No. 24-3086

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONICA GRAY,
Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. and JOE KYLE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

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 charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing the Americans with Disabilities Act's (ADA) prohibitions on employment discrimination, including retaliation, 42 U.S.C. §§ 12116, 12117(a), 12203(c). The district court committed several legal errors in its analysis of the plaintiff's ADA retaliation claim. Because the EEOC has a substantial interest in the proper interpretation of the ADA, it files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES[1]

1. Whether the plaintiff engaged in conduct protected by 42 U.S.C. § 12203(a) when she assisted her coworker's efforts to retain a reasonable accommodation.

2. Whether there was a causal link between that assistance and the plaintiff's termination.

3. Whether a factfinder could reasonably conclude that retaliation was a but-for cause of the plaintiff's termination, notwithstanding the non-

[1] We take no position on any other issue in the case.

retaliatory reason defendant gave for the termination.

STATEMENT OF THE CASE

A. Statement of the Facts

We rely on the facts as recounted in the district court's opinion. We defer to the parties on any factual disputes not apparent from the face of the opinion.

Plaintiff Monica Gray worked at Defendant State Farm Mutual Automobile Insurance (State Farm) from 2003 until her termination in early 2018. R.52, PAGE ID #3732, 3734. Gray's longtime coworker, Sonya Mauter, was an individual with a disability whom State Farm had been accommodating by exempting her from overtime work. *Id*. at PAGE ID #3732. In August 2017, after Mauter returned from a leave of absence following a car accident, Joe Kyle, State Farm's Team Claims manager, demanded Mauter begin working overtime, telling her that State Farm would no longer accommodate Mauter because the requirements of her position had changed. *Id*. State Farm did not specify how much overtime it expected her to work. Mauter told State Farm that requiring her to work overtime "directly contradicted her doctor's orders," but State Farm

nonetheless required that she obtain a doctor's note clearing her for overtime. *Id*. at PAGE ID #3733.

Upset about the situation, Mauter asked Gray, who had a reputation as a helpful colleague, for assistance retaining her accommodation. *Id*. at PAGE ID #3733-34. In response, Gray researched accommodations under the ADA and asked HR exactly what would be required of Mauter. *Id*. at PAGE ID #3733. Gray coached Mauter on how to discuss her accommodation request and advised her to hire a lawyer and file a charge with the EEOC. In August, Gray also filed a complaint against Kyle with the HR Code of Conduct Hotline regarding Kyle's "treatment" of Mauter. *Id*. Mauter filed an EEOC charge in September and was transferred to the supervision of a different manager in October. During this process, Mauter spoke openly with coworkers about Gray's assistance and Mauter made sure Kyle knew that Gray was helping her. Kyle disciplined Mauter for discussing Gray's help with the accommodation process with coworkers. *Id*.

In November, Gray's manager went on a one-week vacation. *Id*. at PAGE ID #3734. Kyle substituted for him and oversaw Gray and her coworkers. During that time, Kyle reviewed employee attendance

timecards, something that Gray's manager did not regularly do. He noticed computer-generated alerts that Gray had manually entered her time in some instances. This was a widespread, common practice among State Farm employees. *Id*. at PAGE ID #3741. Kyle nonetheless investigated further, comparing Gray's manual entries to her computer activity log, and concluded that there were several discrepancies between when Gray manually entered that she was working and when her computer showed activity. Kyle reported Gray to HR, claiming she had been warned about these entries, although he never spoke to Gray about them. *Id*. at PAGE ID #3734.

Gray's regular supervisor questioned her in mid-December about her timecard discrepancies. *Id*. Gray asserted that Kyle had targeted her for retaliation. She also claimed that some discrepancies between her computer activity and her break-time entries were explained by how much she assisted her coworkers as a team mentor and because she regularly received communications from a State Farm development program. *Id.*

In late December, Gray filed an EEOC charge alleging retaliation. *Id.* A week later, Gray emailed her supervisor and explained three of the eleven timecard discrepancies. But State Farm fired her the next day,

claiming she falsified eleven manual time entries on her November timecard. No other employee was investigated or terminated, and State Farm never investigated Gray's allegation that Kyle had retaliated against her. *Id*. at PAGE ID #3734-35.

B. District Court's Decision

Gray filed an ADA retaliation claim against State Farm, which the district court dismissed at summary judgment.[2]

The district court correctly labeled Gray's claim as an ADA retaliation claim, R.52, PAGE ID #3735, but nonetheless began its legal analysis by reciting the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), standard as it applies to disparate-treatment claims, R.52, PAGE ID #3737. The court then analyzed Gray's claim under what generally appears to be the ADA retaliation standard, asking, with a summary-judgment gloss, whether she engaged in protected activity, whether State Farm knew of that activity, whether that activity was causally related to Gray's

[2] Gray also brought state-law claims against State Farm and Joe Kyle; we do not address those claims.

termination, and whether State Farm's explanation for Gray's termination was pretextual.[3] *Id*. at PAGE ID #3738-43.

The district court held that Gray engaged in protected activity when she filed her own EEOC charge against State Farm on December 24, 2017. *Id*. at PAGE ID #3739. The court then held that State Farm knew of Gray's protected activity, but referred not to Gray's EEOC charge, which is the only activity the court held was protected, but instead to Gray's assistance to Mauter and Gray's HR complaint against Kyle. *Id*. at PAGE ID #3740. The court went on to conclude that Gray's termination was an "adverse employment action" and that there was a causal link between Gray's December 24, 2017, charge and her January 2, 2018, termination, given their close temporal proximity. *Id*. at PAGE ID #3740-41. But, the court held, Gray could not show a factual question as to whether State Farm's articulated reason for firing her—misrepresentations about her time—was pretext for retaliation. *Id*. at PAGE ID #3742-43. According to the court, "State Farm had an 'honest belief' in its nondiscriminatory reason (timecard falsification)," and "Gray fail[ed] to demonstrate that State

[3] At R.52, PAGE ID #3739, the court referred to "FLSA protected activity." This appears to be a typo, as Gray did not bring an FLSA claim.

Farm's proffered reasons were insufficient to motivate their actions." *Id*. at PAGE ID #3743.

ARGUMENT

The district court began its analysis of Gray's retaliation claim by citing the inapposite disparate-treatment analytical framework. It then misapplied what appears to be the retaliation standard, failing to consider whether Gray engaged in protected activity not only by filing an EEOC charge on her own behalf in December, but also by assisting Mauter with her efforts to retain her accommodation in August and into September. Broadening the scope of protected activity in the case would have allowed the court to assess the role that retaliation played in Kyle's decision to investigate Gray for conduct that was apparently widespread and in State Farm's decision to then terminate her. Rather than uncritically crediting State Farm's explanation for its actions at summary judgment, the district court should have considered whether a factfinder could reasonably conclude that Kyle's decision to investigate and report Gray was motivated by retaliation, which would create a genuine dispute of fact regarding causation and pretext, precluding summary judgment.

I. The district court set forth an inapposite legal standard.

The district court began its Law and Analysis section by setting forth the standard for assessing disparate-treatment claims that rely on circumstantial evidence. R.52, PAGE ID #3737. Because Gray brought only a retaliation claim, the disparate-treatment standard is irrelevant to her claim.

As relevant to Gray's retaliation claim, the ADA prohibits discrimination "against any individual [1] because such individual has opposed any act or practice made unlawful by this chapter or [2] because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" the ADA. 42 U.S.C. § 12203(a). The clauses are referred to as the opposition clause and the participation clause, respectively.

In the district court, Gray argued that she proffered sufficient circumstantial evidence of retaliation to satisfy the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. Under that framework, to make out a prima facie case of retaliation, the plaintiff must show (1) that the plaintiff "engaged in a protected activity"; (2) that protected activity was known by the defendant; (3) the plaintiff

subsequently suffered a materially adverse action; and (4) the materially adverse action was causally connected to the protected activity. *Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 514 (6th Cir. 2021) (citing *Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 775 (6th Cir. 2018)).[4] The employer can respond by proffering a "legitimate, non-retaliatory reason for its action, supported by admissible evidence." *Id*. at 515. The plaintiff then must demonstrate the employer's reason is pretext for unlawful retaliation. *Id*. "At the summary judgment stage, a plaintiff meets this burden when [s]he 'produce[s] evidence sufficient that a reasonable finder of fact could reject the employer's proffered reason.'" *Id*. (quoting *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 597 (6th Cir. 2007)).

The district court relied on *Briggs* for the applicable legal standard, but it quoted the portion of the *Briggs* opinion discussing disparate-treatment claims, not retaliation claims. *Compare Briggs*, 11 F.4th at 508 (cited by the district court, discussing disparate treatment), *with id*. at 514 (discussing retaliation). It thus wrongly asserted that Gray must show she

[4] Because the ADA and Title VII prima facie standards are "practically identical," we cite Title VII as well as ADA case law. *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 419 (6th Cir. 2021).

was a member of a protected class, qualified for her position, but nonetheless replaced by, or treated worse than, someone outside her protected class. *See* R.52, PAGE ID #3737-38.

II. The district court failed to consider important aspects of Gray's case and committed legal error in its analysis of Gray's claim.

In its application of law to facts, the district court appears to have generally applied the ADA retaliation framework, albeit one that failed to incorporate the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). But its analysis failed to account for important aspects of Gray's case, including whether Gray's assistance to Mauter was protected activity and whether Kyle's investigation into Gray's timecards was motivated by retaliation, which in turn would affect the analysis of whether her ultimate termination was retaliatory.

A. Gray's assistance to Mauter in requesting a reasonable accommodation was protected conduct.

The district court relied solely on Gray's EEOC charge that she filed on her own behalf to establish that she engaged in protected activity. R.52, PAGE ID #3739, 3742. While filing an EEOC charge is indisputably protected conduct under the participation clause, *see* 42 U.S.C. § 12203(a),

the court should have considered whether Gray's advocacy for Mauter was also protected activity under the opposition clause.[5]

The ADA's anti-retaliation provision's opposition clause is "expansive." *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015). The term "oppose" "carries its ordinary meaning: '[t]o resist or antagonize . . .; to contend against; to confront; resist; withstand.'" *Id.* (quoting *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009)). It protects "not only the filing of formal discrimination charges with the EEOC, but also . . . less formal protests of discriminatory employment practices." *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014); *see also id.* n.4 (noting the "district court erred in considering only the formal Charges the Plaintiff filed with the EEOC"). And it protects not only protestations about one's own mistreatment, but also advocacy against the mistreatment of others in the workplace. *See, e.g., New Breed Logistics*, 783 F.3d at 1067-68; *see also DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015); *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39,

[5] Confoundingly, in its analysis of whether State Farm knew of Gray's protected activity, the court focused on Gray's assistance to Mauter with her reasonable accommodation request and a complaint Gray made to HR, *not* Gray's EEOC charge. R.52, PAGE ID #3740.

47 (1st Cir. 2010). Requests for reasonable accommodation under the ADA are protected activity. *See A.C. ex rel. J.C. v. Shelby Cnty. Bd. of Educ.*, 711 F.3d 687, 698 (6th Cir. 2013).

Gray assisted Mauter in her efforts to retain her reasonable accommodation by asking HR exactly what would be required of Mauter to perform her job, researching accommodations, coaching Mauter on how to discuss her accommodation request, and advising her to seek legal counsel and file a charge of discrimination with the EEOC. R.52, PAGE ID #3733. According to the district court, Kyle was aware of this assistance and disciplined Mauter for discussing it with coworkers. *Id*.

Gray thereby engaged in persistent advocacy for Mauter, serving as her "leading advocate and adviser" in her efforts to retain her accommodation. *See DeMasters*, 796 F.3d at 418. As stated, requesting a reasonable accommodation is protected activity. *See A.C. ex rel. J.C.*, 711 F.3d at 698; *see also* EEOC Enforcement Guidance on Retaliation and Related Issues ("EEOC Guidance") § II(A)(2)(e) (Aug. 25, 2016). Given that the anti-retaliation provision protects opposition conduct on behalf of others, *see New Breed Logistics*, 783 F.3d at 1067-68, assisting a coworker

with a reasonable accommodation request is protected activity as well.[6] *See Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Schs.*, 974 F.3d 652, 662-63 (6th Cir. 2020) (school nurses' advocacy on behalf of students with disabilities was protected conduct); *Zarza on behalf of Zarza v. Bd. of Regents of Univ. of Michigan*, No. 22-1776, 2023 WL 3270899, at *4 (6th Cir. May 5, 2023) (opposing "allegedly unlawful treatment of a disabled" coworker is protected under Rehabilitation Act).

[6] According to the district court, Gray made a formal complaint to HR about Kyle, which Kyle knew about, regarding Kyle's "treatment" of Mauter. R.52, PAGE ID #3733, 3740. The district court does not identify exactly what "treatment" Gray complained about. If, however, Gray complained about Kyle's revocation of Mauter's accommodation, that would also be protected conduct. *See, e.g.*, *New Breed Logistics*, 783 F.3d at 1067-68 (complaining about coworkers' mistreatment is protected conduct); *DeMasters*, 796 F.3d at 418 (plaintiff's protected conduct included reaching out to HR on coworker's behalf); *Collazo*, 617 F.3d at 47 (repeated efforts to get HR to act on coworker's complaint constituted protected conduct); *see also* EEOC Guidance at § II(A)(2)(e) ("Protected opposition includes . . . complaining or threatening to complain about alleged discrimination against oneself or others . . . .").

B. The district court correctly credited Gray's termination as a materially adverse action, albeit under the wrong legal standard.

Moving to the third prong of the retaliation prima facie case, the district court correctly held that termination is a materially adverse action, but it did so under the wrong standard.

The district court claimed that Gray had to show an "adverse employment action" amounting to a "materially adverse change" in "the terms and conditions of employment" to support her retaliation claim. R.52, PAGE ID #3740 (quoting *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999)). That was this Court's standard before the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). But *Burlington Northern* explicitly rejected that standard and announced a different, less demanding one. *Id*. at 59-69; *see also Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 569 & n.3 (6th Cir. 2019) (acknowledging *Burlington Northern*'s rejection of Sixth Circuit standard).

The current standard asks whether a retaliation plaintiff suffered a materially adverse action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Redlin v. Grosse Pointe Pub. Sch. Sys.*, 921 F.3d 599, 614 (6th Cir. 2019) (quoting

Burlington Northern, 548 U.S. at 68). Termination certainly satisfies that standard, and the district court was correct in acknowledging as much, albeit based on the wrong reasoning. R.52, PAGE ID #3740.

C. The district court correctly recognized that temporal proximity can raise a causal inference, but overlooked other evidence of causation.

On the last prima facie element, causation, the district court correctly acknowledged that temporal proximity between protected conduct and a materially adverse action can establish a causal inference. R.52, PAGE ID #3742; *see also Jackson v. Genesee Cnty. Rd. Comm'n*, 999 F.3d 333, 349 (6th Cir. 2021). Temporal proximity connects Gray's termination not just to her EEOC charge, but also to her advocacy for Mauter, which occurred just a few months earlier. *See Kirilenko-Ison*, 974 F.3d at 664–65 (noting this Court has "denied summary judgment where," as in this case, "a defendant took adverse action against a plaintiff just a few months after learning of his or her protected activity").

The district court should also have credited Gray's evidence that she and only she was subject to investigation based on manual timecard entries, even though employees manually entering time was a common practice. R.52, PAGE ID #3741. An employer's increased scrutiny of an

employee following that employee's protected activity, when combined with temporal proximity between that protected activity and a materially adverse action, can establish causation. *See Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 436 (6th Cir. 2009); *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 588-89 (6th Cir. 2009). Here, Gray "was the only employee to be investigated for timecard discrepancies, despite that practice being common among employees." R.52, PAGE ID #3741. The district court discounted that fact, countering that Gray was fired because, unlike other employees, she made "*false* time entries." *Id*. The court did not explain how it was able to conclude as a matter of law that Gray's entries were false, but other employees' entries were not. But even assuming that is the case, retaliation could still be a but-for cause of Gray's termination: had Kyle not targeted Gray for investigation, he would not have discovered her allegedly false entries and she would not have been fired. After all, Gray need only show that a factfinder could reasonably conclude her protected activity was *a* but-for cause of her termination, not the *only* cause. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013); *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) ("Often, events have multiple but-for causes.").

D. The district court should not have credited State Farm's explanation for terminating Gray without considering the context surrounding that explanation.

Finally, turning to pretext, the district court credited an "honest belief" on State Farm's part that Gray falsified her time entries, holding as a matter of law that Gray's retaliation claim therefore was unsalvageable. But an honest belief that Gray engaged in some misconduct is immaterial if that was not State Farm's "true reason" for firing her. *George v. Youngstown State Univ.*, 966 F.3d 446, 459 (6th Cir. 2020) (quotation marks omitted). The district court failed to take its analysis this one step further, thereby ignoring what it had acknowledged mere pages earlier: that Gray "was the only employee to be investigated for timecard discrepancies, despite the practice being common among employees." R.52, PAGE ID #3741. Even granting for the sake of argument that State Farm had an honest belief that Gray falsified her timecards, the question remains why she and only she was investigated and punished for it.

In addition to bolstering the causal link between protected activity and adverse action, an employer's increased scrutiny of an employee after the employee engaged in protected conduct can also establish pretext. *Hamilton*, 556 F.3d at 436 (citing *Jones v. Potter*, 488 F.3d 397, 408 (6th Cir.

2007)). "[T]he very definition of pretext," this Court has said, is waiting "for a legal, legitimate reason to fortuitously materialize, and then us[ing] it to cover up [the employer's] true, longstanding motivations for firing the employee." *Id*. Put slightly differently, an employer's allegedly retaliatory motivation for investigating a plaintiff can be evidence that any action taken based on misconduct discovered during that investigation was likewise retaliatory. *See Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 349 (3d Cir. 2022) (employer's allegedly retaliatory motive for searching plaintiff was relevant to pretext, even though search uncovered evidence of wrongdoing by plaintiff); *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 646 (7th Cir. 2013) (holding evidence supported inference that employer's investigation of plaintiff was "prompted by the defendants' desire to construct a case for [plaintiff's] termination"); *Fisher v. Lufkin Indus., Inc.*, 847 F.3d 752, 759-60 (5th Cir. 2017) (where desire to retaliate motivated investigation, it was proximate cause of plaintiff's termination, notwithstanding plaintiff's intervening refusal to participate in investigation).

On the record as described by the district court, a factfinder could conclude that State Farm, via Kyle, investigated Gray looking for a reason

to fire her. If its discovery of misconduct that might otherwise justify termination arose only because it targeted her, then her termination was retaliatory. The court did not consider this nuance.

And even if Kyle's discovery of Gray's timecard discrepancies was happenstance, the fact that she and only she was punished, "despite the practice being common among employees," R.52, PAGE ID #3741, likewise raises a factual question regarding pretext. As a matter of common sense, and as a matter of this Court's case law, selective enforcement of workplace policies is evidence of retaliation. *See, e.g.*, *Hedrick v. W. Rsrv. Care Sys.*, 355 F.3d 444, 460 (6th Cir. 2004) (one way to show pretext is to provide "evidence that other employees . . . were not fired even though they engaged in substantially identical conduct"); *see also Spengler v. Worthington Cylinders*, 615 F.3d 481, 494-95 (6th Cir. 2010) (evidence of selective enforcement of discharge rule sufficiently rebutted employer's proffered reason for discharge at summary judgment); *cf. Laster*, 746 F.3d at 732 (evidence of selective enforcement of workplace rule against plaintiff contributed to finding that plaintiff suffered a materially adverse action).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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May 16, 2024

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 3,744 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(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 May 16, 2024, 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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ADDENDUM

Designation of Relevant District Court Documents

Record Entry #	Document Description	Page ID # Range
52	District Court Decision	3732-3744