No. 23-35423

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUI XU,
Plaintiff-Appellant,

v.

LIGHTSMYTH TECHNOLOGIES, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon

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

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

CHELSEA C. SHARON
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing the prohibitions on discrimination and retaliation contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). This appeal raises important questions regarding the correct standards for determining what conduct is actionable under Title VII's anti-discrimination and anti-retaliation provisions. Because EEOC has a strong interest in the proper application of the laws it enforces, EEOC offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Did the district court err by requiring Plaintiff to show a "tangible employment action" or "material" effect on the terms, conditions, or privileges of her employment to sustain her Title VII discrimination claim?

2. Did the district court err by subjecting Plaintiff's retaliation claim to the same "tangible employment action" standard the court applied to

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

her discrimination claim and by otherwise treating the scope of actionable conduct as equivalent for both claims?[2]

STATEMENT OF THE CASE

A. Statement of the Facts[3]

Plaintiff Hui Xu, an Asian-American woman of Chinese national origin, worked for LightSmyth Technologies, Inc. ("LightSmyth") from 2012 to 2019. ER-258. Xu had a strained relationship with some of her supervisors. ER-258-61. In February 2018, she complained to LightSmyth's General Manager about what she perceived to be "examples of abuse of power, retaliation, and discrimination." ER-143.

Shortly thereafter, Xu requested a reasonable accommodation related to issues with her vision. ER-83, ER-147-48. In March 2018, purportedly in an effort to accommodate these limitations, LightSmyth restructured Xu's

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[2] While the heading of the section of Plaintiff's appellate brief regarding actionable conduct refers to her "Disparate Treatment Claims," Dkt. 11 at 28, the substance of the argument addresses both retaliation and discrimination, Dkt. 11 at 28-42, and references Claim 4, which relates to retaliation, Dkt. 11 at 22, 28. EEOC therefore addresses both claims, as did the district court. ER-16-23.

[3] EEOC presents these facts in the light most favorable to Xu, consistent with the standard of review for an award of summary judgment. *See, e.g.*, *Nehad v. Browder*, 929 F.3d 1125, 1133 (9th Cir. 2019).

role from Supply Chain Manager to Manufacturing Technician. ER-147-48, ER-259. This changed Xu's status from an overtime-exempt, salaried employee to a non-exempt, hourly employee. ER-147-48, ER-259. Xu contends this was effectively a demotion to a less-prestigious position. ER-259. Xu also asserts that, over the next several months, LightSmyth issued her a negative performance review, admonished her to refrain from disrespecting her co-workers, and extended a voluntary offer of severance. Dkt. 11 at 35-42; ER-52.

Xu left LightSmyth in March 2019. The parties dispute the circumstances under which Xu's employment ended. Xu contends that she left primarily because of the "harassment and abuse" she endured at LightSmyth. ER-260. LightSmyth contends that Xu resigned after the company declined her request for additional leave to care for her terminally ill sister. *See* ER-13-14 (district court's description).

B. District Court's Decision

Xu brought this suit asserting, *inter alia*, Title VII and Oregon-law discrimination claims based on her race, national origin, and sex, as well as an Oregon-law retaliation claim. *See* ER-16. Xu argued that LightSmyth discriminated and/or retaliated against her by discharging her,

restructuring her position from Supply Chain Manager to Manufacturing Technician, giving her a negative performance review, admonishing her to respect her co-workers, and extending a voluntary offer of severance.[4] ER-52-57.

The district court granted summary judgment to LightSmyth. The court rejected Xu's wrongful discharge claim on the ground that she failed to establish either that she was constructively discharged or that the termination was pretext for retaliation. ER-26-28. With respect to the other alleged discriminatory and retaliatory actions, the court concluded, as relevant here, that none met the requisite adverse action standard. ER-16-23.

As to Xu's discrimination claim, the district court said that Xu must show "she was subject to an adverse employment action," which it defined as "one that 'materially affect[s] the compensation, terms, conditions, or privileges of [employment].'" ER-16-17 (quoting *Chuang v. Univ. of Cal.*

[4] It is not entirely clear from Xu's summary judgment briefing which of these actions she claimed were discriminatory and which retaliatory. ER-52-57. The district court analyzed Xu's discharge and the restructuring of her position as supporting her retaliation claim, the admonition about respecting co-workers as supporting her discrimination claim, and the performance review and offer of severance as related to both claims. ER-18-23, 26.

Davis, Bd. of Trs., 225 F.3d 1115, 1126 (9th Cir. 2000) (alterations in original)). "The Supreme Court," the district court said, had "described such an action as a 'tangible employment action,'" which "'constitutes 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.'" ER-17 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760-61 (1998)). The district court ultimately concluded that none of the discriminatory conduct Xu challenged was actionable. ER-21-22 (admonition about respecting co-workers did not amount to a "tangible employment action" and could not sustain discrimination claim); ER-20-21 (performance review not actionable discrimination); ER-22-23 (offer of severance not actionable discrimination).

In considering Xu's retaliation claim, the district court stated that "an adverse employment action in the context of a retaliation claim is 'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'" ER-17 (quoting *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000)). In analyzing the retaliatory conduct, however, the district court did not apply this standard. Instead, the court applied the "tangible

employment action" standard in finding the restructuring of Xu's position not actionable. *See* ER-19 (faulting Xu for purportedly "offer[ing] no evidence that . . . her pay and benefits significantly decreased or that her duties significantly changed" and relying on *Ellerth* for the proposition that an adverse action must be a "'reassignment with *significantly different* responsibilities, or a decision causing a *significant change* in benefits'") (quoting *Ellerth*, 524 U.S. at 761). And, in finding the other forms of retaliatory conduct not actionable, the district court relied on case law applicable to Title VII *discrimination* claims or otherwise treated the scope of actionable retaliation as identical to the scope of actionable discrimination. *See* ER-21 (relying on *Hess v. Multnomah County*, 216 F. Supp. 2d 1140 (D. Or. 2001), a Title VII disparate-treatment case, to conclude that Xu's performance review could not sustain her retaliation claim); ER-22 (considering as a singular inquiry whether offer of severance constituted actionable "discrimination or retaliation").

ARGUMENT

I. The district court erred by requiring Xu to show a "tangible employment action" or "material" effect on the terms, conditions, or privileges of her employment to sustain her discrimination claim.

The district court required Xu to show an employment action with a "material[]" effect on the terms, conditions, or privileges of her employment, ER-17 (quoting *Chuang*, 225 F.3d at 1126), that was equivalent to a "tangible employment action," ER-17 (quoting *Ellerth*, 524 U.S. at 760). The district court departed from the plain text of Title VII in requiring this showing.[5]

Section 703(a)(1) of Title VII prohibits discrimination "with respect to [an individual's] compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). This statutory text requires only an

[5] On December 6, 2023, the Supreme Court will hear argument in *Muldrow v. City of St. Louis*, which presents a question similar to those at issue in this case. *See* 143 S. Ct. 2686 (2023) (mem.) (granting certiorari to address "the following question: Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?"). The United States filed an amicus brief in *Muldrow* arguing that all discriminatory transfer decisions are actionable under Title VII and that there is no textual requirement of any "particular showing of harm" or "additional disadvantage" beyond the transfer itself. Br. of the United States as Amicus Curiae at 9-10, 13, *Muldrow v. City of St. Louis*, No. 22-193, 2023 WL 5806264 (S. Ct. Sept. 5, 2023).

impact on the "terms, conditions, or privileges of employment," without any additional requirement of a "material" or "tangible" impact. Grafting onto this statutory provision an additional requirement that the harm be "material" or "tangible" in nature impermissibly "read[s] words or elements into [the] statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009) (citation omitted). As the en banc D.C. Circuit observed, "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete." *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (en banc); *see also Hamilton v. Dallas Cnty.*, 79 F.4th 494, 506 (5th Cir. 2023) (en banc) (rejecting Fifth Circuit's prior requirement that plaintiff show an "ultimate employment decision" to sustain a Title VII discrimination claim and explaining that a plaintiff instead "need only show that she was discriminated against, because of a protected characteristic, with respect to . . . the 'terms, conditions, or privileges of employment'—just as the statute says") (quoting 42 U.S.C. § 2000e-2(a)(1)).

"Nor is Title VII's coverage limited to economic or tangible discrimination." *Hamilton*, 79 F.4th at 501 (internal quotation marks omitted). The Supreme Court and multiple courts of appeals have rejected this notion. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (noting that the Supreme Court has "repeatedly made clear that . . . the scope of the prohibition" against discrimination in section 703(a)(1) "is not limited to economic or tangible discrimination") (internal quotation marks omitted); *Chambers*, 35 F.4th at 874 ("The unadorned wording of the statute admits of no distinction between 'economic' and 'non-economic' discrimination or 'tangible' and 'intangible' discrimination.") (citation omitted); *Threat v. City of Cleveland*, 6 F.4th 672, 680 (6th Cir. 2021) (rejecting the notion that section 703(a)(1) "reaches only employment decisions that cause the employee economic harm"). Instead, the phrase "terms, conditions, or privileges of employment" is "an expansive concept" intended "to strike at the entire spectrum of disparate treatment . . . in employment," *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 66 (1986) (citations omitted), not just discrimination in "the narrow contractual sense," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

The district court reached a contrary conclusion by reading the Supreme Court's decision in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), as requiring Xu to show a "tangible employment action" to sustain a Title VII discrimination claim. ER-17. This reading of *Ellerth* is erroneous. *Ellerth* did not address the scope of actionable conduct under section 703(a)(1) but instead examined the circumstances under which "an employer has vicarious liability" for sexual harassment by a supervisor. 524 U.S. at 754. *Ellerth* concluded that such vicarious liability exists, with no affirmative defense, "when the supervisor's harassment culminates in a tangible employment action," which the Court defined as "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.* at 761, 765. But this "tangible employment action" path for vicarious liability says nothing about the meaning or scope of the phrase "terms, conditions, or privileges of employment" in section 703(a)(1).

Indeed, as the en banc D.C. Circuit observed, any notion that *Ellerth* "implicit[ly] endorse[d] . . . a 'tangible harm' requirement in Title VII claims involving direct liability" was "put . . . to rest" by the Supreme

Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). *See Chambers*, 35 F.4th at 876. In *Burlington Northern*, the Supreme Court clearly stated that "*Ellerth* did not discuss the scope of [Title VII's] general antidiscrimination provision," and that it had invoked the concept of a "tangible employment action" "only to identify a class of hostile work environment cases in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors." *Burlington N.*, 548 U.S. at 64-65 (cleaned up). Thus, *Ellerth* provides no support for requiring a "tangible employment action" to sustain a Title VII discrimination claim.

The district court also relied on this Court's decision in *Chuang* for the proposition that only an adverse action that "materially affect[s] the compensation, terms, conditions, or privileges of [employment]" can sustain a Title VII discrimination claim. ER-17 (quoting *Chuang*, 225 F.3d at 1126) (alterations in original). To be sure, *Chuang* did distinguish between material and non-material employment actions in deciding what actions could support a Title VII disparate-treatment claim. 225 F.3d at 1126. But this discussion can be read—consistent with the Sixth Circuit's decision in *Threat*—not as imposing an atextual "materiality" requirement but as

simply serving as a "shorthand for the operative words in the statute," "ensur[ing] that a discrimination claim involves a meaningful difference in the terms of employment and one that injures the affected employee." *Threat*, 6 F.4th at 678-79 (citations omitted) (adopting this reading of the Sixth Circuit's prior precedent that had "construe[d] the phrase 'terms, conditions, or privileges of employment' in Title VII to cover only a materially 'adverse employment action'"); *see Chuang*, 225 F.3d at 1126 (employer's failure to notify plaintiffs formally of response to their grievances was not actionable because it was merely "irritating").[6]

II. The district court erred by subjecting Xu's retaliation claim to the same "tangible employment action" standard the court applied to her discrimination claim and by otherwise treating the scope of actionable conduct as equivalent for both claims.

In concluding that the alleged retaliatory conduct Xu complained of was not actionable, the district court applied the "tangible employment

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[6] In *Peccia v. California Department of Corrections and Rehabilitation*, No. 21-16962 (9th Cir.), a case before this Court concerning a lateral job transfer, the Department of Justice filed an amicus brief arguing that such a transfer is actionable in the absence of a separate showing of substantial or tangible harm and urging this Court to read *Chuang* in a manner similar to that described above. Br. of the United States as Amicus Curiae, *Peccia v. Cal. Dep't of Corr. & Rehab.*, No. 21-16962, 2022 WL 1280308 (9th Cir. Apr. 25, 2022). This Court has deferred submission of *Peccia* pending the Supreme Court's decision in *Muldrow*. Order, No. 21-16962 (9th Cir. Oct. 31, 2023).

action" standard it believed governed Xu's discrimination claim and otherwise treated the scope of actionable conduct as identical for both claims. ER-19, 21-22. This was error because Xu's retaliation claim does not require proof of a "tangible employment action" or have the same scope of actionable conduct as a Title VII discrimination claim.[7]

Instead, the Supreme Court has held—and this Court has recognized—that a plaintiff may establish an adverse action for a Title VII retaliation claim by showing "that a reasonable employee would have found the challenged action materially adverse," that is, that "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (internal quotation marks omitted); *Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1021 (9th Cir. 2018). And, the Supreme Court has explained, the scope of actionable conduct

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[7] Xu brought her retaliation claim under Oregon law rather than Title VII, but courts construe Oregon's anti-retaliation provision as "directly analogous" to Title VII's anti-retaliation provision. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1049-50 (9th Cir. 2017) (citing *Portland State Univ. Chapter of Am. Ass'n of Univ. Professors v. Portland State Univ.*, 291 P.3d 658, 667 (Or. 2012) (en banc)); *see McLaughlin v. Wilson*, 449 P.3d 492, 501 (Or. 2019) (characterizing inquiry with respect to scope of actionable retaliation as "identical" under Oregon law and Title VII). The district court here recognized that "Plaintiff's federal and state claims under Title VII" and Oregon law "have the same legal standard of review" and applied federal law to Xu's retaliation claim. ER-16 n.10, ER-17.

under Title VII's anti-discrimination provision is "not coterminous" with that actionable under Title VII's anti-retaliation provision. *Burlington N.*, 548 U.S. at 67; *see also Campbell*, 892 F.3d at 1021 (noting that "Title VII retaliation claims may be brought against" a different "range of employer conduct than substantive claims of discrimination").

The district court failed to consider whether the retaliatory conduct Xu challenged could dissuade a reasonable worker from engaging in protected activity, as required by the governing standard. To be sure, the court articulated a variation of that standard, relying on a pre-*Burlington Northern* case from this Court for the proposition that "an adverse employment action in the context of a retaliation claim is 'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'" ER-17 (quoting *Ray*, 217 F.3d at 1242-43). But the court failed to apply even that standard to the challenged retaliatory acts.

Instead, reflecting evident confusion about the standard, the court applied the "tangible employment action" standard or relied on case law applicable to Title VII discrimination claims in finding much of the retaliatory conduct at issue not actionable. For example, in considering the

restructuring of Xu's position, the court faulted Xu for purportedly "offer[ing] no evidence that . . . her pay and benefits significantly decreased or that her duties significantly changed" and relied on *Ellerth* for the proposition that an adverse action must be a "'reassignment with *significantly different* responsibilities, or a decision causing a *significant change* in benefits.'" ER-19 (quoting *Ellerth*, 524 U.S. at 761). And the district court also erroneously treated the scope of actionable conduct for Xu's retaliation claim as coterminous with that for her discrimination claim. For example, the court relied on a Title VII disparate-treatment case to conclude that Xu's performance review "does not amount to an adverse employment action" for her retaliation claim, ER-21 (quoting *Hess*, 216 F. Supp. 2d at 1154), and considered as a singular inquiry whether the offer of severance constituted actionable "discrimination or retaliation," ER-22. This Court should thus remand for the district court to consider whether the alleged retaliatory conduct was actionable under the correct legal standard.

CONCLUSION

For the foregoing reasons, the grant of summary judgment as to the claims addressed above should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

s/Chelsea C. Sharon
CHELSEA C. SHARON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov

November 1, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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s/Chelsea C. Sharon
CHELSEA C. SHARON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
chelsea.sharon@eeoc.gov