UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 08-60855

JOSEPH W. BLACKSTON, M.D., J.D.,
Plaintiff/Appellant

VERSUS

WEXFORD HEALTH SOURCES, INC.,
Defendant/Appellee

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# REPLY BRIEF OF APPELLANT

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

William H. Barbour, Jr., United States District Court Judge

LOUIS H. WATSON, JR.
MISSISSIPPI BAR NO. 9053
NICK NORRIS
MISSISSIPPI BAR NO. 101574

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## TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . i

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . ii

ARGUMENT I. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

APPELLANT DID NOT WAIVE HIS 42 U.S.C. § 1981 CLAIM.

ARGUMENT II . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

RACIAL ANIMUS OF APPELLEE'S CUSTOMER IS IMPUTED TO APPELLEE.

ARGUMENT III . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

THE DISTRICT COURT IMPROPERLY RELIED ON *PRICE WATERHOUSE.*

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

CERTIFICATE OF SERVICE . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7

## TABLE OF AUTHORITIES

**CASES:**

*Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) . . . . . . . . . . . 2

*Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) . . . . . . . . . . . . . . . 2

*Price Waterhouse v. Hopkins,* 490 U.S. 228, 252-53 (1989) . . . . . . . . . . . . 4

*Simple v. Walgreen's Co.,* 511 F3.d 668 (7th Cir. 2007) . . . . . . . . . . . . . . . . 2

*Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002) . . . . . . . . . . . . . . . . . . . 5

*White v. Community Care, Inc.,* 2008 WL 5216569
(W.D. Pa. December 11, 2008) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

**STATUTES:**

42 U.S.C. § 1981 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1

**REPLY ARGUMENT I.**

**APPELLANT DID NOT WAIVE HIS 42 U.S.C. § 1981 CLAIM.**

Contrary to the Appellee's argument, it is clear the Appellant did not waive his race discrimination claim under 42 U.S.C. § 1981. The Appellant filed a race discrimination claim pursuant to Title VII and 42 U.S.C. § 1981. The district court dismissed the Appellant's race discrimination claim under 42 U.S.C. § 1981 and Title VII because according to the district court: (1) the racial animus of the Appellee's customer could not be attributed to the Appellee, and (2) the Appellant failed to rebut the Appellee's legitimate non-discriminatory reason. While the Appellant refutes this finding by the trial court, it is clear the trial court found that both claims would have to be dismissed by this finding. (R. at R. 401). The Appellant clearly raised these issues on appeal in his initial brief. However, while Appellant is seeking this Court to reverse the trial court on these issues, the Appellant understands that his Title VII claim cannot be revived because he has waived his relation back argument under Rule 15(c) of the Federal Rules of Civil Procedure.

## REPLY ARGUMENT II.

**RACIAL ANIMUS OF APPELLEE'S CUSTOMER IS IMPUTED TO APPELLEE.**

As stated in Appellant's initial brief, it is a common legal principal that an employer assumes the discriminatory animus of others (including its customers) when it takes tangible employment actions against its employees. The United States Supreme Court has acknowledged this principle in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). While both cases deal with claims for sexual harassment, the principal is the same here where an employer becomes automatically liable when it takes a tangible employment action in furtherance of another's discriminatory animus.

The Seventh Circuit along with the Fifth and Ninth Circuits has also ruled that customer preference can be used to show pretext. *Simple v. Walgreen's Co.,* 511 F3.d 668 (7th Cir. 2007). The only difference between *Simple* and the current case is that the employer in *Simple* only believed it was the customer's preference, while the Appellee actually knew because its customer made the recommendation. However, this distinction plays no role as to the fact that the Appellee assumed the racial animus of its customer when it took a tangible employment action against the Appellant.

Contrary to the Appellee's argument, the Appellant is not attempting

to raise a bona fide occupational qualification ("BFOQ") defense. The Appellant also argued in his initial brief that the Appellee had failed to raise any such affirmative defense in its Answer. What the Appellant did argue in his initial brief is that the trial court essentially allowed Appellee to put up such a defense without ever raising it.

The Appellee also argues that *White v. Community Care, Inc.,* 2008 WL 5216569 (W.D. Pa. Dec. 11, 2008) is distinguishable from the current case because the Seventh Circuit allows plaintiffs to use circumstantial evidence to prove direct method cases. This argument is nothing more than a red herring. The difference between the Seventh and Fifth Circuits on this issue does not make *White* any less important to the current case because it is clear the Appellant is not arguing that he should be able to prove a direct evidence theory through circumstantial evidence. Additionally, the plaintiff in *White* did not even use this method of offering circumstantial evidence to prove a direct method case. *Id.* at 8. Both the plaintiff in *White* and Appellant in the current case presented direct evidence of their employer's racial animus that was assumed from its customers.

**REPLY ARGUMENT III.**

## THE DISTRICT COURT IMPROPERLY RELIED ON *PRICE WATERHOUSE.*

The Appellee claims that Appellant did not raise any issues of mixed motives. However, this is simply not true. The Appellant clearly cited to the district court the mixed-motive analysis in response to its motion for summary judgment. (R. at R. 296-7). The Appellee also falsely claims that Appellant did not request equitable remedies at the district court level. The Appellant clearly requested such equitable relief in his First Amended Complaint. (R. at R. 105). The Appellant requested (1) reinstatement or future wages in lieu of reinstatement, (2) back wages, (3) pre-judgment and post-judgment interest, (4) attorneys fees, (5) costs, and (6) any other injunctive and equitable relief the Court deemed as just and proper. *Id.*

Under the Appellee's argument the Appellant was required to not only respond to the Appellee's argument for summary judgment, but also know that in the future the district court would improperly rely on *Price Waterhouse v. Hopkins,* 490 U.S. 228, 252-53 (1989), and make responsive arguments in advance. The Appellee did not even cite *Price Waterhouse* in its motion for summary judgment or its reply to the Appellant's response. Appellant is unsure how the district court decided to use *Price Waterhouse* when it is clearly red-flagged in both Westlaw and Lexis that it has been

overturned at least in part, but it is clear neither party proffered the case to the district court in support of their positions.

The Appellee also claims that Appellant cannot seek equitable relief because he has not pled a basis for this relief in his Amended Complaint. First, the Appellee cannot bring this new argument for the first time on appeal when it did not raise it at the district court level. Second, even if it had been brought at the district court level it would have no merit. The United States Supreme Court has already found that a plaintiff is not required to plead specific facts to establish a prima facie case in an employment discrimination case. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002). This ruling by the United State Supreme Court makes it clear that plaintiffs only need to comply with Rule 8 of the Federal Rules of Civil Procedure. The Appellee does not cite one case, statute, or even a legal theory that would require any such standard. The Appellee never made an argument that Appellant has no basis for equitable relief, such as, attorneys fees, back wages and future wages. As such, the Appellant was not required to respond to arguments that were never made. Moreover, the fact that equitable relief is up to the trial court does not mean that Appellant should have essentially "jumped the gun" by making a motion for attorney fees and

other equitable relief before succeeding at trial on the merits.

## **CONCLUSION**

It is clear that the Appellee automatically assumed its customer's discriminatory intent when it made the employment decision to not hire the Appellant. Therefore, the trial court erred by (1) finding that the racial animus of the Appellee's customer was not attributable to the Appellee, (2) relying on *Price Waterhouse* in deciding to dismiss Appellant's cause of action on summary judgment, and (3) making a determination regarding disputed facts that should be left for the jury to decide.

Respectfully Submitted,

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BY: ________________________

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**CERTIFICATE OF SERVICE**

I, Nick Norris do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document, as well as a WP 3.5 disk to:

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THIS, the 17TH day of February, 2009.

______________________________
NICK NORRIS

UNITED STATES COURT OF APPEALS
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Plaintiff/Appellant

VERSUS

WEXFORD HEALTH SOURCES, INC.,
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**CERTIFICATE OF COMPLIANCE**

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains:

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4. The undersigned understands a material misrepresentation in

completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

Respectfully submitted,

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