IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 08-60855

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

VERSUS

WEXFORD HEALTH SOURCES, INC.,
Defendant-Appellee

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

(WILLIAM H. BARBOUR, JR., UNITED STATES DISTRICT COURT JUDGE)

APPELLEE'S BRIEF

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Certificate of Interested Persons

The Defendant-Appellee's counsel of record certifies the following listed persons and entities have an interest in the outcome of this case:

1. Joseph W. Blackston, Plaintiff-Appellant
2. Louis H. Watson, Jr., Attorney for Plaintiff-Appellant
3. Nick Norris, Attorney for Plaintiff-Appellant
4. Wexford Health Sources, Inc., Defendant-Appellee
5. Wexford Health Sources, Inc., Defendant-Appellee, is wholly-owned by The Bantry Group. The Bantry Group is not a publicly-held company.
6. R. Jarrad Garner, Attorney for Defendant-Appellee
7. David W. Donnell, Attorney for Defendant-Appellee

Statement Regarding Oral Argument

Defendant-Appellee Wexford Health Sources, Inc. does not believe oral argument is necessary because the issues have been fully briefed by both sides, thus oral argument will not aid in the Court's disposition of this appeal. If, however, the Court believes that oral argument would be helpful, Defendant-Appellee Wexford Health Sources, Inc. welcomes the opportunity to appear before the Court to explain the reasons the district court did not err in granting summary judgment on all claims with prejudice, dismissing Plaintiff-Appellant Joseph W. Blackston's lawsuit in its entirety.

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Statement of Jurisdiction

This matter involves a federal question. Pursuant to 28 U.S.C. § 1331, the United States District Court for the Southern District of Mississippi properly exercised jurisdiction in entering a final order and judgment granting Appellee Wexford Health Sources, Inc.'s motion for summary judgment. The Fifth Circuit Court of Appeals has jurisdiction to hear Appellant Joseph W. Blackston's timely appeal under 28 U.S.C. § 1291.

Statement of Issues

1. Because there is no indication that Appellant Joseph W. Blackston is appealing the dismissal of his 42 U.S.C. § 1981 claim, and because he discusses only his untimely Title VII claim, this Court should dismiss this appeal in its entirety.

2. The district court correctly refused to impute purported direct evidence of discrimination allegedly attributable to the Mississippi Department of Corrections, to the Appellee, Wexford Health Sources, Inc., a medical staffing company that serviced the Mississippi Department of Corrections pursuant to state contract.

3. The district court correctly granted summary judgment as to all claims asserted by the Appellant, with prejudice, dismissing his lawsuit in its entirety.

4. The district court did not improperly make "fact findings" on summary judgment as to disputed facts.

Standard of Review

This Court reviews de novo the district court ruling granting Appellee Wexford Health Sources, Inc.'s summary judgment motion. See Melton v. Teachers Insurance & Annuity Association of America, 114 F.3d 557 (5th Cir. 1997); Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988). Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is proper where the opposing party "fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); see, e.g., Little v. Liquid Air Corp., 73 F.3d 1069, 1071 (5th Cir. 1994) ("Summary judgment should be granted . . . when the nonmoving party fails to meet its burden to come forward with facts and law demonstrating a basis for recovery that would support a jury verdict."). There are no genuinely disputed material fact issues as to Appellant's race discrimination claim. As to each issue, the record shows Appellant cannot prevail on this appeal.

I. STATEMENT OF THE CASE

On October 22, 2006, the Appellant, Dr. Joseph W. Blackston ("Blackston") submitted a charge of discrimination to the Equal Employment Opportunity Commission ("EEOC") claiming that the Mississippi Department of Corrections ("MDOC") and Wexford Health Sources, Inc. ("Wexford"), a company that staffed MDOC sites with healthcare providers pursuant to contract, discriminated against him on the basis of race. (R. 292). Blackston charged the MDOC and Wexford refused to hire him as a MDOC medical site director because he is Caucasian, a position that Wexford filled by virtue of its contract with the state. (Id.) The EEOC issued a right-to-sue letter on November 30, 2006. (R. 293).

On February 28, 2007, Blackston filed a federal lawsuit against the MDOC alleging race discrimination. (R. 10). The Complaint, filed in the United States District Court for the Southern District of Mississippi, sought various forms of relief, including primarily compensatory and punitive damages. (R. 10-26). It asserted race discrimination claims under Title VII and 42 U.S.C. § 1981a, as well as claims under state law for emotional distress. (Id.)

On March 21, 2007, roughly 110 days after the EEOC issued its right-to-sue letter, Blackston filed an Amended Complaint naming Wexford as a Defendant for the first time. (R. 91-108). Wexford answered the Amended Complaint, denying any liability and raising various affirmative defenses. (R. 120-27).

On April 13, 2007, the MDOC was dismissed from this matter with prejudice, leaving Wexford as the sole Defendant. (R. 111-12).

After the close of discovery, on May 7, 2008, Wexford moved for summary judgment on all claims asserted in the Amended Complaint. (R. 198-285). On June 3, 2008, Blackston responded to the motion. (R. 288-300). Blackston conceded his claims for negligent and intentional infliction of emotional distress, and made no argument regarding his claim for punitive damages. (Id.) In support of his race discrimination charges, Blackston wrote a mere two sentences: "In the current case, the Defendant came forward and blatantly stated to the Plaintiff that the reason he would not be selected for the medical director for Wexford was because he was not a minority. This is clearly direct evidence of race discrimination." (R. 298). On June 13, 2008, Wexford submitted its rebuttal to Blackston's response. (R. 301-15).

On September 10, 2008, the district court granted Wexford's motion for summary judgment as to all claims. (R. 387-403). The district court ruled the Title VII race discrimination claim was time-barred because Blackston did not sue Wexford within 90 days of receiving notice of the EEOC's right-to-sue letter as required by law. (R. 392-397). The district court found that Blackston failed to meet his burden on summary judgment as to all claims asserted against Wexford, including state law claims for emotional distress and punitive damages and federal discrimination claims. (R. 392-402).

II. STATEMENT OF THE FACTS

In July 2003, Blackston began working for the MDOC as the Director of Medical Compliance. (R. 272). His duties required him to oversee the performance of the medical staffing companies that contracted with the MDOC to provide physicians and other health care services. (Id.) In this position, Blackston worked with the MDOC Commissioner in deciding whether certain individual physicians could be assigned to MDOC correctional facilities. (Id.) From 2003 to July 2006, the state contracted with Correctional Medical Services ("CMS") to provide these medical staffing services. (Id.) During this period, CMS hired Dr. Kentrell Liddell, an African-American female, as one of the physicians to staff the MDOC's Central Mississippi Correctional Facility. (Id.)

During 2004, CMS approached Blackston to discuss whether he would be interested in coming to work for the company. (Id.) In or around this period of time, the MDOC talked with Dr. Liddell about the possibility of replacing Blackston as its Director of Medical Compliance. (Id.) Around this time, some tension developed between Dr. Liddell and Blackston. (R. 272-73). Ultimately, on September 1, 2004, Drs. Liddell and Blackston swapped jobs. (R. 273). As the MDOC's new Director of Medical Compliance, Dr. Liddell was responsible for overseeing Blackston's job performance under the CMS contract. (Id.) The relationship between Drs. Liddell and Blackston deteriorated very quickly. (Id.)

To the point, Blackston characterized Dr. Liddell as an "out of control" egoist. (R. 273). Blackston alleged Dr. Liddell stole credit for work he performed, used "highly flawed methods" in performing her job, made "massive" data misrepresentations, and constantly threatened, harassed and insulted employees, sometimes firing them without reason (Id.) The relationship was so bad that, in 2005, Blackston declined a promotion offer from CMS to become its Regional Medical Director because it would have entailed more interaction with Dr. Liddell. (Id.) Blackston testified during his deposition that Dr. Liddell openly criticized and publicly berated him for taking credit for work she claimed to have performed. (Id.)

During 2005-06, there was a decision that CMS would not renew its contract to provide services to the MDOC effective July 1, 2006. (Id.) The state instead chose to contract with Wexford to provide physicians to its inmate population. (Id.) Prior to the transition date, several CMS employees, including Blackston, expressed an interest in working for Wexford. (R. 273-74). In the months before it assumed the MDOC contract, Wexford interviewed most of these CMS employees, including Blackston, and considered them for Wexford positions. (Id.) However, after conversations and discussions with the MDOC and other individuals, Wexford learned that Blackston was not a good fit for the site medical director position at Central Mississippi Correctional Facility. (R. 274). Wexford did not offer to employ Blackston at the Central Mississippi Correctional Facility based on this determination. (Id.) Blackston was informed of this decision and potential other site positions were discussed. (Id.)

Ultimately, Blackston claims he was not hired because he is Caucasian. (R. 274). Specifically, Blackston alleges Wexford representatives told him the MDOC wanted Wexford to hire an African-American physician to run the Central Mississippi Correctional Facility. (Id.) Blackston testified that the MDOC, specifically Dr. Liddell—not Wexford—made the ultimate decision not to hire him. (Id.) He further testified that the MDOC "purposefully and maliciously" decided he should not be hired and characterizes Wexford's actions as mere acquiescence. (Id.)

Beginning July 1, 2006, Blackston was not a CMS employee. (Id.) One month later, on August 4, 2006, Blackston took a job with a hospital making more money than CMS or Wexford paid for the positions he had held. (Id.)

III. SUMMARY OF THE ARGUMENT

First, Blackston fails to delineate the scope of this appeal. Because Blackston does not purport to appeal the dismissal of his claim under 42 U.S.C. § 1981, and discusses only his procedurally barred Title VII claim, Blackston's appeal fails. Second, Blackston offers a confusing argument suggesting the district court erred because it did not impute alleged direct evidence of "customer preference" unlawful discrimination to Wexford. Blackston argues employers cannot use "customer preference" as a basis for making discriminatory decisions. Blackston does not offer relevant legal support for his "customer preference" argument. Rather, Blackston cites analyzing the "bona fide occupational qualification" defense, a statutory Title VII affirmative defense. Blackston argues "the district court essentially allowed [Wexford] to put up a BFOQ affirmative defense." Blackston never explains "how" the district court did so. Blackston's argument in this regard ignores the plain language in the district court's opinion. Thus, Blackston's assignment of error is without merit.

Blackston erroneously argues the district court erred in completely disposing of all claims on summary judgment in the post-Price Waterhouse v. Hopkins era based on the Civil Rights Act of 1991. This claim fails. Blackston never articulated "mixed-motive" arguments in his opposition to summary judgment or claimed entitlement to the equitable remedies potentially available in "mixed-motive" theory cases. To the

extent Blackston argues there exist equitable remedies available to him that preclude the district court from dismissing his claims altogether, Blackston is mistaken. Lastly, Blackston claims the district court made "fact" findings as to disputed issues, without making any clear arguments in support of this belief. Rather, Blackston simply offers duplicative abbreviated and unsupported complaints related ostensibly to the district court's application of the law.

There is no basis in law or fact for Blackston's request that the district court's order granting summary judgment be reversed.

IV. LEGAL ARGUMENT

A. ISSUE ONE: BLACKSTON FAILS TO DELINEATE THE NATURE OF HIS APPEAL AS MANDATED BY THE FEDERAL RULES OF APPELLATE PROCEDURE

In contravention of the minimum legal requirements, including the Federal Rules of Appellate Procedure, Blackston fails to clearly articulate the scope of this appeal. Because Blackston does not purport to appeal the dismissal of his claim under 42 U.S.C. § 1981, this Court should dismiss this appeal in its entirety because Blackston's Title VII is procedurally barred as a matter of law.

It is settled law that issues not raised on appeal are waived. See, e.g., Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1430 (7th Cir. 1986) (holding defendant waived claims incorporated by reference in district court brief argument section based on appellate rules requiring parties to argue claims to preserve them); U.S. v. Abroms, 947 F.2d 1241, 1250–1251 (5th Cir. 1991), cert. denied, 505 U.S. 1204 (1992) (refusing to consider post-trial motion arguments for failure to meet FRAP 28(a)(4), requiring parties to set forth contentions in briefs along with supporting reasons, authorities, statutes, and record excerpts). Furthermore, "[m]erely incorporating an argument made to the district court does not preserve a question for appellate review." Frank v. U.S., 78 F.3d 815, 833 (2d Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997).[1]

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[1] While courts employ the same analytical framework to assess claims brought under Title VII and 42 U.S.C. § 1981, the two are distinct statutes. See, e.g., Newbold v. United States, 614 F.2d 46, 47

In order to conclude that Blackston seeks to appeal the dismissal of the § 1981 claim, one is required simply to assume that Blackston intended to so. The law does not provide for, or permit, this type of assumption. Blackston refers to the district court opinion that granted summary judgment and resulted in the dismissal of his lawsuit. In his opening brief, Blackston raises issues and discusses them only within the Title VII context. Blackston offers no arguments as to the dismissal of the cause of action he brought under 42 U.S.C. § 1981. Blackston never mentions § 1981. He certainly does not identify § 1981 as the statutory basis for one of the discrimination claims he asserted against Wexford (as he does not even reference it or list it in his table of authorities). Blackston's omission is significant because his Title VII claim, the only other discrimination claim he asserted, was correctly dismissed by the district court as untimely (for failure to comply with the EEOC's 90-day filing requirement). (R. 392-97). Blackston chooses not to address the timeliness issue in his brief.

Because there is no objective indication that Blackston seeks to appeal the grant of summary judgment as to his § 1981 claim, this Court should dismiss this appeal in its entirety.

(5th Cir. 1980) (federal employees may seek to remedy discrimination under Title VII but not § 1981). Title VII and § 1981 give rise to distinct causes of action. See, e.g., Johnson v. Railway Express Agency, 421 U.S. 454, 466 (1975) (acknowledging separate and distinct causes of action arising from Title VII and §1981 and holding § 1981 statute of limitations is not tolled upon the timely filing of an EEOC charge). Short v. City of West Point, 1996 WL 737535, *1, *3 (N.D. Miss. December 19, 1996) (refusing to bar § 1981 claim where same claim under Title VII was barred procedurally and noting remedies available under Title VII and § 1981, while related, "are separate, distinct, and independent"). A party asserting Title VII and § 1981 causes of action on the same facts, may appeal the dismissal of one and not the other. See, e.g., Lyght v. Ford Motor Co., 643 F.2d 435, 441 (6th Cir. 1981).

B. ISSUE TWO: THE DISTRICT COURT CORRECTLY REFUSED TO IMPUTE TO WEXFORD THE PURPORTED "DIRECT EVIDENCE" OF RACE DISCRIMINATION ALLEGEDLY ATTRIBUTABLE TO THE MDOC.

Blackston states there is long-standing Fifth and Ninth Circuit case law holding "customer preference" based on unlawful animus must be imputed automatically to an employer that considers the unlawful preference.[2] Blackston claims these cases required the district court to automatically impute the MDOC's alleged racial animus, if any, to Wexford under these facts. Blackston is wrong.

On summary judgment, Wexford argued that Blackston could not prove a prima facie case of race discrimination using direct evidence or circumstantial evidence (under the McDonnell Douglas paradigm). (R. 277-78). Blackston could not show (and did not even attempt to show) disputed material fact issues demonstrating Wexford's proffered legitimate, non-discriminatory reasons for not hiring him were mere pretext. (R. 288-300; 401). In his opposition, Blackston claimed Dr. Lundquist made remarks at an informal meeting that occurred weeks before Wexford began performing under its contract with the MDOC. (R. 295). Blackston maintained these remarks constituted direct evidence that Wexford's

[2] Simultaneously, Blackston conflictingly contends in his brief that (i) the court "failed to acknowledge the Appellee **automatically assumed** the racial animus of its customer when making the [] decision not to hire" him; (ii) the Fifth Circuit courts have long held discriminatory customer preference "**can be attributed** to the employer" that makes decisions based on unlawful customer preference; and (iii) the court erred in finding the "discriminatory intent of Appellee's customer **could not** be attributed to the Appellee.

decision was racially motivated.[3] Blackston never argued these alleged remarks were circumstantial evidence, thus he failed to address his claims under the familiar McDonnell Douglas framework.

The district court concluded the remarks that Blackston attributed to Dr. Lundquist were not direct evidence of discrimination by Wexford. (R. 398-400). The court recognized the alleged remarks did not directly prove discrimination because in order "to find that Wexford possessed a discriminatory animus based on its acquiesce [sic] and/or ratification of the hiring instructions given to it by MDOC would require use of an inference or presumption, …." (R. 399). In other words, taking as true Blackston's testimony, a presumption or inference would still be required to conclude Wexford acted based on intentional racial animus. (Id.) The district court found Blackston failed to show Wexford discriminated against him using direct evidence. (R. 398-99). Blackston's claim that the district court erred in this respect is meritless.

Blackston's assignment of error is seemingly based on his contention that Wexford did not hire him based on a discriminatory "customer preference" (i.e., the MDOC's alleged "recommendation" to Wexford to hire "a minority"). Blackston claims "[t]he Fifth Circuit and Ninth Circuit Courts of Appeal have long held that the customer preference for discrimination in employment by an employer can be

[3] "Direct evidence is evidence that, if believed, proves the fact of discriminatory animus **without inference or presumption**." Rachid v. Jack in the Box, Inc., 376 F.3d 305, 310 (5th Cir. 2004) (emphasis added). The argument in Dr. Blackston's response was just two sentences, citing no legal authority: "In the current case, the Defendant came forward and blatantly stated to the Plaintiff that the reason he would not be selected for the medical director for Wexford was because he was not a minority. This is clearly direct evidence of race discrimination." (R. 298).

attributed to the employer when it makes employment decisions based on the unlawful discriminatory preference of its customers." Blackston fails to support this erroneous assertion.

1. Blackston's "customer preference" argument is based on case law involving the statutory "bona fide occupational qualification" defense, an affirmative defense irrelevant to this matter.

Blackston supports his "customer preference" argument with Fifth and Ninth Circuits cases analyzing the "bona fide occupational qualification" (or "BFOQ") defense, a statutory Title VII affirmative defense. 42 U.S.C. § 2000e-2(e)(1) (permitting discrimination due to sex, religion, or national origin where "reasonably necessary to the normal operation of that particular business or enterprise"). The BFOQ defense is invoked by employers with admittedly discriminatory policies that seek to justify them as a business necessity. It is applicable in limited situations, generally those involving facially discriminatory job classifications. See, e.g., E.E.O.C. v. Sambo's of Georgia, Inc., 530 F.Supp. 86, 91-92 (N.D. Ga. 1981) (explaining the BFOQ defense applies almost exclusively to alleged discrimination "in the form of facially discriminatory job classification, such as the requirement that employees in a certain job be female or, conversely, male").

There is no, and has never existed any, allegation that Wexford's employment policies and/or job classifications are discriminatory. (R. 91-108). Blackston's attempt to interject the BFOQ defense and related case law is patently improper. His misplaced arguments do not warrant reversal of the district court's decision.

2. Blackston cannot interject a statutory affirmative defense that was not invoked by Wexford in this case.

Blackston seeks improperly to interject the BFOQ defense into this case (presumably because he believes the BFOQ case law aids his cause), without any basis for attempting to do so.

Blackston admits in his brief that Wexford did not raise a BFOQ defense.[4] (conceding that Wexford "never asserted the affirmative defense of a bona fide occupational qualification"). The record is clear that the district court did not consider the BFOQ defense, as it was not raised by the parties. (R. 387-402). The record also shows that Wexford clearly proffered legitimate, non-discriminatory reasons for not hiring Blackston as a site medical director. (R. 268-70; 400-01). In proffering these non-discriminatory reasons, Wexford's actions were, by definition, inconsistent with an employer attempting to justify admittedly discriminatory conduct under the BFOQ defense. See, e.g., Darris v. Missouri Dep't of Social Services, 580 F.Supp. 1234, 1237 (D. Mo. 1984), aff'd without opinion, 745 F.2d 62 (8th Cir. 1984). In Darris, the court noted the BFOQ defense is not compatible with an employer's proffered non-discriminatory reasons for its actions and refused to engage in a BFOQ analysis based on the plaintiff's characterization of the employer's defense as a BFOQ defense. Darris, 580 F.Supp. at 1237-38 ("Plaintiff has erroneously characterized

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[4] Wexford has never claimed, and there is no evidence demonstrating, that it discriminated in its hiring decision, claiming it was a business necessity. Unlike cases involving the BFOQ defense, Wexford did not stipulate (and has consistently denied) and there has been no allegation asserted that its corporate policy precludes non-African-Americans from employment in the position at issue. (R. 91-108).

defendant's burden as one of proving a BFOQ existed. Defendant has never admitted to a practice of sex discrimination, especially in plaintiff's case, and consequently never raised the affirmative defense of BFOQ.").

Blackston's mistaken and subjective assertion that the BFOQ defense and case law construing it are relevant controverts the record evidence, and does nothing to support his claim of error.

3. Blackston cannot interject the BFOQ defense based on his unexplained, unsupported and erroneous characterization of the district court's ruling.

Blackston argues "the district court essentially allowed [Wexford] to put up a BFOQ affirmative defense." First, Blackston never explains "how" the district court did so. Second, Blackston's argument in this regard ignores the plain language in the district court's opinion.

On appeal, parties cannot create issues by attempting to go beyond the scope of the district court's order. See, e.g., Anderson v. Pasadena Indep. School Dist., 184 F.3d 439, 446-47 n.3 (5th Cir. 1999) (dismissing appeal from two district court orders imposing sanctions, despite the district court's attempt to clarify or modify the orders after it lost jurisdiction when the notice of appeal was filed; "[W]e are constrained by the plain language of the two sanction orders and cannot base our jurisdiction on language by the district court interpreting those orders five months after the notice of appeal was filed and after the district court lost jurisdiction to clarify or modify the sanctions"). The district court's unambiguous opinion clearly articulates the bases for

its decision. (R. 387-402). None of them involve the BFOQ defense. (Id.) Given the plain language of the court's opinion and its judgment, and the other record evidence, this Court need not address the BFOQ issues discussed in Blackston's brief as they are entirely irrelevant.

4. The BFOQ "customer preference" decisions cited by Blackston do not apply in this case.

Blackston incorrectly argues the district court should have "automatically" imputed to Wexford any direct evidence it believed was attributable to MDOC (i.e., the state agency that Blackston claims made a "recommendation" to Wexford to hire "a minority" as its medical director).[5] The Fifth and Ninth Circuit BFOQ related decisions cited by Blackston involve employers with admittedly discriminatory hiring practices, and which affirmatively invoked the BFOQ statutory defense. As noted above, Wexford has not invoked the BFOQ defense. (R. 120-36). Thus, Blackston's reliance on these decisions is misplaced. They are distinguishable and therefore inapposite.

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[5] Blackston argues—albeit in error—that: "[T]he district court found that though there was direct evidence of race discrimination, this discrimination was only attributable to Appellee's customer, MDOC. In error, the district court failed to acknowledge that the Appellee automatically assumed the racial animus of its customer when making the employment decision not to hire the Appellant." This misstates the opinion. The district court found the evidence was not direct evidence because it would require an inference. (R. 398-99). **The district court analyzed Blackston's race discrimination claims under the burden-shifting framework, in the alternative, only after assuming—for the sake of argument—that Blackston had, in fact, supplied adequate direct evidence.** (R. 399-401). In other words, the district court never found that there was direct evidence of racial discrimination, instead holding that the evidence submitted by Blackston constituted circumstantial evidence (to the extent it even constituted probative evidence as to Wexford at all). (R. 398-401).

Blackston cites cases involving airline defendants seeking to avoid liability by admitting their hiring guidelines were facially discriminatory, but claiming they were business necessities.[6] He also cites a Ninth Circuit Title VII case where the employer claimed its decision not to promote a female employee was justified because its international partners did not like to deal with women.[7] None of these decisions is helpful in resolving the issues before this Court.

In Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1970), male plaintiffs in a class action suit claimed Pan Am Airways refused to hire them as flight attendants per its written policy of hiring women only. Pan Am conceded its policy against hiring men was based on gender. It argued the policy was justified under the BFOQ defense, claiming its customers clearly preferred female flight attendants, i.e., that "femaleness" constituted a BFOQ for its flight attendant positions under Title VII.[8] The Fifth Circuit held Pam Am's discriminatory hiring practices were improper.

In Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), flight hostesses (a position for which Continental hired only women per company policy) claimed an airline employer's published policies requiring them to meet strict weight

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[6] Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1970); Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982).

[7] Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981).

[8] The issue was summarized as follows: "Pan Am admitted that it had a policy of restricting its hiring for the cabin attendant position to females. Thus, both parties stipulated that the primary issue for the District Court was whether, for the job of flight cabin attendant, being a female is a 'bona fide occupational qualification (hereafter BFOQ) reasonably necessary to the normal operation' of Pan American's business." Diaz, 442 F.2d at 386.

requirements as a job condition constituted discrimination. As in Diaz, the employer claimed its policy was necessary to enhance its public image.[9] The Ninth Circuit held that Continental's justification for the weight requirements—that it needed to feature "attractive" female attendants to compete in the industry—was not within the purview of the BFOQ doctrine.

In Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981), a woman sued her employer claiming it violated Title VII by failing to promote her to a position in which she would have been required to interact with South American businessmen. The employer, Wynn Oil Co., invoked the BFOQ defense and argued its foreign partners preferred not to conduct business with women. The Court ruled the "international" nature of the case did not make it distinguishable from decisions holding that mere customer preference would not justify a domestic employer's use of the BFOQ defense simply because it dealt with non-domestic businesses.

Blackston lastly argues the district court should have imputed the MDOC's alleged racial animus to Wexford as direct evidence based on White v. Community Care, Inc., 2008 WL 5216569 (W.D. Pa. Dec. 11, 2008). Blackston contends the court in White looked at facts similar to this case, and held the defendant employer assumed

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[9] The issue was described as follows: "This appeal concerns the validity of a policy requiring employees classified as "flight hostesses," a position held only by women, to comply with strict weight requirements as a condition of their employment with Continental Airlines. The challenged weight program was in effect until 1973 and was imposed, according to Continental, to enhance its business image by assuring that passengers were served by attractive women. No similar requirements were enforced for any job classifications which included men." Gerdom, 692 F.2d at 603.

the racial animus of a customer "by following its client's direction to make an employment decision based on race." Importantly, Blackston fails to acknowledge the significantly different legal standard applied in White, a legal standard which runs contrary to prevailing law in the Fifth Circuit. As a result, Blackston's reliance on this decision is misplaced.[10] In White, the district court analyzed the plaintiff's discrimination claims under a unique Seventh Circuit framework that allows "circumstantial" evidence to prove "direct" evidence cases. Id. at *8 (quoting Hossack v. Floor Covering Assoc. of Joilet, Inc., 492 F.3d 853, 861-62 (7th Cir. 2007) (articulating a qualitatively different and expansive standard allowing plaintiffs to establish discrimination under a "direct" evidence theory, by permitting them to use "circumstantial" evidence, such as suspicious words or actions by decision-makers)). This framework does not comport with Fifth Circuit law. See, e.g., Scales v. Slater, 181 F.3d 703, 709 (5th Cir. 1999) (noting methods by which plaintiffs can attempt to prove discrimination and distinguishing between direct evidence and circumstantial evidence methods) (citing LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996)).[11] The decision in White is thus clearly distinguishable, and does not mandate reversal of the district court's ruling.

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[10] Additionally, in White, the district court noted at the outset that the defendant employer violated local rules by not responding to the plaintiff's "Concise Statement of Material Facts Precluding Summary Judgment." Due to this oversight, the district court deemed "true" all of the plaintiff's fact assertions, and relied on them in making its rulings. For this reason, the holding in White is further distinguishable.

[11] See also Baltazor v. Holmes, 162 F.3d 368, 376-77 (5th Cir. 1998) ("We are aware that it is rare for a plaintiff to be in a position to provide direct evidence of discriminatory intent. LaPierre, 86 F.3d

In summary, Blackston's "customer preference" argument has no legal basis. Blackston purports to assert this argument with legal authorities that do not support his case. For these reasons, this Court should deny Blackston's appeal.

5. The district court, recognizing that Blackston relied entirely on purported direct evidence of discrimination and never attempted to rebut the non-discriminatory reasons proffered by Wexford, correctly granted summary judgment on all claims.

Since the outset of this litigation, Blackston has relied solely on a direct evidence theory of discrimination. (R. 398). Blackston chose not to assert a circumstantial evidence argument (i.e., under McDonnell Douglas). (R. 298; 398-401). Blackston did not make any effort or attempt to rebut the legitimate, non-discriminatory reasons proffered by Wexford for its decision not to hire him as set forth in its McDonnell Douglas circumstantial evidence analysis. (R. 298; 401).

On summary judgment, Wexford explained that under the McDonnell Douglas framework, plaintiffs must show a prima facie case of discrimination in order to raise an inference of discrimination. (R. 277-78). Where, as is the case here, the defendant meets its burden of production by articulating non-discriminatory reasons for its actions 'the plaintiff must identify disputed material fact issues showing either: (1) the employer's proffered reasons are untrue, and merely pretext for discrimination ("pretext" alternative); or (2) the employer's reasons are true, but another motivating

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at 449. Thus, a plaintiff will be allowed to prove intentional discrimination through circumstantial evidence and, specifically, evidence that the defendant's articulated nondiscriminatory rationale was pretextual.") (citations omitted). The legal standard in White has been applied almost exclusively within the Seventh Circuit, and has not been adopted by the Fifth Circuit.

factor for the employer's decision was the plaintiff's protected characteristic ("mixed-motive" alternative). See Rachid v. Jack in the Box, Inc, 376 F.3d 305, 312 (5th Cir. 2004) (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 93 (2003)).

Because Blackston's sole argument was based on his claim there was direct evidence of discrimination, he made no attempt whatsoever to prove his claims under any circumstantial evidence theory. (R. 298; 401). Blackston did not argue he sought to prove a "mixed-motive" case using the purported direct evidence on which he relied. Any argument to the contrary would have to be based on a strained—and likely an outright implausible—reading of Blackston's opposition papers.

Following the district court's conclusion that Blackston had not presented direct evidence of discrimination as to Wexford, Blackston could not maintain his discrimination claims because he never attempted to rebut the proffered, non-discriminatory reasons under the Fifth Circuit's modified McDonnell Douglas analysis. (R. 298; 398-401). Blackston's decision to rely exclusively on his direct evidence theory doomed any potential "mixed-motive" claim (as the district court ruled that Blackston had no direct evidence as to Wexford, and Blackston chose not to pursue his claims via a circumstantial evidence framework, i.e., he did not attempt to argue his case under the traditional or "mixed-motive" circumstantial analyses).[12]

[12] In his opposition to summary judgment, Blackston cites to the existence of the "mixed-motive" theory, but then proceeds to argue only that he produced direct evidence of discrimination. (R. 298.

C. ISSUE THREE: THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON ALL OF BLACKSTON'S CLAIMS.

Blackston argues the district court found direct evidence of discrimination as to Wexford and claims that, as a result, the court proceeded to analyze his claim under the Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53 (1989) "mixed-motive" method.[13] Blackston contends the district court erroneously relied on Price Waterhouse in granting summary judgment on all claims. Blackston argues, albeit incorrectly, that because the district court engaged in a "mixed motive" analysis (to determine whether Wexford could show it would have taken the same challenged action absent Blackston's race), his claim could not be dismissed altogether. Blackston's assertion is based on his flawed understanding of the current "mixed-motive" landscape. Blackston appears to believe the post-Price Waterhouse enactments, which sought to prevent employers from completely avoiding liability where at least one impermissible factor was considered in an employment decision, permits plaintiffs to maintain claims for equitable remedies in all cases, no matter the circumstances. Blackston is mistaken for several reasons.

1. Blackston never asserted a "mixed-motive" circumstantial evidence theory or sought equitable remedies in the district court, thus he cannot raise these issues for the first time on appeal.

[13] Blackston writes "the district court found that once the Appellant proffered direct evidence of discrimination the burden then shifted to the employer to prove, by a preponderance of the evidence, that the same decision would have been made regardless of the discriminatory animus." Blackston argues the district court erred in relying on Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53 (1989) to dismiss all his claims.

To the extent he argues there exist equitable remedies available to him that preclude the district court from dismissing his claims altogether, Blackston is mistaken. Blackston cannot argue summary judgment was inappropriate based on the availability of equitable remedies as he did not raise this issue in the district court. (R. 288-300).

Under settled law, "[a]n argument not raised before the district court cannot be asserted for the first time on appeal." XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd., 513 F.3d 146, 153 (5th Cir. 2008). The same holds true to the extent Blackston argues that a jury must decide whether race was one motivating factor in Wexford's decision not to employ him. First and foremost, he has not argued these points previously. (R. 288-300). Second, Blackston's direct evidence theory (the only discrimination theory he asserts) was not viable as to Wexford based on the district court's refusal to impute to Wexford the alleged direct evidence of discrimination attributable to the MDOC, to the extent there was such evidence. (R. 398-99). For these reasons, Blackston's second assignment of error is therefore without merit, and no additional inquiry is necessary.

2. Blackston inaccurately argues that he is entitled to go to trial under a "mixed-motive" theory to seek equitable remedies.

Blackston asserts that, assuming arguendo, Wexford "could show that its actions were not controlled by an impermissible motivating factor," this case must proceed to trial because there are viable equitable remedies available (i.e., injunctive

and declaratory relief claims and attorneys fees). This argument is based on Blackston's erroneous assertion the district court concluded that he was able to show direct evidence of discrimination by Wexford based on race. (R. 398-99). This grossly misstates the district court's opinion. (Id.). The district court only looked at whether Wexford successfully showed it would have made the same decision absent Blackston's race after it assumed—purely for the sake of argument—that Blackston's evidence constituted direct evidence attributable to Wexford. (R. 398-401). In any event, the district court ultimately correctly held that—at best—Blackston's evidence constituted circumstantial evidence. (R. 398-99). The district court further held that Blackston did not show Wexford's proffered legitimate, non-discriminatory reasons—supported in large part by Blackston's own testimony detailing his volatile working relationship with MDOC officials—were mere pretext. (R. 399-401).

3. Even if Blackston had a basis for seeking equitable remedies available to plaintiffs in the post-Price Waterhouse era, there is no basis for awarding these remedies in this case.

Blackston mistakenly claims he is entitled to "proceed" to trial—despite the absence of evidence supporting his discrimination claim—because equitable remedies "remain available" to him. In Blackston's view, a plaintiff who claims to have produced evidence showing that he or she was adversely impacted by an employment decision in which a protected characteristic was a motivating factor can always avoid summary judgment by arguing that they have viable equitable remedy claims. Blackston is plainly wrong.

Under Title VII, courts are vested with discretion in deciding whether to award equitable relief in certain situations. Garcia v. City of Houston, 201 F.3d 672, 678 (5th Cir. 2000) (explaining that equitable relief afforded under Title VII, including injunctions, declaratory relief, and attorneys' fees is awarded on a discretionary basis, as the court "**may** grant" this relief even where the evidence shows race was a motivating factor and the employer demonstrates that it would have taken the same action absent the improper factor) (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i) (noting discretionary nature of the equitable statutory relief). Contrary to that which Blackston appears to believe, these equitable remedies are not automatic. Blackston is not entitled to equitable remedies.

Blackston did not raise these or similar issues before the district court. (R. 288-300). He cannot therefore raise them now on appeal. Further, Blackston's claim that he is entitled to equitable remedies is based on a flawed reading of the Civil Rights Act of 1991 and Price Waterhouse. Thus, Blackston's claim fails.

a. Blackston is not entitled to the equitable remedies he seeks because he made no such arguments in the district court.

In the district court, Blackston did not argue against summary judgment based on his purported entitlement to equitable remedies (like injunctive relief, declaratory relief, or attorneys' fees). (R. 288-300). In opposing summary judgment, Blackston failed to present his now newly-crafted "equitable remedy" theory (i.e., that his claims are not subject to summary judgment based on alleged entitlement to equitable

remedies) to the district court. (Id.) He is therefore precluded from raising the issue for the first time on appeal. See Heath v. Johnson, 2003 WL 21635325 *1 (5th Cir. July 10, 2003) (refusing to consider plaintiff's argument district court, in dismissing plaintiff's claims, failed to consider question of whether plaintiff was precluded from seeking injunctive relief on basis of language in a Supreme Court case where plaintiff did not present argument to district court).[14] Because Blackston did not raise these issues at the court below, he is precluded from arguing them now.

b. Blackston is not entitled to the equitable remedies he seeks because he has not pled a basis for this relief.

Blackston has never articulated the bases for his alleged entitlement to equitable relief. Blackston's skeletal Amended Complaint purports to seek "money damages, injunctive relief and declaratory relief," but he fails completely to articulate any theory explaining why he would be entitled to any type of equitable remedy. (R. 91-108). Blackston makes no allegations stating the reasons such an order should issue, even under the liberal notice pleading standards of Rule 8. (Id.); See also Fed. R. Civ. P. 8 (requiring short plain statement). For this reason alone, Blackston's claim fails. Blackston purported to seek just one remedy that could be construed as a request for an injunction (for "reinstatement"). (R. 107). However, under the known facts, Blackston would not be entitled to this relief. See, e.g., Lih v. Veneman, 2004 WL

[14] See also United States v. Rohm & Haas Co., 500 F.2d 167, 177 (5th Cir. 1974) (refusing to consider litigant's argument in favor of injunction enjoining chemical plant from shipping pollutants for the first time on appeal, despite argument's viability).

1778806 *1, *7 (N.D. Miss. June 23, 2004). In Lih, the court refused to award equitable relief in the form of reinstatement where it was not feasible to reinstate the plaintiff because of an "unfortunate hostile relationship" with a co-worker with whom reinstatement would have placed the plaintiff in constant contact. Moreover, the position previously held by the plaintiff had been filled. Granting reinstatement would have displaced some other individual. Under these facts, reinstatement was not an appropriate remedy. Lih, 2004 WL 1778806 at *7; see also Goldstein v. Manhattan Indus., 758 F.2d 1435, 1448-49 (5th Cir. 1985) (holding that reinstatement is inappropriate where "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy").

It is undisputed that Blackston was not, and has never been, a Wexford employee. (R. 274). His position with CMS no longer exists because CMS no longer provides staffing services to the MDOC. (R. 273). Moreover, Blackston has a well-documented history of animosity and acrimony with respect to both the Wexford and MDOC employees with whom he would have to work if he was reinstated (or, more appropriately, instated). (R. 272-74). For these reasons, there is no basis for any injunctive relief in this case.

c. Blackston is not entitled to the equitable remedies he seeks because he cannot show he is entitled to these remedies.

An aggrieved party may, in limited situations, be entitled to injunction orders. In Title VII cases, courts generally will not grant injunctive relief absent a showing

that there is some reasonable expectation alleged discriminatory conduct will recur. See Valdez v. Church's Fried Chicken, Inc., 683 F.Supp. 596, 621 (W.D. Tex. 1988). Injunctive relief is not appropriate where interim events have "completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). In this case, Blackston has never asserted any type of argument or claim suggesting there is a possibility of recurring discriminatory conduct. (R. 288-300). Blackston did not make this claim at the district court. (Id.) In this case, there is no threat of recurring discrimination apparent in the record evidence. As a result, Blackston is not entitled to an equitable remedy.

d. Blackston mistakenly argues his lawsuit should not have been dismissed altogether because he is entitled to proceed to trial to seek attorneys' fees that are available as a remedy.

Like his claim that he should be allowed to proceed to trial to try to recover injunctive and declaratory relief, Blackston's argument that he has the right to a jury trial on the issue of attorneys' fees does not warrant reversal of the district court's decision granting summary judgment.

As noted above, equitable remedies available to plaintiffs in discrimination suits, including attorneys' fees, are not automatic. Rather, they "may" be awarded at the district court's discretion, i.e., if the district court concludes the plaintiff has stated bases justifying such an award. See Garcia v. City of Houston, 201 F.3d at 678 (5th Cir. 2000); 42 U.S.C. § 2000e-5(g)(2)(B)(i) (statutory provision authorizing remedies).

Like the other equitable remedies to which he claims entitlement, Blackston did not raise the attorneys' fees issue at the district court; thus, he failed to preserve it for appeal. (R. 288-300). See XL Specialty Ins. Co., 513 F.3d at 153 (5th Cir. 2008). Further, Blackston has not articulated a basis for an order awarding him fees; rather, Blackston's brief baldly asserts that he is entitled to have a jury determine whether an award is justified. There is nothing to support Blackston's request for attorneys' fees, not in his Amended Complaint, his summary judgment papers or his appeal brief. See, e.g., Akrabawi v. Carnes Co., 152 F.3d 688, 695-96 (7th Cir. 1998) (affirming district court's decision denying attorneys' fees to employee and employer); Canup v. Chipman Union, 123 F.3d 1440, 1442-43 (11th Cir. 1997) (affirming trial court's refusal to award attorneys' fees in favor of employee where jury found employer would have fired him for workplace misconduct). Thus, there is no basis for believing Blackston would be entitled to attorneys' fees.

D. ISSUE FOUR: THE DISTRICT COURT DID NOT MAKE "FACT" FINDINGS AS TO DISPUTED ISSUES ON SUMMARY JUDGMENT.

Blackston purports to assign error based on his assertion the district court, on summary judgment, made "fact" findings as to disputed issues. Blackston proceeds to make abbreviated and unsupported complaints related ostensibly to the district court's application of the law.

Though somewhat unclear, Blackston's chief complaint appears to be his subjective opinion there exist "clear disputes" involving material facts to be decided

by a jury. Blackston points to the reasons proffered by Wexford for its decision not to offer him a position, and argues his evidence is sufficient to create triable fact issues. In particular, Blackston takes issue with the district court's conclusion that he "did not dispute the Appellee's reasoning" (presumably Blackston refers to Wexford's proffered non-discriminatory reasons explaining the various reasons that it opted not to hire Blackston). Blackston claims that "[b]y offering direct evidence, the Appellant has put forward proof that his race was the only reason for the adverse employment decision." For some reason, Blackston consistently refuses to acknowledge that the district court clearly ruled he failed to adduce direct evidence of discrimination as to Wexford, that he pursued a direct evidence theory only, and that he did not try to prove his claims under any circumstantial evidence analysis (and, as a result, did not attempt to rebut the proffered reasons with respect to which he claims there are "clear" disputes). (R. 398-401). Blackston also claims one additional time that this matter should be reversed and set for trial for a jury to decide if race was a motivating factor in Wexford's employment decision.

Ultimately, Blackston's argument the district court decided disputed fact issues simply repeats unsupported assertions that appear throughout his brief. Blackston does not show the district court acted in contravention of the Federal Rules of Civil Procedure and other applicable law.

V. CONCLUSION

For the reasons set forth above, Defendant-Appellee Wexford Health Sources, Inc. respectfully requests that this Court dismiss Blackston's appeal and affirm the district court's grant of summary judgment in favor of Wexford.

RESPECTFULLY SUBMITTED this the ____ day of February, 2009.

WEXFORD HEALTH SOURCES, INC.

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CERTIFICATE OF SERVICE

I, R. Jarrad Garner, certify that I have caused to be mailed by U.S. Mail, postage prepaid, on February 9, 2009, a copy of the Brief of Defendant-Appellee Wexford Health Sources, Inc. and one disk containing the brief's text to:

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This the 9th day of February, 2009.

____
R. Jarrad Garner

Certificate of Compliance

Pursuant to Fifth Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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R. Jarrad Garner