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NO. 23-CV-357

**IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS**

LUKMAN AHMED,

Appellant,

**D.C. Superior Court
No. 2020-CA-004660-B**

v.

BRITISH BROADCASTING
CORPORATION, *et al.*,

Appellees.

On Appeal from the Superior Court of the District of Columbia

BRIEF OF APPELLANT LUKMAN AHMED (CORRECTED)

Date: July 6, 2024

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ORAL ARGUMENT REQUESTED

Rule 28(a)(2) Statement

In both the D.C. Superior Court and in this Court, all parties and their counsel are:

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Raymond C. Fay and Fay Law Group PLLC

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On Appeal from the Superior Court of the District of Columbia

BRIEF OF APPELLANT LUKMAN AHMED

Ahmed, a long-term BBC correspondent and the only Black African in BBC's Washington, D.C. office, was terminated from his employment in 2019, while on vacation in Sudan, for having an informal, yet approved, discussion with Sudan's prime minister aired on local outlets. BBC claimed that the session was an unauthorized commercial interview in competition with its worldwide product and contrary to its policies. Ahmed responded that the termination was a pretext for discrimination, not only with respect to the false reasons given regarding the informal interview itself, but also because of the ongoing discriminatory treatment he experienced on the basis of his race and national origin in BBC's D.C. office.

JURISDICTIONAL STATEMENT

On February 22, 2023, the Superior Court of the District of Columbia (Yvonne Williams, J.) issued an Amended Order Granting Defendants’ Motion for Summary Judgment with respect to all the counts of the complaint, and ordered the case closed. Appendix (“A”) 142. All issues were disposed of, rendering the case subject to appeal. A timely notice of appeal of the matter to this Court followed.

ISSUES PRESENTED

- I. Whether the existence of genuine issues of material fact precluded the issuance of summary judgment with respect to the questions of discrimination and pretext.
- II. Whether the Superior Court’s discovery rulings deprived Ahmed of essential information to present his claims and unfairly prejudiced him in the summary judgment decision.
- III. Whether the Superior Court erred in not enforcing a settlement between the parties.

STATEMENT OF THE CASE

On November 10, 2022, Lukman Ahmed filed his Complaint against British Broadcasting Corporation and BBC Worldwide Americas, Inc. for unlawful race and national origin discrimination and nonpayment of wages, containing three

counts: (1) Violation of the D.C. Human Rights Act (“DCHRA”) for Discriminatory Practices, D.C. Code § 2- 1402.11(a)-(b); (2) Violation of the DCHRA for Coercion or Retaliation, D.C. Code § 2-1402.61; and (3) Violation of the D.C. Wage Payment and Collection Act (“WPCA”), D.C. Code § 32-1303(1). Compl. ¶ 1, A20. Compl. ¶¶ 47-64, A26-A28. BBC’s Answer to the Complaint was filed on December 8, 2020. A36.

On July 27, 2022, BBC filed its motion for summary judgment on all three counts in the Complaint. A770. Ahmed filed his Opposition to the Motion on August 10, 2022, A1228, A1245, and BBC’s Reply was filed on August 17, 2022, A1340, A1348.

By Order dated November 1, 2022, the Superior Court granted summary judgment to BBC with respect to the discrimination and retaliation claims, and denied summary judgment as to the wage claim. A101. BBC moved for reconsideration of the wage claim, A1397, which was opposed by Ahmed, A1423.

On February 22, 2023, the lower court issued an Order granting BBC’s motion for reconsideration of the wage claim, A135, and issued an Amended Order granting BBC’s summary judgment motion in its entirety, A142.

In the Amended Order, the court summarized its rulings, at 12 (A153):

The Court grants BBC's Motion for Summary Judgment for the following reasons. First, Mr. Ahmed does not plead any facts that establish race or national origin discrimination was a substantial factor in his termination from BBC or that the circumstances surrounding his termination give rise to an inference of discrimination. Second, Mr. Ahmed's retaliation claim fails because he has not shown he was engaged in a protected activity or that he complained about discrimination or discriminatory acts. Third, BBC appears to have had a legitimate, non-discriminatory, non-retaliatory reason for Mr. Ahmed's termination. Fourth, Mr. Ahmed has not provided sufficient evidence that his termination was pretextual and BBC seems to honestly believe its reasons for the termination. And Fifth, Mr. Ahmed has failed to produce sufficient evidence that he was untimely paid wages owed to him in violation of the WPCA.

Summary judgment was preceded by motions practice with regard to discovery disputes and a dispute over whether the case had been settled by agreement of the parties.

Early in the case, after months of discussion between the parties, the parties on June 21, 2021 filed a Consent Motion to Stay, advising the court that the "parties have reached a settlement in principle of the above-captioned lawsuit, subject to final approval from Defendants' representatives." A244. The court granted the motion on June 22, 2021. A63. The parties continued their discussions but did not achieve a final settlement agreement. They then filed a Joint Motion for Continued Stay on August 6, 2021, in light of the continued discussions and a then upcoming mediation, A248. The court granted that motion on August 9, 2021. A75.

The parties again failed to finalize a settlement agreement. On October 7, 2021, Ahmed filed a Motion to Enforce Settlement, A260, A273, A317. BBC opposed the motion on October 21, 2021, A286, and on November 15, 2021, filed a Motion for Sanctions associated with Ahmed's effort to enforce the settlement. A321. Ahmed filed an opposition on November 29, 2021, A335, and BBC filed a reply on December 6, 2021, A345.

In a Sua Sponte Order on December 6, 2021, the court stated that "an evidentiary hearing is necessary" on the pending motions. A74. However, in its Order of January 14, 2022, the court denied Ahmed's motion to enforce the settlement, and denied BBC's motion for sanctions, A79. With respect to settlement enforcement, the court found that Ahmed had not shown by clear and convincing evidence that the unknown, unnamed BBC "committee" had actually approved the settlement.

As to discovery, Ahmed filed a motion to compel discovery on March 23, 2022, A487, and BBC filed numerous motions to compel discovery and to recover fees and costs: March 4, 2022, A352; March 25, 2022, A501; June 3, 2022, A699; and September 30, 2022, A1362. The court in its Omnibus Order of May 12, 2022, A86, granted BBC's motions in part, requiring Ahmed to produce volumes of material relating to his post-BBC employment, his bank accounts, and his charity. Ahmed's motion was denied for the most part with regard to information sought on the

operations and personnel of BBC's Washington, D.C. office, and was granted with respect to communications about Ahmed made by a limited circle of BBC employees in 2018 and 2019.

On September 14, 2022, the court issued a further discovery order, A94, mainly requiring Ahmed to furnish more detailed information from years of bank statements at institutions in the U.S. and in Sudan.

On November 9, 2022, the court issued a discovery order dealing with the fees and costs it had ordered Ahmed to pay BBC in connection with the discovery motions, A129. The court required Ahmed and his counsel to pay \$27,571.97.

STATEMENT OF FACTS

Plaintiff, Lukman Ahmed, is a Black, Sudanese journalist who was employed by BBC from 2007 to 2019. Ahmed was hired as an Arabic Service Desk correspondent, based out of the Washington, D.C. Bureau of the BBC. Ahmed dep. 58:10-60:19, A829-A831; Ahmed Decl. ¶ 2, A1335.

Shortly after Ahmed began working at the BBC, the other Arabic Desk correspondent left, meaning that Ahmed was now the sole Arabic Desk correspondent in Washington, D.C. Ahmed dep. 60:14-19, A831. Ahmed was also the only Black, Sudanese correspondent in the Washington, D.C. office. Ahmed dep. 210:1-17; 248:19-249:5., A1311, A936-A937; Ahmed Decl. ¶ 6, A1336.

During Ahmed's employment, the BBC had a policy or practice in place to protect reporters from excessive deployment, wherein the BBC did not permit reporters to receive back- to-back deployments. Ahmed dep. 229:9-11, A919. However, this was applied discriminatorily as to Ahmed, as he had to undergo excessive, repetitive deployments. *Id.* 229:9- 13, 237:18-238:10, A919, A927-A928; Ahmed Decl ¶¶ 3-8, A1335-A1336. Ahmed continuously brought up the need for additional reporters at the Arabic language desk over many years. Ahmed was in continuous discussion with Sam Farah, *id.* 242:20-243:8, A930-A931, and supervisor Bassam Andari, *id.* 247:6-15, A935, about the need to hire more reporters for the Arabic language desk to alleviate the unfair workload. *Id.* 247:6-248:9, A935-A935; Ahmed Decl. ¶ 5, A1336.

Despite his many complaints, Ahmed was only provided with a Producer, Nadia Al Huraimy, but no other Arabic language correspondents were hired at the Washington, D.C. bureau during his employment. Ahmed dep. 60:20-62:1, A831-A833; Ahmed Decl. ¶ 9, A1336.

In September 2019, during the U.N. General Assembly meeting in New York, Ahmed conducted an interview on behalf of the BBC of newly appointed Sudanese Prime Minister Abdalla Hamdok. Ahmed dep. 111:17-112:10, A1309-A1310; Ahmed

Decl. ¶¶ 13-15, A1335-A1338.

The following month, while on vacation in Sudan, Ahmed reached out via phone to his supervisor Bassam Andari to obtain approval to engage in a locally televised discussion with Hamdok regarding refugee issues in Darfur, a situation Ahmed was working on through his charity, Malam Darfur Peace and Development (“MDPD”). Ahmed dep. 129:10-130:6, 137:9-19, A864-A865, A872; Ahmed Decl. ¶ 16, A1338.

Andari advised Ahmed that as long as he did not accept money, he could proceed with the televised talk. Ahmed dep. 129:10-133:5, A864-A868; Ahmed Decl. ¶18, A1338-A1339.

On or about November 5, 2019, Ahmed and Prime Minister Hamdok sat down for a locally televised talk in a refugee camp in Darfur, in the Sudan. As Ahmed had advised Andari, it was broadcast over only a small local channel. It was rebroadcast on Sudanese TV and eventually posted online. Ahmed dep. 12:11-22, 118:1-121:3, A855; Ahmed Decl. ¶¶ 17-19, A1338-A1339.

Even though Ahmed had received prior approval from his supervisor, on November 6, 2019, BBC Human Resources informed Ahmed via email that he was being placed on paid administrative leave pending the outcome of an investigation into his activities in Sudan. Ahmed dep. 183:10-186:8, A892-A895.

While Ahmed was still out of the country on vacation with limited access to Wi-Fi and no support of legal counsel, he was required to participate via telephone in a BBC Human Resources interview. *Id.* 181:9-183:5, A890-A892.

Within the week, BBC had concluded its own internal investigation and “found” that Ahmed had violated BBC’s Conflict of Interest and Competitive Broadcasting policies alongside its editorial guidelines, and decided to terminate his employment effective immediately on November 12, 2019. *Id.* 107:8-15, 187:5-190:1, A853, A896-A899.

Despite terminating Ahmed’s employment on November 12, 2019, it was not until May 2020 that Defendants made a one-time direct deposit payment to Ahmed of \$4,849.55, for wages still owed him, but when asked about it by Ahmed’s counsel, failed to explain the purpose of the payment. Fay Decl., filed 22.06.17 ¶ 6, A1452-A1453.

SUMMARY OF ARGUMENT

The Superior Court erred in granting summary judgment to BBC in the presence of genuine issues of material facts regarding Ahmed’s discrimination, retaliation, and wage payment claims. The court ignored or discounted the discriminatory treatment of Ahmed for years as sole occupant of the Arabic language

desk in BBC's Washington, D.C. office responsible for BBC's Arabic TV, radio, and internet coverage in the United States and other parts of the hemisphere. BBC failed to give Ahmed, the only Black African in the office, the support he needed to conduct his work. BBC also overloaded Ahmed with excessive deployments and assignments outside the office in comparison with other correspondents who were not Black or African.

Ahmed suffered further discriminatory treatment when he was summarily terminated from employment by BBC in late 2019 after 12 years of service. BBC falsely claimed that Ahmed, while on leave conducting affairs in Sudan for his charity, took part in a broadcast in competition with BBC—which it was not, in terms of content and the small audience reach--despite the fact that he had obtained permission from BBC to participate. The same supervisors from BBC London who had deprived him of nondiscriminatory working conditions in Washington were key participants in the pretextual dismissal of Ahmed.

In addition, the court improperly granted summary judgment with regard to Ahmed's claim for late payment of wages under D.C. wage law. It was error for the court to disregard Ahmed's evidence of a direct deposit of wages by BBC into his bank account months after his termination.

The lower court abused its discretion in the conduct of discovery, in a manner

that caused unfair prejudice and adversely affected his substantive rights. Among other things, the court refused Ahmed's requests for performance and personnel data on other BBC correspondents in the D.C. office, then issued summary judgment to BBC partly because Ahmed had not made workload comparisons between him and others.

In the alternative, the court erred in not enforcing a settlement agreement between the parties agreed to early in the case. In the circumstances of this case, sufficient authority was displayed to enforce the settlement, especially where BBC failed to show that authority was lacking.

ARGUMENT

Summary judgment should be reversed due to the presence of material facts in dispute amid plaintiff's sound claims of discrimination. Most notably, a jury needs to assess whether Ahmed had engaged in protected activity by complaining of disparate treatment during his employment with BBC, whether Ahmed had sufficiently given notice and received permission from Andari to participate in the talk with Prime Minister Hamdok, whether BBC conducted a fair investigation of Ahmed's non-BBC journalistic activities, and whether the nature of Ahmed's termination demonstrated disparate and discriminatory treatment. Additionally, Ahmed has raised claims under

the District of Columbia Wage Payment and Collection Law (“DCWPCL”) regarding his late-paid wages following his termination.

I. SUMMARY JUDGMENT SHOULD BE REVERSED AND THE CASE REMANDED FOR TRIAL.

Summary judgment may be granted only when “the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” D.C. Super. Ct. Civ. R. 56(a). Summary judgment would only be appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, when viewed in the light most favorable to the non-movant, show that there is no genuine issue as to any material fact. *TIG Ins. Co. v. Sedgwick James*, 276 F.3d 754, 759 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 249-50 (1986)). An issue of fact is “genuine” if the evidence is such that a reasonable fact-finder could find in favor of the non-moving party. *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

A. Ahmed established a *prima facie* case of discrimination based upon race and national origin

This Court applies the same analysis under the D.C. Human Rights Act (“DCHRA”) as under Title VII with regard to establishing a *prima facie* case of discrimination: To establish a *prima facie* case, the employee must show: 1) he is a

member of a protected class; 2) he suffered an adverse employment action; and 3) the circumstances give rise to an inference of discrimination. *Kumar v. D.C. Water & Sewer Auth.*, 25 A.3d 9, 16-17 (D.C. 2011). A plaintiff's burden of establishing a *prima facie* case is neither “onerous,” *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), nor intended to be “rigid, mechanized or ritualistic.” *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Here, there is no dispute that Ahmed is a member of a protected class, he is Sudanese and Black, and suffered an adverse action, his November 12, 2019 termination. “Defs’ SUMF” ¶ 1, A794.

The Superior Court found that Ahmed’s case failed because he did not present sufficient grounds to give rise to an inference of discrimination. The court disregarded Ahmed’s showing regarding the years of understaffing at the Arabic desk, and the excessive deployments and other assignments that had Ahmed, the only Black African in the office, taking on workloads in excess of all other correspondents in Washington—and the complaints he made about the less favorable working conditions that fell on the deaf ears of his superiors.

The court faulted Ahmed’s lack of “comparator” evidence showing that colleagues bore lighter workloads or had lighter work schedules out of the office on

deployments or other assignments. Although the court refused to allow Ahmed discovery regarding the workloads and assignments of other correspondents in D.C. and unfairly hampered Ahmed's ability to respond to the summary judgment motion on that basis (*see* Point II, below), Ahmed nonetheless presented sufficient facts to establish an inference of discrimination and avoid summary judgment.

In addition to the work details described below, Ahmed did receive, in the limited discovery allowed by the court, information regarding his assignments in 2018 and 2019. In opposing summary judgment, Ahmed summarized this material. Exhibit 3 to Opposition, A1298-A1301. The summary shows dozens of tightly-packed assignments for radio, TV, and internet coverage, near the home office or at travel destinations in the United States or abroad. Even without the full work records of Ahmed's co-workers, the inference of Ahmed's work overload and lack of support can be inferred from the summary and from the nature of Ahmed's assignment as sole correspondent at the Arabic desk in Washington.

Although comparator evidence is strong and useful to raise the inference of discrimination, it is not essential. The inference of discrimination can be raised based on circumstantial evidence of (1) "more favorable treatment of employees not in the protected group," and (2) "the sequence of events leading to the plaintiff's discharge."

Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001); *see also Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (summary judgment can be avoided by “a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination”).

Illustrative of the lack of need to present comparator evidence in all cases, the Second Circuit gave the example of “a case where an employer has only one employee.” *Abdu-Brisson*, 239 F.3d at 468. “If that employee were fired for a discriminatory reason [. . .] he could never demonstrate disparate treatment because there is no point of comparison.” *Id.* Mindful of the “flexible spirit of a plaintiff’s *prima facie* requirement,” in such a case a plaintiff can create an inference of discrimination by other evidence, including (1) “more favorable treatment of employees not in the protected group,” or (2) “the sequence of events leading to the plaintiff’s discharge.” *Id.* at 468. As discussed below, Ahmed presented sufficient facts to give rise to an inference of discrimination.

1. BBC’s Less Favorable Treatment of Ahmed Compared to Other Washington D.C. Correspondents

Ahmed was the only Black, African (Sudanese) correspondent at the Washington, D.C. bureau and received less favorable treatment than “employees not in the protected group.” *See Abdu-Brisson*, 239 F.3d at 468. The BBC’s Washington

Bureau had approximately thirty reporters, Ahmed dep. 218:15-17, A909, explicitly organized along linguistic or ethnic categories—an Arabic, English, Persian, and Russian language desks. [*Id.* 230:17-22, A920. The BBC had a policy or practice in place to protect reporters from excessive deployments, *id.* 229:9-13, A919, but Ahmed explained that this policy was applied in a discriminatory fashion. *Id.* 237:18-238:10, A927-A928.

From the Arabic Language Desk, Ahmed was responsible for assignments and deployments covering Washington D.C, the White House, State Department, Capitol Hill, the CIA and other federal agencies, South America, and Canada, *id.* 173:21-174:15, A887-A888, including the internet, radio, and television broadcast. Ahmed dep. 214:1-11, A1315. Ahmed described his schedule as requiring “work 24/7”- he would report breaking news at the top of the hour on television, go to the radio station, file stories for television and radio broadcast, stay up to 11 p.m. to go live for radio, then prepare for breaking events at 5 or 6 a.m. *Id.* 240:14-241:9, A1316-A1317.

As a result, Ahmed described the work load as an “enormous pressure” because he was “the only one that’s working with this load.” *Id.* 241:11-14, A1285. This caused him to be unable to provide coverage when simultaneous important events

required his attention, in turn hurting his professional relationship with his superior, Sam Farah. [*Id.* 242:20-244:12, A930-A932.

The significant cumulative assignments coming from London added to Ahmed's daily workload, as seen in the summary from his last two years on the job. PSJ Ex. 3, A1330-A1333. The other three language desks collectively had approximately thirty reporters. Ahmed dep. 218:15-17, A909. For example, the English language service had six or seven reporters. *Id.* 232:14-16, A922. The other language desks had a reporter dedicated solely to specific issues, such as only for the White House or specific national stories, such as elections. Ahmed dep. 213:15-21, A1314. And the other language desks, staffed by white reporters, had larger staff with individual reporters dedicated to producing content in a specific medium, whether internet or radio, etc. *Id.* 214:1-11, 241:6-18, A1315, A1317.

This proof, ignored by the court in the summary judgment order, is sufficient to show that Ahmed was treated less favorably compared to non-black and non-Sudanese reporters. *See Abdu-Brisson*, 239 F.3d at 468. A court can infer discrimination was the likely reason for a plaintiff's adverse treatment based on the "racial dynamics" implicit in the circumstances of a work place. *See Jones v. United Health Grp.*, No. CV JKB-17-3500, 2019 WL 1903668, at *13 (D. Md. Apr. 29,

2019), *aff'd sub nom. Jones v. UnitedHealth Grp., Inc.*, 802 F. App'x 780 (4th Cir. 2020). Ahmed suffered disparate treatment compared to other workers in a workforce expressly organized along ethnic and linguistic lines that took a toll on Ahmed's well-being and professional relations with his superiors.³

2. *The Sequence of Events Leading to Ahmed's Termination*

The sequence of events leading to Ahmed's termination and Farah's flawed decision-making process also supports finding there was an inference of discrimination. *See Abdu-Brisson*, 239 F.3d at 468; *see also Sassaman v. Gamache*, 566 F.3d 307, 315 (2d Cir. 2009) ("an arguably insufficient investigation may support an inference of discriminatory intent").

Farah's flawed investigation and decision-making process when deciding to terminate Ahmed also support an inference of discrimination. *See Sassaman*, 566 F.3d at 315. BBC terminated Ahmed because he allegedly breached BBC's policy requiring "prior permission before [he] undertake[s] activity which is outside the scope of [his] job with another broadcaster." Farah dep. 42:3-6, A1296. However, Ahmed sought and obtained prior approval in a phone call with his line manager, Andari, to undertake the televised talk with Prime Minister Hamdok on behalf of his charity. Ahmed dep. 107:18-108:2, A1273-A1274 (talk is fine if Ahmed is not accepting money for it);

132:20-133:1, A867-A868 (permission from Andari). Ahmed confirmed that the subject matter of the discussion was the legacy of treatment of refugees in Darfur, not global news topics in competition with BBC. Ahmed dep. 118-119, 121-22, A855-A856, A858-A859; A1189-A1195 (translation). Further, at BBC as a matter of practice oral permission was routinely given in response to such inquiries. Ahmed dep. 106:4-13, A852. Farah admitted “[i]t is not against BBC policy for anyone to appear on another channel with prior permission.” Farah dep. 29:1-3, A1293.

Other aspects of Farah’s investigation were flawed or relied on erroneous information. Farah made the decision to terminate Ahmed based on a report from Andari, who omitted from that he had given prior approval for Ahmed to talk to the Prime Minister, Farah dep. 22:17-23:7, 27:12-28:13, A1288-A1289, A1291-A1292. Farah himself did not “watch[] the whole” video of the discussion between Ahmed and Prime Minister Hamdok, and was unable “to remember hardly anything” from the video. *Id.* 23:20-22, 24:7-8, A1289-A1290.

In forming his opinion to terminate Ahmed, Farah placed weight on the fact that BBC wanted to air the first interview with the new Prime Minister Hamdok. *Id.* 32:14-19. Farah erroneously believed that Ahmed’s September 2019 formal interview with Prime Minister Hamdok in New York for worldwide consumption on the BBC

network occurred before Hamdok took office, stating “To my recollection he wasn’t prime minister then, so his significance would have been completely different.” *Id.* 33:6-8.

Although the court recognized the dispute concerning the communications between Ahmed and Andari regarding the informal discussion between Ahmed and Hamdok, Amended Order at 5, A146, the court failed to factor this and related disputed facts into its summary judgment decision. Andari and Farah were the two principal antagonists in Ahmed’s claims, and Andari went to great lengths to embellish the charges against Ahmed, not only with respect to giving a false account of his conversation with Ahmed about the garden talk (the parties characterize the format of the meeting differently—an “interview” versus a “discussion”—but the label is immaterial because the record is available to confirm the informality of the meeting to discuss refugee issues in the region, A1189-A1195), but also continuing to inject the falsehood that Ahmed had agreed to head Sudan TV while still employed by BBC. Farah for his part totally mischaracterized the garden meeting as the opportunity for BBC’s first news encounter with the new prime minister—when in fact Ahmed conducted that formal interview for BBC months earlier when Hamdok came to the United Nations. The foul play by Andari and Farah infected the

termination process and dissolved the court's assumption that giving Ahmed the boot was unconnected to his discrimination and retaliation claims.

Drawing all inferences in favor of the non-moving party, the sequence of events leading up to Ahmed's termination—the lack of an opportunity for Ahmed to explain his conduct, Andari's false accusations, and the false information Farah based his decision on, including when Hamdok became Prime Minister— support a reasonable inference of discrimination, especially when viewed in combination with the disparate treatment suffered by Ahmed. *See Abdu-Brisson*, 239 F.3d at 468.

B. Ahmed established a *prima facie* case of retaliation

A plaintiff may make out a *prima facie* case of retaliation by establishing: (1) he was engaged in a protected activity, or that he opposed practices made unlawful by the DCHRA; (2) the employer took an adverse personnel action against him; and (3) a causal connection existed between the two. *Howard Univ. v. Green*, 652 A.2d 41, 45 (D.C. 1994). Ahmed established a *prima facie* case of retaliation because (1) he engaged in protected activity and BBC was aware of the activity and (2) there is a causal connection between the protected activity and the adverse action. The lower court was in error in coming to a contrary conclusion.

1. Ahmed Participated in Protected Activity

An employer engages in protected activity if he complains to management about the discriminatory conduct through informal channels. *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 200 (D.D.C. 2012). “[T]he communication of a complaint of unlawful discrimination, in a given set of factual circumstances, may be inferred or implied absent the use of the magic words.” *Howard Univ. v. Green*, 652 A.2d 41, 47 (D.C. 1994) (cleaned up). An employee engages in protected activity when he complains of disparate treatment and the context clearly conveys the racial impetus; in other words, a reasonable employer “should have understood” that the nature of the complaint was discrimination. *See Jones*, No. CV JKB-17-3500, 2019 WL 1903668, at *13.

In *Jones*, a black teacher complained in an email that “certain people” receive “privileges that are not afforded to everyone” and mentioned two co-workers by name, a black employee who was also treated unfairly and a white employee who benefitted from the policy. *Id.* at 13, 3. The court found the teacher engaged in protected activity because “racial dynamics were implicit in the circumstances: a black employee complaining that she and another black employee were treated unfairly, while another ‘type of person’ [. . .] their white colleague” benefitted. *Id.* at 13. *See also Bowman v. Baltimore City Bd. of Sch. Commissioners*, 173 F. Supp. 3d

242, 249 (D. Md. 2016) (finding allegation of racial discrimination clear from context where Black teacher's complaint noted a distinction in treatment between a White teacher and a Black plaintiff).

Here, from 2008 until the date of his termination, Ahmed was the only African (Sudanese) reporter at the Arabic Language Desk, Ahmed dep. 210:1-17, A1311, and the only Black correspondent in the BBC's Washington Bureau. *Id.* 248:19-249:5, A936-A937. As explained above, the BBC was organized along linguistic or ethnic categories—an Arabic, English, Persian, and Russian language desks. *Id.* 230:17-22, A920. Ahmed continuously discussed with Sam Farah, *id.* 242:20-243:8, A930-A931, and Bassam Andari, *id.* 247:6-15, A935, the need for additional reporters at the Arabic language desk to alleviate the unfair workload and excessive deployments Ahmed was subjected to in contrast to other services. *E.g.*, Ahmed dep. 173:6-14, 173:21-175:7, A887-A889. BBC should have known Ahmed complained of racial discrimination because the racial dynamics are implicit due to the express organization of the workforce at the BBC's Washington Bureau along linguistic and ethnic lines. *See Jones*, 2019 WL 1903668, at *13.

2. Causation

Courts have recognized in the retaliation context that if there is a significant time gap between the protected expression and the adverse action, a plaintiff can still demonstrate a causal connection by offering additional evidence, such as a "pattern of antagonism" or that the adverse action was the "first opportunity . . . to retaliate." *Jones v. Suburban Propane, Inc.*, 577 F. App'x 951, 955 (11th Cir. 2014); *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 247 n.22 (D.C. 2016) (citing cases) (establishing causation with an "intervening pattern of antagonism".)

Here, Ahmed routinely requested additional reporters assigned to the Arabic language desk and that these requests created a pattern of antagonism because Ahmed hurt his relationship with his superiors, Farah and Andari. Ahmed dep. 242:20-244:12, A930-A932. Ahmed stated, "I was making this case professionally that [. . .] we need at least to have two reporter[s]" and "having this discussion all of the time, [. . .] it makes unhealthy relationship." *Id.* 244:1-12, A932. Further, Ahmed testified that he was "in continuous discussion" with Andari, but Andari mysteriously believed that there were "not too many" Arabic reporters based in Washington, D.C. *Id.* 247:6-248:15, A935.

C. BBC's Reasons for Terminating Ahmed are Pretextual

In granting summary judgment to BBC by finding that BBC had articulated nondiscriminatory reasons for Ahmed's employment termination and that BBC's actions were not pretexts for discrimination, the court below impermissibly circumscribed Ahmed's case and engaged in the impermissible tactic of trying disputed issues by way of summary judgment. The court improperly made an ultimate determination of "which party has the most competent evidence," and ruled that it was "more probable" that Ahmed was terminated based on a recent violation of company policy than the investigation was designed to cover up discrimination. Amended Order at 25, A166. To top it off, the court made an ultimate factual determination that BBC "honestly believed" termination of Ahmed was based on a violation of company policy. *Id.* at 26, A167.

Once a plaintiff has established his *prima facie* cases of discrimination, the burden of production and persuasion shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). A plaintiff's *prima facie* case of discrimination, combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination. *Estenos v. PAHO/WHO Fed. Credit Union*,

952 A.2d 878, 895-96 (D.C. 2008), citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000). In other words, “the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.” *Reeves*, 530 U.S. at 134.

Here, the court without a trial accepted BBC’s claimed legitimate, non-discriminatory reasons for its action. BBC asserted that Ahmed’s actions and behavior violated BBC policy and that BBC’s own investigation bolstered the underlying determination. The policies allegedly violated include Ahmed’s conducting an unauthorized interview of an important political figure for competitors without first obtaining clearance for the interview.

BBC’s asserted reason is false. Ahmed sought and received oral permission from Andari prior to having a discussion with Prime Minister Hamdok. Ahmed dep. 107:18-108:2, 132:20-133:1, A1305-A1306, A867-A868. Farah admitted “[i]t is not against BBC policy for anyone to appear on another channel with prior permission.” Farah dep. 29:1-3, A1293. When deciding to terminate Ahmed, Farah erroneously believed Ahmed’s discussion with Prime Minister Hamdok was the first interview with Hamdok since Hamdok became Prime Minister. *Id.* 32:14-19, 33:6- 8. At the

very least, the dispute between the parties regarding these matters precluded summary judgment.

First, Ahmed is not required to rebut all of BBC's reasons in order to survive summary judgment. *See Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1310 (10th Cir. 2005) (“[A] successful attack on part of the employer’s legitimate, nondiscriminatory explanation is enough to survive summary judgment even if one or more of the proffered reasons has not been discredited.”).

Second, Ahmed testified that the broadcast was not an “interview” but rather more “casual;” Ahmed dep. 122:8-15, A859, that Andari gave him permission, and that the discussion was not newsworthy by BBC standards. Ahmed dep. 107:18-110:2, A1305-A1308. This Court should credit Ahmed's version of events even if his testimony is “directly contradictory” to other testimony. *Tolan v. Cotton*, 134 S. Ct. 1861, 1867 (2014); *Anderson*, 477 U.S. at 255 (stating it is not appropriate to decide issues of credibility, motive, or intent at summary judgment). Because Ahmed has presented *prima facie* cases of discrimination and retaliation, combined with sufficient evidence for a reasonable factfinder to reject Defendants’ nondiscriminatory explanation for its decision, this is adequate to sustain a finding of

liability for intentional discrimination. *Estenos*, 952 A.2d at 895–96 (citing *Reeves*, 530 U.S. at 147-48).

Third, for the reasons explained above with regard to the full scope of Ahmed’s claims, it was error for the court to view the termination decision in isolation, blocking out the years of discriminatory treatment endured by Ahmed, often instigated by Andari or Farah.

D. Ahmed’s Wage Claim Should Have Survived Summary Judgment

Under the D.C. Wage Payment and Collection Act (DCWPCA), D.C. Code § 32-1301, *et seq.*, “[w]henver an employer discharges an employee, the employer shall pay the employee's wages earned not later than the working day following such discharge.” D.C. Code § 32-1303(1). If an employer fails to timely pay wages, § 32-1303(4) provides for liquidated damages in the lesser amount of either 10 percent of the unpaid wages for each working day an employer failed to pay, or triple the unpaid wages.

Ahmed’s was terminated on November 12, 2019. BBC made a direct-deposit payment to Ahmed in May 2020 of \$4,849.55, and when asked about it by Ahmed’s counsel, failed to explain the purpose of the payment. BBC’s May 2020 payment supports a reasonable inference that BBC failed to timely pay Ahmed’s wages in

November or December 2019 and sought to remedy it post-hoc. *See id.* Therefore, regardless of whether the May 2020 payment represents all of Ahmed’s missing wages, BBC is still liable for violating the DCWPCA, liquidated damages, and attorneys’ fees, and on that basis summary judgment should have been denied with respect to the wage claim. *See id.* § 32- 1303 (1), (4); § 32-1308.

After having first denying summary judgment with respect to the wage claim, in the Amended Order, at 27, A168, the lower court determined that counsel’s June 2022 affidavit was hearsay, not based on personal knowledge regarding the contents of Ahmed’s bank account, and did not furnish a basis for denial of summary judgment. The court erred in a number of respects.

First, the court ignored Ahmed’s evidence in opposition to the motion for reconsideration of the summary judgment denial. With his December 13, 2022, opposition, Ahmed furnished the actual bank account information that he had furnished BBC in discovery, showing on his May 2020 Wells Fargo statement BBC’s direct payroll deposit of \$4,849.55. December 13, 2022 Opp., Exh. B, A1445-A1449.

Second, looking at Ahmed’s initial opposition or his opposition to the reconsideration, or both, at summary judgment proffered evidence will be disregarded only if it “cannot be presented in a form that would be admissible in evidence” at trial.

Super. Ct. Civ. R. 56(c)(2); *Smith v. Union Lab. Life Ins. Co.*, 620 A.2d 265, 268 (D.C. 1993) (summary judgment standard is whether the non-moving party has offered “competent evidence admissible at trial”). To defeat summary judgment, a nonmovant “is not required to produce evidence in a form that would be admissible at trial,” so long as his evidence is “capable of being converted into admissible evidence” at trial. *Ali v. D.C. Gov’t*, 810 F. Supp. 2d 78, 83–85 (D.D.C. 2011) (quoting *Catrett v. Johns–Manville Sales Corp.*, 826 F.2d 33, 38 (D.C. Cir. 1987)).

Thus, the Superior Court was in error by failing to consider an affidavit discussing documents at summary judgment if the documents themselves could be introduced at trial and therefore overcome any hearsay objection. *See id.*; *see also Sibley v. St. Albans Sch.*, 134 A.3d 789, 811 (D.C. 2016) (“viewing the affidavit as a proffer of what appellant’s testimony *would be at trial*”) (emphasis added). On these bases, summary judgment should have been denied as to Ahmed’s WPCA claim.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN THE CONDUCT OF DISCOVERY, ADVERSELY AFFECTING AHMED’S SUBSTANTIVE RIGHTS.

Under the discovery rules, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the action.” *Roberts–Douglas v. Meares*, 624 A.2d 405, 414–15 (D.C. 1992). “Relevancy to the subject

matter is construed most liberally, to the point that discovery should be granted where there is any possibility that the information sought may be relevant to the subject matter of the action.” *Id.* at 415.

Discovery rulings are reviewed under an abuse of discretion standard. Trial courts have “broad discretion in determining whether to grant or deny a motion to compel discovery,” and the trial court's decision will not be reversed on appeal “unless there has been an abuse of discretion resulting in prejudice.” *Haynes v District of Columbia*, 503 A.2d 1219, 1224 (D.C. 1986) (citing *White v. Washington Metro. Area Transit Auth.*, 432 A.2d 726, 728–729 (D.C. 1981)); see *Futrell v. Dep't of Lab. Fed. Credit Union*, 816 A.2d 793, 808–09 (D.C. 2003).

This is the exceptional case where the court’s handling of discovery motions was so uneven handed that it caused undue prejudice to Ahmed and caused serious adverse effect to his ability to prosecute his discrimination claims. On the one side, the court pounded Ahmed with rulings on discovery motions, largely related to duplicative, needless requests concerning his mitigation of damages. Granted, Ahmed, navigating his case more than 6,500 miles from the courthouse, was late in some of his responses, but by June 2002 BBC had all the necessary information regarding his interim earnings, where in one year he earned a salary larger than his

BBC salary due to funding from international organizations supporting public broadcasting in Sudan, followed by years in which his income from the Sudan government was a trickle due to rampant deflation and political instability. Yet the court granted BBC's requests to compel discovery of greater detail spanning years of statements from Ahmed's domestic and foreign bank accounts, all of which did nothing but confirm the information provided in Ahmed's earlier discovery responses. On top of that, the court saddled Ahmed and his counsel with tens of thousands of dollars in discovery sanctions, an extreme penalty against a penurious litigant living at subsistence level as a public servant in a distant country.

On the other side, the court failed to allow Ahmed the basic discovery tools essential to his case. Ahmed sought information relating to the professional personnel in BBC's Washington, D.C. office to support his claims that BBC discriminated against him on the basis of his race and national origin, in comparison with all the non-Black, non-African corps of correspondents making up the rest of the office, in terms of workload, assignments, and excessive deployments. For example, Ahmed requested and was denied an order compelling discovery for the following, A441 at 6 (copy of discovery requests attached to the motion to compel, A487, A490 Ex. 2):

2. From 2012 to the present, all compilations, summaries, reports, or other documents showing the deployments of BBC Washington Bureau personnel, by name, dates, duration, and location.

3. From 2012 to the present, all compilations, summaries, reports, or other documents showing the work schedules of BBC Washington Bureau personnel, by names and dates.

In the Omnibus Order, the court denied Ahmed's motion to compel with regard to the above requests and related requests. In doing so, the court cited "Plaintiff's failure to include the specific wording of the interrogatories or requests for production of documents and the defense responses to each." *Id.* at 6, A91. The court was simply wrong, and it was an abuse of discretion to deny Ahmed's motion on that basis. Not only did Ahmed direct the court to these central requests in his brief in support of the motion to compel, A495, but he provided the entire requests and responses with his exhibits in support of the motion, *see* A441 (copy of requests and responses).

The prejudice to Ahmed was extreme. In the Amended Order on summary judgment, the court concluded that Ahmed had not engaged in protected activity under the antidiscrimination laws, stating that "it does not appear that Mr. Ahmed's complaints were accompanied by comparisons between himself and other individual reports in the D.C. Bureau." *Id.* at 22, A163. The court's decision hung heavily on the matters that Ahmed requested but was denied in discovery, *id.* at 18, A159:

Mr. Ahmed's assertions that BBC's termination decision was based on an inference of discrimination due to his unfavorable treatment compared to the non-Black, non-Sudanese reporters in BBC's D.C. Bureau are not persuasive. Mr. Ahmed attempts to compare his frequent deployment schedule to the deployment schedules of correspondents at other language desks; however, Mr. Ahmed has neither identified how often he was deployed, nor provided evidence to suggest how often correspondents at other language desks were deployed. Thus, the Court does not have figures or estimates of the employees' workloads upon which to base its decision, other than Mr. Ahmed's assertions that he worked excessively, and everyone else did not. Even accepting as true Mr. Ahmed's argument that he was excessively deployed, the Court cannot find that the other correspondents, who were non-Black and non-Sudanese, were treated more favorably than Mr. Ahmed because they had a lighter workload.

Although, as argued above, summary judgment should have been denied even with the limited comparator and related evidence that Ahmed presented, the product of the requested discovery apparently would have satisfied even the Superior Court judge who ruled in favor of BBC on summary judgment. In the entirety of the circumstances in this case, most prominently those depriving Ahmed of essential discovery, the lower court abused its discretion in a way that adversely affected Ahmed's substantive rights. The result should be reversed and on remand Ahmed should be able to obtain the requested discovery.

III. THE LOWER COURT ERRED IN NOT ACCEPTING THE SETTLEMENT BETWEEN THE PARTIES EARLY IN THE CASE.

In the alternative, Ahmed seeks to enforce the parties' 2021 oral settlement agreement. The point on appeal is a narrow one: the inability of Ahmed, and the unwillingness of BBC, to identify the "committee" whose approval to the settlement was supposedly required, should not have been an impediment to settlement enforcement.

There does not seem to be a quarrel with the standards (as opposed to the application of those standards by the court below) relating to enforcement of settlement agreements, as set forth in the opinion by Justice (then Judge) Ketanji Brown Jackson in *Blackstone v. Brink*, 63 F. Supp. 3d 68, 76 (D.D.C. 2014). There the court confirmed the authority of trial courts to enforce settlement agreements entered into by litigants in a case before it.

If an enforcement motion is filed and "there is a genuine dispute as to whether the parties have agreed to enter into a binding settlement, the court must hold an evidentiary hearing and provide an opportunity for cross-examination...." *Id.* "The party moving to enforce the purported agreement bears the burden of showing, by clear and convincing evidence, that the parties in fact formed a binding agreement." *Id.*, citing *Samra v. Shaheen Bus. & Inv. Grp., Inc.*, 355 F.Supp.2d 483, 493

(D.D.C.2005), and *Quijano v. Eagle Maint. Servs., Inc.*, 952 F.Supp. 1, 3 (D.D.C.1997)).

To be enforceable under D.C. law, the court must find that there was “(1) an agreement to all material terms, and (2) intention of the parties to be bound.” *Blackstone*, 63 F. Supp. 3d at 77, quoting *Duffy v. Duffy*, 881 A.2d 630, 634 (D.C.2005) (citations omitted). In the context of settlement agreements, “the amount to be paid and the claimant’s release of liability are the material terms.” *Id.*, quoting *Wise v. Riley*, 106 F.Supp.2d 35, 39 (D.D.C.2000).

The Superior Court had before it the detailed settlement chronology leading up to the parties’ advice to the court on June 21, 2021 that the case had been settled in principle, and additional developments after that date. Ahmed’s counsel submitted a declaration with the motion to enforce the settlement (filed under seal by Order dated November 15, 2021, A72). The declaration recounted the months of discussions with opposing counsel leading to Ahmed’ acceptance on June 18, 2021, including details regarding the form of payment and the form of the release.

With regard to the “committee,” both before and after the date of acceptance, BBC’s counsel failed to respond to all requests to identify the committee, but

acknowledged that, in their law firm's experience with BBC, no settlement had ever failed because of post-negotiation disapproval.

The parties set a target date of June 25, 2021 for the submission of a full settlement agreement draft. On that date, however, BBC's counsel called and then sent an email to say that the "committee" had not approved the agreed sum, but had approved settlement for two-thirds of that amount. Once again counsel was unwilling or unable to identify the "committee."

Whenever an attorney of record enters into a settlement there exist the "presumption that the attorney had authority to do so." *See Sorensen v. Consolidated Rail Corp.*, 992 F. Supp. 146, 149 (N.D.N.Y. Jan. 28, 1998). A party seeking to prove a lack of settlement authority bears the substantial burden of "proving by affirmative evidence that the attorney lacked authority." *Id.* (internal citations omitted).

Here there was a significant question about the existence and identity of the "committee," and whether its approval was a material term to the settlement agreement, given counsel's apparent authority to present a binding settlement offer. Under the *Blackstone* standard, at a minimum the court should have convened an

evidentiary hearing on the settlement, as it initially did in the Sua Sponte Order, A74.

In addition, it was error for the court to dismiss Ahmed's motion to enforce on the basis that he had not proved by clear and convincing evidence that the phantom committee did in fact approve the settlement. At a hearing, there could have been other outcomes, including evidence that sufficient authority to settle already had been conveyed. Also, it was error for the court to impose a clear and convincing evidence burden of proof on Ahmed. The discussion in *Blackstone* and the other cases cited makes it clear that the heightened evidentiary standard applies to the mandatory evidentiary hearing, not to the motion papers.

Finally, the fact that BBC counsel purportedly had authority to offer Ahmed a lower, substitute settlement amount further muddies the waters as to whether counsel needed additional clearance to complete the original settlement offer, or whether they were taking it on themselves to negotiate a better deal for their client.

For these reasons, the Court should enforce a settlement at the amount first offered, or remand the matter for an evidentiary hearing on the enforceability of the agreement.

CONCLUSION

For the foregoing reasons, the summary judgment should be reversed and the case should be remanded for trial. Ahmed should be permitted to obtain the discovery regarding the personnel in BBC's Washington, D.C. office and other matters .that he was deprived of obtaining in the Superior Court's discovery rulings. In the alternative, the 2021 settlement between the parties should be enforced, after an evidentiary hearing if necessary.

Date: July 6, 2024

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CERTIFICATE OF SERVICE

I certify that on July 6, 2024, I sent the Brief of Appellant Lukman Ahmed
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