No. 24-60295

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RENIKA FRANKS,
Plaintiff-Appellant,

v.

CITY OF OXFORD and
OXFORD HOUSING AUTHORITY,
Defendants-Appellees.

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

BRIEF OF THE EEOC AND THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

Title VII of the Civil Rights Act of 1964 bars retaliation for engaging in protected activity. 42 U.S.C. § 2000e-3(a). The Equal Employment Opportunity Commission (EEOC) and the Attorney General share enforcement responsibility under Title VII, *id*. §§ 2000e-5(a) & (f)(1), and share an interest in the proper interpretation of Title VII's protections against retaliation. This case presents an important question about the standard for determining what conduct is actionable under § 2000e-3(a). The EEOC and the Attorney General therefore offer their views pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether the district court erred in holding that the elimination of plaintiff's position, which resulted in her transfer, was not actionable under Title VII, even if it was retaliatory.[1]

[1] The EEOC and Department of Justice take no position on any other issue in this appeal.

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff Renika Franks became a patrol officer with the City of Oxford, Mississippi, in 2015. ROA.750-51. Two years later, Franks transferred to a police officer position at the Oxford Housing Authority (OHA), ROA.756, which comprises over two hundred low-income housing units, ROA.544.

OHA is a federally funded entity governed by a board whose members are appointed by the City. ROA.541, 544. The City's police department agreed, beginning in 2004, to station two full-time City police officers at OHA to patrol and perform other police duties specific to the OHA community. ROA.685-87. In return, OHA paid the City $50,000. ROA.686. The more senior officer stationed at OHA was designated "officer in charge" or "OIC." ROA.23. The OIC was considered the equivalent of a sergeant, though the position did not come with sergeant pay or title. ROA.23, 757-58, 763-64. Turnover at OHA was high; Franks served two stints as the only officer at OHA, thereby assuming OIC status. ROA.779-84, 659, 664.

When Franks took the OHA posting, she effectively signed up for a pay cut because she would work fewer hours at that station. ROA.760. But she enjoyed the work; she connected well with OHA residents, including by mentoring tenants and their children. ROA.977-78, 1021, 1092, 1119. She even turned down an opportunity to apply to be chief of police in a neighboring town because doing so would mean leaving OHA. ROA.736-40.

In August 2020, Officer Cody Pruitt, who had worked previously at OHA, returned and joined Franks. ROA.625. In 2021, the City created a new security and services coordinator position at OHA that came with an additional stipend. ROA.537, 670. Chief of Police Jeff McCutchen's executive assistant told Franks the position was predetermined to go to Pruitt. ROA.805-08. Only Pruitt and Franks applied for the new position, and the City selected Pruitt in August 2021. ROA.818-20.

In September, Franks went out on FMLA leave because of emotional stress. ROA.843-44, 859. She resumed full duty with Oxford in late October or early November. ROA.859. Then, in December, she filed an EEOC charge alleging that the City selected Pruitt over her for the new position based on race and sex. ROA.25. In June 2022, Chief McCutchen told Franks

and Pruitt that the City planned to disband the OHA station altogether, purportedly because there was no longer a need for that level of police involvement at the housing complex. ROA.1268, 1294. Franks and Pruitt were given the option to transfer to patrol, downtown, or a school resource position. Franks chose patrol. ROA.869-70. Franks subsequently received right-to-sue notices against the City and OHA.

B. District Court's Decision

Franks sued the City of Oxford and OHA under Title VII as joint employers, alleging race and gender discrimination.[2] She also alleged the City and OHA retaliated against her for filing an EEOC charge by eliminating her position at OHA. The district court granted summary judgment to the defendants on all claims.

Franks's retaliation claim is the focus of our brief. In rejecting that claim, the district court held that Franks's transfer, which arose because of the City's decision to disband the OHA station, was not an "adverse employment action," which the court viewed as a necessary component of a retaliation claim. ROA.1565. It reasoned the change was not actionable

[2] In the district court, OHA disputed Franks was its employee. The district court did not address the argument. We take no position on the issue.

because it effected no change in Franks's pay or rank and there was no evidence that her new duties were more burdensome. *Id*. The court also held there was no evidence that Chief McCutchen was motivated by retaliatory animus when he decided to disband the OHA station. *Id*.

ARGUMENT

Disbanding the OHA station, which resulted in Franks's forced transfer, may well have dissuaded a reasonable employee in Franks's position from complaining about discrimination.

Title VII makes it unlawful "to discriminate" against employees or applicants because they engaged in protected activity, which includes filing charges of race and sex discrimination with the EEOC. 42 U.S.C. § 2000e-3(a). The prima facie retaliation case comprises three elements: that (1) the plaintiff engaged in Title VII-protected conduct; (2) the plaintiff experienced a "materially adverse action"; and (3) there is a causal connection between the protected activity and the adverse action. *See Cabral v. Brennan*, 853 F.3d 763, 766-67 (5th Cir. 2017).

This brief, like the district court's opinion, focuses on the second element. The district court stated that Franks must establish an "adverse employment action" and held that she did not do so because her transfer, which resulted from disbanding the OHA station, did not result in a

change in pay or rank or the imposition of burdensome duties. ROA.1565. That reasoning failed to account for the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which held that a Title VII retaliation claim requires only that the plaintiff have experienced a "materially adverse" action, meaning an action that may "dissuade a reasonable worker" from engaging in protected activity. *Id*. at 68. Under the *Burlington Northern* standard, a jury could find that the elimination of Franks's position, resulting in her subsequent transfer, is actionable, if retaliatory.[3]

Before the decision in *Burlington Northern*, this Court interpreted Title VII to require both discrimination and retaliation plaintiffs to establish that they suffered an "ultimate employment decision" as an essential element of their claim. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). But the Supreme Court rejected that approach to retaliation claims in *Burlington Northern*, clarifying that the anti-discrimination and anti-retaliation provisions—42 U.S.C. §§ 2000e-2(a) and 2000e-3(a)—are "not coterminous." 548 U.S. at 61, 67; *see also Muldrow v. City of St. Louis*, 601 U.S.

[3] We do not address whether a reasonable jury could find a causal link between Franks's EEOC charge and the dissolution of the OHA.

346, 357-58 (2024) (reiterating differences between Title VII's anti-discrimination and retaliation provisions).

Relying on the anti-retaliation provision's text and purpose, the Supreme Court held in *Burlington Northern* that the anti-retaliation provision prohibits retaliatory actions that are "materially adverse," meaning they "well might have dissuaded a reasonable worker from" engaging in protected activity. 548 U.S. at 68 (quotation marks omitted). Whether a particular action is materially adverse will depend on the case's unique facts and circumstances. *See id*. at 69 (a schedule change that may otherwise appear trivial "may matter enormously to a young mother with school-age children"). This Court has long recognized that *Burlington Northern* abrogated its earlier standard and requires only an "adverse action" that "'might have dissuaded a reasonable worker from'" engaging in protected activity. *Johnson v. Bd. of Sups. of La. State Univ. & Agric. & Mech. Coll.*, 90 F.4th 449, 460 (5th Cir. 2024) (quoting *Burlington N.*, 548 U.S. at 68); *see also McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (*Burlington Northern* "abrogated our approach in the *retaliation* context"),

abrogated on other grounds by Hamilton v. Dallas Cnty., 79 F.4th 494 (5th Cir. 2023).[4]

Under *Burlington Northern*, rather than asking whether Franks's transfer constituted an "adverse employment action" amounting to a change in pay or rank or resulting in the imposition of burdensome duties, the district court should have asked whether a jury could find that the decision to disband the OHA station, resulting in Franks's transfer away from the position, might have dissuaded a reasonable employee in Franks's position from complaining about discrimination. *See Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 947 (5th Cir. 2015) (evaluating material adversity from the perspective of a reasonable employee in the plaintiff's shoes).

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[4] This Court frequently recites a requirement that the plaintiff show she suffered an "adverse *employment* action" in retaliation cases, even though *Burlington Northern* expressly held that actionable retaliation could occur beyond the workplace. *Compare Burlington N.*, 548 U.S. at 67 ("The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."), *with Saketkoo v. Adm'rs of Tulane Educ. Fund*, 31 F.4th 990, 1000 (5th Cir. 2022) (requiring plaintiff to establish an "adverse employment action" (quoting *Brown v. Wal-Mart Stores E., L.P.*, 969 F.3d 571, 577 (5th Cir. 2020), *as revised* (Aug. 14, 2020))). This imprecise language may lead to confusion among the district courts. We therefore urge the Court to avoid the "employment" modifier when discussing adverse actions in the context of retaliation claims.

Had the district court applied that standard, it would no doubt have found that a reasonable jury could conclude Franks experienced a materially adverse action, satisfying that element of her prima facie case. The record shows that Franks declined an invitation to apply to be chief of police in a neighboring town because she "love[d her] job" at OHA. ROA.737-39. She applied for the OHA position in 2017, even though she would work fewer hours in that position than in patrol and therefore would take home less money. ROA.760. Pruitt testified that the OHA job was "important to" Franks and that she was "very involved with the youth, specifically the females, in" OHA. ROA.1092. And there was evidence that the position was objectively desirable; it was not just Franks's idiosyncratic preference. Pruitt testified that he valued the position as a "good fit for" him as well. ROA.269-70, 1077.

A reasonable jury could find that disbanding the OHA station, thereby preventing Franks from ever holding that coveted position again, might well have dissuaded a reasonable worker from complaining of discrimination, even if she transferred to another position at the same pay and rank without more burdensome duties. *Cf. Burlington N.*, 548 U.S. at 70-71 (change in job duties, even within same job description, can

constitute materially adverse action). The district court's contrary holding was error.

CONCLUSION

For the foregoing reasons, this Court should hold that the district court applied the wrong standard to evaluate whether Franks established the adverse action element of her retaliation claim. Under the correct standard, a reasonable jury could have found that Franks experienced a materially adverse action.

Respectfully submitted,

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September 11, 2024

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 1,826 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.

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