

No. 26-10634

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MELISA TINER,
Plaintiff-Appellant,

v.

ALLIANCE RECOVERY, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, No. 5:25-CV-136
Hon. James W. Hendrix, United States District Judge

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (“Commission”) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In this case, the district court concluded that this Court’s precedent required it to evaluate the plaintiff’s Title VII retaliation claim under the burden-shifting evidentiary framework provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In applying that framework, however, the district court failed to analyze the adverse-conduct element of the plaintiff’s claim under the “materially adverse” standard provided by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). Instead, the district court used an “adverse employment action” standard it compiled from decisions addressing Title VII *discrimination*, not retaliation, claims. This was error – as *Burlington Northern* and subsequent Supreme Court precedent have recognized, the adversity standard for discrimination claims is not interchangeable with *Burlington Northern*’s materially-adverse standard for retaliation claims.

Ensuring that courts analyze retaliation claims under the appropriate standards is a matter of great importance for the effective enforcement of

Title VII and other federal employment-discrimination statutes. For this reason, the Commission respectfully offers its views to the 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 ISSUES¹

1. Whether the district court erred in its analysis of the plaintiff's Title VII retaliation claim by using an adversity standard that is applicable to discrimination, but not retaliation, claims.

2. Whether the *McDonnell Douglas* evidentiary framework provides the only permissible analytical approach to Title VII retaliation claims premised upon circumstantial evidence.

STATEMENT OF THE CASE

A. Statement of the Facts

In July 2023, plaintiff Melisa Tiner began working for defendant Alliance Recovery, LLC ("Alliance"), a company that disposes of waste oil for businesses such as car dealerships. ROA.662. Tiner worked for Alliance in sales and eventually became the company's top seller. *Id.*

¹ We take no position on any other issue in this appeal, including the question of whether the court of appeals should vacate the district court judgment.

After Tiner rebuffed an advance from Jason Boyd, Alliance's general manager (who had recruited Tiner to work at Alliance), her relationship with Boyd and the company's owner deteriorated. ROA.662-68. When Boyd criticized her behavior toward an important client, Tiner complained to Alliance's owner that Boyd had attempted to kiss her and subjected her to other harassing conduct. ROA.663-66.

Thereafter, Tiner alleged, Alliance subjected her to a number of retaliatory acts, including denying her needed information relating to her work; directing customers away from her; accusing her of lying about being at work; not paying her in a timely fashion on two occasions; ignoring her while also treating her "with open hostility"; and, ultimately, terminating her employment. ROA.683-86. Tiner subsequently filed suit alleging Alliance had subjected her to sexual harassment and retaliation in violation of Title VII. ROA.4-8.

B. District Court Decision

The district court granted summary judgment to Alliance on all of Tiner's claims. ROA.661. As for her retaliation claim, the court rejected Tiner's assertion that she had presented direct evidence of retaliation, and therefore proceeded to analyze her claim using the *McDonnell Douglas*

evidentiary framework. ROA.679-82. In opting to use the *McDonnell Douglas* framework, the court noted that the Eleventh Circuit has held that application of this framework is discretionary rather than mandatory. ROA.681 (citing *Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 946-47 (11th Cir. 2023)). However, the court concluded, this Court requires use of the framework when, as here, “circumstantial evidence is subject to a prima-facie test.” ROA.680-82 (citing *Awe v. Harris Health Sys.*, 163 F.4th 969, 972 (5th Cir. 2026) (per curiam)). The court then stated that for Tiner to establish a prima facie case of retaliation she needed to show that “(1) she engaged in an activity protected by Title VII; (2) Alliance Recovery took an adverse employment action against her; and (3) a causal connection exists between that protected activity and the adverse employment action.” ROA.682 (citing *Cooper v. Dallas Police Ass'n*, 278 F. App'x 318, 320 (5th Cir. 2008)).

After noting that it was undisputed that Tiner had engaged in protected activity, the court addressed whether she had shown that Alliance took an “adverse employment action” against her. ROA.682. The court defined “adverse employment action” as employer conduct that “give[s] rise to ‘differences in treatment that injure’ the employee by means

of affecting the ‘employment “terms [or] conditions.”’ ROA.682-83 (quoting *Muldrow v. City of St. Louis*, 601 U.S. 346, 354 (2024) (quoting 42 U.S.C. § 2000e-2(a)(1))). The court further stated that “[w]hile the terms and conditions of a job need only be ‘economic or tangible,’ they must also be ‘identifiable.’” ROA.683 (quoting *Muldrow*, 601 U.S. at 354-55). The court added that in *Hamilton v. Dallas County*, 79 F.4th 494, 505 (5th Cir. 2023) (en banc), this Court explained that “while an adverse action need not be significant, it must at least be something more than a ‘de minimis workplace trifle[.]’” ROA.683 (alteration in original) (additional citation omitted).

Applying this adversity standard to Alliance’s allegedly retaliatory actions, the court concluded that four of those actions met that standard: the “breakdown in communication,” the “reassignment of customers,” one of the two instances where Alliance failed timely to pay Tiner, and her termination. ROA.686. As for the other allegedly retaliatory conduct, the court stated that it was “not persuaded . . . that being accused of lying or having hostile disagreements with coworkers is an adverse workplace action,” and that the one occasion Tiner received an expense-reimbursement check a week late was “[a]t best, . . . the sort of equal

treatment that cannot stand out as discrimination,” and “at worst, . . . a minor workplace ‘trifle.’” ROA.684-85 (citations omitted). After determining that Tiner had also shown a causal connection sufficient to support a *prima facie* case, the court concluded that she nevertheless failed to show that a genuine issue existed as to whether Alliance’s explanation for its conduct was pretextual. ROA.686-91.

ARGUMENT

I. The district court failed to analyze Alliance’s alleged retaliatory conduct under *Burlington Northern*.

The antiretaliation provision of Title VII prohibits an employer from “discriminat[ing] against . . . [its] employees or applicants for employment . . . because [an employee or applicant] has opposed any practice made an unlawful employment practice by” Title VII. 42 U.S.C. § 2000e-3(a); *see Burlington N.*, 548 U.S. at 56. The Supreme Court and this Court have long recognized that for retaliatory conduct to be actionable under § 2000e-3(a), it must be “materially adverse” to the plaintiff, “which in [the retaliation] context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 490 (5th Cir. 2014) (quoting *Burlington N.*, 548 U.S. at 68).

This standard for assessing retaliation claims brought under § 2000e-3(a) is conceptually distinct from the adversity standard governing discrimination claims brought under 42 U.S.C. § 2000e-2(a)(1), which prohibits discrimination as to hiring, discharge, compensation, or other “terms, conditions, or privileges of employment.” *Muldrow*, 601 U.S. at 356-58 (discussing § 2000e-2(a)(1) and *Burlington Northern*). *Muldrow* did revise the adversity standard for § 2000e-2(a)(1) discrimination claims, clarifying that a plaintiff alleging discrimination “must show some harm respecting an identifiable term or condition of employment.” *Muldrow*, 601 U.S. at 354-55. That case, however, did not involve a retaliation claim, nor did the Court’s decision purport to change the retaliation standard. To the contrary, *Muldrow* reiterated that the proper adversity standard for retaliation claims comes from *Burlington Northern*, and arose “for reasons peculiar to the retaliation context.” *Id.* at 357-58.

As *Muldrow* explained, the material-adversity test for retaliation “was meant to capture those (and only those) employer actions serious enough to ‘dissuade[] a reasonable worker from making or supporting a charge of discrimination.’” *Id.* at 357 (alteration in original) (quoting *Burlington N.*, 548 U.S. at 68). “If an action causes less serious harm, [*Burlington Northern*]

reasoned, it will not deter Title VII enforcement; and if it will not deter Title VII enforcement, it falls outside the purposes of the ban on retaliation.” *Id.* But in the discrimination context, “[w]hether an action causes significant enough harm to deter any employee conduct is . . . beside the point.” *Id.* at 358. In such cases, the question is simply whether an employee has experienced workplace discrimination based on a protected trait, “without distinguishing between significant and less significant harms.” *Id.* at 358; *see also Burlington N.*, 548 U.S. at 67 (rejecting “the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision”).

Here, the district court failed to mention *Burlington Northern’s* materially-adverse-action standard, let alone apply it to Tiner’s retaliation claim. *See* ROA.679-85. Instead, the court cited *Muldrow* and *Hamilton* (itself a discrimination – not retaliation – case that addressed the adversity standard for discrimination claims, *see generally* 79 F.4th at 497-506) for the “adverse employment action” standard it applied to Tiner’s retaliation

claim. *See* ROA.683-85. This was error.² As described above, Title VII's discrimination and retaliation provisions have different purposes and are subject to different standards for measuring adversity – standards that are not interchangeable.

II. While this Court requires use of the *McDonnell Douglas* framework to assess a plaintiff's circumstantial evidence of retaliation on summary judgment, other circuits have taken a more flexible approach.

The district court concluded that it was bound by the decisions of this Court to apply the *McDonnell Douglas* framework in every case involving circumstantial evidence of retaliation. ROA.679-82. We acknowledge that this Court remains bound to existing circuit precedent, and the full Court has not yet considered whether to apply the *McDonnell Douglas* framework less categorically when evaluating Title VII claims involving circumstantial

² The district court also erred in its characterization of *Muldrow's* substantive holding. Contrary to the court's claim that under *Muldrow*, the affected "terms and conditions of a job need only be 'economic or tangible,'" ROA.683, *Muldrow* in fact states that Title VII's "'terms [or] conditions' phrase . . . is *not* used 'in the narrow contractual sense'; it covers *more* than the 'economic or tangible.'" 601 U.S. at 354 (alteration in original) (emphasis added) (citation omitted). In light of the district court's misstatement on this point, we note that the *Burlington Northern* material-adversity standard is similarly not limited to economic harms. *Burlington N.*, 548 U.S. at 68-69.

evidence on summary judgment. *See, e.g., Holloway v. Procter & Gamble Mfg. Co.*, 185 F.4th 545, 552 (5th Cir. 2026) (Ho, J., concurring) (per curiam); *Awe*, 163 F.4th at 975-76 (Elrod, C.J., concurring) (observing that “because of the Fifth Circuit’s reading of the *McDonnell Douglas* standard, foreign to both Title VII and Rule 56, our court ‘put[s] on blinders’ to the ‘various ways in which a plaintiff could prove his claim.’” (citation omitted)).

We respectfully note that other circuit courts have concluded that the *McDonnell Douglas* framework is not the exclusive means by which a Title VII plaintiff relying on circumstantial evidence may prove her case. In those circuits, the courts recognize that the focus in such suits is less on the plaintiff’s ability to satisfy the requirements of a particular evidentiary framework than on the ultimate question of whether the evidence establishes (or, in the summary judgment context, if a reasonable fact finder could conclude) that the employer discriminated as the plaintiff alleged. For example, the Eleventh Circuit has explained that “[a] plaintiff who cannot satisfy the *McDonnell Douglas* framework may still be able to prove her case with a convincing mosaic of circumstantial evidence that would allow a reasonable jury to infer or find intentional racial discrimination in an adverse employment action.” *Poer v. Jefferson Cnty.*

Comm’n, 100 F.4th 1325, 1336-37 (11th Cir. 2024). “To defeat his employer’s motion for summary judgment on a Title VII discrimination claim,” that court held, “a plaintiff may use the *McDonnell Douglas* framework or the convincing mosaic approach.” *Hall v. Coal Bed Servs. Inc.*, — F.4th —, 2026 WL 2581843, at *4 (11th Cir. Sept. 1, 2026). *Hall* describes the availability of an alternative to the *McDonnell Douglas* framework as providing “‘two paths to the same destination—the ordinary summary judgment standard.’ Whichever path is used, the destination is the same: an answer to whether the evidence is sufficient for a reasonable jury to infer illegal discrimination.” *Id.* (citations omitted)). Similarly, the Seventh Circuit recognizes that on summary judgment, a plaintiff “may prove discrimination in a holistic fashion, by proffering ‘direct or circumstantial evidence of intentional racial discrimination,’” or “may rely on the [*McDonnell Douglas*] burden-shifting framework.” *Wince v. CBRE, Inc.*, 66 F.4th 1033, 1040 (7th Cir. 2023) (citations omitted).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court hold that the district court erred when it failed to assess

Alliance's allegedly retaliatory conduct under the *Burlington Northern* material adversity standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Fifth Circuit Rule 32.2, because it contains 2,163 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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