



NO. 23-CV-357

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

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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

REPLY BRIEF OF APPELLANT LUKMAN AHMED

Date: August 28, 2024

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ORAL ARGUMENT REQUESTED

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A. Summary Judgment Should Be Reversed on the Discrimination Claims.

BBC's turgid appellate brief underscores the confluence of errors by the Superior Court that deprived Appellant Lukman Ahmed of a trial on his claims of race and national origin discrimination and retaliation under the D.C. Human Rights Act.

The core of Ahmed's discrimination claim is that he suffered years of disparate treatment in comparison with his non-Black, non-African correspondent colleagues in BBC's Washington, D.C. office. Ahmed was overworked and left without support resources available to his D.C. colleagues. His main complaint was excessive deployment to cover the news in D.C. and in the hemisphere as the only Arabic-speaking correspondent. This not only subjected him to adverse working conditions,

but also deprived him of valuable work opportunities, such as when he lost his White House press credentials due to the burdens of his excessive assignments. A1336. (BBC casts this as a shortcoming on Ahmed's part, when in reality it is another part of the fabric of evidence of discriminatory treatment by his employer.)

The Superior Court's decision violates the fundamental precept that summary judgment is proper only if the evidence "is so *one-sided* that one party *must* prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (emphases added). The decision below also inverts the basic principle that the benefit of the doubt must go to the non-moving party in assessing the existence of genuine issues of material facts--resolving evidentiary conflicts, credibility calls, and competing inferences in the employee's favor--even though a jury might later find the employer's story more believable. *See, e.g., Tolan v. Cotton*, 572 U.S. 650, 660 (2014); *Marcano-Martínez v. Cooperativa de Seguros Múltiples de P.R.*, 991 F.3d 336, 338 (1st Cir. 2021).

Ahmed, without the discovery in the hands of BBC that the lower court would not require to be produced, was able to describe in broad strokes only that *none* of the other correspondents in the D.C. office were subjected to the same backbreaking scheduling assignments as he was. A1335-36. But that evidence was brushed aside. Similarly, when Ahmed offered evidence of the excessive schedules he endured in the

last two years of his employment with BBC, that evidence was ignored, too. A1298-A1301. (On appeal, BBC goes so far as to argue that Ahmed’s accurate summary of his assignments taken from BBC’s Arabic Service records was incompetent, when that evidence was admissible as an accurate summary of voluminous records in BBC’s possession. *See Willard Co. v. Columbia Van Lines Moving and Storage Co.*, 253 A.2d 454, 456–57 (D.C.1969); *cf.* Fed. R. Evid. 1006.) The mistreatment of Ahmed regarding work schedules and deployments, in comparison with the more favorable treatment afforded non-Black, non-African D.C. correspondents at the other “desks,” pointed to unlawful “racial dynamics” in the work place. *See Jones v. United Health Grp.*, 2019 WL 1903668, at *13 (D. Md. Apr. 29, 2019).

The lower court’s error in failing to recognize Ahmed’s *prima facie* proof of unlawful discrimination was compounded by its errant discovery rulings. The court abused its discretion by laying numerous tripwires preventing Ahmed from discovering the work schedules and deployment information of his colleagues in the D.C. office. Even though only 30 or so employees were in the mix, the court denied Ahmed’s motion to compel discovery, buying BBC’s specious argument that there weren’t centralized records that compiled or summarized the information.

Ahmed’s requests were not limited to centralized records or summaries, but also sought “other documents” showing the work assignments and deployment information

of his D.C. colleagues. A487, A490. The burden on a global corporation of producing such documents was minimal, and certainly not sufficient to absolve BBC of its discovery obligations in this area. Indeed, when it suited BBC's tactics, it belatedly produced thousands of pages of records regarding assignments and deployment of Arabic service employees worldwide, but nothing regarding Ahmed's co-worker correspondents in D.C. in the other services.

The discovery rulings substantially and unfairly prejudiced Ahmed's case, because the court granted summary judgment in part because Ahmed did not provide comparator evidence of the work assignments and deployments of others in D.C., A159, A163—precisely the information Ahmed was foreclosed from obtaining in discovery.

Serious error also occurred in granting summary judgment on the basis of the so-called "independent" investigation of Ahmed's garden talk with Sudanese Prime Minister Hamdok during Ahmed's annual leave in Sudan, and the termination decision that flowed from it.

Rather than treating the facts and inferences in accordance with well-established summary judgment principles, the Superior Court effectively tried the case on the papers and indulged movant BBC all inferences and conclusions that are supposed to be reserved for the non-movant in a summary judgment proceeding.

All the key facts in the termination scenario were in dispute. First of all, the starting point for denying summary judgment under BBC's termination scenario is not the informal discussion in the garden that Ahmed had with Prime Minister Hamdok in early November 2019, but rather the formal head-of-state level interview broadcast worldwide by BBC that Ahmed conducted of Hamdok during the time of the U.N. General Assembly meeting in New York City in September 2019. Ahmed dep. 111:17-112:10, A1309-A1310; Ahmed Decl. ¶¶ 13-15, A1335-A1338.

The importance of the New York interview cannot be overstated in addressing summary judgment in a correct manner in this case, because it belies virtually every assertion and omission in BBC's one-sided termination scenario adopted by the Superior Court. The first material aspect of it is that it existed at all, because when Ahmed was brought up on charges in the "independent investigation" immediately preceding his termination, Ahmed's superiors made no mention of the significant New York interview available to BBC's outlets worldwide, reaching a half a billion viewers and listeners. In fact, Ahmed's second level supervisor, Sam Farah, first was agnostic about the interview and later feigned ignorance of the fact that it occurred after Hamdok became Prime Minister. On appeal, BBC follows the lead of the Superior Court judge and does not even acknowledge the New York interview or its significance.

Second, the Hamdok appearance at the U.N. was a big deal, and BBC—through Ahmed’s leadership in the major journalistic “get” for the network, A1338 ¶15—thought it was a big deal, too. Sudan had just emerged from decades of dictatorial rule. Due to its international persona non grata status, Sudan had not appeared before the U.N. General Assembly in ten years. Hamdok’s appearance at the U.N. was then memorialized in Ahmed’s official BBC interview that followed.

The protocols that BBC falsely claimed were required for Ahmed to conduct an informal garden chat with Hamdok in November necessarily were followed in preparation for Ahmed’s formal New York interview of Hamdok in September. Simply stated, to the extent required, *see* A1337-38, Ahmed followed BBC protocol and did not violate it in conducting formal BBC business with Hamdok. In contrast to Ahmed’s superiors’ convenient amnesia when constructing their termination scenario falsely claiming that the garden talk was a first-time interview with a new head of state, BBC’s records of Ahmed’s activities in September 2019 show the company’s conscious focus and attention on the U.N. proceedings. A1332-33.

The contrast between Ahmed’s two appearances with Hamdok, and confirmation of the formal interview in New York that Ahmed’s superiors claimed not to know about, are seen in the recordings of the events:



Third, BBC seriously misrepresented the nature of the discussion Ahmed had in the garden with Prime Minister Hamdok. Regardless of how that session is labeled—as an interview or a discussion--the content of the garden talk shows it was as

advertised—an opportunity for Ahmed to discuss informally with the new leader a common hope for the peaceful development of the country and continued settlement of hundreds of thousands of Sudanese refugees displaced by years of civil strife. In the garden, Prime Minister Hamdok stated, A1189, A1194:

In the beginning, my dear brother Lukman, I am, in fact, happy that we meet in Al Fasher, Fasher of Sultan, Fasher Abu Zakaria, as the last meeting between us was in New York and today we meet under the skies of the homeland and I and you we lived for long years in exile and we did not be away from the homeland, today my visit to Al Fasher, it does not come as a coincidence, but it came as a result of the symbolic of this State, it came to fulfil the desire of the Sudanese to achieve peace, to stop this damned war and to build peace in Sudan....

Today was a visit for the displaced people, and the visits of tomorrow and the next tomorrow will be for those who returned because, with their return, they made our beginnings in that new society, a society to rebuild those societies that we dream of, and we will accompany their issues and their visions in the future of this journey, with their return in a voluntary repatriation, they started this journey, which we think we will walk together.

Two additional subthemes to the garden talk impermissibly tainted the one-sided summary judgment decision. The first is BBC's laughable argument that the transmission of the meeting on a local cable outlet with a few thousand customers, A1339, was in "competition" with BBC, and that Ahmed's garden appearance violated BBC's policies against working for competitors. It does not take expert testimony from telecommunications economists to appreciate that the tiny local cable TV channel was

not in competition with BBC's customer base of 500 million people. Any doubt in the matter, however, should be aired at trial, rather than accepting BBC's preposterous *ipse dixit* pronouncement that competition was in play.

As to the second point, BBC makes much of the argument that, while Ahmed got permission from his supervisor to make the local appearance on behalf of his charity, Malam Darfur Peace and Development, there was no mention of his charity in the discussion with Hamdok. Specific mention of the charity was unnecessary and, in any event, subsumed in the nature of the discussion. Ahmed and his charity loomed large in Sudan, particularly in the Darfur region, where Ahmed was instrumental in the repatriation of over 300,000 refugees. *See* A1338 (needs of repatriated displaced persons "of course was one of the important missions, if not the key mission, of MDPD, my charity").

Ahmed had used his BBC vacation time each year to conduct his charitable work, including the building of schools, homes, and water wells. A1125. Until BBC disparaged Ahmed's charitable work in the termination scenario, BBC was charitable to the charity, at one point donating computers to the cause. A1337. BBC also reported on Ahmed's village work conducted through his charity. A1125.

BBC falsely depicts Ahmed's charitable work as a rogue, unapproved function that justifiably contributed to Ahmed's termination. But Ahmed showed that he had

written approval for the charity work dating from 2015. A1101. BBC barks that Ahmed did not show written renewals of the approval, but they were not required. *See* A1337. Similarly, BBC insinuates that Ahmed’s charitable work in Sudan was to BBC’s disadvantage, because it was conducted during Ahmed’s vacations when BBC had to fly in backup from London to cover for Ahmed (never mind that requiring additional professional backup during Ahmed’s absence only underscores Ahmed’s main discrimination claim that he singly was overworked and under-supported among the D.C. correspondents). BBC’s point is hollow and does not support summary judgment, as Ahmed’s charitable work in Sudan was all above board and taken during approved personal leave.

Fourth, the decision to terminate Ahmed’s employment was heavily infected with the false testimony of his direct supervisor, who denied that he gave Ahmed approval to appear on local TV in Sudan. To the contrary, Andari advised Ahmed that so 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. There is no question that Ahmed complied with that directive. The Superior Court judge’s conclusion that Andari’s account was credible and that Ahmed’s was not is exactly the type of credibility contest disallowed at the summary judgment stage. This Court should credit Ahmed's account of events, even if his testimony is “directly

contradictory” to Andari’s testimony. *Tolan v. Cotton*, 572 U.S. 650, 659-60 (2014); *Anderson*, 477 U.S. at 255 (it is not appropriate to decide issues of credibility, motive, or intent at summary judgment).

BBC defends the termination of Ahmed as a product of an “independent investigation” leading to a decision by previously uninvolved higher ups (mainly Farah’s supervisor, Tarik Kafala, Head of Language, World Service Languages) and that the decisionmakers came to their conclusions based on an “honest belief” that Ahmed was a corporate wrongdoer. An “honest belief” does not trump a plaintiff’s showing of pretext, as Ahmed showed here. Ahmed Op. Br. 25-28; *see Stroup v. United Airlines, Inc.*, 26 F.4th 1147, 1161-62 (10th Cir. 2022) (the “business judgment rule does not immunize an employer where its proffered reasons have been shown to be unworthy of belief”).

Moreover, that is the wrong paradigm for this case. Under the facts here, the appropriate legal standard is the “cat’s paw” standard of liability.

In *Staub v. Proctor Hosp.*, 562 U.S. 411, 413 (2011), the Supreme Court confirmed the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision. The Court specifically rejected the theories, espoused by BBC here, that its adverse employment

decision against Ahmed should be upheld as based on an independent investigation and honest business judgment. The Court explained that the reporting agent's actions and the ultimate decisionmaker's actions are both proximate causes of liability, and that "the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." 562 U.S. at 419.

The Court declined to adopt a rule that "the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus" should "suffice to negate the effect of the prior discrimination." *Id.* at 420. On this point, the Court concluded, *id.* at 421: "We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of 'fault'."

The D.C. Court of Appeals recently confirmed the availability of a "cat's paw" standard of liability in cases under the D.C. Human Rights Act. *District of Columbia v. Bryant*, 307 A.3d 443 (D.C. 2024).

To avoid summary judgment under the "cat's paw" standard, Ahmed has to ascribe discriminatory animus to the reporting agents, Andari and Farah, particularly Andari who ginned up the complaint requesting "urgent disciplinary action" against

Ahmed that resulted in Ahmed's termination. A1103. Ahmed's principal evidence of discriminatory animus, of course, is the years of intentional mistreatment Ahmed suffered in relation to his non-Black, non-African colleagues in D.C. regarding excessive assignments and deployments, all with lack of adequate help.

In the termination scenario, Andari laid it on thicker, repeating the lie that Ahmed did not ask permission to appear on local Sudanese TV, along with the lie about the subject matter of the appearance. And then Andari continued to smear Ahmed with the rumor that he was slated to take over Sudan TV while still employed at BBC (which rumor Ahmed truthfully and definitively denied, A1179-80)

Andari's personal animosity toward Ahmed and his ethnic background is reflected in his complaint against Ahmed asking for urgent disciplinary action, A1103: "Lukman has been the face of BBC Arabic in Washington for 11 years. Appearing on other channels a clear breach of contract and carries reputational damage to the BBC as he sings praise of the PM who has been appointed by a military government in a country that is not known for its clean human rights record." Contrary to Andari's thinking, Ahmed did not have an employment contract, and Ahmed's clear message in the garden talk was to bring peace and stability to poor souls who had been victims of past civil unrest. More to the point, except where BBC seeks to slam a loyal employee like Ahmed, BBC's global business model is indiscriminate to the form of government

in countries where news is gathered. BBC even has one of its language services devoted to the world's most notable dictatorial power (the Russian desk).

It bears repeating that the point of the above selection of facts is not to convince this Court that Ahmed should win his case, but rather to establish his right to take his claims to trial under a fair and lawful application of summary judgment principles. The Superior Court's grant of summary judgment on the discrimination claim should be reversed and the matter remanded for pretrial and trial.

Included in the matters to be remanded for trial should be Ahmed's retaliation claim under DCHRA. The court's decision blow, embellished on appeal by BBC, is that Ahmed did not engage in protected activity and did not complain about "discrimination." Ahmed, the only Black African among the correspondents in the D.C. office, complained incessantly over the years about the unequal treatment in work assignments and deployments he received (to which the judge made a 19th century-like remark that some people might be happy getting all that work), which caused him harm. A1335-36 (back-to-back travel assignments, discouraged under BBC policy, "took a toll on me"). The mistreatment did not abate, and eventually Ahmed's London supervisors cornered him in the unlawful termination scenario. In all of this, BBC cites no authority for the proposition that an employee must cry "discrimination" in complaining about discriminatory or retaliatory behavior by the employer.

B. Summary Judgment Should Be Reversed on the Wage Claim.

The Superior Court erred in granting summary judgment on Ahmed’s claim under the D.C. Wage Payment and Collection Act (DCWPCA), D.C. Code § 32-1301, *et seq.*, which provides that, “[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). The penalty for failure to pay all wages due on a timely basis is 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. § 32-1303(4). In this case, BBC made a payroll direct deposit in Ahmed’s bank account in the amount of \$4,849.55, four months after his employment ended. Despite BBC’s obfuscatory argument on appeal, Ahmed’s right to a trial on his wage claim is straightforward.

First, BBC argues that Ahmed admitted that he was paid all his wages and did not make a wage claim. That does not defeat the claim under the WPCA, however, because Ahmed’s claim is for *late* payment, not nonpayment. Contrary to BBC’s argument, Ahmed made no concession that he was not owed statutory damages under WPCA. The damages estimate he submitted in discovery clearly was labeled “Plaintiff’s *Back Pay* Damages Estimate,” showing lost back pay and interim earnings,

A1221, and was not designed to address non-wage statutory liquidated damages under WPCA.

Second, BBC's argument that Ahmed did not present evidence of the late payment in his summary judgment opposition is false. When BBC sought reconsideration of the order denying summary judgment on the late wage claim, Ahmed furnished a copy of his actual bank statement in opposition, showing BBC's direct payroll deposit in Ahmed's Wells Fargo account on April 10, 2020, in the amount of \$4,849.55, with the entry "British Broadcas Direct Dep 200410-927714245637C22 Ahmed.Lukman." A1447. BBC does not deny that it made a payroll direct deposit to Ahmed's account in that amount on that date.

Third, based on the above, it is wrong for BBC to attack counsel's affidavit as the source of the proof for the WPCA claim. The primary evidentiary basis for opposing summary judgment is the bank record of BBC's direct deposit. Ahmed explained in his opening brief that a hearsay objection to that document would support summary judgment 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)). BBC does not contest the correctness of Ahmed’s legal analysis on this point.

For these reasons, summary judgment on the WPCA claim should be reversed and the matter should proceed to trial.

C. In the Alternative, the Settlement Agreement Should Be Enforced.

The sole issue in Ahmed’s alternative request to enforce the settlement agreement is whether BBC’s failure to identify the existence of the “committee” that supposedly withheld approval of the settlement should have resulted in enforcement of the settlement, or at a minimum required an evidentiary hearing first ordered by the Superior Court then recanted. With one exception noted here, there is no serious disagreement regarding the legal standards applicable to the approval of oral settlement agreements in litigation, but BBC fails to grasp Ahmed’s argument about the “committee.”

BBC’s lawyers had apparent authority to enter into the settlement, and the parties reached accord when Ahmed accepted the settlement offer with the material terms of

the settlement amount and the dismissal of the lawsuit. *Blackstone v. Brink*, 63 F. Supp. 3d 68, 77 (D.D.C. 2014), quoting *Wise v. Riley*, 106 F.Supp.2d 35, 39 (D.D.C.2000). The settlement was subject to BBC's approval, which BBC's counsel explained was always given in their experience with the client, and was expected here.

When, at the eleventh hour, BBC's counsel informed Ahmed that the settlement was not approved by an unnamed BBC "committee," but that BBC—without any further requirement of approval—would settle for a lower amount, that raised serious questions. Two possibilities arose: either the committee did not exist, or the lawyers didn't need the phantom committee's approval after all. In either case, settlement would have been complete with the full apparent authority of BBC's agents (its lawyers).

BBC's insistence that the committee existed and had rejected the settlement, without a shred of proof that was the case, at a minimum should have triggered an evidentiary hearing, as required in *Blackstone* and as initially ordered by the court. A74. (BBC keeps referring to the orders of "Chief Judge Diaz," but no such judge presided in this case.) BBC argues that an evidentiary hearing was not required, citing *Proctor v. Liberty Mut. Auto & Home Servs.*, 308 F. Supp. 3d 175, 176-77 (D.D.C. 2018). That case plainly says that a hearing is not required if the court "is persuaded on the basis of the briefing that a settlement agreement exists," *id.*, not if there is a

question about the existence of the settlement. Accordingly, the Superior Court's refusal to accept the settlement should be reversed, and this Court should order enforcement of the settlement as alternative relief, or remand for an evidentiary hearing on the settlement.

D. Conclusion.

For the foregoing reasons and for the reasons stated in Ahmed's opening brief, 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.

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