

No. 26-10678

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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JEANETTA STRICKLAND,  
Plaintiff-Appellant,

v.

VULCAN MATERIALS COMPANY, INC.,  
Defendant-Appellee.

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On Appeal from the United States District Court  
for the Northern District of Alabama, No. 2:24-cv-01468  
Hon. R. David Proctor, Senior United States District Judge

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

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CATHERINE ESCHBACH  
Acting General Counsel

CHRISTOPHER LAGE  
Deputy General Counsel

JENNIFER S. GOLDSTEIN  
Associate General Counsel

DARA S. SMITH  
Assistant General Counsel

JAMES M. TUCKER  
Attorney

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
Office of General Counsel  
131 M St. N.E., 5th Floor  
Washington, D.C. 20507  
(202) 921-2554  
James.Tucker@EEOC.gov

**Certificate of Interested Persons**  
**and Corporate Disclosure Statement**

Pursuant to Eleventh Circuit Rule 26.1-1(a)(4), amicus curiae the Equal Employment Opportunity Commission (“EEOC”) hereby submits the following Certificate of Interested Persons and Corporate Disclosure Statement. The undersigned counsel hereby certifies that, in addition to those identified in the Certificates filed by the parties, the following persons and entities may have an interest in the outcome of this case:

Equal Employment Opportunity Commission

Eschbach, Catherine (Acting General Counsel, EEOC)

Goldstein, Jennifer S. (Associate General Counsel, EEOC)

Lage, Christopher (Deputy General Counsel, EEOC)

Smith, Dara S. (Assistant General Counsel, EEOC)

Tucker, James M. (Attorney, EEOC)

Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a government entity, is not required to file a corporate disclosure statement. The EEOC is not aware of any publicly traded corporations

*Jeanetta Strickland v. Vulcan Materials Company, Inc.,*  
Case No. 26-10678

or companies that have an interest in the outcome of this case or  
appeal.

s/ James M. Tucker  
JAMES M. TUCKER  
Attorney

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
Office of General Counsel  
131 M St. NE, Rm. 5NW10P  
Washington, D.C. 20507  
(202) 921-2554  
James.Tucker@EEOC.gov

**TABLE OF CONTENTS**

Certificate of Interested Persons and Corporate Disclosure  
Statement ..... C-1

Table of Citations ..... ii

Statement of Interest ..... 1

Statement of the Issue ..... 2

Statement of the Case ..... 2

    1. Statement of Facts ..... 2

    2. District Court Decision..... 6

Argument ..... 8

    The district court misapplied the standard for determining  
    whether an employer’s conduct was materially adverse for  
    purposes of a Title VII retaliation claim ..... 8

    A. Title VII prohibits retaliation for engaging in protected  
    activity ..... 9

    B. Whether conduct is materially adverse is a separate  
    question from causation, and is not dependent on an  
    employer’s justification for its conduct ..... 11

    C. The material adversity of retaliatory conduct does not  
    depend on whether the individual continued to engage  
    in protected activity after a retaliatory act ..... 15

Conclusion ..... 20

Certificate of Compliance

**TABLE OF CITATIONS**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Ambus v. Autozoners, LLC,</i> 938 F. Supp. 2d 1225 (M.D. Ala. 2013) .....	19
<i>Baker v. Upson Reg'l Med. Ctr.,</i> 94 F.4th 1312 (11th Cir. 2024).....	2
<i>Baloch v. Kempthorne,</i> 550 F.3d 1191 (D.C. Cir. 2008).....	17
<i>*Brannon v. Finkelstein,</i> 754 F.3d 1269 (11th Cir. 2014).....	13
<i>*Burlington Northern &amp; Santa Fe Railway Co. v. White,</i> 548 U.S. 53 (2006).....	1, 6, 9, 10, 11, 12, 13, 15, 18
<i>Goldsmith v. Bagby Elevator Co.,</i> 513 F.3d 1261 (11th Cir. 2008).....	9, 12
<i>Hassen v. Ruston La. Hosp. Co.,</i> 932 F.3d 353 (5th Cir. 2019).....	14
<i>Jefferson v. Sewon Am., Inc.,</i> 891 F.3d 911 (11th Cir. 2018).....	9, 12

<i>Lewis v. Michaels Stores, Inc.,</i>	
No. 3:05-CV-1323, 2007 WL 3333498 (M.D. Fla. Nov. 7, 2007) .....	19
<i>Mach Mining, LLC v. EEOC,</i>	
575 U.S. 480 (2015).....	16
<i>*Monaghan v. Worldpay Inc.,</i>	
955 F.3d 855 (11th Cir. 2020).....	6, 10
<i>Myers v. Cent. Fla. Invs., Inc.,</i>	
592 F.3d 1201 (11th Cir. 2010).....	17
<i>Patane v. Clark,</i>	
508 F.3d 106 (2d Cir. 2007) .....	18, 19
<i>Robinson v. Shell Oil Co.,</i>	
519 U.S. 337 (1997).....	10, 15, 16
<i>Smith v. City of Union,</i>	
144 F.4th 867 (6th Cir. 2025).....	14
<i>Somoza v. Univ. of Denver,</i>	
513 F.3d 1206 (10th Cir. 2008).....	18
<i>Steele v. Schafer,</i>	
535 F.3d 689 (D.C. Cir. 2008).....	18

*Tarmas v. Sec’y of the Navy,*

433 F. App’x 754 (11th Cir. 2011) .....7, 15, 19, 20

*Vincent v. Jefferson Cnty. Bd. of Educ.,*

152 F.4th 1339 (11th Cir. 2025).....16

**Statutes**

29 U.S.C. §§ 621 *et seq.*.....5

42 U.S.C. §§ 2000e *et seq.*.....1

42 U.S.C. § 2000e-3(a).....9

42 U.S.C. § 2000e-5(f)(1).....16

**Rules and Other Authorities**

Fed. R. App. P. 29(a)(2).....2

EEOC Enforcement Guidance on Retaliation and Related Issues,

No. 915.004 (Aug. 25, 2016), 2016 WL 4688886.....13, 19

## STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (“Commission” or “EEOC”) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”). This appeal raises important questions about the correct standard for assessing whether an employer’s allegedly retaliatory conduct was “materially adverse” for purposes of Title VII’s protection against retaliation.

Here, the district court granted summary judgment to the defendant, concluding that its alleged retaliatory conduct was not materially adverse. In so concluding, the court initially identified the correct standard for material adversity set out in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006): that the challenged employer conduct was sufficiently harmful that it well might have dissuaded a reasonable worker from engaging in protected activity. *Id.* at 68. The district court’s analysis then deviated from this test, instead focusing on the employer’s explanation for its actions and on whether the employee was actually dissuaded from engaging in further protected activity. The court’s approach is contrary to *Burlington Northern* and this Court’s precedent.

Given the importance of the correct interpretation of Title VII's antiretaliation provision to the Commission's enforcement efforts, the Commission respectfully offers its views to this Court. As a federal agency, the Commission is authorized to participate as amicus curiae in the courts of appeals. Fed. R. App. P. 29(a)(2).

### Statement of the Issue

Whether the district court misapplied the standard for determining whether an employer's conduct was materially adverse for purposes of a Title VII retaliation claim.<sup>1</sup>

## STATEMENT OF THE CASE

### **A. Statement of the Facts<sup>2</sup>**

In May 1996, Defendant Vulcan Materials Company hired Plaintiff Jeanetta Strickland, who is African-American, as an Accounts Payable Clerk at its location in Birmingham, Alabama. District Court Docket No.

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<sup>1</sup> The EEOC takes no position on any other issue in this appeal, including whether the Plaintiff can survive summary judgment under the correct legal standard.

<sup>2</sup> As this Court is reviewing the district court's grant of summary judgment to Vulcan, we present these facts in the light most favorable to Strickland as the nonmovant. See *Baker v. Upson Reg'l Med. Ctr.*, 94 F.4th 1312, 1316-17 (11th Cir. 2024).

("R.") 1 at 3; R.16-4. Vulcan produces aggregate-form crushed rock, to be used as construction material for roads, buildings, and other infrastructure. R.16-1 at 4. Over the following twenty-seven years, Vulcan promoted Strickland several times to positions in the Procurement Department of its Southern and Gulf Coast Division, culminating with an elevation to Sourcing Lead in 2022. R.16-5; R.16-6; R.16-7; R.16-9 at 3. Also in 2022, Vulcan hired Thiago Simoes as Director of Regional Sourcing and Jeff Chisolm as Procurement Operations Support Team Manager for the division that included Strickland's position. R.16-9 at 2, 4.

In early 2023, Simoes asked Chisolm to give Strickland an opportunity to take a lead role in managing the Alabama plants under Chisolm's direct supervision. R.16-9 at 4. In June, Simoes asked Strickland to prepare and lead a presentation regarding procurement operations. R.16-3 at 65; R.16-14 at 22. Chisolm contacted Simoes via email about this project, stating that the presentation would "expose" Strickland. R.16-3 at 66; R.16-14 at 22. Chisolm mistakenly copied Strickland on the email. R.16-11 at 2; R.16-14 at 22. Strickland complained about the email to Darren Hicks, Vulcan's Chief Human Resources Officer, telling him that she "knew Chisolm had been the subject of complaints about hostile working

conditions from another black female” and that she was “concerned about the tone of [her] early interactions” with Chisolm. R.21-1 at 1.

On October 13, 2023, as part of her 2023 job performance assessment, Chisolm told Strickland that her performance needed to improve. R.16-3 at 38. After that meeting, Strickland emailed Hicks and reported that Chisolm stated to her that her job was on the line and there were other “older” procurement employees whose jobs were on the line because of their “old way of thinking.”<sup>3</sup> R.16-23 at 2. Strickland told Hicks that, “all in all, this is pure discrimination, conspiracy, bullying, and retaliation.” *Id.* Strickland explained this statement in her deposition, describing that she “felt as though [she] was the only one that [Simoes and Chisolm] were treating this way, being the only black female in the group,” and that she was thinking of the “totality, all the things that had occurred.” R.16-3 at 43.

In late October or November 2023, Vulcan reduced the geographic scope of Strickland’s job. R.16-3 at 44. In January 2024, with input from Oliver and Chisolm, Simoes placed Strickland on a performance

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<sup>3</sup> The record shows that Strickland was sixty years old in 2025, R.16-3 at 20, indicating that she was fifty-eight or fifty-nine years old when Chisolm made this comment in October 2023.

improvement plan (“PIP”). R.16-26; R.16-38 at 40. The PIP was set to last until March 8, 2024. R.16-26 at 1. Chisolm was primarily responsible for evaluating Strickland’s performance under the PIP. R.16-38 at 42. In March 2024, Vulcan officials determined that Strickland had not satisfied the PIP requirements and terminated her employment. R.16-38 at 49.

Strickland filed a charge with the Commission, alleging in relevant part that Vulcan had subjected her to a retaliatory hostile work environment in violation of Title VII and that it terminated her because of her age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (“ADEA”). R.1-1. After receiving her notice of right to sue, Strickland filed suit. R.1 at 1, 4. Vulcan moved for summary judgment, arguing in part that Strickland’s retaliatory hostile work environment claim failed for lack of a materially adverse action because “she cannot show that Vulcan’s alleged retaliatory actions actually dissuaded her from exercising her rights.” R.17 at 17. In response, Strickland argued that the materially-adverse standard is objective, not subjective as Vulcan asserted, and that courts have recognized the “illogic” in Vulcan’s approach— if “applied literally,” Vulcan’s position “would

mean that any plaintiff who persevered in filing a federal lawsuit could not establish dissuasion.” R.22 at 17-18 (citations omitted).

### **B. District Court Decision**

The district court granted summary judgment to Vulcan on each of Strickland’s claims. R.30 at 29. Addressing the material adversity element of Strickland’s Title VII retaliatory hostile work environment claim, the court defined that element as whether the retaliatory harassment “well might have dissuaded a reasonable worker from engaging in protected activity.”<sup>4</sup> *Id.* at 13 (citing *Monaghan v. Worldpay Inc.*, 955 F.3d 855, 861-62 (11th Cir. 2020)); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)) (other citations omitted).

The court identified the conduct underlying Strickland’s retaliation claim as Vulcan denying her a promotion opportunity in 2023, reducing her job responsibilities, not investigating her discrimination complaints, putting her on a PIP, and terminating her. *Id.* at 18. It then determined that “because the employer’s decisions were indisputably tied to

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<sup>4</sup> The court did not separately analyze Strickland’s 42 U.S.C. § 1981 retaliatory harassment claim, noting that it was governed by the same analytical framework as her Title VII retaliation claim. R.30 at 12.

documented concerns about Plaintiff's performance," a "trier of fact could not reasonably infer that the challenged actions would have dissuaded a reasonable worker from engaging in protected activity." *Id.* The court stated that Vulcan's actions "were not materially adverse retaliation but rather ordinary workplace responses to an employee who was not meeting job expectations." *Id.* The court also noted that there was no evidence that Vulcan's alleged failure to investigate Strickland's discrimination complaints was directed at her or based on a retaliatory reason. *Id.*

The court then added that "if an employee files and pursues their discrimination complaint after the alleged harassment, the harassment did not dissuade that employee from making a charge of discrimination." *Id.* at 19 n.4 (citing *Tarmas v. Sec'y of the Navy*, 433 F. App'x 754, 763 (11th Cir. 2011)). The court observed that here, "[e]ven after the alleged harassment occurred, [Strickland] testified that she complained to Hicks again in February 2024 and filed her EEOC charge in May 2024. Thus, [she] was not ultimately dissuaded from making a charge of discrimination." *Id.* (citing *Tarmas*, 433 F. App'x at 763). The court concluded that "for all the above

reasons” Strickland had failed to establish a prima facie case of retaliatory harassment.<sup>5</sup> *Id.* at 19.

### ARGUMENT

**The district court misapplied the standard for determining whether an employer’s conduct was materially adverse for purposes of a Title VII retaliation claim.**

The district court made two errors in its determination that Vulcan’s conduct was not sufficiently “materially adverse” to support Strickland’s Title VII retaliation claim. First, the court conflated the material adversity element of the retaliation claim with the causation element. Second, the district court compounded that error by asserting that because Strickland was not actually dissuaded from engaging in further protected activity by Vulcan’s conduct, that fact rendered Vulcan’s earlier conduct not materially adverse and, therefore, not actionable as unlawful retaliation. Neither of these approaches can be reconciled with the standards governing material adversity in Title VII retaliation claims.

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<sup>5</sup> The court also granted summary judgment to Vulcan on Strickland’s ADEA claim, concluding the evidence was insufficient to establish causation. R.30 at 19-29.

**A. Title VII prohibits retaliation for engaging in protected activity.**

Title VII provides that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a). To establish a retaliation claim, a plaintiff must show (1) she engaged in statutorily protected activity, (2) she suffered a materially adverse action, and (3) there was some causal relation between the two events. *See, e.g., Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924 (11th Cir. 2018); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008).

As to the second prong, the Supreme Court explained that “the antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.” *Burlington N.*, 548 U.S. at 67. For this reason, *Burlington Northern* explained “the level of seriousness” to which this harm must rise: the challenged action must be employer conduct that “a reasonable employee would have found . . . materially adverse, [meaning] it well might have dissuaded a reasonable worker from

making or supporting a charge of discrimination.” *Burlington N.*, 548 U.S. at 67-68 (internal citations and quotation marks omitted); *see also Monaghan*, 955 F.3d at 857, 861 (recognizing same). And as this Court recognizes, while retaliatory conduct in violation of Title VII can manifest in a variety of forms (including harassment), *all* Title VII retaliation claims are subject to the same materially-adverse standard. *See Monaghan*, 955 F.3d at 860-62.

In describing the purpose behind this standard, *Burlington Northern* recognized that “Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses,” and “[t]he antiretaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms.” *Burlington N.*, 548 U.S. at 67-68 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). “It does so by prohibiting employer actions that are *likely* ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.” *Id.* at 68 (emphasis added) (quoting *Robinson*, 519 U.S. at 346). Accordingly, *Burlington Northern’s* materially-adverse standard focuses on the “reactions of a *reasonable* employee” because “the provision’s standard for judging harm must be objective,” which makes it

“judicially administrable” and accords with “the need for objective standards in other Title VII contexts.” *Id.* at 68-69 (citing cases).

**B. Whether conduct is “materially adverse” is a separate question from causation, and is not dependent on an employer’s justification for its conduct.**

The district court initially articulated the correct, “well might dissuade” standard for material adversity. *See* R.30 at 18 (quoting *Burlington N.*, 548 U.S. at 68). Its analysis, however, did not track that standard. Instead, the court examined Vulcan’s conduct in light of its proffered explanations for why it took those actions, describing how “the employer’s decisions were indisputably tied to documented concerns about [Strickland]’s performance” and that Vulcan’s actions were “ordinary workplace responses to an employee who was not meeting job expectations.” *Id.*

This was error. For purposes of determining material adversity, the court’s focus should be on the harm caused by the employer’s conduct, as measured by the *Burlington Northern* “well might have dissuaded” standard, and not on potential justifications for the employer’s conduct. Whether the employer can point to an allegedly nonretaliatory *reason* for taking the disputed action – such as alleged job performance deficiencies –

does not resolve whether a reasonable employee would find that the employer's action was sufficiently *harmful* that it well might have dissuaded them from engaging in protected activity.

As framed by the Supreme Court, the material-adversity standard focuses on the *effect* of the employer's action: whether it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68. This standard addresses the question of "retaliation that produces an *injury or harm*" and "the level of seriousness to which this *harm* must rise before it becomes actionable retaliation." *Id.* at 67 (emphases added). Given the Supreme Court's focus on the level of harm as the proper measure of material adversity, it is understandable that *Burlington Northern* made no mention of the material-adversity analysis being informed by the employer's possible motives or justifications for its conduct or by other indices of causation. *See id.*

This is not to say that an employer's explanation for its actions plays no role in a court's analysis. That explanation, however, is assessed as part of a plaintiff's burden to show causation, not material adversity. *See, e.g., Jefferson*, 891 F.3d at 924 (describing causation and material adversity as distinct elements of a Title VII retaliation claim); *Goldsmith*, 513 F.3d at 1277

(same) (citing *Burlington N.*, 548 U.S. at 59-71); *see also* EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, at II.B, C (Aug. 25, 2016), 2016 WL 4688886, at \*16-\*25 (“Retaliation Guidance”) (discussing material adversity and causation as separate elements of a retaliation claim).

While this Court has not directly addressed the improper conflation of causation and adversity standards in the Title VII retaliation context, it has addressed the same type of error in the analogous context of a First Amendment retaliation claim. *See Brannon v. Finkelstein*, 754 F.3d 1269, 1275 (11th Cir. 2014). In *Finkelstein*, this Court rejected the defendant’s argument that reducing plaintiff’s consulting work was not an adverse action because the reduction was due to budget cuts. *Id.* The Court held that it is error to “conflate[] the issue of adverse conduct with its cause” because at the adverse-conduct stage the court “need not ask” what was the “cause[]” of the employer’s action: “all [it] need conclude” at that stage is whether the contested employer conduct satisfies the relevant adverse-action standard. *Id.* *Finkelstein*’s reasoning – that causation (the basis for the employer’s action) and adversity (the resultant harm from its action) are addressed independently of each other – applies with equal force in the

context of Title VII retaliation claims and undermines the district court's analysis of Strickland's claim.

Other circuits have similarly criticized conflating the causation and adversity elements of retaliation claims. *See Smith v. City of Union*, 144 F.4th 867, 878 (6th Cir. 2025) (in the analogous context of a retaliation claim brought under the ADEA, criticizing the district court's "logic" for "conflat[ing] the materially adverse inquiry, which focuses on the perspective of a reasonable employee, with causation and pretext, which concern whether the employer took the challenged actions in order to retaliate"); *cf. Hassen v. Ruston La. Hosp. Co.*, 932 F.3d 353, 358 (5th Cir. 2019) (in a Title VII race-discrimination suit where the district court determined that the plaintiff's termination was not an adverse action because the plaintiff "herself caused it – by taking full-time employment elsewhere," faulting the district court for "conflat[ing] the prima facie stage with the next stage; where defendants may present a legitimate explanation" for their action).

**C. The “material adversity” of retaliatory conduct does not depend on whether the individual continued to engage in protected activity after a retaliatory act.**

The district court further erred when it suggested that Strickland could not show material adversity because she “was not ultimately dissuaded from making a charge of discrimination.” See R.30 at 19 n.4 (citing *Tarmas*, 433 F. App’x at 763). As described previously, Title VII’s antiretaliation provision prohibits employer actions that are “likely ‘to deter victims of discrimination from complaining.’” *Burlington N.*, 548 U.S. at 68 (emphasis added) (quoting *Robinson*, 519 U.S. at 346). Accordingly, the Supreme Court focused the standard for material adversity on the “reactions of a *reasonable* employee” because it thought it necessary that the test be an objective one. *Id.* at 68-69.

The district court’s contrary, subjective standard – measuring whether the employer’s actions *in fact dissuaded* the particular employee from further protected activity – cannot be reconciled with the *Burlington Northern* test. In fact, *Burlington Northern* itself involved an employee who filed a charge with the Commission and a complaint in district court – both activities protected against retaliation under Title VII that she undertook *after* suffering the employer’s alleged retaliatory conduct. See *id.* at 58-59,

70-73 (describing the employee's protected activities and holding the jury reasonably concluded that the retaliatory acts satisfied the materially adverse standard).

The actually-dissuaded standard also undermines a key purpose of Title VII's antiretaliation provision: "[m]aintaining unfettered access" to the statute's remedial mechanisms. *Robinson*, 519 U.S. at 346. As explained below, rather than protecting such access, the district court's reasoning would insulate employers that penalize employees who access Title VII's remedial mechanisms. Its reasoning is therefore "destructive of this purpose of the antiretaliation provision." *Id.*

The category of "engaging in further protected activity" includes making additional complaints to the employer and filing a charge with the Commission. *See Vincent v. Jefferson Cnty. Bd. of Educ.*, 152 F.4th 1339, 1353 (11th Cir. 2025) ("Protected activity includes not only filing formal EEOC complaints, but also informally voicing complaints to one's superiors or using an employer's internal grievance procedures.") (citation modified)). And filing a charge with the Commission is a prerequisite to an enforcement action under Title VII. *See* 42 U.S.C. § 2000e-5(f)(1); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 483 (2015) (discussing how Title VII's

remedial process begins with the filing of a charge with the Commission); *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1223-24 (11th Cir. 2010) (charge-filing requirement is a non-jurisdictional prerequisite for bringing suit under Title VII).

But with the actually-dissuaded standard, the protected activity of filing a charge *itself* renders any retaliatory conduct complained of in that charge not materially adverse because that conduct did not actually deter the employee from filing the charge. *See* R.30 at 19 n.4 (district court noting as part of its no-materially-adversity analysis that Strickland “was not ultimately dissuaded from making a charge of discrimination”). The district court’s reasoning therefore suggests that *no* retaliatory conduct could *ever* be challenged by resort to the statute’s remedial mechanisms, including litigation.

While this Court has not directly addressed this question in a published decision, other courts of appeals have rejected the actually-dissuaded standard. *See Baloch v. Kempthorne*, 550 F.3d 1191, 1199 n.5 (D.C. Cir. 2008) (Kavanaugh, J.) (“The District Court explained that Baloch had not been dissuaded from making charges of discrimination and that the alleged actions therefore could not have been materially adverse. . . . We

disagree with the District Court's reasoning on this one point because it appears that the court focused on Baloch's subjective reactions rather than on whether the objective 'reasonable worker' would have been dissuaded from making a discrimination complaint.") (citing *Burlington N.*, 548 U.S. at 68; other citation omitted); *Steele v. Schafer*, 535 F.3d 689, 696 (D.C. Cir. 2008) (*Burlington Northern* "expressly forecloses" consideration "of the courage that particular employee demonstrated by reporting [discrimination]"); *Patane v. Clark*, 508 F.3d 106, 116 (2d Cir. 2007) (rejecting the employer's argument that its conduct did not satisfy the *Burlington Northern* standard because it did not dissuade the plaintiff herself from reporting sexual harassment again when it recurred; recognizing that such a rule "would require that *no* plaintiff who makes a second complaint about harassment could *ever* have been retaliated against for an earlier complaint"); *but see Somoza v. Univ. of Denver*, 513 F.3d 1206, 1214-19 (10th Cir. 2008) (in case where employees continued to engage in protected activity after employer took action against them, noting that an employee's continuing to do so "may shed light as to whether the actions are sufficiently material and adverse," but also "reiterat[ing] that the focus of the question is on whether a reasonable employee 'would have found the

defendant's conduct sufficiently adverse that he or she well might have been dissuaded by such conduct from making or supporting a charge of discrimination''; ultimately concluding for other reasons that the conduct at issue did not meet the *Burlington Northern* standard) (citation omitted).

Similarly, district courts within this circuit have recognized the flawed reasoning behind the actually-dissuaded standard as a measure of material adversity. *See Lewis v. Michaels Stores, Inc.*, No. 3:05-CV-1323, 2007 WL 3333498, at \*6 (M.D. Fla. Nov. 7, 2007) ("If Defendant's argument were effective, no retaliation claim filed by a plaintiff in federal court could survive. This Court does not adopt Defendant's circular reasoning on this point."); *Ambus v. Autozoners, LLC*, 938 F. Supp. 2d 1225, 1237 (M.D. Ala. 2013) (same, citing *Lewis*). In addition, Commission policy guidance is consistent with *Baloch, Steele, and Patane*. *See Retaliation Guidance*, at II.B.1, 2016 WL 4688886 at \*16 & n.103 (recognizing that the *Burlington Northern* materially adverse action standard "can be satisfied even if the individual was not in fact deterred") (citing *Patane*, 508 F.3d at 116; other citation omitted).

As support for its contrary approach, the district court cited *Tarmas*, a per curiam, unpublished, nonprecedential decision. *See* R.30 at 19 n.4;

*Tarmas*, 433 F. App'x at 754, 756. But *Tarmas* noted in only a single sentence that the plaintiff was not dissuaded from pursuing a complaint. 433 F. App'x at 763. That sentence did not include a citation to any supporting authority, nor did it explain how to reconcile its observation with the objective test set out in *Burlington Northern*. See *id.* As such, *Tarmas* is not persuasive authority for the district court's approach here.

### CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court hold that the district court erred in its approach to analyzing whether alleged retaliatory conduct is materially adverse.

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/ James M. Tucker  
JAMES M. TUCKER  
Attorney

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
Office of General Counsel  
131 M St. N.E., 5th Floor  
Washington, D.C. 20507  
(202) 921-2554  
James.Tucker@EEOC.gov

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,803 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Eleventh Circuit Rule 32-4.

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s/ James M. Tucker  
JAMES M. TUCKER  
Attorney  
EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
Office of General Counsel  
131 M St. N.E., 5th Floor  
Washington, D.C. 20507  
(202) 921-2554  
James.Tucker@EEOC.gov