No. 24-10572

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DEMARKUS HALL and EDDIE HUGHES,
Plaintiffs-Appellants,

v.

COAL BED SERVICES, INC. and PATE HOLDINGS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Hall v. Coal Bed Servs., Inc., No. 24-10572

Pursuant to Eleventh Circuit Rule 26.1-1, the Equal Employment Opportunity Commission (EEOC) as amicus curiae certifies that, in addition to those listed in the certificates filed by plaintiffs-appellants and defendants-appellees, the following persons and entities may have an interest in the outcome of this case:

1. Equal Employment Opportunity Commission (Amicus Curiae)
2. Gilbride, Karla (General Counsel, EEOC)
3. Goldstein, Jennifer S. (Associate General Counsel, EEOC)
4. Occhialino, Anne Noel (Assistant General Counsel, EEOC)
5. Yeomans, Georgina C. (Attorney, EEOC)

Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a government agency, is not required to file a corporate disclosure statement. The EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

/s/Georgina C. Yeomans
GEORGINA C. YEOMANS

TABLE OF CONTENTS

Certificate of Interested Persons C-1

Table of Contents i

Table of Authorities iii

Statement of Interest 1

Statement of the Issues 2

Statement of the Case 3

A. Statement of the Facts 3

B. District Court's Decision 6

Argument 8

I. Hall and Hughes put forth sufficient evidence to defeat summary judgment on their disparate-treatment claim. 9

A. Ramsey is a similarly situated comparator under *McDonnell Douglas*. 14

B. Hall and Hughes also demonstrated a convincing mosaic of evidence of discrimination, including evidence that Coal Bed Services's explanation for its actions was pretextual. 21

II. Hall and Hughes put forth sufficient evidence to defeat summary judgment on their retaliation claim. 25

A. The plaintiffs' retaliation claim survives summary judgment under the *McDonnell Douglas* framework.....27

B. The plaintiffs set forth a convincing evidentiary mosaic of retaliation.....30

Conclusion.....31

Certificate of Compliance 32

Certificate of Service 33

TABLE OF AUTHORITIES

Cases

Akridge v. Alfa Ins. Cos.,

93 F.4th 1181 (11th Cir. 2024)…….24

Ash v. Tyson Foods, Inc.,

546 U.S. 454 (2006)……...24

Berry v. Crestwood Healthcare LP,

84 F.4th 1300 (11th Cir. 2023)……..……..2, 25, 26, 27, 28, 30

Bowen v. Manheim Remarketing, Inc.,

882 F.3d 1358 (11th Cir. 2018)……...3

Brady v. Off. of Sergeant at Arms,

520 F.3d 490 (D.C. Cir. 2008)……..12

Bryan v. Jones,

575 F.3d 1281 (11th Cir. 2009)……...2

Burlington N. & Santa Fe Ry. Co. v. White,

548 U.S. 53 (2006)…….28

Canada v. Samuel Grossi & Sons, Inc.,

49 F.4th 340 (3d Cir. 2022)……...29

Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media,

589 U.S. 327 (2020)…….2

Donnellon v. Fruehauf Corp.,

794 F.2d 598 (11th Cir. 1986) ……..27

Furcron v. Mail Ctrs. Plus, LLC,

843 F.3d 1295 (11th Cir. 2016) ……27

Furnco Constr. Corp. v. Waters,

438 U.S. 567 (1978) …….....10

Grigsby v. Reynolds Metals Co.,

821 F.2d 590 (11th Cir. 1987) ……9

Hairston v. Gainesville Sun Pub. Co.,

9 F.3d 913 (11th Cir. 1993) ……..29

Jenkins v. Nell,

26 F.4th 1243 (11th Cir. 2022) ……..13, 16, 22, 24

Lewis v. City of Union City,

877 F.3d 1000 (11th Cir. 2017) ……13

**Lewis v. City of Union City*,

918 F.3d 1213 (11th Cir. 2019) (en banc) ……...*passim*

Lewis v. City of Union City,

934 F.3d 1169 (11th Cir. 2019) …….13, 14, 22, 23

**McDonnell Douglas Corp. v. Green*,

411 U.S. 792 (1973) ……..*passim*

Moreland-Richardson v. City of Snellville,

No. 19-14228, 2021 WL 4452523 (11th Cir. Sept. 29, 2021) ……16

Ossmann v. Meredith Corp.,

82 F.4th 1007 (11th Cir. 2023) ……11, 12, 22

Patterson v. Ga. Pac., LLC,

38 F.4th 1336 (11th Cir. 2022) ……..26, 28

Pennington v. City of Huntsville,

261 F.3d 1262 (11th Cir. 2001) ……28

Phillips v. Legacy Cabinets,

87 F.4th 1313 (11th Cir. 2023) ……..16, 21

Rollins v. State of Fla. Dep't of L. Enf't,

868 F.2d 397 (11th Cir. 1989) ……..27

Smith v. Lockheed-Martin Corp.,

644 F.3d 1321 (11th Cir. 2011) ……11

St. Mary's Honor Ctr. v. Hicks,

509 U.S. 502 (1993) …….....10, 12

Texas Dep't of Cmty. Affs. v. Burdine,

450 U.S. 248 (1981) …….....10

Thomas v. Sheriff of Jefferson Cnty.,

No. 22-13875, 2023 WL 6534602 (11th Cir. Oct. 6, 2023) ……22

**Tynes v. Fla. Dep't of Juv. Just.*,

88 F.4th 939 (11th Cir. 2023) ……..9, 11, 13, 14, 20, 22

U.S. Postal Serv. Bd. of Governors v. Aikens,

460 U.S. 711 (1983) ……....9, 10, 12

Yelling v. St. Vincent's Health Sys.,

82 F.4th 1329 (11th Cir. 2023) ……26

Statutes

42 U.S.C. § 2000e-2…….....9

42 U.S.C. § 2000e-3…….....25

42 U.S.C. § 1981…….....2, 6

Other Authorities

EEOC Enforcement Guidance on Retaliation and Related Issues,

2016 WL 4688886 (Aug. 25, 2016) ……27

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 regarding how to analyze claims under Title VII's disparate-treatment and retaliation provisions, including the overlap between the Supreme Court's *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), framework and this Court's convincing-mosaic analysis. This appeal also requires the Court's intervention to correct a misapplication of this Court's *McDonnell Douglas* comparator-evidence standard under *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (en banc). 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]

1. Whether the district court misapplied *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (en banc), when it relied on non-material differences to hold the plaintiffs' comparator was not similarly situated in all material respects.

2. Whether the plaintiffs presented enough evidence to support a reasonable inference of discrimination, thereby defeating summary judgment on their Title VII disparate-treatment claim, under either the *McDonnell Douglas* framework or a convincing-mosaic analysis.

3. Whether the district court erred in granting summary judgment on the plaintiffs' retaliation claim.

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[1] We do not separately address the plaintiffs' 42 U.S.C. § 1981 claims but note this Court has held that "[b]oth statutes require the same proof and analytical framework," except that Title VII disparate-treatment claims have a more inclusive causal element than § 1981 claims. *Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1307 (11th Cir. 2023) (retaliation); *see also Bryan v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009) (disparate treatment); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 336-38 (2020) (Title VII "motivating factor" causal standard not applicable to § 1981).

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Plaintiffs DeMarkus Hall and Eddie Hughes worked in Alabama as laborer-operators for Defendant Coal Bed Services, Inc. from September 2020 until their termination in February 2021. They were often assigned the least desirable jobs and passed over for opportunities to train on heavy equipment. R.29-3 at 41:13-42:22, 47:1-17, 51:10-52:18; R.29-6 at 35:11-16, 58:2-60:8. Willie Williams generally supervised Hall and Hughes, but when he was not around, James Toxey often stepped in to supervise the plaintiffs. R.29-3 at 50:20-51:4; R.29-6 at 37:4-38:14.

Toxey treated Hall and Hughes differently than their White coworkers. He called the plaintiffs' White coworkers by their names but referred to Hall and Hughes as "y'all" or "boy," even after Hall asked Toxey to stop. R.29-3 at 45:7-46:22; R.29-6 at 35:19-37:4, 42:6-10. On one occasion, Toxey told Hall and Hughes to wash his car. R.29-6 at 36:6-38:19.

Shortly before their terminations, Hall and Hughes complained to Williams that Toxey was racist and was treating them differently than their

[2] We recite the record facts in the light most favorable to the plaintiffs, as non-movants at summary judgment. *See Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1362 (11th Cir. 2018).

White coworkers. R.29-9 at 32:17-33:15; R.29-3 at 52:19-53:15; R.29-6 at 42:3-43:14. Less than a month later, and possibly as soon as one to two weeks later,[3] Williams claims to have received a report that Hall and Hughes were smoking marijuana on the job. R.29-9 at 36:21-37:11. Williams did not ask for documentation of the purported report, although on a prior occasion, in July 2020, Williams received a similar complaint about a different group of employees' alleged on-the-job drug use and had asked the complaining employee to put his allegation in writing. R.29-9 at 55:4-14; R.29-10 at 23. Williams instead immediately ordered the plaintiffs' work crew of about eight employees drug tested and warned that anyone who failed or refused to test would be terminated. R.29-9 at 36:10-18, 38:15-22.

Brandon Ramsey, a White coworker, refused to test, throwing his drug test back in the tests' box and declaring the order to test "the dumbest shit I ever seen" before walking off the job site. R.29-3 at 56:2-5; R.29-6 at 46:6-11; R.29-11 at 31:21-32:19. After a while, Williams told the plaintiffs they could "just leave too," because he didn't think they would pass the

[3] Williams says Hall and Hughes complained in January, Hall says they complained a week before their February 19 terminations, and Hughes says they complained about fourteen days before they were fired. R.29-9 at 32:17-33:15; R.29-3 at 52:19-53:15; R.29-6 at 42:3-43:14.

test. R.29-3 at 56:6-10. Hall and Hughes declined to test and left. *Id*.; R.29-6 at 46:10-16. Hall and Hughes later testified that they did not smoke marijuana on the job but thought they would fail a drug test because they smoked marijuana outside work hours. R.29-3 at 56:11-58:22; R.29-6 at 44:18-46:4.

Later that day, Ramsey asked for and got his job back after speaking to Williams, who spoke in turn with Stan Pate, the owner of Coal Bed Services. R.29-11 at 34:4-7. They conditioned his return only upon his agreement to be subjected to random drug testing. R.29-11 at 35:20-36:22. But Coal Bed Services did not require Ramsey to actually take a drug test before resuming work the next day, or at any time until "probably a couple months" later. R.29-11 at 37:19-38:8.

Hall also asked for his job back, contacting both Williams and Pate directly. Pate did not substantively respond, R.29-3 at 64:18-69:16, and Williams testified that he told Hall "No." R.29-9 at 45:19-46:7; *see also* R.33-4 at 2. Hughes texted Williams and Ralfe Hickman, who was "one of the bosses," asking about returning to work. Williams never responded, and Hickman said he would follow up, but never did. R.29-6 at 54:8-56:14.

Coal Bed Services paid Ramsey for a full workday on the date of the drug test, despite his walking off the job around 11 a.m., but paid Hall and Hughes only for the time they worked before declining the drug test. R.29-10 at 20-21.

B. District Court's Decision

Hall and Hughes sued Coal Bed Services and its parent company, Pate Holdings, Inc., alleging that their terminations and Coal Bed Services's refusal to rehire them constituted disparate treatment based on race and retaliation under Title VII and 42 U.S.C. § 1981. The district court granted summary judgment to the defendants on all claims.

The court first held that the plaintiffs could not make out a prima facie case of disparate treatment under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because their comparator, Ramsey, was not similarly situated in all material respects. R.37 at 12. The court reasoned that, although Ramsey was subject to the same policies, had the same supervisor, and was fired under the same circumstances as the plaintiffs, the fact that Ramsey had more construction experience, had worked for Coal Bed Services since 2018, and was an operator, rather than a laborer-operator, meant he was not similarly situated under this Court's

case law interpreting *McDonnell Douglas*. *Id*. at 11-12 (citing *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (en banc)). The court then held that the plaintiffs did not present a convincing mosaic of circumstantial evidence that would support an inference of discrimination because their evidence consisted solely of "bits and pieces." *Id*. at 13. The court also concluded the defendants had "non-pretextual reasoning for not rehiring the Plaintiffs"—namely, that the plaintiffs had less experience and less time with Coal Bed Services than Ramsey and that Hall and Hughes were the ones purportedly reported for smoking on the job. *Id*. at 14.

Turning to retaliation, the court assumed the plaintiffs' complaint about Toxey was protected activity and seemingly acknowledged it was close enough in time to the plaintiffs' termination to raise a causal inference between the two events. *Id*. at 16-17. Nonetheless, the court held, "the report of the Plaintiffs spotted smoking marijuana on the job and their refusal to take a drug test broke the causal chain." *Id*. at 17.

The court further held that even if the plaintiffs had established a prima facie case, the defendants had "several reasons" for their decision to terminate and not rehire the plaintiffs that Hall and Hughes failed to adequately rebut: the importance of a drug-free workplace and the

plaintiffs' relative inexperience and tenure when compared with Ramsey. *Id*. at 18-19. Finally, the court correctly recognized that this Court recently extended its convincing-mosaic framework to retaliation claims but held that the plaintiffs again had not presented a convincing mosaic of evidence to establish a genuine factual question regarding retaliation because their evidence consisted solely of "bits and pieces." *Id*. at 20.

ARGUMENT

This Court evaluates discrimination and retaliation claims through two different lenses: the Supreme Court's *McDonnell Douglas* burden-shifting test and the holistic convincing-mosaic analysis. Although this Court often characterizes the convincing-mosaic analysis as a fallback to *McDonnell Douglas*, the convincing-mosaic framework more closely tracks the Federal Rule of Civil Procedure 56 standard in disparate-treatment cases and is often the more efficient starting place for analysis. In the retaliation context, the two frameworks largely overlap.

Here, the plaintiffs uncovered enough evidence to support a reasonable inference that the defendants discriminated against them based on their race and retaliated against them for engaging in protected conduct. The conclusion holds true regardless of the analytical filter applied to the

record. Because the district court erred in its application of each framework to each of the plaintiffs' claims, and either framework suffices to allow the plaintiffs to reach a jury, we urge the Court to reverse the grant of summary judgment.

I. Hall and Hughes put forth sufficient evidence to defeat summary judgment on their disparate-treatment claim.

The ultimate question for a factfinder in a Title VII race-discrimination case is whether the defendant employer took a challenged action against the plaintiff because of race. *See* 42 U.S.C. § 2000e-2(a)(1); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). At summary judgment, the question is whether the plaintiff has proffered "enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action." *Tynes v. Fla. Dep't of Juv. Just.*, 88 F.4th 939, 946 (11th Cir. 2023).

Often, summary-judgment evidence is circumstantial. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987). And when that is the case, litigants and courts frequently turn to the *McDonnell Douglas* burden-shifting framework—a tool the Supreme Court developed as a "sensible, orderly way to evaluate the evidence in light of common experience as it

bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). That framework consists of requiring the plaintiff to establish a prima facie case of discrimination; shifting the burden to the employer to proffer a legitimate, nondiscriminatory reason for its challenged action; and affording the plaintiff an opportunity to show that reason was pretext for discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Importantly, the prima facie case becomes irrelevant once the employer has articulated a legitimate, nondiscriminatory reason for its challenged action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). At that point, the plaintiff's burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981).

While it can be a helpful analytical tool, the *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic." *Furnco*, 438 U.S. at 577; *see also McDonnell Douglas Corp.*, 411 U.S. at 802 & n.13. Adherence to its burden-shifting framework should not overtake what is really at issue in a Title VII intentional race-discrimination case: whether the challenged action was taken because of race. *See Aikens*, 460 U.S. at 713-

14. Accordingly, this Court has acknowledged that a plaintiff need not satisfy the *McDonnell Douglas* framework, but instead "will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

This Court has named the general principle that summary judgment is inappropriate where a plaintiff presents circumstantial evidence creating a triable issue of fact regarding discrimination the "convincing mosaic" standard. *See Tynes*, 88 F.4th at 946. This Court sometimes characterizes the standard as an alternative available to plaintiffs who cannot make out a *McDonnell Douglas* prima facie case. *See Ossmann v. Meredith Corp.*, 82 F.4th 1007, 1020 (11th Cir. 2023). But the "convincing mosaic" analysis "is basically just Rule 56 in operation." *Tynes*, 88 F.4th at 951 (Newsom, J., concurring). It "asks the key question: Does the 'record, viewed in a light most favorable to the plaintiff, present[] a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker?'" *Id.* (quoting *Smith*, 644 F.3d 1328).

This Court has described the convincing-mosaic analysis as "identical to the final stage of the *McDonnell Douglas* framework," *i.e.*, the pretext

stage, in that "both ask whether there is enough evidence for a reasonable jury to infer intentional discrimination." *Ossmann*, 82 F.4th at 1020. In a case in which the defendant has proffered a legitimate, nondiscriminatory reason for its actions, it may therefore be more efficient, and truer to the ultimate question of liability, to begin with the convincing-mosaic analysis rather than to treat it as a fallback option to *McDonnell Douglas*. That is because, as noted above, after the defendant has proffered a legitimate, nondiscriminatory reason, the prima facie case is irrelevant; the question is simply whether the evidence would allow a jury to reasonably infer the employer took the challenged action because of race. *See Aikens*, 460 U.S. at 715; *see also Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008) (Kavanaugh, J.) (citing *St. Mary's Honor Ctr.*, 509 U.S. at 510-11). And the court will have to undertake the convincing-mosaic analysis under either approach. If a plaintiff successfully establishes a prima facie case under *McDonnell Douglas* to which the employer has responded with a legitimate, nondiscriminatory reason for its action, the convincing-mosaic analysis arises at the pretext stage. And even if the plaintiff does not make out a *McDonnell Douglas* prima facie case, absent forfeiture of the argument, the plaintiff is still entitled to a holistic review of his evidence to

determine whether summary judgment is warranted. *See Jenkins v. Nell*, 26 F.4th 1243, 1249-51 (11th Cir. 2022) (plaintiff did not make out a *McDonnell Douglas* prima facie case but did satisfy the convincing-mosaic analysis); *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (*Lewis II*) (same).

Before mechanically starting with *McDonnell Douglas* in each case, courts should prudently ask whether the framework serves any real purpose or whether it instead "obfuscates the critical inquiry" by taking the court down a path of factors with often limited relevance to "the only question that matters at summary judgment": whether "the plaintiff [has] shown a 'genuine dispute as to any material fact' . . . as to whether her employer engaged in discrimination based on a protected characteristic." *Tynes*, 88 F.4th at 949, 951 (Newsom, J., concurring); *see also id*. at 952-53 (noting "lower courts have become progressively obsessed with [*McDonnell Douglas's*] minutiae" and warning against treating its factors as "standalone, case-dispositive elements"). The *Lewis v. City of Union City* case is illustrative. An Eleventh Circuit panel held the plaintiff survived summary judgment on both *McDonnell Douglas* and convincing-mosaic analyses. 877 F.3d 1000, 1015-20 (11th Cir. 2017). This Court then went en

banc to revisit the *McDonnell Douglas* standard and held that, under its newly clarified gloss on the *McDonnell Douglas* test, the plaintiff did not make out a prima facie case. 918 F.3d at 1229-31. The case then returned to the panel to decide whether the plaintiff could nonetheless proceed under the convincing-mosaic analysis. The panel held that she could. 934 F.3d at 1178-79, 1185-89. The *McDonnell Douglas* framework, which resulted in *en banc* consideration, was not ultimately dispositive. Had the court skipped it altogether, the parties would have ended up in the same position, minus the expense and delay of en banc review. *See Tynes*, 88 F.4th at 957 n.8 (Newsom, J., concurring) (Judge Newsom, who wrote the *Lewis* en banc majority opinion, "worry[ing]" that *McDonnell Douglas* "risks missing the forest for the trees").

A. Ramsey is a similarly situated comparator under *McDonnell Douglas*.

The convincing-mosaic analysis is the more efficient starting point in this case: The plaintiffs have enough evidence to defeat summary judgment under that analysis and therefore starting with it would render the *McDonnell Douglas* analysis unnecessary. We nonetheless address the district court's application of the *McDonnell Douglas* framework, and we

urge this Court to address it even though it is not dispositive of the case, because the district court's application of the en banc *Lewis* decision constituted clear legal error. As we explain below, the district court held that the plaintiffs' proffered similarly situated comparator was not in fact similarly situated in all material respects, but it based that conclusion on differences that are undisputedly not material. Disqualifying a comparator based solely on articulable differences rather than material differences is exactly what *Lewis* sought to avoid and erects an unduly burdensome barrier to making out a prima facie case. *See Lewis*, 918 F.3d at 1226 n.10 ("*[R]ejecting as too strict* the 'nearly identical' standard that has pervaded our case law for decades.").

The *McDonnell Douglas* prima facie case comprises four requirements. Generally, in a failure-to-hire case, the plaintiff must show "(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." *Id*. at 1221. This Court has further modified the fourth factor of the prima facie case to encompass an

alternative showing that the plaintiff was treated differently than a comparator who is "similarly situated in all material respects." *Id*. at 1226.[4]

Material similarity is a context-specific analysis guided by "substantive likenesses," not "formal labels." *Id*. at 1228. Four considerations generally shape the inquiry. In most successful cases, the comparator and the plaintiff (1) "will have engaged in the same basic conduct (or misconduct)"; (2) "will have been subject to the same employment polic[ies]"; (3) "will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor"; and (4) "will share . . . employment or disciplinary history." *Id*. at 1227-28. But these guideposts "do not necessarily apply in every case, and . . . should not be applied in an overly formalistic way." *Moreland-Richardson v. City of Snellville*, No. 19-14228, 2021 WL 4452523, at *6 (11th Cir. Sept. 29, 2021). "[W]hat constitutes a 'material' similarity or difference will differ from case to case." *Jenkins*, 26 F.4th at 1249. Importantly, "[a] plaintiff needn't prove . . . that she and her comparators are identical save for their race . . . . Nor is it necessary for a

[4] A plaintiff may also make out the fourth element of the *McDonnell Douglas* test by showing he was replaced by someone outside his protected class. *Phillips v. Legacy Cabinets*, 87 F.4th 1313, 1322 n.6 (11th Cir. 2023). We do not address whether Hall and Hughes can succeed on this alternative theory.

plaintiff to prove purely formal similarities—*e.g.*, that she and her comparators had precisely the same title." *Lewis*, 918 F.3d at 1227. Summary judgment is therefore appropriate only "where the comparators are simply too dissimilar to permit a valid inference that invidious discrimination is afoot." *Id*. at 1229; *see also McDonnell Douglas*, 411 U.S. at 802 n.13 (recognizing that "facts necessarily will vary in Title VII cases").

Here, the plaintiffs' comparator, Brandon Ramsey, engaged in the same basic misconduct as the plaintiffs by declining to submit to a drug test; was subject to the same employment policies as the plaintiffs; and, like the plaintiffs, worked under Williams's supervision. *See supra* at 4-5. The district court held, however, that Ramsey was not situated similarly to the plaintiffs in all material respects because he was an operator, rather than a laborer-operator, and because he had more construction experience and had worked for Coal Bed Services for two years longer than the plaintiffs. R.37 at 11-12. While these differences are undisputed in the record, the district court failed to examine whether they were material, thereby missing the analysis's central question. *See Lewis*, 918 F.3d at 1227-29 (explaining why the court requires similarity in "all *material* respects" and discussing what constitutes "material" similarity (emphasis added)).

Because there is no evidence that these differences had any bearing on the decision to treat Ramsey differently from the plaintiffs, a jury could reasonably conclude that Ramsey is a proper comparator. The record shows that Hall and Hughes were "laborers" or "laborer-operators," whereas Ramsey was an operator. R.29-3 at 32:22-33:1, 38:3-11, 39:10-21; R.29-11 at 13:6-14:17. On the worksite, Ramsey operated the heavy equipment, while Hall and Hughes seldom did. R.29-3 at 39:22-42:6. The three men worked "together on the same job site" "most days" and all took their direction from Williams. R.29-11 at 22:5-20. Ramsey testified that sometimes he would "be in charge" if Williams was not present. *Id*. at 23:3-10.

While the difference in title and experience between the men could be material in some circumstances, it is not material on this record. Stan Pate, the owner of Coal Bed Services and the ultimate decisionmaker regarding all three individuals' rehiring, testified that the *only* barrier to rehiring Hall and Hughes was their (disputed) unwillingness to come back to work on the same terms as Ramsey. Pate said he offered to rehire Hall if he agreed to "get clean [and] submit to random drug testing." R.29-13 at 58:16-59:4. Pate testified that he would have hired Hughes back as well, but Hughes

"didn't want a job."[5] *Id.* at 70:9-71:3. When asked, "If Mr. Hall and Mr. Hughes had agreed to get clean and take drug tests, would you have hired them back?" Pate answered, "Yes. There were no employees available during COVID." *Id*. at 97:19-98:1. Indeed, Pate testified repeatedly that he was having trouble hiring at that time and said he "wanted [Hall] to return to work, but he had to agree that he would not do drugs." *Id*. at 68:17-69:11, 59:3-4. And although Williams was not the final decisionmaker regarding rehiring, he also testified that Hall and Hughes would have been allowed back to work had they agreed to the same conditions as Ramsey, even while acknowledging that he never offered Hall and Hughes this same opportunity. R.29-9 at 45:11-15-48:3. For their part, Hall and Hughes flatly denied they were offered the same opportunity to return to work as Ramsey. R.29-3 at 71:3-23; R.29-6 at 53:17-56:14; R.33-2 ¶ 7.

No witness testified that Ramsey's different title or experience factored into the decision to treat him differently. Excluding Ramsey as a comparator based on those differences was therefore inappropriate. As this Court explained in *Lewis*, the purpose of the "all material respects"

[5] Hughes disputed that assertion and said he texted Williams and another supervisor asking for "the same opportunity Brandon got." R.29-6 at 54:8-56:2; R.33-2 ¶ 7.

standard is to "eliminat[e] the most common nondiscriminatory reasons for an employer's action," and thus preserve the employer's prerogative to "accord different treatment to employees who are differently situated in 'material respects.'" 918 F.3d at 1228 (quotation marks omitted). The guideposts the court fashioned were geared toward common nondiscriminatory distinctions that may result in differential treatment. But absent any evidence that an employer actually relied on a particular distinction—and where all evidence is to the contrary—excluding a comparator based on that distinction transforms the court's guideposts into a formulaically demanding standard untethered to any probative value. *See Tynes*, 88 F.4th at 953 (Newsom, J., concurring) (formulaically applying *McDonnell Douglas* risks allowing "the tool to eclipse (and displace) the rule").

The only distinction the defendants said they relied on between Ramsey and the plaintiffs was the plaintiffs' purported refusal to "get clean" and return to work. But a jury could reasonably disbelieve Pate's testimony that Hall refused to stop smoking marijuana and that Hughes did not want to work given the plaintiffs' testimony to the contrary, leaving no material difference between Ramsey and the plaintiffs. *See*

Phillips, 87 F.4th at 1322-23 (where only purported distinction between comparator and plaintiff turns on a dispute of fact, the plaintiff has established a prima facie case at summary judgment). Ramsey is an otherwise unusually close match to the plaintiffs, having (1) worked with them regularly, (2) reported to the same supervisor, and (3) been fired at the same time and under the same circumstances. He is therefore an appropriate comparator under *Lewis* and suffices to establish a prima facie case of discrimination.

The district court's disqualification of Ramsey as a comparator based on articulable, but not material, differences so thoroughly conflicts with *Lewis* that this Court should correct it and should take this opportunity to provide guidance to district courts on the proper application of the standard *Lewis* adopted.

B. Hall and Hughes also demonstrated a convincing mosaic of evidence of discrimination, including evidence that Coal Bed Services's explanation for its actions was pretextual.

The plaintiffs made out a prima facie case under *McDonnell Douglas*, meaning the burden shifted to Coal Bed Services to proffer an explanation for its actions, and the plaintiffs had an opportunity to show that a jury could find that explanation pretextual.

As noted above, the pretext analysis is identical to the "convincing mosaic" analysis; "both ask whether there is enough evidence for a reasonable jury to infer intentional discrimination." *Ossmann*, 82 F.4th at 1020. Thus, if the Court chooses not to address the district court's misapplication of *Lewis* at the prima facie stage of the *McDonnell Douglas* framework, it can reverse on the independent, alternative ground that the plaintiffs submitted a sufficient convincing mosaic of circumstantial evidence to withstand summary judgment.

The convincing-mosaic analysis, and thus the *McDonnell Douglas* pretext analysis, is "holistic," *Thomas v. Sheriff of Jefferson Cnty.*, No. 22-13875, 2023 WL 6534602, at *6 (11th Cir. Oct. 6, 2023), encompassing "any relevant and admissible evidence," *Tynes*, 88 F.4th at 946 n.2. With this background principle in mind, this Court has articulated a non-exhaustive list of evidence that may be probative of discrimination including, "(1) suspicious timing, ambiguous statements, or other information from which discriminatory intent may be inferred, (2) 'systematically better treatment of similarly situated employees,' and (3) pretext." *Jenkins*, 26 F.4th at 1250 (quoting *Lewis II*, 934 F.3d at 1185). "A plaintiff can show pretext by (i) casting sufficient doubt on the defendant's proffered nondiscriminatory

reasons to permit a reasonable fact finder to conclude that the employer's proffered reasons were not what actually motivated its conduct, (ii) showing that the employer's articulated reason is false and that the false reason hid discrimination, or (iii) establishing that the employer has failed to clearly articulate and follow its formal policies." *Lewis II*, 934 F.3d at 1186.

As noted above, the defendants' primary defense was that they offered to rehire the plaintiffs. R.29-1 at 26. The plaintiffs dispute that the defendants ever made that offer, and that factual dispute must be resolved in the plaintiffs' favor at summary judgment. Alternatively, Coal Bed Services argued that Hall's and Hughes's relative lack of skill, work history, and direct allegation of drug use were race-neutral reasons for refusing to rehire them. *Id*. There is no evidence that those reasons played any part in Coal Bed Services's actions and, as explained above, Pate's and Williams's testimony is to the contrary. *See supra* at 18-19. In any event, the plaintiffs set forth plenty of evidence from which a jury could reasonably disbelieve the defendants' explanations and infer discrimination, satisfying both the pretext phase of the *McDonnell Douglas* analysis and the convincing-mosaic analysis standing alone.

Even if the court were to conclude that Ramsey is not a strict comparator for purposes of the prima facie case, his preferential treatment is still relevant to the convincing mosaic and pretext analyses. *See Akridge v. Alfa Ins. Cos.*, 93 F.4th 1181, 1198 (11th Cir. 2024) (noting the court "may consider relevant evidence about similarly situated employees, even if those employees are not 'strict comparator[s]' at the prima facie stage"); *see also Jenkins*, 26 F.4th at 1251 (same). The defendants' willingness to rehire Ramsey and pay him for a full day on the day he walked out—but not to do the same for the plaintiffs—therefore supports an inference of discrimination. In addition, the plaintiffs proffered evidence that Toxey refused to call Hall and Hughes by their names, referring to them instead as "y'all" or "boy," R.29-3 at 45:7-46:22; R.29-6 at 35:19-36:14, 42:8; R.33-1 at ¶ 5; R.33-2 ¶ 5, the latter being a term that can connote racial animus depending on the context, *see Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006). Notably, Toxey called a White employee who was more junior than Hall and Hughes by his name. R.33-2 at ¶ 5. And the plaintiffs were consistently given worse assignments than their White coworkers, including, again, a White coworker who was more junior. *Id*.

On this record, a jury could reasonably find discrimination, meaning the plaintiffs have satisfied their burden to create a genuine issue of fact regarding pretext and have also satisfied the convincing-mosaic analysis. Summary judgment on their Title VII race-discrimination claim was therefore inappropriate.

II. Hall and Hughes put forth sufficient evidence to defeat summary judgment on their retaliation claim.

Title VII prohibits employers from discriminating against any employee "because he has opposed any practice made an unlawful employment practice" under the statute. 42 U.S.C. § 2000e-3(a). The ultimate question in the retaliation context is "whether the evidence permits a reasonable factfinder to find that the employer retaliated against the employee." *Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1310-11 (11th Cir. 2023).

The plaintiff can meet her burden via the *McDonnell Douglas* burden-shifting framework, under which "[t]he plaintiff must first make out a prima facie case of retaliation, showing (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action was causally related to the protected activity." *Patterson v.*

Ga. Pac., LLC, 38 F.4th 1336, 1344-45 (11th Cir. 2022) (quotation marks omitted). The employer may then proffer a legitimate, non-discriminatory reason for its adverse action. If it does, to overcome summary judgment, the plaintiff must proffer enough evidence from which a jury could reasonably conclude the reason was "merely a pretext and that the real reason was retaliation." *Id*. at 1345. To show pretext, the plaintiff must "present evidence that casts doubt on the employer's proffered reason as the only reason for its action." *Berry*, 84 F.4th at 1308.

Alternatively, as the district court appropriately recognized, R.37 at 19, the plaintiff may rely on the convincing-mosaic analysis, looking to the totality of her evidence to create a material factual dispute regarding why she suffered the challenged adverse action. *See Yelling v. St. Vincent's Health Sys.*, 82 F.4th 1329, 1342 (11th Cir. 2023). In the retaliation context, the *McDonnell Douglas* prima facie elements more closely mirror the statutory standard than in the disparate-treatment context. The convincing-mosaic analysis may therefore overlap with not just the *McDonnell Douglas* pretext stage, but also the prima facie stage of a retaliation claim.

Ultimately, "[t]o survive summary judgment, the employee must present a story, supported by evidence, that would allow a reasonable jury

to find that the employer engaged in unlawful retaliation against the employee." *Berry*, 84 F.4th at 1311. Here, the district court first analyzed the claim under *McDonnell Douglas*, then turned to a "convincing mosaic" analysis, so we do the same.

A. The plaintiffs' retaliation claim survives summary judgment under the *McDonnell Douglas* framework.

The district court correctly assumed that the plaintiffs' complaint to Williams that Toxey was a racist and was treating them differently than their White coworkers was protected opposition conduct under Title VII. R.37 at 16. Title VII's opposition clause is expansive and applies to a range of activity, including informal complaints to one's supervisor. *See Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1311 (11th Cir. 2016); *Rollins v. State of Fla. Dep't of L. Enf't*, 868 F.2d 397, 400 (11th Cir. 1989); EEOC Enforcement Guidance on Retaliation and Related Issues § II(A)(2)(a), 2016 WL 4688886 (Aug. 25, 2016).

The district court also seemingly acknowledged, correctly, that the gap of less than one month between the plaintiffs' complaint and their termination created a causal inference between the two events. R.37 at 16-17; *see Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 601 (11th Cir. 1986) (gap of

one month is sufficiently proximate to create genuine issue as to causation); *see also Patterson*, 38 F.4th at 1352 (close temporal proximity can create a genuine issue as to causation); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (causation prong of prima facie case "construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated" (quotation marks omitted)).[6]

But the district court erred when it held that any causal link between the plaintiffs' complaint and their termination and failure to rehire was defeated by "the report of the Plaintiffs spotted smoking marijuana on the job and their refusal to take a drug test." R.37 at 17. To be sure, this Court has held that "the intervening discovery of employee misconduct can sever the causal inference created by close temporal proximity." *Berry*, 84 F.4th at 1309. But as noted above, the record thoroughly rebuts any inference that

[6] In reciting the elements of a *McDonnell Douglas* prima facie retaliation case, the court required the plaintiffs to show "they suffered an adverse employment action." R.37 at 15. Although not dispositive here, that is a misstatement of the law after *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), in which the Court held that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Id*. at 63 (emphasis in original).

the defendants refused to rehire the plaintiffs because of their alleged misconduct. Moreover, given the close timing between the plaintiffs' protected activity and the decision to drug test them, a jury could reasonably conclude that Williams only drug tested the plaintiffs' work crew to create a pretextual basis to fire Hall and Hughes. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (11th Cir. 1993) (employer's increased scrutiny of employee post-protected conduct "bear[s] on the pretext issue"); *cf. Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 349 (3d Cir. 2022) (employer's allegedly retaliatory motive for searching plaintiff was relevant to pretext, even though search uncovered evidence of wrongdoing by plaintiff). The causal link between the plaintiffs' complaints and their termination and failure to rehire was therefore not broken as a matter of law by the purported report of them smoking on the job or their "refusal" to take drug tests.

The court also erred when it held that the defendants had put forth an unrebutted non-discriminatory reason not to rehire plaintiffs: namely, their "refusal to take a drug test, in conjunction with their lack of time with the company and lack of experience." R.37 at 19. As discussed above, the record establishes that was not the defendants' reason for their actions. *See*

supra at 18-19. Where, as here, the "evidence . . . casts doubt on the employer's proffered reason as the only reason for its action," summary judgment is inappropriate. *Berry*, 84 F.4th at 1308.

B. The plaintiffs set forth a convincing evidentiary mosaic of retaliation.

Looking at the claim holistically (which, again, in the retaliation context will often be similar to the *McDonnell Douglas* analysis), the record shows that the plaintiffs complained of discrimination, were drug tested a couple weeks later, and were then permanently terminated, while their coworker who also refused a drug test and walked off the job midday, but who did not engage in protected activity, was re-hired and paid for a full day's work. And the only explanations the defendants gave on the record for this course of events—that Hughes did not want to work and that Hall refused to get clean—are disputed and so cannot be the basis for summary judgment.

The plaintiffs have therefore "present[ed] a story, supported by evidence, that would allow a reasonable jury to find that the employer engaged in unlawful retaliation against the employee." *Berry*, 84 F.4th at

1311. The district court's contrary conclusion—that "Plaintiff's mosaic consists solely of 'bits and pieces,'" R.37 at 20—was error.

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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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 6,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on July 9, 2024, 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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