No. 24-1781

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SCOTT THATCH,
Plaintiff-Appellant,

v.

FEDEX FREIGHT, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

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

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest 1

Statement of the Issues 1

Statement of the Case 2

A. Statement of the Facts 2

B. District Court's Decision 4

Argument 5

I. *Muldrow* changed the adverse action standard for discrimination claims to "some harm." 6

II. Retaliation claims use the *Burlington Northern* dissuade-a-reasonable-worker standard for adverse actions. 10

Conclusion 12

Certificate of Compliance 13

Certificate of Service .....

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Anne Arundel Cnty. Pub. Schs.,
789 F.3d 422 (4th Cir. 2015) 4, 6

Boone v. Goldin,
178 F.3d 253 (4th Cir. 1999) 6, 8

Bostock v. Clayton Cnty.,
590 U.S. 644 (2020) 6, 7

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 2, 10, 11

Holland v. Washington Homes, Inc.,
487 F.3d 208 (4th Cir. 2007) 4

Jackson v. Lightsey,
775 F.3d 170 (4th Cir. 2014) 2

James v. Booz-Allen & Hamilton, Inc.,
368 F.3d 371 (4th Cir. 2004) 3, 4, 8

Laird v. Fairfax Cnty.,
978 F.3d 887 (4th Cir. 2020) 6, 11

Mitchell v. Planned Parenthood of Greater N.Y., Inc.,
No. 1:23-CV-01932, — F. Supp. 3d —, 2024 WL 3849192
(S.D.N.Y. Aug. 16, 2024) 8, 9

Muldrow v. City of St. Louis,
601 U.S. 346 (2024) ..... *passim*

Peccia v. Cal. Dep't of Corr. & Rehab.,
No. 21-16962, 2024 WL 1985817 (9th Cir. May 1, 2024) 9, 10

Peifer v. Bd. of Prob. & Parole,
106 F.4th 270 (3d Cir. 2024) 9

Rios v. Centerra Grp. LLC,
106 F.4th 101 (1st Cir. 2024) 9

Strothers v. City of Laurel,
895 F.3d 317 (4th Cir. 2018) 10, 11

Statutes

Title VII of the Civil Rights Act of 1964

42 U.S.C. §§ 2000e *et seq.* 1

42 U.S.C. § 2000e-2(a) 6

Rules & Regulations

Fed. R. App. P. 29(a) 1

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with administering and enforcing federal laws prohibiting workplace discrimination, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The district court here dismissed the *pro se* plaintiff's Title VII discrimination and retaliation claims. According to the court, the plaintiff had not pled sufficiently adverse actions, among other things, for either claim. The EEOC has a strong interest in ensuring that courts apply the correct adverse action standards to both discrimination claims and retaliation claims under Title VII. The EEOC therefore offers its views to the Court. *See* Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUES[1]

1. Did the district court err by requiring the plaintiff to plead an adverse action that imposed a "significant detriment" for his discrimination claim, even after the Supreme Court's decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), which abrogated that standard?

[1] The EEOC does not take a position on any other issue in this appeal.

2. Did the district court err by not applying the adverse action standard for retaliation claims that the Supreme Court set out in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006), which looks to whether the challenged action might well dissuade a reasonable worker from complaining of discrimination?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Scott Thatch, who is Black, worked at FedEx Freight for eighteen years. R.19 at 9; R.22 at 2. FedEx Freight promoted him from supervisor to operation manager before transferring him to a new job at a location in Chesapeake, Virginia. R.19 at 9. Thatch alleged that he "[r]eceived numerous award[s] from [FedEx Freight] as well as [his] employees." *Id.* at 9-10.

According to Thatch, his supervisor, Kaila Giron, subjected him to discrimination beginning in February 2022. *Id.* at 5, 9. Giron, who is White,

[2] Because the court dismissed Thatch's amended complaint, we draw the facts from that complaint with the liberal reading used for *pro se* complaints and accepting "all facts pleaded as true, and draw[ing] all reasonable inferences in [Thatch]'s favor." *See Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014).

gave him different assignments than she gave to White supervisors, and she harassed him in person and through emails. *Id.*

Thatch complained to management and human resources about the discrimination. *Id.* After he complained, Giron tried to get rid of Thatch. *Id.*at 9; R.22 at 2. She sent him critical emails every day, and she accused him of misconduct. R.19 at 5, 9. FedEx Freight ultimately terminated Thatch. *Id.* at 4; R. 22 at 2.

Thatch then filed an administrative charge of discrimination, received a notice of right to sue, and filed this lawsuit *pro se*. R.19 at 6; R.1. FedEx Freight moved to dismiss Thatch's complaint. R.7-8. The court granted the motion in part and allowed Thatch to amend his complaint. R.18. Thatch did so, R.19, and FedEx Freight again moved to dismiss, citing *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004), for the adverse action standard for Thatch's discrimination claim. R.21 at 6. As to the retaliation claim, FedEx Freight focused on Thatch's termination and did not address whether any other conduct was actionable. *See id.* at 7-8.

Almost two months after FedEx Freight filed its motion to dismiss the amended complaint, the Supreme Court decided *Muldrow v. City of*

St. Louis, 601 U.S. 346 (2024), which abrogated the "significant detrimental effect" adverse action standard in *James*, 368 F.3d at 376.

B. District Court's Decision

The court granted FedEx Freight's motion to dismiss the amended complaint. *See* R.22. It first held that Thatch had not adequately pled a race discrimination claim. That claim required an adverse action, one that "adversely affect[ed] the terms, conditions, or benefits of the plaintiff's employment." *Id.* at 7 (quoting *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007)). The adverse action standard, the court reasoned, separates "those harms that work a *significant detriment* on employees from those that are relatively insubstantial or trivial." *Id.* at 8 (emphasis added) (internal quotation marks omitted) (quoting *Adams v. Anne Arundel Cnty. Pub. Schs.*, 789 F.3d 422, 431 (4th Cir. 2015)). Applying that pre-*Muldrow* standard, the court held that Thatch's termination was an adverse action, but that his "allegations of pre-termination mistreatment" were not. *Id.* It then held that the complaint did not include sufficient facts to suggest FedEx Freight terminated him or mistreated him because of his race. *Id.* at 8-9.

The court also held that Thatch had not adequately pled retaliation. *Id.* at 11. According to the court, the complaint did not plead facts suggesting that FedEx Freight terminated Thatch because of protected activity. *Id.* at 11-12. Then, the court held, without reciting the *Burlington Northern* standard, that the alleged pre-termination mistreatment did not rise to the level of an adverse employment action. *Id.* at 12 (discussing allegations that Thatch endured attacks, false statements, and discriminatory work assignments). Even if it did, the court concluded, there was not a causal connection to any protected activity. *Id.*

ARGUMENT

The Supreme Court recently set out the governing standard for adverse actions in discrimination claims in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024). Although the Supreme Court decided *Muldrow* before the district court's order here, the court did not apply the *Muldrow* standard to Thatch's complaint. Meanwhile, Thatch also alleged that FedEx Freight retaliated against him by subjecting him to adverse actions for complaining of discrimination. Because the standard for adverse actions differs for discrimination and retaliation claims and it is unclear what standard the

district court applied, we also briefly address the adverse action standard for retaliation claims.

I. *Muldrow* changed the adverse action standard for discrimination claims to "some harm."

The district court concluded that the alleged mistreatment Thatch endured was not sufficiently serious to constitute actionable discrimination. In doing so, it recited a standard requiring an adverse action that imposed "a significant detriment." R.22 at 7-8 (quoting *Adams*, 789 F.3d at 431). The Fourth Circuit has long used that standard, particularly in reassignment cases, requiring a plaintiff to show a "significant detrimental effect." *Laird v. Fairfax Cnty.*, 978 F.3d 887, 893 (4th Cir. 2020); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). Earlier this year, however, the Supreme Court held that the "significant detrimental effect" standard was too restrictive for Title VII discrimination claims. *Muldrow*, 601 U.S. at 354-55.

Title VII forbids discrimination in the terms or conditions of employment, 42 U.S.C. § 2000e-2(a). In *Muldrow*, the Court reasoned that Title VII's use of "'discriminate against' . . . refer[red] to 'differences in treatment that injure' employees." 601 U.S. at 354 (quoting *Bostock v.*

Clayton Cnty., 590 U.S. 644, 681 (2020)). The Court then explained that "terms or conditions" "covers more than the economic or tangible." *Id.* at 354 (cleaned up). Based on those definitions, the Court held that a plaintiff alleging discrimination under Title VII need only show that the discrimination caused "*some harm* respecting an identifiable term or condition of employment." *Id.* at 354-55 (emphasis added).

The "some harm" standard is not onerous. The Court held that a plaintiff does not have to show "that the harm incurred was significant." *Id.* (quotation marks omitted). And, it reasoned, the term "[d]iscriminate against" does not set "an elevated threshold of harm." *Id.* "To demand 'significance' is to add words . . . to the statute Congress enacted" and "demand[] something more of [the plaintiff] than the law as written." *Id.* As Justice Kavanaugh observed in a concurrence, by "emphasiz[ing] that 'some harm' is less than significant harm, serious harm, or substantial harm," the *Muldrow* standard sets "a relatively low bar." *Id.* at 365 (Kavanaugh, J., concurring in the judgment).

The Court acknowledged that the "some harm" standard would mark a change for many courts. Describing several circuit court decisions, the Court noted that each required an adverse action that was

"significant."[3] *Id.* at 355-56. That list included this Court's decision in *Boone*, 178 F.3d at 256, which held the plaintiff had not shown a "significant detrimental effect." *Muldrow*, 601 U.S. at 355. The Court concluded that *Boone* and other cases requiring significance "compel[ed] workers to make a showing that the statutory text does not require." *Id.* at 356. Thus, under the "some harm" standard, cases like *Boone* "will come out differently." *Id.* at 356 n.2.

The decision in *Muldrow* involved an allegedly discriminatory transfer, but the *Muldrow* standard also applies to other adverse actions. The Court drew the "some harm" test from Title VII's use of "discriminate against" and "terms, conditions, or privileges of employment." *Id.* at 354-55. Those terms do not expressly reference transfers or suggest that courts should treat transfers differently than other potentially adverse actions. *See Mitchell v. Planned Parenthood of Greater N.Y., Inc.*, No. 1:23-CV-01932, — F. Supp. 3d —, 2024 WL 3849192, at *9 (S.D.N.Y. Aug. 16, 2024) ("Although *Muldrow* directly concerned a transfer, its

[3] Earlier in its opinion, the Court noted *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004), which FedEx Freight cited below, also required a "significant detrimental effect," *Muldrow*, 601 U.S. at 353 n.1.

reasoning relies on the language of Title VII's anti-discrimination provision rather than anything special about transfers."). Indeed, the *Muldrow* court "underscore[d]" the breadth of its ruling: "[T]his decision changes the legal standard used in any circuit that has previously required 'significant,' 'material,' or 'serious' injury. It lowers the bar Title VII plaintiffs must meet." 601 U.S. at 975 n.2. And other circuits have already applied *Muldrow*'s standard to other potentially adverse actions. *See, e.g.*, *Peifer v. Bd. of Prob. & Parole*, 106 F.4th 270, 277 (3d Cir. 2024) (remanding for district court to apply *Muldrow* to plaintiff's allegation that the denial of requested accommodations for her pregnancy constituted an adverse action); *Rios v. Centerra Grp. LLC*, 106 F.4th 101, 112–13 (1st Cir. 2024) (applying *Muldrow* to plaintiff's claims that "supervisors told him not to eat at his post, not to park his car in the spots near the guard rest house, and not to use the guard rest house bedroom to change his clothes").

The district court issued its decision here almost three months after *Muldrow*, but it still applied this Court's pre-*Muldrow* standard. We ask the Court to remand to the district court to consider Thatch's discrimination claim under *Muldrow*'s "some harm" standard. *See Peifer*, 106 F.4th at 277 (remanding for district court to apply *Muldrow*); *Peccia v. Cal. Dep't of*

Corr. & Rehab., No. 21-16962, 2024 WL 1985817, at *1 (9th Cir. May 1, 2024) (same).

II. Retaliation claims use the *Burlington Northern* dissuade-a-reasonable-worker standard for adverse actions.

Thatch also alleged that FedEx Freight retaliated against him for engaging in protected activity. The district court did not describe the adverse action standard it used for that claim, leaving it unclear what standard it applied. We thus briefly note that the adverse action standard is different for retaliation claims. Unlike discrimination claims, retaliation claims require an adverse action that is "materially adverse." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006).

The Supreme Court explained in *Burlington Northern* that material adversity means that the action "well might have dissuaded a reasonable worker from" engaging in protected activity. *Id.* at 68 (cleaned up). That standard "extends beyond workplace-related or employment-related retaliatory acts and harm." *Id.* at 67. As a result, this Court recognized that "the adverse employment action standard . . . was expressly rejected by the Supreme Court in *Burlington Northern*." *Strothers v. City of Laurel*, 895 F.3d 317, 327 n.3 (4th Cir. 2018) (internal quotation marks omitted).

And this Court therefore "adopt[ed] the 'adverse action' formulation because the adverse action need not be employment- or workplace-related." *Id.*; *Laird*, 978 F.3d at 893 n.6 (4th Cir. 2020) (similar).

The *Burlington Northern* dissuade-a-reasonable-worker standard for adverse actions requires a contextual approach. *Burlington Northern*, 548 U.S. at 69 ("[T]he significance of any given act of retaliation will often depend upon the particular circumstances."). Thus, the Supreme Court observed, "refus[ing] to invite an employee to lunch is normally trivial," but "excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.*

The district court held that Thatch had not alleged actions beyond his termination that "rose to the level of an adverse employment action." R.22 at 12. It did not cite *Burlington Northern* or set out the dissuade-a-reasonable-worker standard. *See id.* And requiring "an adverse employment action" suggests the court may have considered a pre-*Burlington Northern* retaliation standard. *See Strothers*, 895 F.3d at 327 n.3; *see also* R.22 at 12 (citing, with another case, two pre-*Burlington Northern* cases). We therefore ask the Court to confirm that the *Burlington*

Northern dissuade-a-reasonable-worker standard governs Thatch's retaliation claim.

CONCLUSION

For these reasons, the Court should vacate the district court's judgment and remand for the district court to apply *Muldrow* to Thatch's discrimination claim and *Burlington Northern* to his retaliation claim.

Respectfully submitted,

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September 13, 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 2,189 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on this 13th day of September, 2024, I electronically filed this brief in PDF format with the Clerk of Court via the appellate CM/ECF system. Appellant is proceeding *pro se* and will be served by a third-party commercial carrier at:

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