No. 24-3121

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JENNIFER BLAINE,
Plaintiff-Appellant,

v.

MYSTERE LIVING & HEALTHCARE, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Kansas, No. 2:22-cv-2471-TC
Hon. Toby Cruse, United States District Judge

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

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission ("Commission") with administering and enforcing federal laws prohibiting workplace discrimination, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. In this case, the district court rejected the plaintiff's Title VII retaliation claim, concluding that she failed to show that she had been subjected to an adverse employment action that resulted in "a significant change in employment status." However, in reaching that conclusion, the district court mistakenly relied upon an outdated standard applicable to Title VII discrimination claims, rather than the correct "materially adverse" standard for Title VII retaliation claims announced in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). Under *Burlington Northern*, a plaintiff need only show that the employer's allegedly retaliatory conduct well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Because of the importance of this issue to the effective administration and enforcement of Title VII, the Commission respectfully offers its views to the Court. Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUE[1]

Whether the district court erred by requiring the plaintiff to satisfy this Court's obsolete adverse employment action standard for Title VII discrimination claims, rather than the Supreme Court's "materially adverse" standard for Title VII retaliation claims?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

In 2014, Plaintiff Jennifer Blaine began working for defendant Mystere Living & Healthcare, Inc. d/b/a Wellsville Health & Rehabilitation ("Mystere"), a retirement and assisted living facility, as a Certified Occupational Therapy Assistant. District court docket no. ("R.") 49-1 at 2; R.53-1 at 2. In 2015, Mystere promoted Blaine to Director of Rehabilitation. R.53-1 at 2. Tim Sullivan was Mystere's Dietary Manager, and later worked in its business office. R.53-2 at 6-7, 9-10.

Over the course of Blaine's employment at Mystere, Sullivan subjected her and other women to a variety of harassing behavior. In April

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[1] We take no position on the merits of the plaintiff's retaliation claim or any other issue in the appeal.

[2] We present these facts in the light most favorable to the plaintiff as the nonmovant on summary judgment. *See Kincaid v. Unified Sch. Dist. No. 500*, 94 F.4th 936, 941 (10th Cir. 2024).

or May 2019, while Blaine and Sullivan were working together preparing omelets for the facility's residents, Sullivan "reached over and patted [Blaine's] butt repeatedly" while claiming to be looking for a pen, and then stated, "no pen in there." R.53-1 at 11. Prior to this incident, Sullivan had engaged in harassment "often," over the course of multiple years, and his harassing conduct included making inappropriate jokes with sexual meanings, staring at Blaine's chest for long periods of time, and patting his lap signaling for someone to sit. R.53-1 at 11-13. Blaine also witnessed Sullivan harass other women in the workplace, including in October 2021 when Blaine saw Sullivan "take a blue glove and . . . 'ricochet' it" or "snap" it off a female co-worker's bottom, R.53-1 at 4, and on another occasion when Sullivan "slap[ped]" the same female employee "with papers on the backside as [she] passed by him in the hallway[]," R.53-1 at 4, 13.

When Sullivan touched her bottom in 2019, Blaine reported the incident to Mystere's HR official, who told Blaine that "basically nothing's going to happen" because Sullivan is "friends with Scott [Averill, Mystere's owner]." R.53-1 at 14. Nevertheless, Blaine reported Sullivan's conduct to Averill, who contacted Sullivan about the incident. R.53-2 at 7-8. Sullivan admitted to and apologized for the conduct, and Averill told him it could

never happen again. R.53-2 at 8. In October 2021, Blaine reported to Averill the blue-glove incident, accompanied by the coworker at whom Sullivan had snapped the blue glove. R.53-1 at 4-6. The coworker also informed Averill about other harassing conduct by Sullivan, such as his smacking her bottom with papers and "looking her up and down." R.53-1 at 6. A few days later, the coworker submitted to HR—at HR's request—a written summary of all of Sullivan's inappropriate conduct toward her over two years. R.53-3 at 7-8; *see also* R.53-4 (harassment summary). After Blaine reported Sullivan's conduct to Averill in October 2021, several other employees came forward and reported instances of Sullivan's inappropriate conduct. *See* R.53-5; R.53-6; R.53-7; R.53-8 (written reports by other female employees of harassment by Sullivan).

On November 9, Blaine submitted a letter to Mystere stating that she would be resigning effective November 23. R.53-1 at 23. However, on November 12, Mystere informed Blaine that they did not need her anymore and that that day was her last day of work. R.53-1 at 24. Mystere paid Blaine all her wages and benefits through November 23. R.41 at 2; R.53-1 at 23.

Blaine filed a charge of discrimination with the Commission and ultimately brought suit against Mystere, alleging in relevant part that the company violated Title VII by terminating her in retaliation for complaining of sex harassment. *See generally* R.10 (first amended complaint). Mystere moved for summary judgment, arguing that Blaine could not establish that she had been subjected to "an action that was materially adverse," and stating that "[a]n adverse employment action is a significant change in employment status, . . . or a decision causing a significant change in benefits." R.49 at 26 (citations omitted). In response, Blaine argued that there was sufficient evidence in the record to support her retaliation claim, describing Mystere's retaliatory conduct as its decision to terminate her employment rather than allow her to continue to work through her resignation date. R.53 at 34. Blaine did not dispute Mystere's articulation of the "adverse employment action" standard for establishing that a claimed retaliatory act was materially adverse. *See* R.53 at 33 (Blaine's summary judgment response).

B. District Court Decision

The district court granted Mystere's motion for summary judgment. In analyzing Blaine's retaliation claim based on Mystere's refusal to allow

her to work the entire two-week period after she gave notice of her resignation, the court stated that if a plaintiff's opposition to discrimination "triggers adverse action, and 'a reasonable employee' would find that action 'materially adverse,' then the plaintiff states a prima facie case." R.58 at 14 (citation omitted). The court observed that while Mystere did not dispute that Blaine's complaints about Sullivan's conduct constituted protected opposition to discrimination, the company did dispute whether she had shown a materially adverse action. *Id.*

The court correctly described a "materially adverse action" as "something that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006)). However, the court then confused the retaliation standard with the since-abrogated discrimination standard, stating that, "[t]hus, adverse employment actions include 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Id.* (quoting *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1222 (10th Cir. 2022), *abrogated by Muldrow v. City of St. Louis*, 601 U.S. 346 (2024)).

Applying this standard to Blaine's retaliation claim, the court determined that it failed because she could not show that she suffered an "adverse employment action." *Id.* The court stated that "the only retaliatory act she identifie[d]" was Mystere's decision to terminate her "rather than allowing her to continue to work through her resignation date," and noted that Mystere paid her through that resignation date. *Id.* "This does not constitute adverse action," the court explained, "because adverse actions in the retaliation context must cause 'significant' harm." *Id.* (citing *Muldrow*, 601 U.S. at 357). The court added that "[c]ourts generally do not treat paid but unworked notice periods—like Blaine's—as adverse actions." *Id.* (citing *Wynn v. Paragon Sys., Inc.*, 301 F. Supp. 2d 1343, 1354 (S.D. Ga. 2004); *Rodriguez v. Wet Ink, LLC*, No. 08-CV-00857, 2012 WL 1079006, at *8 (D. Colo. Mar. 30, 2012); *Cover v. OSF Healthcare Sys.*, 697 F. Supp. 3d 803, 815 (N.D. Ill. 2023)). Noting that with this action Mystere "did not change her employment status for the worse" or change her benefits or pay, the court concluded that Blaine lacked evidence that she suffered any harm. *Id.* at 15.

ARGUMENT

The district court applied an incorrect standard for measuring whether the alleged retaliatory conduct was sufficiently adverse to the plaintiff to support her claim.

The antiretaliation provision of Title VII, codified at 42 U.S.C. § 2000e-3(a), prohibits an employer from "discriminat[ing] against . . . [its] employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by" Title VII. *See also Burlington N.*, 548 U.S. at 56 (same). The Supreme Court and this Court have long recognized that for allegedly retaliatory conduct to be actionable under § 2000e-3(a), it must be "materially adverse" to the plaintiff, "which in [the retaliation] context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316 (10th Cir. 2017) (quoting *Burlington N.*, 548 U.S. at 68). This retaliation standard is distinct from the adverse action standard governing Title VII discrimination claims brought under 42 U.S.C. § 2000e-2(a)(1), which prohibits discrimination as to hiring, discharge, compensation, or other "terms, conditions, or privileges of employment." *See Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212-13 (10th Cir. 2008) (discussing *Burlington Northern*).

Here, the district court failed to apply *Burlington Northern*.[3] At the outset, the court cited *Burlington Northern* and correctly articulated its might-well-dissuade standard. R.58 at 14. But the court then quoted this Court's decision in *Ford* for the proposition that "adverse employment actions include 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Id.* (quoting *Ford*, 45 F.4th at 1222).

There are two problems with the district court's invocation of *Ford*'s significant-change test. First, the Supreme Court in *Muldrow* abrogated that portion of *Ford*. *See Muldrow*, 601 U.S. at 354-57 (a discrimination plaintiff need only show "some harm" respecting a term or condition of employment, not a "significant" harm or change to employment). Second, and most crucially, the cited portion of *Ford* utilized that "significant change" standard in the context of the plaintiff's *discrimination* claims. *See*

[3] We note that the failure to identify the proper retaliation standard in the summary judgment briefing, *see supra* p.5, does not limit this Court's authority to apply the correct legal standard to Blaine's claim. *See Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (recognizing that while parties may "forfeit claims, defenses, or lines of argument" they cannot "bind [the court] to application of an incorrect legal standard").

Ford, 45 F.4th at 1222.[4] As both *Burlington Northern* and *Muldrow* emphasized, the retaliation standard is different than the discrimination standard. *See Muldrow*, 601 U.S. at 357-58 (discussing the different standards); *Burlington N.*, 548 U.S. at 67 ("Title VII's substantive provision and its antiretaliation provision are not coterminous.").

Burlington Northern defined "significant"—i.e., materially adverse—harm under the retaliation provision as conduct that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (cleaned up). This retaliation-specific definition of "significant harm" is not interchangeable with the "significant change" standard for discrimination claims that *Muldrow* abrogated, because in a discrimination claim "[w]hether an action causes significant enough harm to deter any employee conduct is . . . beside the point." *Muldrow*, 601 U.S. at 358.

While *Muldrow* did revise the adverse action standard for Title VII discrimination claims, *Muldrow* did not involve a retaliation claim, nor did

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[4] *Ford*, which addressed both discrimination and retaliation claims, also applied the "adverse employment action" standard for discrimination claims in its analysis of the plaintiff's retaliation claims. 45 F.4th at 1224-27. For the same reasons discussed above, this was error.

it purport to change the retaliation standard. To the contrary, *Muldrow* reiterated that the proper retaliation standard comes from *Burlington Northern*. *See id.* at 357-58 (discussing *Burlington Northern*). And consistent with this Supreme Court precedent, this Court recently recognized that the "significant change" standard for discrimination claims is inapplicable to retaliation claims. *See Frank v. Heartland Rehab. Hosp., LLC*, No. 22-3031, 2023 WL 4444655, at *4 n.3 (10th Cir. July 11, 2023). For these reasons, the district court erred in relying on *Ford* to read a "significant change" requirement into the retaliation standard.[5]

Tracking *Ford*'s description of the pre-*Muldrow* discrimination standard, the district court went on to conclude that Blaine "cannot show an adverse employment action." R.58 at 14. Instead of considering whether a jury could find that the challenged conduct met the well-might-dissuade standard from *Burlington Northern*, the court stated that "[c]ourts generally do not treat paid but unworked notice periods—like Blaine's—as

[5] On this point, and for the reasons stated above at *supra* pp. 8-11, we disagree with Blaine's argument on appeal that *Muldrow* displaced the *Burlington Northern* materially adverse standard and that after *Muldrow* the standards for discrimination and retaliation claims are coterminous. *See* Appellant's Brief at pp.24-28.

adverse actions." *Id.* As support, the district court cited a handful of nonprecedential district court decisions where the cited "adverse action" analyses involved discrimination claims, not retaliation claims, or the cited cases themselves predated *Burlington Northern* and, inconsistent with *Burlington Northern*, applied the discrimination adverse action standard to retaliation claims. *See id.* at 14-15 (citing *Wynn*, *Rodriguez*, and *Clover*); *Wynn*, 301 F. Supp. 2d at 1352, 1354 (pre-*Burlington Northern* discrimination and retaliation suit where the court applied the same "serious and material change" adverse-action standard for discrimination claims to its retaliation analysis); *Rodriguez*, No. 08-CV-00857, 2012 WL 1079006, at *8-9 (concluding as to the plaintiff's discrimination claim that her premature termination two weeks prior to the scheduled end of her employment was an adverse action); *Cover*, 697 F. Supp. 3d at 815 (citing *Rodriguez* and *Wynn* in its adverse-action analysis of discrimination claim).

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court vacate the district court's summary judgment order as to

Blaine's retaliation claim and remand the case for further proceedings under the proper standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,379 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 November 22, 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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