No. 23-13157

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JORGE MONTEAGUDO ALBURQUERQUE,
Plaintiff-Appellant,

v.

THE DE MOYA GROUP, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:22-cv-22343
Hon. K. Michael Moore, United States District Judge

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 29-2, the Equal Employment Opportunity Commission (EEOC) as amicus curiae certifies that, in addition to those listed in the certificates filed by the plaintiff-appellant and the defendant-appellee, the following persons and entities may have an interest in the outcome of this case:

1. Equal Employment Opportunity Commission (EEOC) (Amicus Curiae)
2. Gilbride, Karla (General Counsel, EEOC)
3. Goldstein, Jennifer S. (Associate General Counsel, EEOC)
4. Patel, Tara (Attorney, EEOC)
5. Smith, Dara S. (Assistant General Counsel, EEOC)

Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a government agency, is not required to file a corporate disclosure statement. The EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal, other than those identified in the Certificates previously filed by the parties.

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STATEMENT OF INTEREST

Congress tasked the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal presents important questions concerning the correct standard for determining what conduct is actionable under Title VII's anti-retaliation provision. The correct standard, which the district court did not use, is laid out in *Burlington Northern & Santa Fe Railway Company v. White* and asks whether the employer's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53, 68 (2006) (cleaned up). Because the EEOC has a substantial interest in the proper resolution of these questions, the agency offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Whether the district court should have applied the standard from *Burlington Northern*—whether the employer's conduct might have dissuaded a reasonable worker from making or supporting a charge of discrimination—for determining whether the challenged conduct is

[1] The EEOC takes no position on any other issues in this appeal.

materially adverse (and thus potentially actionable) under Title VII's anti-retaliation provision.

2. Whether a reasonable jury could find that a physical assault and verbal threat by a company supervisor might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

3. Whether a reasonable jury could infer that the assaulting supervisor expressed a retaliatory motive when, after the assault, he threatened to "disappear" the plaintiff if anything happened to the supervisor the plaintiff had accused of discrimination.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Defendant The De Moya Group, Inc. ("De Moya"), a construction company, hired Plaintiff Monteagudo Albuquerque in August 2019 to work as a laborer. R.50-21; R.50-2 at 26; R.44-2 at 8.[3] Monteagudo[4] is a

[2] Because this appeal is from a summary-judgment decision, the record facts are stated in the light most favorable to Monteagudo, the nonmoving party. *See generally Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

[3] "R.# at #" refers to the district-court docket entry and CM/ECF-assigned page numbers.

[4] This brief uses the same naming convention for Plaintiff—Monteagudo, rather than Alburquerque—as Appellant's opening brief.

Cuban immigrant who speaks Spanish and does not speak English. R.51-48 at 2(¶3); R.50-2 at 21. Among other tasks at De Moya, Monteagudo assisted in finishing the grade of the asphalt and ensuring that the machinery operators did not damage plumbing or electrical lines. R.50-2 at 26-27.

Noel Leon[5] was Monteagudo's first supervisor at De Moya. R.50-2 at 17; R.50-5 at 43. While supervising Monteagudo, Noel Leon "disrespected and belittled" him because he does not speak English and is from Cuba. R.51-48 at 2-3(¶¶3,5).

On September 14, 2020, Monteagudo met with Chris De Moya, the Vice Present of Field Operations, to complain about Noel Leon's behavior. R.44-2 at 5; R.50-2 at 17,19; R.69 at 4,16. Monteagudo complained to Chris De Moya via a translator that Noel Leon disrespected him and discriminated against him "because I did not know to speak English and because I was Cuban." R.50-2 at 17-19; R.51-48 at 2(¶5); R.50-11 at 41-42.[6]

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[5] This brief uses Noel Leon's full name to differentiate him from his son, Alejandro Leon. For the same reason, it refers to Alejandro Leon by his full name. In addition, this brief uses Chris De Moya's full name to differentiate him from the employer, De Moya (The De Moya Group, Inc.).

[6] The parties dispute the admissibility of the deposition testimony on this issue. The Commission takes no position on this evidentiary dispute.

Chris De Moya switched Monteagudo's supervisor to Manny Comes after the meeting. R.50-2 at 21. Soon after Monteagudo started working under Comes, Comes told Monteagudo that Noel Leon informed him of Monteagudo's complaint. R.50-2 at 23. Comes also told Monteagudo that Monteagudo caused conflict due to his complaint. *Id.*

On October 2, 2020, Noel Leon and Monteagudo had a verbal dispute at work due to their "ongoing issue[s]." R.50-36 at 4. On the same day, Alejandro Leon, Noel Leon's son and a quality control supervisor at De Moya, confronted Monteagudo at work, verbally insulted him, and "struck him twice on his chest with an open hand." *Id.*; R.50-1 at 31. Alejandro Leon warned Monteagudo during the assault that "if anything happens to my father, I will disappear you." R.50-36 at 4. Monteagudo reported the assault to the police on October 5 and to De Moya Human Resources on October 6. *Id.*; R.51-48 at 2(¶9).

De Moya fired Monteagudo on October 7. R.44-10; R.50-31. The parties dispute the reason for termination. *Compare* R.44 at 8-9(¶¶32,35-40); R.44-10; R.50-9 at 44-45 *with* R.69 at 11-15(¶¶32,35-40); R.50-2 at 37-40; R.51-48 at 2(¶¶7-8).

Monteagudo filed suit in federal district court. R.1. In relevant part, he alleged that De Moya retaliated against him, in violation of Title VII and the Florida Civil Rights Act (FCRA), for complaining about race and national origin discrimination. *Id.*[7]

B. District Court's Decision

The district court first addressed whether three retaliatory actions asserted by Monteagudo—Comes's confrontation, Alejandro Leon's physical assault and verbal threat, and Monteagudo's termination—constituted "adverse employment actions" under Title VII. R.87 at 4. The court concluded that the termination constituted an adverse employment action, but the other actions did not because Monteagudo failed to adduce evidence to show that they impacted his "status as an employee, his compensation, or his responsibilities" or caused him to "suffer[] a serious and material change in the terms, conditions, or privileges o[f] employment." *Id.* at 5-6 (citing *Blue v. Dunn Constr. Co.*, 453 F. App'x 881, 884 (11th Cir. 2011)). The court separately found that Monteagudo failed to show Alejandro Leon's physical assault and verbal threat were "meant to

[7] Courts interpret the FCRA using the same substantive standards as Title VII. *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1387-90 (11th Cir. 1998).

retaliate against Plaintiff for complaining *of discrimination*." *Id.* at 6. Instead, the court surmised that Alejandro Leon's statement that "if anything happened to his father, he would disappear Plaintiff," suggested he was "trying to protect his father, not retaliate against Plaintiff." *Id.* at 6.

Turning to Monteagudo's termination, the district court assumed he could establish a prima facie case, but held that he failed to show that De Moya's legitimate, nondiscriminatory reason for the termination was pretext for unlawful retaliation. *Id.* at 6-10.

SUMMARY OF ARGUMENT

The district court erred in its retaliation analysis. To start, the court articulated the incorrect standard for determining whether an employer's conduct constitutes a materially adverse action, such that it falls within the scope of conduct that can support a Title VII retaliation claim. The Supreme Court in *Burlington Northern* made clear that an employer's action is materially adverse if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (cleaned up). Rather than use the *Burlington Northern* standard, the court used the standard this Court applies to Title VII discrimination claims.

The court then erroneously held that Alejandro Leon's physical assault of, and verbal threat toward, Monteagudo were not materially adverse. To the contrary, a reasonable jury could easily find that a physical assault and verbal threat could dissuade a reasonable worker from making or supporting a charge of discrimination.

Next, the district court made an inference inappropriate at summary judgment when it determined that Alejandro Leon physically assaulted and verbally threatened Monteagudo solely to "protect" his father, Noel Leon, rather than in retaliation for Monteagudo's discrimination complaint against Noel Leon. A reasonable jury could instead infer, from the same evidence relied on by the district court, that Alejandro Leon physically assaulted and threatened to "disappear" Monteagudo precisely as retaliation against Monteagudo for complaining about Noel Leon's discriminatory remarks.

ARGUMENT

I. The district court erred in its analysis regarding whether Alejandro Leon's physical assault of, and verbal threat toward, Monteagudo

falls within the scope of conduct that can support a Title VII retaliation claim.

A. The district court applied the incorrect standard for what qualifies as actionable retaliation.

Title VII prohibits employers from retaliating against any employee "because he has opposed any practice made an unlawful employment practice" under the statute. 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show, among other things, that he suffered a materially adverse action. *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1211 (11th Cir. 2013). A materially adverse action is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (cleaned up); *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 861 (11th Cir. 2020) (same).

The district court erroneously applied the standard used to determine whether an employer's conduct supports a Title VII *discrimination* claim to Monteagudo's Title VII *retaliation* claims. Specifically, the court quoted *Blue*, 453 F. App'x at 884, which addressed a Title VII discrimination claim, when it stated that "Plaintiff fails to show any evidence suggesting that the

[Alejandro Leon] interaction caused him to 'suffer[] a serious and material change in the terms, conditions, or privileges o[f] employment.'" R.87 at 6.[8]

This is not the proper standard to apply in a retaliation case. The Supreme Court has held—and the Eleventh Circuit has recognized—that a plaintiff may establish a materially adverse action for a Title VII retaliation claim by showing that the employer's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (cleaned up); *Monaghan*, 955 F.3d at 857 ("[T]he proper standard in a retaliation case is the one set out by the Supreme Court in *Burlington Northern* ….").

[8] Although this case involves a retaliation claim, we note that even the standard applicable to discrimination claims, as laid out in *Blue*, 453 F. App'x at 884, and as articulated by the district court, may warrant scrutiny. Two circuits sitting en banc have recently reconsidered their adverse action standards for discrimination claims. *See Hamilton v. Dallas Cnty.*, 79 F.4th 494, 501-02 (5th Cir. 2023) (en banc); *Chambers v. District of Columbia*, 35 F.4th 870, 872-73 (D.C. Cir. 2022) (en banc). The Supreme Court recently heard argument on a related question. *See Muldrow v. City of St. Louis*, 143 S. Ct. 2686 (2023) (mem.) (granting certiorari to decide whether "Title VII prohibit[s] discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage") (argued Dec. 6, 2023).

The Supreme Court in *Burlington Northern*, 548 U.S. at 61-63, 67, further clarified that Title VII's anti-discrimination and anti-retaliation provisions "are not coterminous" because "[t]he language of the substantive provision differs from that of the antiretaliation provision." Indeed, whereas the anti-discrimination provision prohibits discrimination "with respect to … compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), "[n]o such limiting words appear in the antiretaliation provision." *Burlington N.*, 548 U.S. at 62; 42 U.S.C. § 2000e-3(a).

In addition, "Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a workplace where individuals are not discriminated against" because of their protected characteristics whereas "[t]he antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N.*, 548 U.S. at 63.

The Eleventh Circuit, too, has underscored that the two provisions differ. *See Monaghan*, 955 F.3d at 861 ("In contrast to the disparate-

treatment provision, § 2000e-2(a)(1), the retaliation provision is not limited to discrimination with respect to compensation, terms, conditions, or privileges of employment."); *Crawford v. Carroll*, 529 F.3d 961, 974 n.14 (11th Cir. 2008) ("[W]hile the new standard enunciated in *Burlington* applies to Title VII retaliation claims, it has no application to substantive Title VII discrimination claims."); *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1266 (11th Cir. 2021) (noting that the two standards are different), *petition for cert. filed* 2022 WL 4236675 (U.S. Sept. 8, 2022) (No. 22-231). The district court thus used the incorrect standard for a retaliation claim.

B. A reasonable jury could find that Alejandro Leon's physical assault and verbal threat constitute materially adverse actions.

Because the court applied the wrong standard, concluding that "[t]his Alejandro incident does not rise to the level of an adverse employment action," R.87 at 6, it failed to consider whether Alejandro Leon's verbal threat and physical assault of Monteagudo might dissuade a reasonable worker from engaging in protected activity. A reasonable jury could in fact find that Alejandro Leon's behavior—striking Monteagudo and threatening that "if anything happens to my father [Noel Leon], I will

disappear you"—is precisely the type of conduct that could dissuade a reasonable employee from engaging in protected activity.

Indeed, the Eleventh Circuit has held that "threat[s] [of] termination and *possible* physical harm" constituted actionable conduct to support a retaliation claim. *Monaghan*, 955 F.3d at 863 (emphasis added). Here, Monteagudo experienced *actual* physical harm and threats of further harm—or even death. *Cf. Howell v. Baptist Health Sys., Inc.*, No. 2:16-CV-00007-AKK, 2017 WL 4538922, at *8 (N.D. Ala. Oct. 11, 2017) (finding that physical intimidation could "prevent [plaintiff] from raising additional complaints"); *Wharton v. Gorman-Rupp Co.*, 309 F. App'x 990, 998 (6th Cir. 2009) ("Threatening behavior by a vice-president of human resources toward a subordinate employee in the company parking lot, where that employee reasonably feels that violence is a real possibility, is likely to dissuade any reasonable worker from making or supporting a charge of discrimination …."). A jury could thus find that the physical assault and verbal threat could dissuade a reasonable worker from engaging in protected activity.

II. A reasonable jury could find that Alejandro Leon verbally threatened and physically assaulted Monteagudo in retaliation for Monteagudo's complaint against Noel Leon.

The district court also erred by concluding that Alejandro Leon's statement ("if anything happens to my father, I will disappear you") "suggest[ed] Alejandro was trying to protect his father, not retaliate against Plaintiff," and thus that "Plaintiff fail[ed] to show that the altercation was meant to retaliate against Plaintiff for complaining *of discrimination*." R.87 at 6. In so holding, the district court failed to draw "all justifiable inferences … in [Monteagudo's] favor," as required by the established summary-judgment standard. *Anderson*, 477 U.S. at 255.

A reasonable jury could readily find, contrary to the district court's conclusion, that the threat makes apparent that Alejandro Leon physically assaulted and verbally threatened Monteagudo in retaliation for Monteagudo's complaint against Alejandro Leon's father, Noel Leon—indeed, perhaps to "protect" his father from the consequence of the complaint. Courts have found summary judgment inappropriate where, as here, "a reasonable fact finder evaluating the evidence could draw more than one inference from the facts" and the inference in favor of the non-movant "introduces a genuine issue of material fact." *Allen v. Bd. of Pub.*

Educ. for Bibb Cnty., 495 F.3d 1306, 1315 (11th Cir. 2007). For instance, in *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1298–99 (11th Cir. 2012), this Court noted that although the placement of banana peels on a truck may be innocuous, "the adjudicative facts of the record are also susceptible to a very different characterization." Thus, it held, "we shall consider the placement of the banana peels on the truck as racially motivated for purposes of … reach[ing] a jury." *Id.*; *see also Tolan v. Cotton*, 572 U.S. 650, 657-59 (2014) (concluding a jury could reasonably interpret the statement "get your f[***]ing hands off my mom" as either a threat or a son's plea not to continue the assault of his mother, and that the Fifth Circuit, by crediting only one interpretation, "failed to view the evidence at summary judgment in the light most favorable to [the nonmovant]."). Likewise, here, the district court should have inferred that Alejandro Leon's threat to "disappear" Monteagudo if "anything happen[ed]" to his father referred to the possible consequences of Monteagudo's discrimination complaint, rather than unspecified other "protective" purposes.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment as to Monteagudo's Title VII retaliation

claim involving Alejandro Leon's physical assault and threat and remand the case for further proceedings.

Respectfully submitted,

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December 13, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Rule 32-4.

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CERTIFICATE OF SERVICE

I certify that on December 13, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

I further certify that I caused four paper copies of the foregoing brief to be mailed to the Clerk of Court.

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