

No. 25-2996

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CLAUDIA R. DIBLASI, DO,
Plaintiff-Appellant,

v.

GUTHRIE/ROBERT PACKER HOSPITAL,
Defendants-Appellees.

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

CATHERINE ESCHBACH
Acting General Counsel

CHRISTOPHER LAGE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

GAIL S. COLEMAN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

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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.*, and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.* This appeal presents important questions regarding how to analyze hostile-work-environment claims under those statutes. This appeal may also raise questions regarding how a charging party receives an EEOC Notice of Right to Sue, which has implications for the timeliness of a lawsuit. Because the EEOC has a substantial interest in the proper interpretation of Title VII and the ADEA, it files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES¹

1. Did the district court apply the wrong legal standards to Plaintiff’s hostile-work-environment claim, by:
 - a. Assessing the evidence for “pervasive and regular intentional discrimination” rather than “severe or pervasive” harassment?

¹ The EEOC takes no position on any other issue in this case.

- b. Excluding independently actionable discrete acts of discrimination from consideration as part of a hostile-work-environment claim?
 - c. Assessing the hostile-work-environment claim without considering the totality of the circumstances?
2. Did the district court err with respect to Plaintiff's retaliation claim by holding that she did not show a causal connection between her protected activity and the alleged retaliation, without considering whether Defendants discriminated against her at their first opportunity?
3. Did Plaintiff timely file this lawsuit within ninety days of receipt of the EEOC's letter of determination and notice of right to sue?

STATEMENT OF THE CASE

A. Statement of the Facts²

Plaintiff Claudia DiBlasi was a newly minted doctor when she joined the Family Medicine Residency Program at Robert Packer Hospital in Sayre, Pennsylvania in June 2019. Appx0696-0697. At age 49, she was

² We recite these facts in the light most favorable to DiBlasi, the non-movant, consistent with the standard of review for an award of summary judgment. *See Morgan v. Allison Crane & Rigging LLC*, 114 F.4th 214, 220 (3d Cir. 2024).

considerably older than her fellow residents. Appx0847-0848. According to DiBlasi, her residency experience was rife with sex, age, and disability discrimination.³ Appx0076-0080.

Near the end of her first year, the hospital opened a new residency program in anesthesiology. Appx0757-0758. DiBlasi sought to transfer from the three-year Family Medicine Program to the five-year Anesthesiology Program, but the hospital did not allow her to do so. Appx0152, 0754, 0757, 0762. According to the hospital, allowing in-house transfers would adversely affect the amount of federal funding the hospital would receive. Appx0112. Nonetheless, DiBlasi testified, the hospital permitted two younger, male doctors to transfer out of the Family Medicine Program into a different residency. Appx0775-0777.

Among other incidents, DiBlasi testified that that a senior resident told her twice, "Beyond a certain age, it's difficult to learn." Appx0779. She also testified that other residents were rude to her, routinely turning their backs while she was mid-sentence. Appx0754. She stated that the hospital

³ The EEOC addresses only the allegations related to her sex and age claims, as DiBlasi brought the disability claims only under state law.

gave her more night shifts, call schedules, and shift changes than anyone else, and that she had to do additional work for her osteopathic designation. Appx0755. Once, she said, a male nurse slapped her hand as she reached to adjust a patient's bed in the intensive care unit ("ICU"). Appx0755. After this, she said, one of her supervisors told her that she was no longer allowed in the ICU. Appx0861. Additionally, she testified, another supervisor inappropriately asked a second-year resident who was not her senior to evaluate her during her Maternal/Child rotation. Appx0657.

On July 8, 2022, DiBlasi took a leave of absence in order to undergo surgery on her Achilles tendon. Appx0716, 0719. Later that month, she dual-filed an administrative charge of discrimination with the Pennsylvania Commission on Human Rights and the EEOC, and the EEOC notified the hospital of the charge on July 26, 2022. Appx0046, 0649. Meanwhile, DiBlasi experienced medical complications and had to undergo a second surgery. Appx0717. She remained on leave until March 2, 2023. Appx0719.

DiBlasi testified that the hospital retaliated against her for her discrimination charge when she returned to complete her residency

requirements. Appx0798. According to DiBlasi, the hospital allowed her license to expire by not paying renewal fees in time, Appx0803, 2516, required her to see patients virtually rather than in-person, Appx0810, prevented her from performing medical procedures she had specifically requested, Appx0813-0814, barred her from the facility, Appx0792-0793, and blocked her access to email, Appx0794. She eventually graduated in April 2023 but was not invited to a graduation ceremony. Appx0719, 0853.

On March 3, 2023, the EEOC posted a notice on its online portal linking to a document dismissing DiBlasi's charge and advising her that she had ninety days to file suit. Appx0644, 2828. The dismissal notice contains DiBlasi's mailing address, Appx0644, but the EEOC documentation on file with the district court does not show that the EEOC actually mailed it, Appx2828. The record does contain an email to Defendants stating that "[a] new document was added to [DiBlasi's] Charge" and was available on the portal. Appx0949. It does not contain a similar email to DiBlasi, who testified that she did not remember receiving an email from the EEOC. Appx0822.

On April 13, 2023, the EEOC mailed DiBlasi a copy of the March 3 letter with a cover letter stating that it had emailed her on March 3 advising

her to download the document, but that EEOC records indicated she had not done so. Appx0643. “For your convenience,” the letter said, “a copy of the Notice is enclosed with this letter. Please note that if you want to pursue this matter further in court, you must file a lawsuit within 90 days of the date you receive the Notice.” Appx0643.

DiBlasi filed the instant lawsuit against the hospital and Guthrie Medical Group, a regional healthcare provider that owns the hospital, on July 7, 2023. Appx0074. This date was 126 days from March 3 and 85 days from April 13, meaning that the timeliness of the lawsuit depended on when the ninety-day clock began. Defendants moved for summary judgment. Appx0456.

B. District Court’s Decision

The district court granted summary judgment to Defendants. Before reaching the merits, the court dealt with various issues related to timing.

Beginning with administrative requirements, the court observed that Title VII and the ADEA require individuals to file a charge of discrimination within 180 or 300 days of a discrete adverse employment action, depending on whether the charge is cross-filed with a state anti-discrimination agency (as it was here). Appx0041-0042. Citing Supreme

Court precedent, the court noted that hostile work environments are “composed of a series of separate acts that collectively constitute one ‘unlawful employment practice.’” Appx0047 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002)). Thus, a hostile-work-environment charge is timely as long as it is filed “within 180 or 300 days of any act that is part of the hostile work environment [claim].” Appx0047.

The hospital denied DiBlasi’s transfer request more than 300 days before she filed a charge of discrimination, the court said, and the denial was therefore untimely when considered on its own. Appx0044, 0046 (rejecting DiBlasi’s arguments regarding the “discovery rule” and equitable tolling as grounds for extending the filing deadline). The court refused to consider the denial of transfer as part of DiBlasi’s timely hostile-work-environment claim, reasoning that “[t]he component acts of a hostile work environment claim cannot be discrete, separately actionable acts.”

Appx0041 n.4 (citing *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 165 (3d Cir. 2013)). Accordingly, the court said, “DiBlasi’s claims relating to defendants denying her transfer requests cannot be congregated with other acts in a hostile work environment claim to extend the time DiBlasi had to file an administrative charge.” Appx0041 n.4.

The court distinguished the rest of DiBlasi's allegations of sex and age discrimination as "minor incidents" that were not "independently actionable, discrete acts." Appx0050. Some examples of these remaining allegations, the court said, included that other residents, supervisors, and residency leadership treated DiBlasi more disdainfully than other residents; that Defendants imposed more burdensome administrative requirements on her; and that they held her to different graduation requirements. Appx0049-0050. Unlike the denial of DiBlasi's transfer request, the court deemed these incidents to be part of DiBlasi's timely hostile-work-environment claim. Appx0050.

Regarding pre-suit litigation requirements, the court agreed with DiBlasi that she had properly filed her complaint within ninety days after receiving the EEOC's notice of right to sue, as Title VII and the ADEA require. Appx0053. "[F]or the ninety-day time limit to begin," the court held, the EEOC must send a communication to the plaintiff clearly explaining that their ninety-day time limit has begun, and this requirement is not met when the EEOC only posts a right to sue letter on an online portal without providing a more specific communication." Appx0054 (citing *Hayes v. N.J. Dep't of Human Servs.*, 108 F.4th 219, 223 (3d Cir. 2024)).

The court found no record evidence that DiBlasi had received the March 3, 2023, notice of right to sue before the EEOC mailed a hard copy of it to her on April 13, 2023. Appx0054. In the absence of evidence of when she received that letter, the court presumed in accordance with Third Circuit law that she had done so three days after the April 13 mailing, making her complaint timely. Appx0054; *see Hayes*, 108 F.4th at 222 (discussing three-day presumption).

Turning to the merits, the court first analyzed DiBlasi's hostile-work-environment claim. Appx0055. A hostile work environment, the court said, requires that discrimination be "pervasive and regular." Appx0056 (quoting *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009)); *see also* Appx0057-0061 (applying "pervasive and regular" standard). DiBlasi's evidence, the court held, did not satisfy that standard. Appx0060-0061.

The court refused to consider the denial of transfer as a component of the alleged hostile work environment because the denial of transfer was an independent, "unexhausted" claim "that cannot be aggregated into a hostile work environment claim." Appx0057 n.9. The court considered DiBlasi's remaining allegations separately, finding that none of them,

standing alone, was sufficient to create “pervasive and regular” discrimination. Appx0058-0060.

The court also held that DiBlasi could not establish a prima facie case of retaliation. Appx0061. “[A] reasonable jury,” the court said, “may not infer causation where there is no evidence that a defendant subjected a plaintiff to any adverse actions or hostility for several months after a protected action.” Appx0062. Here, the court explained, the EEOC notified Defendants of DiBlasi’s charge on July 26, 2022, but the earliest alleged retaliation occurred on February 28, 2023, when DiBlasi requested to return to work and Defendants delayed her licensing. Appx0063. “Accordingly,” the court concluded, “a reasonable jury may not infer causation because there is no evidence that Defendants subjected DiBlasi to any adverse actions or hostile treatment for seven months after she filed her administrative charge.” Appx0063-0064. The court did not consider that DiBlasi was on a leave of absence from July 2022 through March 2023. *See* Appx0062.

ARGUMENT

The district court applied incorrect legal standards in several aspects of its summary judgment analysis. The EEOC urges this Court to remand the

case so that the district court may apply the correct standards. *See O’Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 762 n.3 (3d Cir. 2021) (“[A]s a ‘court of review, not of first view,’ we will analyze a legal issue without the district court’s having done so first only in extraordinary circumstances.” (quoting *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019))).

I. The district court incorrectly analyzed the hostile-work-environment claims.

The district court failed to apply the governing law when granting summary judgment on DiBlasi’s hostile-work-environment claims. Specifically, the court should have: (1) looked for “severe or pervasive” harassment, not “pervasive and regular” harassment; (2) considered discrete acts that are independently actionable as part of a hostile work environment if they are sufficiently related; and (3) analyzed the totality of circumstances, as required.

A. The district court applied the wrong standard for analyzing a hostile-work-environment claim.

Title VII prohibits employers from subjecting employees to a hostile work environment based on their sex, race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986). The ADEA, which contains almost identical language,

likewise prohibits hostile work environments because of age. *Compare* 29 U.S.C. § 623(a) *with* 42 U.S.C. § 2000e-2(a); *see also* *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 441 (5th Cir. 2011); *cf.* *Howell v. Millersville Univ. of Pa.*, 749 F. App'x 130, 135 (3d Cir. 2018) (assuming but not deciding that ADEA permits hostile-work-environment claims). To establish a hostile-work-environment claim, a plaintiff must show she suffered “severe or pervasive” intentional discrimination that was based on a protected characteristic. *Castleberry v. STI Grp.*, 863 F.3d 259, 263 (3d Cir. 2017). A plaintiff must also show a basis for employer liability. *Id.*

The Supreme Court has made clear that harassment must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Like the district court here, Appx0056, this Court has at times cited “pervasive and regular” as the operative standard. *See, e.g. Andreoli v. Gates*, 482 F.3d 641, 643 (3d Cir. 2007). However, this Court made clear in *Castleberry* that this was a mistake.⁴ *See* 863 F.3d at 263-64.

⁴ *Castleberry* alleged a violation of 42 U.S.C. § 1981, not of Title VII, but the Court expressly recognized that “[i]n employment discrimination cases,

In *Castleberry*, two Black plaintiffs alleged that they found racially discriminatory comments on several sign-in sheets; that despite their greater experience than their non-Black coworkers, they were assigned less-skilled work; and that their supervisor told them they would be fired if they “n***r-rigged” a fence. *Id.* at 262. The district court dismissed their harassment claim because the facts “did not support a finding that the alleged harassment was ‘pervasive and regular,’ which it deemed a requisite element to state a claim.” *Id.* at 262. On appeal, this Court acknowledged that its precedent was inconsistent, alternately requiring “severe or pervasive,” “pervasive and regular,” “severe and pervasive,” or some combination of these. *Id.* at 263-64. In *Castleberry*, this Court determined that “[t]he correct standard is ‘severe or pervasive.’” *Id.* at 264.

The *Castleberry* Court observed that the Supreme Court has repeatedly used the “severe or pervasive” standard, lending support to the notion that a single incident of harassment, if severe, may suffice to state a claim. *See id.* (citing *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004); *Harris*,

these claims are subject to the same analysis as discrimination claims under Title VII of the Civil Rights Act of 1964.” 863 F.3d at 263.

510 U.S. at 22). “[S]everity’ and ‘pervasiveness’ are alternative possibilities,” the *Castleberry* Court said. *Id.* “Some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.” *Id.* Under a “pervasive and regular” standard, however, no single incident could ever be enough to create a hostile work environment, no matter how severe. *See id.* at 264-65, 267; *see also* Appx0059 (rejecting claim that nurse hitting DiBlasi’s hand could, by itself, create a hostile work environment because “isolated incidents, even those that involve non-extreme physical contact, are not alone sufficient to create a genuine dispute of fact regarding pervasive and regular discrimination”).

The district court erred by assessing DiBlasi’s claims under a “pervasive and regular” standard. This Court should remand for the district court to evaluate her claims applying the “severe or pervasive” standard instead.

B. The district court erred in refusing to consider the denial of transfer as part of DiBlasi’s hostile-work-environment claim.

The district court erred in holding that “discrete acts ... cannot be aggregated into a hostile work environment claim.” Appx0057 n.9. The

court reached this conclusion by misinterpreting *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

In *Morgan*, the Supreme Court held that “discrete acts” are different from hostile work environments for purposes of timeliness. *Id.* at 105. Title VII requires that an EEOC charge be filed either 180 or 300 days “after the alleged unlawful employment practice occurred,” depending on whether the charge is dual filed with a parallel state agency. 42 U.S.C.

§ 2000e-5(e)(1). This provision is self-explanatory with respect to “discrete acts,” such as termination or denial of promotion, which occur on a single day. *Morgan*, 536 U.S. at 114. A plaintiff who does not challenge a discrete act within 180 or 300 days may not recover for that allegedly unlawful employment practice. *Id.*

Hostile work environments, the Court explained, are “different in kind from discrete acts” because “[t]heir very nature involves repeated conduct.” *Id.* at 115. A hostile work environment “occurs over a series of days or perhaps years,” the Court said, “and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.” *Id.*

Rather, the Court held, all of the acts comprising a hostile work environment, taken together, “collectively constitute one ‘unlawful

employment practice.’” *Id.* at 117 (citation omitted). “Provided that an act contributing to the claim occurs within the filing period,” the Court said, “the entire time period of the hostile environment may be considered by a court for purposes of determining liability.” *Id.* “A court’s task,” the Court concluded, “is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period.” *Id.* at 120.

The district court here interpreted *Morgan* to mean that “[t]he component acts of a hostile work environment claim cannot be discrete, separately actionable acts.” Appx0041 n.4 (citing *Mandel*, 706 F.3d at 165). *Mandel* does not stand for this proposition, as the cited page simply reiterates the language of *Morgan*. The Supreme Court itself has cited *Morgan* for exactly the opposite proposition. See *Green v. Brennan*, 578 U.S. 547, 557 (2016) (hostile-work-environment claim “includes every act composing that claim, whether those acts are independently actionable or not” (emphasis added) (citing *Morgan*, 536 U.S. at 115-21)). Post-*Green*, this Court, too, has held (albeit in an unpublished opinion) that independently actionable discriminatory acts can comprise part of a hostile-work-

environment claim.⁵ See *Stucke v. City of Phila.*, 685 F. App'x 150, 153 (3d Cir. 2017) (district court erred by “view[ing] [plaintiff’s] shift work denials and discipline as discrete acts of disparate treatment that could not be considered for the purposes of a hostile work environment claim”).

Multiple other circuits are in accord. See *McNeal v. City of Blue Ash*, 117 F.4th 887, 902 n.14 (6th Cir. 2024); *King v. Aramark Servs., Inc.*, 96 F.4th 546, 561 (2d Cir. 2024); *Hambrick v. Kijakazi*, 79 F.4th 835, 842 (7th Cir. 2023); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 222-23 (4th Cir. 2016); *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C. Cir. 2011); *Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007). They recognize that “a hostile environment is formed and shaped by an assemblage of discriminatory acts – including acts that might also support a discrete-act discrimination claim if timely filed.” *King*, 96 F.4th at 561; see also *McNeal*, 117 F.4th at 902

⁵ Prior to *Green*, this Court and some others reached an opposite conclusion by relying on *Morgan’s* statement, 536 U.S. at 113, that “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.” See *O’Connor v. City of Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (section 1983 case) (holding that discrete acts could not be aggregated under a continuing-violation theory); see also *Porter v. Cal. Dep’t of Corrs.*, 419 F.3d 885, 893 (9th Cir. 2005) (same). Whatever the merits of this reading of *Morgan*, it is no longer tenable after *Green*.

n.14 (“[W]hen a discrete act also contributes to a different and continuing harm – for example, the pervasive humiliation of an employee – its ancillary impacts may be considered in a hostile-work-environment claim.”).

The EEOC has long taken this position. Its Compliance Manual states, “Artificially carving out all discrete acts from hostile work environment claims is contrary to the Supreme Court’s repeated admonition that courts consider ‘all the circumstances’ in determining whether a hostile work environment exists.” *See* EEOC Threshold Issues Guidance, Timeliness, <https://www.eeoc.gov/laws/guidance/section-2-threshold-issues>, at § 2-IV(C)(1)(b) n.191 (Aug. 2009). “An incident may be part of a hostile work environment even if it is also a discrete act. However, a discrete act of discrimination may be part of a hostile work environment only if it is related to abusive conduct or language, i.e., a pattern of discriminatory intimidation, ridicule, and insult.” *Id.* at text accompanying nn. 191-192.

The EEOC urges this Court to join its sister courts and hold – in a published opinion – that discrete acts may give rise to a stand-alone disparate treatment claim (if timely) and simultaneously serve as one of

several component parts of a broader hostile-work-environment claim. Recovery for the hostile-work-environment claim would be separate from recovery, if any, for the discrete act itself. *See King*, 96 F.4th at 560 (“[A]n untimely discrete act claim cannot be pulled into the limitations period by a claim premised on a continuing course of conduct, even if the course of conduct includes that discrete act.”). The Court should remand for the district court to consider DiBlasi’s hostile-work-environment claims under this standard.

C. The district court failed to analyze the totality of the circumstances.

Title VII prohibits discriminatory hostile work environments because, “even without regard to ... tangible effects, the 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.” *Harris*, 510 U.S. at 22. The Supreme Court has instructed that “whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.” *Id.* at 23. This Court has said the same. *See Nitkin v. Main Line Health*, 67 F.4th 565, 570 (3d Cir. 2023) (“To determine whether an

environment is hostile, a court must consider the totality of the circumstances"); *Cardenas v. Massey*, 269 F.3d 251, 261 (3d Cir. 2001) ("A discrimination analysis must concentrate not on individual incidents, but on the overall scenario." (citation omitted)).

In *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. 2013), this Court reversed an award of summary judgment to the employer in a Title VII hostile-work-environment case after the court failed to follow this rule. The Court explained, "The District Court summarized the alleged incidents and concluded that 'none of the alleged incidents is sufficiently severe to establish a hostile work environment.' The District Court's reasoning suggests that it improperly parsed out each event and viewed them separately, rather than as a whole." *Id.* at 168. "On remand," this Court said, "the District Court must consider the totality of the circumstances, rather than parse out the individual incidents, to determine whether the acts that collectively form the continuing violation are severe or pervasive." *Id.*; see also *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of some of its scenes, but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."),

superseded in part on other grounds by Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072.

The district court here made the same mistake. First, as described above, *supra* at 14-19, it wrongly failed to consider the denial of transfer as part of DiBlasi's hostile-work-environment claim. *See* Appx0057 n.9.

Compounding that mistake, the court split her remaining allegations into categories of like conduct – i.e., unpleasant interactions with other residents and supervisors, additional work requirements, and an unsatisfactory Human Resources investigation. *See* Appx0057-0060. The court evaluated each category separately and found that each category was “insufficient” to create a genuine issue of material fact regarding a hostile work environment. *See* Appx0058 (disparagement was “insufficient”); Appx0058 (unpleasant or extra work was “insufficient”); Appx0060 (disappointing HR investigation was “insufficient”).

Like the district court in *Mandel*, the court here never considered the combined effect of all of DiBlasi's allegations. The Court should remand for the district court to assess DiBlasi's work environment as a whole.

II. The district court failed to consider whether Defendants retaliated at their first opportunity.

Title VII and the ADEA prohibit retaliation for filing an EEOC charge. 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA). To establish unlawful retaliation, a plaintiff must show that (1) she engaged in protected activity (e.g., filing the charge); (2) the employer took an adverse action against her; and (3) there was a causal connection between the protected activity and the adverse action. *Moore v. City of Philadelphia*, 461 F.3d 331, 340-41 (3d Cir. 2006). This Court “consider[s] ‘a broad array of evidence’ in determining whether a sufficient causal link exists to survive a motion for summary judgment.” *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 232 (3d Cir. 2007) (citation omitted). In some cases, close temporal proximity alone is sufficient to show a causal link. *Qin v. Vertex, Inc.*, 100 F.4th 458, 476 (3d Cir. 2024). However, “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 inference can be drawn.” *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 178 (3d Cir. 1997).

Thus, this Court has found sufficient evidence of a causal link despite a large time gap between the protected activity and the adverse action where the timing is suspicious in other ways. In *Qin*, 100 F.4th 458, for example, the plaintiff was repeatedly passed over for promotions. *Id.* at 466. In October 2018, before the beginning of the annual review period, he asked his manager, Rick Harter, whether he had not been promoted because he was Chinese (thus engaging in protected activity). *Id.* at 466. Harter gave him a negative evaluation the following February, and Vertex once again denied him a promotion. *Id.* at 467-68. This Court looked at “timing plus other evidence,” *id.* at 476, and observed, “In the context of Vertex’s set evaluation cycle, calibration process, and promotion schedule, Vertex’s February 2019 decision not to promote Qin happened at the first promotion opportunity following his protected activity. A jury, then, could find a causal connection between Qin’s inquiry to Harter and his failure to be promoted.” *Id.* at 478.

This Court found a causal connection with an even longer time gap in *Connelly v. Lane Construction Corp.*, 809 F.3d 780 (3d Cir. 2016). There the plaintiff was a seasonal worker for a construction company. In May 2010, she complained that a supervisor had sexually harassed her. *Id.* at 784. Five

months later, the employer laid her off before the end of the construction season, notwithstanding her seniority. *Id.* at 784-85. In April or May 2011, she observed that her coworkers had been called back for the next season, but she had not. *Id.* at 785. The district court held that the length of time between her protected activity and the failure to rehire (seventeen months), together with the absence of a pattern of antagonism, doomed her claim. *Id.* at 792. This Court reversed. *Id.* at 792-93. “Because Lane only hired Connelly during construction seasons, traditionally laying workers off in October or November and then rehiring them in March or April of the following year, it may be that a retaliatory decision to not rehire her would not become apparent until after the off-season that ran from October 2010 to March 2011,” the Court said. *Id.* at 792.

Other courts of appeals agree. The Seventh Circuit, for instance, has stated that “even after intervals of years, inferences of retaliatory intent may be reasonable where, for example, the alleged retaliation would have been the decision-maker’s first opportunity to retaliate.” *Murphy v. Caterpillar Inc.*, 140 F.4th 900, 918 (7th Cir. 2025). The Fourth Circuit has stated that “retaliation at the first opportunity” supports a plausible inference of retaliatory intent. *Barbour v. Garland*, 105 F.4th 579, 596 (4th Cir.

2024). And the Sixth Circuit has said, “[W]hen assessing temporal proximity, we consider whether the biased actor took the first opportunity that he had to retaliate.” *Gray v. State Farm Mut. Auto. Ins. Co.*, 159 F.4th 1024, 1034 (6th Cir. 2025); *see also Mustafa v. Ford Motor Co.*, No. 24-1763, 2025 WL 2720988, at *6 (6th Cir. Sept. 24, 2025) (holding that plaintiff stated plausible claim for retaliation despite nine-month gap between protected activity and adverse action because, “[i]n light of Ford’s actions preceding Mustafa’s leave, the company’s immediate termination of him upon his return bolsters the plausible inference of retaliatory conduct”).

Here, the district court stated categorically that “a reasonable jury may not infer causation where there is no evidence that a defendant subjected a plaintiff to any adverse actions or hostility for several months after a protected action.” Appx0062. The court mentioned but did not consider that DiBlasi was on a leave of absence when she filed her EEOC charge, and that the alleged retaliation occurred as soon as she returned to work. *See* Appx0063. While it is true that there is no evidence of adverse actions or animosity during the seven months after DiBlasi filed the charge, as the district court said, Appx0063-0064, one viable theory of causation could be that Defendants had no opportunity to retaliate against her until

she returned from leave. The EEOC urges this Court to recognize that the district court's analysis did not account for this possibility and remand for it to do so.

III. The district court correctly began counting DiBlasi's lawsuit-filing period from the date she received a hard copy of the EEOC's letter of determination and notice of right to sue.

Because Defendants may renew their timeliness arguments as an alternate ground for affirmance, the EEOC offers its view that the district court correctly deemed DiBlasi to have received the EEOC's letter of determination and Notice of Right to Sue ("NRTS") three days after the EEOC mailed her a hard copy, rather than one month earlier when the EEOC had posted a notice on its portal that a document was available for review. Accordingly, as the court properly held, this lawsuit is timely.

Under Title VII and the ADEA, a charging party has ninety days from the NRTS to file suit. 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 U.S.C. § 626(e) (ADEA). EEOC regulations state that the ninety-day clock starts with "receipt" of the letter of determination. *See* 29 C.F.R. § 1601.19(a); 1601.21(b)(1); 1626.17(c)(3). In keeping with its liberal construction of Title VII and the ADEA, and in accord with the EEOC's view, this Court generally counts this ninety-day period from the day the charging party

actually receives the NRTS, not the day the EEOC mailed it. *Hayes v. N.J. Dep't of Hum. Servs.*, 108 F.4th 219, 221 (3d Cir. 2024). When the actual date of receipt is unknown, this Court applies a rebuttable presumption that the plaintiff received the letter three days after mailing. *Id.* at 222.

Not all notice, however, is by letter. During the time when the EEOC issued DiBlasi's NRTS (March 3, 2023), the EEOC's usual practice was to post the determination and NRTS on a password-protected portal and email the charging party (here, DiBlasi) and respondents (here, Defendants) with downloading instructions. The email that Defendants received in this case said only, "A new document was added to [CHARGE]. To view it, sign-in to the EEOC Respondent Portal."

Appx0949. This email is similar to those that the EEOC sent in *García-Gesualdo v. Honeywell Aerospace of Puerto Rico, Inc.*, 135 F.4th 10, 13 (1st Cir. 2025) (email sent 2022); *Kinder v. Marion County Prosecutor's Office*, 132 F.4th 1005, 1007 (7th Cir. 2025) (email sent 2022); and *McDonald v. St. Louis University*, 109 F.4th 1068, 1070 (8th Cir. 2024) (email sent 2022).

Courts of appeals have divided on whether these emails were, standing alone, sufficient notice to start the ninety-day clock; whether the specific contents of the email matter; or whether the charging party must

download the NRTS before notice begins. *Compare McDonald*, 109 F.4th at 1071 (holding that filing period commenced when EEOC first emailed charging party’s attorney the link to the NRTS); *Kinder*, 132 F.4th at 1009 (holding that filing period commenced, at a minimum, when plaintiff’s counsel received subsequent email stating that “charge was closed” and counsel knew that the NRTS was available in the portal), *with García-Gesualdo*, 135 F.4th at 18 (holding that “for an email that does not attach the right-to-sue letter itself to provide notice, it must ‘indicate [] without ambiguity’ that the EEOC has reached a final decision and that the claimant has ninety days to bring suit if they so wish” (citation omitted)).

This Court does not need to decide here whether the EEOC’s email was sufficient to begin the filing period.⁶ In *Hayes*, this Court held that

⁶ In any event, the EEOC has since modified its practice. As of July 30, 2025, the EEOC sends an email when it dismisses a charge saying, in relevant part, “The [EEOC] has issued a final decision regarding [CHARGE], which can be found in the document titled Determination and Notice of Rights in the EEOC Public Portal. This email, as well as the Determination and Notice of Rights, is official notice that the EEOC has dismissed the above-referenced EEOC charge and that the Charging Party has the right to sue the respondent(s) on this charge in court within 90 days of receipt of this notice.” Further, the email’s subject line is, “Time-Sensitive EEOC Final Decision for EEOC Charge ...” Going forward, therefore, we expect that

notification requires “some affirmative act of communication from the EEOC to the plaintiff or her lawyer” stating that the ninety-day clock is beginning to run. 108 F.4th at 223. As this Court explained, “This requirement helps strike a fair balance between a defendant’s interest in a quick resolution of charges and a plaintiff’s interest in having adequate opportunity to bring suit and a clear understanding of when and where to do so.” *Id.* There was no evidence in *Hayes* that the EEOC actually told the plaintiff that the NRTS had been posted to the portal. *Id.* “Under these circumstances,” this Court held, “the posting of the right-to-sue letter to the EEOC’s online portal did not start the 90-day clock.” *Id.* at 224.

DiBlasi’s circumstances are the same – there is no evidence to show that the EEOC actually informed her that the ninety-day clock was starting on March 3. Although the April 13 letter stated that the EEOC had emailed DiBlasi on March 3, there is no copy of that email in the record and the EEOC’s case log does not indicate that such an email was ever sent.

Appx2828. In contrast, the case log does indicate that the EEOC sent emails

courts will not find any ambiguity in whether the email constitutes notice that the ninety-day clock has begun.

to Defendants and their attorneys. Appx 2828. DiBlasi, moreover, testified that she does not recall any communications from the EEOC. Appx0822. At this stage of the proceedings, the court may not rule out the possibility that the EEOC mistakenly failed to communicate with DiBlasi on March 3. An EEOC error, if any, should not prejudice a charging party. *See Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 966 (3d Cir. 1978).

In the absence of evidence that the EEOC did communicate with DiBlasi in March, the district court was correct to treat the April 13 letter as the start of the ninety-day period. The court appropriately applied the three-day presumption to this letter, thereby finding that DiBlasi's complaint was timely filed. *See Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 108 n.5 (3d Cir. 2003) (discussing application of three-day presumption). At most, the question of whether the EEOC actually sent an email on March 3 advising DiBlasi to download the letter of determination and NRTS is a genuine issue of material fact, inappropriate for resolution at summary judgment. *See id.* at 117 (“[G]enuinely disputed facts cannot be the basis of summary judgment.”).

CONCLUSION

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

Respectfully submitted,

CATHERINE ESCHBACH
Acting General Counsel

CHRISTOPHER LAGE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

s/Gail S. Coleman
GAIL S. COLEMAN
Maryland Bar No. 199101080003
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

January 29, 2026

CERTIFICATE OF COMPLIANCE

Pursuant to 3d Cir. L.A.R. 28.3(d) and 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. *See id.*

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(f) because it contains 6,123 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.

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 1.443.889.0, and that no virus was detected.

s/Gail S. Coleman

GAIL S. COLEMAN

Attorney

EQUAL EMPLOYMENT

OPPORTUNITY COMMISSION

Office of General Counsel

131 M St. N.E., 5th Floor

Washington, D.C. 20507

(202) 921-2920

gail.coleman@eoc.gov

January 29, 2026

CERTIFICATE OF SERVICE

I certify that on this 29th day of January, 2026, 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.

s/Gail S. Coleman

GAIL S. COLEMAN

Attorney

EQUAL EMPLOYMENT

OPPORTUNITY COMMISSION

Office of General Counsel

131 M St. N.E., 5th Floor

Washington, D.C. 20507

(202) 921-2920

gail.coleman@eeoc.gov