No. 10-1254

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL FORD,

Plaintiff-Appellant,

v.

JAMES MANSFIELD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION.

Mr. Mansfield's brief has virtually no legal argument relevant to the issues before this Court, and ignores or misrepresents key disputed factual issues. The entire argument section relating to whether there was race-based interference with Mr. Ford's employment is only twelve pages (Appellee's Br. at 44-57), of which three and one-half pages (*id.* at 44-47) are devoted to the standard of review, another two pages argue whether Mr. Mansfield's actions created a hostile work environment, an issue not before this Court (*id.* at 49-51), and another two pages argue that the termination of Mr. Ford's employment by the Board of Horizon House was not race-based (*id.* at 51-53), also not an issue before this Court.

The remaining four and one-half pages in the argument section fail to discuss the legal issues raised in this appeal, and Mr. Mansfield did not mention, let alone address, many of the key cases relied upon by Mr. Ford. Instead, the bulk of Mr. Mansfield's brief (*id.* at 5-43), is a recitation of Mr. Mansfield's version of the disputed facts, in an improper attempt to have this Court serve as a fact finder. That Mr. Mansfield devoted thirty-eight pages to arguing the facts of this case highlights the need for a jury to make findings of fact regarding the numerous material facts in dispute.

II. MR. MANSFIELD'S FACTUAL DISCUSSION CONFIRMS THAT NUMEROUS DISPUTED ISSUES OF MATERIAL FACT EXIST, WHICH PRECLUDES SUMMARY JUDGMENT.

Mr. Mansfield devoted the majority of his brief to arguing the disputed facts (Appellee's Br. at 5-43), yet he downplayed or did not address numerous disputed issues of material fact that Mr. Ford discussed in his brief, thereby confirming that there exist disputed issues of material fact that preclude summary judgment.

For example, the primary issue of disputed fact is whether Mr. Mansfield's actions were motivated by race, as Mr. Ford contends, or by his obligation to provide legal representation to his former client, the Horizon House Condominium Unit Owners Association, which was run by a Board of Directors ("the Board"); Mr. Mansfield was supposed to take direction from the President of the Board. Mr. Mansfield ignored or disregarded the fact that he took, or threatened to take, numerous actions that were not authorized by the Board, and that exceeded the scope of his representation.

In December 2005, after Mr. Ford was hired as the Building Manager at Horizon House, Mr. Mansfield threatened to sue Zalco Realty (the property management company) over the Board's termination of Jennifer O'Keefe, the interim building manager (Appellant's Br., at 11), but he now argues on appeal that he was merely trying "to ensure that Zalco followed proper procedure" (Appellee's Br. at 30), which is improperly arguing the facts. Only one month later, Mr.

Mansfield again threatened to sue Zalco Realty on behalf of a Horizon House resident, Adrienne Garretson (Appellant's Br. at 16), to which Mr. Mansfield's only response is that there was nothing "racial" about his threat to sue (Appellee's Br., at 35), ignoring the dispositive fact that Mr. Mansfield was again acting outside the scope of his representation by assisting a co-conspirator in obtaining personnel information about Mr. Ford.

Mr. Mansfield's brief also did not respond to the expert ethics opinion proffered by Bernard DiMuro, Esquire, which explained that Mr. Mansfield acted beyond the scope of his representation when he threatened to take legal action on behalf of Ms. O'Keefe and Ms. Garretson. (Appellant's Br., at 11; JA 812, JA 817, JA 835). A plaintiff can demonstrate pretext if there is sufficient evidence that the "asserted justification is false" or "unworthy of credence." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 148 (2000); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Therefore, evidence that Mr. Mansfield acted beyond the scope of his representation undermines his argument that his actions were only that of an attorney providing legal services to his client, and gives more credence to Mr. Ford's assertion that Mr. Mansfield's actions were motivated by racial bias.

Mr. Mansfield also attempts to explain away his unauthorized background checks of Mr. Ford and of Vondell Carter, the first African-American President of

the Board (Appellant's Br., at 12-13), by claiming that any authorization was not needed "as this was not a suit by Horizon House to challenge Mansfield's fees." (Appellee's Br. at 31). This response, a *non sequitur*, ignores the fact that Mr. Mansfield chose to investigate only the two African-American individuals involved, and not the other Board members who are not minorities, which a reasonable fact finder could find to be probative evidence of his racial animus.

Mr. Mansfield's brief also failed to address Mr. DiMuro's expert opinion that Mr. Mansfield had acted beyond the scope of his authority in conducting the background checks of Messrs. Ford and Carter. (Appellant's Br., at 13; JA 803-805, JA 817). This evidence gives further support to Mr. Ford's assertion that Mr. Mansfield's actions were motivated by Mr. Ford's race, and not by his obligations as the attorney for Horizon House.

Mr. Mansfield also attempts to explain away his unauthorized assistance to the Horizon House residents who were attempting to remove three of the Board members, by arguing that there was "nothing racial" in offering assistance to those dissident residents. (Appellee's Br. at 36). Aside from arguing the facts, this ignores the dispositive fact that Mr. Mansfield exceeded the scope of his legal representation of the Association, which acted through the Board, by working closely with those who were challenging the Board. (Appellant's Br. at 17-18).

Mr. Mansfield also attempts to explain away his unauthorized distribution of

his January 17, 2006 letter about Mr. Ford, to all residents at Horizon House (including renters, not just the unit owners), and his unauthorized recitation of this letter at the meetings of the "Concerned Citizens" group, by arguing that the letter was acceptable since it "did not reference Mr. Ford's race." (Appellee's Br. at 37). Again, Mr. Mansfield is arguing the disputed facts as to the contents and clear implication of his letter, and as to the mob-like scene that ensued when he publicly read from that letter. Mr. Mansfield has ignored the dispositive fact that the Board never authorized him to write this letter, or to disclose personnel information and attorney-client privileged communications to the Horizon House residents. Mr. DiMuro testified that in doing so, Mr. Mansfield "was acting in derogation of confidentiality he owed to the Association as its attorney." (Appellant's Br. at 20; JA 805, JA 813, JA 816, JA 818, JA 839-844). Nor did Mr. Mansfield address Mr. DiMuro's expert opinion that he did not have the authority to organize or participate in the meetings of the Concerned Citizens group – the Horizon House residents who conspired with Mr. Mansfield to terminate Mr. Ford. (Appellant's Br. at 21; JA 818).

Mr. Mansfield also directly contradicted the factual record by arguing that even after the Board voted to terminate him as the attorney on January 23, 2006, that he "believed he could continue to represent the Association." (Appellee's Br. at 40). However, the factual record shows that Mr. Mansfield did not continue to

represent the "Association," but signed retainer agreements with *individual* residents who wanted to remove the three Board members who had hired Mr. Ford. (Appellant's Br. at 23-24; JA 1160, JA 1238, JA 1309-1318, JA 1345). Thus, Mr. Mansfield was not representing the "Association" as he now claims on appeal, but represented the dissident residents who were conspiring with Mr. Mansfield to remove Mr. Ford. As Mr. DiMuro explained, this was outside the scope of his representation since he was "acting against the interests of certain Board members and with … bad intent planning to have them removed." (JA 807-808).

Finally, Mr. Mansfield argues, for the first time on appeal, that his expert psychiatrist made certain findings about Mr. Ford's mental health. (Appellee's Br. at 43 n.20). However, Mr. Mansfield did not make these arguments to the district court, since he merely submitted the report of his expert in his summary judgment reply brief (JA 1398, at n.10) but without making any argument in response to Mr. Ford's discussion of the findings of his expert psychiatrist. (JA 676-677).

Taken together, these numerous disputed factual issues, and yet others identified in Mr. Ford's opening brief, which Mr. Mansfield tries to ignore, gloss over, or misrepresent, confirm that there exist genuine disputes as to issues of material fact as to whether Mr. Mansfield acted outside the scope of his authority when he worked in concert with dissident residents who were trying to terminate Mr. Ford's employment by any means possible.

III. MR. MANSFIELD'S FACTUAL DISCUSSION DOES NOT ADDRESS THE DISTRICT COURT'S ERRORS OF LAW.

A. The District Court usurped the jury's function by deciding genuine issues of material fact that exist as to whether the comments made to Mr. Ford were race-based.

Mr. Mansfield agrees with Mr. Ford as to the correct legal standard for race discrimination under Section 1981. Mr. Ford is required to show that (1) "he is a member of a racial minority; (2) the defendant intended to discriminate against him on the basis of race; and (3) the discrimination concerned a privilege protected under Section 1981." (Appellee's Br. at 47; accord Appellant's Br. at 43). There is no dispute that Mr. Ford meets the first element, as he is an African American male. As to the third element, Mr. Ford alleges that Mr. Mansfield's actions were race-based, and intended to interfere with his contractual relationship – his employment as a building manager at Horizon House. Mr. Ford's employment relationship is a privilege protected under Section 1981, which Mr. Mansfield concedes: "Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the proposed or existing contract." (Appellee's Br. at 53-54) (citing *Domino's Pizza Inc. v. McDonald*, 546 U.S. 470, 476 (2006)).

Here, the contested issues of material fact relate to the second element, *i.e.*, whether Mr. Mansfield's actions were motivated by Mr. Ford's race. Two

questions are subsumed within this element. First, is there any evidence upon which a reasonable fact finder could conclude that Mr. Mansfield's actions against Mr. Ford were motivated by Mr. Ford's race? Second, if there is evidence that there was race-based treatment, is there evidence from which a fact finder could reasonably conclude that Mr. Mansfield's actions led to or influenced Mr. Ford's termination by the Horizon House Board?

It bears emphasizing that the issue before this Court is whether Mr. Mansfield's actions were race-based, *not* whether the Horizon House Board's termination of Mr. Ford's employment was based upon his race. Mr. Mansfield continues to confuse the issue of whether the termination of Mr. Ford's employment was race-based, thereby obscuring the real issue – whether Mr. Mansfield's interference with Mr. Ford's employment was race-based.

On the issue of whether there was race-based interference, there are contested issues of material fact, discussed in more detail in Part V of Appellant's Brief, and in Part II herein. This Court has stated that "because motive is often a critical issue," the trial courts "must take special care" to insure they are not invading the province of the jury. *Evans v. Tech. Apps. & Serv. Co*., 80 F.3d 954, 958 (4th Cir. 1990). Here, in analyzing this issue, the district court erred as a matter of law in finding that comments like such as "boy" and "we don't want your kind here," directed toward Mr. Ford, an African-American, had a non-racial

meaning. (JA 1633). The district court, in substituting its view for the role of the jury, determined that "these comments are more easily, and more sensibly, explained as having non-racial meanings," and that "[w]hile the Court may not be able to decipher exactly what was meant by these comments, the Court can determine that there is no indication that they were intended to be racially derogatory." (*Id.*). As discussed at pages 30-35 of Appellant's opening brief, this was legal error and alone warrants a remand. Mr. Mansfield has no response.

Notably, the district court did not base its decision on any critical analysis of whether these comments were imputable to Mr. Mansfield. (JA 1630). Further, Mr. Mansfield's brief did not substantively address Mr. Ford's argument that the residents' comments to Mr. Ford may be used to impute racial animus to Mr. Mansfield, or the legal support cited in Mr. Ford's brief.[1]

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[1] Statements "by a co-conspirator during the course and in furtherance of the conspiracy" are admissible to evince a defendant-conspirator's motivations. *See* Rule 801(d)(2)(E), Fed. R. Evid. As both the Supreme Court and this Court recognized, evidence of other individuals' discriminatory animus may be admissible to prove the defendant's discriminatory animus. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387-88 (2008); *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 108 (4th Cir. 2000) (management's statements about an employee were admissible to show the Union's animus towards the employee because the Union and management entered into a conspiracy to terminate him). Thus, Mr. Ford did not have to name as defendants all of the co-conspirators, such as Adrienne Garretson and Lenny Conrad, as Mr. Mansfield incorrectly suggests. (Appellee's Br., at 56 n. 22). In fact, Ms. Garretson had died by the time the EEOC issued Mr. Ford's probable cause finding, the prerequisite to his filing a Title VII claim.

As noted in Mr. Ford's opening brief, these comments should not be separated from the mosaic of other evidence that could reflect Mr. Mansfield's race-driven interference with Mr. Ford's employment at Horizon House. For example, some of the comments at issue were made by people with whom Mr. Mansfield worked closely in their attempts to have Mr. Ford removed from his position at Horizon House. Indeed, Mr. Mansfield championed his fellow conspirators' cause by making unauthorized presentations to the "Concerned Citizens" group, where he made repeated misrepresentations about Mr. Ford that played on racial stereotypes about African American men in a residential workplace. *See also* Part II, *supra*.[2]

These are just a few examples of other evidence, in addition to the comments like "boy" and not wanting "your kind here," upon which a reasonable fact finder could conclude that Mr. Mansfield's interference with Mr. Ford's employment was race-based (as discussed in more detail in Appellant's opening brief in Part VII.C, at pages 35-43).

Instead, the district court seemed to require some direct evidence of racial bias from Mr. Mansfield. This Court has directly rejected any such requirement in

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[2] As discussed in detail at pages 39-40 of the Appellant's Opening Brief, Mr. Mansfield was not acting as an attorney for the Horizon House Board during part of this time.

stating that: "[a] plaintiff does not need a 'smoking gun' to prove invidious intent, and few plaintiffs will have one." *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 300 (4th Cir. 2010).[3] The Second Circuit similarly rejected this same contention: "[d]irect evidence of discrimination, a 'smoking gun,' is typically unavailable …. It is well settled, however that employment discrimination plaintiffs are entitled to rely on circumstantial evidence." *Holcomb v. Iona College*, 521 F.3d 130, 141 (2d Cir. 2008). *Holcomb* also cautioned that the courts should be "alert to the fact that [those discriminating] are rarely so cooperative as to include a notation in the personnel file" that their action is for a reason forbidden by law. *Id*.

Here, there are contested issues of material fact that preclude summary judgment. In addition to the comments such as "boy" and not wanting "your kind here," there exists other compelling circumstantial evidence from which a jury could reasonably conclude that Mansfield's actions were race-based. Mr. Ford's opening brief discusses this circumstantial evidence in greater detail in Part VII.C, at pages 35-42.

This Court should remand to allow a jury to determine, based upon "context, inflection, tone of voice, local custom and historical usage," *Ash v. Tyson Foods,*

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[3] Mr. Ford discussed the relevance of this Court's *Merritt* decision, *see* Appellant's Br., at 33, 37-38, but Mr. Mansfield's brief did not mention this decision.

Inc., 546 U.S. 454, 456 (2006) (*per curiam*), whether these were race-based comments, and if so, whether these comments, considered with the other circumstantial evidence offered by Mr. Ford, reflect racial animus by Mr. Mansfield.[4]

There exists sufficient evidence from which a jury could conclude that Mr. Mansfield's actions were race based. Of course, a jury could also conclude that Mr. Mansfield's comments, and those of his co-conspirators, did not reflect racial animus, or that the comments of his co-conspirators could not be imputed to him, but as this Court has recently observed, it is not the court's role to "intrude on the jury function by substituting our own judgment for that of the finder of fact." *Merritt*, 601 F.3d at 302 (citing *Dennis v. Columbia Colleton Med. Ctr., Inc*., 290 F.3d 639, 650 (4th Cir. 2002)). This Court should remand to allow the jury to make factual determinations on this critical issue of Mr. Mansfield's intent.

Rather than responding to the district court's legal error, Mr. Mansfield continues to attempt to confuse matters by arguing yet other issues not relevant to this appeal. Mr. Mansfield still argues he can not be liable because he was not Mr. Ford's employer: "[a]s noted above, Mr. Mansfield did not take any action as Mr. Ford's employer" (Appellee's Br. at 48); "Mr. Mansfield was never Mr. Ford's

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[4] Mr. Ford discussed the relevance of the Supreme Court's *Ash* decision, *see* Appellant's Br., at 30-32, but Mr. Mansfield's brief did not mention this decision.

employer" (*id.* at 51); and "Mr. Ford's claim that he was terminated by Mansfield due to his race must fail because Mansfield was not Ford's employer." (*Id.* at 52).[5] Mr. Ford does not contend that Mr. Mansfield is liable because he terminated Mr. Ford. Instead, Mr. Ford's claim arises from Mr. Mansfield's race-based interference with Mr. Ford's employment at Horizon House – an issue that the district court did not address, even while noting that Mr. Mansfield could be liable "depending on what role he played in the termination." (JA 1631). Although Mr. Mansfield submitted affidavits from several of the new Board members who claim that they did not fire Mr. Ford because of his race, they do not state that information provided by Mr. Mansfield played no role in terminating Mr. Ford. In fact, three Board members specifically relied upon information that came solely from Mr. Mansfield, i.e., Mr. Ford's "criminal history" (JA 489 (McManus) and JA 505 (Martinez-Alvarez)), and "his admissions" about alleged "consensual" interactions with a tenant at another property. (JA 458 (Dragun)). These board members confirmed that Mr. Mansfield provided information about Mr. Ford – information that Mr. Mansfield knew was false and knew that he was not

[5] Mr. Mansfield's citation to *Alford v. Martin & Gass, Inc.*, 2009 WL 497581 (E.D. Va. Feb. 25, 2009) does not advance his argument. (Appellee's Br. at 46, 52-53). There, the plaintiff was attempting to hold a third party liable as an employer under both Title VII and Section 1981. Here, Mr. Ford is not attempting to hold Mr. Mansfield liable as an employer, but rather to hold him accountable for his own discrimination in interfering with Mr. Ford's employment at Horizon House.

authorized to release – that led to terminating Mr. Ford.

Mr. Mansfield's confusion can perhaps best be illustrated by a hypothetical fact situation. Assume that a Mr. Doe, because of expressed racial prejudice, takes it upon himself to see that blacks either do not get gainful employment, or lose it if they have it. Mr. Doe, in his attempts to prevent blacks from being gainfully employed, provides the employer with all types of information about minority employees, some true and some false. Mr. Doe does not provide this information about comparable non-minority employees. A black employee is fired based upon the information provided by Mr. Doe. That employee may, or may not, have a claim against the employer for race discrimination. However, for Section 1981 to have any meaning in a race-based interference situation, it must allow a claim against Mr. Doe for his expressed race-based interference. Any other interpretation would render Section 1981 meaningless. Otherwise a statute that was passed, and has been interpreted to prevent all race discrimination in the making and enforcement of contracts, would provide no relief against the individual who actually harbors the racial bias. This is not the intent of the statute, nor how it has been applied by the courts.[6]

In Mr. Ford's case, his Section 1981 claim against Mr. Mansfield is clear

[6] The broad reach of Section 1981 and how it has been applied to a wide range of contexts is discussed in detail in Part VII.D of Appellant's opening brief, at pages 43-53.

and direct – Mr. Mansfield interfered with Mr. Ford's employment relationship based upon race. Mr. Mansfield no doubt contends that his actions were not race based. However, because there exist numerous disputed issues of material fact regarding Mr. Mansfield's motivation and his unauthorized acts in concert with others who wanted to remove Mr. Ford by any means possible, and because the district court erred as matter of law when it ruled that comments like "boy" and "we do not want your kind here" did not reflect any racial animus, this Court should remand this case to allow the jury to make these factual determinations.

B. A Plaintiff Need Not Present Direct Evidence of the Defendant's Racial Animus to Raise a Genuine Issue of Material Fact.

Mr. Mansfield failed to address Mr. Ford's argument that the district court erred by requiring direct evidence of racial animus and failing to properly consider the circumstantial evidence. Instead, Mr. Mansfield merely asserts that "Mr. Mansfield never referenced Mr. Ford's race or made any racially derogatory statement about Mr. Ford." (Appellee's Br. at 51). However, this is not the applicable standard to determine whether an individual was motivated by racial animus, thereby violating the anti-discrimination statutes.

A plaintiff need not offer direct evidence of racial references or derogatory statements. As this Court has held, a plaintiff can satisfy his burden with circumstantial evidence that raises a genuine issue of material fact that the defendant was motivated by racial animus. *Hill v. Lockheed Martin Logistics*

Mgmt., 354 F.3d 277, 284 (4th Cir. 2004) (*en banc*). Recognizing that most individuals do not openly admit that they discriminate, *see Foster v. Tandy Corp.*, 828 F.2d 1052, 1057 (4th Cir. 1987) ("plaintiffs can rarely prove racial discrimination by direct evidence" in employment discrimination cases), a plaintiff can survive a motion for summary judgment by presenting either direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the adverse employment decision. *Hill*, 354 F.3d at 284.[7]

Here, Mr. Ford provided sufficient circumstantial evidence to raise a genuine issue of material fact that Mr. Mansfield was motivated by racial animus. Although Mr. Mansfield was aware that Mr. Ford was acquitted of the baseless charge against him, Mr. Mansfield never communicated this *critical* fact to the Horizon House Board or to the other Horizon House residents. (Appellant's Br. at 25). Furthermore, Mr. Mansfield failed to communicate to the Board or the other residents the exculpatory information that he had gathered from multiple sources suggesting that Mr. Ford had not engaged in the alleged inappropriate conduct. (*Id.* at 8-10). Instead, on multiple occasions, Mr. Mansfield exceeded the scope of his legal representation of the Board by working in a concerted effort with other

[7] Mr. Ford discussed the relevance of this Court's *Hill* and *Foster* decisions, *see* Appellant's Br., at 36, but Mr. Mansfield's brief did not mention these decisions.

co-conspirators, who were Horizon House residents, to interfere with Mr. Ford's employment. Mr. Mansfield also conducted an unauthorized investigation to determine whether there was a connection between Mr. Ford and the President of the Board, who also was an African-American. (*Id.* at 12-13).

Additionally, on multiple occasions, Mr. Mansfield deliberately and publicly provided misinformation about the reason that Mr. Ford left his previous job, mischaracterized the substance of the charge that had been filed against Mr. Ford, and mischaracterized statements made by Mr. Ford. (*Id*. at 18-20, 21-23, 24-25).

Indeed, the prodigious amount of misinformation that Mr. Mansfield provided to the Board and to Horizon House residents about Mr. Ford's background strongly suggests that Mr. Mansfield was motivated by something other than Mr. Ford's actual record, and raises a material question of fact as to whether Mr. Mansfield was motivated by racial animus.

Because Mr. Ford has provided ample evidence to establish a material question as to whether Mr. Mansfield was motivated by racial animus, this Court should reverse the district court's grant of summary judgment.

C. Mr. Mansfield's Brief Misrepresents the District Court's Ruling on Mr. Ford's Request for Emotional Distress Damages.

Finally, this Court should reject Mr. Mansfield's attempt to argue – for the first time on appeal – that the district court struck Mr. Ford's request for emotional distress damages on his Section 1981 claim as a discovery sanction under Rule 37,

Fed. R. Civ. P.[8] (Appellee's Br. at 57-59). However, the district court made no mention of Rule 37 in its decision. (JA 1634). In fact, the district court's opinion was unambiguous in striking Mr. Ford's request for emotional distress damages solely because the district court believed (erroneously) that Mr. Ford had brought a separate claim for intentional infliction of emotional distress ("IIED"). (JA 1634). Based on that assumption, the district court held that since Mr. Ford could not satisfy the elements for an IIED claim under Virginia law, his request for emotional distress damages on his Section 1981 claim had to be dismissed. (*Id.*).

However, Mr. Ford did not bring a common-law IIED claim. Instead, as he explained in his opening brief, he sought emotional distress damages as part of his prayer for relief on his Section 1981 claim. (JA 64-68, Amended Complaint; *see also* Appellant's Br., at 53). Further, to obtain emotional distress damages on a Section 1981 claim arising in the employment discrimination context, the case law is clear that a plaintiff can rely solely on his own testimony, and that of his family members and friends, and does not need to produce any medical records. *See, e.g.*, *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 546 (4th Cir. 2003); *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996); *see also* Appellant's Br. at

[8] *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered.") (citing *National Wildlife Fed. v. Hanson*, 859 F.2d 313, 318 (4th Cir. 1988); *Stewart v. Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985); and *Maynard v. General Elec. Co.*, 486 F.2d 538, 539 (4th Cir. 1973)).

54 (collecting cases from other circuits). Even if this Court analyzes this issue as a discovery sanction, holding Mr. Ford to such a heightened standard to maintain his prayer for relief for emotional distress damages is plainly an abuse of the district court's discretion.

Mr. Mansfield did not address the district court's erroneous application of the heightened standard for an IIED claim to Mr. Ford's request for emotional distress damages on his Section 1981 claim, thereby conceding the issue.

This Court should not countenance Mr. Mansfield's attempt to compound this error – or attempt to divert this Court's attention from that error – by arguing for the first time on appeal that the district court had imposed a Rule 37 discovery sanction, when it did no such thing.

IV. CONCLUSION.

For the foregoing reasons, and those set forth in Mr. Ford's opening brief, this Court should find that the district court erred in granting summary judgment on Mr. Ford's Section 1981 claim and further erred in dismissing his request for emotional distress damages on the Section 1981 claim by applying the higher standard for a common-law intentional infliction of emotional distress claim. This Court should reverse and remand for a trial.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C), because this brief contains 4,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that on this 7th day of July, 2010, a copy of the foregoing Appellant's Reply Brief was served on counsel of record by this Court's ECF system, to:

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