

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-13563

Non-Argument Calendar

BEN CHRISTIAN,

Plaintiff-Appellant,

versus

THE SOUTHERN COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-04563-WMR

Before WILLIAM PRYOR, Chief Judge, LUCK and LAGOA, Circuit Judges.

PER CURIAM:

Ben Christian appeals the dismissal of his complaint that The Southern Company terminated him based on his age, in violation of the Age Discrimination in Employment Act. 29 U.S.C. §§ 621–34. Southern Company moved to dismiss on the ground that Christian failed to exhaust his administrative remedies when he did not timely file his charge of discrimination with the Equal Employment Opportunity Commission. The district court granted the motion to dismiss based on evidence that Southern Company attached to its motion. Because the district court treated the motion to dismiss as a motion for summary judgment without giving Christian notice and an opportunity to respond, we vacate the order of dismissal and remand for further proceedings.

Christian’s complaint alleged the following facts, which we accept as true. *See Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1251 (11th Cir. 2021). Southern Company hired Christian in 1980 and eventually promoted him to budget staff accountant/budgeting development specialist. In 2016, when Christian was over age 60, Cheryl Peters became his supervisor. Within one year, Christian noticed that Peters and managers were assigning high-profile tasks and assignments to younger employees, transferring his responsibilities to younger and less qualified employees, and isolating him from younger

employees. Peters told Christian that he was “a very expensive employee” and that “his skills in Powerpoint were outdated.” And a manager, John Hemphill, told Christian that he had “lost a step” and he was not “performing as fast as prior years.” Hemphill remarked he did not know whether Christian’s slowed pace was due to his “age or health” because he had prostate cancer.

Christian alleged that, on November 3, 2017, Peters gave him an “ultimatum to either retire or be terminated and forfeit his yearly bonus of approximately \$15,000.00.” When Christian requested an explanation, Peters stated that “the company’s needs and direction had changed” and that, if Christian was “an employee on January 1, [2018,] his performance review would restart.” Christian was unaware he had a “review or plan for performance” because “[h]e had received no notice of any needed improvement to his performance and had received no criticisms of his work performance in the months preceding th[e] meeting.” On November 17, 2017, Christian received his last paycheck. He never received his bonus.

Southern Company moved to dismiss Christian’s complaint. *See* Fed. R. Civ. P. 12(b). It argued that Christian failed to exhaust his administrative remedies by not filing his charge of discrimination within 180 days of his adverse employment action. *See* 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d)(1)(A). The company contended that its alleged adverse employment action occurred during Peters’s conversation with Christian on November 3, 2017, and the

180-day deadline expired before he filed a charge of discrimination on May 8, 2018.

Southern Company attached to its motion an email exchange between Christian and its human resources officer on November 8, 2017. Christian requested that the officer “email [him] the items discussed in our meeting on November 3, 2017 concerning my departure f[ro]m Southern Company” with the explanation that he “received a voice mail from Cheryl Peters in which she stated that there was additional information for me to consider in my options going forward.” The officer responded, “We discussed that your employment was being terminated, with your last day in the office being Friday, November 3rd, and last day of pay being Nov. 17. We gave you the option to notify us in writing, if you chose to retire in lieu of termination” by “Wednesday, November 8 (today)”

A magistrate judge recommended that the district court deny the company’s motion to dismiss. The magistrate judge determined that Christian timely filed his charge of discrimination 180 days after he received unequivocal notice of his termination on November 17, 2017. The magistrate judge found that the conversation on November 3, 2017, amounted to equivocal notice due to Peters’s remark about Christian being an employee on January 1. The magistrate judge expressed “doubts as to whether th[e] isolated email exchange [on November 8] is properly considered in deciding a motion to dismiss, as opposed to a motion for summary judgment.” “In any event, [the magistrate judge decided that the

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emails] . . . would not change” the outcome because “[b]oth [Christian]’s complaint and Charge indicate that he had been told there was the possibility he would still be employed . . . on January 1, 2018, and that his performance review would restart at that time” and “[t]he email does not mention, and so does not address, this fact.”

The district court dismissed Christian’s complaint. The district court, “assum[ed], without deciding, that [Peters] in fact made the comment about possibly receiving a performance review in January of the following year[, which] demonstrat[ed] that [Christian]’s termination was not yet final” on November 3, 2017. “But, [the district court found that] . . . any uncertainty about [Christian]’s employment status was resolved by [the company]’s email on November 8, 2017; notice of his termination was made unequivocal at that point.” And “[b]ecause [Christian]’s Charge was not filed until May 8, 2018, [he] filed the EEOC Charge 1 day too late.”

We review *de novo* the dismissal of Christian’s complaint. *See Coral Ridge*, 6 F.4th at 1251.

The district court erred by relying on the extrinsic evidence that Southern Company attached to its motion to dismiss. The district court interpreted the email exchange on November 8, 2017, as providing unequivocal notice of Christian’s termination. *See Char-don v. Fernandez*, 454 U.S. 6, 8 (1981). But Christian did not mention the email exchange in his complaint. *Cf. SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010). When the district court relied on the email exchange, a “matter[]

outside the pleadings . . . , the motion [Southern Company filed had to] be treated as one for summary judgment under [Federal] Rule [of Civil Procedure] 56.” Fed. R. Civ. P. 12(d); *see Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). In that circumstance, the district court must give the parties “notice and a reasonable time to respond.” Fed. R. Civ. P. 56(f); *see id.* R. 12(d). The district court ignored Christian’s request that the district court, if it considered the email exchange, allow him to brief the issue of timeliness. The district court failed to comply with Rules 56 and 12. *See Jones v. Auto. Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1532 (11th Cir. 1990).

We **VACATE** the order dismissing Christian’s complaint and **REMAND** for further proceedings.