No. 17-13750-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARY BRATWAITE,

Plaintiff-Appellant

v.

BROWARD COUNTY SCHOOL BOARD,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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

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Bratwaite v. *Broward County School Board*, No. 17-13750-DD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for the United States certifies that in addition to the individuals and entities listed on the Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed on November 30, 2017, the following individuals and entities have an interest in this case:

Baldwin, Anna M. (DOJ attorney)

Tucker, James M. (EEOC attorney)

Equal Employment Opportunity Commission (amicus curiae)

Gore, John M. (Acting Assistant Attorney General)

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U.S. Department of Justice (amicus curiae)

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

s/ Anna M. Baldwin

Date: December 7, 2017

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

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). In

the decision below, the district court applied the wrong test for determining when an employer has taken an adverse action and failed to cite the Supreme Court case, *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), which sets out the controlling legal standard for Title VII retaliation claims under 42 U.S.C. 2000e-3(a). 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) (*Burlington Northern*), 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. *Burlington N.*, 548 U.S. at 64, 68. The Court explicitly rejected the view that the anti-retaliation provision prohibits only adverse employment 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. Mary Bratwaite, an African-American secretary employed by the Broward County School Board (School Board), filed a complaint under Title VII alleging that another employee verbally harassed and physically bullied and threatened her because of her race, and that she suffered retaliation in the form of verbal and written reprimands after she filed a charge of discrimination with the EEOC and complained of discrimination to her supervisor. Doc. 1, at 2-4 and Ex. A.; see also Doc. 32, at 6 (citing Doc. 27-8, Doc. 27-12).[2]

The School Board moved for summary judgment, arguing in relevant part that Bratwaite could not establish a prima facie case of retaliation because she could not show that the School Board disciplined her because of her protected activity rather than for legitimate, non-retaliatory reasons, and because the issuance of a reprimand allegedly could not constitute a prohibited adverse employment action. Doc. 25, at 9-15; Doc. 35, at 5 n.3. In making the latter argument, the School Board did not discuss or cite the legal standard set out in *Burlington Northern*.

3. The district court granted the School Board's motion for summary judgment. Doc. 39. The district court concluded that Bratwaite's retaliation claim failed for two reasons. First, the court concluded that verbal and written

[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.

reprimands "do not constitute 'adverse employment action' for Title VII purposes," because they do not effect "a serious and material change in the terms, conditions, or privileges of employment." Doc. 39, at 9 (citations omitted). In reaching this conclusion, the district court did not cite *Burlington Northern* or otherwise discuss the standard that decision announced for retaliation claims under Section 2000e-3(a). Instead, the district court cited *Davis* v. *Town of Lake Park* 245 F.3d 1232 (11th Cir. 2001)—a substantive race discrimination case, not a retaliation case, that pre-dates *Burlington Northern*—for the proposition that retaliation claims must feature an adverse employment action that effects "a serious and material change in the terms, conditions, or privileges of employment." Doc. 39, at 9 (quoting *Davis*, 245 F.3d at 1239).

The court also cited an unpublished retaliation decision by this Court that pre-dates *Burlington Northern* and which held that a reprimand could not constitute an "adverse employment action" if it did not impact the employee's "salary, title position, or job duties." See *Summerlin* v. *M&H Valve Co.*, 167 F. App'x 93, 97 (11th Cir. 2006) (cited in Doc. 39, at 9). The district court did not analyze whether the reprimands at issue here could have "dissuaded a reasonable worker from making or supporting a charge of discrimination," the inquiry under *Burlington Northern*, 548 U.S. at 68.

Second, the district court held that the plaintiff's retaliation claim failed because she was unable to show a causal connection between the reprimands and any protected activity, such as filing her EEOC charge or submitting complaints to her supervisor. Doc. 39, at 10.

SUMMARY OF ARGUMENT

The district court disregarded controlling Supreme Court law and applied the wrong legal standard to Bratwaite's retaliation claim. Contrary to the district court's analysis, 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 well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 68 (citation and internal citation marks omitted).

The district court erroneously applied an adverse action standard derived from substantive discrimination cases, not from retaliation cases. Thus, the district court wrongly required Bratwaite to show that she suffered a "serious and material change in the terms, conditions, or privileges of employment." Doc. 39, at 9. 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 HER 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: "(1) that she engaged in an activity protected under Title VII; (2) she 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. In *Burlington Northern*, the Supreme Court held 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.

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 well might 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 that affected the employee's eligibility for a merit pay increase "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, 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. Just as the district court did here, 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 an adverse action requires "a serious and material change in the terms, conditions, or privileges of employment"—even in Title VII retaliation cases. 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 district court never addressed *Burlington Northern* but instead relied on this Court's decision in *Davis* to require the presence of an adverse action that effects a "serious and material change in the terms, conditions, or privileges of employment." Doc. 39, at 9. Similarly, the court cited a pre-

Burlington Northern decision by this Court holding that a reprimand does not constitute an adverse employment action where there is no impact on an "important condition of employment, such as salary, title, position, or job duties." *Summerlin*, 167 F. App'x at 97 (cited in Doc. 39, at 9). Moreover, while the district court cited this Court's decision in *Crawford*, it failed to apply *Crawford*'s reasoning. *Crawford* recognized that the Supreme Court in *Burlington Northern* repudiated any requirement that a plaintiff suffer an adverse action that goes to an "ultimate employment decision" in order to prove a retaliation claim. 529 F.3d at 970, 974 (citation omitted). But the district court cited *Crawford* for the *opposite* proposition—suggesting that retaliatory adverse actions are limited to employment actions such as "[t]ermination, failure to hire, and demotion." Doc. 39, at 9 (citing *Crawford*, 529 F.3d at 970).

As a result of its misreading of *Crawford* and its reliance on outdated case law, the district court adopted a per se rule that verbal and written reprimands cannot constitute adverse actions where they do not affect the terms, conditions, or privileges of plaintiff's employment.[3] The district court neither asked nor

[3] Likewise, notwithstanding this Court's clear statement of the law in *Crawford*, multiple district court decisions in this Circuit have continued to rely on the *Davis* standard in adjudicating Title VII retaliation claims. See, *e.g.*, *Wells* v. *Miami Dade Cty.*, No. 15-cv-22431, 2016 U.S. Dist. LEXIS 180303, at *11-12 (S.D. Fla. Dec. 30, 2016) ("The standard in this circuit for both discrimination and retaliation claims requires an employee to establish an ultimate employment

(continued…)

answered the right question—which is whether the reprimands "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (citations omitted). Following *Burlington Northern*, reprimands may, in some circumstances, deter a reasonable employee from making or supporting a charge of discrimination. See *Leatherwood* v. *Anna's Linens Co.*, 384 F. App'x 853, 858 (11th Cir. 2010); see also *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.

(…continued)
decision" or prove "a serious and material change in the terms, conditions, or privileges of employment to show an adverse employment action") (citations and internal quotation marks omitted); *Albu* v. *TBI Airport Mgmt.*, No. 15-cv-3120, 2016 U.S. Dist. LEXIS 147913, at *12 (N.D. Ga. Oct. 26, 2016) (requiring a "serious and material change in the terms, conditions, or privileges" of employment to show an adverse action for Title VII retaliation claim); see also *Lewis* v. *Macon Cty. Sch. Bd.*, No. 15-cv-125, Doc. 52, at 30 (M.D. Ga. Sept. 26, 2017), appeal pending, No. 17-14739-D (11th Cir.). The United States recently filed an amicus brief in another appeal pending in this Court in which the district court committed the same legal error in relying on decisions applying the *Davis* standard to adjudicate a Title VII retaliation claim. U.S. Amicus Br., *Houston* v. *City of Atlanta*, No. 17-12126 (11th Cir.) (filed Sept. 27, 2017).

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 3185 words.

s/ Anna M. Baldwin
ANNA M. BALDWIN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 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
ANNA M. BALDWIN
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