No. 23-1031

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

QING QIN,
Plaintiff-Appellant,

v.

VERTEX, INC.,
Defendant-Appellee.

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

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

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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*. This appeal presents important questions about the scope and application of Title VII's disparate treatment and retaliation provisions. Because the EEOC has a substantial interest in the proper interpretation of Title VII, it files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

1. Whether Plaintiff-Appellant Qing Qin engaged in protected opposition to discrimination when he asked his supervisor whether Vertex had not promoted him for eighteen years because he is Chinese.

2. Whether a reasonable jury could find a causal link between Qin's protected conduct and adverse actions that Vertex took against him soon after.

3. Whether a reasonable jury could find that Vertex's proffered legitimate, nondiscriminatory reasons for placing Qin on a performance improvement plan and later terminating him were pretextual in the context of Qin's retaliation claim.

4. Whether the district court misapplied the *McDonnell Douglas* standard when it held that Qin did not establish a prima facie case of disparate treatment based on Vertex's failure to promote Qin in 2018 and based on its termination of Qin in 2019.

5. Whether a reasonable jury could find that Vertex's proffered legitimate, nondiscriminatory reasons for placing Qin on a performance improvement plan and later terminating him were a pretext for race or national origin discrimination.

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff-Appellant Qin moved to the United States from China, his birthplace, in 1985. Appx.1070. He worked as an Enterprise Software Architect at Defendant-Appellee Vertex, Inc. from October 2000 until Vertex terminated him on May 16, 2019. Appx.819. Vertex typically promoted Qin's peers after about eight years. Appx.820. But Vertex never promoted Qin, despite his nearly two decades with the company. *Id*. Qin also suffered indignities based on his national origin while at Vertex, including being asked by coworkers why he did not "go back to China" and being called "China Man." Appx.822.

1. Qin is not promoted in 2018 and questions the motivation behind Vertex's decisionmaking.

In 2018, Qin finally appeared to be on track for a long-awaited promotion to Senior Enterprise Architect. In February, his supervisor Rick Harter emailed Ed Read, Qin's sponsor[1] and a director of finance at Vertex. Appx.1272. Harter wrote that he had spoken with Qin about a possible promotion at the end of the year, "after being fully engaged this rating period." *Id*. Harter also wrote that Qin's "current assignments certainly reflect senior level workload." *Id*.

Read drafted a recommendation to promote Qin, effective October 2018. Appx.1170-71. In it, he wrote Qin "has continued to prove himself and adds a tremendous amount of value to the organization." Appx.1170. He also explained that Vertex was facing "a business need for work at the senior enterprise level of architecture that will be persistent in Vertex's future." *Id*. Harter approved the promotion.[2] Appx.846-47.

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[1] At Vertex, employees have both managers and sponsors. Managers are supervisors; sponsors help employees with personal and career development. Appx.845.

[2] Although the promotion recommendation was meant to be effective in October 2018, Appx.1170, there is reference in Harter's deposition to an email in November 2018 prompting him to sign off on Qin's

But come October, Qin was not promoted. Around that time, Qin asked Harter whether Qin had not been promoted for eighteen years because he is Chinese. Appx.822. Harter recalled telling Qin, "[i]f you had issues or questions about that, you need to go to your HR representative or the HR department." Appx.857.

Qin then reached out to Vertex's Human Resources officer Andrea Falco on December 10, asking for more information to better understand how a recent harassment training he had received applied at Vertex. Appx.1307. Over the course of a two-day email exchange, Qin asked "whom I can consult on specifics, such as how to tell whether [harassment] should be reported, what info to collect, what forms to fill in, etc." Appx.1306. He also asked Falco for a time to meet to "learn specifics and details." *Id*. Falco replied that she would be "happy to meet with [Qin] if necessary," and provided Qin with Vertex's policy on harassment and reporting. Appx.1305. She also told Qin that he could go to his manager or to human resources to report harassment. *Id*. The two then met on

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recommendation, Appx.847. That email is not in the record and Harter apparently did not independently recall the process, though his testimony suggests that he would have been prompted to officially sign off after having already "put in" the recommendation. Appx.847.

December 13 and discussed Vertex's reporting process in the abstract, but when Falco asked Qin whether he had anything specific he wanted to report, Qin declined. Appx.913-14, 1282.

The next day, December 14, Jen Kurtz, Vertex's Chief Technology Officer, expressed skepticism in an email to Harter about the recommendation to promote Qin. Appx.1284. Harter wrote back agreeing to postpone decision on Qin's promotion, even though Qin "accomplished the goals that Ed and I set for him earlier in the year," because Harter was "starting to feel uncomfortable about some of the issues (minor though they are) that have showed up in [Qin's] review." *Id*.

2. Qin receives a negative annual review, complains about discrimination, and is later terminated.

On February 8, 2019, Qin received the results of his annual review. Appx.861, 1050. The results were the culmination of Vertex's annual review process, which began three months earlier in November, shortly after Qin asked if his non-promotion was because he is Chinese. Appx.513-14. Vertex employees were asked to choose four people to provide feedback on their review. Reviewers submitted their comments by November 26. A supervisor then provided an overarching narrative of the feedback and a

rating by December 20. Finally, a "calibration team" reviewed and potentially adjusted the rating, which was then conveyed to the employee no later than early February. *Id*.; *see also* Appx.790, 848.

Qin received a "usually meets expectations rating," which is a poor rating at Vertex. Appx. 791, 848, 953 985. Vertex then asked Qin to choose between accepting a severance agreement or completing a performance improvement plan (PIP); Qin chose the PIP. Appx.283, 790-91, 996, 1286. Qin's poor rating contrasted with prior assessments, including a 2015 promotion recommendation that concluded that he met every item in the job description of a Senior Enterprise Software Architect (the position above his role). Appx.1061-66. And the consequences Qin faced were an abrupt about-face from Read's 2018 recommendation (with Harter's apparent initial sign-off) to promote Qin.

As alluded to above, Qin's rating was based in part on assessments provided by his four reviewers. Appx.848. One of Qin's assessments, by an individual named John Hart, was, as Harter put it, "very negative." *Id*. Hart expressed disappointment with Qin's "general passivity," complaining that he "takes an excessive amount of time to accomplish tasks, and is overly reliant on others for direction." Appx.955. He described

Qin as "reluctant to be the one who makes the decision to the point that he uncomfortably laughs and physically recoils when it is suggested that he take ownership." *Id*. That comment was at least one factor that contributed to Qin's "usually meets expectations" rating. Appx.849-50. Qin's three other reviews recommended next steps for Qin's career progression and praised his "exceptional talent." Appx.955.

After receiving his annual review in February, Qin confronted Hart about his negative assessment. Hart attributed his comments to "cultural differences." Appx.823, 917. Qin understood this to mean that Hart's negative review reflected Qin's national origin, not any performance issues. Appx.823, 1126, 1286.

On March 31, Qin complained via email to Falco and Norm Stahlheber, director of software engineering, that Hart's review was discriminatory. He described the review as a "stereotypical generalization of me as a Chinese" and "baseless and false." Appx.1286. On April 1, Qin reiterated in a follow-up email that Hart's review was "full of descriptions of a stereotypical Chinese" with "no factual basis." Appx.1126.

After an investigation beginning mid-April and concluding on May 1, in which Falco interviewed Qin and Hart, Vertex agreed "that it was

inappropriate to have this information in his performance evaluation," and removed Hart's assessment. Appx.997-98, 1131. According to Falco, Hart "was an inappropriate reviewer and not somebody who could really comment on Mr. Qin's performance." Appx.1002. Falco also testified that, although she did not think Hart intended his comments to be racially or culturally insensitive, she understood that Qin interpreted them that way and acknowledged he was "well within his rights to do that." *Id*.

Meanwhile, Qin signed his PIP on April 1. Appx.1122-24. Stahlheber countersigned it on April 2. *Id*. The PIP gave Qin until May 3 to meet any one of three performance goals. *Id*. The PIP was then extended for two weeks, but when Qin did not meet any of the goals during that time, Falco and Stahlheber decided to terminate him on May 16. Appx.99, 788-89, 923-24. Vertex did not revisit Qin's performance rating or the decision to place Qin on a PIP even after concluding around May 1 that Hart's comments were inappropriate and removing them from his review. Appx.1131.

One other employee in the architecture group, Fred Yawe, whom Harter also supervised, was rated "usually meets expectations" at the end of the evaluation period, but was not put on a PIP or terminated. Appx.792, 1052. He was not Chinese. Appx.1337.

B. District Court's Decision

After he received a right-to-sue notice from the EEOC, Qin sued Vertex, alleging that the company discriminated against him in violation of Title VII, 42 U.S.C. § 1981, and the Pennsylvania Human Relations Act. He brought retaliation, race- and national origin-based disparate treatment, and harassment claims. The court granted Vertex's motion for summary judgment and, after denying Qin's motion for reconsideration, entered judgment in Vertex's favor.

In its opinion, the court held that Qin had not presented evidence from which a jury could find that he experienced unlawful retaliation. It identified three possible instances of protected activity: (1) Qin's discussion with Harter in October 2018 regarding whether he had not been promoted because he is Chinese; (2) Qin's inquiry to Human Resources regarding how to file a harassment complaint; and (3) Qin's March 31, 2019, email describing the Hart portion of his performance evaluation as discriminatory. The court assumed the third instance was protected, but held the first two instances were only "inquiries," and did "not seemingly rise to the level of informal complaints or protests, nor [did] they state

opposition to unlawful discrimination in a clear and unequivocal manner." Appx.14.

Even assuming all three instances were protected activity, the court said, Qin had not shown causation because the timing between his protected activity and Vertex's materially adverse actions was too attenuated. Appx.14-15. The court held that the lapse between the October and December 2018 protected activities and what the court identified as Vertex's decision in February 2019 not to promote Qin was too long to suggest causation. Appx.15. So was the gap between Qin's March 31, 2019, complaint regarding his evaluation and his May 16 termination. *Id*.[3]

Having concluded that Qin did not establish a prima facie retaliation case, the court "decline[d] to engage in the [remainder of] the *McDonnell Douglas* burden-shifting framework." Appx.16. But the court then said, contradictorily, that Vertex "proffered a plausible and consistent explanation for both the lack of promotion and the subsequent

[3] In one instance on page 15 (Appx.15), the court lists Qin's termination date as May 26 instead of May 16. We assume that was a typographical error, given the undisputed record evidence and the court's earlier acknowledgement that Qin was fired on May 16.

termination," and that the court was "compel[led]" to "find a lack of pretext." *Id*.

The court also rejected Qin's disparate treatment claim. It began by holding that Qin did not present direct evidence of discrimination. In the court's view, Hart's attribution of his negative review to "cultural differences" and Qin's colleagues' "China Man" and "go back to China" comments were all stray remarks made by non-decisionmakers that could not be considered direct evidence of discrimination for purposes of his disparate treatment claim. Appx.5.

The court then analyzed Qin's disparate treatment claim under the burden-shifting *McDonnell Douglas* framework. In assessing whether Qin made out a prima facie case of discrimination, the court focused on whether Qin presented evidence from which a jury could find that Vertex failed to promote him and then terminated him under circumstances that could give rise to an inference of discrimination. The court held that Qin did not, because he had not presented evidence that Vertex selected another candidate over Qin for promotion, nor had he shown that a comparator employee was treated more favorably. Appx.7.

Even if Qin had established a prima facie case of discrimination, however, the court held he did not overcome Vertex's legitimate, nondiscriminatory justifications for not promoting him and ultimately firing him: namely, that Qin failed to engage in formal projects and that Qin failed to complete his PIP. Appx.8.[4]

After the district court denied Qin's motion for reconsideration, Qin appealed.

ARGUMENT

I. A reasonable jury could find Vertex retaliated against Qin.

Title VII prohibits an employer from taking materially adverse action against an employee "because [the employee] has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Retaliation claims that rely on circumstantial evidence follow the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework, under which it is the plaintiff's burden to make out a prima facie case of retaliation; the employer may then "provide a legitimate, non-

[4] The court also granted summary judgment to Vertex on Qin's hostile work environment claim. We take no position on that claim and do not address it in this brief.

retaliatory reason for its action"; and the plaintiff may then show "that the employer's response is merely a pretext." *Kengerski v. Harper*, 6 F.4th 531, 536 n.3 (3d Cir. 2021).

To make out a prima facie case, the plaintiff must proffer evidence that he engaged in protected activity, that his employer took a materially adverse action against him, and that his "protected activity was the *likely reason*" for the adverse action. *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 259 (3d Cir. 2017). The third prong of the prima facie case, often referred to as "causation," can be established through a range of circumstantial evidence, including temporal proximity between the protected activity and the adverse action. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279-81 (3d Cir. 2000).

A. Qin engaged in two instances of protected conduct.

Title VII's antiretaliation provision is expansive and protects a range of activity that falls within the meaning of "opposed." 42 U.S.C. § 2000e-3(a); *see* EEOC Enforcement Guidance on Retaliation and Related Issues § II(A)(2)(a), 2016 WL 4688886, at *7 (Aug. 25, 2016). This includes "informal protests of discriminatory employment practices, including making complaints to management." *Moore v. City of Phila.*, 461 F.3d 331,

343 (3d Cir. 2006) (quoting *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 135 (3d Cir. 2006)). "[T]here is no hard and fast rule as to whether the conduct in a given case is protected." *Curay-Cramer*, 450 F.3d at 135. Rather, it is a fact-specific question. *Id*. Moreover, an employee's opposition to discrimination is protected so long as the employee holds a reasonable, good-faith belief that the activity he opposes is unlawful, even if it is later held not to be. *See Kengerski*, 6 F.4th at 536-37; EEOC Enforcement Guidance on Retaliation and Related Issues § II(A)(2)(c), 2016 WL 4688886, at *9.

Qin opposed discrimination in a manner triggering Title VII's protection on at least two occasions: (1) when he asked Harter in October 2018 whether his consistent non-promotion was based on his being Chinese; and (2) when he complained to Falco and Stahlheber on March 31, 2019, that Hart's comments in his annual review were based on stereotypes of Chinese people.

1. The district court assumed, correctly, that Qin's March 31 email complaint to Falco and Stahlheber was protected. On that date, Qin wrote that Hart's review was a "stereotypical generalization of me as a Chinese and . . . baseless and false." Appx.1286. Falco asked for clarification and

Qin added on April 1 that Hart's review was "full of descriptions of a stereotypical Chinese, e.g., lacking social skills ('uncomfortable laughs,' etc.), needing guidance/less autonomous ('general passivity,' 'overly reliant upon others for direction[,]' etc.)." Appx.1126; Appx.650. Those emails clearly conveyed Qin's reasonable, good-faith belief that Hart's negative review was based on Qin's national origin. In the district court, Vertex did not dispute this point.

2. The district court erred, however, in holding that Qin's October 2018 discussion with Harter, in which Qin asked whether he was not promoted because he is Chinese, was not protected conduct because it was a mere "question" and not "clear and unequivocal" opposition to unlawful discrimination. Appx.13-14.

In this Court, protected opposition to discrimination "must not be equivocal," *Moore*, 461 F.3d at 341, or "vague," *Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995). These qualifications serve to preclude retaliation claims where the employee utterly fails to communicate to her employer that she believes she has suffered discrimination. For instance, a letter complaining of unfair treatment, but making no explicit or even

implicit allegation that the treatment was due to a protected characteristic, is not protected. *See Barber*, 68 F.3d at 702.

But this Court does not require employees to follow a script or to invoke talismanic language when complaining of discrimination. The opposition inquiry focuses on "the message being conveyed rather than the means of conveyance." *Curay-Cramer*, 450 F.3d at 135. Accordingly, "[w]hen an employee communicates to her employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's *opposition* to the activity." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009) (alteration and quotation marks omitted) (quoting Brief for United States as *Amicus Curiae* at 9).

Qin's conduct was neither equivocal nor vague because, a jury could find, his question effectively conveyed to Harter that he believed he was being discriminated against because of his race or national origin. In asking Harter whether he was not promoted because he is Chinese, Qin made an explicit connection between his protected traits and his lack of promotion. *Cf. Curay-Cramer*, 450 F.3d at 135 ("[O]pposition to an illegal employment practice must identify the employer and the practice . . . at least by

context."). In response, Harter referred Qin to Human Resources. Appx.857. A jury could infer from Harter's response that he understood Qin's question to raise an issue best addressed by personnel versed in handling discrimination complaints, rather than by personnel responsible for making promotion decisions.

Nor is Qin's choice to phrase his opposition as a question dispositive. Given the context, asking one's manager "am I not being promoted because I'm Chinese" is not meaningfully different from saying, "I think I'm not being promoted because I'm Chinese." On these facts, a jury could find Qin's question to Harter constituted protected conduct. *Cf. Crawford*, 555 U.S. at 276-77 (answering questions during an employer's internal investigation can constitute opposition).

B. A reasonable jury could find a causal link between Qin's protected activity and materially adverse actions Vertex took.

The court next erred when it held that no jury could find a causal link between Qin's protected activities in October 2018 and on March 31-April 1, 2019, and materially adverse actions Vertex took. The district court's holding in this regard was predicated on a misapplication of the law and misconception of the record.

This Court has held that close timing between protected activity and an adverse action can, standing alone, satisfy the causation element of a prima facie case. *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 221 (3d Cir. 2017). "An inference of 'unduly suggestive' temporal proximity begins to dissipate when there is a gap of three months or more." *Id.* (citing *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3d Cir. 2007)).

Although unusually suggestive timing alone can suggest causation, timing is not the only relevant consideration when assessing whether a plaintiff has plausibly alleged that his protected activity motivated his employer's conduct. "A plaintiff can also demonstrate a causal connection through other types of circumstantial evidence." *Wadhwa v. Sec'y, Dep't of Veterans Affs.*, 505 F. App'x 209, 215 (3d Cir. 2012) (citing *Farrell,* 206 F.3d at 280–81); *see also Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) ("[T]he mere passage of time is not legally conclusive proof against retaliation." (quotation marks omitted)).

As discussed above, Qin engaged in protected activity around October 2018 when he spoke with Harter and on March 31 and April 1, 2019, when he emailed Falco and Stahlheber. The record does not establish exactly when Qin spoke with Harter, but for purposes of summary

judgment, this Court can infer that it was late October. *See Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 192 (3d Cir. 2015) (noting summary judgment standard requires court to view "the evidence in the light most favorable to the nonmoving party"). Qin then experienced several materially adverse events. The evaluation process that culminated in his February 2019 poor performance review began in November 2018; Hart was required to submit his review by November 26. Then, on December 14, Vertex (Harter and Kurtz), delayed Qin's promotion. On February 8, 2019, Qin received his negative performance rating. Shortly thereafter, he was offered the undesirable choice between accepting a severance package or completing a PIP. His PIP was finalized on April 1. And on May 16, Vertex fired Qin. *See supra* pp. 5-8.

The temporal proximity between Qin's October 2018 complaint to Harter, and Harter and Kurtz's December 14 decision to delay his promotion, as well as the proximity between Qin's March 31-April 1, 2019, e-mail complaints to Falco and Stahlheber and their decision to terminate him as of May 16, fell within the three-month mark by which this Court has said the "inference of 'unduly suggestive' temporal proximity begins to

dissipate." *Moody*, 870 F.3d at 221. A jury could therefore find a causal link from the mere timing of events.

And while Qin received his negative performance review in February 2019, even that adverse action was not so removed from the October 2018 protected conduct that a jury could not reasonably rely on it to find causation. That is because, although Qin received the results of his performance evaluation on February 8, and thus became aware of his first negative rating at that time, the evaluation process began in November 2018. Appx.513-14. And Harter was required to complete his manager evaluation, including consideration of Hart's negative comments, and to enter Qin's performance rating by December 20. *Id*.

Moreover, the temporal proximity between Qin's October complaint and his negative review is bolstered by the fact that the review process occurs at a set time each year. *See* Appx.848. This Court has considered relevant that an adverse action took place as early as it could have, given an employer's set cycle of employment decisions. *See Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 792-93 (3d Cir. 2016) (protected activity in May and retaliation in October temporally proximate where, given hiring schedules, retaliatory decision not to rehire would not become apparent

until October). Vertex gave Qin a negative evaluation as early as it could have—during a review period that commenced a few weeks after Qin's protected activity and culminated a few months thereafter.

In holding that no jury could find a causal connection between Qin's protected activity and adverse actions he faced, the district court mis-assessed the evidence and misapplied the law. On the evidence, the court tied Qin's non-promotion to February 2019 and held that it was too remote from his October 2018 conversation with Harter to suggest causation. But the record shows that Harter agreed to delay Qin's promotion on December 14, less than two months after Qin complained to Harter about his discriminatory non-promotion. Appx.1284.

On the law, the district court cited *Thomas v. Town of Hammonton*, 351 F.3d 108 (3d Cir. 2003), for the proposition that even three weeks separating protected conduct and an adverse consequence is too attenuated, standing alone, to establish causation. Appx.15-16. The district court read too much into *Thomas*, which did not hold as a matter of law that a three-week lapse cannot suggest causation. In *Thomas*, the court noted there was no "plausible theory" of First Amendment retaliation on the case's facts. 351 F.3d at 114. Although Thomas complained of sexual harassment three

weeks before her termination, she was absent for nine days in one month and failed to call in for several of those days. *Id*. at 12, 14. What's more, Thomas's claims required a jury to believe that her employer township terminated her for making a sexual harassment claim against an employee of a different township. *Id*. at 14. The court acknowledged that timing "can be probative of causation," but then said "in the context of the record as a whole, the chronology of events does not provide substantial support" for a finding of causation. *Id*. Qin's claim of retaliation is not so implausible.

C. A reasonable jury could find that Vertex's explanations for its materially adverse actions were pretextual.

Finally, the district court equivocated over whether it reached pretext, the third step of the *McDonnell Douglas* burden-shifting analysis. That is, whether, assuming Qin made out a prima facie case of retaliation, a jury could find that Vertex's explanation that it declined to promote him because of performance issues and that it terminated him because he failed to complete his PIP was pretextual. The court first said it declined to engage in the pretext analysis, but then "f[ou]nd a lack of pretext with respect to th[e] retaliation claim." Appx.16. To the extent the court held that

no jury could disbelieve Vertex's explanations for its adverse actions and infer retaliation, the court erred.

At the pretext stage, the plaintiff's burden is to show "that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). To do so, the "plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 347 (3d Cir. 2022) (quotation marks omitted); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."). This analysis considers the totality of circumstances, including any "inconsistencies in the reasons the employer gives for its adverse action," or "that the employer treated other, similarly situated persons not of his protected class more favorably." *Canada*, 49 F.4th at 347 (quotation marks omitted).

A jury could disbelieve Vertex's explanation that it decided not to promote Qin because of performance issues and instead infer retaliation, given Harter's inconsistent position on the promotion. In February, Harter told Read that Qin was on track for promotion at the end of the year "after being fully engaged this rating period." Appx.1272. He then signed off on Read's recommendation to promote Qin, which listed an effective date of October 2018. Appx.846-47. Then, in December, despite acknowledging Qin "accomplished the goals that Ed [Read] and I set for him earlier in the year," Harter backed off the recommendation. Appx.1284. A jury could find from this evidence that it was not Qin's performance, but a change of heart on Harter's part—the very person to whom Qin complained in October 2018—that delayed his promotion. *See, e.g.*, *Fasold v. Justice*, 409 F.3d 178, 185-86 (3d Cir. 2005) (jury could disbelieve employer's claim that it fired employee for performance issues where evidence showed employee's supervisor was "basically satisfied" with employee's performance).

A jury could also find that Vertex's decision to put Qin on a PIP and then kept him on it, despite agreeing to remove Hart's negative review, was retaliatory. *See supra* pp. 5-8. Even after removing Hart's inappropriate

comments from Qin's review, Vertex declined to revisit the PIP and to adjust Qin's rating. Moreover, Vertex put Qin, but not Yawe, on a PIP, even though both employees were rated "usually meets expectations." *See id*. Based on this evidence, a jury could disbelieve Vertex's explanations for its actions and, when considered in conjunction with Qin's prima facie case, conclude that Vertex retaliated against Qin.

II. The district court's decision to grant summary judgment to Vertex on Qin's disparate treatment claim was error.

The court also erred in assessing Qin's disparate treatment claim. First, the court required Qin to rigidly adhere to the *McDonnell Douglas* framework, despite repeated warnings from the Supreme Court and this Court that the prima facie case is not a rigid formula. Second, as with Qin's retaliation claim, the court wrongly disregarded evidence tending to undermine Vertex's explanations for its actions and therefore incorrectly held that no jury could find that Qin overcame Vertex's legitimate, nondiscriminatory justifications for failing to promote him and terminating him.

A. The district court should not have required Qin to rigidly adhere to the *McDonnell Douglas* framework.

In the absence of direct evidence of discrimination, courts analyze Title VII disparate treatment claims under the burden-shifting *McDonnell Douglas* framework, as the district court did. The district court's rigid application of the framework, however, was error.

In *McDonnell Douglas*, the Supreme Court articulated a four-factor framework for establishing a prima facie case of racial discrimination in hiring. It asked whether the plaintiff showed:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The Court simultaneously cautioned that "[t]he facts necessarily will vary in Title VII cases" and that the highly specific factors the Court articulated in that case are "not necessarily applicable in every respect to differing factual situations." *Id*. at 802 n.13.

Since then, the Supreme Court and this Court have repeatedly said "the *McDonnell Douglas* test forms one model of a prima facie case, not an invariable scheme." *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 347 (3d Cir. 1990)

(citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); *see also Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228 (2015) (*McDonnell Douglas* framework not an "inflexible rule").

While a plaintiff *may* make out a prima facie case using the elements the court described, he is not limited to that method of proof if he can otherwise show circumstances that could give rise to an inference of intentional discrimination. *See, e.g.*, *Williams v. URS Corp.*, 124 F. App'x 97, 100-02 (3d Cir. 2005) (evaluating whether plaintiff was paid less than she should have been, given pay scale). For that reason, courts have abandoned rigidly requiring, for instance, that a failure-to-hire-plaintiff establish his employer held a position open or hired someone who did not share the same protected status as the plaintiff. *See, e.g.*, *Charlton-Perkins v. Univ. of Cincinnati*, 35 F.4th 1053, 1061 (6th Cir. 2022) (holding the "district court erred in concluding that [plaintiff] was required to establish that someone else filled the position to state a prima facie case"); *Chappell-Johnson v. Powell*, 440 F.3d 484, 488 (D.C. Cir. 2006) (noting plaintiff may satisfy the prime facie burden "by producing any evidence that gives rise to an 'inference of discrimination'").

In its analysis, the district court correctly recited a more flexible formulation of the *McDonnell Douglas* prima facie case, asking Qin to show that he (1) is a member of a protected class, (2) who was qualified for his position, but (3) suffered an adverse employment action, (4) "under circumstances that could give rise to an inference of intentional discrimination." Appx.6 (quoting *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008)). But in its application, the district court reverted to the highly specific factors applied in *McDonnell Douglas*, requiring Qin to show, for his failure-to-promote claim, that he applied to an open position and was rejected, and that the position "either: (1) remained open after [his] rejection and the employer continued to seek applicants with the plaintiff's qualifications; or (2) was filled by someone else who was chosen over" Qin. Appx.7 (quoting *Scott v. Sunoco Logs. Partners, LP*, 918 F. Supp. 2d 344, 353 (E.D. Pa. 2013)). Because there was no evidence that Vertex "sought applicants for the Senior Architect position," or that Vertex "select[ed] another candidate over" Qin, the court held that he could not make out a prima facie case of discriminatory failure to promote. *Id*. The court then held Qin did not make out a prima facie case of discriminatory termination because he did not demonstrate that a similarly situated person "outside

the protected class [was] treated more favorably." *Id*. (quoting *Collins v. Kimberly-Clark Pa., LLC*, 247 F. Supp. 3d 571, 589 (E.D. Pa. 2017)).

That analysis was error. When assessing Qin's failure-to-promote claim, the court should have considered the circumstances unique to this case to discern whether the evidence could give rise to an inference of discrimination. Namely, Qin presented evidence that, on average, Enterprise Software Architects were promoted to Senior Enterprise Software Architect after about eight years. Appx.820. Senior Enterprise Software Architects were typically promoted to Principal Architect after about 6 more years. *Id*. Qin, an Enterprise Software Architect for 18 years, and the only Chinese person in the architecture group, missed out on two promotions that his non-Chinese peers typically received. Appx.820, 822. Qin also presented evidence that he was on track for promotion in 2018 and that Vertex expressed a need for a Senior Enterprise Software Architect. Appx.1170-71, 1272. And he presented evidence from which a jury could infer that part of the reason Qin was not promoted in 2018 was Hart's negative review. Indeed, Harter's stated reason for retracting his promotion recommendation on December 14 was that he had concerns

triggered by "some of the issues (minor though they are) that have showed up in his review." Appx.1284.

In this context, the fact that Vertex did not seek applicants for Senior Enterprise Software Architect and did not select another candidate over Qin is not highly probative, let alone dispositive. *See Metal Serv. Co.*, 892 F.2d at 348 (noting that courts have "generally held that the failure to formally apply for a job opening" does not preclude establishing a prima facie case in failure to promote cases "as long as the plaintiff made every reasonable attempt to convey his interest in the job to the employer"); *Chappell-Johnson*, 440 F.3d at 488 (plaintiff who alleged her employer discriminatorily denied her "an opportunity for advancement" did not need to rely on allegations that her employer maintained an open position and continued to seek applicants).

And as to Qin's termination claim, at a minimum, the court should have considered whether Qin would have been fired had Hart not provided his negative review, instead of confining the analysis to whether a person outside the protected group was treated more favorably. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (noting a plaintiff establishes discrimination "because of" a protected characteristic

"whenever a particular outcome would not have happened 'but for' the purported cause"); *see also* 42 U.S.C. § 2000e-2(m) (discussing motivating factor standard). Notably, the district court also seemingly overlooked the evidence regarding Yawe, a non-Chinese employee in the architecture group who was, a jury could find, treated more favorably than Qin. *See supra* p.8.

B. A reasonable jury could find Vertex's explanations for its adverse actions were pretextual.

Finally, the court held that even if Qin established a prima facie disparate treatment case, Vertex's explanations for not promoting him and for terminating him were nondiscriminatory and Qin failed to undermine those explanations.

Like in the retaliation context discussed above, after a plaintiff establishes a prima facie case of discrimination, the employer may articulate a legitimate, nondiscriminatory reason for its challenged action. The plaintiff then has an opportunity to show the articulated reason was pretextual. *See McDonnell Douglas*, 411 U.S. at 804.

A jury could disbelieve Vertex's explanations that it declined to promote Qin because of performance issues and that it terminated him

because he failed to complete his PIP for the same reasons that it could disbelieve those explanations in the context of Qin's retaliation claim. *See supra* section I.C.

CONCLUSION

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

Respectfully submitted,

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June 30, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to 3d Cir. L.A.R. 28.3(d) & 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.*

I certify that this brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,214 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 3d Cir. L.A.R. 29.1(b). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Office 365 ProPlus in Book Antiqua 14-point font, a proportionally spaced typeface.

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 Trend Micro Office Scan, version 14.0.8515, and that no virus was detected.

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CERTIFICATE OF SERVICE

I certify that on June 30, 2023, 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.

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