* App. H Pet. Petition for Rehearing En banc at pp. 2-3). Petitioner then appealed for a second time to The Eleventh Circuit Court, but on November 7, 2022, The Eleventh Circuit dismissed and remanded Petitioner's appeal. (*Id.*).

Later, on April 24, 2023, the district court granted Holman's judgment on the pleadings. (*See* App. B). Petitioner then appealed for a third to The Eleventh Circuit, and on June 6, 2024, The Eleventh Circuit affirmed the district court's judgment. (*See* App. A). Petitioner subsequently filed a petition for panel rehearing and rehearing en banc, and The Eleventh Circuit denied Petitioner's petition on July 12, 2024. (*See* App. E, H). Further, Petitioner filed a motion to vacate the panel's opinion and to stay the mandate and on August 6, 2024, The Eleventh Circuit denied the motion. (*See* App. F, I). Finally, Petitioner filed a motion to recall the mandate, and reconsideration of Petitioner's motion to stay the mandate and petition for rehearing en banc and add decision. (*See* App. L).

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's opinion that schedule changes that are based on a collective bargaining agreement are not an adverse employment action is in conflict with another United States Court of Appeals on the same matter.

The Eleventh Circuit's opinion that schedule changes that are based on a collective bargaining agreement are not an adverse employment action is in conflict with another United States Court of Appeals on the same matter because the Ninth Circuit found that a violation/breach of collective bargaining agreement is an adverse employment action. Admittedly, Petitioner indicated to The Eleventh Circuit that Petitioner accidentally submitted an outdated version of the CBA in summary judgment because of the voluminous amount of documents produced in this case. (*See* App. G Pet. Br. at p. 16). However, the outdated version of the CBA Petitioner submitted in summary judgment, and the dated version of the CBA is almost identical, notwithstanding the years of implementation of the CBA and pay raises. (*Id.*). Petitioner can produce the correct version of the CBA to the Court. (*Id.*).

Moreover, The Eleventh Circuit acknowledged that a CBA (i.e., contract) governed Petitioner's employment and work schedule because it highlighted in the relevant part "even though [Petitioner] should have always started at 8:00 AM according to the collective bargaining agreement." (*See* App. A Ct. Op. at p. 5). However, The Eleventh Circuit held that "as alleged that [Petitioner's] schedule changes were not materially adverse employment actions" wholesale disregarding the undisputed fact that Petitioner's schedule was bound through the CBA and other similarly situated contractually shit bidded schedule was not changed. (*Id.*). Lead Court Security Officer Teresa McLaurin (LCSO McLaurin) stated in the relevant part:

> "The schedule has been changed to different hours that the CSO's did not bid for originally. This caused a major confusion among the [CSOs]. [Petitioner] had worked that schedule. [Petitioner] was all of a sudden moved to the loading dock booth. [Petitioner] schedule changed again. These hours were a conflict [for] [Petitioner] and there had been several discussions on [Petitioner's] hours being changed. No resolution was ever was accomplished; it was never addressed that this was a hardship for [Petitioner]. [Petitioner] came in and opened the loading dock and worked those hours documenting and noting that other officers were allowed to come in and work and get off whenever they chose not following the schedule at all." (*See* App. G Pet. Br. at p.).

Also, LCSO McLaurin stated in the relevant part:

> "There were efforts to try and separate [Petitioner and O'Donnell] closeness through scheduling. [Petitioner] was moved to a different report time than O'Donnell. [LCSO McLaurin] tried to see if the scheduling could go back to its original, but management was not trying to change what they had on the schedule for [Petitioner] and O'Donnell." (*Id.* at p. 32).

Furthermore, The Eleventh Circuit's finding that the changes to Petitioner's contractual shift bidded work schedule, which was not subject to change and was based on CBA, was not a violation/breach of the CBA/contract, is not adverse employment action conflicts with at least one of its sister circuit The Ninth Circuit. (*See* App. L Pet. Mot. to Recall at pp. 3-4). Importantly, The Ninth Circuit held in the relevant part "an adverse employment action where a plaintiff was [...] repeatedly denied overtime opportunities and timely compensation in violation of collective bargaining agreement while others were not..." (*Id.*). (*see also Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F.3d 840, 847 (9th Cir. 2004)).

Thus, The Eleventh Circuit's opinion that schedule changes that are based on a collective bargaining agreement are not an adverse employment action is in conflict with another United States Court of Appeals on the same matter because The Ninth Circuit found that a violation/breach of collective bargaining agreement is an adverse employment action.

1. **The Eleventh Circuit's opinion that Petitioner's contractually shift-bidded work schedule is not an adverse employment action is of national importance because it encourages parties to a contract to arbitrarily breach the material terms in a CBA.**

The Eleventh Circuit opinion that Petitioner's contractually shift-bidded work schedule is not an adverse employment action is of national importance because it permits/allows/encourages parties to a contract to arbitrarily and capriciously violate/breach/change/not adhere to the material terms in a CBA/contract without fear and consequence of committing an adverse employment action. Notably, "[m]anifest injustice refers to injustice that is apparent to the point of almost being indisputable." (*Id.* at p. 4). (*see also Lone Star Indus., Inc. v. United States,* 111 Fed. Cl. 257, 258 (2013)).

Here, this Court's finding that the changes to Petitioner's contractual shift bidded work schedule that was not subject to change and was based on CBA was not a violation/breach of the CBA/contract is not adverse employment action is of national importance and injustice because it permits/allows/encourages parties to a contract to arbitrary and capricious violate/breach/change/not adhere to the material terms in a CBA/contract without fear and consequence of committing an adverse employment action. (*See* App. L Pet. Mot. to Recall at pp. 4-5). Significantly, "to constitute a vital or material breach, a party's nonperformance must go to the essence of the contract." (*Id.* at p. 5). (*see also MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 849 (11th Cir. 2013)).

Thus, The Eleventh Circuit opinion that Petitioner's contractually shift-bidded work schedule is not an adverse employment action is of national importance because it permits/allows/encourages parties to a contract to arbitrarily and capriciously violate/breach/change/not adhere to the material terms in a CBA/contract without fear and consequence of committing an adverse employment action.

2. There is precedential value of this Court holding that a breach of contractually shift bidded work schedule is an adverse employment action because it will undo the circuit split created by The Eleventh Circuit.

There is precedential value of this Court holding that a violation/breach/change of a contractually shift-bidded work schedule is an adverse employment action because it will undo the circuit split created by The Eleventh Circuit when it found that a change to a contractual shift-bidded schedule was not a materially adverse employment action that was based on a CBA.

It is important to note that no federal circuit court of appeals has decided the issue of whether a violation/breach/change of a contractually shift bidded work schedule is an adverse employment action. (*See* App.

L Pet. Mot. to Recall at pp. 4-5). Moreover, if this Court finds that a violation/breach/change to a contractual shift-bidded work schedule is an adverse employment action, the decision would create a precedent by undoing the circuit split created by The Eleventh Circuit when it found that a change to a contractual shift bidded work schedule, that was not subject to change, and was based on a CBA was not a materially adverse employment action, and its sister circuit the Ninth Circuit found in the relevant part "an adverse employment action where a plaintiff was [...] repeatedly denied overtime opportunities and timely compensation in violation of collective bargaining agreement while others were not..." (*Id.* at pp. 5-6). (*see also Fonseca*, 374 F.3d at 847).

Thus, there is precedential value of this Court holding that a violation/breach/change of contractually shift-bidded work schedule is an adverse employment action because it will undo the circuit split created by The Eleventh Circuit when it found that a change to a contractual shift bidded schedule was not a materially adverse employment action that was based on a CBA.

B. The Eleventh Circuit opinion that when there are material facts in dispute the moving party is granted judgment on the pleadings is in conflict with another United States Court of Appeals on the same matter.

The Eleventh Circuit's opinion that when there are material facts in dispute, the moving party is granted judgment on the pleadings is in conflict with another United States Court of Appeals on the same matter because The Federal Circuit found that if issues of material fact are unresolved in the pleadings, a motion for judgment on the pleadings cannot be granted. Shockingly, The Eleventh Circuit granted Holman judgment on the pleadings when there are material facts in dispute of whether or not he assaulted and battered Petitioner during the course of the meeting and whether or not Petitioner sustained any injuries from the assault and battery during

the course of the meeting. (*See* App. L Pet. Mot. to Recall at pp. 8-9).

Here, The Eleventh Circuit's decision to grant a party judgment on the pleadings when there are material facts in dispute is in conflict with the decision of another circuit court of appeals because The Federal Circuit held "[i]f issues of material fact are unresolved in the pleadings, a motion for judgment on the pleadings cannot be granted." (*Id.* at p. 9). (*See J.M. Huber Corp. v. United States,* 27 Fed. Cl. 659, 661 (1993)). Notably, The Eleventh Circuit's actions granting a party judgment on the pleadings when there are material facts in dispute created an unnecessary circuit split of national importance because two federal circuit courts of appeals, The Eleventh and The Federal Circuit, have ruled differently on the same issue of whether a party can be granted judgment on the pleadings when there are material facts in dispute. (*See* App. L Pet. Mot. to Recall at p. 9).

Furthermore, The Eleventh Circuit's actions of granting a party judgment on the pleadings when there are material facts in dispute could cause chaos throughout the federal judicial system because The Eleventh Circuit's decision goes against the guiding principle of federal rules of civil procedure 12(c) that the moving party [Holman] much show that there are no material facts in dispute and establish law that issues of fact are for a jury to decide when the material facts are in dispute, not the court, when a jury trial is requested as in Petitioner's case.

Thus, The Eleventh Circuit's opinion that when there are material facts in dispute, the moving party is granted judgment on the pleadings is in conflict with another United States Court of Appeals on the same matter because The Federal Circuit found that if issues of material fact are unresolved in the pleadings, a motion for judgment on the pleadings cannot be granted.

The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings

because it wholesale disregarded its own binding precedent.

The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it wholesale disregarded its own binding precedent that if a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied as to call for an exercise of this Court's supervisory power. Chiefly, The Eleventh Circuit disregarded its own binding precedent that "if a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied." (*Id.* at p. 6). (*see Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014)). (*see also* US Supreme Court rule 10(a)).

Importantly, The Eleventh Court departed from the accepted and usual course of judicial proceedings when it granted Holman judgment on the pleadings based on "The Georgia Workers Compensation Act [being] the exclusive remedy for injuries sustained by an employee based on intentional torts committed by a coworker..." because a comparison of the averments in the competing pleadings revealed material dispute of facts regarding whether Petitioner sustained an injury based on Holman's assault and battery that he committed against Petitioner. (*See* App. L Pet. Mot. to Recall at p. 7) (*See also Webster v. Dodson,* 522 S.E.2d 487, 489 (Ga. Ct. App. 1999) Respectfully, the "pleadings" include both the complaint and the answer. (*See* Fed. R. Civ. P. 7(a)).

Here, Petitioner pleaded in Petitioner's first amended complaint that Holman struck Petitioner, causing Petitioner to bleed during the course of the meeting. (*See* App. L Pet. Mot. to Recall at p.7) However, Holman, in his amended answer, denied striking Petitioner during the course of the meeting, and he also denied causing Petitioner's injuries during the course of the meeting. (*Id.*).

As a result of the averments in the pleadings in Petitioner's first amended complaint and Holman's amended answer revealing material facts in dispute of whether or not Holman assaulted and battered Petitioner during the course of the meeting and whether or not Petitioner sustained any injuries from the assault and battery during the course of the meeting, judgment on the pleadings respectfully must be denied. (*Id.*). (*see also Perez,* 774 F.3d. at p. 1335).

Thus, the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it wholesale disregarded its own binding precedent that if a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied as to call for an exercise of this Court's supervisory power.

C. The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it entered a decision in conflict with Georgia state law that governed state law torts.

The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it entered a decision in conflict with Georgia state law that governed state law torts of assault and battery.

The Eleventh Court found that "Holman was not accomplishing the ends of employment when he assaulted and battered Plaintiff, citing the case of *Waters v. Steak & Ale of Georgia, Inc.,* 527 S.E.2d 592, 595 (Ga. Ct. App. 2000)." (*See* App. L Pet. Mot. to Recall at p. 10). However, this Court has held in binding precedent that "The broad command of *Erie* [...] federal courts are to apply state substantive law and federal procedural law." (*See Hanna v. Plumer*, 380 U.S. 460, 465 (1965)).

Here, The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings that federal courts are to apply state precedent when dealing with state law claims such as Petitioner's claims of assault

and battery because The Eleventh Circuit wholesale disregarded that Georgia state law says "[a]s a general rule, the determination of whether an employee was acting within the scope of his employment is a question for the jury" [when there is relevant overwhelming evidence (1) a declaration, (2) a letter, (3) two written statements, and (4) an interview transcript that is presented which demonstrates that the employee Holman was acting within the course of his employment and duties of addressing issues with work schedules]. (*See* Apps. L at p. 10, H at pp.7-10, I at pp. 6-7). (*see also Waters,* 527 S.E.2d at 594).

Furthermore, The Eleventh Circuit, departing from the accepted and usual course of judicial proceedings that federal courts are to apply state precedent when dealing with state law claims, could have chilling effect on state sovereignty in violation 10th Amendment Section 4 to the US Constitution that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" because federal courts would be able to arbitrarily disregard a state's ability to write, create, and interpret its own laws.

Thus, The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it entered a decision in conflict with Georgia state law that governed state law torts of assault and battery.

The issue of a federal circuit court of appeals and a district court wholesale disregarding a decision of this Court is of national importance because, in our adversarial system of adjudication the courts follow the principle of party presentation.

The issue of The Eleventh Circuit and a US district court in The Northern District of Georgia wholesale disregarding a decision of this Court is of national importance because, in our adversarial system of adjudication, the courts follow the principle of party presentation Chiefly, "[t]he general rule of long standing is that the law announced in the Court's decision controls the

case at bar." (*See Agostini v. Felton*, 521 U.S. 203, 237 (1997)). (*see also* App. L Pet. Mot. to Recall at p.11).

Here, The Eleventh Circuit and the US district court have so far departed from the accepted and usual course of judicial proceedings when they cited evidence and brought forth facts that Akal, the party, did not cite nor bring forth itself of the CBA stating that "court security officers do not have full formal supervisory authority and d[id] not directly supervise other employees" because this Court has made clear that "in our adversarial system of adjudication, we follow the principle of party presentation." (*See Greenlaw v. United States*, 554 U. S. 237, 243 (2008)). (*see also* App. L Pet. Mot. to Recall at pp. 10-11).

Thus, the issue of the Eleventh Circuit and a US district court in The Northern District of Georgia wholesale disregarding a decision of this Court is of national importance because, in our adversarial system of adjudication, the courts follow the principle of party presentation.

D. The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it failed to cite and acknowledge the summary judgment standard in its opinion.

The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it failed to cite, acknowledge, and apply the summary judgment standard in its opinion. This Court has affirmatively stated that "appellate courts look at the record on summary judgment in the light most favorable to non-movant." (*See Poller v. Columbia Broadcasting System*, 368 U.S. 464, 474 (1962)).

Here, The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it failed to cite, apply, and acknowledge the summary judgment standard as to Petitioner as the non-moving party, in its opinion. (*See* App. L Pet. Mot. to Recall

at pp. 12-13).

Also, The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it failed to state and view the summary judgment record in the light most favorable to Petitioner as the non-moving party and to draw all reasonable inferences in favor of Petitioner as the non-moving party.

Furthermore, The Eleventh Circuit's actions of reviewing the summary judgment record most favorable to the moving parties Akal, and the USMS and drawing all reasonable inferences in favor of Akal and the USMS as the moving parties could have a chilling effect on summary judgment decisions within the federal court system because it changes the requirements and standards of the Federal Rules of Civil Procedure 56(a) that the moving party [Akal and the USMS] bears the burden to show that there are no material facts in dispute, not the non-moving party [Petitioner].

Thus, The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings because it failed to cite, acknowledge, and apply the summary judgment standard in its opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Marquice Robinson, PhD., LLM., JD., MSCJ

September 7, 2024

Exhibit D

No. 23-11735-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

MARQUICE ROBINSON,

Plaintiff-Appellant,

v.

MICHAEL HOLMAN, ET AL,

Defendants-Appellees.

On Appeal from the United States District Court

from the Northern District of Georgia

Honorable William M. Ray II., District Court Judge

Case No. 1:17-cv-03658

MOTION TO RECALL THE MANDATE, TO STAY OF ISSUANCE OF THE MANDATE, AND TO RECONSIDER THIS COURT'S DECISION DENYING PLAINTIFF PETITION FOR REHEARING EN BANC PENDING PLAINTIFF/APPELLANT PETITION FOR A WRIT OF CERTIORARI IN THE US SUPREME COURT

Marquice Robinson
6400 Oakley Road Apt #4208
Union City, GA 30291
770-527-6568

Marquice Robinson v. Michael Holman, et al.
No. 23-11735-A

STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff/Appellant, pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, files this Certificate of Interested Persons and Corporate Disclosure Statement.

Plaintiff/Appellant is not a publicly held corporation and has no parent corporations, affiliates, or subsidiaries with interest in the outcome of this case. Other identifiable interested parties to the action are:

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Barr, William — Former US Attorney General

Bly, Christopher. C — U.S. Magistrate Judge

Buchanan, Ryan — U.S. Attorney for The Northern District of Georgia

Cohan, Louis, R. — Plaintiff/Appellant's former counsel

Cooper, Lisa — Former Counsel for Defendant/Appellee the USMS

Erskine, Kurt — Former Acting US Attorney for The Northern District of Georgia

Fenster, Ariel D.	Plaintiff/Appellant's former counsel
Fuller, Clay	U.S. Magistrate Judge
Garland, Merrick	US Attorney General
Johnson, Tiffany	Counsel for Defendant/Appellee the USMS
Jones, Steve C.	U.S. District Court Judge
Kitt Company	Defendant/Appellee Akal Security's parent corporation
Krinsky, Erin. J	Plaintiff's former counsel
Kohler, Dion	Counsel for Defendant's Akal and Holman- Appellees
Lui, Ellis	Plaintiff's former counsel
Malone, Jason	Former Counsel for Defendant/Appellees Akal and Holman
McBath, Elizabeth	Former Appellate Counsel for USMS
Mendel, Gabriel	Former Appellate Counsel for Defendant the USMS
Noebes, Pierre	Former Counsel for Defendant's Akal and Holman
O'Donnell, Michael	Former Plaintiff

Pak, BJay	Former US Attorney For the Northern District of Georgia
Peterson, Kurt	Former Counsel for Defendant/Appellees Akal and Holman
Ray, William. M II	U.S. District Court Judge
Robinson, Marquice	Plaintiff/Appellant
Sessions, Jeff	Former US Attorney General
Traynor, William	Former Appellate counsel for the Defendant USMS
U.S Government	Defendant/Appellee
US Marshal Service	Defendant/Appellee

Respectfully submitted this 7th day of August, 2024.

/s/ Marquice Robinson, PhD., LLM., JD., MSCJ
Marquice Robinson, PhD., LLM., JD., MSCJ

I. INTRODUCTION

On June 6, 2024, this Court affirmed the district court's judgment. (See Ex. A Ct. Op.). Then, on July 12, 2024, this Court denied Plaintiff/Appellant Marquice Robinson's (Plaintiff) petition for panel rehearing and rehearing en banc. Further, on August 6, 2024, this Court denied Plaintiff's motion to vacate and to stay the issuance of the mandate.

However, pursuant to this Court's local rule, 11th Cir. R. 41-1(b) and Federal Rules of Appellate Procedure 41(d)(1) Plaintiff files this motion to recall the issuance of the mandate, to stay the issuance of the mandate, and to reconsider this Court's decision denying Plaintiff's petition for rehearing en banc to prevent a manifest injustice pending Plaintiff's petition for a writ of certiorari in The US Supreme Court because the petition would present a substantial question and there is good cause for delay.

Thus, Plaintiff respectfully asks this Court to recall the issuance of the mandate, to stay the issuance of the mandate, and to reconsider this Court's decision denying Plaintiff's petition for rehearing en banc for the following reasons.

II. ARGUMENT AND CITATIONS OF AUTHORITY

[1] Notably, for the reasons discussed in this motion, this Court should be respectfully aware that Plaintiff will be filing a petition for writ of certiorari in The US Supreme Court no later than August 12, 2024, absent any exigent circumstances and will notify this Court if necessary by notice when Plaintiff's petition is filed.

This Court should respectfully reconsider its decision denying Plaintiff's petition for rehearing en banc because of manifest injustice.

This Court should respectfully reconsider its decision denying Plaintiff's petition for rehearing en banc because of manifest injustice in which Plaintiff's motion presents substantial questions of exceptional importance and there is good cause for delay.

It is important to note this Court has made clear that "a party may move for reconsideration when there is (1) newly discovered evidence, (2) an intervening change in controlling law, or (3) the need to correct clear error or prevent manifest injustice. (*See Del. Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1383 (11th Cir. 2010)). Notably, "[m]anifest injustice refers to injustice that is apparent to the point of almost being indisputable." (*See Lone Star Indus., Inc. v. United States,* 111 Fed. Cl. 257, 258 (2013)).

Here, this Court should respectfully reconsider its decision denying Plaintiff's petition en banc because Plaintiff presented issues of exceptional importance. Thus, this Court should respectfully reconsider its decision denying Plaintiff's petition for rehearing en banc because of manifest injustice in which Plaintiff's motion presents substantial questions of exceptional importance and there is good cause for delay.

A. Plaintiff's motion presents a substantial question and there is good cause for delay because this Court is in conflict with another United Court of Appeals on the same matter that a violation/breach of collective bargaining agreement is an adverse employment action.

Plaintiff's motion presents a substantial question or exceptional importance and there is good cause for delay because pursuant to Supreme Court Rule 10(a), this Court is in conflict with another United Court of Appeals, the Ninth Circuit, on the same matter that a violation/breach of material terms in a Collective Bargaining Agreement (CBA) is an adverse employment action. Notably, this Court acknowledged that Plaintiff's schedule was based on a CBA (i.e., a contract) highlighting in the relevant part "even though [Plaintiff} should have always started at 8:00 AM according to the collective bargaining agreement." (*See* Ex. A Ct. Op. at p. 5). However, this Court held that "as alleged that Plaintiff's schedule changes were not materially adverse employment actions. (*Id.*).

Moreover, this Court's finding that the changes to Plaintiff's contractual shift bidded work schedule that was not subject to change and was based on CBA was not a violation/breach of the CBA/contract is not adverse employment action conflicts with at least one of its sister circuit the Ninth Circuit Court of Appeals. (*See* Pl. Mot. to Vac. at pp. 3-4) (*See* Ex. B Pl. pet. at pp. 5-6). (citing Pl. Br. at pp. 13-17). (citing also Pl. Reply Br. at pp. 2-6). (*But See* Ex. A Ct. Op. at p. 5). Importantly, the Ninth Circuit held in the relevant part "an adverse employment action where a plaintiff was [...] repeatedly denied overtime opportunities and timely compensation in violation of collective bargaining agreement..." (*See Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F.3d 840, 847 (9th Cir. 2004)).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court is in conflict with another United Court of Appeals, the Ninth Circuit, on the same matter that a violation/breach of material terms in a Collective Bargaining Agreement (CBA) is an adverse employment action.

B. Plaintiff's motion presents a substantial question and there is good cause for delay because this Court finding that the changes to Plaintiff's contractually shift-bidded work schedule are not an adverse employment action is of national importance.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court finding that the changes to Plaintiff's contractually shift bidded work schedule are not an adverse employment action is of national importance and injustice. Notably, "[m]anifest injustice refers to injustice that is apparent to the point of almost being indisputable." (*See Lone Star Indus., Inc.,* 111 Fed. Cl. at 258 (2013).

Here, this Court's finding that the changes to Plaintiff's contractual shift bidded work schedule that was not subject to change and was based on CBA was not a violation/breach of the CBA/contract is not adverse employment action is of national importance and injustice because it permits/allows/encourages parties to a contract to arbitrary and capricious violate/breach/change/not adhere to the material terms in a CBA/contract without fear and consequence of committing an adverse employment action. (*See* Ex. B Pl. pet. at pp. 5-6). (citing Pl. Br. at pp. 13-17). (citing

also Pl. Reply Br. at pp. 2-6). (*But See* Ex. A Ct. Op. at p. 5). Significantly, "to constitute a vital or material breach, a party's nonperformance must go to the essence of the contract." (*See MDS (Canada) Inc. v. Rad Source Techs., Inc.*, 720 F.3d 833, 849 (11th Cir. 2013)).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court finding that the changes to Plaintiff's contractually shift bidded work schedule are not an adverse employment action is of national importance and injustice.

C. Plaintiff's motion presents a substantial question and there is good cause for delay because of the precedential value of The US Supreme Court holding that a violation/breach/change of contractually shift bidded work schedule is an adverse employment action.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because of the precedential value of The US Supreme Court holding that a violation/breach/change of a contractually shift-bidded work schedule is an adverse employment action.

It is important to note that no federal circuit court of appeals has decided the issue of whether a violation/breach/change of a contractually shift bidded work schedule is an adverse employment action. Moreover, if the US Supreme Court finds that a violation/breach/change to a contractual shift-bidded work schedule is an adverse employment action, the decision would create a precedent by undoing the circuit split created by this Court when it found that a change to a contractual shift

bidded work schedule that was not subject to change and was based on a CBA was not a materially adverse employment action and its sister circuit the Ninth Circuit court of appeals found in the relevant part "an adverse employment action where a plaintiff was [...] repeatedly denied overtime opportunities and timely compensation in violation of collective bargaining agreement...(*See* Ex. A Ct. Op. at p. 5). (*But see Fonseca*, 374 F.3d at 847).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because of the precedential value of The US Supreme Court holding that a violation/breach/change of a contractually shift bidded work schedule is an adverse employment action.

D. Plaintiff's motion presents a substantial question and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings when this Court wholesale disregarded its own binding precedent that "if a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied" as to call for an exercise of this Court's supervisory power. (*See* Supreme Court Rule 10(a)). (*see also Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014)).

Importantly, this Court departed from the accepted and usual course of judicial proceedings when it granted Defendant/Appellee Michael Holman (Holman) judgment on the pleadings based on "The Georgia Workers Compensation Act is the exclusive remedy for injuries sustained by an employee based on intentional torts committed by a coworker..." because a comparison of the averments in the competing pleadings revealed material dispute of facts regarding whether Plaintiff sustained an injury based on Holman's assault and battery that he committed against Plaintiff. (*See* Ex. A Ct. Op. at p. 9). (*See also Webster v. Dodson*, 522 S.E.2d 487, 489 (Ga. Ct. App. 1999) (citing O.C.G.A. §§ 34-9-1(4), 34-9-11(a)). (*But see* Ex. B Pl. pet at p. 11). Respectfully, the "pleadings" include both the complaint and the answer. (*See* Fed. R. Civ. P. 7(a)).

Here, Plaintiff pleaded in Plaintiff's first amended complaint that Holman struck Plaintiff, causing Plaintiff to bleed during the course of the meeting. (See Ex. A Ct. Op. at pp. 9-10). (*But see* Ex. B Pl. pet at p. 11). (Citing Pl. Br. at pp. 51-52). (citing also Pl. [s] Am. Compl. Doc. 32 p.19 at ¶ 34). However, Holman, in his amended answer, denied striking Plaintiff during the course of the meeting, and he also denied causing Plaintiff's injuries during the course of the meeting. (See Ex. B Pl. pet. at p. 11). (Citing Pl. Br. at pp. 51-52). (citing also Holman's Am. Ans. Doc. 58 p. 8 at ¶ 34).

As a result of the averments in the pleadings in Plaintiff's first amended complaint and Holman's amended answer revealing material facts in dispute of whether or not Holman assaulted and battered Plaintiff during the course of the meeting and whether or not Plaintiff sustained any injuries from the assault and battery during the course of the meeting judgment on the pleadings must be denied. (S*ee Perez,* 774 F.3d. at p. 1335). (*see also* Ex. B Pl. pet at p. 11).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings when this Court wholesale disregarded its own binding precedent that "if a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied" as to call for an exercise of this Court's supervisory power.

E. Plaintiff's motion presents a substantial question and there is good cause for delay because this Court entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter of judgment on the pleadings.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter of granting a party judgment on the pleadings when there are material facts in dispute that created a circuit split of national importance. Shockingly, this Court

granted Holman judgment on the pleadings when there are material facts in dispute of whether or not he assaulted and battered Plaintiff during the course of the meeting and whether or not Plaintiff sustained any injuries from the assault and battery during the course of the meeting. (*See* Ex. B Pl. pet at p. 11).

Here, this Court's decision to grant a party judgment on the pleadings when there are material facts in dispute is in conflict with the decision of another Circuit Court of Appeals because the Federal Circuit Court of Appeals held "[i]f issues of material fact are unresolved in the pleadings, a motion for judgment on the pleadings cannot be granted." (*See J.M. Huber Corp. v. United States*, 27 Fed. Cl. 659, 661 (1993)). Notably, because of this Court's actions granting a party judgment on the pleadings when there are material facts in dispute, it creates a circuit split of national importance due to the fact that two federal circuit courts of appeals, this Court and Federal Circuit Court of appeals have ruled differently on the same issue of whether a party can be granted judgment on the pleadings when there are material facts in dispute.

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court entered a decision in conflict with the decision of another United States court of appeals on the same important matter of granting a party judgment on the pleadings when there are material facts in dispute that created a circuit split of national importance.

F. Plaintiff's motion presents a substantial question and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings when it entered a decision in conflict with Georgia state law.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings when it entered a decision in conflict with Georgia State that law which governed Plaintiff's claims of assault and battery. This Court found that "Holman was not accomplishing the ends of employment when he assaulted and battered Plaintiff citing the case of *Waters v. Steak & Ale of Georgia, Inc.*, 527 S.E.2d 592, 595 (Ga. Ct. App. 2000)." (*See* Ex. A Ct. Op. at p. 7). However, this Court has held in binding precedent that "state law governs substantive issues and federal law governs procedural issues." (*See McDowell v. Brown*, 392 F.3d 1283, 1294 (11th Cir. 2004)).

Here, this Court has so far departed from the accepted and usual course of judicial proceedings that Georgia state law governs substantive issues of Plaintiff's claims of assault and battery because this Court whole disregarded what the finding of the state law concluded when evidence is presented that the tortfeasor was acting within the course of his employment that "[a]s a general rule, the determination of whether an employee was acting within the scope of his employment is a question for the jury. (*See Waters*, 527 S.E.2d at 594).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings when it entered a decision in conflict with state law which governed Plaintiff's claims.

G. Plaintiff's motion presents a substantial question and there is good cause for delay because the issue of Federal Circuit Courts of Appeals and district courts wholesale disregarding a decision of The US Supreme Court is of national importance.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this issue of Federal Circuit Courts of Appeals and district courts wholesale disregarding a decision of The US Supreme Court is of national importance. Chiefly, "[t]he general rule of long standing is that the law announced in the Court's decision controls the case at bar." (*See Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

Here, this Court and the district court have so far departed from the accepted and usual course of judicial proceedings when they cited evidence and brought forth facts that Akal, the party, did not cite nor bring forth itself of the CBA stating that "court security officers do not have full formal supervisory authority and d[id] not directly supervise other employees because the US Supreme Court has made clear that "in our adversarial system of adjudication, we follow the principle of party presentation." (*See* Ex. A Ct. Op. at p. 7). (quoting District Ct. Or. Doc. 228 at p.

12). *(But see* Akal Mot. for Sum. Jud. Doc. 162-1 at pp. 24-25). (*But see* also *Greenlaw v. United States*, 554 U. S. 237, 243 (2008)).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this issue of Federal Circuit Courts of Appeals and district court's whole disregarding a decision of The US Supreme Court is of national importance.

H. Plaintiff's motion presents a substantial question and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings of failing to cite and acknowledge the summary judgment standard.

Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings of failing to cite, apply, and acknowledge the summary judgment standard in its opinion. Notably, "[this Court] review[s] a district court's grant of summary judgment de novo, applying the same legal standards applied by the district court." (*See Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1303 (11th Cir. 2003)). Further, "[this Court] view[s] the summary judgment record in the light most favorable to the non-moving party, and we draw all reasonable inferences in favor of the non-moving party." (*See Stanley v. City of Sanford*, 83 F.4th 1333, 1337 (11th Cir. 2023)).

Here, this Court has so far departed from the accepted and usual course of judicial proceedings because it failed to cite, apply, and acknowledge the summary

judgment standard as to Plaintiff as the non-moving party in its opinion. (*See* Doc. 184 Pl. Resp to Akal and Holman Sum. Jud. Mot.). (*see* also Pl. Resp. to USMS Sum. Jud. Mot Doc. 186.). (But See Ex. A Ct. Op. at pp. 4-7).

Thus, Plaintiff's motion presents a substantial question of exceptional importance and there is good cause for delay because this Court has so far departed from the accepted and usual course of judicial proceedings of failing to cite, apply, and acknowledge the summary judgment standard in its opinion.

Therefore, this Court should respectfully reconsider its decision denying Plaintiff's petition for rehearing en banc because of manifest injustice in which Plaintiff's motion presents substantial questions of exceptional importance and there is good cause for delay.

III. CONCLUSION

For the foregoing reasons, this Court should respectfully grant Plaintiff's motion for reconsideration of Plaintiff's petition for rehearing en banc, to recall the issuance of the mandate, and to subsequently stay the issuance of the mandate pending Plaintiff's to prevent a manifest injustice pending Plaintiff's petition for a writ of certiorari in The US Supreme Court.

Respectfully submitted this 7th day of August, 2024.

<u>/s/ Marquice Robinson, PhD., LLM., JD., MSCJ</u>
Marquice Robinson, PhD., LLM., JD., MSCJ

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,331 words.

2. This document complies with the typeface requirements of the Fed. R. App. P. 32(a)(5)(A) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word processing software in 14-point Times New Roman.

DATED: August 7, 2024

<u>/s/ Marquice Robinson, PhD., LLM., JD., MSCJ</u>
Marquice Robinson, PhD., LLM., JD., MSCJ

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, which automatically sends a notification to the parties and counsels of record who are registered in the system. Pursuant to Fed. R. App. P. 25 I will also send electronic mail of such filing to all counsels and parties of record exempt from electronic filing. My address is below, to which all correspondence from the court should be sent.

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