No. 17-11802

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERBEREE JEFFERSON,

Plaintiff/Appellant,

v.

SEWON AMERICA, INC.,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
HONORABLE TIMOTHY C. BATTEN, SR.
(3:15-cv-00078-TCB)

BRIEF FOR LAW AND RELIGION PRACTITIONERS
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Amici Curiae, pursuant to 11th Cir. R. 26.1-1, 26.1-2 and 26.1-3, hereby files their Certificate of Interested Persons:

1. Barrett & Farahany (Counsel to Plaintiff/Appellant);
2. Honorable Timothy C. Batten, Sr. (United States District Court Judge);
3. Burr & Forman LLP (Counsel to Defendant/Appellee);
4. Amanda A. Farahany (Counsel to Plaintiff/Appellant);
5. Jon M. Gumbel (Counsel to Defendant/Appellee);
6. Ingu Hwang (Counsel to Defendant/Appellee);
7. Jerberee Jefferson (Plaintiff/Appellant);
8. Adeash A. Lakraj (Counsel to Plaintiff/Appellant);
9. Lisa C. Lambert (Counsel to Plaintiff/Appellant);
10. Law Office of Lisa C. Lambert (Counsel to Plaintiff/Appellant);
11. Sewon America, Inc. (Defendant/Appellee);
12. Sewon Technology Co., Ltd. (Parent Company of Defendant/Appellee);
13. David Schoen (Counsel for Amicus curiae);
14. Mark Goldfeder (Amicus curiae);
15. Anton Sorkin (Amicus curiae);
16. Honorable Russell G. Vineyard (United States District Magistrate Court Judge)

Respectfully submitted this 3 day of August 2017.

/s/ David Schoen
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/s/ Mark Goldfeder
MARK GOLDFEDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS

TABLE OF AUTHORITIES—Continued

Page(s)

UNITED STATES DISTRICT COURT

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICI*

Amici are law professors, scholars, and religious liberty practitioners who teach, research, and write about issues of law and religion. Our interest is in ensuring that the procedure in place to resolve employment discrimination cases does not undermine Title VII remedies.

David I. Schoen is a solo practitioner based in Montgomery, Alabama. He has over 30 years of complex litigation experience with a focus on civil rights issues, including First Amendment and law and religion related issues.

Mark Goldfeder is Senior Lecturer at Emory Law School, Senior Fellow at the Center for the Study of Law and Religion, Director of the Law and Religion Student Program, and Director of the Religious Freedom Project at Emory. He is also an adjunct professor of Religion at Emory University, and an adjunct Professor of Law at Georgia State University. He has written dozens of articles on law and religion topics.

Anton Sorkin is a doctoral student and an attorney with the Emory University's Center for the Study of Law and Religion. He received his JD from Regent University and has worked extensively on various projects involving law and religion.

STATEMENT OF THE ISSUES

I. Could a reasonable jury conclude that Defendant discriminated against Plaintiff because of Plaintiff's race/national origin?

II. Could reasonable minds conclude that Plaintiff's race/national origin was a motiving factor in its decision?

III. Did Plaintiff engage in protected speech when she reported this act?

IV. Did the trial court err when the totality of the evidence, taken in Plaintiff's favor, would permit a jury to find that she is a victim of race and national origin discrimination and retaliation?

V. Does this high rate of summary judgment in employment discrimination claims deny Plaintiffs the constitutional right to a jury trial?

VI. Should the District Court be compelled to follow Congressional intent?

SUMMARY OF THE ARGUMENT

Alongside the multi-prong tests and showing of pretext required of employees to prevail in employment discrimination cases, secondary sources and analytical data have demonstrated the disproportionate use of summary judgment rulings in the district courts of Georgia to the point of raising constitutional questions.

Considering these issues in the aggregate, *amici* address three concerns. First, the pattern of excessive summary judgment grants as an undue hurdle for employees. Second, the constitutional legitimacy of excessive summary judgment grants as a barrier to jury trials under the Seventh Amendment. Finally, the impact this procedure has on religious discrimination cases.

ARGUMENT

I. CONCERNS INVOLVING A PATTERN OF EXCESSIVE SUMMARY JUDGMENT GRANTS AS A BARRIER TO EMPLOYEES.

Through scholarly work and a study of recent jurisprudence, statistical data has emerged that supports Appellant's call "to address how summary judgment is being misapplied, particularly in the Northern District of Georgia." *Brief of Appellant*, at 14; *see also* Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. Destefano*, 57 N.Y.L. Sch. L. Rev. 865, 866 (2013) ("Scholars have long criticized the federal courts for their inappropriate grants of summary judgment in Title VII cases"). Recent studies have suggested that the rate of cases terminated by summary judgment has significantly increased since 1975, leading some academics to suggest that the leanings of district courts towards use of particular methods for disposing of cases have taken precedence over the merits of individual claims. Charlotte L. Lanvers, *Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia,* 16 Cornell J.L. & Pub. Pol'y 381, 413 (2007). This is consistent with empirical research that suggests the overuse of summary judgment in employment discrimination cases and that the Motion for Summary Judgment itself is demonstrably pro-defendant/employer. From 1979 to 2006, the plaintiff win-rate in

federal employment cases was only 15%, compared to the 51% success that plaintiffs saw in the non-employment context. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 127 (2009). As McGinley points out, "the gap in success between employment discrimination plaintiffs and defendants raises serious questions about procedural and substantive fairness, and the proper role of judges and juries." McGinley, *supra*, at 868.

Specifically in the Northern District of Georgia, a report examining data from 2011 and 2012 has shown an overwhelming trend towards summary judgment dispositions favoring employers in employment discrimination cases. *See* Amanda Farahany & Tanya McAdams, *Analysis of Employment Discrimination Claims for Cases in Which an Order was Issued on Defendant's Motion for Summary Judgment in 2011 and 2012 in the U.S. District Court for the Northern District of Georgia* (Sept. 16, 2013), https://ssrn.com/abstract=2326697. A motion metrics report using Lex Machina from 2008 has verified these results up to the present year within the three federal districts of Georgia. *See* Lex Machina, http://lexmachina.com (Motion Metrics Report, compiling and analyzing NOS 799 cases filed between 01/01/2008 and 12/31/2016).

This continued pattern of using a Motion for Summary Judgment as a means of disposing of employment discrimination cases is particularly oppressive on

followers of minority religious traditions who are often left with the courts as their last resort in protecting their freedom of religion. As in the case at issue here, a judge should not be able to grant summary judgment since a "reasonable jury may infer from the assumed facts the conclusion upon which the [Plaintiff's] claim rests" and return a verdict in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 743 (11th Cir. 1996). Without a jury trial—where plaintiffs/employees tend to do better—the evidence is left to the sole discretion of a judicial fact finder who typically rules in favor of defendants/employers. *See* Clermont, *supra*, at 127–31; Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law,* 56 St. Louis U. L.J. 111, 112 (2011) ("Research confirms how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal.")

While we remain open-minded to the potential myriad of factors that some have used to explain these discrepancies, we are also concerned with the possibility of "hurdles being placed before employment discrimination plaintiffs." Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 Minn. L. Rev. 1275, 1293 (2012) ("psychology scholars have found a pronounced unwillingness to make attributions to discrimination, even in the presence of quite compelling facts"). One's right to a day in court must

be held sacrosanct and any question of its credibility immediately addressed for fear of supporting an unjust system. One solution has been advanced by Judge Denny Chin of the Second Circuit who recommends replacing the *McDonnell Douglas* test with a "more simplified, more focused approach" when assessing employment discrimination cases on summary judgment. Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective,* 57 N.Y.L. Sch. L. Rev. 671, 677 (2013). This will even the playing field for employees and remove the specter of constitutional concerns relating to summary judgment discussed next.

II. CONCERNS INVOLVING THE LACK OF ACCESS TO JURY TRIALS IN CONTRAVENTION TO THE SEVENTH AMENDMENT.

Amici also ask whether the excessive grant of summary judgment as applied is an unconstitutional abridgment of a plaintiff's right to trial by jury. The Seventh Amendment guarantees this right, stating that "the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Thomas Jefferson in the Declaration of Independence lists the lack of jury trials as one of the gravest injuries against free people, "having in direct object the establishment of an absolute Tyranny over [the] States." The Declaration of Independence, para. 2 (U.S. 1776); *see also* Brandon L. Boxler, *Judicial Gatekeeping and the Seventh Amendment: How Daubert Infringes on the*

Constitutional Right to A Civil Jury Trial, 14 Rich. J.L. & Pub. Int. 479, 481 (2011) ("early American history [records] are filled with references to juries serving as 'anchors' in society that prevent the State from straying too far from principles of republican governance").

As this Court has acknowledged, a party determines whether it has a constitutional right to a jury trial by invoking a historical test consistent with the common law as it existed in 1791. *Burch v. P.J. Cheese, Inc.,* No. 13-15042, 2017 WL 2885095, at *5 (11th Cir. July 7, 2017). This applies not only to common law causes of actions, but also to enforce analogous statutory rights decided in English law courts and to causes of action created through congressional enactment. *Feltner v. Columbia Pictures Television, Inc.,* 523 U.S. 340, 348 (1998); *Tull v. United States*, 481 U.S. 412, 417 (1987). An added concern is with federal judges, burdened with heavy dockets, who take to summary judgment as a favored means of disposing cases quickly thereby disproportionately affecting certain parties. A. Leah Vickers, *Daubert, Critique and Interpretation: What Empirical Studies Tell Us About the Application of Daubert,* 40 U.S.F. L. Rev. 109, 117 (2005). With these concerns in mind, we are also mindful that judges may remove cases from the jury if the evidence at trial, "with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff[.]" *Home Design*

Servs., Inc. v. Turner Heritage Homes Inc., 825 F.3d 1314, 1331 (11th Cir. 2016) (quoting *Randall v. Baltimore & O.R. Co.*, 109 U.S. 478, 481 (1883)).

While the Supreme Court has seemingly adopted the idea that "summary judgment does not violate the Seventh Amendment" in a parenthetical reference, *see Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 336 (1979), some have argued that its use to dismiss claims goes against the core procedures and principles of the common law on which the Seventh Amendment rests. *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 142–43 (2007) ("procedure will be constitutional under the Seventh Amendment if the procedure satisfies the substance of the English common law jury trial in 1791"). While there remains skepticism that summary judgment is unconstitutional *per se*, Appellants are right to question the misapplication of summary judgment in employment discrimination claims especially given its predominant use and advantage to employers. *Brief of Appellant,* at 46. This is bolstered by the string of case citations from Appellant showing near unanimity across federal circuit courts that the use of summary judgment should not be infrequent—especially given the complexity of psychoanalyzing the motives of parties and the decisions of reasonable jurors. *Id.* at 47–48. In one dissenting opinion from the Eighth Circuit, there is a call for approaching employment discrimination cases with caution, arguing that summary judgment should not be granted "unless the evidence could not support any

reasonable inference" for the nonmovant. *Kampouris v. St. Louis Symphony Soc.*, 210 F.3d 845, 847 (8th Cir. 2000) (Bennet, J, dissenting).

The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 176 (1970). The advantages of trial by jury may just help reduce what Jerome Frank has called the doomed effort to "eliminate the personality of the judge" by giving opportunity to test the credibility and weight of witness testimonies through cross-examination. Jerome Frank, *Law and the Modern Mind, in* ANALYTIC JURISPRUDENCE ANTHOLOGY 187 (D'Amato ed. 1996); *Poller* v. *Columbia Broadcasting*, 368 U.S. 464, 473 (1962). While mindful that summary judgment is an important tool for "screening out meritless cases," Chin, *supra*, at 676, we remain concerned about its frequent use in Georgia and its implications on employment discrimination cases involving race and religion—the latter of which is most pressing to *amici*, which we turn to next.

III. CONCERNS INVOLVING DISTRICT COURT EMPLOYMENT CASES ON MATTERS OF RELIGIOUS DISCRIMINATION.

Aside from claims being thrown out, *amici* are concerned that the current analysis under Title VII allows for employers to harbor religious animus and simply wait till employees make one mistake and use that as evidence of work-related misconduct to strike down employee's "valid comparator" prong for intentional discrimination under the *McDonnell Douglas* test. *See generally Butler*

v. Emory Univ., 45 F. Supp. 3d 1374, 1386 (N.D. Ga. 2014) (*prima facie* religious discrimination requires proof of a valid comparator "similarly situated to the plaintiff in all relevant respect"). While claimants may respond by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence," *Combs v. Plantation Patterns,* 106 F.3d 1519, 1538 (11th Cir. 1997), the factual analysis is largely deferred to the workings of a magistrate whose Report & Recommendation (R&R) is adopted overwhelmingly by courts in Georgia. *See* Farahany, *supra*, at *25 (90% likelihood that R&R will be followed by northern district judges in the northern district in 2011-2012). An example of this exact problem is now working its way to the Supreme Court. In *Abeles v. Metropolitan Washington Airports Authority*, 676 Fed. Appx. 170 (11th Cir. 2017), summary judgment was granted in the lower court against the appellant based on her missing a day of work for a religious holiday that her employers knew she had been observing for more than 20 years. Since 1987, Susan Abeles had been given time off to observe the religious holiday of Passover without any issue. *Id.* Prior to missing the day of work, her employer informed her that she could potentially be suspended for five days for an alleged charge of insubordination. The alleged insubordination coupled with her failure to properly notify her employer of the required day off in the prescribed manner

resulted in her being discharged. A Petition for Certiorari is pending before the Supreme Court in this case.

Susan Abeles' case is a textbook example of where a Motion for Summary Judgment was improperly rendered. Questions of the sufficiency of how she notified her employer or the reasonableness of her request in light of the years of common practice are just two examples of outcomes that would have been better addressed at a jury trial than a Motion for Summary Judgment. Even a bench trial would have been preferable to disposing of the case on a Motion for Summary Judgment as at least some neutral fact finder would have looked over the information. Instead, summary judgment has evolved into a *de facto* bench trial without any of the constitutional protections that an actual trial affords. As the facts in *Abeles* show—and indeed the research and evidence shows—courts heavily favor summary judgment in employment cases.

Another concern involves the factual complexities of religious claims, which are often confused by judges when they interpret them through their own framework for spiritual fulfillment. *See generally* Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, 30 J. L. & Religion 36, 55 (2015). This issue came up in a religious accommodation case when the lower court refused to acknowledge a Christian employee's *prima*

facie claim for religious accommodation based on the first (sincerity) and third element (adverse action) for failing to accommodate. *Mwawasi v. Sam's Club E., Inc.,* No. 1:07-CV-1717-CC/AJB, 2008 WL 11333413, at *13 (N.D. Ga. Dec. 18, 2008), *report and recommendation adopted,* No. 1:07-CV-1717-CC, 2009 WL 10671147 (N.D. Ga. Jan. 6, 2009). The Plaintiff preached for the World Evangelical Gospel Outreach on Sundays. *Id.* at *2. In the Court's sincerity analysis, it found that the Plaintiff did not have a bona fide religious conflict based on his statement that his religion did not *require* him to preach on Sunday. *See Id.* at *14, n. 19. While the Plaintiff's religion may not *require* that he preach on Sunday, this point is not dispositive as to whether he holds a sincere religious claim, but goes to the question of "whether he actually holds the beliefs he claims to hold[.]" *Yellowbear v. Lampert,* 741 F.3d 48, 54 (10th Cir. 2014); *see also Philbrook v. Ansonia Bd. of Educ.,* 757 F.2d 476, 481 (2d Cir.1985) (sincerity analysis allows judges to differentiate between sincerely held beliefs and beliefs motivated by deception and fraud). Otherwise, courts have said that a person's sincere beliefs do not have to correspond to that religion's orthodox tenets, fall in line with the doctrines of any organized religion, or even be religious at all. *See, e.g.,* 42 U.S.C. § 2000e(j); *Welsh v. United States,* 398 U.S. 333, 339 (1970); *Patrick v. LeFevre,* 745 F.2d 153, 157 (2d Cir. 1984); *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978); *Yellowbear*, 741 F.3d at 54–55; *see also Thomas v.*

Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707, 715 (1981) ("judicial process is singularly ill equipped to resolve [intrafaith differences] in relation to the Religion Clauses").

Notably, in a more recent case, the same court got this issue right when it considered a religious accommodation request from a Jehovah's Witness to attend a Spanish-language convention assigned to her by her church for a specific date. *Zamora v. Gainesville City Sch. Dist.*, No. 214CV00021WCOJCF, 2015 WL 12851549, at *5 (N.D. Ga. June 22, 2015), *report and recommendation adopted*, No. 214CV00021WCOJCF, 2015 WL 12852321 (N.D. Ga. Aug. 26, 2015). The employer contended that alternatives existed for her to attend her convention without having to miss work on the date she requested, but the Court refused to concede on this point, noting that the *bona fide* beliefs of the Plaintiff in respects to attending the conference on *her preferred* date was an issue for the jury to decide. *Id.* at *6. In the Court's own words: "The fact that other conventions were held on different dates and Plaintiff did not inquire as to whether she could attend an alternative . . . is not enough to say that no issue of material fact exists as to whether Plaintiff held a *bona fide* religious belief." *Id.* at *5.

With the passage of *Abercrombie* in clarifying the "intentional discrimination" statute, these factual concerns often remain material and overlooked when summary judgment circumvents the opportunity for jurors to

make their own inferences based on available facts. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 2033 (2015) ("intentional discrimination provision prohibits certain *motives,* regardless of the state of the actor's knowledge"). At least one scholar has noted that when judges determines that no "reasonable" or "fair-minded factfinder" can find for a plaintiff, they often fail to distinguish between "whether *they* think that the evidence is sufficient" versus whether a "*reasonable jury* could find for the plaintiff." Suja A. Thomas, *The Fallacy of Dispositive Procedure,* 50 B.C. L. Rev. 759, 760 (2009) (emphasis mine). This problem is compounded when we add the element of religion into the mix given that conceptual filters may confuse a judge's interpretation of a given religious practice.

A final concern involves the sole discretionary authority of judges to determine factual allegations while denying requests for a jury trial. One example involves an employee alleged that her co-worker carried on a practice of singing gospel songs, preaching to the staff at the end of meetings, and quoting bible scripture. *Byrd v. Donahoe*, No. 111CV00208TCBRGV, 2013 WL 12097641, at *14 (N.D. Ga. Oct. 18, 2013), *report and recommendation adopted,* No. 111CV208TCB, 2013 WL 12106197 (N.D. Ga. Nov. 21, 2013). The record also shows that her co-worker insinuated that Plaintiff needs Jesus and referred to her as "Satan" and "the devil" on one occasion and told her she was "going to hell" in

another. *Id.* The District Court adopted the recommendations of the magistrate judge that the singing and preaching did not create a hostile work environment because the evidence did not show that the co-worker "intentionally directed" these things at any one individual—explaining the over religious behavior as product of the co-worker's "religious involvement." *Id.* at 15. Regarding the disparaging remarks about Plaintiff's eternal place of rest, the court offered a list of examples as evidence that the Eleventh Circuit requires much more egregious complaints to raise to a level of a hostile work environment. *Id.* at 16. In another similar case, the lower court again granted a defendant's motion for summary judgment, finding, *inter alia*, that no "fair-minded factfinder" would conclude that the actions of the employer amounted to a "severe or pervasive harassment" of the employee's Muslim faith to alter the terms and conditions of employment and create a discriminatorily abusive working environment. *Khattab v. Morehouse Sch. Of Med.*, No. CIV.A.107CV196RWSLTW, 2009 WL 2600523, at *13–14 (N.D. Ga. Aug. 20, 2009) (among the alleged actions of the employer was saying she wanted "Americans to kill all Syrians like [plaintiff], like they killed the Iraqis"); *Touzout v. Am. Best Car Rental KF Corp.,* No. 15-61767-CV, 2017 WL 1957185, at *11 (S.D. Fla. May 11, 2017); *see also Mack-Muhammad v. Cagle's Inc.*, No. 4:08-CV-11 CDL, 2010 WL 55912, at *5 (M.D. Ga. Jan. 4, 2010) (manager called Plaintiff "Mr. Bin Laden," "Osama," and "the Muhammad Man" over the company radio).

In all of these instances, *amici* are mindful of the need to ensure a freedom to express one's religious convictions with an added concern for balancing "workplace efficiency and employee morale." *See generally* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 Harv. J.L. & Pub. Pol'y 959, 966 (1999); *Sanford v. Walmart, Inc.,* No. 1:13-CV-174 (LJA), 2016 WL 5662029, at *14 (M.D. Ga. Sept. 29, 2016) ("no 'magic number' of incidents that meet the objective severity requirement"). Courts must do their best to preserve this balance without creating mechanisms that help to insulate abusive behavior at work through administrative barriers. We believe that the barrier concerning excess summary judgment grants strike a poor balance.

CONCLUSION

While no one case proves dispositive in respects to the constitutional matters previously addressed, we ask this court to be mindful of these perceived concerns in the aggregate—considering the analytical data and the real world potential for chilling religious free expression at work. The use of summary judgment is merited in some instances, but the disparate manner in which it is used in the employment context, particular against religious clients, cannot go unacknowledged.

Respectively submitted,

/s/ David Schoen
David Schoen
Counsel of Record

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with FRAP 32(a)(7)(c) that this brief complies with the type-volume limitation specified in Rule 32(a)(7)(B). Specifically, it contains 3571 words in the Brief.

Respectively submitted,

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