No. 23-03132

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GERALD MINNITI,
Plaintiff-Appellant,

v.

CRYSTAL WINDOW & DOOR SYSTEMS PA, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

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 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal presents important questions about the scope and application of Title VII's antiretaliation provision. Because the EEOC has a substantial interest in the proper interpretation of Title VII, it offers its views to the Court pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES[1]

1. Whether Plaintiff-Appellant Gerald Minniti engaged in protected activity under Title VII when he stated his opposition to, and refused to carry out, the firing of the only two Black employees at the plant he managed when they did not report to work for medical reasons.

2. Whether Minniti adduced sufficient evidence to support a reasonable jury finding that the defendant terminated him in retaliation for his protected activity.

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

STATEMENT OF THE CASE

A. Statement of the Facts

Defendant Crystal Window & Door ("Crystal") hired Minniti to manage its Benton, Pennsylvania manufacturing plant in September 2019. SAppx136, 138. Minniti's boss, Chief Operating Officer Andy Shashlo, oversaw the operations of all of Crystal's plants. SAppx251. Although Shashlo was based in New York, he visited the Benton plant weekly. SAppx146, 252.

Crystal tasked Minniti with making the financially struggling plant more profitable, which Minniti told the company would not be "an overnight thing." SAppx136, 139. According to Minniti, the facility, which had been open for five years, was rife with personnel and productivity problems. SAppx136, 137-38. Minniti was determined to bring "a positive energy and attitude to the plant and change it." SAppx136. He moved the management offices closer to the plant floor and introduced incentive pay to motivate the hourly production workers. SAppx136-37. Human Resources (HR) official Amanda Cardillo,[2] who took daily attendance and

[2] Amanda Cardillo is now Amanda Mannheimer. SAppx339.

maintained employee records at the plant, testified that she and Minniti were "a great team," he "was a very fair person" who treated everyone the same, and he created "a very nice working environment." SAppx342.

Minniti testified that he was beginning to make "headway" with hiring the right personnel when the COVID-19 pandemic hit. SAppx138. Crystal shut down the plant in March 2020 for three days after an employee was rumored to have tested positive for the virus and employees walked out. SAppx140-42, 340-41. Because Crystal manufactured windows "for hospitals, schools, banks, [and] jails," it was considered an essential business and allowed to stay open. SAppx341. The plant continued to produce windows and doors that would be ready when construction sites began receiving inventory. SAppx148. Minniti testified that "the plant had windows on every square inch of that building because we could not ship. Job sites were shut down all across New York, Pennsylvania—everywhere. You could not ship a window anywhere because there was no one on site to take them or install them." *Id.*

In the spring of 2020, Crystal was losing money because customers were not receiving the company's products during the height of the pandemic. SAppx148. Most management-level officials, including Minniti,

were furloughed in late March and early April. SAppx158, 258. Minniti attended regular meetings remotely and visited the plant periodically on and off until the end of May, when he returned to the plant full time. SAppx142-43.

Soon after Minniti returned to managing the plant in person, Shashlo detailed a list of concerns regarding a "lack of progress" in the plant's financial situation in a June 10 email and noted that he would follow up with Minniti on June 15. SAppx235. Minniti responded with his plans for addressing each item but testified that he believed Shashlo's criticism was unfair as he had been furloughed the prior two months and the plant's troubles were largely outside his control because of the pandemic. SAppx147-49. Shashlo also informed Minniti that he and other senior managers would be receiving a pay cut due to the company's financial situation. SAppx144, 158, 258. However, Minniti was hopeful that business would soon improve; he testified that, starting in June, "[construction] jobs were finally opening up." SAppx148. Minniti recalled that he told Shashlo, "[T]his is going to be the month that we start to get healed in here because we got windows everywhere." *Id.*

On June 16, production employees Sammy Alberran and Dwayne Parker, both of whom are Black, were absent from work. SAppx151. Shashlo, who was visiting the plant that day, told Minniti and Cardillo that both men needed to be fired.[3] SAppx152. Cardillo responded that each had called in with medical excuses and, in accordance with Crystal's policy, they would bring in medical documentation upon their return to the plant, but Shashlo said he didn't care if they had excuses and directed Minniti to fire them. *Id.* Minniti advised Shashlo that "these were the only two African-American employees that we had and it wasn't going to work. It was going to look bad." SAppx152, 165. When Minniti warned Shashlo that firing the only two Black employees would expose the company to litigation, Shashlo responded, "They can't afford an attorney anyway." SAppx165.

Minniti was asked at his deposition why he pointed out to Shashlo that the two employees were Black. He responded that it was "[b]ecause I told [Shashlo] they were both out on excused [absences]" and "would

[3] Minniti testified that Shashlo was familiar with all the Benton plant employees and "absolutely knew" that Alberran and Parker were Black. SAppx165.

bring notes in when they came back and he didn't care." SAppx165. "And at that point," Minniti added, "I felt it was—it turned race…. And I pointed out that they were the only two African-Americans in my plant. This is not going to look good…. This is wrong." *Id.* Minniti emphasized that "[a]nybody else that came in with excused absences were never questioned to be terminated" and that Alberran and Parker followed "exactly the protocol [for] the Crystal policy." SAppx165-66. Minniti told Shashlo, "[N]o, I'm not terminating them. They have the notes." SAppx166. Minniti did not fire either employee.[4] *Id.*

The following day, June 17, he met with Cardillo to report that he believed Shashlo was going to fire him if he did not fire Alberran and Parker. SAppx152-53. That same day, Cardillo wrote and signed a statement summarizing that Minniti was filing a complaint "about his concerns about firing certain employees due to Andy's discretion. The said employees did provide [C]rystal PA with hospital notes for reasons as to why they missed work. Jerry was concerned for the employees because

[4] Crystal terminated Parker on June 24 for "disrespectful attitude," SAppx269-70, and Alberran voluntarily resigned on July 9. SAppx267.

they are both of race and haven't missed many days." SAppx236. Cardillo testified Minniti "did say he was worried about their race, but it was the color of their skin. I didn't know a nice way to put that down, so I put both of race." SAppx357. She also noted that "[i]f an employee provides a valid excuse then the absence is excused. Both employees had turned in excuses." SAppx236.[5] Cardillo added that Minniti "was concerned because they were both of the same race, and they didn't miss any days, and it was a shock to Jerry that Andy really wanted them fired." SAppx342. Minniti testified that Shashlo asked him on Friday, June 19, if he had fired Alberran and Parker, to which Minniti said no. SAppx165. Minniti recounted, "that was the writing on the wall…. I felt very threatened when it happened." *Id.*

June was the most profitable month in the plant's history. SAppx148; SAppx273. Nonetheless, on June 23, Shashlo directed Cardillo to fire Minniti. SAppx342. Shashlo gave her no reason for the decision, *id.*; Cardillo testified that she never observed any performance problems with Minniti, SAppx345, and his firing "came out of nowhere." SAppx348. The termination letter, which Shashlo signed, stated that Crystal "is

5 Parker and Alberran submitted doctor's notes explaining their June 16 absence by June 19. SAppx152.

implementing a layoff of certain positions," including Minniti's, "to ensure the financial stability of the company." SAppx238.

Crystal replaced Minniti as plant manager and gave two other employees raises to take on more responsibility after Minniti's termination. SAppx157-58. Crystal later maintained that it fired Minniti for performance reasons. SAppx270-71. Shashlo conceded that there were problems at the plant before Minniti took over as manager but maintained that Minniti was "not the right person to fix [them]." SAppx270. Minniti sued the company for retaliation under, inter alia, Title VII. SAppx95-96.

B. District Court's Decision

The district court granted Crystal's motion for summary judgment, ruling that Minniti's statements to Shashlo and refusal to carry out Shashlo's order to fire Parker and Alberran were "too equivocal to constitute protected activity," Appx20, and "cannot reasonably be interpreted as having opposed unlawful racial discrimination." Appx19. Because Minniti did not explicitly articulate a contemporaneous belief that Shashlo was motivated by race discrimination when he directed Minniti to fire Parker and Alberran, the court stated, no reasonable person could

subjectively or objectively have believed Minniti was opposing discrimination. Appx21.

According to the court, a plaintiff claiming retaliation for opposing discrimination "'must have stood in opposition to it—not just objectively reported its existence or attempted to serve as an intermediary.'" Appx19 (quoting *Moore v. City of Phila.*, 461 F.3d 331, 350 (3d Cir. 2006)). Minniti "merely stated that it would 'look bad' to fire two African American employees," the court said, "not that it would be discriminatory to so do, or that he felt the request was animated by discriminatory animus." *Id.* And, the court pointed out, Minniti failed to point to evidence that Shashlo even knew the employees were Black until after he requested their firing and Minniti told him. Appx21. The court further cited a lack of white comparators absent under similar circumstances where Shashlo did not order their termination. *Id.*

The court characterized Shashlo's directive to fire the Black employees as "rash and problematic" given that they followed Crystal's policy but asserted that "it is undisputed that employee attendance at the Plant was a problem, and employees were routinely fired for absenteeism." *Id.* Thus, the court surmised, "It is not unthinkable that Shashlo would

request the termination of employees who did not report for their scheduled shifts." *Id.*

Because the district court ruled that Minniti failed to establish a prima facie case of retaliation, it did not rule on whether Minniti offered sufficient evidence of pretext to reach a jury. But the court observed that "there are significant reasons to question whether Crystal's proffered legitimate, non-retaliatory reasons for terminating Minniti's employment are merely pretextual," which it detailed in a footnote. Appx17 & n.75. This pretext evidence includes: (1) Minniti's termination just one week after he refused to fire Parker and Alberran; (2) Minniti's nine-month tenure on the job and Crystal's understanding that turning the plant around financially would take years; (3) the fact that Minniti was furloughed for two months during the pandemic, during which he could do nothing to help the plant be more profitable; (4) the effect of the global pandemic, which so negatively affected the plant's financial stability that no manager could have remedied it by the spring of 2020; and (5) Minniti's termination letter, which said he was being terminated due to company finances, while other employees received raises and a new manager was hired three months

later. The court stated that the company "provides no reasonable explanation for Minniti's termination." Appx17-18 & n.75.

ARGUMENT

A reasonable jury could find Crystal retaliated against Minniti for engaging in protected activity under Title VII.

Title VII prohibits employers from taking materially adverse action against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Retaliation claims that rely on circumstantial evidence follow the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), under which it is the plaintiff's burden to make out a prima facie case of retaliation. If the employer then "provide[s] a legitimate, non-retaliatory reason for its action," the plaintiff may then show "that the employer's response is merely a pretext." *Kengerski v. Harper*, 6 F.4th 531, 536 n.3 (3d Cir. 2021).

In this Court, a prima facie case of retaliation requires the plaintiff to proffer evidence that he engaged in protected activity, that his employer took a materially adverse action against him, and that his "protected activity was the *likely* reason" for the adverse action. *Carvalho-Grevious v.*

Del. State Univ., 851 F.3d 249, 259 (3d Cir. 2017). Causation, the third prong of the prima facie case, can be established through a range of circumstantial evidence, including temporal proximity between the protected activity and the adverse action. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279-81 (3d Cir. 2000).

Ultimately, as the Supreme Court has explained, "[t]he text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim … must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). At the pretext stage, the plaintiff must demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions from which a reasonable juror could conclude that the Defendants' explanation is unworthy of credence, and hence infer that the employer did not act for the asserted [non-retaliatory] reasons." *Carvalho-Grevious*, 851 F.3d at 262 (cleaned up); *see also Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 306 (3d Cir. 2007), *as amended* (Aug. 28, 2007) (in state-law retaliation case interpreted in tandem with the ADEA, a "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to

conclude that the employer unlawfully [retaliated]") (alteration in original; cleaned up).[6]

A. A reasonable jury could find that Minniti engaged in protected opposition under Title VII.

The district court granted summary judgment based only on the first element of the prima facie case, ruling that Minniti's statements and conduct regarding Crystal's proposed termination of Parker and Alberran did not constitute activity protected by Title VII. The court erred because a jury could find that Minniti reasonably believed that he was opposing Shashlo's termination order because of the race of its targets.

The Supreme Court addressed the meaning of the word "oppose" in *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271, 277 (2009). "'Oppose,'" the Court explained, "goes beyond 'active, consistent' behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a

[6] As this Court noted in *Marra*, "[s]ubsumed in this inquiry … is consideration of whether there is a sufficient causal connection between the protected activity and adverse action, meaning any difference in our analysis at this stage [from the prima facie case] is probably more semantic than substantive." 497 F.3d at 301 n.13 (reviewing jury verdict for sufficiency of evidence) (cleaned up).

position beyond disclosing it.… And we would call it 'opposition' if an employee took a stand against an employer's discriminatory practices not by 'instigating' action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons." *Id.* Title VII accordingly protects a broad array of activity that falls within the meaning of opposition. *See* 42 U.S.C. § 2000e-3(a); EEOC Enforcement Guidance on Retaliation and Related Issues § II(A)(2)(a), 2016 WL 4688886, at *7 (Aug. 25, 2016) ("Retaliation Guidance"); *cf. Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 67 (2006) ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses …. Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.").

"'Opposition' to discrimination" includes "informal protests of discriminatory employment practices, including making complaints to management," *Moore v. City of Phila.*, 461 F.3d 331, 343 (3d Cir. 2006) (quoting *Curay-Cramer v. Ursuline Acad. Of Wilmington, Del.*, 450 F.3d 130, 135 (3d Cir. 2006)). Whether conduct is protected opposition is a fact-

specific inquiry that depends on the surrounding context; "there is no hard and fast rule," and courts "evaluate the facts of each case in light of the statutory language and legislative intent." *Curay-Cramer,* 450 F.3d at 135 ("[I]t must be possible to discern from the context of the statement that the employee opposes an unlawful employment practice.").

To be covered under Title VII, the discrimination the plaintiff opposes must be "based on a protected category, such as … race." *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015) (citations omitted). This Court has held that protected opposition "must not be equivocal," *Moore*, 461 F.3d at 341, or "vague." *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, `702 (3d Cir. 1995). These qualifications serve to preclude retaliation claims where the employee wholly fails to communicate that he believes the employer is discriminating because of a protected trait. *Compare Barber*, 68 F.3d at 701-02 (holding that plaintiff's letter complaining of unfair treatment was unprotected because it made no allegation that the treatment was due to a protected characteristic), *with Robinson v. Se. Penn. Transp. Auth.,* 982 F.2d 892, 897 (3d Cir. 1993) (letter complaining of management's "blatant racism" and stating that the matter "could end up in court very soon" was not too vague to suggest plaintiff's opposition), *and Vermeer v.*

Univ. of Del., No. 21-1500-RGA, 2024 WL 81291, at * 12 (D. Del. Jan. 8, 2024) (communications to university committee comparing plaintiff's evaluation to those of male tenure candidates were protected opposition because they "allege gender discrimination and are not too vague").

An employee need not use any special words or terminology to convey his opposition, so long as he makes it clear that he is opposing conduct that falls within Title VII's ambit. As this Court has observed, the opposition analysis focuses on "the message being conveyed rather than the means of conveyance." *Curay-Cramer*, 450 F.3d at 135. *See also id.* ("[O]pposition to an illegal employment practice must identify the employer and the practice … at least by context."); Retaliation Guidance § II(A)(2)(a), 2016 WL 4688886, at *8 ("The opposition clause applies if an individual explicitly or implicitly communicates his or her belief that the matter complained of is, or could become, … discrimination. The communication itself may be informal and need not include … legal terminology, as long as circumstances show that the individual is conveying opposition or resistance to a perceived potential EEO violation.").

Consequently, "[w]hen an employee communicates to her employer a belief that the employer has engaged in … a form of employment discrimination, that communication *virtually always* constitutes the employee's *opposition* to the activity." *Crawford*, 555 U.S. at 276 (first emphasis added; alteration and quotation marks omitted) (citing Brief for United States as Amicus Curiae Supporting Pet'r, 2008 WL 1757590, at *9). Moreover, an employee claiming retaliation "'need not prove the merits of the underlying discrimination complaint' in order to seek redress." *Moore*, 461 F.3d at 344 (quoting *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996)); *Kengerski*, 6 F.4th at 536-37. *See also* Retaliation Guidance, § II(A)(2)(c), 2016 WL 4688886, at *9 (U.S. 2008) (explaining that "a retaliation claim based on opposition is not defeated merely because the underlying challenged practice ultimately is found to be lawful" and that it is sufficient for the complaining employee to hold "a reasonable good faith belief that the conduct opposed violates the EEO laws, or could do so if repeated"). Ultimately, "[t]he crux of a retaliation claim is reasonableness: employees are protected from retaliation whenever they make good-faith complaints about conduct in their workplace they reasonably believe violates Title VII." *Kengerski*, 6 F.4th at 542.

A jury could find Minniti opposed discrimination in a manner triggering Title VII's protection by voicing his disagreement with Shashlo's direction to fire the plant's only two Black employees, reporting his discomfort with Shashlo's order and its racial implications to HR, and refusing to carry out the termination. As described above, the record reflects that, when Shashlo insisted that Minniti fire Alberran and Parker for their June 16 absence notwithstanding their medical excuses, Minniti pointed out that the two men were the only two Black employees at the plant and that firing them was "going to look bad" and could invite a lawsuit against the company. *See supra* p. 5. According to Minniti, even after he mentioned Alberran and Parker's race and that they were absent for excused reasons, Shashlo said he "didn't care" and that Alberran and Parker couldn't afford a lawyer anyway. SAppx152, 165.

At that point, Minniti testified, "it turned race. And I pointed out … [t]his is wrong.… Anybody else that came in with excused absences were never questioned to be terminated." SAppx165-66. Then, fearing Shashlo would fire him in retribution for not firing Alberran and Parker as directed, he met with HR to document his concerns and reported to Cardillo that Shashlo was targeting the two employees because of their race. *See supra*

pp. 6-7. Because Minniti's statements and conduct, taken in context, would support a finding that he reasonably believed Shashlo was discriminating because of race, his opposition was protected by Title VII.

The district court made several errors of law in ruling otherwise. First, the court erred in holding that Minniti's conduct was unprotected because his statements were insufficiently clear and unequivocal to constitute protected opposition. *See supra* pp. 8-9. A jury could find that, taken as a whole, Minniti's statements to Shashlo, his report to Cardillo, and his refusal to fire the employees conveyed his belief that Shashlo was discriminating against Alberran and Parker because of their race. Contrary to the district court's characterization of the facts, Minniti did not "merely" state that it would "look bad" to fire two Black employees (Appx19)—he also repeatedly refused to fire them after pointing out that their absences were excused and that their termination could expose the company to litigation. Minniti then went to HR to report what he believed was a racially discriminatory act that he feared would lead to his own firing, which indeed happened only seven days later.

As explained *supra* p. 16, the law did not require Minniti to say that Shashlo was "engaging in race discrimination" to establish protected

opposition. Minniti made an explicit connection between the two employees' race and Shashlo's decision to terminate them for their absences on June 16 despite having excused medical reasons per Crystal's policy. Minniti therefore did enough to support a jury finding that he sufficiently communicated a reasonable, good-faith belief that Shashlo was engaging in discrimination prohibited by Title VII.

The district court also erred by relying on *Moore* to support its holding that Minniti simply "reported" rather than "opposed" discrimination. Appx19-20 & nn. 83, 85. *Moore* was decided three years before *Crawford*, in which the Supreme Court clarified that opposition means the same thing in this context as in ordinary discourse, including "someone who has taken no action at all to advance a position beyond disclosing it." *Crawford*, 555 U.S. at 277; *see supra* pp. 13-14. To the extent *Moore*'s standard is in tension with *Crawford*, the Supreme Court's subsequent decision controls. *See United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009) (recognizing the "overriding principle that, as an inferior court in the federal hierarchy, we are, of course, compelled to apply the law announced by the Supreme Court as we find it on the date of our decision") (cleaned up).

Nevertheless, this Court could still find the part of *Moore* on which the district court relied to be distinguishable from Minniti's case. According to the *Moore* Court, the plaintiffs recounted the onset of racial problems within their police squad prior to December 1997 in "neutral" terms. 461 F.3d at 350. As one plaintiff testified, he told the new squad supervisor that two named officers, who were Black, "feel like" the supervisor was "not talking to them" and "[t]hey're not getting a fair deal." *Id.* He explained, "I didn't say anything that [the supervisor is] right or wrong.… I was just trying to be the middle man just to resolve this." *Id.* But in this case, for the reasons described above, a jury could find that Minniti clearly communicated to Shashlo that he thought race was at issue and that Shashlo's conduct was wrong. Indeed, Minniti refused to be the "middle man" when he would not carry out what he considered to be Shashlo's discriminatory termination order. Minniti's refusal further reinforces that he reasonably and in good faith thought Shashlo was engaging in illegal discrimination. *See Crawford*, 555 U.S. at 277 ("standing pat" by refusing to follow a supervisor's order to fire a subordinate for discriminatory reasons is protected opposition).

Somewhat confusingly, as part of its protected-opposition analysis, the district court then faulted Minniti for failing to offer evidence that Shashlo knew Alberran and Parker were Black. Appx21. A jury would not be compelled to agree with the court in light of Minniti's testimony, first, that Shashlo visited the plant weekly and knew Alberran and Parker, and second, that Minniti expressly stated to Shashlo that the two men were the only Black employees there, after which Shashlo continued to insist on their termination. *See supra* p. 5. But, in any event, whether Shashlo knew that the two men were Black—or intended to discriminate—is irrelevant to whether *Minniti* reasonably believed in good faith that he was opposing discrimination.[7]

Finally, by ruling that Minniti failed to engage in conduct protected by Title VII, the district court resolved disputed factual issues in Crystal's favor. *See Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1080-81 (3d Cir.

[7] At least in theory, Shashlo's knowledge of Alberran's and Parker's race could be relevant to the causation analysis. If it were true that Shashlo had no idea the two employees were Black when he ordered them fired, a reasonable jury could conclude that he lacked the requisite intent to discriminate against Minniti because he would have had no idea Minniti was opposing race discrimination. But, again, a reasonable jury would not be compelled to make that finding on this record.

1996) ("[T]he facts asserted by the nonmoving party, if supported by affidavits or other evidentiary material, must be regarded as true; and the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.") (cleaned up). Although it is undisputed that absenteeism at the plant was a problem, largely because of the COVID pandemic, the court's surmising that "it is not unthinkable that Shashlo would request termination of employees who did not report for their scheduled shifts," Appx21, misses the point. Cardillo, who took daily attendance and maintained employee files, testified that Crystal's policy was not to terminate employees for missing work if they had medical documentation for their absences, which both Alberran and Parker produced. Minniti reported that it was Shashlo's departure from this policy that made him think Shashlo's decision could be based on the men's race. An employer's failure to follow its own policies can be evidence of discrimination. *See Hampton v. Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 113-14 (3d Cir. 1996) (discrepancies in evaluation process for promotion decision precluded summary judgment); *EEOC v. Navy Fed'l Credit Union*, 424 F.3d 397, 409 (4th Cir. 2005) (employer's failure to follow its probation policy was evidence of retaliation); *cf. Vill. of*

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (in housing discrimination action, "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role").

B. A reasonable jury could find that Minniti adduced sufficient evidence of retaliation for trial.

The district court did not decide whether Minniti established an inference of causation for purposes of the prima facie case or whether he created a fact issue on pretext. But should Crystal argue, as it did below, that Minniti offered insufficient evidence to support a finding that his protected opposition was the likely reason for his termination and that the company's stated reasons for firing him were a pretext for discrimination, neither ground should prevent the case from going to a jury.

1. A jury could infer causation for purposes of Minniti's prima facie case of retaliation.

This Court has held that close timing between protected activity and an adverse action can, standing alone, satisfy the causation element of a prima facie case. *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 221 (3d Cir.

2017).[8] It has also stated that "[a]n inference of 'unduly suggestive' temporal proximity begins to dissipate when there is a gap of three months or more." *Id.* (quoting *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007)). Although unusually suggestive timing alone may establish the requisite intent, courts can consider other types of evidence as well. *Farrell*, 206 F.3d at 280–81 (reversing the district court's overly restrictive view of the type of evidence that can be considered probative of the causal link and stating, "it can be other evidence gleaned from the record as a whole from which causation can be inferred"); *see also Kachmar v. SunGuard Data Sys.,* 109 F.3d 173, 178 (3d Cir. 1997) (holding that an absence of immediacy between protected conduct and adverse action does not disprove causation and stating that "it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an

[8] Evidence of temporal proximity may also be offered "to discredit an employer's justification at the third step of the *McDonnell Douglas* analysis," *Proudfoot v. Arnold Logistics, LLC*, 629 F. App'x 303, 308 (3d Cir. 2015), where "the timing of the alleged retaliatory action" is "unusually suggestive of retaliatory motive," *Ross v. Gilhuly*, 755 F.3d 185, 194 (3d Cir. 2014). *See also* Appx17 n.75 (including as evidence of pretext Minniti's termination just one week after he refused to fire Parker and Alberran).

inference can be drawn"). Among the kinds of evidence that a plaintiff can proffer are intervening antagonism or retaliatory animus, inconsistencies in the employer's articulated reasons for terminating the employee, or any other evidence in the record sufficient to support the inference of retaliatory animus. *Farrell*, 206 F.3d at 281.

As discussed above, Minniti engaged in protected activity on June 16-17 and was fired a week later, on June 23. The fact that Minniti's termination came so soon after he engaged in protected activity is sufficient to raise a genuine issue of material fact on the question of prima facie causation. The ultimate question of what caused Shashlo to decide to fire Minniti is a question of fact for a jury. *See Kachmar,* 109 F.3d at 179 (cause of termination presents a factual question).

Crystal argued to the district court that Minniti could not establish a causal connection between his June 16 conversation with Shashlo and his termination because its financial problems and issues with Minniti's work performance predated June 16. It also asserted that because only Shashlo knew of the June 16 conversation and he was one of four decisionmakers, there was no causal connection between Minniti's refusal to fire Parker and Alberran and his termination. R.31 at 2, 15-17 (Def. Reply). But a jury

would not have to accept these justifications. For example, a jury could note that Shashlo was still thinking about the June 16 incident when he followed up with Minniti on Friday, June 19, to ask whether he had fired Parker and Alberran, and Minniti responded no. SAppx165. Four days later (including a weekend), Shashlo signed Minniti's termination letter and directed Cardillo to inform him he was fired. The evidence indicates that the Benton plant was struggling financially years before Minniti became its manager and the pandemic exacerbated its economic woes. *See supra* pp. 2-3. These facts only amplify the evidentiary weight of the suspicious timing between Minniti's protests to Shashlo about Parker and Alberran's firing and his own almost immediate firing a week later.

2. A reasonable jury could determine that Crystal's stated nondiscriminatory reasons for terminating Minniti are a pretext for discrimination.

Finally, for all the reasons the district court itself acknowledged, a jury could disbelieve Crystal's explanation that it terminated Minniti because of the plant's financial woes and Minniti's alleged inability to remedy them. The district court catalogued what it termed "significant reasons to question whether Crystal's proffered legitimate, non-retaliatory reasons for terminating Minniti's employment are merely pretextual,"

observing that "[t]he facts strongly suggest that Minniti was terminated for reasons other than Crystal's financial condition and his performance." Appx17 & n.75 (listing evidence). The court's inventory of pretext evidence included, among other key facts, Minniti's relatively short stint as a plant manager inheriting a struggling business that was expected to take significant time to make profitable and the unprecedented and unpredictable setbacks caused by the COVID pandemic. *See id.* Additionally, HR official Cardillo, who worked closely with Minniti, testified that he was a good manager who treated everyone well; she said she knew of no performance issues and was surprised by his firing. SAppx342, 348. And the company had its most profitable month ever in June 2020, once its construction clients began receiving Crystal's products following a virtual business shutdown in the spring of 2020 at the height of the pandemic. SAppx148, 273. A jury could find it suspicious that Shashlo decided to fire Minniti without waiting to see if this positive trajectory continued.

As the district court said, "Crystal provides no reasonable explanation for Minniti's termination." Appx17-18 n.75. Because the court

already determined that there are multiple genuine disputes of material fact as to pretext, we urge this Court to remand the case for trial.

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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April 22, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to 3d Cir. L.A.R. 28.3(d) & 46.1(e), I certify that, as an attorney representing an agency of the United States, I am not required to be admitted to the bar of this Court. *See* 3d Cir. L.A.R. 28.3, comm. cmt. I also certify that all other attorneys whose names appear on this brief likewise represent an agency of the United States and are also not required to be admitted to the bar of this Court.

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5,697 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 3d Cir. L.A.R. 29.1(b). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Office 365 ProPlus in 14 point Book Antiqua, a proportionally spaced typeface.

Pursuant to 3d Cir. L.A.R. 31.1(c), I certify that the text of the electronically filed version of this brief is identical to the text of the hard copies of the brief that will be filed with the Court. I further certify pursuant to 3d Cir. L.A.R. 31.1(c) that, prior to electronic filing with this

Court, I performed a virus check on the electronic version of this brief using Microsoft Defender Antivirus version 1.409.343.0, and that no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on April 22, 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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