No. 26-1379

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MELISSA MARTIN,
Plaintiff-Appellant,

v.

STATESIDE ASSOCIATES, 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

CHRISTOPHER LAGE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

JULIE L. GANTZ
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2547
julie.gantz@eeoc.gov

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 7

Argument 9

I. Martin plausibly alleged that her transfer was materially adverse because she did not choose it voluntarily. 11

II. Martin plausibly alleged retaliation in the form of harassment that was materially adverse under *Burlington Northern*. 20

Conclusion 22

Certificate of Compliance 24

Certificate of Service 25

TABLE OF AUTHORITIES

Cases

Adams v. Anne Arundel Cnty. Pub. Schs.,
789 F.3d 422 (4th Cir. 2015) 13

Ashcroft v. Iqbal,
556 U.S. 622 (2009) 11

Bell Atl. Corp. v. Twombly,
550 U.S. 544, 570 (2007) 11

Blake v. Potter,
247 F. App'x 673 (6th Cir. 2007) 8, 17-18

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 8, 13, 14, 15

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) ..... *passim*

Butler v. United States,
702 F.3d 749 (4th Cir. 2012) 11

Drager v. PLIVA USA, Inc.,
741 F.3d 470 (4th Cir. 2014) 2

Herkert v. Bisignano,
151 F.4th 157 (4th Cir. 2025) 9, 17, 19-20

Holland v. Wash. Homes, Inc.,
487 F.3d 208 (4th Cir. 2007) 14

Hoyle v. Freightliner, LLC,
650 F.3d 321 (4th Cir. 2011) 8, 12, 13, 14

Laird v. Fairfax Cnty.,
978 F.3d 887 (4th Cir. 2020) 12, 14, 16

Laurent-Workman v. Wormuth,
54 F.4th 201 (4th Cir. 2022) 10, 13, 20, 22

Muldrow v. City of St. Louis,
601 U.S. 346 (2024) 13, 14, 15, 17, 18

Strothers v. City of Laurel,
895 F.3d 317 (4th Cir. 2018) 10, 13

Turley v. SCI of Ala.,
190 F. App'x 844 (11th Cir. 2006) 8, 17, 18

Vance v. Ball State Univ.,
570 U.S. 421 (2013) 15

Statutes & Rules

42 U.S.C. § 2000e 1

42 U.S.C. § 2000e-3(a) 9

Fed. R. Civ. P. 12 11

Fed. R. App. P. 29 1

STATEMENT OF INTEREST

Congress tasked the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This appeal involves the proper standard for evaluating whether an employer's action qualifies as materially adverse for purposes of a retaliation claim under *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). Because the EEOC has a substantial interest in the correct articulation and application of this standard, the agency offers its views to the Court. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Whether an employer's decision to force an employee to choose between two negative work assignments could be materially adverse under *Burlington Northern*.

2. Whether *Burlington Northern*'s well-might-have-dissuaded standard provides the proper test to evaluate allegations of retaliation in the form of harassment, rather than the "severe or pervasive" standard the district court applied.

[1] The EEOC takes no position on any other issue in this appeal.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Stateside Associates, a government relations and affairs consulting firm, hired plaintiff Melissa Martin as a Regulatory Counsel in March 2007. Second Amended Complaint, JA.159-160 (R.38 ¶¶ 5, 13). After Martin achieved consistently solid performance reviews and bonuses, Stateside promoted her in the summer of 2019 to Senior Director for the Healthcare and Education Team, where she would use her "considerable expertise" as "a supervisory regulatory team leader." JA.160 (R.38 ¶¶ 13-15). The company increased her salary by 16% and assigned her to report to Senior Principal Robert Holden. *Id.* (R.38 ¶¶ 14-15).

Beginning later that year, Martin alleged, Holden "unveiled deep animus" toward Martin and other women on the Healthcare Team and began efforts to force Martin out of the company. JA.160 (R.38 ¶ 16). Holden told staffers to avoid working directly with Martin and her team because it "would complicate matters." *Id.* In the winter of 2020, one of

---

[2] Because this appeal arises from a grant of a motion on the pleadings under Federal Rule of Civil Procedure 12(c), we present the facts as stated in the Amended Complaint in the light most favorable to Martin. *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014).

Holden's staffers, Zach Cook, directed other employees to scrutinize Martin and her team's work for "errors," despite that these employees lacked regulatory experience and would not have the requisite knowledge to identify any errors. JA.160 (R.38 ¶ 17). Martin alleged that male managers and their staff were not subjected to such oversight. JA.161 (R.38 ¶ 17).

Martin alleged that Holden, Cook, and "other managers" made "demeaning remarks about female managers and staff, especially [Martin]." JA.160 (R.38 ¶ 18). For example, Cook "continually" disparaged Martin's academic credentials and divorced status. *Id.* Cook did not direct similar disparaging comments at male employees. *Id.* Additionally, Martin alleged that Holden's male subordinates, including Cook, received repeated promotions while female employees were denied comparable advancement opportunities. *Id.*

Martin alleged that her Healthcare Team was understaffed in comparison to Stateside's other teams, and senior managers ignored Martin's reports that this was affecting her team's "ability to perform its missions." JA.161 (R.38 ¶ 19). The Healthcare Team's workload had increased significantly in 2020, first with a new client and then with the

onset of the COVID-19 pandemic. JA.161 (R.38 ¶¶ 20-22). Holden reacted to this surge of work by "regularly lash[ing] out vehemently at Plaintiff over operational matters on the Healthcare Team" and "regularly threatened Plaintiff by vehemently screaming at her." JA.162 (R.38 ¶ 23). He "would pound his fists and slam his hands on tables and other office furniture." *Id.*

In August 2020, Martin lodged an internal complaint. JA.162 (R.38 ¶ 25). One week later, she described Holden's abusive behavior directed at her and other female staffers to Senior Principal and Co-CEO Mark Anderson. JA.162 (R.38 ¶ 26). Anderson enlisted attorney Meredith Campbell to investigate. JA.162 (R.38 ¶ 27). Martin recounted "the abusive work environment" "resulting from Holden's threatening behavior directed at her and other female staffers" to Campbell on August 27 and wrote up and signed her interview report the following month. JA.162-63 (R.38 ¶¶ 28-29).

After over two months had elapsed without Stateside taking any remedial action, Martin emailed Anderson to request another meeting. JA.163 (R.38 ¶ 31). Anderson then gave Martin "an ultimatum" that included two options: (1) continue working on the Healthcare Team and reporting to Holden, with decreased responsibility and increased

micromanagement, or (2) move off the Healthcare Team to work on special projects under Anderson's supervision and give up her role as a supervisor. JA.163 (R.38 ¶ 32). Anderson offered Martin no specifics about the second option. *Id.* Martin alleged that she "was alarmed" by what she viewed as retribution for complaining about discrimination and viewed this as a choice between two "substantial[ly] negative" job options. JA.164 (R.38 ¶ 33). Martin "reluctantly accepted the new position" as Senior Director and Counsel of Policy Research under Anderson. JA.164 (R.38 ¶ 34).

Anderson did not provide Martin with a job description or convey his expectations for the position. *Id.* He emailed Martin's colleagues that her role would involve "ongoing research regarding 'compliance projects and ongoing research into existing policies that arise throughout the year.'" *Id.* Stateside promoted Cook to replace Martin. JA.164 (R.38 ¶ 35). Cook, who had led the effort to surveil Martin's work and repeatedly directed disparaging remarks at Martin and other female employees, lacked regulatory expertise and had only limited management experience, "dramatically less" than Martin. *Id.*

Martin experienced the new role as a "dead-end position with no defined responsibilities." JA.168-69 (R.38 ¶ 56). She alleged that her efforts to obtain clarification from Anderson were met with repeated criticism and reprimands for not performing the job. JA.165-66 (R.38 ¶¶ 36-39, 41-42). Martin reported her ongoing concerns about discrimination, harassment, and retaliation to Vice President Stephanie Reich in March 2021. JA.167 (R.38 ¶ 48). Reich sent Martin back to Campbell, whose previous questioning had resulted in no action. JA.167 (R.38 ¶¶ 48-49). Although Martin offered to give Campbell the names of employees who could corroborate her reports about being targeted, Campbell declined to interview those employees. JA.167 (R.38 ¶ 50).

Martin alleged that "co-workers shunned her," she had "little productive work to perform," and without supervisory responsibilities, "her status and standing with [Stateside] was sharply diminished." JA.167-68 (R.38 ¶ 51). She alleged the abuse she suffered "was having a dramatic effect" on her health, "thwarting" her "ability to perform her job," and required medical treatment for depression and anxiety. JA.168 (R.38 ¶¶ 52-53). In the spring of 2021, her mental health provider recommended she resign, which she did on April 6. JA.168 (R.38 ¶¶ 53-54). Martin alleged

that "[o]ther female employees quit because of the oppressive working conditions." JA.169 (R.38 ¶ 58).

Martin sued Stateside for sex discrimination and retaliation under Title VII. She alleged that Stateside "treated [her] disparately compared to other similarly situated co-workers not in Plaintiff's protected classifications and that had not engaged in similar projected activities," including Cook. JA.169 (R.38 ¶ 59). These male employees "were not subject to similar treatment by Holden and Defendant's other managers." *Id.* She also maintained that "[s]imilarly situated males, who had similar or worse work histories" and who "had not complained of discriminatory practices," including Cook, "were not subject to adverse actions similar to those imposed" on Martin. JA.170 (R.38 ¶ 65). She also alleged sex discrimination and retaliation in the form of harassment. JA.173-75 (R.38 at 16-18).

B. District Court's Decision

The district court granted Stateside's motion for judgment on the pleadings. JA.18, 26. On Martin's retaliation claim, the court held that the operative complaint did not allege facts sufficient to plausibly allege that she was subjected to a materially adverse action. JA.32. Although the court

quoted *Burlington Northern* and described the materially adverse action standard as one that might have dissuaded a reasonable worker from making or supporting a charge of discrimination, the district court elaborated that the "resulting harm" must be a "significant detriment" to the plaintiff, "[t]ypically" "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* (citing *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998))). In the court's view, Martin failed "to meet this standard and to plausibly allege retaliation." *Id.* The court ruled that Martin did not allege that she experienced "a material change in employment status when Defendant offered a choice between two positions" because *she* selected the new position over remaining as Healthcare Team director. JA.35 (citing *Turley v. SCI of Ala.*, 190 F. App'x 844, 846 (11th Cir. 2006); *Blake v. Potter*, 247 F. App'x 673, 676 (6th Cir. 2007)).

The district court characterized Anderson's refusal to supervise and work with Martin and criticism of her work as "minor work disagreements or personality conflicts between coworkers" that are beyond Title VII's

reach. JA.36. The district court then dismissed both Martin's discriminatory and retaliatory hostile-work-environment claims, treating them as one claim and applying the same standard to both. JA.37. The court did not address separately Martin's retaliatory hostile-work-environment claim that after she complained about discrimination to Anderson, instead of resolving her concerns, Stateside targeted her with "a lack of work and shunning by her co-workers." JA.41. Nor did the court apply *Burlington Northern*. Instead, the court suggested that the same severe or pervasive requirement for actionable discriminatory harassment applied and held that the alleged shunning and unsatisfactory work assignments could not "clear the high bar needed to meet the 'severe or pervasive element.'" *Id.*

ARGUMENT

Title VII's anti-retaliation provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice by this subchapter…." 42 U.S.C. § 2000e-3(a). To establish a retaliation claim, a plaintiff must show that her employer injured her, but "courts have employed a distinct standard for identifying cognizable adverse actions" in that context. *Herkert v. Bisignano*, 151 F.4th

157, 165 (4th Cir. 2025). Relying on the antiretaliation provision's text and purpose, the Supreme Court in *Burlington Northern* explained that the provision protects an individual from retaliatory actions that are "materially adverse," meaning they "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 67-68 (citation modified); *see also Strothers v. City of Laurel*, 895 F.3d 317, 327 (4th Cir. 2018) (recognizing same).

The *Burlington Northern* Court explained that it referred to "material" as a way to "separate significant from trivial harms," and that "petty slights, minor annoyances, and simple lack of good manners" would not be deterrent—and therefore actionable—retaliation. 548 U.S. at 68. In addition, the Supreme Court held that unlike Title VII's substantive antidiscrimination provision, the antiretaliation provision "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64; *see also Strothers*, 895 F.3d at 327 (same). That is because "[u]nlike the substantive discrimination provision, the anti-retaliation provision seeks to deter not status-based discrimination, but employer retribution that chills employee opposition to discrimination." *Laurent-Workman v. Wormuth*, 54 F.4th 201, 216 (4th Cir. 2022).

Here, the district court cited the *Burlington Northern* standard, but instead of applying it, the court used adversity standards that apply (or previously applied) to discrimination claims. Under the proper standards, Martin plausibly alleged multiple types of retaliation.[3]

I. Martin plausibly alleged that her transfer was materially adverse because she did not choose it voluntarily.

Martin alleged that Stateside retaliated against her by transferring, or demoting, her to an undefined non-management position soon after she renewed her complaint about sex discrimination and harassment. JA.163. After she began that new job, she alleged, Anderson refused to give her meaningful work or guidance on her job duties, sabotaging her ability to succeed in the position. JA.165, 167. He also repeatedly berated her when she would ask for feedback on prioritizing competing deadlines or offer status reports. JA.165-66, 167. Where she had led the Healthcare Team, she

[3] A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is evaluated under the same standards as a motion to dismiss under Rule 12(b)(6). *Butler v. United States*, 702 F.3d 749, 751-52 (4th Cir. 2012). At the pleading stage, courts apply the familiar *Iqbal/Twombly* plausibility standard, under which "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

was then working solo and alleged that she was ostracized by her colleagues in a role that diminished her standing in the company. JA.167-68. Accordingly, Martin plausibly alleged that Stateside subjected her to one or more materially adverse actions. *See Hoyle*, 650 F.3d at 337 (applying *Burlington Northern*) (plaintiff's transfer with different job duties was a materially adverse action that could support her retaliation claim because it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination") (internal quotations marks omitted).

In concluding otherwise, the district court failed to apply the "well might have dissuaded" analysis required by *Burlington Northern*. The court initially recited the correct standard by describing a "materially adverse action" in the retaliation context as one that "might have dissuaded a reasonable worker" from engaging in protected activity. JA.32. The court added that the "resulting harm" must be "a significant detriment" to the plaintiff, meaning not one that is "insubstantial or trivial." *Id.* (quoting *Laird v. Fairfax Cnty.*, 978 F.3d 887, 893 (4th Cir. 2020)). But it said that "typically" "an adverse action is one that constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment

with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* (citing *Hoyle*, 650 F.3d at 337, and *Ellerth*, 524 U.S. at 761).

This approach reflects some confusion in this Court's retaliation case law surrounding material adversity. On the one hand, this Court has ruled, correctly, that plaintiffs "need to show material adversity precisely because acts of retaliation that do *not* alter the terms of employment still can frustrate Title VII's aims." *Laurent-Workman*, 54 F.4th at 216-17 (emphasis added) (citing *Burlington N.*, 548 U.S. at 63). Inserting a standard "from the substantive discrimination provision back into the anti-retaliation provision repeats the error *Burlington Northern* sought to correct." *Id.* at 216-17; *see also Strothers*, 895 F.3d at 327 (differentiating between adverse employment actions and materially adverse actions).

On the other hand, in a number of decisions, this Court has conflated the meaning of "significant" harm for retaliation purposes with the now-outdated "significance" requirement for adverse employment actions that some courts applied to *discrimination* (not retaliation) claims.[4] *See Adams v.*

[4] In *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), the Supreme Court held that to establish an adverse employment action, a plaintiff must show that

Anne Arundel Cnty. Pub. Schs., 789 F.3d 422, 431 (4th Cir. 2015); *Laird*, 978 F.3d at 893 (citing portion of *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007), discussing adverse employment action standard for discrimination claims).

And in other decisions, like *Hoyle*, 650 F.3d at 337, on which the district court relied here, this Court has set an even higher bar for "significant," stating that it means a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." But that is the standard used to "'identify a class of [hostile work environment] cases' in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *Burlington Northern*, 548 U.S. at 64 (alteration in original) (quoting *Ellerth*, 524 U.S. at 760) (other citations omitted).

---

her employer took an action that caused "some harm respecting an identifiable term or condition of employment." 601 U.S. at 354-55; *see also id.* at 359 (plaintiff "need show only some injury respecting her employment terms or conditions"). A plaintiff need not show "that the harm incurred was 'significant'" nor must a plaintiff exceed a heightened bar. *Id.* at 355.

Under *Burlington Northern*, "significant" harm for retaliation purposes is not equivalent either to the pre-*Muldrow* standard or to *Ellerth*. The *Ellerth* standard applies to strict liability for a supervisor's harassment resulting in a tangible employment action. *Vance v. Ball State Univ.*, 570 U.S. 421, 440 (2013). And after *Muldrow*, plaintiffs need not show significant harm to prove discrimination claims, 601 U.S. at 355-56, making pre-*Muldrow* "significance" analysis particularly unhelpful. Most importantly, *Burlington Northern* spelled out what differentiates the significant from the trivial for retaliation purposes: the employer action's likely deterrent effect. 548 U.S. at 68.

Here, instead of applying the *Burlington Northern* material adversity standard, the district court determined that Martin's transfer to the non-managerial job following her complaints of harassment was not sufficiently adverse because she *chose* to transfer to the new position Anderson proposed—a "dead-end," non-supervisory role "with no defined responsibilities"—instead of remaining subordinate to her alleged harasser with increased supervision and less responsibility. JA.169. In the court's view, the transfer was "not the result of a deliberate decision by the employer." JA.27.

But according to Martin's complaint, it was Stateside's deliberate decision to present Martin with two bad options for her continued employment, both of which plausibly meet the material adversity standard. Martin stated in her complaint that she "reluctantly" chose the new "dead-end position with few responsibilities" and saw both options that Anderson presented as "negative" to her working conditions. JA.164. She alleged that staying meant withstanding Holden's continued, potentially escalating abuse that was wreaking havoc on her health and ability to perform at work. But the move to the new position meant giving up leading the Healthcare Team and working with colleagues to take on special projects for Anderson, who seemed determined to undermine her efforts. The prospect of either scenario "well might have dissuaded a reasonable worker from" complaining about discrimination. *Burlington N.*, 548 U.S. at 68.

This Court has reasoned that "a transfer is not an adverse action when it is *voluntarily requested* and agreed upon." *Laird*, 978 F.3d at 895 (considering discrimination and retaliation claims under analogous statute) (emphasis added). However, Martin alleged that her choice to move to the new position was neither requested nor voluntary, and the district court

erred in failing to credit those allegations. *See, e.g., Herkert*, 151 F.4th at 163, 166-68 (reversing summary judgment for the employer in a discrimination and retaliation case brought under the Rehabilitation Act, 29 U.S.C. § 794(d), where there were factual disputes as to the voluntary nature of the plaintiff's reassignment to a non-supervisory position).

The district court relied on *Blake*, 247 F. App'x at 676, and *Turley*, 190 F. App'x at 846, JA.35, but those cases do not justify the court's determination that Martin's "choice" somehow negated the adversity of her transfer. First, both cases relied on pre-*Muldrow* adversity analysis from the discrimination context. In *Blake*, the plaintiff alleged that the employer's denial of four of her requests for schedule changes to avoid working weekends or evenings because of her parenting responsibilities was an adverse employment action because she took time off without pay rather than reporting to work as scheduled. 247 F. App'x at 675. The Sixth Circuit, applying the "significant" adversity standard *Muldrow* rejected, concluded as to the plaintiff's *discrimination* claim that a denial of discretionary schedule changes is not comparable to termination or a demotion with a decrease in wages, nor did it result in a "material loss of benefits" or "significantly diminished material responsibilities." *Id.* The court stressed

that the employer granted the plaintiff many of her requested schedule changes and that it was her choice to take unpaid leave rather than work in the few instances it denied her requests. *Id. Blake's* holding thus rests upon its pre-*Muldrow* application of the test for an adverse employment action in the discrimination, not retaliation, context.

In *Turley*—a discrimination case that did not include a retaliation claim— the employer gave the employee a Hobson's choice between (1) staying in the sales manager position to which she had been promoted but giving up her own sales, which would mean she would earn about one-third the money, or (2) a demotion in which she would return to being a sales counselor without managerial duties but could continue to earn sales-based commissions. 190 F. App'x at 846. Turley "chose" the latter for financial reasons and so, the court concluded, there was no adverse employment action. *Id.* But the court provided no legal authority or analysis supporting its conclusion that the district court did not err in ruling that the plaintiff "chose" to take a demotion and the "'demotion' was the not result of a deliberate decision of" the defendant. *Id.* at 846-47.

Here, that Stateside required Martin to choose between two bad alternatives does not negate the transfer's material adversity. These facts

are analogous to those in *Herkert*, where the defendant transferred the plaintiff from her supervisor job to a non-supervisory position after she requested a scheduled telework agreement as an accommodation for multiple disabilities. 151 F.4th at 161. The new position came with a loss of supervisory duties, prestige, and advancement opportunities. *Id.* The employer subsequently offered the plaintiff a third position, as the plaintiff complained about hostility and harassment toward her telework requests from her supervisor. *Id.* at 161, 167. But because "it was at all times made clear to her that she could not keep her original job," this Court held that a jury could find that the transfer "was not 'voluntary' in the relevant sense" and reversed the district court's ruling that the plaintiff was precluded from showing material adversity because she accepted the reassignment. *Id.* at 166-67.

Like the plaintiff in *Herkert*, Martin alleged that she accepted the transfer as a way to remove herself "from the hostile, harassing and retaliatory work environment in her current office," 151 F.4th at 167. Indeed, she alleged that she faced decreased responsibilities and additional micromanagement if she stayed in her current role. JA.160, 162, 168-69. Thus, she alleged that while she technically chose her transfer, that choice,

like the *Herkert* plaintiff's, was not genuinely "voluntary." Accordingly, she plausibly alleged that her transfer was materially adverse.

II. Martin plausibly alleged retaliation in the form of harassment that was materially adverse under *Burlington Northern.*

Although Martin alleged a retaliatory hostile work environment as well as a sex-based hostile work environment, the district court treated them as the same. *See* JA.37-41. As this Court explained in *Laurent-Workman*, the tests are not the same. Whereas "[b]efore *Burlington Northern*, [this Court] held that retaliatory harassment can constitute adverse employment action if it affected the terms, conditions, or benefits of employment," the Supreme Court "now imposes a less demanding heuristic for retaliation claims to accomplish the purpose of that provision." 54 F.4th at 216 (citation modified). But, this Court said, severity and pervasiveness are "useful units of measurement" even under the different standard. *Id.* at 217. Thus, "[a] retaliatory hostile work environment must be so severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination." *Id*. That is because "[t]he severity and frequency of hostility are important factors to consider when determining whether the circumstances would

dissuade a reasonable employee from opposing discrimination, just as they are for assessing substantive hostile work environments." *Id.* Consequently, *Burlington Northern* prohibits harassment in retaliation for the exercise of protected conduct if it meets the "well might have dissuaded" test regardless of whether the harassment is severe or pervasive enough to alter the terms and conditions of employment. *Id.* at 216 (quoting *Burlington N.*, 548 U.S. at 68).

Although the district court described the standard for adversity when assessing retaliation in the form of harassment, it never applied *Burlington Northern*. It dismissed Martin's sex-based hostile work environment claim after determining that the alleged harassment was neither because of sex nor sufficiently severe or pervasive to violate Title VII. JA.38-41; *see also* JA.40-41 (referencing the "high bar" required for an actionable hostile work environment claim). It then perfunctorily concluded that Martin "failed to establish either a sex-based or retaliatory hostile work environment claim." JA.41.

Martin alleged that when she complained about the sex-based harassment she had suffered, Stateside did not do anything to remedy the offending behavior, but instead offered her reassignment to the undefined,

non-manager position without articulated duties or projects, and where she would work without colleagues. JA.163, 167-69. Once she agreed to the transfer, she alleged, Anderson set her up to fail by repeatedly berating her for asking for clarification and refusing to work with her. J.A.165-66. She alleged that Stateside isolated her from her colleagues and gave her little meaningful work. Stateside's conduct, as alleged, plausibly could discourage a reasonable worker from complaining of discrimination. *See Laurent-Workman*, 54 F.4th at 218 (plaintiff's allegations that supervisor "engaged in a series of unpredictable management decisions and acts of sabotage" were sufficient to plead material adversity).

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to apply the correct standards, as set forth above, to Martin's retaliation claims.

Respectfully submitted,

CHRISTOPHER LAGE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

s/*Julie L. Gantz*
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2547
julie.gantz@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 4,234 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(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.

s/*Julie L. Gantz*
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2547
julie.gantz@eeoc.gov

CERTIFICATE OF SERVICE

I certify that on November 6, 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/*Julie L. Gantz*
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2547
julie.gantz@eeoc.gov