No. 23-35259

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELZBIETA ASHLEY,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Alaska

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

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STATEMENT OF INTEREST

Congress has charged 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.* In *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006), the Supreme Court held that employers are liable for retaliation under Title VII for conduct that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (internal quotation marks and citation omitted). Overlooking this binding precedent, the district court applied a different and more stringent standard of liability because the plaintiff alleged retaliation in the form of harassment. Retaliation based on harassment, the court said, requires "repeated and ongoing verbal harassment and humiliation" — a standard more consistent with proving a discriminatory hostile-work-environment claim than with proving retaliation.

Contrary to the district court's approach, *Burlington Northern* leaves no room for exceptions. The employment-discrimination statutes prohibit *all* retaliation that "well might have 'dissuaded a reasonable worker from

making or supporting a charge of discrimination,'" including retaliation in the form of harassment.

The EEOC has a strong interest in seeing that courts interpret the employment-discrimination statutes correctly. Accordingly, it offers its views to the Court. The EEOC files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.[1]

STATEMENT OF THE ISSUE

Does the *Burlington Northern* standard for assessing retaliation claims, rather than the "severe or pervasive" standard required to establish a discriminatory hostile-work environment, apply to retaliation taking the form of harassment?

[1] An amicus curiae "must file its brief…no later than 7 days after the principal brief of the party being supported is filed." Fed. R. App. P. 29(a)(6). Typically, the EEOC waits to file its brief until after the party being supported has already filed its principal brief. In light of the potential federal government shutdown, however, and given the significance of the issue, the EEOC files this brief now. *See* Antideficiency Act, 31 U.S.C. §§ 1341(a)(1)(B), 1342.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Elzbieta Ashley, a 71-year-old woman from Poland, began working for Federal Express ("FedEx") in 1998 as a part-time employee in its Anchorage, Alaska facility. R.28-1 at 1. Initially, she loaded airplanes, but in 2005, following a work-related injury, she became a part-time operations agent processing employee timecards. R.28-1 at 1-2. For years, Ashley received positive feedback and awards for her work. R.28-1 at 2. This changed in 2015 when George Kendall became her new supervisor. R.28-1 at 2.

Ashley testified that Kendall criticized her performance and once, early in his tenure, told her that she had "paranoia." R.21-2 at 9; R.28-1 at 3. He also made "frequent comments" about her age, stating, "You are too old for that. You are slowly [sic]. You are too old." R.21-2 at 12. Moreover, she testified, coworkers "repeatedly" asked her "when I was going to 'return' or 'go back' to China." R.28-1 at 4. One coworker referred to her as

[2] References to the record take the form "R.__ at ___," which refers to the district court's docket-entry number and the page number assigned by the court's electronic filing system.

"mafia" between two and ten times; said "Hola Gangster" to her; and once told her to "kiss my ass." R.28-1 at 5, 7; R.34-1 at 92-93.

In June 2017, Ashley cross-filed a discrimination charge with the Alaska State Commission for Human Rights ("ASCHR") and the EEOC. R.21-2 at 49. After she filed the charge, she testified, "[t]he treatment I received got worse." R.28-1 at 5. She alleged that the harassment escalated, individuals deliberately hid her timecards to diminish her productivity, and FedEx took negative personnel actions against her. R.21-2 at 11, 33, 103; R.28-1 at 4-5; R.34-1 at 132. In March 2018, Ashley filed a new charge with the ASCHR and EEOC alleging retaliation for having filed the 2017 charge. R.21-2 at 106.

The instant lawsuit raises claims for retaliation and breach of the implied covenant of good faith and fair dealing. R.8 at 7-8. The complaint does not specify whether Ashley asserts retaliation under federal or state law, R.8 at 5, but the district court considered her administrative charges and determined that she had adequately raised a Title VII claim, R.38 at 14-15.

B. District Court's Decision

The district court granted FedEx's motion for summary judgment. R.38 at 45. An "adverse employment action" in the context of a retaliation claim, the court said, is a materially adverse action that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 17 (quoting *Burlington N.*, 548 U.S. at 68 (citation omitted)). "In some circumstances," the court said, "'repeated and ongoing verbal harassment and humiliation' can rise to the level of an adverse employment action, but typically only when there exists some other form of harm." *Id.* at 21 (quoting and citing pre-*Burlington Northern* cases).

Here, the court reasoned, "The record…does not support Ms. Ashley's claims that Mr. Kendall verbally harassed her to a level approaching 'repeated and ongoing verbal harassment and humiliation' after she filed either ASCHR complaint." *Id.* Moreover, the court said, Kendall's comments "clearly did not have a chilling effect on Ms. Ashley." *Id.* at 23. Thus, the court concluded, his conduct did not amount to an "adverse employment action." *Id.* at 24. The court further held that the comments of Ashley's coworkers did not constitute an "adverse employment action" because "[t]he limited instances in which [they] made

the comments demonstrate that they did not change the conditions of Ms. Ashley's employment or rise to the level of repeated and ongoing verbal harassment and humiliation." *Id.* at 27 (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003)).

ARGUMENT

I. *Burlington Northern*'s prohibition on retaliation that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" applies to all forms of retaliation, including harassment.

The district court applied the wrong legal standard in determining that Ashley's allegations of harassment could not establish a retaliation claim. The court did not consider whether the harassment might well have deterred a reasonable employee from "making or supporting a charge of discrimination," the correct standard for retaliation claims under *Burlington Northern*, 548 U.S. at 68. Rather, the court assessed whether Ashley experienced "repeated and ongoing harassment and humiliation" that was accompanied by "some additional harm" (R.38 at 21)—a framework more consistent with the "severe or pervasive" standard for discriminatory hostile-work-environment claims (although incorrect even for those claims, *see infra* p.11 at n.5).

In *Burlington Northern*, the Supreme Court highlighted the textual distinction between Title VII's antidiscrimination and antiretaliation provisions. The antidiscrimination provision, the Court said, prohibits discrimination "because of…race, color, religion, sex, or national origin," and is "limit[ed]…to actions that affect employment or alter the conditions of the workplace." *Burlington N.*, 548 U.S. at 62 (quoting 42 U.S.C. § 2000e-2(a)). But "[n]o such limiting words appear in the antiretaliation provision." *Id.* (discussing 42 U.S.C. § 2000e-3(a)). Accordingly, Title VII "seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," while the 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." *Id.* at 63 (internal citation omitted).

To fulfill the purpose of the antiretaliation provision, the Court announced a new standard intended to provide "broad protection" from "the many forms that effective retaliation can take." *Id.* at 64, 67. A plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have

dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id*. at 68 (cleaned up). Although the antiretaliation provision "cannot immunize [an] employee from those petty slights or minor annoyances that often take place at work and that all employees experience…[it] prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC.'" *Id*. (cleaned up).

Nothing in *Burlington Northern* authorizes courts to analyze retaliation differently when it takes the form of harassment as opposed to other conduct. The First, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits have recognized as much and analyze *all* claims of retaliation, including that which takes the form of harassment, pursuant to *Burlington Northern*.[3] *See Monaghan v. Worldpay US, Inc*., 955 F.3d 855, 862 (11th Cir. 2020) ("severe or pervasive" standard is inconsistent with

[3] Outlier decisions—including some within the above circuits—describe retaliation-by-harassment claims using the same framework as discriminatory hostile-work-environment claims. None of those cases cites *Burlington Northern* for the relevant proposition. *See, e.g., Maldonado-Cátala v. Mun. of Naranjito*, 876 F.3d 1, 10 & n.11 (1st Cir. 2017); *Baird v. Gotbaum*, 792 F.3d 166, 168-69 (D.C. Cir. 2015); *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 996 (6th Cir. 2009); *Hobbs v. City of Chi.,* 573 F.3d 454, 464 (7th Cir. 2009); *McGowan v. City of Eufala*, 472 F.3d 736, 743 (10th Cir. 2006).

Burlington Northern); *Poullard v. McDonald*, 829 F.3d 844, 857-58 (7th Cir. 2016) (analyzing retaliatory harassment claim by asking if the conduct alleged was "serious enough to dissuade a reasonable employee from engaging in protected activity"); *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 57 (1st Cir. 2010) ("intensification of [preexisting] harassment" could be actionable as retaliation if it could dissuade a reasonable employee from engaging in protected activity"); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 347 (6th Cir. 2008) ("As *Burlington Northern* made clear,…the tests for [discriminatory] harassment and retaliation are not coterminous."); *Weger v. City of Ladue*, 500 F.3d 710, 727-28 (8th Cir. 2007) (considering whether retaliatory harassment "materially and adversely affected [plaintiff's] life such that a reasonable employee in her shoes would be dissuaded from complaining" (citation omitted)); *Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006) (recognizing that after *Burlington Northern*, "severe or pervasive" standard no longer applies to claims of retaliatory harassment); *cf. Laurent-Workman v. Wormuth*, 54 F.4th 201, 216-17 (4th Cir. 2022) (applying *Burlington Northern* to retaliatory harassment claim by assessing whether conduct was severe or pervasive enough to deter a reasonable employee from engaging in protected activity, and noting that *Burlington*

Northern "does not give way simply because retaliation takes the form of a hostile work environment"); *see also EEOC Enforcement Guidance on Retaliation and Related Issues*, 2016 WL 4688886, at *20 (Aug. 25, 2016) ("If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.").

The district court quoted the *Burlington Northern* standard, R.38 at 17, but then imposed additional requirements inconsistent with the Supreme Court's intent to provide "broad protection from retaliation," *Burlington N.*, 548 U.S. at 67. "In some circumstances," the district court said, "repeated and ongoing verbal harassment and humiliation can rise to the level of an adverse employment action,[4] but typically only when there exists some other form of harm." R.38 at 21 (cleaned up). A requirement for additional

[4] The court erred in referring to "an adverse employment action." The Supreme Court has instructed that "one cannot [protect equal employment opportunities] by focusing only upon employer actions and harm that concern employment and the workplace. …An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Burlington N.*, 548 U.S. at 63 (emphasis in original). Thus, retaliation claims involve "adverse actions," not "adverse employment actions."

harm is inaccurate even with respect to discriminatory hostile work environment claims.[5] In any event, all the cases that the court cited in support of this proposition pre-date *Burlington Northern* and are, accordingly, no longer good law. *See* R.38 at 21 (citing *Coszalter v. City of Salem*, 320 F.3d 968, 976-77 (9th Cir. 2003); *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000); *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 869 (9th Cir. 1996)).

The district court departed from *Burlington Northern* in one additional way when it noted that the alleged retaliation did not deter Ashley from complaining of discrimination. *See* R.38 at 23. The *Burlington Northern* standard is objective; the question is whether conduct might deter a reasonable employee, not whether it actually deterred any particular plaintiff. *Burlington N.*, 548 U.S. at 54 ("The Court refers to a *reasonable* employee's reactions because the provision's standard for judging harm

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[5] Verbal harassment alone can be actionable if it is "severe or pervasive." *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."); *EEOC v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 998-1001 (9th Cir. 2010) (jury question whether verbal harassment alone created hostile work environment). No "other form of harm" is required.

must be objective, and thus judicially administrable." (emphasis in original)); *see also Steele v. Schafer*, 535 F.3d 689, 696 (D.C. Cir. 2008) (*Burlington Northern* "expressly forecloses … consideration[]" of "the courage that [the] particular employee demonstrated by reporting [discrimination]").

II. This Court should clarify that *Burlington Northern* applies to claims of retaliation in the form of harassment, and unpublished decisions holding otherwise are incorrect.

No published decision of this Court addresses the impact of *Burlington Northern* on retaliation claims that take the form of harassment. Among the unpublished decisions, only the dissent in *Rispoli v. King County*, 297 F. App'x 713 (9th Cir. 2008)—a case about discovery sanctions—correctly cites *Burlington Northern* to articulate the standard for such claims. "[T]he question whether those actions suffice to establish retaliatory harassment," Judge Berzon stated, "would be purely one of law—namely, whether the challenged action 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id*. at 716 (Berzon, J., dissenting) (quoting *Burlington N.*, 548 U.S. at 68).

All other unpublished decisions addressing retaliatory harassment continue to cite *Ray*, 217 F.3d at 1245, a pre-*Burlington Northern* case that

applies a "severe or pervasive" standard to claims of retaliation in the form of harassment. *See Walia v. Brennan*, 594 F. App'x 400, 401 (9th Cir. 2015); *Jones v. Las Vegas Valley Water Dist.*, 552 F. App'x 623, 624 (9th Cir. 2013); *Knox v. Donahoe*, 540 F. App'x 811, 812 (9th Cir. 2013); *Rose v. Mabus*, 478 F. App'x 435, at *1 (9th Cir. 2012); *Square v. Donahoe*, 430 F. App'x 633, 633 (9th Cir. 2011); *Schlosser v. Potter*, 248 F. App'x 812, 817 (9th Cir. 2007). *Schlosser* does quote language in *Ray* anticipating the *Burlington Northern* standard, 248 F. App'x at 817 (defining retaliation as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity"(quoting *Ray*, 217 F.3d at 1243)), but does not acknowledge that *Ray* simultaneously and erroneously requires that retaliation in the form of harassment be "severe or pervasive," *see Ray*, 217 F.3d at 1245.[6]

This Court should now clarify that retaliation in the form of harassment is actionable if it is sufficient to deter a reasonable employee

[6] *Schlosser* further erred by holding that the retaliatory, harassing phone calls at issue in that case did not amount to an actionable adverse action because they did not result in any employment consequences. *Schlosser*, 248 F. App'x at 817. To the contrary, *Burlington Northern* expressly stated that actionable retaliation need not be related to employment. 548 U.S. at 63; *see generally supra* p.10 at n.4.

from making or supporting a charge of discrimination, whether or not it is severe or pervasive enough to support a discriminatory hostile-work-environment claim. As virtually every other circuit has recognized, this is the only standard consistent with *Burlington Northern*, 548 U.S. at 68.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of the district court and remand for further proceedings.

Respectfully submitted,

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September 28, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 7th Cir. R. 29 because it contains 2,687 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on this 28th day of September, 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.

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