No. 23-50401

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FREDDA LEVARIO,
Plaintiff-Appellant,

v.

AT&T CORPORATION; AT&T SERVICE, INCORPORATED,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, No. 7:21-cv-110
Hon. David Counts, 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 ("EEOC") with interpreting, administering, and enforcing federal prohibitions on employment discrimination, including the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"). Here, the district court concluded on summary judgment that the plaintiff could not establish a prima facie case of disability discrimination under the ADA based on her negative job performance review because performance reviews did not meet this Court's strict "ultimate employment decision" standard for discrimination claims. But this Court, sitting en banc, recently retired the "ultimate employment decision" standard in *Hamilton v. Dallas County*, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023). The performance review at issue here amply satisfies this Court's revised adverse-action standard.

The district court also ruled that the plaintiff could not show that her negative review violated the ADA's antiretaliation provision because she continued to engage in protected activity after she received it. And the court rejected the plaintiff's retaliatory termination claim on the grounds that her termination was too temporally remote from her "first" protected

act, notwithstanding her more recent protected activities. In so ruling, the district court relied on inapposite legal standards that are inconsistent with the ADA, this Court's and the Supreme Court's relevant precedent, and the standards applied by other circuit courts of appeals.

Because of the importance of these issues to the effective administration and enforcement of the ADA, the EEOC respectfully offers its views to the Court. As a federal agency, the EEOC is authorized to participate as amicus curiae in the courts of appeals. Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Whether a reasonable jury could find that the plaintiff's negative job performance review falls within the ADA's prohibition of discrimination in the "terms, conditions, or privileges of employment."

2. Whether a jury could find that an alleged act of retaliation may be materially adverse under the ADA even if the plaintiff continues to engage in protected activity thereafter.

[1] The Commission takes no position on any other issue in this appeal.

3. Whether an ADA plaintiff relying on temporal proximity between multiple protected activities and an alleged retaliatory act to demonstrate causation may measure proximity against later activities in the series, as appropriate to the particular case.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

At all relevant times, Defendant-Appellee AT&T Services, Inc. ("AT&T") employed plaintiff Fredda Levario as a Senior Quality/Methods & Procedure/Process Manager, level 2. ROA.1544-45; ROA.1039. Her job duties included planning, developing, and implementing projects for AT&T. ROA.1544-45. Beginning in May 2013, Levario's supervisor was Todd Newman, who reported to Director Bryan Rae. ROA.1545.

On August 16, 2013, Levario slipped while walking into the office and injured her knee, ultimately requiring surgery and medical leave for her recovery. ROA.1544-45. After returning to work in December, Levario met with Newman and Rae and requested time off to attend physical

[2] Because the EEOC takes no position on the underlying facts of this case, this recitation is taken primarily from the district court's summary-judgment decision.

therapy appointments; Newman and Rae modified her work hours accordingly. ROA.1545. Levario also made a similar accommodation request through AT&T's Integrated Disability Service Center for time off to attend her physical therapy appointments. ROA.1545.

On January 15, 2014, Levario lodged an internal complaint with AT&T, asserting that it had not accommodated her need for physical therapy. ROA.1545. The following day, AT&T notified Levario that her accommodation request was approved through April 21. ROA.1545. Levario then took medical leave. ROA.1546. One week after Levario lodged her internal complaint—and one day after she went on approved medical leave—Newman rated her as "does not meet expectations" on her 2013 performance review and prepared to place her on a "Coaching Action Plan." ROA.1546. But he did not give Levario her performance review or implement the Coaching Action Plan because she had started her leave a day earlier. ROA.1546.

As AT&T's Rule 30(b)(6) representative, Rae testified that a "does not meet" performance review rating would prevent an employee from being eligible for a promotion the following year, would impact her ability to receive a pay increase, and could impact her ability to transfer to a different

position. ROA.1410-11. Customarily, AT&T gave its employees annual salary increases of approximately twelve percent when the company met certain metrics including certain revenue goals, growth goals, and customer retention goals, so long as the employee achieved a rating higher than "does not meet" on her annual performance review. ROA.1040; *see also* ROA.1411. In 2013, AT&T met the necessary conditions, and as a result all of Newman's direct supervisees at Levario's level and position received their annual salary increase for the year—except Levario, because of her "does not meet" performance review rating. ROA.1040.

Upon Levario's return to work in April she requested more time off as an accommodation, and Newman and Rae again agreed to modify her work hours while she awaited approval of her leave request. ROA.1546. On May 13, Newman gave Levario her 2013 performance review. ROA.1546. AT&T then granted Levario's request for leave from May 21 to August 3, so Newman did not implement the Coaching Action Plan during this period. ROA.1546.

On August 5, Levario requested more time off work and to be allowed to stand periodically to avoid sitting for prolonged periods; AT&T ultimately granted her requests. ROA.1546; ROA.383-84; ROA.1017.

About a week after making these requests, Levario opened another internal complaint with AT&T, asserting that it had failed to accommodate her disability and discriminated against her by subjecting her to a Coaching Action Plan. ROA.1547. The next day, August 14, Levario began the Coaching Action Plan, which she completed in October. ROA.1547.

On October 5, Levario filed her first charge with the EEOC. ROA.1547. In December 2014, AT&T determined that there was no evidence of discrimination or retaliation regarding Levario's August 13 internal complaint and October 5 charge. ROA.1547. Throughout 2015, Levario made three additional accommodation requests for short periods of time off work, each of which AT&T granted. ROA.1547.

In late 2015, AT&T informed Rae that due to a "surplus" he would need to eliminate two of the eighteen Senior Quality/Methods & Procedure/Process Manager positions. ROA.1547-48. One of these managers left for another job with AT&T, leaving only one position to be eliminated. ROA.1547-48. Rae and Newman scored each employee eligible for the reduction in force, and they ranked Levario last among her colleagues. ROA.1548. On February 5, 2016, AT&T notified Levario that her position had been selected for surplus; that same day, she filed a

second charge with the EEOC, alleging retaliatory termination. ROA.1548. AT&T gave Levario sixty days to apply for another position at AT&T, which she did, but she was not selected for any of the positions. ROA.1548. On April 6, 2016, AT&T terminated her employment. ROA.1548.

Levario sued AT&T under the ADA, challenging (in relevant part) her 2013 performance review and 2016 termination as discrimination and retaliation. ROA.32-39. AT&T moved for summary judgment, arguing that Levario could not establish a prima facie case of discrimination as to the performance review because it did not constitute an "ultimate employment action." ROA.391-92. As for Levario's retaliation claims, AT&T argued that the performance review did not amount to a "materially adverse action," noting that it had not "dissuaded Levario from making a complaint of discrimination." ROA.398-99. Finally, as to her retaliatory termination claim, AT&T argued that Levario had failed to show causation because the sixteen-month gap between her first charge and her termination notice did not reflect the "very close" temporal proximity this Court requires. ROA.400-01.

B. District Court's Decision

The district court granted summary judgment to AT&T. As to Levario's discrimination claim, after observing that termination is undisputedly an adverse action for prima-facie-case purposes, the court turned to her performance review. ROA.1552. The court noted that "[t]he Fifth Circuit 'strictly interprets' what qualifies as an adverse employment action in the discrimination context, limiting it to 'ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating.'" ROA.1552-53 (quoting *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004)). The court thus concluded that "a negative performance evaluation does not constitute an adverse employment action." ROA.1553 (citing *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 427 n.19 (5th Cir. 2017)) (additional citation omitted). Although Levario had argued that her negative evaluation was distinguishable because it resulted in her not receiving a salary increase, the court disagreed, noting this Court's repeated holding that a missed pay increase is not adverse. ROA.1553-54 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 703, 706, 708 (5th Cir. 1997)).

The court likewise found that Levario's negative performance review did not constitute an "adverse employment action" for retaliation purposes. ROA.1556-57. While it acknowledged that discrimination and retaliation claims have different adverse-action standards, it described the retaliation standard as "'materially adverse, such that it *would* dissuade a reasonable employee from making a discrimination complaint.'" ROA.1557 (quoting *Newbury v. City of Windcrest*, 991 F.3d 672, 678 (5th Cir. 2021)) (emphasis added). The court held that the performance review was not an adverse action because Levario continued to engage in protected activity afterwards, observing that "if the 2013 Performance Review was meant to dissuade [her] from complaining about discrimination, it did not." ROA.1557-58.

As for her retaliatory termination claim, the court ruled that Levario failed to establish a prima facie case because she could not show causation based on temporal proximity. ROA.1558. Observing that the timing between the protected activity and the adverse action "must generally be 'very close'" to support such a showing, the court rejected Levario's assertion that the court should calculate temporal proximity based on the date of her last approved medical leave, some fifty-one days prior to her

termination notice. ROA.1558-59. Instead, the court stated, "the alleged adverse employment action must be temporally near the date Defendant '*first* gained knowledge of her protected activity.'" ROA.1559 (citations omitted). Measuring Levario's termination against her first discrimination charge (sixteen months) and her first accommodation request (almost a year prior to the charge), the court concluded that she could not establish temporal proximity between those events. ROA.1559-60. Nor, the court stated, did Levario offer any other evidence showing causation. ROA.1560.

ARGUMENT

I. Levario's 2013 negative performance review falls well within the scope of employer conduct covered by the ADA's prohibition on disability discrimination.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to … terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). This statutory language is effectively identical to Title VII's language making it "an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of a characteristic protected under Title VII. 42 U.S.C. § 2000e-2(a)(1). *See also Flowers v. S.*

Reg'l Physicians Servs. Inc., 247 F.3d 229, 233 (5th Cir. 2001) (recognizing that the ADA and Title VII prohibit discrimination as to terms, conditions, or privileges of employment "[i]n almost identical fashion" that "dictates a consistent reading of the two statutes").

In rejecting Levario's disability discrimination claim regarding her performance review, *see* ROA.1552-55, the district court relied on this Court's former "ultimate employment decision" adverse-action standard for ADA and Title VII discrimination claims. *See*, *e.g.*, *Thompson v. Microsoft Corp.*, 2 F.4th 460, 470 & n.25 (5th Cir. 2021) (in ADA suit, stating that "[a]dverse employment decisions are 'ultimate employment decisions such as hiring, granting leave, discharging, promoting, … compensating,' or demoting") (omission in original) (citing *Pegram*, 361 F.3d at 282 (describing "ultimate employment decision" standard as an aspect of this Court's Title VII jurisprudence)).

While this appeal was pending, this Court issued its en banc decision in *Hamilton v. Dallas County*, No. 21-10133, 2023 WL 5316716 (5th Cir. Aug. 18, 2023), a Title VII discrimination suit involving sex-based shift assignments. *Id.* at *1. In reversing the district court's dismissal of the complaint, this Court retired the "ultimate employment decision" standard

as "a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias." *Id.* In particular, this Court observed, the statute "makes it unlawful for an employer 'otherwise to discriminate against' an employee 'with respect to [her] terms, conditions, or privileges of employment,'" "key language" that operates as "the statute's catchall provision" but "ignore[d]" by the ultimate employment decision test. *Id.* at *4 (quoting 42 U.S.C. § 2000e-2(a)(1)). *Hamilton* further recognized the Supreme Court's understanding that the "terms, conditions, or privileges" language "evinces a congressional intent to strike at the *entire spectrum* of disparate treatment of men and women in employment," and, accordingly, that "[*a*]*ny* 'benefits that comprise the incidents of employment, or that form an aspect of the relationship between the employer and employees'" "fall within Title VII's ban on discrimination." *Id.* at *5 (citation omitted) (emphases added). "Satisfied that our 'ultimate employment decision' standard lies on fatally flawed foundations," *Hamilton* concluded, "we flatten it today." *Id. See also Harrison v. Brookhaven Sch. Dist.*, No. 21-60771, 2023 WL 6158232, at *2 (5th Cir. Sep. 21, 2023) (per curiam) (quoting *Hamilton*).

At the same time, *Hamilton* stated, the statute "does not permit liability for de minimis workplace trifles." *Id.* at *7 (citations omitted); *see also id.* at *8 n.65 (recognizing that *Groff v. DeJoy*, 143 S. Ct. 2279, 2295 (2023), "not[ed] that 'de minimis' means 'something that is "very small or trifling"'" (quoting Black's Law Dictionary 388 (5th ed. 1979))). The *Hamilton* Court did not define the minimum level of harm that must result from discrimination to support a claim. *Id.* at *17-18. Nevertheless, applying the new standard, the Court concluded that the plaintiffs' discriminatory-shift-assignment allegations easily stated a plausible discrimination claim. *Id.* at *13-14. Subsequently, in *Harrison*, 2023 WL at *4, this Court clarified that it was adopting the Sixth Circuit's articulation of the de minimis standard from *Threat v. City of Cleveland*, 6 F.4th 672, 678-79 (6th Cir. 2021).

The district court concluded that Levario's ADA claim regarding her performance review fails because it does not allege an "ultimate employment decision." ROA.1552-53. But that conclusion cannot be reconciled with *Hamilton*. First, *Hamilton*'s analysis of Title VII claims applies with equal force to analogous claims brought under the ADA. *See supra* p. 10; *Flowers*, 247 F.3d at 233. Second, because AT&T's allegedly

discriminatory performance review implicated the terms, conditions, or privileges of Levario's employment, it is an "aspect" of the relationship between AT&T and its employees that falls well within the scope of *Hamilton*'s standard. *Hamilton*, 2023 WL 5316716, at *5 (citations omitted). Wherever the "de minimis" floor in *Hamilton* lies, a negative performance review like the one at issue here exceeds it because, by its nature, it carries a range of adverse consequences for the employee.

For example, in this case the parties did not dispute that, at AT&T, the consequences of a negative, "does not meet" performance rating included: precluding the employee from receiving an annual salary increase (when salary increases were generally available to other employees), rendering her unable to secure a promotion in the following year, and possibly precluding her from securing a transfer to another position. *See supra* pp.4-5. Nor did the parties dispute that Levario's 2013 negative review precluded her from receiving an estimated twelve percent salary increase in 2014, which alone far exceeds the kind of "very small or trifling" consequence that would be de minimis. *Hamilton*, 2023 WL 5316716, at *8 n.65 (quoting *Groff*, 143 S. Ct. at 2295). For these reasons, this

Court should apply *Hamilton* to vacate the district court's finding that Levario's 2013 performance review was not actionable under the ADA.

II. The "material adversity" of retaliatory conduct does not depend on whether or not the individual continued to engage in protected activity after the alleged retaliatory act.

The district court's ruling that Levario's performance review was not "materially adverse" is inconsistent with the standards governing the material-adversity requirement in ADA retaliation claims. The ADA's antiretaliation provision states that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). Protection against retaliation extends to requests for reasonable accommodation. *See, e.g.*, *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 625 (5th Cir. 2009) (reversing summary judgment in ADA suit where "the EEOC has raised genuine questions of material fact regarding ... whether [the employer] discharged [the employee] because of her CFS disability *and requests for accommodations*" (emphasis added)); *Hammond v. Jacobs Field Servs.*, 499 F. App'x 377, 383 (5th Cir. 2012) (noting that the plaintiff

"appears to have engaged in protected activity under the ADA when he requested accommodation for his disability"); s*ee also* EEOC Enforcement Guidance on Retaliation and Related Issues, at II.A.2.e (2016) ("Retaliation Guidance"), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (last visited Sept. 22, 2023) ("A request for reasonable accommodation of a disability constitutes protected activity under the ADA, and therefore retaliation for such requests is unlawful.") (citation omitted).

Under the ADA, a prima facie case of retaliation requires the plaintiff to show "(1) engagement in an activity protected by the ADA, (2) an adverse employment action, and (3) a causal connection between the protected act and the adverse action." *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999). As the Supreme Court explained in the Title VII context, such provisions "protect[] an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006); *see also Credeur v. La. Through Off. of Att'y Gen.*, 860 F.3d 785, 798 (5th Cir. 2017) (applying *Burlington Northern*'s materially-adverse-action standard to ADA retaliation claim). For this reason, the Supreme Court adopted an objective

standard "to describe the level of seriousness to which [a] harm must rise before it becomes actionable retaliation." *Burlington N.*, 548 U.S. at 67. The challenged action must be "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).

Explaining that standard, the Supreme Court recognized that Title VII "depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses," and reiterated that "[t]he antiretaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms." *Id.* at 67-68 (citation omitted). "It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Id.* at 68 (citation omitted). Moreover, the Court observed, this standard focuses on the "reactions of a *reasonable* employee" because an objective standard is "judicially administrable" and accords with "the need for objective standards in other Title VII contexts." *Id.* at 68-69 (citing cases). At the same time, the Court "phrase[d] the standard in general terms because the significance of any given act of

retaliation will often depend upon the particular circumstances. Context matters." *Id*. at 69.

Here, the district court recognized that *Burlington Northern* controls. *See* ROA.1555 (n.39). But instead of employing the objective, "well might have dissuaded a reasonable worker" test from *Burlington Northern*, it employed a subjective test, looking only at whether Levario herself was deterred from further protected activity. *See* ROA.1557-58 (concluding that it was "difficult … to say the 2013 Performance Review was 'materially adverse'" because "it did not dissuade" *Levario herself* from further protected activity, and therefore the review was not an action that 'would dissuade a reasonable employee from making a discrimination complaint.'" (quoting *Newbury*, 991 F.3d at 678)). In so doing, the district court erred.

While this Court has not addressed the issue in a published decision, other courts of appeals that have done so have disavowed actual dissuasion as the test for material adversity. *See Baloch v. Kempthorne*, 550 F.3d 1191, 1199 n.5 (D.C. Cir. 2008) (Kavanaugh, J.) (where "[t]he District Court explained that [the plaintiff] had not been dissuaded from making charges of discrimination and that the alleged actions therefore could not

have been materially adverse," "disagree[ing] with the District Court's reasoning … [that] focused on [the plaintiff's] subjective reactions rather than on whether the objective 'reasonable worker' would have been dissuaded from making a discrimination complaint") (citing *Burlington N.*, 548 U.S. at 68); *Steele v. Schafer*, 535 F.3d 689, 696 (D.C. Cir. 2008) (*Burlington Northern* "expressly forecloses" consideration "of the courage that particular employee demonstrated by reporting [discrimination]"); *Patane v. Clark*, 508 F.3d 106, 116 (2d Cir. 2007) (rejecting the employer's argument that its conduct did not satisfy the *Burlington Northern* standard because it did not dissuade the plaintiff from reporting sexual harassment again when it recurred; recognizing that such a rule "would require that *no* plaintiff who makes a second complaint about harassment could *ever* have been retaliated against for an earlier complaint"). *Cf. Somoza v. Univ. of Denver*, 513 F.3d 1206, 1214 (10th Cir. 2008) (noting, where employees continued to engage in protected activity after employer took action against them, that an employee's continuing to do so "may shed light as to whether the actions are sufficiently material and adverse"; ultimately concluding for other reasons that the action at issue did not meet the *Burlington Northern* standard).

EEOC guidance likewise recognizes that the *Burlington Northern* materially-adverse-action standard "can be satisfied even if the individual was not in fact deterred." Retaliation Guidance, at II.B.1. Indeed, *Burlington Northern* itself involved an employee who continued engaging in protected activity after experiencing retaliation: the plaintiff opposed an unlawful employment practice; in response, her employer assigned her "more arduous and dirtier" work duties; and then, undeterred, she filed an EEOC charge (as well as additional charges when the employer retaliated further). 548 U.S. at 58-59, 71.[3]

In focusing on actual deterrence of the plaintiff as a prerequisite for a materially adverse action, the district court cited a decision of this Court that partially misstated the *Burlington Northern* test. *See* ROA.1557 (standard requires showing "a retaliatory action that '*would* dissuade a

[3] In an unpublished, nonprecedential decision, this Court has stated summarily that certain employer actions were not materially adverse where the plaintiff continued to engage in protected activity. *See Jackson v. Honeywell Int'l, Inc.*, 601 F. App'x 280, 286 (5th Cir. 2015) ("[W]ritten warnings and unfavorable performance reviews are not adverse employment actions … where the employee continues to engage in protected activity.") (Title VII case). *Jackson* cited *Burlington Northern*, but did not explain how to reconcile its statement with *Burlington Northern's* objective, reasonable-person test.

reasonable employee from making a discrimination complaint'") (quoting *Newbury*, 991 F.3d at 678) (emphasis added). The correct *Burlington Northern* test states: "a 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." 548 U.S. at 68 (emphases added) (cleaned up). It is unclear whether the district court focused on Levario herself because of the abbreviated way it described the test. If it did, then *Newbury*'s shorthand must be understood to omit important language explaining that, in this context, materially adverse "means it *well might* have dissuaded a reasonable worker."[4] *Burlington N.*, 548 U.S. at 68. The proper question is not whether the action at issue *would*

[4] This Court's decisions issued prior to *Newbury* use the correct "might" language in addressing the *Burlington Northern* standard. *See Credeur*, 860 F.3d at 798 (recognizing the "might" standard for materially adverse actions); *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 390 (5th Cir. 2007) ("LeMaire's suspension is an adverse employment action, as a two-day suspension without pay might have dissuaded a reasonable employee from making a charge of discrimination"). Thus, in addition to *Burlington Northern* itself, this Court's rule of orderliness means the "might" standard governs. *See McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 385 (5th Cir. 2011) ("This court's rule of orderliness prevents one panel from overruling the decision of a prior panel.") (citation omitted).

in fact have deterred Levario or any other worker, but whether it *well might* have dissuaded a reasonable worker from doing so.

Moreover, insofar as the district court suggested that the materially-adverse-action standard considers only whether the employer's motive or intent was to dissuade future protected activity, this suggestion is incorrect. *See* ROA.1557 (observing that "if the 2013 Performance Review was meant to dissuade Plaintiff from complaining about discrimination, it did not"). In the analogous context of Title VII retaliation claims, the Supreme Court has noted that the relevant intent inquiry in a retaliation case like this one is whether the individual's *prior* protected activity motivated the employer to take a materially adverse action; not whether the employer had the specific intent to impede future protected activity. *See, e.g.*, *Univ. of Tx. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) ("The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim … must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."); *see also* 42 U.S.C. § 12203(a) (forbidding retaliation "because such individual *has opposed* any act or practice made unlawful by this chapter or because such individual *made* a charge, *testified*, *assisted*, or *participated* in any manner in

an investigation, proceeding, or hearing under this chapter") (emphases added).

III. Levario was not required to rely on her earliest protected activity when using temporal proximity to establish a prima facie case of retaliation.

An individual who engages in a series of protected activities may rely on her most recent protected activity to establish temporal proximity in support of a prima facie case of retaliation under the ADA. In evaluating a grant of summary judgment on an ADA retaliation claim based on circumstantial evidence, this Court applies the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 304 (5th Cir. 2020). Under that framework, "[t]he burden of establishing a prima facie case … is not onerous," simply requiring a plaintiff to show "by a preponderance of the evidence" that she was subjected to adverse treatment "under circumstances which give rise to an inference" of unlawful retaliation. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523, 527 (5th Cir. 2022) (citations omitted) (same).

To establish a prima facie case of retaliation the plaintiff must identify evidence of a causal relationship between the protected activity and the materially adverse action. *See, e.g.*, *Seaman*, 179 F.3d at 301. As this Court has observed, one way for a plaintiff to meet this requirement is by showing sufficient temporal proximity between her protected activity and the materially adverse action, such that the trier of fact could infer a retaliatory motive. *Gosby*, 30 F.4th at 527. To make this showing, the protected activity and the subsequent materially adverse action "must be very close in time." *Id.* (cleaned up). This Court has not established a bright-line rule for what constitutes sufficient temporal proximity—as it has noted, it has "accepted a two-and-a-half-month gap as sufficiently close in one case, and rejected nearly the same timeframe in another," and "accepted gaps of less than two months." *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 948-49 (5th Cir. 2015) (citations omitted).

In cases where a plaintiff relies on more than one protected activity in support of her retaliation claim, this Court has recognized that temporal proximity may be measured against the plaintiff's most recent protected activity. In *Zamora v. City of Houston*, 798 F.3d 326, 335 (5th Cir. 2015), this Court rejected the defendant's argument that the plaintiff's earlier

protected activity was too remote in time. The Court noted that the plaintiff's earlier protected act "was not his only protected activity" and "the jury could have found" that the employer was retaliating for the plaintiff's other "protected activity—which took place close in time to the retaliatory statements—as well." *Zamora*, 798 F.3d at 335.

This approach to measuring temporal proximity is consistent with the practice of the other courts of appeals. *See, e.g.*, *Holloway v. Md.*, 32 F.4th 293, 300 (4th Cir. 2022) (measuring temporal proximity against the "last" of plaintiff's three EEO complaints); *DeBose v. USF Bd. of Trustees*, 811 F. App'x 547, 557-58 (11th Cir. 2020) (unpubl.) (measuring temporal proximity against the plaintiff's two, five-months-apart protected activities); *LaRiviere v. Bd. of Trustees of S. Ill. Univ.*, 926 F.3d 356, 360 (7th Cir. 2019); (measuring temporal proximity against the latest possible date); *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 784, 791-92 (3d Cir. 2016) (measuring temporal proximity against the date of the last of the plaintiff's multiple complaints about sexual harassment); *Littlejohn v. City of New York*, 795 F.3d 297, 319-20 (2d Cir. 2015) (holding that where the plaintiff began complaining of discrimination "over a year" before her demotion and continued "through ... the day of her demotion," the plaintiff raised a

plausible inference of causation); *McGowan v. City of Eufala*, 472 F.3d 736, 739, 744 (10th Cir. 2006) (measuring temporal proximity against the plaintiff's recent protected activity of giving a deposition in her lawsuit, instead of protected activity from two years prior); *Holcomb v. Powell*, 433 F.3d 889, 903 (D.C. Cir. 2006) (holding that "viewed in isolation" the plaintiff's January 2000 complaint would not establish temporal proximity, but that complaint and her multiple other protected acts over the subsequent two years did suffice to show causation); *Pardi v. Kaiser Found. Hosps.*, 389 F.3d 840, 850 (9th Cir. 2004) (concluding that the plaintiff's numerous protected activities over the three-year period prior to the employer's adverse action were sufficient to show temporal proximity); *Calero-Cerezo v. U.S. Dep't of Just.*, 355 F.3d 6, 25-26 (1st Cir. 2004) (holding sufficient temporal proximity by measuring the defendant's alleged retaliatory act against the plaintiff's most recent, but not first, protected activity).

This approach is also consistent with the basic principle of but-for causation that governs ADA retaliation claims. *See Lyons*, 964 F.3d at 304. As the Supreme Court and this Court have recognized, it may be the last of a series of acts that, cumulatively, results in harmful consequences, not

necessarily only the first. *See, e.g., Burrage v. United States*, 571 U.S. 204, 211 (2014) (explaining how a later act may be a but-for cause "if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back"); *United States v. Cockrell*, 769 F. App'x 116, 118 (5th Cir. 2019) (discussing *Burrage*, recognizing that "even if other factors have some role in causing the result, the defendant's conduct will be a but-for cause if the result in question would not have happened without such conduct," and concluding that the conduct in question was the "trigger[ing]" event for the resultant harm).

The district court here ruled that it would consider only the temporal proximity between the alleged adverse acts and when the defendant "*first* gained knowledge of [Levario's] protected activity" in the form of either her EEOC charge or her first accommodation request. ROA.1559 (citation omitted). But the district court's analysis cannot be reconciled with the language of the statute, Supreme Court precedent, or this Court's controlling precedent.

First, the text of the ADA does not limit protection from retaliation to a plaintiff's first protected activity. An employer may not retaliate in

response to any protected activity, whether it is the first in a series of protected activities or a later opposition or participation. *See supra* p. 15 (discussing 42 U.S.C. § 12203(a)).

Second, although the district court characterized its narrow focus on the first protected act as "mak[ing] practical sense," ROA.1559, it does just the opposite. An employee may engage in protected participation or opposition activity repeatedly. *See generally Mach Mining, LLC v. EEOC*, 575 U.S. 480, 483 (2015) (discussing Title VII's "detailed, multi-step" enforcement procedure); *see*, *e.g.*, *Dillard v. City of Austin*, 837 F.3d 557, 562-63 (5th Cir. 2017) (recognizing that the employer's duty to provide reasonable accommodation "should be an ongoing, reciprocal process" involving requests for different or additional accommodations as needed); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, question 32 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada (last visited Sept. 22, 2023) (explaining that "[t]he duty to provide reasonable accommodation is an ongoing one" that may involve multiple accommodation requests over time). It may be that

the last of such protected acts is the "straw that [breaks] the camel's back," *Burrage*, 571 U.S. at 211, and triggers the employer's retaliation.

While the district court stated that its approach was based on "substantial case law" and that Levario's contrary position "departs from the law," as before, the opposite is true. The district court relied primarily on *Alkhawaldeh* for its first-protected-activity rule. *See* ROA.1559 (n.60). In *Alkhawaldeh*, a Title VII retaliation suit, this Court reasoned that the plaintiff had failed to show sufficient evidence of pretext to establish that his protected activity was a but-for cause of his termination. 851 F.3d at 427-30. In particular, the Court held, the plaintiff's poor job performance "independently justifie[d] [his] termination." *Id.* at 430. The Court did not decide whether the plaintiff had established a prima facie case, much less whether temporal proximity was sufficient to show pretext. *See id*. at 427-28.

Alkhawaldeh only mentioned temporal proximity in a footnote, where it discussed protected activity generally. *Id.* at 428 n.23. Addressing the plaintiff's assertion that he had "repeatedly engaged in protected activity" and noting that the gap in time between his protected activity and termination "raises serious temporal-proximity concerns," the Court

simply stated—without further explanation—that "a Title VII claimant cannot, with each protected activity, re-start 'the temporal-proximity clock.'" *Id.* (citations omitted).

This passage in *Alkhawaldeh* is dictum at best: it played no role in the holding that the plaintiff could not show but-for causation, and it was neither necessary to the result nor an explanation of legal principles yielding that result. *See United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014) ("A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it.") (citation omitted). The fact that *Alkhawaldeh* made this statement without citing or addressing *Zamora*—an earlier, precedential decision explicitly holding otherwise—further indicates that this language is dictum that "may not have received the full and careful consideration of the court that uttered it."[5] *Segura*, 747 F.3d at 328 (citation omitted). *See supra* p. 34 ; *Zamora*, 798 F.3d at 335.

[5] Even if the cited passage in *Alkhawaldeh* were not dictum, the panel's failure to follow *Zamora* violates this Court's rule of orderliness. *See supra* p. 21 n.4.

Nor do the district court's other cited authorities provide meaningful support for its analysis. The district court cited the concurrence in *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009), and the decision in *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001), both of which stand for the unremarkable proposition that an employer's knowledge of protected activity must precede the alleged retaliatory act for timing to support a plaintiff's retaliation claim—a point not at issue in this case. *See* ROA.1559 (n.60). The district court also cited *Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992). ROA.1559. But in *Shirley* this Court affirmed the district court's finding (after a bench trial) that a fourteen-month span between the filing of an EEOC charge and the defendant's alleged retaliatory act, combined with other evidence, showed causation. *Shirley*, 970 F.2d at 42-44. *Shirley* did not address whether the plaintiff's more-recent protected activity would have been an appropriate measuring point for temporal proximity. *See id.*

The district court was also unnecessarily concerned that a contrary rule would lead to courts "sustain[ing]" "any adverse action taken" after later protected activity, "no matter how justified." *See* ROA.1559. The court's concern was misplaced, however, in light of the *McDonnell Douglas*

framework. Considered on its own, temporal proximity only allows a plaintiff to establish a prima facie case of retaliation. *Garcia v. Pro. Cont. Servs., Inc.*, 938 F.3d 236, 243-44 (5th Cir. 2019). If the employer justifies its action with a legitimate reason, this Court has held that for a plaintiff to demonstrate but-for causation "more than mere temporal proximity" is required. *Id.* at 244. For the prima facie case, though, "a plaintiff can meet his burden of causation simply by showing close enough timing between his protected activity and his adverse employment action." *Id.* at 243.

CONCLUSION

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

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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), and Fifth Circuit Rules 29.2, 29.3, and 32.2, because it contains 6,195 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1, 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 font for text and footnotes.

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CERTIFICATE OF SERVICE

I certify that on September 22, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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