No. 17-12126-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD HOUSTON,

Plaintiff-Appellant

v.

CITY OF ATLANTA,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT

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Houston v. *City of Atlanta*, No. 17-12126-BB

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the individuals and entities listed on the Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed on September 20, 2017, the following individuals and entities have an interest in this case:

Baldwin, Anna M. (DOJ attorney)

Coleman, Gail S. (EEOC attorney)

Equal Employment Opportunity Commission (amicus curiae)

Gore, John M. (Acting Assistant Attorney General)

Goldstein, Jennifer S. (EEOC Associate General Counsel)

Lee, James L. (EEOC Deputy General Counsel)

Robin-Vergeer, Bonnie I. (DOJ attorney)

Theran, Elizabeth E. (EEOC Acting Assistant General Counsel)

U.S. Department of Justice (amicus curiae)

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which involves an important question of law regarding the prohibition against retaliation set forth in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-3(a). The Attorney General enforces Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the Equal Employment Opportunity Commission (EEOC) enforces the statute against private employers, 42 U.S.C. 2000e-5(a) and (f)(1).

At issue in this appeal is the proper standard for determining an "adverse action" when a plaintiff alleges retaliation in violation of 42 U.S.C. 2000e-3(a).

The magistrate judge, in a report and recommendation adopted by the district court, confused the standard that the Supreme Court has set out for Title VII retaliation claims with the standard applicable to Title VII discrimination claims. It then applied the wrong test to this case. Because of the federal government's interest in a proper interpretation of Title VII, the United States offers its views to the Court pursuant to Federal Rule of Appellate Procedure 29(a).

QUESTION PRESENTED

Whether the district court erred in holding that the anti-retaliation provision of Title VII, 42 U.S.C. 2000e-3(a), requires a plaintiff to show a "serious and material change in the terms, conditions, or privileges of employment," when controlling Supreme Court law requires only that "a reasonable employee would have found the challenged action materially adverse," such that it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006) (citations and internal quotation marks omitted).[1]

[1] The United States takes no position on any other issue presented in this case.

STATEMENT OF THE CASE

1. In *Burlington Northern & Santa Fe Railway Co*. v. *White*, 548 U.S. 53 (2006), the Supreme Court ruled that Title VII's anti-retaliation provision, 42 U.S.C. 2000e-3, provides broader protection to employees from adverse action than its anti-discrimination provision, 42 U.S.C. 2000e-2, and that the anti-retaliation provision is not limited to discriminatory actions that affect the terms and conditions of employment. *Id*. at 64, 68. The Court explicitly rejected the view that the anti-retaliation provision prohibits only adverse actions such as those involving "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id*. at 64 (citation omitted). The Court explained that the "scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm," such that actionable retaliation is not limited "to so-called ultimate employment decisions." *Id*. at 67 (citations and internal quotation marks omitted). Under the standard adopted by the Court in *Burlington Northern*, a plaintiff in a Title VII retaliation case must show only that "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id*. at 68 (citations and internal quotation marks omitted).

2. Richard Houston, a Sergeant with the Atlanta Police Department, alleges that his employer retaliated against him for complaining about sexual harassment. Doc. 1, at 1-2.[2] He testified that his supervisor, who was the alleged harasser, yelled at him, denied him sick leave (which another supervisor then granted), increased his work load, and filed a complaint against him that resulted in a written reprimand and a two-year probation. Doc. 52-3, at 47-52, 71-72, 85-88, 92, 110, 124, 142 (Houston Dep.). During this same period, the department denied Houston's requested transfer but promoted him from Police Officer to Sergeant based upon the results of a written and oral examination. Doc. 52-3, at 19-21, 177; see also Doc. 72, at 13.

The City moved for summary judgment, arguing in relevant part that Houston could not establish a prima facie case of retaliation because he did not show "tangible injury or harm." Doc. 52, at 2. Specifically, the City said, Houston "[did not] suffer any loss of salary or benefits" and none of the challenged actions "had any remote impact on the terms and conditions" of his employment. Doc. 52, at 3. Houston countered that "[a]dverse employment action is not limited to actions that result in loss of tangible job benefits" (Doc. 60, at 9), but did not cite

[2] Citations to "Doc. __, at __" refer to the documents in the district court record, as numbered on the docket sheet, and page numbers within those documents.

Burlington Northern and its controlling standard for finding an actionable adverse action under Title VII's anti-retaliation provision.

3. A magistrate judge issued a final report and recommendation in favor of granting the City's motion for summary judgment. Doc. 72. The magistrate judge concluded that Houston's retaliation claim failed for two reasons. First, the magistrate judge found that Houston could not establish that he had engaged in activity protected by Title VII because he "never put his employer on notice of any alleged sexual harassment." Doc. 72, at 22. Second, the magistrate judge determined that, even assuming that Houston had engaged in protected activity, he had failed to show that he suffered a materially adverse employment action. Doc. 72, at 26.

In setting out the standard for finding an adverse action, the magistrate judge began by quoting *Burlington Northern*'s standard that "a retaliation plaintiff 'must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Doc. 72, at 23 (quoting *Burlington Northern*, 548 U.S. at 68). But, immediately thereafter, the magistrate judge cited a substantive Title VII sex discrimination case for the proposition that an adverse action is "[a] tangible employment action constitut[ing] 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." Doc. 72, at 24 (brackets in original; quoting *Webb-Edwards* v. *Orange Cty. Sheriff's Office*, 525 F.3d 1013, 1031 (11th Cir. 2008)). The magistrate judge noted that *Webb-Edwards* cited "*Burlington*" but did not indicate that the cite was to *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), not to the Supreme Court's decision in *Burlington Northern*. See *Webb-Edwards*, 525 F.3d at 1031. *Burlington Industries* v. *Ellerth* does not address the legal standards for retaliation claims. Quoting another substantive discrimination case, the magistrate judge added, "[t]o prove a materially adverse employment action, 'an employee must show a *serious and material* change in the terms, conditions, or privileges of employment.'" Doc. 72, at 24-25 (quoting *Holland* v. *Gee*, 677 F.3d 1047, 1057 (11th Cir. 2012) (quoting *Davis* v. *Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (emphasis in *Davis*)).

The magistrate judge observed that Houston "lost no pay and had no serious and material change in the terms, conditions, or privileges of his employment." Doc. 72, at 25. Moreover, he added, the City promoted Houston to Sergeant during the relevant time frame. Doc. 72, at 26. For these reasons, the magistrate judge concluded that Houston had not suffered a materially adverse employment action. Doc. 72, at 26.

The district court approved and adopted the magistrate judge's report and recommendation as the judgment of the court and therefore granted summary judgment to the City. Doc. 75.

SUMMARY OF ARGUMENT

The district court disregarded controlling Supreme Court law and applied the wrong legal standard to Houston's retaliation claim. Contrary to the magistrate judge's analysis, adopted by the district court, Title VII's anti-retaliation and substantive discrimination provisions do not apply the same standard for finding an adverse action. For purposes of the anti-retaliation provision, *Burlington Northern* holds that a plaintiff must show only "that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 68 (citation omitted).

The magistrate judge erroneously applied an adverse action standard derived from substantive discrimination cases, not from retaliation cases. Thus, the magistrate judge wrongly required Houston to show that he suffered a "serious and material change in the terms, conditions, or privileges of employment." Doc. 72, at 24 (emphasis omitted). This is not the standard for a retaliation claim under 42 U.S.C. 2000e-3(a).

ARGUMENT

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD IN DETERMINING THAT PLAINTIFF-APPELLANT HAD SUFFERED NO MATERIALLY ADVERSE ACTION FOR PURPOSES OF HIS TITLE VII RETALIATION CLAIM

Title VII prohibits an employer from retaliating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). To establish a prima facie case of retaliation, an employee must show that: "(1) [he] engaged in an activity protected under Title VII; (2) [he] suffered a materially adverse action; and (3) there was a causal connection between the protected activity and the adverse action." *Kidd* v. *Mando Am. Corp.*, 731 F.3d 1196, 1211 (11th Cir. 2013).

Both retaliation claims and substantive discrimination claims require proof of an adverse action. However, the Supreme Court held in *Burlington Northern* that the standard for finding an adverse action under the anti-retaliation provision, 42 U.S.C. 2000e-3(a), differs from the standard for finding an adverse action under the substantive discrimination provision. In reaching this conclusion, the Court focused on differences in the statutory language.

The Supreme Court in *Burlington Northern* emphasized that Title VII's substantive provision prohibiting discrimination makes it an unlawful employment

practice for an employer "*to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment* because of such individual's race, color, religion, sex, or national origin," or to "limit, segregate or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee*, because of such individual's race, color, religion, sex, or national origin." 548 U.S. at 62 (quoting 42 U.S.C. 2000e-2(a)). The anti-retaliation provision, in contrast, makes it an unlawful employment practice for an employer "to discriminate against" an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Ibid.* (emphasis omitted; quoting 42 U.S.C. 2000e-3(a)).

The Court observed that where Congress has created linguistic distinctions between different parts of a statute, courts normally presume that it did so intentionally. *Burlington N.*, 548 U.S. at 62-63. As to Title VII, the Court emphasized, the "words in the substantive provision—'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'—explicitly limit the scope of that

provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision." *Id.* at 62.

The different statutory language, the Court explained, reflects different statutory purposes. "The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N.*, 548 U.S. at 63 (internal citation omitted).

Thus, the Court in *Burlington Northern* announced a different, more expansive standard for showing a materially adverse action in the retaliation context: a plaintiff must show "that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 68 (citations and internal quotation marks omitted). To meet this broader standard, a plaintiff alleging retaliation need not show that the harm in question constituted an "ultimate employment decision." *Id.* at 67; see also *id.* at 64. Although the anti-retaliation provision "cannot immunize [an] employee from those petty slights or minor annoyances that often take place at

work and that all employees experience," it "prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC.'" *Id.* at 68 (citation omitted). "[T]he significance of any given act of retaliation will often depend upon the particular circumstances," the Court explained. *Id.* at 69. "[An] act that would be immaterial in some situations is material in others." *Ibid.* (citation and internal quotation marks omitted).

A. This Court Has Generally Recognized That Burlington Northern *Requires A More Expansive Standard For Retaliation Claims Than For Substantive Discrimination Claims*

In *Crawford* v. *Carroll*, 529 F.3d 961, 973 (11th Cir. 2008), this Court acknowledged that *Burlington Northern* had announced a "decidedly more relaxed" adverse action standard for retaliation claims than for substantive discrimination claims. "[T]he *Burlington* Court effectively rejected the standards [previously] applied by this court * * * that required an employee to show either an ultimate employment decision or substantial employment action to establish an adverse employment action for the purpose of a Title VII retaliation claim," the *Crawford* Court said. *Id.* at 973-974 & n.14 (ruling that the pre-*Burlington Northern* standard requiring a "serious and material" change in the terms, conditions, or privileges of employment does not survive). This Court stressed that the difference in standards matters: "The two standards are distinct and different and * * * the *Burlington* standard applies to a wider range of employer conduct."

Id. at 974 n.14. Applying the *Burlington Northern* standard to the facts of the case before it, the *Crawford* Court held that an unfavorable performance review "clearly might deter a reasonable employee from pursuing a pending charge of discrimination or making a new one." *Id.* at 974; see also *Grant* v. *Miami-Dade Cty. Water & Sewer Dep't*, 636 F. App'x 462, 468 (11th Cir. 2015); *Barnett* v. *Athens Reg'l Med. Ctr.*, 550 F. App'x 711, 714 (11th Cir. 2013), cert. denied, 134 S. Ct. 2312 (2014); *Worley* v. *City of Lilburn*, 408 F. App'x 248, 250 (11th Cir. 2011).

Notwithstanding *Crawford*, this Court has also, on occasion, reverted to pre-*Burlington Northern* law in non-precedential decisions by applying the same adverse action standard in the retaliation context as in the substantive discrimination context. For example, this Court has repeatedly cited *Davis* v. *Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001), a Title VII race discrimination case, for the proposition that, in a Title VII retaliation case, an adverse action requires "a serious and material change in the terms, conditions, or privileges of employment." See, *e.g.*, *Gray* v. *City of Jacksonville*, 492 F. App'x 1, 9 (11th Cir. 2012) (quoting *Davis*, 245 F.3d at 1245, and observing in a retaliation case that it would be unusual for "a change in work duties without any tangible harm to be 'so substantial and material that [they do] indeed alter the terms, conditions, or privileges of employment'") (brackets in original), cert. denied, 134

S. Ct. 84 (2013); *McCaslin* v. *Birmingham Museum of Art*, 384 F. App'x 871, 875 (11th Cir.) (quoting *Davis*, 245 F.3d at 1239, and finding no adverse action in a retaliation case because "it is undisputed that [she] has not been an employee of BMA since the [protected conduct, and] has failed to show any tangible adverse effect on her prospective employment with other employers"), cert. denied, 562 U.S. 1031 (2010); *Everson* v. *Coca-Cola Co*., 241 F. App'x 652, 653 (11th Cir. 2007) (quoting *Davis*, 245 F.3d at 1239, and finding no adverse action in a retaliation case because failure to respond to internal complaints and failure to reinstate benefits in a timely manner "are not the types of actions that would have any 'material' [e]ffect on her employment").

This Court must disregard any decision that contradicts *Burlington Northern*. See *James* v. *City of Boise*, 136 S. Ct. 685, 686 (2016) (per curiam) ("It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.") (citations omitted; brackets in original).

B. The District Court Erred In Failing To Apply The Legal Standard Established In Burlington Northern

In this case, the magistrate judge quoted at length from *Burlington Northern* but then relied upon this Court's decision in *Holland* v. *Gee*, 677 F.3d 1047, 1057 (11th Cir. 2012), a pregnancy discrimination case, which in turn relied on *Davis*, a race discrimination case, to require a "*serious and material* change in the terms,

conditions, or privileges of employment." Doc. 72, at 24. Not only did the magistrate judge fail to acknowledge that he was citing the standard governing adverse actions in discrimination, not retaliation, cases, but the magistrate judge also mistakenly believed that one of the discrimination cases he cited, *Webb-Edwards*, itself had relied upon *Burlington Northern*. Doc. 72, at 24. But the *Burlington* opinion that *Webb-Edwards* cites is actually *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), which is not a retaliation case at all—it creates an affirmative defense to liability for supervisory harassment where no tangible employment action has been taken. *Id.* at 765; see also *Burlington Northern*, 548 U.S. at 64-65. Because he conflated the two *Burlington* cases, the magistrate judge erroneously believed that the only actionable adverse actions were those constituting 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," or "a *serious and material* change in the terms, conditions, or privileges of employment." Doc. 72, at 24 (citations omitted). Again, this is not the correct anti-retaliation standard, and it is directly contrary to *Burlington Northern* and this Court's decision in *Crawford*.

Houston argues that the City took several materially adverse actions against him in retaliation for protected activity. Among his allegations are that the City denied him a transfer, issued a written reprimand, and placed him on probation for

two years. Doc. 1, at 17. These actions might, in certain circumstances, constitute materially adverse actions within the meaning of Title VII's anti-retaliation provision. See, *e.g.*, *Smith* v. *City of Greensboro*, 647 F. App'x 976, 981-982 (11th Cir. 2016) (shift change away from working only nights could be materially adverse to plaintiff who worked second daytime job to support his family); *Millea* v. *Metro-N. R.R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011) (formal letter of reprimand could be materially adverse because "it can reduce an employee's likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy") (Family and Medical Leave Act retaliation claim applying Title VII retaliation standard). As the Supreme Court has emphasized, "[c]ontext matters." *Burlington N.*, 548 U.S. at 69.

CONCLUSION

In the event that this Court reaches the question of whether there was an adverse action, it should vacate the judgment and remand for application of the correct legal standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) and the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a). Excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 3200 words.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

Date: September 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF PLAINTIFF-APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that all case participants will be served via ECF.

I further certify that the United States is submitting seven paper copies of its electronically filed brief to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by certified U.S. mail, postage prepaid.

s/ Anna M. Baldwin
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