THE TOP FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2022

State Bar of Texas Webcast CLE
January 24, 2023

Mark J. Oberti
Ed Sullivan
Oberti Sullivan LLP
712 Main Street, Suite 900
Houston, Texas 77002
(713) 401-3555
mark@osattorneys.com
ed@osattorneys.com

Joseph Y. Ahmad
AZA
2500 One Houston Center
1221 McKinney Street
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com

Ruthie White
Spencer Fane LLP
3040 Post Oak Blvd., Suite 1300
Houston, TX 77056
(713) 212-2626
rwhite@spencerfane.com

1

1. *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523 (5th Cir. 2022)

- Gosby is diabetic. She was hired on March 23, 2018, and was expected to work for Apache for six months. On April 26, 2018, she had a diabetic attack at work. A week later, May 2, 2018, she was laid off along with 11 other workers. She sued for disability discrimination under the ADA. She lost on summary judgment. She appealed.
- The Fifth Circuit reversed. It held that, contrary to the district court's determination, that only six days passed between her diabetic episode and lay-off was sufficient to create a *prima facie* case of disability discrimination.
- The Fifth Circuit found Gosby showed pretext because: (1) Apache's witnesses gave different rationales for how it made decisions on who to select in the RIF; (2) there was no evidence Apache evaluated terminated and retained workers against any fixed criteria.
- The Fifth Circuit held that "the inconsistent explanations and the absence of clear criteria, though, is evidence tending to show that Apache's "proffered explanation is false or 'unworthy of credence,'" and thus summary judgment was not proper.

2

2. *Wantou v. Wal-Mart Stores, Texas, L.L.C.*, 23 F.4th 422 (5th Cir. 2022)

- Wantou, who is from Cameroon, West Africa, was subjected to racial slurs and mistreatment. He complained. He subsequently received three coachings and was terminated. He sued for a racially hostile environment and retaliation.
- The district court granted summary judgment on the hostile environment claim. The jury found that one of the three coachings was retaliatory and awarded Wantou $32,240 in back pay and $75,000 in punitive damages. The district court reduced the back pay award to $5,177.50. Both parties appealed. The Fifth Circuit affirmed.
- As for the hostile environment claim, the Fifth Circuit found that Wantou had not proven that Walmart knew about the harassment and failed to take prompt remedial action. Judge Ho vigorously dissented from this holding.
- The Fifth Circuit found the plaintiff's manager acted with "malice," and Walmart did not prove the *Kolstad* defense to punitive damages.
- Finally, the Fifth Circuit upheld the $75,000 punitive damages award despite there being only $5,177.50 in actual damages awarded because, under *Abner v. Kansas City Southern R. Co.*, any punitive damages award under Title VII's cap is immune from a ratio-based analysis.

3

3. *Owens v. Circassia Pharmaceuticals, Inc.*, 33 F.4th 814 (5th Cir. 2022)

- Owens, an Asian woman, was a Regional Sales Manager for the defendant. She was placed on a 60-day PIP for alleged performance issues and terminated when the PIP expired. She sued for national origin and sex discrimination, and retaliation. Her case was dismissed on summary judgment. She appealed.
- The Fifth Circuit affirmed. It held that Owens had presented substantial evidence of pretext, but that summary judgment was still proper because she presented no evidence that the defendant was motivated by discrimination or retaliation.
- The Fifth Circuit noted that proof of pretext alone can be enough to infer discrimination and survive summary judgment in some cases, but was not enough in this particular case.
- In *Reeves*, the Supreme Court indicated that as a general rule, proof of pretext is enough to justify an inference of discrimination and survive summary judgment, and that it was only in a distinct subgroup of cases where it would not be – *e.g.*, where the record conclusively shows some other non-discriminatory reason for the challenged adverse employment action.
- This decision is not as vocal about reminding the reader that in most cases, proof of pretext will be enough to justify an inference of discrimination and survive summary judgment. This is a decision defense lawyers will want to cite in almost every summary judgment motion.

4

4. *Bye v. MGM Resorts Intern., Inc.*, 49 F.4th 918 (5th Cir. 2022)

- Bye, a server at the Beau Rivage Casino, sought lactation breaks. She claimed management was not accommodating, made taking breaks difficult for her, and that her coworkers harassed her for taking such breaks. Eventually, she quit and sued for harassment and constructive discharge. She lost on summary judgment, and the Fifth Circuit affirmed.
- The comments by Bye's coworkers were not sufficiently "severe or pervasive" as a matter of law to support a harassment claim.
- Similarly, the harassment and other problems associated with her requested breaks were not so bad that a reasonable employee would have felt compelled to resign, and thus her constructive discharge claim also failed as a matter of law.
- Finally, while Bye may have had an FLSA claim over the lactation breaks issue (under the 2010 amendments to the FLSA that specifically relate to lactation breaks), Bye failed to timely raise such a claim in the district court.

5

5. *Saketkoo v. Admins. of the Tulane Ed. Fund*, 31 F.4th 990 (5th Cir. 2022)

- A female doctor/professor was yelled at and degraded by her male boss, and then her contract was not renewed. She sued for sex discrimination and hostile work environment. She lost on summary judgment. The Fifth Circuit affirmed.
- The defendant asserted that it terminated plaintiff because she was not profitable, and her subspeciality was not mission-critical to the school. Some male professors were also not profitable, but the plaintiff failed to demonstrate that those professors were "nearly identical" to her, in that they had different job titles and responsibilities. For that reason alone, the plaintiff failed as a matter of law to establish a *prima facie* case of sex discrimination.
- Her hostile environment claim failed because, while her boss's conduct was "lamentable" it was not sufficiently "severe or pervasive" to be actionable. And, there was no proof his conduct was based on sex to begin with – he treated males badly too.

6

6. *Woods v. Cantrell*, 29 F4th 284 (5th Cir. 2022)

- Woods, a *pro se* plaintiff, asserted that he had once been called the "N" word by his Hispanic supervisor. The district court dismissed his racially hostile environment claim on a Rule 12(b)(6) motion to dismiss.
- On appeal, the Fifth Circuit joined other circuit courts in holding that one use of the "N" word by a supervisor in the presence of his or her subordinate is sufficient to establish a racially hostile environment claim under Title VII and 42 U.S.C. § 1981.
- The Fifth Circuit noted that even without direct economic harm, Woods may be entitled to damages for mental anguish and punitive damages.

7

7. *Bailey v. KS Management Services*, 35 F.4th 397 (5th Cir. 2022)

- The district court refused to permit the ADEA discrimination and retaliation plaintiff to do any discovery and granted defendant's motion for summary judgment. The plaintiff appealed, and the Fifth Circuit reversed.
- The Fifth Circuit held that comparator evidence the plaintiff sought was relevant to the issue of pretext in the case, and thus it was an abuse of discretion for the district court to bar such discovery.
- The Fifth Circuit also held that it was an abuse of discretion for the district court to deny the plaintiff the opportunity to depose an employee of the defendant whose testimony may have unearthed evidence of a causal nexus between the plaintiff's protected activity and termination.

8

8. *Taylor v. HD and Assoc., L.L.C.*, 45 F.4th 833 (5th Cir. 2022)

- Cable technicians were assigned work orders to install or repair equipment and were paid different amounts depending on the "point value" Defendant HAD assigned to each work order, with no overtime. They sued for overtime under the FLSA. The district court granted summary judgment on the basis of the FLSLA's "bona fide commission exemption." 29 U.S.C. § 207(i). The Fifth Circuit affirmed.

- The case turned on whether the payments made based on the "point value" system HDA used were "bona fide commissions." The Fifth Circuit held they were, holding that "[b]ecause compensation goes up or down by the number of work orders completed, not the number of hours worked, HAD technicians are paid a bona fide commission and are exempt from FLSA overtime requirements."

9

9. *Field v. Anadarko Petroleum Corp.*, 35 F.4th 1013 (5th Cir. 2022)

- Two companies moved to intervene of right in this FLSA case, but were denied. They appealed, and the Fifth Circuit reversed.

- The two companies offered apps whereby they hired workers as independent contractors, paid the workers, and provided them to their clients. In return, the workers agreed to arbitrate any claims against the two companies and their clients. Yet, some of the workers sued their client (Anadarko), and Anadarko (a non-signatory to the arbitration agreements) did not move to compel arbitration. Instead, it indicated that it would seek contractual indemnity from the two companies if it lost.

- The Fifth Circuit held that the two companies had a right to intervene in order to enforce the arbitration agreements and protect their interests, especially given the legal positions Anadarko had taken in the case.

10

10. *Newman v. Plains All American Pipeline, L.P.*, 23 F.4th 393 (5th Cir. 2022)

- The plaintiffs were hired by a staffing company and sent to the staffing company's client, Plains, to work. The plaintiffs later sued Plains for FLSA violations. The plaintiffs did not sue the staffing company.
- The plaintiffs had signed arbitration agreements with the staffing company. The agreements did not mention Plains. Nevertheless, Plains moved to compel arbitration based on those arbitration agreements. The district court denied the motion to compel arbitration. Plains appealed.
- The Fifth Circuit affirmed the district court's decision. The court held that whether Plains could enforce the arbitration agreement between the staffing company and plaintiffs was for the court to decide, not an arbitrator.
- The Fifth Circuit also held that Plains could not enforce the arbitration agreement between the staffing company and the plaintiffs because Texas law presumes noncontracting parties are not third-party beneficiaries and Plains failed to present evidence to overcome that presumption (presumably because there was none).
- The Fifth Circuit also rejected Plains' reliance on the theory of "intertwined-claims estoppel" because that requires a "close relationship" and Plains and the staffing company did not have a "close relationship."
- *En Banc* review was denied on August 5, 2022. Judges Jones, Smith and Duncan dissented.

11

11. *In re A&D Interests, Inc.*, 33 F.4th 254 (5th Cir. 2022)

- The district court certified a class of exotic dancers under the FLSA that included all such dancers who worked at Heartbreakers the last three years, regardless of the fact that some of them had signed arbitration agreements. Heartbreakers petitioned the Fifth Circuit for a writ of mandamus directing the district court to withdraw its order.
- The Fifth Circuit granted the petition. It held that the district court's certification ran afoul of its holding in *In re JP Morgan Chase & Co.*, 916 F.3d 494 (5th Cir. 2019), and thus the district court had "clearly and indisputably erred," in allowing employees who had signed arbitration agreements to be included in the class.
- Judge Higginson dissented.

12

12. *Easom v. US Well Servs.*, 37 F.4th 238 (5th Cir. 2022)

- The plaintiffs filed a WARN Act class action after US Well terminated their employment without giving any notice, must less the 60 days' notice required by the WARN Act. The plaintiffs sued.
- US Well argued that COVID fits under the "natural-disaster exception" in WARN, so their lack of notice was excused. The district court agreed. On appeal, on that point, the Fifth Circuit reversed, finding that COVID did not fit under the WARN Act's "natural-disaster exception".
- The District Court had also held that the WARN Act's "natural-disaster exception" incorporated "but-for" causation, rather than proximate causation. *I.e.*, that the natural disaster had to be the "but-for" cause of the otherwise WARN Act covered terminations. On appeal, on that point, the Fifth Circuit reversed as well, holding that the correct standard was proximate cause.

13

13. *Perthuis v. Baylor Miraca Genetics Labs, L.L.C.*, 645 S.W.3d 228 (Tex. 2022)

- Over a period of months, the plaintiff negotiated, worked up, and had a contract ready for a customer to sign that would be the largest sale in the defendant's history.
- The defendant fired him, and the next day the customer signed the contract he had negotiated and worked up. The defendant refused to pay him any commissions on the sale, on the grounds that he was only entitled to commissions on sales he made during his employment. But there was no agreement that actually said that.
- The plaintiff sued, and ultimately the Texas Supreme Court took his case and adopted the "procuring-cause doctrine."
- Based on that doctrine, it held that in the absence of an agreement to the contrary, when a salesperson's efforts are the direct and proximate cause of the sale, then they are entitled to the commissions from the sale, even if they are no longer employed by the Company when the sale is contractually executed or the commissions are paid.
- The Texas Supreme Court emphasized that the "procuring-cause doctrine" is simply a default common law rule to be applied in the absence of an agreement to the contrary.
- In other words, employers can always override the "procuring-cause doctrine" with a specific agreement specifying that if the salesperson is not employed when the sale is completed, or the commissions are paid, they are not entitled to any commission.

Query: then how would *Sellers v. Minerals Techs., Inc.*, 753 F. App'x 272 (5th Cir. 2018) fit into the analysis?

14

14. *Wallace v. Performance Contractors, Inc.*, ___ F.4th ___ (5th Cir. 2023)

- The plaintiff claimed sex discrimination, sexual harassment, and retaliation, and was poured out on summary judgment on all three claims. She appealed. The Fifth Circuit reversed on all three claims.
- It found: (a) she did suffer an ultimate employment action – an effective informal demotion and important failure to train; and (b) that direct evidence supported the plaintiff's sex discrimination claim.
- It found a reasonable jury could conclude that the plaintiff was suspended and terminated because she rejected a supervisor's sexual advances, which created a fact question as to her *quid pro quo* sexual harassment claim.
- Alternatively, it found that, in any event, contrary to the district court's holding, a reasonable jury could conclude that the employer had not established the elements of the *Ellerth/Faragher* affirmative defense.
- Finally, the Fifth Circuit found that, contrary to the district court's holding, the plaintiff had engaged in "protected activity" when she internally complained about alleged sex discrimination and sexually harassing comments by her supervisors, and thus summary judgment as to her retaliation claim was not proper.

15

THE TOP FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2022

State Bar of Texas Webcast CLE
January 24, 2023

Mark J. Oberti
Ed Sullivan
Oberti Sullivan LLP
712 Main Street, Suite 900
Houston, Texas 77002
(713) 401-3555
mark@osattorneys.com
ed@osattorneys.com

Joseph Y. Ahmad
AZA
2500 One Houston Center
1221 McKinney Street
Houston, Texas 77010
(713) 655-1101
joeahmad@azalaw.com

Ruthie White
Spencer Fane LLP
3040 Post Oak Blvd., Suite 1300
Houston, TX 77056
(713) 212-2626
rwhite@spencerfane.com

16

EXHIBIT 1

30 F.4th 523
United States Court of Appeals, Fifth Circuit.

Arlicia GOSBY, Plaintiff—Appellant,

v.

APACHE INDUSTRIAL SERVICES, INCORPORATED, Defendant—Appellee.

No. 21-40406

FILED April 8, 2022

Synopsis

Background: Temporary employee on construction job brought action against employer, alleging disability discrimination in violation of the Americans with Disabilities Act (ADA). The United States District Court for the Eastern District of Texas, No. 1:20-cv-69, Michael Joseph Truncale, J., granted summary judgment to employer. Employee appealed.

Holdings: The Court of Appeals, Leslie H. Southwick, Circuit Judge, held that:

[1] employee satisfied burden of establishing prima facie case as to causal link between disability and termination, and

[2] genuine issue of material fact as to whether employer's proffered nondiscriminatory reason for termination of employee was pretextual precluded summary judgment.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (10)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews a grant of summary judgment de novo, applying the same legal standard as the district court.

[2] **Federal Courts** Summary judgment

On review of grant of summary judgment, Court of Appeals views evidence and all factual inferences in the light most favorable to the nonmoving party.

[3] **Civil Rights** Discrimination by reason of handicap, disability, or illness

An employee may use direct or circumstantial evidence, or both, to establish a case of discrimination under the ADA. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[4] **Civil Rights** Discrimination by reason of handicap, disability, or illness

In ADA cases in which a terminated employee alleging disability discrimination produces only circumstantial evidence, court proceeds under the *McDonnell Douglas* burden shifting framework; this framework first requires the employee to establish a prima facie case of discrimination, after which employer has burden of articulating a legitimate, non-discriminatory reason for the firing, and then, if employer does so, burden returns to the plaintiff to produce evidence from which a jury could conclude that the employer's articulated reason is pretextual. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[5] **Civil Rights** Practices prohibited or required in general; elements

To establish a prima facie case of disability discrimination under the ADA arising from termination of employment, employee must establish (1) she is disabled within the meaning of the ADA, (2) she was qualified for the job, and (3) she was fired on account of her disability. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[6] **Civil Rights** Particular cases

Civil Rights Discrimination by reason of handicap, disability, or illness

Temporary employee on construction job satisfied burden of establishing prima facie case as to causal link between employee's disability of diabetes and her termination, shifting burden to employer to provide nondiscriminatory reason for termination, in employee's disability-discrimination action under ADA, where employee's termination occurred only six days after employee suffered diabetic attack at work and was taken to medical tent for treatment. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[7] **Civil Rights** Discrimination by reason of handicap, disability, or illness

Burden of establishing prima facie case of disparate treatment, in a disability-discrimination case under the ADA, is not onerous. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[8] **Civil Rights** Practices prohibited or required in general; elements

Civil Rights Causal connection; temporal proximity

In retaliation cases under the ADA, temporal proximity between protected activity and adverse employment action is sometimes enough to establish causation at prima facie stage, although the protected act and the adverse action must be very close in time; this principle holds for disability-discrimination cases under the ADA as well. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[9] **Civil Rights** Discrimination by reason of handicap, disability, or illness

In a disability-discrimination action under the ADA brought by terminated employee, in response to a motion for summary judgment, employee must present substantial evidence that the employer's legitimate, nondiscriminatory reason for termination is pretextual; employee may meet this burden by presenting evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

1 Cases that cite this headnote

[10] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact as to whether employer's proffered nondiscriminatory reason for termination of employee, a temporary employee on construction job, was pretextual precluded summary judgment, in employee's disability-discrimination action under the ADA arising from her termination six days after suffering diabetic attack at work. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

***524** Appeal from the United States District Court for the Eastern District of Texas, No. 1:20-cv-69, Michael Joseph Truncale, U.S. District Judge

Attorneys and Law Firms

James Edward Sudduth, III, Esq., Kourtney Lanea Kech, Esq., Sudduth & Associates, L.L.C., Lake Charles, LA, for Plaintiff—Appellant.

Anthony Gerard Stergio, Wesley Walker, Andrews Myers, P.C., Houston, TX, for Defendant—Appellee.

Jeremy D. Horowitz, U.S. Equal Employment Opportunity Commission, Office of General Counsel/Appellate Services, Washington, DC, for Amicus Curiae.

Before Southwick, Haynes, and Higginson, Circuit Judges.

Opinion

Leslie H. Southwick, Circuit Judge:

A temporary employee on a construction job suffered a diabetic attack at work. Six days later, the employee was terminated along with several others. The employee sued her employer, alleging she had been discriminated against due to her diabetes. The district court granted summary judgment for the employer. We REVERSE and REMAND.

FACTUAL AND PROCEDURAL BACKGROUND

Apache Industrial Services, Inc. hired Arlicia Gosby on March 23, 2018, to work as a scaffolding helper at an Exxon plant in Beaumont, Texas. The job consisted mostly of assisting in the building or dismantling of scaffolds. She was required to undertake a physical examination before she began work. In her pre-employment paperwork and physical examination, Gosby disclosed that she suffers from diabetes ***525** , a condition covered by the Americans with Disabilities Act ("**ADA**"). *See, e.g.*, 29 C.F.R. § 1630.2(j)(3)(iii). On the day of her physical, Gosby's blood glucose levels were elevated. A nurse practitioner recommended a consultation with Gosby's primary care provider in addition to following a restriction against climbing at the jobsite.

After Gosby's doctor cleared her for work, she began on April 3, 2018. Apache does not dispute that Gosby was qualified to do her job even after Apache's physician recommended she not climb in her job working with scaffolding. Gosby worked for Apache for several weeks, with the expectation that the job would not last more than six months. Her employment terminated long before that six-month mark when she and eleven other employees were included in a "reduction in force" on May 2, 2018.

Gosby alleged that her inclusion among those terminated was due to her having diabetes. On April 26, just a week earlier, she had suffered a diabetic attack at work and was taken to the medical tent for treatment. Gosby's supervisor, Charles Hutchins, was informed of the incident and sent Gosby home to stabilize her blood sugar. Gosby soon received clearance to return to work and informed Apache of that clearance on her next scheduled workday. That day, though, Apache sent home the scaffolding team on which Gosby worked, allegedly due to lack of work. Two days later, Apache announced 12 layoffs that included Gosby. Gosby has stated that two Apache employees, Edward Mason and Jacob Primeaux, told her that she was included in the layoffs because of her visit to the medical tent. During her deposition, Gosby stated that she had even earlier been warned by Primeaux not to go to the medical tent for a jammed finger because she "probably would have got laid off" for being a "risk." Gosby's supervisor, Hutchins, is the person who signed the paperwork for Gosby's discharge.

Gosby filed a charge with the Equal Employment Opportunity Commission alleging discrimination on account of her disability. After exhausting her administrative remedies, Gosby sued Apache in the United States District Court, Eastern District of Texas, bringing claims for damages under the **ADA**. At the conclusion of discovery, the district court granted Apache's motion for summary judgment. Gosby timely appealed.

DISCUSSION

[1] [2] We review a grant of summary judgment *de novo*, applying the same legal standard as the district court. *Caldwell v. KHOU-TV*, 850 F.3d 237, 241 (5th Cir. 2017). Summary judgment is appropriate when the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). We view evidence and all factual inferences in the light most favorable to the nonmoving party. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016).

[3] [4] [5] The **ADA** prohibits discrimination against a qualified individual based on the individual's disability. 42 U.S.C. § 12112(a); *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014). An employee may use "direct or circumstantial evidence, or both" to establish a case of discrimination. *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 340 (5th Cir. 2019). In cases in which the plaintiff produces only circumstantial evidence, we proceed under the *McDonnell Douglas* burden shifting framework. *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 474 (5th Cir. 2015) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). The framework first requires the employee to ***526** establish a *prima facie* case of discrimination. *See LHC Grp.*, 773 F.3d at 694. That requires an employee to establish (1) she is disabled within

the meaning of the ADA, (2) she was qualified for the job, and (3) she was fired on account of her disability. *See* *Nall*, 917 F.3d at 341. If a *prima facie* case is established, the employer has the burden of "articulat[ing] a legitimate, non-discriminatory reason" for the firing. *See* *id.* If the employer does so, the burden returns to the plaintiff "to produce evidence from which a jury could conclude that the employer's articulated reason is pretextual." *Cannon v. Jacobs Field Servs. N.A., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016).

We summarize the district court's analysis in granting summary judgment to Apache. First, the district court found that Gosby had failed to establish a *prima facie* case of discrimination because she produced no evidence for a causal link between her disability and termination beyond the temporal proximity of her diabetic attack to her termination. Further, the district court decided the temporal relationship "should be given little weight" because Gosby expected to be laid off within six months when the projects were completed.

The district court also disregarded Gosby's recollection of statements from Apache employees Primeaux and Mason because there was no evidence the employees were involved in or made the decision to terminate Gosby. As a result, the district court stated it viewed the evidence in Gosby's favor but could not infer that Apache intended to discriminate on the basis of Gosby's diabetes.

The district court then concluded that even had Gosby presented a *prima facie* case, Apache presented a legitimate, nondiscriminatory, and unrebutted reason for her termination. The reason was a reduction in force. The burden then shifted to Gosby to support that the reason was pretextual. She argued that a fact question arose because Apache offered different explanations for how they chose employees for the reduction in force; that another fact question remained as to whether Gosby's work restrictions influenced her termination; and that Apache retained a similarly situated employee while terminating Gosby. The district court granted summary judgment for Apache.

Gosby argues the district court erred when it stated that temporal proximity was insufficient to establish a *prima facie* case when the employment is "short-term in nature." She also argues that the district court committed various errors in applying the *McDonnell Douglas* framework. We now evaluate those arguments.

I. Gosby's prima facie *case*

[6] The district court found that Gosby had carried her burden to establish a *prima facie* case except for failing to demonstrate a causal link between her disability and her termination. Gosby had argued that she had established the necessary causal connection based on the "exceptionally close temporal proximity between" her diabetic episode that caused her to be sent home briefly and her termination. The district court rejected that there was any significance to the fact that only six days passed between her diabetic attack and layoff since Gosby's employment was to be temporary anyway. The district court believed that if temporal proximity alone were sufficient to establish a *prima facie* showing in a case with only brief employment, "Apache would only be able to terminate Gosby during a small portion of her employment without being at risk of a temporal proximity argument.

***527** [7] [8] We disagree with the district court. "The burden of establishing a *prima facie* case of disparate treatment is not onerous." *Turner v. Kansas City S. Ry. Co.*, 675 F.3d 887, 892 (5th Cir. 2012) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). In retaliation cases, "temporal proximity between protected activity and [adverse employment action] is sometimes enough to establish causation at the *prima facie* stage." *See* *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 948–49 (5th Cir. 2015). This guidance is qualified, though: "[T]he protected act and the adverse employment action [must be] 'very close' in time." *Id.* (alterations in original). The principle holds for discrimination cases as well.

A relevant precedent is our recent decision in *Lyons v. Katy Independent School District*, 964 F.3d 298 (5th Cir. 2020). There, we found error in a district court's finding that a "one-week temporal proximity between" a protected activity and an adverse action was insufficient to establish a *prima facie* case. *Id.* at 306. Apache, though, of course insists the district court was correct to conclude that employment that by its very nature is to be short term must be treated differently. We can agree at least to the extent of saying that facts matter. Evaluating temporal proximity in the context of employment that is understood to be short-term cannot ignore that context. How long her employment was expected to last may have

been unknown, but all we are concerned with here is whether Gosby carried her light burden of showing a *prima facie* case.

The evidence was that Gosby was terminated immediately after an event that highlighted her ADA-protected disability. If in fact her short-term position was to end for other reasons at the same time, that can be shown by the employer as part of its response. Gosby, a new and disabled employee, was included in the reduction in force. Employment was continuing for many, and perhaps most, other scaffolding employees. The proximity of her diabetic episode on the job and her termination was sufficient to constitute a *prima facie* case that she was included in the group to be terminated for ADA-violative reasons.

If failure to satisfy this first step in the burden shifting framework was the only reason for summary judgment, we would reverse simply for that error. Here, though, the district court also found Gosby failed to show Apache's explanation for her termination was pretextual. Thus, we continue.

II. Pretext

[9] [10] After the employee makes out a *prima facie* case, the employer must articulate a "legitimate, nondiscriminatory reason" for the adverse employment action; if it does so, the burden shifts back to the employee. *See* *Goudeau*, 793 F.3d at 474. At that point, in response to a motion for summary judgment, "an employee must present 'substantial evidence' that the employer's legitimate, nondiscriminatory reason for termination is pretextual." *Delaval v. PTech Drilling Tubulars, LLC*, 824 F.3d 476, 480 (5th Cir. 2016) (quoting *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 233 (5th Cir. 2015)). A plaintiff may meet this burden by presenting "evidence of disparate treatment or by showing that the employer's proffered explanation is false or 'unworthy of credence.' " *See* *id.* (quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003)).

The district court determined that Apache's reduction-in-force justification was a "legitimate, non-discriminatory reason for termination." The burden then shifted back to Gosby to rebut the reason ***528** as pretextual. Gosby did not challenge the reduction in force itself as pretextual, but she did claim that her inclusion in it was discriminatory. Gosby did not argue she was "clearly better qualified than similarly situated employees" but claimed that Apache used criteria for selecting those to be terminated that allowed her disability to be considered. In support of the claim, she argues here as she did in district court that factual disputes remain as to the actual reasons she and others were selected for termination, and whether her medical restrictions prevented her from obtaining the experience and training that others gained. The district court found that Gosby failed to establish a material question of fact about whether Apache's "reduction in force" was pretextual.

We summarize the crux of one of Gosby's arguments as being that Apache was unable to express coherent, consistent criteria that it used in reducing the force. Apache's inability to state reliably why certain people were chosen for termination is significant, Gosby argues, because it discredits Apache's insistence that no discrimination was involved.

Gosby is correct that Apache witnesses gave different rationales for inclusion in the reduction in force at different times. One set of offered criteria for the layoffs was that they were based on "performance, the skillset of individuals, and time on the worksite." Another explanation was much more detailed, and seemingly different:

> typically in a layoff, we would impact people at a lower job level, want to keep the employees that are highly skilled, and then also people who have had longer time at the site.... [s]o it would be, again, their job title or job level. It could be seniority, the performance. Any customer requirements at the time would also be a consideration. You know, attendance or discipline would also be taken into consideration. Yeah those are the main factors that are involved in the decision.

In addition, there is no evidence that Apache evaluated both terminated and retained employees against any fixed criteria. The record indicates that Gosby's supervisor, Hutchins, assessed each of the *terminated* employees against a set of ten criteria. There is no similar documentary evidence of assessments for retained employees. Indeed, Apache has argued that these evaluations were not the basis for inclusion in the reduction in force. The lack of evidence of a meaningful assessment process alone does not prove that Apache

discriminated against Gosby. The inconsistent explanations and the absence of clear criteria, though, is evidence tending to show that Apache's "proffered explanation is false or 'unworthy of credence.' " *Delaval*, 824 F.3d at 480 (quoting *Laxton*, 333 F.3d at 578). At this point, that is enough. We hold that Gosby has presented evidence sufficient to rebut Apache's nondiscriminatory reason for termination and show that a fact question exists as to whether that explanation is pretextual. [1]

***529** *III. Conclusion*

Gosby has established the elements of her *prima facie* case. She has also presented "substantial evidence" that Apache's nondiscriminatory rationale for her inclusion in the reduction in force was pretextual. *See* *Delaval*, 824 F.3d at 480. Consequently, an issue of material fact remains regarding whether Apache discriminated against Gosby on the basis of her disability by including her in the reduction of force. We REVERSE the district court's summary judgment and REMAND for proceedings consistent with this opinion.

All Citations

30 F.4th 523

Footnotes

1 Gosby also claims that the district court improperly disregarded the warnings allegedly made by Jacob Primeaux to avoid the medical tent and the statements by Primeaux and Edward Mason that she had been terminated due to her disability. Apache argues that Gosby has forfeited this argument because she did not refer to the statements "as evidence of pretext" in her summary judgment briefing, and that the statements are hearsay and incapable of being presented in an admissible form at trial. Those are issues relevant to the grant of summary judgment. Because we reverse and remand for further proceedings, we need not analyze either issue as it is unlikely either will reappear, at least in the same form.

End of Document

EXHIBIT 2

23 F.4th 422
United States Court of Appeals, Fifth Circuit.

Yves WANTOU, Plaintiff—Appellant/Cross-Appellee,

v.

WAL-MART STORES TEXAS, L.L.C., Defendant—Appellee/Cross-Appellant.

No. 20-40284
|
FILED January 10, 2022

Synopsis

Background: Black former employee brought claims against employer under **Title VII** for discrimination and retaliation and claim for quantum meruit. The United States District Court for the Eastern District of Texas, Robert W. Schroeder, III, J., 2020 WL 4664739, granted summary judgment to employer on some claims and entered judgment on jury verdict for employee on one claim of retaliation. Parties appealed.

Holdings: The Court of Appeals, Engelhardt, Circuit Judge, held that:

[1] employer took prompt remedial action and was thus not liable for hostile work environment;

[2] employee was not entitled to his proposed Cat's Paw instructions on claim of retaliation;

[3] evidence supported jury's verdict that coaching would not have occurred but for employee's complaints;

[4] jury did not render inconsistent verdicts on retaliation claims; and

[5] evidence supported award of punitive damages.

Affirmed.

Ho, Circuit Judge, concurred in part, dissented in part, and filed opinion.

West Headnotes (64)

[1] **Federal Courts** Summary judgment

Summary judgments are reviewed de novo, applying the same standard that the district court applied. Fed. R. Civ. P. 56.

[2] **Federal Courts** Theory and Grounds of Decision of Lower Court

An appellate court may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court. Fed. R. Civ. P. 56.

[3] **Federal Civil Procedure** Materiality and genuineness of fact issue

Material facts, the existence of which may preclude summary judgment, are those that might affect the outcome of the suit under the governing law. Fed. R. Civ. P. 56.

[4] **Federal Civil Procedure** Presumptions

Federal Civil Procedure Ascertaining existence of fact issue

On a motion for summary judgment, all facts and reasonable inferences are construed in favor of the nonmovant, and the court should not weigh evidence or make credibility findings. Fed. R. Civ. P. 56.

[5] **Federal Civil Procedure** Ascertaining existence of fact issue

The resolution of a genuine dispute of material fact is the exclusive province of the trier of fact and may not be decided at the summary judgment stage. Fed. R. Civ. P. 56.

[6] **Civil Rights** Back pay or lost earnings

Back pay and front pay are equitable remedies determined by the court in an action for

intentional employment discrimination. 42 U.S.C.A. §§ 1981a(b)(2), 1981a(c).

[7] **Federal Courts** 🔑 Employment discrimination

An appellate court review the district court's findings of fact regarding back pay and front pay for clear error and legal issues de novo in an action for employment discrimination. 42 U.S.C.A. §§ 1981a(b)(2), 1981a(c).

[8] **Federal Courts** 🔑 Findings

Factual findings made under an erroneous view of controlling legal principles are reviewed de novo.

[9] **Federal Courts** 🔑 Definite and firm conviction of mistake

A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, based on all the evidence, is left with the definitive and firm conviction that a mistake has been committed.

[10] **Federal Courts** 🔑 Findings

A reviewing court is not entitled to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.

[11] **Federal Courts** 🔑 Taking case or question from jury; judgment as a matter of law

An appellate court reviews de novo the district court's ruling on a motion for judgment as a matter of law, applying the same legal standard as the trial court. Fed. R. Civ. P. 50(a).

[12] **Federal Courts** 🔑 Taking case or question from jury; judgment as a matter of law

In reviewing a district court's ruling on a motion for judgment as a matter of law, the appellate court considers all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party. Fed. R. Civ. P. 50(a).

[13] **Federal Courts** 🔑 Verdict

Federal Courts 🔑 Taking case or question from jury; judgment as a matter of law

On review of a district court's ruling on a motion for judgment as a matter of law, although the appellate court's review is de novo, the appellate court recognizes that its standard of review with respect to a jury verdict is especially deferential. Fed. R. Civ. P. 50(a).

[14] **Federal Civil Procedure** 🔑 Evidence

A motion for judgment as a matter of law must be denied unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion. Fed. R. Civ. P. 50(a).

[15] **Federal Courts** 🔑 Taking case or question from jury; judgment as a matter of law

An appellate court reverses the denial of a motion for judgment as a matter of law only if the jury's factual findings are unsupported by substantial evidence or the legal conclusions implied from the jury's verdict cannot in law be supported by those findings. Fed. R. Civ. P. 50(a).

[16] **Federal Courts** 🔑 New Trial, Rehearing, or Reconsideration

Federal Courts 🔑 Inadequate or excessive damages

The district court's exercise of discretion in denying a motion for new trial or remittitur can be set aside only upon a clear showing of abuse. Fed. R. Civ. P. 59.

[17] **Federal Courts** 🔑 Verdict

When reviewing a jury's conclusions, an appellate court is bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination.

[18] **Federal Courts** 🔑 Verdict

Appellate courts defer to jury verdicts and interpret them most favorably to upholding the jury's decision by a finding of consistency.

[19] **Federal Courts** 🔑 Insufficiency of evidence

An appellate court will reverse the denial of a motion for new trial only when there is an absolute absence of evidence to support the jury's verdict. Fed. R. Civ. P. 59.

[20] **Federal Courts** 🔑 Conduct of trial in general; evidence; judgment

On review of the denial of a motion for new trial, when the appellate court is left with the perception that the verdict is clearly excessive, deference must be abandoned. Fed. R. Civ. P. 59.

[21] **Federal Civil Procedure** 🔑 Remittitur

When defects in the damages award are readily identifiable and measurable, remittitur ordinarily is appropriate.

[22] **Federal Courts** 🔑 Punitive damages

Constitutional challenges to the size of the punitive damages award are reviewed de novo.

[23] **Federal Courts** 🔑 Instructions

An appellate court reviews challenges to jury instructions for abuse of discretion and affords the trial court great latitude in the framing and structure of jury instructions. Fed. R. Civ. P. 51.

[24] **Federal Civil Procedure** 🔑 Construction and Effect of Charge as a Whole

Verdict forms are considered part of the jury instruction, and the appellate court considers them in light of the entire jury instruction. Fed. R. Civ. P. 51.

[25] **Federal Courts** 🔑 Instructions

An appellate court asks not whether the court gave every correct instruction offered by the parties, but rather whether it correctly and adequately instructed the jury as to the law to be followed in deciding the issues. Fed. R. Civ. P. 51.

[26] **Federal Courts** 🔑 Reception of Evidence

A trial court reviews the district court's evidentiary rulings for abuse of discretion.

[27] **Federal Courts** 🔑 Abuse of discretion in general

A trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence.

[28] **Federal Courts** 🔑 Evidence

To vacate a judgment based on an error in an evidentiary ruling, the Court of Appeals must find that the substantial rights of the parties were affected.

[29] **Civil Rights** 🔑 Discrimination by reason of race, color, ethnicity, or national origin, in general

Civil Rights 🔑 Hostile environment; severity, pervasiveness, and frequency

Civil Rights 🔑 Sex Discrimination in General

In addition to protecting employees from race, sex, and national origin discrimination in the workplace, **Title VII** also makes it unlawful

for employers to require people to work in a discriminatorily hostile or abusive environment. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[30] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

A hostile work environment claim under **Title VII** is composed of a series of separate acts that collectively constitute one unlawful employment practice. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[31] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To survive summary judgment on a hostile work environment claim under **Title VII**, a plaintiff must show that (1) he is a member of a protected class; (2) he suffered unwelcomed harassment; (3) the harassment was based on his membership in a protected class; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassment and failed to take prompt remedial action. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[32] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Under **Title VII**, for harassment to affect a term, condition, or privilege of employment, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[33] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To violate **Title VII**, the work environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[34] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

The totality of the employment circumstances determines whether an environment is objectively hostile under **Title VII**. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[35] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Although no single factor is determinative regarding whether a hostile work environment exists under **Title VII**, pertinent considerations are: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[36] **Civil Rights** Practices prohibited or required in general; elements

Title VII is not a general civility code. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[37] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment for purposes of a claim of hostile work environment under **Title VII**. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[38] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment in such a way as to unreasonably interfere with

an employee's work performance for purposes of a hostile work environment under **Title VII**. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[39] **Civil Rights** 🔑 Hostile environment; severity, pervasiveness, and frequency

Frequent incidents of harassment, though not severe, can reach the level of "pervasive," thereby altering the terms, conditions, or privileges of employment such that a hostile work environment exists under **Title VII**. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[40] **Civil Rights** 🔑 Hostile environment; severity, pervasiveness, and frequency

The required showing of severity or seriousness of the harassing conduct for a claim of hostile work environment under **Title VII** varies inversely with the pervasiveness or frequency of the conduct. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[41] **Civil Rights** 🔑 Hostile environment; severity, pervasiveness, and frequency

Likening a Black person to an animal is an especially heinous form of harassment for purposes of a claim of hostile work environment under **Title VII**. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[42] **Civil Rights** 🔑 Hostile environment; severity, pervasiveness, and frequency

Physical threats are not indispensable elements of a hostile work environment claim under **Title VII**. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[43] **Civil Rights** 🔑 Knowledge or notice; preventive or remedial measures

Employer took prompt remedial action and was thus not liable for hostile work environment under **Title VII**; offensive racist comments and conduct did not continue after investigation and instruction provided by employer's managerial personnel in response to complaint, both employee and co-worker received written coaching for not maintaining communication as they had previously been instructed to do, and manager met with employee and co-workers to restate requirement that all personnel act professionally. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[44] **Federal Courts** 🔑 Instructions

The district court's refusal to give a requested jury instruction constitutes reversible error only if the instruction (1) was a substantially correct statement of law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the party's ability to present a given claim.

[45] **Federal Civil Procedure** 🔑 Applicability to pleading and evidence

A court's refusal to give a jury instruction constitutes error only if there is sufficient evidence to support the instruction.

[46] **Civil Rights** 🔑 Motive or intent; pretext

A plaintiff asserting a **Title VII** discrimination claim must show only that the employer's discriminatory motive was a motivating factor for an adverse employment action. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[47] **Civil Rights** 🔑 Causal connection; temporal proximity

A plaintiff asserting a **Title VII** retaliation claim must establish that his or her protected activity was a but-for cause of the alleged adverse action

by the employer. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

[48] **Civil Rights** Motive or intent; pretext

Plaintiffs use a Cat's Paw theory of liability under **Title VII** when they cannot show that the decisionmaker—the person who took the adverse employment action—harbored any retaliatory animus. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[49] **Civil Rights** Motive or intent; pretext

Under the Cat's Paw theory of liability under **Title VII**, a plaintiff must establish that the person with a retaliatory motive caused the decisionmaker to take the retaliatory action. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[50] **Civil Rights** Motive or intent; pretext

In a retaliation action under **Title VII** based on the Cat's Paw theory of liability, a plaintiff must show that the person with retaliatory animus used the decisionmaker to bring about the intended retaliatory action. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[51] **Civil Rights** Instructions

Employee was not entitled to his proposed Cat's Paw instructions on claim of retaliation under **Title VII**; proposed instructions were internally inconsistent, one proposed instruction referred to "discriminatory bias" and "discriminatory animus" at various times despite district court's grant of summary judgment on all claims of discrimination, and employee was able to provide his full story in closing and present all of his arguments to jury without objection. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[52] **Civil Rights** Practices prohibited or required in general; elements

Civil Rights Retaliation claims

To establish a claim of retaliation under **Title VII** or § 1981, a plaintiff must prove by a preponderance of the evidence that: (i) he engaged in a protected activity; (ii) an adverse employment action occurred; and (iii) a causal link exists between the protected activity and the adverse employment action. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A § 1981.

1 Cases that cite this headnote

[53] **Civil Rights** Retaliation claims

Once a plaintiff establishes a claim of retaliation under **Title VII** or § 1981, the burden of production then shifts to the defendant to articulate a legitimate, nonretaliatory reason for the alleged retaliatory action; if the defendant satisfies this burden, the plaintiff must offer sufficient evidence that the proffered reason is a pretext for retaliation. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A § 1981.

[54] **Civil Rights** Causal connection; temporal proximity

In a retaliation claim under **Title VII** or § 1981, the employee's ultimate burden is to prove that the adverse employment action would not have occurred but for the protected conduct. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A § 1981.

[55] **Civil Rights** Causal connection; temporal proximity

Even if a plaintiff's protected conduct is a substantial element in a defendant's adverse employment action, no liability for unlawful retaliation under **Title VII** or § 1981 arises if the employee would have faced that discipline even without the protected conduct. Civil Rights Act

of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A § 1981.

1 Cases that cite this headnote

[56] **Civil Rights** Retaliation claims

Evidence supported jury's verdict that manager was aware of employee's various ethics complaints when she issued coaching, and that coaching would not have occurred but for those complaints, as required for employee to prevail on claim of retaliation under **Title VII**; employee alleged that day before coaching, employee telephoned manager to complain about disparate treatment due to his race, color, and national origin. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[57] **Civil Rights** Trial in general

Jury did not render inconsistent verdict on pharmacist's retaliation claims under **Title VII** by answering "yes" in response to question regarding whether employer had engaged in retaliation by issuing coaching based pharmacist's ethics complaints but answering "no" in response to question regarding whether pharmacist would not have been terminated but for his complaints; evidence showed that employer's termination decision turned on fact that pharmacist continued to immunize outside of approved age groups in violation of corporate policy, and jury's advisory verdict regarding amount of back pay failed to suggest that jury was convinced that, but for coaching, pharmacist would have maintained his employment and annual salary. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[58] **Civil Rights** Exemplary or Punitive Damages

The proof necessary for an award of punitive damages in a **Title VII** action is a higher standard than the showing necessary for compensatory damages. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981a(b)(1).

[59] **Civil Rights** Exemplary or Punitive Damages

Not every sufficient proof of pretext and discrimination is sufficient proof of malice or reckless indifference to merit an award of punitive damages under **Title VII**. 42 U.S.C.A. § 1981a(b)(1); Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[60] **Civil Rights** Exemplary or Punitive Damages

Ultimately, the terms "malice" and "reckless indifference," for the purpose of awarding punitive damages in a **Title VII** action, focus on the actor's state of mind; both pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination or retaliatory conduct. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981a(b)(1).

[61] **Civil Rights** Exemplary or Punitive Damages

In a **Title VII** action, the defendant employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable for punitive damages. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981a(b)(1).

[62] **Civil Rights** Persons liable; apportionment

Even if particular agents acted with malice or reckless indifference, an employer may avoid vicarious punitive damages liability if it can show that the agents' actions were contrary to the employer's good-faith efforts to comply with **Title VII**. 42 U.S.C.A. § 1981a(b)(1); Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.

[63] **Civil Rights** ⇐ Exemplary or Punitive Damages

Evidence supported award of punitive damages on **Title VII** retaliation claim; jury could have reasonably found that manager acted with malice given evidence of strong personal conflict between employee and manager, and employee presented evidence from which jury could conclude that at least certain of his ethics complaints were ignored by employer, which demonstrated lack of good faith. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981a(b)(1).

[64] **Civil Rights** ⇐ Measure and amount

Award of $75,000 in punitive damages was not unreasonable for **Title VII** retaliation claim even though award of back pay was only $5,177.50. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e et seq.; 42 U.S.C.A. § 1981a(b)(1).

***429** Appeal from the United States District Court for the Eastern District of Texas, USDC No. 5:17-cv-00018, Robert William Schroeder, III, U.S. District Judge

Attorneys and Law Firms

Yves Wantou, Albany, FL, Pro Se.

Robert Brooks Gilbreath, Esq., Attorney, Hawkins Parnell & Young, L.L.P., Dallas, TX, Nancy Louise Waters, Esq., Attorney, James Nick Zoys, Geary, Porter & Donovan, P.C., Addison, TX, for Defendant—Appellee/Cross-Appellant.

Gail S. Coleman, U.S. Equal Employment Opportunity Commission, Office of General Counsel/Appellate Services, Washington, DC, for Amicus Curiae Equal Employment Opportunity Commission.

Before Stewart, Ho, and Engelhardt, Circuit Judges.

Opinion

Kurt D. Engelhardt, Circuit Judge

Both parties appeal certain rulings by the district court relative to the claims asserted by Plaintiff–Appellant/Cross-Appellee Yves Wantou against Wal-Mart Stores Texas, L.L.C., under **Title VII** of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. § 1981a, and Texas law. We AFFIRM.

I.

Wantou, a pharmacist and black man from Cameroon, West Africa, filed suit against his former employer, Wal-Mart, contending that Wal-Mart intentionally subjected and/or allowed him to be subjected to discrimination based on race, color, and national origin, illegal harassment, and a hostile work environment. Wantou additionally claims that Wal-Mart retaliated against him for complaining about discrimination and asserting his rights. Specifically, Wantou's suit challenges his termination from employment, three written "coachings" (formal workplace disciplinary actions) that he received while employed by Wal-Mart, a threat of demotion, and Wal-Mart's alleged failure to pay him for approximately 24 hours of work. Based on these assertions, Wantou has requested relief in the form of back pay, front pay, compensatory damages, punitive damages, attorney's fees, and restitution under quantum meruit for unpaid work.

In the district court, all of Wantou's claims were dismissed by summary judgment except for his **Title VII** retaliation claims and his quantum meruit claim. The remaining claims were presented to a jury in October 2019. The jury rejected all but one claim—regarding the third coaching—for which it awarded $75,000 in punitive damages. The jury also provided an advisory verdict recommending an award of $32,240 in back pay and $0 in front pay. Post-trial, the district court entered judgment in favor of Wantou as to the third coaching, awarding $75,000 in punitive damages but only $5,177.50 as back pay. Attorney's fees also were awarded under 42 U.S.C. § 1988(b) to Wantou as a prevailing party.

On appeal, Wantou challenges the jury's rejection of his **Title VII** retaliation claims regarding his termination and first and ***430** second coachings, and the jury's failure to award compensatory damages or restitution for unpaid work and other benefits. Wantou also contests the district court's front and back pay awards, the summary judgment dismissal of his discrimination and hostile work environment claims, and a number of the district court's rulings regarding proposed jury instructions, the admission of evidence, and limitations on trial time. Wal-Mart appeals all aspects of the district

court's judgment and post-judgment rulings that are favorable to Wantou, in addition to arguing that punitive damages, if awarded, should be remitted to no more than $10,355.

II.

[1] **[2]** In this appeal, we are tasked with reviewing the district court's final judgment and rulings on the parties' motions asserted pursuant to Rules 49, 50, 51, 56, and 59 of the Federal Rules of Civil Procedure. Summary judgments rendered pursuant to Rule 56(b) are reviewed de novo, " 'applying the same standard that the district court applied.' " *Aggreko, L.L.C. v. Chartis Specialty Ins. Co.*, 942 F.3d 682, 687 (5th Cir. 2019) (quoting *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016)). "We may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." *Amerisure Mut. Ins. Co. v. Arch Specialty Ins. Co.*, 784 F.3d 270, 273 (5th Cir. 2015).

[3] **[4]** **[5]** Summary judgment is appropriate where there is "no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Material facts are those that "might affect the outcome of the suit under the governing law." *Leasehold Expense Recovery, Inc. v. Mothers Work, Inc.*, 331 F.3d 452, 456 (5th Cir. 2003) (internal quotation marks and citation omitted). "A genuine [dispute] of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017). All facts and reasonable inferences are construed in favor of the nonmovant, and the court should not weigh evidence or make credibility findings. *Deville v. Marcantel*, 567 F.3d 156, 163–64 (5th Cir. 2009). The resolution of a genuine dispute of material fact "is the exclusive province of the trier of fact and may not be decided at the summary judgment stage." *Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 578 n.3 (5th Cir. 2002).

[6] **[7]** **[8]** Although Wantou's claims were presented to a jury, the jury's determinations regarding back pay and front pay are, in this context, only advisory. That is, back pay and front pay are equitable remedies determined by the court. *See* 42 U.S.C. § 1981a(b)(2), (c). Thus, we review the district court's findings of fact for clear error and legal issues de novo. *Gebreyesus v. F.C. Schaffer & Assocs., Inc.*, 204 F.3d 639, 642 (5th Cir. 2000) (following a bench trial, we review the findings of fact for clear error and the legal issues de novo). "[F]actual findings made under an erroneous view of controlling legal principles are reviewed de novo." *Walker v. Braus*, 995 F.2d 77, 80 (5th Cir. 1993).

[9] **[10]** A finding of fact is clearly erroneous "when, although there is evidence to support it, the reviewing court, based on all the evidence, is left with the definitive and firm conviction that a mistake has been committed." *Gebreyesus*, 204 F.3d at 642; *see also Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Importantly, "[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that ***431** it would have decided the case differently." *Anderson*, 470 U.S. at 573, 105 S.Ct. 1504.

[11] **[12]** **[13]** **[14]** **[15]** Regarding the jury's verdict, both parties moved for judgments as a matter of law or, in the alternative, a new trial. After a party has been fully heard on an issue during a jury trial, judgments as a matter of law are appropriately rendered by the court only when "a reasonable jury would not have a legally sufficient evidentiary basis to find for a party on [an] issue." Fed. R. Civ. P. 50(a). We review de novo the district court's ruling on a motion for judgment as a matter of law, applying the same legal standard as the trial court. *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001). "[W]e consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party." *Id.* (quoting *Brown v. Bryan Cnty.*, 219 F.3d 450, 456 (5th Cir. 2000)). Although our review is de novo, we recognize that "our standard of review with respect to a jury verdict is especially deferential." *Id.* Thus, a Rule 50 motion must be denied "unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Id.* (internal quotation omitted). We reverse the denial of a Rule 50 motion only if the jury's factual findings are unsupported by substantial evidence or "the legal conclusions implied from the jury's verdict cannot in law be supported by those findings." *Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 614 (5th Cir. 2018) (citation omitted).

[16] After a jury trial, Rule 59 of the Federal Rules of Civil Procedure authorizes courts to grant motions for new trial for any reason for which a new trial has heretofore been granted in an action at law in federal court. Fed. R. Civ. P. 59. After a nonjury trial, Rule 59 allows new trials for any reason for which a rehearing has heretofore been granted in a suit in

equity in federal court. *Id.* The district court's exercise of discretion in denying a motion for new trial or remittitur "can be set aside only upon a clear showing of abuse." *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995); *see also Abner v. Kansas City S.R.R. Co.*, 513 F.3d 154, 157 (5th Cir. 2008).

[17] **[18]** **[19]** **[20]** **[21]** **[22]** When reviewing a jury's conclusions, "we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination." *Rideau v. Parkem Indus. Servs., Inc.*, 917 F.2d 892, 897 (5th Cir. 1990). We defer to jury verdicts and interpret them "most favorabl[y] to upholding the jury's decision by a finding of consistency." *Merritt Hawkins & Assocs., L.L.C. v. Gresham*, 861 F.3d 143, 154 (5th Cir. 2017). We will reverse the denial of a motion for new trial "only when there is an absolute absence of evidence to support the jury's verdict." *Williams*, 898 F.3d at 614 (citation omitted). "However, when this court is left with the perception that the verdict is clearly excessive, deference must be abandoned." *Eiland*, 58 F.3d at 183. When "defects in the award are readily identifiable and measurable," remittitur ordinarily is appropriate. *Matter of 3 Star Props., L.L.C.*, 6 F.4th 595, 613 (5th Cir. 2021) (quoting *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 179 (5th Cir. 1992)). Constitutional challenges to the size of the punitive damages award are reviewed de novo. *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001)).

[23] **[24]** **[25]** Challenges to jury instructions are governed by Rule 51 of the Federal Rules of Civil Procedure. We "review challenges ***432** to jury instructions for abuse of discretion and afford the trial court great latitude in the framing and structure of jury instructions." *Young v. Bd. of Supervisors*, 927 F.3d 898, 904 (5th Cir. 2019) (citation omitted). "Verdict forms are considered part of the jury instruction," *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018), and we consider them "in light of the entire jury instruction." *Jones v. United States*, 527 U.S. 373, 393, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (citation omitted). We ask not whether the court gave "every correct instruction offered by the parties," but rather whether it "correctly and adequately instruct[ed] the jury as to the law to be followed in deciding the issues." *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1227 (5th Cir. 1984) (per curiam). "[T]he party challenging the instruction must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Young*, 927 F.3d at 904 (citation omitted). An error not preserved as required by Rule 51(d)(1) of the Federal Rules of Civil Procedure may be considered if the error is plain and affects substantial rights. *See* Fed. R. Civ. P. 51(d).

[26] **[27]** **[28]** Finally, we review the district court's evidentiary rulings for abuse of discretion. *Wallace v. Endeavor Corp.*, 916 F.3d 423, 428 (5th Cir. 2019) (citations omitted). "A trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Id.* "[T]o vacate a judgment based on an error in an evidentiary ruling, 'this court must find that the substantial rights of the parties were affected.' " *Seatrax, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 370 (5th Cir. 2000) (quoting *Carter v. Massey-Ferguson, Inc.*, 716 F.2d 344 (5th Cir. 1983)).

III.

The factual and procedural background of this matter, along with all contested issues, competing arguments, and substantive legal principles, is more than adequately set forth in the parties' extensive briefs and the district court's written rulings. Indeed, the district court has generated three lengthy written rulings laboriously recounting the parties' motions, arguments, pertinent evidence, and applicable law. The September 30, 2019 order devotes 128 pages to discussion of the summary judgment issues and rulings, whereas the 36-page March 12, 2020 order and 20-page July 6, 2020 order address the parties' initial and second round of post-trial motions.

Given this detailed record, we need not parse each of the parties' many assertions made on appeal. Rather, having carefully reviewed the parties' briefs, the record, and applicable law, we agree in large part with the district court's assessment. Thus, we shall limit our additional comments herein to only those areas for which elaboration or modification is truly warranted.

A. Hostile Work Environment

[29] **[30]** Beginning with the district court's summary judgment dismissal of Wantou's hostile work environment claim, Wantou and the Equal Employment Opportunity Commission ("EEOC"), as *amicus curiae*, contend the district court misstated and misapplied the applicable legal standard for an actionable hostile work environment claim under **Title**

VII. In addition to protecting employees from race, sex, and national origin discrimination in the workplace, Title VII also makes it unlawful for employers to require "people to work in a discriminatorily hostile or abusive environment." *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 325 (5th Cir. 2019) (quoting ***433** *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). "A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.' " *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 106, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (quoting 42 U.S.C. § 2000e-5(e)(1)).

[31] **[32]** **[33]** To survive summary judgment on a hostile work environment claim, a plaintiff must show that (1) he is a member of a protected class; (2) he suffered unwelcomed harassment; (3) the harassment was based on his membership in a protected class; (4) the harassment "affected a term, condition, or privilege of employment"; and (5) "the employer knew or should have known" about the harassment and "failed to take prompt remedial action." *West v. City of Houston*, 960 F.3d 736, 741–42 (5th Cir. 2020) (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002)). For harassment to affect a term, condition, or privilege of employment, it "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* The environment must be "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (citing *Harris*, 510 U.S. at 21–22, 114 S.Ct. 367)).

[34] **[35]** **[36]** **[37]** The totality of the employment circumstances determines whether an environment is objectively hostile. *Harris*, 510 U.S. at 23, 114 S.Ct. 367. Although no single factor is determinative, pertinent considerations are: (1) "the frequency of the discriminatory conduct"; (2) "its severity"; (3) "whether it is physically threatening or humiliating, or a mere offensive utterance"; and (4) "whether it unreasonably interferes with an employee's work performance." *Id.* "Title VII, however, is not a 'general civility code.' " *Faragher*, 524 U.S. at 788, 118 S.Ct. 2275 (internal quotation marks and citation omitted). Thus, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Id.*

[38] **[39]** **[40]** Arguing that Wantou's deposition testimony identified pervasive comments related to his race and national origin that were both insulting and humiliating, Wantou and the EEOC contend that the district court erroneously required Wantou to establish conduct by his co-workers that was severe *and* pervasive rather than severe *or* pervasive. We have noted that "the test—whether the harassment is severe or pervasive—is stated in the disjunctive." *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 163 (5th Cir. 2007). "An egregious, yet isolated, incident can alter the terms, conditions, or privileges of employment and satisfy the fourth element necessary to constitute a hostile work environment." *Id.* (citing *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 434–35 (5th Cir. 2005)). "The inverse is also true: Frequent incidents of harassment, though not severe, can reach the level of 'pervasive,' thereby altering the terms, conditions, or privileges of employment such that a hostile work environment exists." *Id.* Thus, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Id.* (quoting *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991)).

[41] Wantou and the EEOC also maintain that the district court wrongly emphasized that "the incidents [asserted by Wantou] involved no physical threat," thus suggesting that factor is of special importance ***434** in determining whether conduct is "severe" and, in doing so, ignoring that "likening a black person to an animal is an especially heinous form of harassment." *Abner*, 513 F.3d at 168 & n.74; *see also Henry v. CorpCar Servs. Hous. Ltd.*, 625 F. App'x 607, 612 (5th Cir. 2015); *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007). On this latter point, Wantou testified (at his deposition) that three Caucasian pharmacy technicians (Ann Samples, Rayla Edwards, and Wendy Willoughby) "continuously" called him "chimp" or "monkey." And, they made "a lot of comments" about Wantou's negative reaction to flies being in the pharmacy, telling him that Africa was "probably fly-infested" and "a dirty place," so he should just deal with it. They also "constantly" mimicked and mocked Wantou's accent, which was especially offensive because it occurred in front of customers. Wantou additionally contends that Shawn Shannon—another Wal-Mart pharmacist—emboldened and amplified the co-workers' harassment by calling Wantou an "African fart" and "you little African" on "multiple" occasions. Furthermore, Shannon eventually stopped speaking to Wantou altogether, making it harder for Wantou to do his job.

[42] **[43]** We agree that physical threats are not "indispensable elements" of a hostile work environment claim. As we have stated before, the test considers the totality of the circumstances. And the comments that Wantou attributes to his co-workers are unquestionably reprehensible. Were this the only evidence before us, we likely would vacate and remand the district court's summary judgment relative to Wantou's hostile work environment for further consideration in light of the principles discussed herein. On the instant record, however, we do not think that necessary here.

We reach this conclusion because of the fifth requirement for an actionable hostile work environment claim, i.e., that "the employer knew or should have known" about the harassment and "failed to take prompt remedial action." The EEOC's amicus brief does not focus on this requirement and Wantou's assessment regarding this question relative to the aforementioned offensive comments is scant. Our own review of the record reveals multiple references to co-workers' offensive comments in Wantou's deposition testimony. On the other hand, the same frequency and specificity is not true of Wal-Mart's documentation or the written statements that Wantou provided to Wal-Mart in connection with his various complaints to the company.

Among those documents is an October 1, 2015 email from Wantou to Wal-Mart Market Health and Welfare Director Steven Williams. Wantou references Shawn Shannon's not talking to him after September 23, 2015, except for "violent language or insults in [a] totally unprofessional manner and in front of techs," and accuses Shannon of "colluding with some of the techs to bully, mob, harass him and create a hostile work environment." In the same document, Wantou characterizes co-worker Rayla Edwards as "notorious in her harassment and constant bullying behavior towards me," and states that the climate negatively impacts work performance, morale, and customer service.

Interview documentation completed by Williams in the course of the investigation that he began in November 2015 references Samples' admitted remarks about flies and Africa, as well as the admonition that Samples received from then-Pharmacy Manager Pascal Onyema about such comments, and her own contention that she, a "world traveler," "didn't mean anything" by her comment. A reference to Ebola by a co-worker also is mentioned.

***435** A statement prepared by Wantou, dated November 22, 2015, contends that Shawn Shannon is routinely treated more favorably by Caucasian pharmacy techs, who give Shannon "full support, while being hostile and uncooperative" to Wantou and "turning a blind eye to Shannon's shortcomings." Wantou also describes Shannon as "on occasion, verbally violent, unprofessional, [using] insulting language; [and] contributing to a divide along racial lines by colluding with most of the Caucasian technicians ..., to bully, [ ], and harass me," whereas [pharmacy tech] Rayla Edwards "[is] notorious in her harassment and constant bullying behavior," "routinely yells at me," and "displays aggressive behavior towards me."

The record also includes an email that Wantou sent to himself on June 28, 2015, which references co-worker Ann Samples' comment about flies and Africa, and states that, another time, Samples said to Wantou: "You like to work like a dog, or a monkey rather." That comment likewise appears in a written statement that Wantou submitted to Williams on November 22, 2015, in connection with the investigation that Williams was conducting at the time. In that statement, Wantou adds that he experiences slurs regarding race, color, and national origin. *Id.* Finally, in his December 6, 2015 Global Ethics complaint, Wantou identifies co-worker Rayla Edwards as the most notorious harasser/bully, followed by Ann Samples, and references the impact that the hostile climate has on morale and work performance.

Based on this documentation, it is evident that workplace relations at the Wal-Mart pharmacy at which Wantou worked were hardly copacetic throughout his employment. Importantly, however, it is not apparent that offensive racist comments and conduct of the sort highlighted in the EEOC's brief and Wantou's deposition testimony continued after the investigation and instruction provided by Wal-Mart managerial personnel, in late 2015, in response to Wantou's complaint to management. Furthermore, on April 25, 2016, both Wantou and fellow pharmacist Shawn Shannon received a written coaching by Wal-Mart Interim Market Health and Welfare Director Damon Johnson for not maintaining communication as they had previously been instructed to do. And, according to Pharmacy Manager Katie Leeves, she also met with Wantou, Shannon, and the pharmacy technicians, on April 26, 2016, to restate the requirement that all personnel act professionally in the pharmacy.

In all, based on this limited evidentiary showing, it is not evident that a triable dispute exists relative to whether Wal-Mart remained aware that Wantou suffered continued harassment and "failed to take prompt remedial action." Thus, given this additional determination regarding Wantou's

hostile work environment claim, we find no reversible error in the district court's summary judgment ruling in Wal-Mart's favor.

B. Jury Instructions

[44] **[45]** Focusing next on jury instructions, Wantou maintains the district court erred in failing to include his proposed "Cat's Paw" instructions in the court's instructions to the jury. "[T]he district court's refusal to give a requested jury instruction constitutes reversible error only if the instruction (1) was a substantially correct statement of law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the party's ability to present a given claim." *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004). ***436** A court's refusal to give a jury instruction constitutes error "only if there [is] ... sufficient evidence to support the instruction." *Jackson v. Taylor*, 912 F.2d 795, 798 (5th Cir. 1990).

[46] **[47]** Here, the district court concluded Wantou did not come forward with sufficient evidence to support a "Cat's Paw" causation instruction. If we were to consider the question in the first instance, we might find no harm in providing a Cat's Paw instruction. A plaintiff asserting a **Title VII** *discrimination* claim must show only that the employer's discriminatory motive "was a motivating factor" for an adverse employment action. *Zamora v. City of Houston*, 798 F.3d 326, 331 (5th Cir. 2015). In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013), however, the Supreme Court clarified that a plaintiff asserting a **Title VII** *retaliation* claim must meet a higher standard of causation. Such a plaintiff "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* In *Zamora*, we confirmed that that the Cat's Paw analysis remains viable in the context of the but-for causation required for **Title VII** retaliation claims. 798 F.3d at 332–33; *see also Brown v. Wal-Mart Stores East*, L.P., 969 F.3d 571, 577 (5th Cir. 2020).

[48] **[49]** **[50]** "Plaintiffs use a [C]at's [P]aw theory of liability when they cannot show that the decisionmaker—the person who took the adverse employment action—harbored any retaliatory animus." *Zamora*, 798 F.3d at 331. Thus, under the Cat's Paw theory, a plaintiff must establish that the person with a retaliatory motive caused the decisionmaker to take the retaliatory action. *Id.* "Put another way, a plaintiff must show that the person with retaliatory animus used the decisionmaker to bring about the intended retaliatory action." *Id.*

[51] Nevertheless, we find no abuse of discretion by the district court. To start, Wantou's proposed instructions, as written, are confusing if not, as the district court concluded, internally inconsistent. And one proposed instruction referred to "discriminatory bias" and "discriminatory animus" at various times, despite the district court's grant of summary judgment on all claims of discrimination. In any event, Wantou's ability to present and argue his retaliation claim to the jury was not seriously impaired by the district court's ruling.

Through the presentation of evidence, Wantou connected persons and evidence. And in closing argument, Wantou freely discussed the roles and alleged motives of the various actors, and was not limited in attributing those actions and motivations to Wal-Mart, who is the sole defendant. Consistent with Wal-Mart's disciplinary process and the complexity of Wantou's allegations, the instruction did not identify specific decisionmakers. "Defendant Wal-Mart" could capture each co-worker or supervisor covered in Wantou's requested instruction. Given this wording, Wantou was able to argue about the retaliatory animus of his co-workers, and assert that animus resulted in various adverse employment actions. Indeed, Wantou was able to provide his full story in closing and present all of his arguments to the jury without objection. Accordingly, we find no error in the district court's refusal to provide the specific Cat's Paw instructions that Wantou requested.

C. Jury Verdict—Sufficiency of the Evidence

[52] **[53]** **[54]** **[55]** To establish a claim of retaliation under **Title VII** or Section 1981, a plaintiff must prove by a preponderance of the evidence that: (i) he engaged in a ***437** protected activity; (ii) an adverse employment action occurred; and (iii) a causal link exists between the protected activity and the adverse employment action. *Washburn v. Harvey*, 504 F.3d 505, 510 (5th Cir. 2007). The burden of production then shifts to the defendant to articulate a legitimate, nonretaliatory reason for the alleged retaliatory action. *Id.* If the defendant satisfies this burden, the plaintiff must offer sufficient evidence that the proffered reason is a pretext for retaliation. *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005); *Gee v. Principi*, 289 F.3d 342, 345, 347 (5th Cir. 2002). Under this framework, the employee's ultimate burden is to prove that the adverse employment action would not have occurred but for the protected conduct.

Brown, 969 F.3d at 577. Even if a plaintiff's protected conduct is a substantial element in a defendant's adverse employment action, no liability for unlawful retaliation arises if the employee would have faced that discipline even without the protected conduct. *See Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996).

[56] As the district court reasoned, sufficient conflicting evidence exists to support the jury's verdict regarding the merits of Wantou's retaliation claims. Although we might reach a different result if we considered the claim in the first instance, that is not the role of the appellate court. Rather, the record reflects that the jury was presented with all relevant evidence (including live witness testimony), heard arguments by counsel, and received the necessary instruction regarding applicable law by the district court. And, in the end, the jury's assessment, including its credibility determinations, favored Wantou regarding the third (June 28, 2016) coaching, and Wal-Mart regarding the first and second coachings, as well as Wantou's termination. In short, we cannot say the jury's verdict is against the great weight of the evidence or that a reasonable person could only have reached an opposite decision. Nor has reversible legal error been identified.

Particularly regarding the third coaching, enough evidence exists to allow the jury to conclude, despite Pharmacy Manager Katie Leeves' protests to the contrary, that Leeves was sufficiently aware of Wantou's various ethics complaints (submitted by means of Wal-Mart's Global Ethics Hotline), and complaints of race discrimination, when she issued the June 28, 2016 (third) coaching, and that the coaching would not have occurred but for those complaints.[1] Particularly pertinent here, we again emphasize the applicable standard of review and that the jury, as the trier of fact, is charged with making credibility determinations based on testimony and other evidence presented it. That is, a Rule 50 motion must be denied "unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Flowers*, 247 F.3d at 235. Thus, we find no reason to set aside the judgment of the district court and the jury's verdict relative to this claim.

D. Jury Verdict Form—Inconsistencies and Back Pay Award

Although we appreciate the logic of Wantou's assertions, we are not persuaded ***438** that the jury's responses to Questions 4 and 6, or the responses to Questions 4 and 7.3, of the verdict form are inconsistent. Both Questions 4 and 6 relate to whether Wantou was retaliated against, and the answer to Question 7 provides the jury's advisory verdict regarding back pay:

> **QUESTION 4**: Do you find that Plaintiff Wantou would not have been issued a written coaching on June 28, 2016 but for his good-faith, reasonable ethics complaints based on race, color or national origin discrimination by way of Defendant Wal-Mart's Global Ethics Hotline?
>
> Answer "Yes" or "No."
>
> YES
>
> **QUESTION 6**: Do you find that Plaintiff Wantou would not have been terminated but for his good-faith, reasonable ethics complaints based on race, color or national origin discrimination by way of Defendant Wal-Mart's Global Ethics Hotline?
>
> Answer "Yes" or "No."
>
> NO
>
> **QUESTION 7**: What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiff Wantou for the damages, if any, you have found Defendant Wal-Mart caused Plaintiff Wantou?
>
> 3. Wages and benefits from November 9, 2016 to November 5, 2019.
>
> $32,240.00

[57] Regarding Questions 4 and 6, Wantou argues that Wal-Mart conceded that he was fired for "Misconduct with Coachings," such that the third written coaching was a prerequisite to Wantou's termination. From this, Wantou maintains, because the jury found his third written (June 28, 2016) coaching retaliatory, and the third written coaching was a but for cause of his termination, his termination was retaliatory. Thus, Wantou argues, the jury could not have answered Question 6 in the negative. Relatedly, Wantou contends, if his termination was retaliatory, the jury should have awarded full back pay. As the district court reasoned, however, the jury's answers to Questions 4, 6, and 7 are reconcilable.

Wantou's argument rests on his assertion that his third written coaching was necessary for his termination. However, as the district court concluded, a reasonable jury could disagree. Record evidence suggests that that Wal-Mart's

coaching levels are a guideline rather than a strict hierarchy. Indeed, Wantou's second written coaching informed him that the next level of action (if behavior continued) is "Third Written up to and including Termination." Additionally, Wal-Mart presented evidence that providing immunizations beyond the parameters established by the Standing Order is an immediately terminable offense. Notably, though Wal-Mart witnesses stated that Wantou was not terminated solely because he immunized persons outside of the age parameters established by the Standing Order, Wal-Mart also provided extensive evidence of its investigation into Wantou's immunization practices.

Furthermore, the cited evidence more than adequately supports the notion that Wal-Mart's termination decision turned on the fact that Wantou continued to immunize outside of the Standing Order's approved age groups, *even after having been specifically and expressly instructed not to do so*, rather than the mere fact that he already had received a third coaching, such that termination, rather than another coaching, was the indicated next level of discipline. Thus, considering Wantou's behavior—repeated defiance of Wal-Mart's corporate policy, the Standing Order, and management's express directives—a reasonable ***439** jury could find that his termination did *not* depend upon the third coaching for purposes of answering Questions 6 and 7.

Additionally, as the district court emphasized, Wantou did not object to the wording of the jury verdict form when it was provided to the jury or the jury's answers upon the return of the jury verdict. Nor, moreover, did Wantou, who bears the burden of proof, seek to include an additional jury question or elicit probative testimony (or other evidence) on this particular point. In other words, Wantou did not ask the persons who decided that he would be terminated whether his discipline would have been only an additional coaching, instead of termination, if he had not already received a third coaching.

Lastly, Question 7 does not dictate that "full back pay" had to be awarded. Rather, it simply asks the sum of money that would fairly and reasonably compensate Wantou for lost wages and benefits, if any, that Wal-Mart was determined to have caused. And, in any event, the parties have not disputed the district court's determination that it, not the jury, was charged with deciding the actual amount of back pay and front pay, if any, to be awarded. Thus, the final determination regarding the role that retaliation played vis-à-vis Wantou's termination and back pay award was the district court's to make, not the jury's.

Considering the amount of back pay ordered by the court, $5,177.50, and the other factors discussed herein, we find no clear error occurred relative to this finding. Indeed, given Wantou's statement (in closing argument) that he earned an annual salary of approximately $215,000 while employed by Wal-Mart, the jury's advisory verdict of only $32,240 seemingly fails to suggest that the jury was convinced that, but for his third coaching, Wantou would have maintained his employment and annual salary during the three years identified in Question 7.3.

E. Punitive Damages

[58] **[59]** A **Title VII** plaintiff may recover punitive damages upon proof that the defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). This is a higher standard than the showing necessary for compensatory damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999). Thus, "not every sufficient proof of pretext and discrimination is sufficient proof of malice or reckless indifference." *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 270 (5th Cir. 2000).

[60] **[61]** **[62]** Ultimately, the terms "malice" and "reckless indifference" "focus on the actor's state of mind." *Kolstad*, 527 U.S. at 535, 119 S.Ct. 2118. Both "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination [or retaliatory conduct]." *Id.* Thus, the defendant employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable for punitive damages." *Id.* at 536, 119 S.Ct. 2118. "Moreover, even if particular agents acted with malice or reckless indifference, an employer may avoid vicarious punitive damages liability if it can show" that the agents' actions were contrary to the employer's good-faith efforts to comply with **Title VII**. *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 467 (5th Cir. 2013) (citing *Kolstad*, 527 U.S. at 545–46, 119 S.Ct. 2118).

[63] The district court denied Wal-Mart's motion seeking judgment as a matter of law regarding punitive damages, concluding Wantou presented evidence that would allow a reasonable jury to conclude ***440** that Leeves acted with malice and that Wal-Mart did not exercise good faith. On malice, Leeves made several statements detailing a history of

personal conflict with Wantou. Leeves admitted that, before Wantou's third written coaching, these disputes boiled over with raised voices and that she "did get a little defensive." Also, their interactions were "very confrontational." Because the malice inquiry "focus[es] on the actor's state of mind," Leeves " 'must at least [have] [retaliated] in the face of a perceived risk that [her] actions w[ould] violate federal law to be liable for punitive damages.' " *Boh Bros. Constr. Co.*, 731 F.3d at 468 (quoting *Kolstad*, 527 U.S. at 535-36, 119 S.Ct. 2118). Leeves was trained on Wal-Mart's statement of ethics policy, so she knew not to retaliate against Wantou because of his complaints of discrimination and harassment by his co-workers. Nonetheless, given the evidence of strong personal conflict between Leeves and Wantou, the jury could have reasonably found she did so, and with malice.

Regarding good-faith efforts, Wantou presented evidence from which the jury could conclude that at least certain of his ethics complaints were ignored by Wal-Mart. Even before his third written coaching, Wantou's ethics complaints were regularly demoted to nonethics. When "Wal-Mart failed to respond effectively to [discrimination complaints]," the Fifth Circuit has found sufficient evidence to sustain an award of punitive damages, despite Wal-Mart encouraging employees to report grievances. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999). "For JMOL purposes, the evidence of Wal-Mart's antidiscrimination good faith was certainly not so overwhelming that reasonable jurors could not conclude otherwise." *Id.* A reasonable jury could credit Wantou's version of the facts and reject Wal-Mart's view; the jury, alone, weighs evidence and determines credibility. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

[64] In addition to arguing that no punitive damages are warranted, Wal-Mart contends the district court's award of $5,177.50 in back pay cannot support an award of $75,000.00 in punitive damages. In support of this argument, Wal-Mart cites *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000), where the jury awarded $2,500 in compensatory damages plus $75,000 in punitive damages. There, we concluded the award was constitutionally excessive and remitted it to $25,000—10 times the amount of compensatory damages.

In *Abner*, however, we reasoned the statutory cap on punitive damages, coupled with the high threshold for culpability, "confine[d] the amount of the award to a level tolerated by due process." 513 F.3d at 157. And, because Congress "effectively set the tolerable proportion," we reasoned that "the three-factor [*BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)] analysis is relevant only if the statutory cap itself offends due process." *Id.* at 164. Concluding that it did not, and that a ratio-based inquiry became irrelevant, we considered the "sufficiency of evidence [supporting] the statutory thresh-old [to be] a determinant of constitutional validity." *Id.* Applying that analysis here, we are not convinced, on the instant record, that any reduction of the $75,000 punitive damages award is legally necessary or appropriate.

F. Evidentiary Rulings

Lastly, Wantou protests a number of the district court's evidentiary rulings and limitation of trial time. Again, we emphasize ***441** that the applicable query is not whether another judge necessarily would have rendered the same ruling. Rather, it is whether the district court charged with this discretionary duty abused that discretion at the particular time that it was exercised. Considering the record at hand and the parties' submissions, we are not convinced that any of these rulings constitute an abuse of discretion. Nor is apparent that any of these rulings adversely affected any of the parties' substantial rights.

IV.

As stated herein, we find no reversible error in the district court rulings challenged on appeal. Accordingly, we AFFIRM.

James C. Ho, Circuit Judge, concurring in part and dissenting in part:

Yves Wantou is a pharmacist. But for five of his co-workers at Wal-Mart, all they saw was the color of his skin. According to the summary judgment evidence, his co-workers repeatedly called him a "monkey," a "chimp," "a little African," and an "African fart." They constantly mocked his accent in front of co-workers and customers. And they made numerous comments disparaging Cameroon, Wantou's country of origin, as "Ebola infested," "fly-infested," and a "dirty place." As one co-worker told Wantou: "I see pictures of dirty children from Africa with running nose and flies all over their face all the time. Being from Africa, there is no reason for you to be annoyed by flies. You come from a dirty and fly-infested country."

This evidence establishes a troubling pattern of racial harassment—one that a jury could find sufficiently pervasive to alter the conditions of employment and thereby support a claim of hostile work environment under **Title VII** of the Civil Rights Act of 1964. *See, e.g., Alaniz v. Zamora-Quezada*, 591 F.3d 761, 771 (5th Cir. 2009) ("A workplace environment is hostile when it is 'permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment.' ") (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Walker v. Thompson*, 214 F.3d 615, 619–22 (5th Cir. 2000) (plaintiff survives summary judgment where evidence demonstrated use of racial epithets including "little black monkey"); *see also, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001) (reversing summary judgment where plaintiff suffered "incessant racial slurs" including "dumb monkey").

But the district court concluded that these incidents, "although allegedly recurring, ... involved no physical threat," and granted summary judgment to Wal-Mart accordingly.

I strongly disagree with the respected district judge on this point. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, **Title VII** is violated." *Harris*, 510 U.S. at 21, 114 S.Ct. 367 (cleaned up). And that is precisely what is presented here.

Physical threats or attacks are not required to establish a hostile work environment under **Title VII**. So the absence of physical threats to go along with the verbal abuse does not prevent this case from proceeding to trial. *See, e.g., Walker*, 214 F.3d at 626 ("In the instant case, the district court granted summary judgment, concluding that '[n]one of these comments were physically threatening or humiliating, nor did they unreasonably interfere with Walker and Preston's work. Instead, they ***442** were simply truly offensive.' We disagree.").

Accordingly, I would vacate the judgment as to the hostile work environment claim and remand for further proceedings. I would not affirm on alternative grounds not reached by the district court in the first instance, nor addressed by Wantou in his pro se brief on appeal—namely, whether Wal-Mart took prompt remedial action to redress the situation in a manner sufficient to avoid liability under **Title VII**.[1]

That is an issue that should be decided in the first instance by the district court, if not by a jury. As we've said before, we are a court of review, not first view. Accordingly, I concur in part and dissent in part.

All Citations

23 F.4th 422

Footnotes

1 For instance, an addendum to Wantou's formal complaint (dated June 29, 2016) represents that, on June 27, 2016, the day before the third coaching, Wantou telephoned Pharmacy Manager Katy Leeves (who was away from the pharmacy) to "complain, once again, about the disparate treatment on the part of the technicians and the cashiers due to [his] race, [his] color, and [his] national origin." The same document accuses Leeves of "not affording [him] the right to complain, and retaliating against him whenever [he] complain[s]."

1 According to Wantou, he first informed Wal-Mart in late October 2015 about his hostile work environment—an environment that, according to Wantou, continued to persist through the early summer of 2016, leading up to his termination.

End of Document

EXHIBIT 3

33 F.4th 814
United States Court of Appeals, Fifth Circuit.

Grace **OWENS**, Plaintiff—Appellant,

v.

CIRCASSIA PHARMACEUTICALS, INCORPORATED, Defendant—Appellee.

No. 21-10760

FILED May 13, 2022

Synopsis

Background: Asian female former employee brought action against employer, alleging discrimination and retaliation in violation of Title VII and § 1981. The United States District Court for the Northern District of Texas, Barbara M. G. Lynn, Chief Judge, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Engelhardt, Circuit Judge, held that:

[1] employee failed to show that employer's proffered legitimate, nondiscriminatory reason for firing her was pretextual, and

[2] employee failed to show that employer's proffered legitimate, nonretaliatory reason for firing her was pretextual.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (45)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews the district court's grant of summary judgment de novo and affirms if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

[2] **Federal Civil Procedure** Materiality and genuineness of fact issue

For purposes of summary judgment, fact is "material" if it might affect the outcome of the suit under the governing law, while a dispute about that fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Fed. R. Civ. P. 56(a).

[3] **Federal Civil Procedure** Presumptions

On motion for summary judgment, court construes all the evidence and makes all reasonable inferences in the light most favorable to non-moving party. Fed. R. Civ. P. 56(a).

[4] **Federal Civil Procedure** Burden of proof

Movant for summary judgment bears the burden of demonstrating that there is no genuine dispute of material fact. Fed. R. Civ. P. 56(a).

[5] **Federal Civil Procedure** Weight and sufficiency

Movant for summary judgment carries burden of demonstrating there is no genuine dispute of material fact if it can demonstrate that non-movant has completely failed to prove an essential element of her case. Fed. R. Civ. P. 56(a).

[6] **Federal Civil Procedure** Burden of proof

If movant for summary judgment demonstrates that there is no genuine dispute of material fact, then non-movant must point to specific facts showing that there is a genuine dispute for trial. Fed. R. Civ. P. 56(a).

[7] **Federal Civil Procedure** Materiality and genuineness of fact issue

On motion for summary judgment, if the record could not lead a rational trier of fact to find for

non-movant, there is no genuine dispute for trial. Fed. R. Civ. P. 56(a).

[8] **Federal Courts** Failure to mention or inadequacy of treatment of error in appellate briefs

Employee forfeited on appeal claims for wrongful termination under California Whistleblower Statute and wrongful discharge in violation of public policy; district court held that employee failed to make out prima facie case for each claim, and employee did not challenge holding in opening brief. Cal. Lab. Code § 1102.5.

[9] **Federal Courts** Matters of Substance

Employee waived on appeal argument that employer was liable under negligence, disparate impact, or implicit bias theory; argument was not raised before district court, as employee's complaint made no mention of it nor did employee's response to employer's motion for summary judgment.

[10] **Federal Courts** Failure to mention or inadequacy of treatment of error in appellate briefs

Employee forfeited on appeal discrimination claim under California Fair Employment and Housing Act (FEHA); district court held that employee did not establish prima facie case, and employee did not challenge holding on appeal. Cal. Gov't Code § 12940.

[11] **Federal Courts** Matters of Substance

Federal Courts Failure to mention or inadequacy of treatment of error in appellate briefs

Employee waived on appeal retaliation claim under California Fair Employment and Housing Act (FEHA), although employee invoked FEHA in retaliation section of complaint; employee did not mention claim in her response to employer's motion for summary judgment even though employer expressly moved for summary judgment on that claim, district court only addressed retaliation under Title VII and § 1981, and employee did not challenge that omission on appeal. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981; Cal. Gov't Code § 12940.

[12] **Federal Courts** Failure to mention or inadequacy of treatment of error in appellate briefs

Arguments raised for the first time in a reply brief are waived.

[13] **Federal Civil Procedure** Hearing, evidence, and presentation of arguments

Party may not merely mention or allude to a legal theory but rather must, at the very least, clearly identify that theory as a proposed basis for deciding the case.

[14] **Civil Rights** Employment practices

Civil Rights Effect of prima facie case; shifting burden

Under *McDonnell Douglas* framework, plaintiff must make out a prima facie case of discrimination under Title VII and § 1981; if she succeeds, defendant must respond with a legitimate, nondiscriminatory reason for adverse action, and then the burden shifts back to plaintiff, who must counter with substantial evidence that defendant's proffered reason is pretextual. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[15] **Civil Rights** Practices prohibited or required in general; elements

To make a prima facie case of discrimination under Title VII and § 1981, an employee must show that: (1) she belongs to a protected group;

(2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) she was replaced by someone outside of her protected group or a similarly situated employee outside of her protected group was treated more favorably. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[16] **Civil Rights** Particular cases

Asian female employee was qualified for her position as regional sales manager, as required for prima facie case of discrimination under **Title VII** and § 1981; performance reviews made clear that employee was "solid performer," who was consistently performing well in all aspects of her job, and consistently displaying expected competencies at correct level. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[17] **Civil Rights** Employment practices

Civil Rights Weight and Sufficiency of Evidence

Evidence of pretext in discrimination action under **Title VII** and § 1981 is "substantial" if it is of such quality and weight that reasonable and fair-minded triers of fact in exercise of impartial judgment might reach different conclusions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[18] **Civil Rights** Motive or intent; pretext

To prevail at pretext stage, in discrimination action under **Title VII** and § 1981, employee must show that reasonable minds could disagree that employer's proffered reasons were, indeed, the reasons for adverse employment action. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[19] **Civil Rights** Employment practices

Civil Rights Weight and Sufficiency of Evidence

Employee may meet her burden to show pretext, in discrimination action under **Title VII** and § 1981, through use of various forms of circumstantial evidence, including evidence of disparate treatment or evidence tending to show that employer's explanation is unworthy of credence. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[20] **Civil Rights** Employment Practices

Employment laws do not transform federal courts into human resources managers, so the inquiry is not whether employer made wise or even correct decision; instead, the ultimate determination, in every case, is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination under **Title VII** and § 1981. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[21] **Civil Rights** Motive or intent; pretext

Civil Rights Employment practices

Civil Rights Presumptions, Inferences, and Burden of Proof

Employers are entitled to be unreasonable in terminating their employees so long as they do not act with discriminatory animus; thus, it is employee's burden to create fact dispute as to reasonableness that could give rise to inference of discrimination under **Title VII** and § 1981. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[22] **Civil Rights** Employment practices

Civil Rights Presumptions, Inferences, and Burden of Proof

For purposes of pretext in discrimination action under Title VII and § 1981, evidence of falsity of employer's explanation for adverse employment action must be of sufficient nature, extent, and quality to make inferential leap to discrimination a rational one. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[23] **Civil Rights** Employment practices

Civil Rights Weight and Sufficiency of Evidence

Asian female employee failed to show that she experienced disparate treatment compared to white male comparators and, thus, did not show that employer's proffered legitimate, nondiscriminatory reason for firing her, due to poor performance, was pretextual, precluding liability for discrimination under Title VII and § 1981; outside of vaguely referencing "white male comparators" or "her peers," employee did not identify comparators, nor did she produce any evidence that comparators were similarly situated outside of their job titles. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[24] **Civil Rights** Disparate treatment

To show disparate treatment, in discrimination action under Title VII and § 1981, employee must identify comparators and produce evidence that they were similarly situated employees. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[25] **Civil Rights** Motive or intent; pretext

Civil Rights Employment practices

Civil Rights Presumptions, Inferences, and Burden of Proof

Employer's investigatory choices might, depending on facts of particular case, be suspicious in way that renders employer's explanation unworthy of credence and permits inference of discrimination under Title VII and § 1981. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[26] **Civil Rights** Employment practices

Civil Rights Presumptions, Inferences, and Burden of Proof

For purposes of pretext in discrimination action under Title VII and § 1981, failure-to-investigate evidence does not require court to evaluate whether an employer's investigatory practices were sufficient or correct, but only whether, considered with all other evidence, they tend to permit a rational inference that the employer's ultimate reason for taking an adverse action is unbelievable; whether evidence does so in a particular case depends on its nature, extent, and quality. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[27] **Civil Rights** Motive or intent; pretext

Asian female employee did not show that employer's failure to investigate whether she was developing her team, failure to interview her team, failure to compare her to other regional sales managers, and failure to adequately investigate her discrimination and pricing misconduct allegation were evidence of pretext, precluding liability for discrimination under Title VII and § 1981; employer conducted serious investigations regarding discrimination and compliance issues, employee cited no requirement that employer could only place employee on performance improvement plan (PIP) or terminate employee after comparing employee to peers, and supervisor had conversations with employee's team on topics relevant to employer's concerns. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[28] **Civil Rights** Employment practices

Civil Rights 🔑 Weight and Sufficiency of Evidence

Asian female employee did not show that employer's inconsistent and illogical reasons for firing her were evidence of pretext, precluding liability for discrimination under **Title VII** and § 1981, although employee presented evidence that directly and specifically contradicted several factual bases for her placement in performance improvement plan (PIP) and termination; employee provided scant evidence of discriminatory treatment. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

1 Cases that cite this headnote

[29] **Federal Civil Procedure** 🔑 Employees and Employment Discrimination, Actions Involving

To survive summary judgment, in discrimination action under **Title VII** and § 1981, employee must produce sufficient evidence of implausibility to permit an inference of discrimination, not merely an inference that employer's proffered reason is false. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

[30] **Civil Rights** 🔑 Employment practices

Civil Rights 🔑 Questions of law or fact

Mere disputes over employer's assessment of employee's performance do not create issues of fact, in discrimination action under **Title VII** and § 1981, but in policing this line, courts should be cautious to not dismiss any dispute as mere dispute. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[31] **Federal Courts** 🔑 Theory and Grounds of Decision of Lower Court

Court of Appeals may affirm summary judgment on any ground supported by the record.

[32] **Civil Rights** 🔑 Motive or intent; pretext

Asian female employee failed to show that her termination on 57th day of 60-day performance improvement plan (PIP) was evidence of pretext, precluding liability for discrimination under **Title VII** and § 1981; employer had scheduled termination for Friday because PIP expired on Sunday, employee had taken paid time off for Friday, and employee provided no evidence that departure from policy was meaningful in any way. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[33] **Civil Rights** 🔑 Motive or intent; pretext

Asian female employee failed to show that offer of severance agreement during performance improvement plan (PIP) was evidence of pretext, precluding liability for discrimination under **Title VII** and § 1981; employee presented no evidence that her firing was part of larger plot that made it inevitable even if she improved her performance. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[34] **Civil Rights** 🔑 Discharge or layoff

Severance offers may constitute evidence of discrimination under **Title VII** and § 1981 when the offeree cannot decline and continue working under lawful conditions. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[35] **Federal Civil Procedure** 🔑 Employees and Employment Discrimination, Actions Involving

It is not enough to permit reasonable inference that some reason other than proffered one motivated adverse employment action; aggrieved employee's evidence must, at summary judgment stage, permit reasonable inference that real reason was impermissible discrimination under **Title VII** and § 1981. 42

U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

1 Cases that cite this headnote

[36] **Civil Rights** Practices prohibited or required in general; elements

As with discrimination, retaliation claims under § 1981 and **Title VII** are parallel causes of action that require proof of same elements in order to establish liability. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[37] **Civil Rights** Causal connection; temporal proximity

Employee showed causal connection between complaints of discrimination and price violations and termination and, thus, established prima facie case of retaliation under **Title VII** and § 1981; interval of weeks between complaints and termination was close timing. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[38] **Civil Rights** Practices prohibited or required in general; elements

To establish prima facie case of retaliation under **Title VII** and § 1981, employee must show that: (1) she engaged in protected activity; (2) she suffered adverse employment action; and (3) there is causal connection between the two. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[39] **Civil Rights** Causal connection; temporal proximity

Mere fact that some adverse action is taken after employee engages in some protected activity will not always be enough for prima facie case of retaliation under **Title VII** and § 1981. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[40] **Civil Rights** Causal connection; temporal proximity

Close timing between protected activity and adverse action can establish causal link required to assert prima facie case of retaliation under **Title VII** and § 1981. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[41] **Civil Rights** Retaliation claims

Employee failed to show that employer's proffered legitimate, nonretaliatory reason for firing her, due to poor performance, was pretextual, precluding liability for retaliation under **Title VII** and § 1981, although employee presented evidence that directly and specifically contradicted several factual bases for her placement in performance improvement plan (PIP) and termination; employee provided scant evidence that employer was motivated by retaliation. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[42] **Civil Rights** Causal connection; temporal proximity

For purposes of retaliation, inquiry of whether conduct protected by **Title VII** and § 1981 was but for cause of adverse employment decision requires a greater showing than mere causal connection; it requires that the plaintiff show that protected conduct was the reason for the adverse action. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[43] **Civil Rights** Causal connection; temporal proximity

Even if plaintiff's protected conduct is substantial element in defendant's decision to terminate

employee, no liability for unlawful retaliation arises under Title VII and § 1981 if employee would have been terminated even in absence of protected conduct. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

[44] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

Plaintiffs may combine suspicious timing with other significant evidence of pretext to survive summary judgment on retaliation claim under Title VII and § 1981. 42 U.S.C.A. § 1981; Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e.

[45] **Civil Rights** Employment practices

Civil Rights Presumptions, Inferences, and Burden of Proof

Even when an employee presents evidence that would allow a jury to conclude that an employer's proffered justification for an adverse action is false, that does not necessarily permit a rational inference that the real reason was discrimination under Title VII and § 1981. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e; 42 U.S.C.A. § 1981.

1 Cases that cite this headnote

***820** Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:19-CV-2231, Barbara M. G. Lynn, Chief Judge

Attorneys and Law Firms

Brian Paul Sanford, Elizabeth J. Sanford, Sanford Firm, Dallas, TX, for Plaintiff-Appellant.

Kimberly Summer Moore, Laura E. Calhoun, Attorney, Clark Hill, P.L.C., Frisco, TX, for Defendant-Appellee.

Before Willett, Engelhardt, and Wilson, Circuit Judges.

Opinion

Kurt D. Engelhardt, Circuit Judge:

This case turns on what circumstantial evidence of pretext a plaintiff in an employment-discrimination case must present to survive summary judgment under the "unworthy of credence" standard set forth in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).[1] The plaintiff, Grace Owens, alleges that her former employer, Circassia Pharmaceuticals ("Circassia"), fired her for discriminatory and retaliatory reasons. The district court granted summary judgment for Circassia, holding that Owens had failed to create a genuine dispute of material fact as to pretext. Owens presents substantial evidence that could lead a reasonable trier of fact to conclude that Circassia's justification for her termination is false. But she presents next to no evidence that Circassia was motivated in any way by discrimination or retaliation. We therefore AFFIRM.

I

A. Factual Background

Owens, an Asian woman, worked for a medical company named Aerocrine starting in 2010. She was promoted to Regional Sales Manager ("RSM") in 2013. In 2015, Circassia acquired Aerocrine and kept Owens on as RSM. While initially supervised by David Acheson, a white man and a Senior Vice President, Circassia later hired Scott Casey, another white man, as Area Sales Director and Owens' immediate supervisor. Circassia sold NIOX, a medical device, and Tudorza, a pharmaceutical product.

Both Acheson and Casey conducted performance reviews of Owens. Three reviews are relevant here: the 2016 year-end review, the 2017 mid-year review, and the 2017 year-end review. Common themes emerge from each. In each review Owens was rated a 3 out of 5 overall, or a "Valuable Contribution" under Circassia's metrics. Likewise, each review flags Owens' "team development" as an area that needed improvement.

The 2016 year-end review identified multiple flaws. First, by doing "one off business calls," Owens was "position[ing] herself more as a 'super rep' than a manager" and causing

her team to "rely on [her] to save them all the time." Second, Owens was not putting enough effort into development and needed to "observe, ***821** coach, and regularly develop" her team more. Third, Owens was not spending enough time on field visits and her field reports were subpar. The bottom line was that Owens had strong "business acumen and drive for results," but that strength became a weakness when it interfered with developing her subordinates into independent salespeople who could succeed "not always with [Owens'] direct involvement/actions."

The 2017 mid-year report noted no improvement. Specifically, Owens "continue[d] to take on much more of the workload than [wa]s required ... sacrificing the development of [her] people." Owens' continued "drive for results" and "sole[ ] focus[ ] on the business" got in the way of "develop[ing] and hold[ing] [her] people accountable." Ditto for the year-end review. In addition to repeating the deficiencies mentioned in the mid-year report, the year-end report noted that Owens continued to spend insufficient time on field visits, something that Circassia believed critical to development and that had been an issue since 2016. Further, her field reports were still lacking. The upshot was that Owens was "not meeting expectations" for development, an important component of being a manager, as "her hyper focus on the business and her desire to control all the business needs in her region" became "a considerable concern."

Owens was aware of these issues as she read each review and discussed it with the relevant reviewer. However, she believed that there was a misunderstanding between her and Circassia "of how to develop people," and that her team's "high accolades and high achievements" demonstrated that she was developing them adequately. Circassia believed it necessary for Owens to allow her team members latitude to fail at times in order to develop. Owens disagreed.

Nevertheless, each performance review ranked Owens' performance as a "3" overall. According to Circassia's rating system, that meant that Owens was "a solid performer" who was "consistently performing well in all aspects of [her] job" and "[c]onsistently display[ing] expected competencies at the correct level."

Aside from the reviews themselves, Owens' region consistently ranked among the best in the company in overall revenue, although revenue was not the ultimate metric of sales success at Circassia. Owens' subordinates succeeded as well. In 2016, both Melanie Tsakonas and Christy Grounds were promoted. Tsakonas was selected for membership in Circassia's Sales Leadership Council, while Grounds became a representative for the Managed Markets team. In 2017, Gary Koop, Leah McDonald, and Carl Rose were listed as top performers in various categories. Also in 2017, Kareem Berdai, Carl Rose, Gary Koop, Patrick Brogan, and Troy Lott were promoted.

On February 1, 2018, Owens reported to Casey an incident with Chili Hill, an Accounts Director at Circassia. According to Owens, she spoke with Hill over the phone after she had emailed him about a new account and copied her team. Hill took a hostile volume and tone, stated that Owens' team was underperforming, and spoke to her in a way Owens described as abusive. The parties dispute whether Owens reported any discriminatory treatment. Owens states that Hill made "sexist comments" and that she reported them to Casey. But Casey says that "Owens did not assert that she thought Hill's conduct was because she was a female or based on her race or national origin."

***822** Casey informed Lori Antieau,[2] Circassia's Senior Director of Human Resources, about Owens' problems with Hill. Antieau, who handled the complaint, states that Owens never painted Hill's conduct as discriminatory or otherwise based on gender, race, or national origin, either in the initial report or in subsequent meetings. Owens, on the other hand, asserts that when she met with Antieau on February 21, she "expressly state[d] to ... Antieau[ ] that Circassia is and has been discriminating against me and others because of gender." Antieau sent an email to, among others, Owens and Casey following that meeting recapping what was discussed, but it did not mention any allegations of discrimination. On March 22, Antieau asked Owens how things were going with Hill. Owens replied that they were "good," and that communication had improved. Owens did not dispute Antieau's description of the meeting or discuss discrimination.

On March 27 and 28, Casey and Antieau met with two other directors and determined that Owens, based on her performance issues and lack of improvement, should be placed on a Performance Improvement Plan ("PIP") along with two other RSMs, both white men. Tom Scaccia, Circassia's National Sales Director, supported putting Owens on a PIP based on his attendance of several of Owens' team conference calls. Scaccia highlighted two calls that occurred in February and March 2018, noting that they lacked structure, Owens did not review current business, each

team member shared successful NIOX sales stories despite a national directive to focus on Tudorza, Owens did not focus on Tudorza, and Owens did not review a new company initiative.

On April 11, 2018, Casey met with Owens and placed her on the PIP. It summarized the issues with Owens' performance, described what Owens was expected to improve, and warned that unless things improved within 60 days,[3] Owens could be terminated.

On April 18, Antieau discussed the PIP with Owens. According to Antieau's notes, Owens asserted that she was being discriminated against and pushed out via the PIP. She complained about the interaction with Hill, claimed that she was passed over for promotion, and alleged differential treatment compared to male RSMs. Antieau promised to investigate Owens' concerns. On April 25, Antieau discussed her findings with Owens. Specifically, Antieau interviewed Casey, Acheson, and three other individuals, including "one of Owens' peers." Antieau's investigation did not substantiate Owens' claims. Based on Antieau's notes, Owens responded by pointing out perceived deficiencies with Antieau's methodology and a statement that she would take legal action.

Casey continued to observe deficiencies in Owens' performance into May. On May 10, about halfway through the PIP, Antieau met with Owens. According to Antieau's notes, she discussed these deficiencies with Owens as well as a severance option. Owens asked how she was not meeting expectations.

On May 17, Owens emailed Antieau, copying Acheson, alleging discrimination and retaliation by Circassia. She alleged that the PIP was "completely unfounded" and "based on subjective criteria." She pointed out that her team members were recognized and promoted, and that her region was a consistent top performer. According ***823** to Owens, "[t]he difference" in treatment between her and other RSMs was "gender and ethnicity." According to Owens, Circassia did not explain how she was not meeting performance expectations, nor did Circassia provide "specifics concerning [her] performance."

Owens also alleged that Circassia was "involved in unlawful kickbacks and pricing" and "excessively charging Medicare." Antieau forwarded Owens' email to Preah Dalton, Director of Compliance, on May 21. Antieau also conducted her own investigation. Owens later emailed Dalton about compliance issues specifically surrounding one customer. Dalton investigated and found no evidence supporting the allegations.

Over the following month, Owens, Casey, and Antieau went back and forth on the PIP, Owens' performance generally, and Owens' allegations of discrimination. During this period Casey met with Owens to discuss the PIP. He also received feedback about Owens from other Circassia employees. Scaccia attended a May 2018 team conference call and observed little improvement from his previous experiences. He informed Casey about his misgivings on May 30. Tim Moran, Circassia's Regional Director of the South, also informed Casey of some communication and leadership issues he had observed with Owens.

On June 7, three days before the PIP expired, Casey and Antieau met to discuss the outcome of the PIP. According to Antieau's email memorializing the meeting, Owens had improved in some areas but had not done so overall. The next step was to terminate Owens. Casey scheduled a meeting with Owens on Friday, June 8th but Owens took paid time off for that day. Thus, Owens was terminated on June 7, 2018. Her team was divided between three other RSMs, including two white men and one Hispanic man.

B. Procedural Background

Owens sued Circassia in the United States District Court for the Central District of California alleging violations of California Labor Code § 1102.5 (the "Whistleblower Statute"), 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and California Government Code § 12940 (California Fair Employment and Housing Act or "FEHA"). After several amendments, motions, and briefs, that court granted Circassia's motion to transfer venue to the United States District Court for the Northern District of Texas.

After further motion practice, Owens filed a second amended complaint similarly alleging wrongful termination under the Whistleblower Statute, a California claim for wrongful discharge in violation of public policy, discrimination in violation of 42 U.S.C. § 1981, 42 U.S.C. § 2000e, Title VII, and the FEHA, and retaliation in violation of the same. Following discovery, the district court granted summary

judgment for Circassia on all claims. It held that Owens had failed to show that Circassia's stated nondiscriminatory reason for her termination was pretextual, defeating her federal discrimination and retaliation claims, and that she failed to establish a prima facie case for wrongful termination in violation of public policy, wrongful discharge in violation of the Whistleblower Statute, or discrimination under the FEHA. Owens appeals, arguing that she put forth sufficient evidence of pretext to survive summary judgment.

II

[1] **[2]** **[3]** We review the district court's grant of summary judgment de novo and affirm if "there is no genuine dispute as to any material fact and the movant is entitled ***824** to judgment as a matter of law." FED. R. CIV. P. 56(a); *Renfroe v. Parker*, 974 F.3d 594, 599 (5th Cir. 2020). A fact is material if it "might affect the outcome of the suit under the governing law," while a dispute about that fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). We construe all the evidence and make all reasonable inferences in the light most favorable to Owens. *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007).

[4] **[5]** **[6]** **[7]** Circassia bears the burden of demonstrating that there is no genuine dispute of material fact. *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 994 F.3d 704, 708 (5th Cir. 2021). It carries that burden if it can demonstrate that Owens has completely failed to prove "an essential element of [her] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Coleman v. BP Expl. & Prod., Inc.*, 19 F.4th 720, 726 (5th Cir. 2021). If Circassia meets that burden, then Owens must point to "specific facts showing that there is a genuine [dispute] for trial." *Jones v. United States*, 936 F.3d 318, 321 (5th Cir. 2019) (cleaned up). If the record "could not lead a rational trier of fact to find for [Owens], there is no genuine [dispute] for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (cleaned up).

III

[8] **[9]** **[10]** **[11]** **[12]** **[13]** We first consider Owens' claims of discrimination under Title VII and 42 U.S.C. § 1981.[4]

***825** It is unlawful to terminate an employee "because of" her "race ..., sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); *see* 42 U.S.C. § 1981 (prohibiting intentional racial discrimination).[5] Because Owens does not present direct evidence of discrimination, she must satisfy the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Sanders v. Christwood*, 970 F.3d 558, 561 (5th Cir. 2020). We analyze employment discrimination claims arising under both 42 U.S.C. § 1981 and Title VII on this basis. *Sanders*, 970 F.3d 558, 561 n.7 (5th Cir. 2020); *Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 891 n.2 (5th Cir. 2012); *Lawrence v. Univ. of Tex. Med. Branch at Galveston*, 163 F.3d 309, 311 (5th Cir. 1999).

[14] Under that framework, Owens must make out a prima facie case of discrimination. *Watkins v. Tregre*, 997 F.3d 275, 281 (5th Cir. 2021). If she succeeds, Circassia must respond with a "legitimate, nondiscriminatory reason" for terminating Owens. *Id.* at 282. Then the burden shifts back to Owens, who must counter with substantial evidence that Circassia's proffered reason is pretextual. *Id.*

A. Prima Facie Case

[15] Owens has established a prima facie case. To make a prima facie case of discrimination, Owens must show that: 1) she belongs to a protected group; 2) she was qualified for her position; 3) she suffered an adverse employment action; and 4) she was replaced by someone outside of her protected group or a similarly situated employee outside of her protected group was treated more favorably. *See id.*; *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011).

[16] While the parties do not dispute that Owens belongs to a protected group or that she suffered an adverse employment action, Circassia argues that because Owens failed to meet performance expectations, Owens was not qualified for her position and therefore fails to present a prima facie case. That argument fails for two reasons. First, the sole authority Circassia cites for this proposition is an unpublished district court case that in turn cites no authority for *its* holding. *See* *Smith v. ExxonMobil Corp.*, No. CV H-18-367, 2020 WL 5576695, at *2 (S.D. Tex. Sept. 17, 2020).[6] Second, Circassia's own performance reviews make clear that, at all relevant times, Owens was "a solid performer" who was "consistently performing well in all aspects of [her] job" and "[c]onsistently display[ing] expected competencies at the correct level." Thus, Owens has satisfied this element.

Circassia also disputes the fourth element by arguing that Owens failed to show that RSMs outside her protected group were treated more favorably. But the district court's holding on this element was based on Owens being replaced by Rich Kosar, a white man, as Owens submitted declarations from multiple individuals supporting that proposition. Circassia offers no challenge to that holding and, in any event, we agree that Owens has surpassed the "very minimal" barrier of making her prima facie case. ***826** *Guthrie v. Tifco Indus.*, 941 F.2d 374, 377 (5th Cir. 1991) (quotation omitted).

B. Legitimate Nondiscriminatory Reason

We likewise agree with the district court that Circassia, by claiming to have fired Owens for poor performance, has presented a legitimate, nondiscriminatory reason for doing so. Owens does not dispute that this justification satisfies the second step of *McDonnell Douglas*. Thus, we consider whether Owens has offered sufficient evidence on the third step: pretext.

C. Pretext

[17] **[18]** Pretext is the crux of this appeal. At this stage, Owens must present "substantial evidence" that Circassia's asserted reason for terminating her is pretext for discrimination. *Watkins*, 997 F.3d at 283. "Evidence is substantial if it is of such quality and weight that reasonable and fair-minded [triers of fact] in the exercise of impartial judgment might reach different conclusions." *Laxton v. Gap Inc.*, 333 F.3d 572, 579 (5th Cir. 2003) (quotation and internal quotation marks omitted). Because Circassia's "reasons for [Owens'] termination were her poor performance and demonstrated lack of effort to change her behavior[,] to prevail at this stage, [Owens] must show that reasonable minds could disagree that these were, indeed, the reasons for her discharge." *Salazar v. Lubbock Cnty. Hosp. Dist.*, 982 F.3d 386, 389 (5th Cir. 2020).

[19] **[20]** Owens may meet her burden through use of various forms of circumstantial evidence, including evidence of disparate treatment or evidence tending to show that Circassia's "explanation is unworthy of credence." *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097; *Watkins*, 997 F.3d at 283. But employment laws do not transform federal courts into human resources managers, so the inquiry is not whether Circassia made a wise or even correct decision to terminate Owens. *Bryant v. Compass Grp. USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005) (citation omitted). Instead, "[t]he ultimate determination, in every case, is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination." *Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000). Thus, evidence must be of sufficient "nature, extent, and quality" to permit a jury to reasonably infer discrimination. *Id.* at 903.

[21] **[22]** Owens focuses primarily on evidence that tends to show that Circassia's justification is unworthy of credence. But even if Owens has provided sufficient evidence for a jury to disbelieve Circassia's explanation for her termination, that is not necessarily enough.[7] Employers are "entitled to be unreasonable" in terminating their employees "so long as [they] do[ ] not act with discriminatory animus." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002). Thus, it is the employee's burden to create a fact dispute as to reasonableness that could give rise to an inference of discrimination. *Id.* As the Supreme Court explained in *Reeves*, "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." 530 U.S. at 148, 120 S.Ct. 2097. As we explain below, this is one of those instances.

***827** Owens advances six categories of evidence that she argues demonstrate that Circassia's reason for firing her was pretextual. We address each in turn and explain why, or why not, that evidence is sufficient to reject Circassia's proffered explanation. [8]

1. Disparate Treatment

[23] **[24]** Owens first argues that she experienced disparate treatment compared to white male comparators. To show disparate treatment, Owens must identify such comparators and "produce ... evidence that [they] were similarly situated employees." *Okoye v. Univ. of Tex. Hous. Health Sci. Ctr.*, 245 F.3d 507, 515 (5th Cir. 2001). But, outside of vaguely referencing "white male comparators" or "her peers," Owens does not identify comparators. Nor does she produce any evidence whatsoever that these comparators were similarly situated outside of their job titles. Instead, she asserts—in conclusory fashion—that she has personal knowledge that she was making more field rides with her team, that her Field Coaching Reports ("FCRs") were of the same or better quality, and that her team performed well compared to her peers. [9] Conclusory declarations are insufficient to create issues of fact [10] and, save for a concession in Antieau's deposition that we discuss below, Owens fails to cite any specific factual basis in the record to support her conclusions. [11] We cannot compare Owens to other RSMs when she fails to name or otherwise identify comparator RSMs, much less explain why they are similarly situated.

***828** The comparative data we *do* have is presented by Circassia and consists of 2017 performance reviews for all other RSMs. They do not show different treatment. For example, Casey gave Nicole Bennett, a female RSM, a performance rating of "4," which he states—and the record supports—was the highest rating that year. All other RSMs received, like Owens, a "3" overall rating, but only one RSM, Jeff Pearl, received a "2" rating in "developing others." Owens does not discuss these reports or any specific facts demonstrating that any of these RSMs were treated favorably compared to her. Nor does she argue that Pearl is a comparator, even though he seems the most suitable candidate. Thus, neither Owens nor the record reveals an appropriate comparator that would permit a rational finding of disparate treatment.

One wrinkle worth mentioning is that Antieau did concede in her deposition that Owens' team exceeded the sales performance of some other teams, yet the RSMs overseeing those teams were not placed on a PIP. But Owens again does not provide evidence or argument that these RSMs were similarly situated. She does not provide any evidence, for example, that her team outperformed similar teams in similar markets, which the record and common sense dictate to be an important consideration. [12] Because Owens has failed to present evidence—or argument, for that matter—tending to establish a suitable comparator, she has failed to create a fact issue as to disparate treatment. [13] *See Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) ("The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim.").

2. Lack of Investigation

Next, Owens argues that Circassia's failure to investigate whether she was developing her team, failure to interview her team, failure to compare her to other RSMs, and failure to adequately investigate her discrimination and pricing misconduct allegation are evidence of pretext.

We have only recently addressed failure-to-investigate in the context of pretext. In an unpublished opinion, a panel of this court rejected the Sixth Circuit's requirement that, while an "employer need not leave 'no stone unturned,' " it must "make a 'reasonably informed and considered decision' " to undertake the adverse action. *Gill v. DIRTT Env't Sols., Inc.*, 790 F. App'x 601, 605 (5th Cir. 2019) (per curiam) (quoting *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 398 (6th Cir. 2008)). Instead, the panel held that the employer was entitled to summary judgment, dismissing out of hand the argument that the employer conducting *no* investigation into the complaints that formed the basis for its action was evidence of pretext. *Id.*

[25] While we do not pass on whether the Sixth Circuit's approach is the correct one, *Gill*'s language implies that lack-of-investigation evidence is never sufficient and, in that respect, *Gill* goes too far. [14] An ***829** employer's investigatory choices might, depending on the facts of a particular case, be suspicious in a way that renders the

"defendant's explanation ... unworthy of credence" and permits an inference of discrimination. *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 (2000); *see also* *EEOC v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 624–25 (5th Cir. 2009) (in the ADA context, failing to "ma[ke] any attempt to check the accuracy of [an] incorrect assumption" when presented with objective evidence that the assumption is false can be evidence of pretext if it tends to show that an employer's true motivation was discriminatory).

[26] Contra *Gill*, permitting such evidence to defeat a motion for summary judgment does not require employers to make "objectively verifiable showing[s]" or to make correct decisions. *Gill*, 790 F. App'x at 605 (citing *LeMaire v. La. Dep't of Transp. & Dev. ex rel. La.*, 480 F.3d 383, 391 (5th Cir. 2007)). Instead, we simply recognize that such evidence does not require us to evaluate whether an employer's investigatory practices were *sufficient* or *correct*, but only whether, considered with all other evidence, they tend to permit a rational inference that the employer's ultimate reason for taking an adverse action is *unbelievable*. Whether evidence does so in a particular case depends on its "nature, extent, and quality." *Crawford*, 234 F.3d at 903.

[27] Under that standard, most of Owens' arguments on this point clearly fall short. Regarding Circassia's discrimination and compliance issues, Circassia appears to have conducted serious investigations. Specifically, Antieau investigated Owens' complaints of discrimination and retaliation, and Dalton investigated the pricing allegations and a different instance of alleged retaliation. Both appear to have interviewed relevant witnesses and analyzed relevant law and company policy. Owens argues that these investigations were inadequate. But while Circassia certainly could have interviewed more or different people, the mere fact that Circassia did not conduct these investigations as Owens might have preferred is not sufficient to show that the investigations were inadequate. *Bryant*, 413 F.3d at 478.

Regarding Circassia's investigation of Owens' performance vis-à-vis other RSMs, Owens cites no requirement, either in law or Circassia's policies, that Circassia must only place an employee on a PIP or terminate an employee after comparing that employee to his or her peers. Thus, even if Owens is right, she has only shown that Circassia's investigatory practices do not involve comparative analysis. That is not enough to show that such practices are inadequate, to say nothing of discriminatory.

Owens' argument that Circassia's investigation was inadequate—to the extent of being pretextual—because Circassia failed to interview Owens' team is stronger, but still falls short. Owens' authority for the proposition that failure to interview is relevant consists solely of out-of-circuit caselaw. *See* *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 108 (2d Cir. 2010); *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 414–15 (6th Cir. 2008); *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1159 (10th Cir. 2008); *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 529–30 (6th Cir. 2005).[15] In *Gorzynski*, the relevant decisionmaker ***830** conceded that additional witnesses should have been interviewed before terminating the plaintiff based on a complaint. 596 F.3d at 108. There is no such concession here. *Martin* and *Tisdale* rely on Sixth Circuit tests, neither of which has been adopted in this circuit. *Martin*, 548 F.3d at 414–15; *Tisdale*, 415 F.3d at 529–30.

Trujillo, however, is relevant. In that case, the employer failed to interview one of the employees' supervisors regarding an alleged infraction that led to their terminations. 524 F.3d at 1159. That supervisor submitted an affidavit that undercut the employer's justification for the terminations. *Id.* If the employer had interviewed the supervisor, therefore, it may have found that its basis for the terminations was mistaken. Its failure to interview was consequently suspicious and "a significant circumstance contributing to the inference of discrimination." *Id.*

Here, however, the record shows that while Antieau did not interview Owens' team, Casey *did* have conversations with them on topics relevant to Circassia's concerns. Casey testified that his understanding of Owens' deficiencies came from "calls, ... observations, ... peer coaching reports ... [a]ll of it." He specifically recalls talking with Owens' subordinates at various points and hearing stories of Owens "com[ing] in and fix[ing]" problems rather than helping her team members develop by handling those situations themselves. Casey did not conduct formal interviews, as he testified that he would not discuss Owens' deficiencies or her need for improvement with her subordinates.

At bottom, then, this dispute is two ships passing in the night. Owens, citing Antieau's deposition, argues that Circassia did not interview her team. Casey testified that he based his concerns about Owens' performance on, among other things, conversations he had with her team. Owens does not reference or dispute Casey's testimony. Nor does she argue that informal conversations, either in general or as they took place here, are inadequate to the extent that they are evidence of pretext. Thus, Owens has failed to demonstrate that Circassia's investigation was inadequate at all, let alone inadequate in a way that could give rise to a reasonable inference of pretext for discrimination.

3. Illogic and Inconsistency

[28] Owens also argues that Circassia's stated reasons for firing her were inconsistent with reality and, given Circassia's own behavior, illogical. She cites Circassia's appraisals of her team's performance and introduces fact evidence that contradicts Circassia's version of events. This is her strongest argument. But while she has likely presented sufficient evidence for a reasonable factfinder to reject Circassia's explanation for her termination, she has not presented sufficient evidence to permit a rational inference that the proffered reason was pretext for discrimination. *See Crawford*, 234 F.3d at 902.

[29] We have recently held that evidence of "inconsistent explanations and the absence of clear criteria" in an employer's decisionmaking can be enough to survive summary judgment if, under the facts of a ***831** particular case, that inconsistency and lack of criteria could lead to a reasonable inference of pretext. *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523, 528 (5th Cir. 2022). That kind of evidence makes an employer's decision seem illogical and, therefore, unworthy of credence. But again, "[t]he ultimate determination ... is whether, viewing all of the evidence in a light most favorable to the plaintiff, a reasonable factfinder could infer discrimination." *Crawford*, 234 F.3d at 902. Thus, to survive summary judgment, Owens must produce sufficient evidence of implausibility to permit an inference of *discrimination*, not merely an inference that Circassia's proffered reason is false. *See* *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097 ("[T]here will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.").

[30] Mere disputes over an employer's assessment of an employee's performance do not create issues of fact. *Salazar*, 982 F.3d at 389. But in policing this line, courts should be cautious to not dismiss *any* dispute as a *mere* dispute. *Salazar* is a prime example of the latter. In that case, the employee submitted conclusory affidavits stating that her performance was adequate with scant evidence to support such assertions. *Id.* at 389; *see* *id.* at 392 (Ho, J., concurring) (clarifying that the problem with the statements was that they were conclusory). Thus, the employee had not provided enough evidence to raise anything more than a "mere" dispute.

To be sure, much of Owens' declaration and those of her subordinates contain bald assertions of Owens' prowess as a manager and conclusory legal analysis. Likewise, many declarations contain threadbare rejections of Circassia's reasons for terminating Owens and conclusory assertions that Owens developed her team. If that was all they contained, then that would be the end of the matter.

[31] But that is not all.[16] Several declarations attest to specific facts which, if credited by a factfinder, could lead to a reasonable rejection of Circassia's proffered reason for firing Owens. Further, Owens presents objective evidence that Circassia acted in a way that does not logically comport with its assessment of her performance. Three of the underlying reasons for placing Owens on a PIP and eventually terminating her were that she was failing to develop her team, she was doing the work of her team and acting as a "super rep" rather than a manager, and she was not conducting proper field visits. Owens presents substantial evidence to contest each.

Start with the field visits. The PIP stated that Owens' field visits were insufficient and needed to be a 1.5 to 2 days in length. Kareem Berdai's declaration attests to Owens conducting field rides with him "about once a quarter ... for about 3–4 days at a time." Jodie Eades, Patrick Brogan, and Troy Lott all state—with some detail—that Owens visited for two days at a time. Christy Grounds attests to "1–2 days." These declarations therefore provide *facts*, not conclusory opinions or factual inferences. Further, they directly contradict one of Circassia's *factual* assumptions—i.e., ***832** that Owens was *not* visiting for at least a 1.5 days at a time—for Owens' PIP and eventual termination. A reasonable factfinder could credit and weigh them as evidence supporting a rejection of Circassia's proffered justification.

Next, development. The PIP stated that Owens needed to provide challenge, have "frequent developmental discussions," be aware of career goals, create development plans and execute them, facilitate "developmental moves," and support subordinates who need help. While the meaning of these phrases is not completely clear, Owens has introduced substantial evidence tending to show that she had developed her team. More than that, Circassia appears to have agreed.

First, the declarations identified above also speak to development. On "frequent developmental discussions," multiple subordinates attest to a "mandatory 2:00pm conference call on every Friday with the whole team" to discuss "best practices, updates, and development." On more general development, Berdai recounts details about how he discussed his goals and priorities with Owens and how she helped him manage those priorities "for six straight years every quarter." When Troy Lott was Circassia's top salesman, Owens arranged for Berdai to ride with him to help Berdai's development. She was also aware of Berdai's career aspirations, as part of the reason Owens had Berdai ride with Lott was to "kickstart ... developing [his] role as a manager." Further, Owens put Berdai's name in for a group of top sales representatives, encouraging his "interest in future leadership." Berdai's declaration is not the only one to include such details.

Second, Circassia was evidently pleased with how Owens had developed her team. In 2016, two of Owens' subordinates were promoted. In 2017, five of her subordinates were promoted. Her team also found success on other terms, including membership on Circassia's Sales Leadership Council, membership on the Managed Markets team, and top performance awards. Further, Antieau testified that the 2017 promotions occurred under a "career ladder," Circassia's internal development metric. To be sure, there is also evidence that not all these promotions and accolades are reflective of development. Casey, for example, testified that the 2016 promotions of Christy Grounds and Melanie Tsakonas were tenure-based, not performance-based. But Casey does not dispute every promotion and award. Indeed, he confirmed that membership on the Sales Leadership Council reflected "ability and skill set competencies." Thus, the import of these promotions and accolades appears to be a classic fact dispute wherein a reasonable factfinder could choose how to weigh the evidence either for or against Owens.

Third, Owens' region consistently ranked among the best in the company in overall sales revenue. Circassia dismisses her team's sales performance as "only one factor in how well they were being developed." But Circassia does not explain how a company that sells products can so easily dismiss how many products it sells as a measure of how well a team is performing which, in turn, reflects on how well that team is being managed and developed. To the contrary, as Antieau testified, sales performance speaks, at least to some extent, to Owens' influence on her team's development.

Finally, we consider Owens' propensity for stepping in and doing sales representative work. Here, again, the declarations provided by Owens contradict the facts underlying Circassia's rationale. The declarations bear out two consistent themes. First, Owens made introductions, while the ***833** team members themselves closed the deals. Second, Owens only provided support and resources when asked, including moral support and marketing materials.

Owens has accordingly presented evidence that directly and specifically contradicts several factual bases for her placement on the PIP and her eventual termination. Although there are alternative explanations for some of this evidence, reasonable inferences are drawn in favor of Owens. *Scott*, 550 U.S. at 378, 127 S.Ct. 1769. Thus, a reasonable trier of fact could find that Circassia's proffered justification for terminating Owens is false. But that alone is not enough. The evidence must permit a reasonable inference that Circassia's false reason was pretext for the true, discriminatory, reason. *Reeves*, 530 U.S. at 147–48, 120 S.Ct. 2097; *Crawford*, 234 F.3d at 902.

Aside from the incident with Chili Hill, who was not involved in the decision to place Owens on the PIP or to fire her, Owens provides scant evidence of discriminatory treatment. In her briefs, Owens cites several documents in the record that she alleges are evidence of discrimination. But those portions of the record reveal nothing of the sort. For example, Owens alleges that Acheson "engage[d] in ... discrimination," but for support she cites an email that is Antieau's response to Owens' allegations of pricing misconduct and a portion of Jodie Eades' declaration that discusses the same thing. The only other suggested basis for a finding of discrimination is disparate treatment which, as we explained above, is not enough without identifying a comparator and providing *something* to compare. Perhaps recognizing this difficulty, Owens argues discrimination based on negligence, disparate

impact, and implicit bias. But that argument was not raised before the district court, so we do not consider it here. *Est. of Duncan*, 890 F.3d at 202.

Thus, although Owens likely presents enough evidence of illogic to permit a rational factfinder to think Circassia's proffered reason might be false, Owens does not present the type of evidence necessary to permit an inference of discrimination. Instead, this is a case where, "although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097; *see* *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002) (same). In other words, a juror could reasonably conclude that Circassia wanted Owens gone for some reason other than her performance, but an "inference of discrimination [would] be weak or nonexistent." *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1338 (2d Cir. 1997) (quoted approvingly in *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097).

4. Subjectivity, Failure to Follow Policy, and Severance Agreement

Owens raises three more arguments that Circassia's proffered reason is pretext. None hold water. First, Owens argues that employers may not use subjective criteria. Not so. The case Owens cites did not consider subjective criteria at the pretext stage, but rather "whether an employer can defeat an employee's claim via summary judgment *at the prima facie case stage* by claiming that he failed to meet entirely subjective hiring criteria." *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 681 (5th Cir. 2001) (emphasis added). Owens provides no further support for the proposition that employers are barred from using subjective criteria to evaluate employees, and we reject this argument.

[32] Next, Owens argues that Circassia's firing of Owens on the 57th day of the ***834** 60-day PIP is evidence of pretext. But the cases Owens cites betray why her argument fails. Trying to terminate someone on a Friday because the PIP expires on a Sunday, then rescheduling the firing for Thursday because the employee can't make the Friday meeting, is hardly on the same level as firing someone without warning when policy dictates that discipline be progressive or other evidence showing meaningful departure from policy. *See Lindsey v. Bio-Med. Applications of La., L.L.C.*, 9 F.4th 317, 326 (5th Cir. 2021). Other than the fact that Owens was fired three days shy of the running of the PIP's stated period, Owens provides neither evidence nor argument that the departure was meaningful in any way. Thus, we reject this argument as well.

[33] **[34]** Finally, Owens argues that the fact that she was offered a severance agreement during the PIP is evidence that the Circassia never allowed for Owens to complete the PIP and remain employed. Severance offers may constitute evidence of discrimination when the offeree cannot decline and continue working under lawful conditions. *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 577 (5th Cir. 2003) (quotation and internal quotation marks omitted). *Palasota* illustrates why that is not the case here. In *Palasota*, a Sales Associate was offered a severance package. *Id.* He was fired, along with twelve others, two months after he declined the offer as part of an alleged restructuring. *Id.* Within a year, all Sales Associates had been fired and replaced by Retail Marketing Associates. *Id.* The now-fired Sales Associates were ninety-five percent men over forty, while the newly hired Retail Marketing Associates were ninety-five percent women under forty. *Id.* That, combined with substantial evidence that the roles were the same, permitted an inference of discrimination. *Id.* Here, Owens presents no evidence that her firing was part of a larger plot that made it inevitable even if she improved her performance. Nor does she present any other evidence that her termination was inevitable. Thus, there is no reason to believe that the severance agreement is evidence of pretext.

[35] At bottom, Owens has provided enough evidence to permit a finding that Circassia's proffered justification for her termination is false. But she has presented a mere scintilla of evidence that the true reason for her termination was discriminatory animus, and "the burden of proof [is hers] throughout." *Saketkoo v. Adm'rs of Tulane Educ. Fund*, 31 F.4th 990, 999 (5th Cir. 2022). It is not enough to permit a reasonable inference that *some* reason other than the proffered one motivated the adverse employment action. *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097; *see* *Price*, 283 F.3d at 720. An aggrieved employee's evidence must, at the summary-judgment stage, permit a reasonable inference that the real reason was impermissible discrimination. *Sandstad*, 309

F.3d at 899.[17] Summary judgment for Circassia is therefore appropriate because Owens' evidence is of insufficient "nature, extent, and quality" to permit a reasonable factfinder to resolve "[t]he ultimate determination" of discrimination in her favor. *Crawford*, 234 F.3d at 902–03.

IV

[36] We next consider Owens' claims of retaliation under Title VII and ***835** 42 U.S.C. § 1981.[18] These claims are likewise "subject to the *McDonnell Douglas* burden-shifting framework" because Owens seeks to prove retaliation by circumstantial evidence. *Jones v. Gulf Coast Rest. Grp., Inc.*, 8 F.4th 363, 368 (5th Cir. 2021); *see also Saketkoo*, 31 F.4th at 998-1000.

[37] **[38]** **[39]** **[40]** To establish a prima facie case of retaliation, Owens must show that: 1) she engaged in a protected activity; 2) she suffered an adverse employment action; and 3) there is a causal connection between the two. *Saketkoo*, 31 F.4th at 998-1000. The district court found that Owens had established a prima facie case, and Circassia only disputes that Owens has established the third element on appeal. Circassia's arguments are without merit. As the district court found, Circassia terminated Owens weeks after she complained of discrimination and price violations. "[T]he mere fact that some adverse action is taken *after* an employee engages in some protected activity will not always be enough for a *prima facie* case." *Swanson v. GSA*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997). Nevertheless, "[c]lose timing" between the protected activity and adverse action can establish the causal link required to assert a prima facie case. *Id.* at 1188. An interval of weeks between Owens' complaints and her termination is certainly close timing, so we agree with the district court and hold that Owens has established a prima facie case. The parties do not dispute the second step of *McDonnell Douglas*, that Circassia has put forth a legitimate, nondiscriminatory reason for terminating Owens. Thus, we move to the third step which asks "whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision." *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996) (citation omitted); *see also Saketkoo*, 31 F.4th at 1000-01.

[41] **[42]** **[43]** **[44]** This inquiry requires a greater showing than mere causal connection. It requires that the plaintiff show that protected conduct was *the* reason for the adverse action. "In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct." *Long*, 88 F.3d at 305 n.4 (citation omitted). Plaintiffs may combine "suspicious timing with other significant evidence of pretext" to survive summary judgment, and that is precisely what Owens attempts to do here. *Saketkoo*, 31 F.4th at 1003.

Owens raises no additional arguments regarding pretext to support her retaliation claim. Thus, for the same reasons discussed above, she falls short of creating a genuine dispute of material fact. We agree with the district court that summary judgment for Circassia is appropriate.

V

[45] There is a gray area between firing an employee for obvious performance deficiencies and firing an employee for discriminatory reasons. But under Title VII and 42 U.S.C. § 1981, discrimination is what matters. Even when an employee presents evidence that would allow a jury to conclude that an employer's proffered justification for an adverse action is false, that does not necessarily permit a rational inference that the real reason was discrimination. The Supreme Court warned of ***836** such cases, and this happens to be one. Thus, we AFFIRM.

All Citations

33 F.4th 814

Footnotes

1 Although *Reeves* considered a motion for judgment as a matter of law under Rule 50, we apply it to summary judgment cases. *Pratt v. City of Houston*, 247 F.3d 601, 606 n.3 (5th Cir. 2001).

2 Antieau's last name is now O'Sullivan, but Owens refers to her as Antieau. To avoid confusion, we likewise refer to her as Antieau.

3 The PIP expired on June 10, 2018, which was a Sunday.

4 These and Owens' claims of retaliation under the same provisions are the only claims properly before this court.

We do not consider Owens' California wrongful termination claims because she has forfeited them. The district court held that Owens failed to make out a prima facie case for each claim, and in her opening brief Owens does not challenge that holding. *See Rollins v. Home Depot*, 8 F.4th 393, 397 n.1 (5th Cir. 2021). She broaches the issue on reply, but arguments raised for the first time in a reply brief are waived. *Est. of Duncan v. Comm'r*, 890 F.3d 192, 202 (5th Cir. 2018).

Likewise, we do not consider Owens' argument that Circassia is liable under a negligence, disparate impact, or implicit bias theory because it was not raised before the district court. *Id.* Owens' complaint makes no mention of it. Nor does her response to Circassia's motion for summary judgment.

Finally, Owens has failed to preserve her two FEHA claims. First, she forfeited her FEHA discrimination claim because the district court held that Owens did not establish a prima facie case, yet Owens does not challenge that holding on appeal. *See id.*

Second, she has waived her FEHA retaliation claim for more complex reasons. Although she invokes the FEHA in the retaliation section of her complaint, there is nary a mention of it in her response to Circassia's motion for summary judgment even though Circassia expressly moved for summary judgment on that claim. *See Rollins*, 8 F.4th at 397 (abandoning a known right is waiver). Further, the district court only addressed retaliation under Title VII and § 1981, not the FEHA. Owens does not challenge that omission on appeal. Thus, Owens did not defend her FEHA claim at the summary-judgment stage nor does she take issue with the district court's obvious omission of it from the summary-judgment order. Even if it was not waived, we have long held that an argument raised "as an afterthought" is abandoned. *United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010) (gathering cases). A party may not "merely mention or allude to a legal theory" but rather must, "[a]t the very least ... [,] clearly identify[ ] [that] theory as a proposed basis for deciding the case." *Knatt v. Hospital Serv. Dist. No. 1 of E. Baton Rouge Par.*, 327 F. App'x. 472, 483 (5th Cir. 2009) (unpublished) (citations omitted) (quoted as persuasive authority and adopted in *Scroggins*, 599 F.3d at 446–47; *id.* at 447 n.7). Thus, by failing to press her FEHA retaliation claim both before the district court and this court, Owens has failed to preserve it.

5 While Owens' operative complaint contains broad language that could encompass a panoply of claims, she later clarified in her response to Circassia's motion for summary judgment that she is only invoking these laws in response to her termination.

6 Circassia invokes the holding of *Smith* as the holding of "this Court," i.e., the Court of Appeals for the Fifth Circuit. That's incorrect. *Smith* is the holding of a judge in the Southern District of Texas and is not binding here.

7 To be clear, it *can* be enough in some cases. *See* *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 ("[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."). But evidence of falsity must be of sufficient "nature, extent, and quality" to make the inferential leap to discrimination a rational one. *Crawford*, 234 F.3d at 903.

8 Both parties make hay of a so-called "honest belief defense." Other than two unpublished district court cases that use that phrase in a descriptive manner, the parties cite nothing to support the existence of that defense and we find nothing in our caselaw that does so. *Singleton v. YMCA*, No. CV H-17-2903, 2019 WL 2617097, at *9 (S.D. Tex. June 26, 2019); *Royall v. Enter. Prods. Co.*, No. 3:19-CV-00092, 2021 WL 260770, at *7 (S.D. Tex. Jan. 5, 2021). Instead, these cases merely use that phrase to describe pretext itself. *See Singleton*, 2019 WL 2617097, at *9 (quoting *Sandstad*, 309 F.3d at 899). Honest belief is the same thing as absence of pretext because giving a false reason for an action to obscure the real reason—i.e., dishonesty—is the very definition of pretext. *See Pretext*, BLACK'S LAW DICTIONARY (5th pocket ed. 2016). Because pretext is already front-and-center in the *McDonnell Douglas* inquiry, we see little basis to spin off honesty as a standalone doctrinal issue.

9 While Owens asserts additional types of disparate treatment in her declaration, she does not argue that they were disparate treatment on appeal. These arguments are unavailing for much the same reason as those discussed here, but since they are not briefed, we do not address them.

10 The problem is not that Owens' declaration is self-serving, because "[t]here is nothing inherently wrong with self-serving statements." *Salazar*, 982 F.3d at 392 (Ho, J., concurring). The problem is that most of her declaration, a liturgical recitation of legal conclusions and factual inferences, does not provide the underlying facts supporting those inferences and conclusions. *See* *id.* (citations omitted).

11 It appears that Owens moved to compel production of data relevant to other RSMs including FCRs, communications between themselves, Casey, and their sales teams, and performance reviews. The problem is that Owens never requested production of those documents in and of themselves. Instead, she requested comparative data "that Circassia considered in arriving at the decision to terminate Owens' employment." Thus, Circassia produced all documents that it considered in its decision, which evidently fell short of what Owens thought Circassia had—or should have—considered. The magistrate judge to whom the motion was referred agreed with Circassia's position and denied the motion, so the record is devoid of documents we could use to compare Owens to other RSMs. We recount this not to say that the magistrate judge was incorrect, only to explain the dearth of useful data in the record.

12 Specifically, Casey testified that he expected higher performance from teams in mature markets with experienced reps than teams in new markets with inexperienced reps.

13 Circassia urges us to reject Owens' arguments on an additional basis: that two white male RSMs were placed on a PIP at the same time as Owens and are therefore appropriate comparators for disparate-treatment purposes, notwithstanding that they had a different supervisor. We do not reach this argument because Owens fails at the outset to establish that *any* RSM is a comparator.

14 *Gill* also held, applying the Sixth Circuit test in the alternative, that the plaintiff had failed to show that the employer had not made a sufficiently informed and considered decision. 790 F. App'x at 605–06.

15 Some of our precedent rejects failure-to-interview as a valid consideration in the pretext inquiry. *See* *Hanchey v. Energas Co.*, 925 F.2d 96, 99 (5th Cir. 1990) ("[F]ail[ing] to consult local personnel" before

firing an employee cannot show that the employer's "reasons are unworthy of credence"). But *Hanchey* and cases like it require a "pretext plus" evidentiary showing, wherein a plaintiff *must* provide some evidence of discriminatory motive because a factfinder could *never* infer that motive from the apparent falsity of an employer's justification alone. *See* *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1508 n.6 (5th Cir. 1988) (relied upon by *Hanchey*). That approach was unequivocally rejected by our en banc court in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc), and by the Supreme Court in *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097.

16 Although the district court characterized the sum of Owens' evidence as mere disagreement with Circassia's assessment and investigatory practices, that is not entirely accurate. We nevertheless affirm because we may do so "on any ground supported by the record." *McIntosh v. Partridge*, 540 F.3d 315, 326 (5th Cir. 2008) (quotation and internal quotation marks omitted).

17 Owens has not, for example, provided evidence that Circassia was "unable to express coherent, consistent criteria" for terminating her, invoking "different rationales ... at different times." *Gosby*, 30 F.4th at 528. That kind of freewheeling, standardless rationale is inherently suspicious in a way that, depending on the facts of a particular case, could give rise to a rational inference of discrimination when combined with a prima facie case.

18 As with discrimination, retaliation claims under § 1981 and Title VII "are parallel causes of action" that require "proof of the same elements in order to establish liability." *Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 340 (5th Cir. 2003).

End of Document

EXHIBIT 4

49 F.4th 918
United States Court of Appeals, Fifth Circuit.

Bailie BYE, Plaintiff—Appellant,

v.

MGM RESORTS INTERNATIONAL, INCORPORATED, doing business as Beau Rivage Resort and Casino, Defendant—Appellee.

No. 22-60034

FILED September 28, 2022

Synopsis

Background: Former employee brought state action against employer, alleging pregnancy and sex discrimination, harassment, and constructive discharge under **Title VII**. Following removal, the United States District Court for the Southern District of Mississippi, Halil Suleyman Ozerden, J., 2021 WL 5985121, granted summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Appeals, Jones, Circuit Judge, held that:

[1] employee failed to establish prima facie case of harassment and hostile work environment under **Title VII**;

[2] employee failed to establish that working conditions were so intolerable that reasonable person would feel compelled to resign, precluding liability for constructive discharge; and

[3] district court did not abuse its discretion by dismissing employee's Fair Labor Standards Act (**FLSA**) claim invoked for first time in response to employer's motion for summary judgment.

Affirmed.

Ho, Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (17)

[1] **Federal Courts** ⬅ Summary judgment

Court of Appeals reviews a district court's grant of summary judgment de novo, applying the same standard as the district court. Fed. R. Civ. P. 56.

[2] **Federal Civil Procedure** ⬅ Burden of proof

Once party moving for summary judgment has initially shown that there is an absence of evidence to support the non-moving party's cause, the non-movant must come forward with specific facts showing a genuine factual issue for trial. Fed. R. Civ. P. 56.

[3] **Civil Rights** ⬅ Practices prohibited or required in general; elements

Title VII does not prohibit all harassment. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[4] **Civil Rights** ⬅ Hostile environment; severity, pervasiveness, and frequency

Standards for judging hostility are sufficiently demanding to ensure that **Title VII** does not become general civility code. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[5] **Civil Rights** ⬅ Hostile environment; severity, pervasiveness, and frequency

Standards for judging hostility, for purposes of **Title VII** claim, are intended to filter out complaints attacking ordinary tribulations of workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[6] **Civil Rights** Adverse actions in general

Civil Rights Adverse actions in general

Allegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation under **Title VII**. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[7] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

There must be discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter conditions of plaintiff's employment and create abusive working environment to constitute hostile work environment under **Title VII**. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[8] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

In order to establish a hostile work environment claim under **Title VII** based on sexual harassment, employee has to demonstrate that (1) the employee belonged to a protected class; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[9] **Civil Rights** Sex discrimination

Female employee failed to establish prima facie case of harassment and hostile work environment under **Title VII**, although employee claimed that other employees chose to and purposefully failed to break her on time, harassed her by clapping when she had to go to hospital for her child, and refused to work with her; employee provided no evidence regarding who said what, or how often, or how treatment was related to her needing to take lactation breaks. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[10] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

For conduct to be sufficiently severe or pervasive to constitute hostile work environment under **Title VII**, it must be both objectively and subjectively offensive. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[11] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To determine whether work environment is objectively offensive so as to constitute hostile work environment under **Title VII**, court considers totality of circumstances, including (1) frequency of discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely offensive utterance; and (4) whether it interferes with employee's work performance. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[12] **Civil Rights** Constructive discharge

Employee failed to establish that working conditions were so intolerable that reasonable person would have felt compelled to resign, precluding liability for constructive discharge under **Title VII**; employee conceded that she received her lactation breaks most of the time, even if they were 30 minutes to an hour past scheduled time, and reasonable employee in her shoes would not have considered late lactation breaks so intolerable as to compel resignation, especially given management's ongoing efforts to accommodate her requests. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[13] **Civil Rights** Constructive discharge

To prove a constructive discharge, a **Title VII** plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[14] **Civil Rights** Constructive discharge

Constructive discharge requires a greater degree of harassment than that required by a **Title VII** hostile environment claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[15] **Civil Rights** Constructive discharge

Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge under **Title VII**. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[16] **Federal Civil Procedure** Matters considered

District court did not abuse its discretion by dismissing employee's **FLSA** claim invoked for first time in response to employer's motion for summary judgment; employee was represented by competent counsel, several claims she pled all arose from **Title VII**, employee attempted to raise **FLSA** claim months after deadline for pleading amendments, well after discovery cutoff date, and within month or two of trial setting, **FLSA** claim for denial of lactation breaks invoked different facts and remedies than **Title VII**, and at no point during two-year pendency of case had employee alluded to **FLSA** claim. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(r); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[17] **Federal Civil Procedure** Matters considered

Claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court. Fed. R. Civ. P. 56.

1 Cases that cite this headnote

***920** Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 1:20-CV-3, Halil S. Ozerden, U.S. District Judge

Attorneys and Law Firms

Daniel Myers Waide, Esq., Johnson, Ratliff & Waide, Hattiesburg, MS, for Plaintiff—Appellant.

Tammy Lynn Baker, Attorney, Jackson Lewis, P.C., Birmingham, AL, for Defendant—Appellee.

Before Jones, Ho, and Wilson, Circuit Judges.

Opinion

Edith H. Jones, Circuit Judge:

Plaintiff is a working mother who brought suit against her employer for pregnancy discrimination under **Title VII**, constructive discharge, and creating a hostile work environment. The district court granted summary judgment to her employer because she failed to create triable fact issues. We concur. We also find no error or abuse of discretion in the district court's dismissal of her belatedly-raised Fair Labor Standards Act ("**FLSA**") claim. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11, 135 S. Ct. 346, 346, 190 L.Ed.2d 309 (2014) (per curiam) is inapposite. The judgment is AFFIRMED.

BACKGROUND

Defendant Beau Rivage Resorts, LLC operates a casino and resort facility in Biloxi, Mississippi. Plaintiff Bailie Bye was employed at Beau Rivage as a server at Defendant's Terrace Café from January 7, 2015, until she gave two weeks' notice on June 28, 2019. She brought suit against Beau Rivage alleging that, while she was employed, she was

subject to pregnancy and sex discrimination, harassment, and constructive discharge in violation of Title VII of the Civil Rights Act. Specifically, she challenges the adequacy of her lactation breaks and she alleges harassment from co-workers due to her lactation breaks.

***921** As a matter of course, servers at the Terrace Café were provided a mandatory 30-minute break and two additional optional 15-minute breaks during their shifts. They would generally follow a breaker schedule to track their breaks. For each shift, one of the servers would serve as a "breaker," who was responsible for relieving each server for his or her break. The breaker would relieve those who started earliest in the shift and rotate to those who arrived later. The earliest arrivals would come in at 6am, the next round at 8am, and the last round at 1pm. Servers were sometimes delayed, however, from taking their breaks for any number of reasons including staffing, shift changes, the number of patrons in the restaurant, or customers lingering at the table. It was in the servers' best interest to delay a break until a table's entrée was served in order to retain the tip from that table instead of having the table (and the accompanying tip) transferred to the breaker. This was especially true given the added complication of having to involve a manager to close out a check for a server who was on break.

Ms. Bye returned to work from maternity leave on March 10, 2019. She worked the 8am-4pm shift. Upon her return, she requested two 30 to 40-minute lactation breaks. At first, she did not request that her breaks occur at any particular time. Her request was approved, and she received access to a locked lactation room. She typically received her first break according to the breaker schedule and her second break after the breaker relieved the other servers. For just over two months, Ms. Bye took either two 30-minute breaks or one hour-long break each full day she worked.

On May 11, 2019, Ms. Bye sought a modified accommodation, seeking two 45-minute breaks at specific times—the first at 10am and the second at 1pm. She included a medical certification from her physician, which stated that "she must be able to pump breast milk twice during her shift in 45 min increments, once at 10:00am and at 1:00 pm." Management was initially concerned that scheduling breaks at specific times would be difficult due to the unpredictable nature of the business and the need for flexibility in order to maintain continuity in service. Thus, in response to her request, Beau Rivage offered Ms. Bye three options: (1) she could work the earlier 6am shift, allowing her to take an earlier break at 8am; (2) she could work as the breaker for as long as she needed to in order to take her breaks as needed; or (3) she could break once in the morning and once in the afternoon for 45 minutes as close as possible to the times she requested, but not necessarily at those exact times. Ms. Bye rejected all three proposals.

Nevertheless, management granted Ms. Bye's request for an accommodation on June 14, 2019, indicating that she could take her first break sometime between 10am and 10:30am and her second break sometime between 1pm and 1:30pm. According to Beau Rivage, in compliance with this new schedule, Ms. Bye's manager would speak with the breaker at the beginning of every shift to ensure that Ms. Bye received her breaks at the necessary time. When the breaker was unable to accommodate Ms. Bye's schedule, one of the managers would step in and cover her tables or close her section so she could go on her break. Ms. Bye contends, on the other hand, that her breaks were "sporadic, sometimes not occurring at all" and sometimes occurring "30 minutes to over an hour past time." She suggests that there were multiple times when the breaker did not respect her specific break time and that there was effectively "no accommodation made for Ms. Bye to take breaks."

***922** Ms. Bye further alleges that her co-workers began to harass her as a result of this new break schedule. She describes various instances where co-workers got frustrated with her for wanting to leave early or for taking her breaks. She asserts that her co-workers did not want to work with her and that they made negative comments to her about her lactation breaks. She also contends that her general manager was attempting to terminate her, but her belief is based entirely on the fact that one of the restaurant hostesses, Jennifer Cress, told Ms. Bye that Jennifer knew about a group message among restaurant workers where an unidentified person stated that the general manager "was working on getting rid of [Plaintiff]." Ms. Bye never saw this message herself, and Jennifer told her that she did not "know how true it is" or "who it came from" because she was not a participant in the group message.

Due to this alleged mistreatment, Ms. Bye contends that she complained to human resources about not receiving breaks as scheduled and the purported harassment by her co-workers, but that nothing ultimately came of her reports. She testified in her deposition that, "[r]ight when [she] was finally starting to actually get pump breaks at the times that [she] needed them, the harassment had gotten overwhelming." She gave two weeks' notice on June 28, 2019.

On May 29, 2019, Ms. Bye filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging harassment, sex discrimination, and retaliation due to being "denied the ability to take needed breaks and use a breast pump." She filed a second charge with the EEOC on August 2, 2019, alleging retaliation and that she "was forced to quit [her] job at the Beau Rivage due to them refusing to allow [her] to take breaks to pump breast milk, along with harassment from [her] coworkers." The EEOC issued right to sue letters for both charges on September 17, 2019.

On November 13, 2019, Ms. Bye filed suit against Beau Rivage in the Circuit Court of Harrison County, Mississippi, alleging pregnancy and sex discrimination, harassment, and constructive discharge in violation of **Title VII**. Defendants removed the case to federal court.

The district court granted summary judgment to Beau Rivage, holding that Ms. Bye did not present sufficient evidence to support a prima facie case of either disparate treatment, harassment, or constructive discharge. Regarding her allegations of inadequate lactation breaks, the court further noted that, even if Ms. Bye could support a prima facie case of disparate treatment, her claim would still fail because Beau Rivage has articulated legitimate, nondiscriminatory reasons for not giving her breaks at the exact times requested.

Ms. Bye also invoked the **FLSA** for the first time in response to the motion for summary judgment, and the district court rejected the claim as untimely and not properly before the court. Ms. Bye appealed.

STANDARD OF REVIEW

[1] [2] This court reviews a district court's grant of summary judgment *de novo*, "applying the same standard as the district court." *Brandon v. Sage Corp.*, 808 F.3d 266, 269 (5th Cir. 2015) (citing *Roberts v. City of Shreveport*, 397 F.3d 287, 291 (5th Cir. 2005)). A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56; *see also* ***923** *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). But "[o]nce the moving party has initially shown that there is an absence of evidence to support the non-moving party's cause, the non-movant must come forward with specific facts showing a genuine factual issue for trial." *U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (internal quotation marks omitted).

DISCUSSION

Ms. Bye raises three primary arguments [1] on appeal. First, she challenges the district court's conclusion that she failed to make out a prima facie case of harassment or hostile work environment. Second, she suggests that her constructive discharge claim should have made it to a jury. Third, she contends that the district court erred by dismissing her **FLSA** claim.

I. Harassment/Hostile Work Environment

[3] [4] [5] [6] [7] The district court held that Ms. Bye failed to establish a prima facie case of harassment or hostile work environment. "**Title VII** does not prohibit all harassment." *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 325 (5th Cir. 2019), *as revised* (Feb. 7, 2019). The "standards for judging hostility are sufficiently demanding to ensure that **Title VII** does not become a 'general civility code.' " *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283–84, 141 L.Ed.2d 662 (1998) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 1002, 140 L.Ed.2d 201 (1998)). These standards are intended to "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.* at 788, 118 S. Ct. at 2284 (internal quotation marks omitted). "[A]llegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation." *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 826 (5th Cir. 2019) (internal quotation marks omitted). Rather, there must be "discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment." *Badgerow v. REJ Properties, Inc.*, 974 F.3d 610, 617 (5th Cir. 2020) (internal quotation marks and alterations omitted).

[8] In order to establish a hostile work environment claim, Ms. Bye had to demonstrate that

> (1) the employee belonged to a protected class; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

Woods v. Delta Beverage Grp., Inc., 274 F.3d 295, 298 (5th Cir. 2001). The district court determined that, "at a minimum the third and fourth elements are problematic" for Ms. Bye. It concluded that she failed to produce "any competent summary judgment evidence, other than her own conclusory assertions or subjective beliefs," that indicated that the alleged harassment was related to her lactation breaks. While she provided comments that her co-workers made about her taking breaks to pump, she has submitted no evidence showing the ***924** frequency of the comments or who specifically made them. Additionally, according to the district court, the conduct described by Ms. Bye was not "sufficiently severe or pervasive," as she again failed to demonstrate that the alleged hostility was more than "mere offensive utterances," which are not sufficient to establish a claim under **Title VII**.

[9] We find nothing problematic about the district court's assessment of the evidence. Ms. Bye contends that the district court inappropriately dismissed evidence that "employees chose to and purposefully failed to break Ms. Bye on time, harassed Ms. Bye by clapping when she had to leave to go to the hospital for her child, [and] refus[ed] to work with Ms. Bye." But as the district court observed, Ms. Bye provided no evidence regarding who said what or how often, or how this treatment was related to her needing to take lactation breaks. All the court had was Ms. Bye's own account, unsupported by competent evidence. And her subjective beliefs as to the motivation of others are insufficient.

[10] [11] Additionally, the level of mistreatment she claims occurred would not constitute harassment or a hostile work environment under **Title VII**. For conduct to be sufficiently severe or pervasive, it must be both objectively and subjectively offensive. *Badgerow*, 974 F.3d at 617–18. To determine whether the work environment is objectively offensive, the court considers the totality of the circumstances, including "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance." *Id.* at 618 (internal quotation marks omitted). "No single factor is determinative." *Id.* (internal quotation marks omitted).

Ms. Bye's allegations do not support a finding that the conduct was objectively severe. At worst, her co-workers were unkind to her, and she had difficulty working with some of them. But not all troubled work relationships can be remedied by federal law. **Title VII** is not a tool to exact revenge on those with whom one does not get along. The picture she paints is not of a hostile or abusive working environment as evaluated by the totality of the circumstances. Ms. Bye's harassment claim fails as a matter of law.

II. Constructive Discharge

[12] [13] For similar reasons, the court correctly granted summary judgment on Ms. Bye's constructive discharge claim. She contends that Beau Rivage constructively discharged her by not allowing her to take lactation breaks as needed. "To prove a constructive discharge, a 'plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign.' " *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001) (quoting *Faruki v. Parsons*, 123 F.3d 315, 319 (5th Cir. 1997)). This court has considered the following events relevant in determining whether a reasonable employee would feel compelled to resign:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) offers of early retirement that would make the

> employee worse off whether the offer were accepted or not.

Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 991 (5th Cir. 2008) (quoting *Aryain v. Wal–Mart Stores Tex. LP*, 534 F.3d 473, 481 (5th Cir. 2008)).

***925** [14] [15] Ms. Bye seeks to rely upon the "badgering, harassment, or humiliation" by other employees, but, again, she has provided insufficient evidence that conditions were so intolerable that she was compelled to resign. "Constructive discharge requires a greater degree of harassment than that required by a hostile environment claim." *Brown*, 237 F.3d at 566. "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge ...." *Id.* On appeal, she faults the district court for allegedly failing to consider the physical pain she endured because she did not receive her lactation breaks on time. And while there is no evidence to question that Ms. Bye experienced discomfort, she concedes she received her lactation breaks most of the time, even if they were 30 minutes to an hour past the scheduled time. A reasonable employee in Ms. Bye's shoes would not have considered these late lactation breaks so intolerable as to compel resignation, especially given management's ongoing efforts to accommodate her requests. Ms. Bye's subjective disparagement of management's efforts, given much evidence of the difficulty of arranging breaks exactly while also accommodating servers' needs to close out tables, is not sufficient to maintain her constructive discharge claim.

III. FLSA

[16] [17] Finally, Ms. Bye challenges the district court's dismissal of her untimely raised **FLSA** claim. Ms. Bye never alluded to an **FLSA** claim until she responded to the defendant's motion for summary judgment. The district court determined that this belated reference demonstrated the claim was not properly presented. *See Douglas v. Wells Fargo Bank, N.A.*, 992 F.3d 367, 373 (5th Cir. 2021). It is true that "[a] claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court." *Jackson v. Gautreaux*, 3 F.4th 182, 188 (5th Cir. 2021) (quoting *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005)). Indeed, this court has "repeatedly emphasized this rule." *Id.* at 188–89 (collecting cases).

Ms. Bye, however, relies on the Supreme Court's statement in *Johnson v. City of Shelby, Miss.*, that "[f]ederal pleading rules ... do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." 574 U.S. 10, 11, 135 S. Ct. 346, 346, 190 L.Ed.2d 309 (2014) (per curiam). In *Johnson*, the plaintiffs' failure to cite 42 U.S.C. § 1983 in their complaint was a hypertechnical error, given that the only plausible basis for federal court jurisdiction there was that the plaintiffs were terminated in violation of their First Amendment rights by their public employer, which could only proceed according to § 1983.[2] *Id.* at 11, 135 S. Ct. 346 –47. The Supreme Court cited *Twombly*[3] and ***926** *Iqbal*[4] in concluding that plaintiffs' allegations plainly "informed [the Defendant] of the factual basis for the[ ] complaint," as a result of which the plaintiffs were "required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* at 12, 135 S. Ct. at 347.

Johnson is inapposite here for various reasons. First, the only claim considered by the Supreme Court was plaintiffs' sole claim under Section 1983, whereas here, the plaintiff's pleadings exclusively and repeatedly focus on **Title VII** claims alone. In *Johnson*, the Court noted that the plaintiffs' recitation of facts left no room for doubt as to the legal basis for their claim, *see id.*, whereas here, the plaintiff, represented by highly competent counsel, was the mistress of her complaint, and the several claims she pled all arose from **Title VII**. Neither the defendant nor the district court were required to read into the carefully stated complaint (together with exhibits demonstrating exhaustion of **Title VII** remedies) a wholly different claim that was not pled. This is one reason why this court has "repeatedly emphasized" that new claims need not be considered when first raised in responses to summary judgment motions.

Second, nothing in *Johnson* purports to supersede the ordinary rules of case management prescribed by the Federal Rules of Civil Procedure. To be clear, in *Johnson*, the

lower courts had granted and affirmed summary judgment based on plaintiffs' pleading omission, but the Court's opinion is premised on the obviousness of Section 1983 as the vehicle under which the claim had proceeded. Here, the progress of the case was quite different. The district court explained that Ms. Bye's attempt to raise an FLSA claim occurred months after the deadline for pleading amendments, well after the discovery cutoff date, and within a month or two of the trial setting. The court emphasized, correctly, how the case had developed for nearly two years in light of scheduling conferences and orders intended precisely to shape the case for impending trial or other final resolution.

Third, an FLSA claim for denial of lactation breaks invokes different facts and remedies than Title VII, e.g., claims for failure to pay overtime and potential double damages. *See* 29 U.S.C. § 207(r)(1)(A), Sec. 216. Although Section 207(r) specifies that an employer has no duty to compensate an employee for lactation breaks, the Department of Labor has ruled that if the employee uses regular break time for lactation, she must be paid in tandem with other employees.[5] Nothing in plaintiff's pleading asserted any damage claim consistent with the FLSA pregnancy provision. The district court noted this deficiency, stating that no facts had been adduced that as to unpaid minimum wage or overtime, nor did Ms. Bye claim other FLSA-related damages, e.g., the employer's abuse of exceptions like sick leave. In fact, because this provision has generally been enforced by the Labor Department rather than individual plaintiffs, the plaintiff's belated attempt to inject an FLSA claim here left the court and the defendants largely in the dark about its potential reach and consequences. Contrary to the dissent, this was a "new" claim.

Fourth, in connection with case management, we note the district court considered *sua sponte* whether Ms. Bye should be permitted to amend and add the FLSA *927 claim, but it rejected that option. The Supreme Court's *Johnson* opinion does not discuss the implications to be drawn from Fed. R. Civ. Pro. 16, but it seems unlikely that in the course of holding only that facts, rather than legal theories, matter at the pleading stage, the Court intended to upset the case management framework articulated in Rule 16, titled "Pretrial Conferences; Scheduling, Management." Briefly summarizing its detailed provisions (which are further usually elaborated on by local district court rules), the purposes of pretrial conferences include expediting disposition of the action; establishing early and continuing judicial control to avoid protracting the case; improving the quality of trial through more thorough preparation; and facilitating settlement. Rule 16(a). Further, a court *must* ordinarily issue a scheduling order that, *inter alia*, limits the time to amend the pleadings, complete discovery, and file dispositive motions. Rule 16(b)(2), (3)(A). Finally, among many case management aims stated for pretrial conferences, the court "may" "formulat[e] and simplify[ ] the issues, and eliminat[e] frivolous claims and defenses." Rule 16(c)(2)(A). Each of these steps had occurred in this case, more than once. Yet at no time during the two-year pendency of the case had Ms. Bye alluded to an FLSA claim, and the parties were on the verge of trial when the district court ruled on defendant's motion for summary judgment. The court cited the length of her delay, the prejudice to the defendant, and the burden on the court from a continuance that would be required to address her new claim. The belated FLSA claim was an abuse of the opposing party and the court, and it was no abuse of discretion for the district court to deny an amendment. Moreover, Ms. Bye failed to address this aspect of the court's decision and has forfeited any challenge to it. *In re Southmark Corp.*, 163 F.3d 925, 934 n.12 (5th Cir. 1999). In essence, she concedes the impropriety of her dilatory maneuver.

Fifth, our colleague cites two cases that allegedly adopted a "broad" version of *Johnson*, but each is plainly distinguishable. The Second Circuit in *Quinones* reversed a Rule 12(b)(6) dismissal on the pleadings where the district court incorrectly found no Sec 1981 discrimination claim had been pled---despite that the plaintiff's first paragraph stated, "[t]he claim for discriminatory conduct based on Hispanic origin is brought pursuant to 42 U.S.C. Sec. 1981." *Quinones v. City of Binghamton*, 997 F.3d 461, 468-69 (2d Cir. 2021). Plaintiff's complaint also alleged he sustained damages because he was discriminated against on the basis of Hispanic origin." *Id.* Unlike this case, *Quinones* had not proceeded through the court-supervised pretrial management process to the end of discovery and verge of trial before the "new" claim had been articulated. And in *Koger v. Dart*, 950 F.3d 971, 974-75 (7th Cir. 2020), the Seventh Circuit noted that the magistrate judge *herself* had understood a prisoner plaintiff's suit to include a due process damage claim for the prison's loss of his books, even though the court later held the claim was insufficiently pled. There was no surprise to the defendants or the court about that claim

which had been maintained from the outset. And again, there is no discussion of the impact of pretrial case management upended by the plaintiff's tactic of belated articulation. We do not disagree with *Johnson*, nor with the sister circuits' decisions, but each case must be understood in its specific procedural setting. The procedural setting of the instant case likewise necessarily bears on the latitude with which the "facts only" pleading rules apply as a case moves further, via case management principles, toward trial or definitive motion practice.

*928 CONCLUSION

For the foregoing reasons, the judgment is AFFIRMED.

James C. Ho, Circuit Judge, concurring in part and dissenting in part:

The Fair Labor Standards Act is often understood as helping workers by providing extra pay for extra hours worked. But "that is not the only way—and perhaps not even the best way—to understand the **FLSA**." *Hewitt v. Helix Energy Sols. Grp.*, 15 F.4th 289, 303 (5th Cir. 2021) (en banc) (Ho, J., concurring), *cert. granted*, — U.S. —, 142 S. Ct. 2674, 212 L.Ed.2d 762 (2022). What drives many Americans is not higher pay, but a better life. What gets countless citizens out of bed each morning is not work, but family. Many workers prefer "more free time over more money," because that means more opportunity to "rest, recreate, and spend time with loved ones." *Id.* In sum, the **FLSA** helps many workers lead more joyous and abundant lives by offering not greater compensation, but better working conditions.

Consistent with these principles, Congress amended the **FLSA** in 2010 to require employers to provide nursing mothers reasonable unpaid break time to express breast milk after the birth of a child. Pub. L. No. 111-148, § 4207, 124 Stat. 119, 577-78 (2010). As amended, the Act requires employers to "provide ... a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk," and "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 207(r)(1)(A)-(B).

The complaint in this case appears to plead all of the facts necessary to support a claim that the Beau Rivage Resort and Casino in Biloxi, Mississippi, violated Bailie Bye's rights to a reasonable break time for nursing as required by the 2010 amendments to the **FLSA**. Specifically, Bye's complaint alleges that the lactation breaks that the Beau Rivage afforded her "were sporadic." "The room was filthy, and [she] had to complain to make sure that the room was cleaned up so that the room was sanitary to pump." "Every time she needed a break [she] was questioned or told that she had to wait." Her "breast became engorged" because she "was not given regular breaks," leading to "unbearable pain at work." She was "told that she could not take a break until employees who had not taken their breaks yet had taken their breaks." As a result, she was only given her break "hours past its required time." "Because of [her] pumps breaks," "co-workers began to harass" her. She was eventually "forced to leave her employment because she could no longer endure the harassment and physical pain from not being allowed to take her pump breaks."

These allegations would seem to be well sufficient to state a claim under the **FLSA**, but for one problem: The complaint does not mention the **FLSA**. It mentions only **Title VII** of the Civil Rights Act of 1964.

The panel majority concludes that this omission is fatal to the **FLSA** claim, and accordingly dismisses it without addressing its merits.

I respect the majority's reasoning. But I'm not sure it's consistent with governing Supreme Court precedent.

I.

Reasonable minds can disagree over how much detail a plaintiff should be required to include in a complaint—and how best to strike the balance between ensuring ***929** fair notice to defendants and avoiding unnecessary burden on plaintiffs. In this case, Bye's complaint mentions no statutory basis for relief other than **Title VII**. So Beau Rivage might reasonably infer that Bye deliberately chose not to pursue relief under any provision of law other than **Title VII**. *Expressio unius* usually means *exclusio alterius*. *See ante*, at 925-26.

But the Supreme Court has made clear that plaintiffs need only plead facts—not legal theories.

In *Johnson v. City of Shelby, Mississippi*, 574 U.S. 10, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014) (per curiam), the Supreme Court summarily reversed our court for mistakenly requiring plaintiffs to plead legal theories as well as facts. The Court explained that "[a] plaintiff ... must plead *facts* sufficient to show that her claim has substantive plausibility." *Id.* at 12, 135 S. Ct. 346, 346 (emphasis added). It concluded that the complaint in that case alleged sufficient facts: "Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city." *Id.*

And here's the kicker: "Having informed the city of the factual basis for their complaint, they were required to do *no more* to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* (emphasis added).

So *Johnson* makes clear that "it is *unnecessary* to set out a legal theory for the plaintiff's claim for relief." *Id.* (quotations omitted, emphasis added).

Other circuits have interpreted *Johnson* similarly. The Seventh Circuit summed it up this way: Under *Johnson*, "[c]omplaints plead *grievances*, not legal theories." *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020). So it didn't matter that a complaint "initially relied only on the First Amendment"—the plaintiff could still invoke the Due Process Clause "at later stages of the suit." *Id.* at 975. What's more, the plaintiff "did not [even] need to amend the complaint to do so." *Id.* The Second Circuit has taken the same approach. *See* *Quinones v. City of Binghamton*, 997 F.3d 461, 468 (2nd Cir. 2021) ("[T]he complaint identifies a single cause of action for retaliation and does not similarly label a cause of action for discrimination. But this failure is not fatal here.") (following *Johnson*).

To be sure, I can understand the temptation to reconceptualize *Johnson*. After all, the plaintiffs there plainly alleged a constitutional violation by the city—their complaint just neglected to mention 42 U.S.C. § 1983. It would surely be "obvious" to any defendant—and certainly to any municipal lawyer worth their salt—that a complaint that alleges a constitutional violation by a city surely means to seek relief under § 1983. *See ante*, at 926 (noting "the *obviousness* of Section 1983 as the vehicle under which the claim had proceeded" in *Johnson*) (emphasis added).

So it would have been easy for the Court to decide *Johnson* based on the inherent obviousness of § 1983 claims, and nothing more.

But it didn't. *Johnson* is premised not on § 1983, but on general pleading principles.

II.

Before I conclude, I offer a few brief rebuttals to various additional points made by the panel majority.

1. The majority tries to distinguish this case from *Johnson* on the ground that "each case must be understood in its specific procedural setting." *Ante*, at 927.

As the majority explains, Bye did not refer to the **FLSA** until "well after ... discovery," when she "first raised [it] in responses to summary judgment motions." ***930** *Id.* at 926. Based on that procedural posture, the majority concludes that allowing Bye's claim to proceed at this stage would "supersede the ordinary rules of case management" and "upset the case management framework articulated in Rule 16." *Id.* at 926, 926–27.

But *Johnson* involved precisely the same procedural posture. Like Bye, the plaintiffs in *Johnson* did not mention their statutory basis for relief until "after" discovery, in response to a motion for summary judgment. *See* *Johnson v. City of Shelby*, 743 F.3d 59, 61 (5th Cir. 2013), *rev'd*, 574 U.S. 10, 135 S.Ct. 346, 190 L.Ed.2d 309 ("Following discovery, the City ... filed a motion for summary judgment," where it "argued that it was entitled to judgment in its favor because [the plaintiffs] did not invoke 42 U.S.C. § 1983 in their complaint.").

2. The majority offers another observation about the procedural posture of this case: The court below "considered *sua sponte* whether Ms. Bye should be permitted to amend

and add the FLSA claim, but it rejected that option." *Ante*, at 926–27. That is significant, the majority says, because "it was no abuse of discretion for the district court to deny an amendment"—and what's more, "Bye failed to address this aspect of the court's decision and has [thus] forfeited any challenge to it." *Id.* at 927. And in the absence of an amendment, the majority contends, Bye's FLSA claim conflicts with the established principle that "new claims need not be considered when first raised in responses to summary judgment motions." *Id.* at 926.

But *Johnson* makes clear that there was no need for Bye to amend her complaint.

To begin with, no amendment was necessary because the complaint is already sufficient. That's the whole point of *Johnson:* Facts are enough—and legal theory is not required—to state a claim. *See* 574 U.S. at 12, 135 S.Ct. 346 ("no more" is "required" than providing a "factual basis for the[ ] complaint," and "it is unnecessary to set out a legal theory") (quotations omitted).

What's more, the Court noted that the plaintiffs there should "be accorded an opportunity" to amend their complaint—but only for purposes of "clarification," not legal mandate. *See id.* ("For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983."); *see also Koger*, 950 F.3d at 975 (under *Johnson*, plaintiff "did not need to amend the complaint").

3. Finally, the majority observes that Bye failed to allege damages in the form of either "unpaid minimum wage or overtime," as contemplated by 29 U.S.C. § 216(b). *Ante*, at 926. But that is not surprising. As the Labor Department has noted, unpaid minimum wages and overtime compensation are not the appropriate remedies for violations of the FLSA nursing provision "in most circumstances."[1] I ***931** have found no circuit opinions to date that analyze what remedies are available under 29 U.S.C. § 207(r)(2) for plaintiffs like Bye. But in all events, the point is that the district court should have decided Bye's FLSA claim on the merits, rather than refuse to consider her claim altogether.

* * *

I agree with the majority with respect to the Title VII claim. I disagree as to the FLSA claim. Accordingly, I concur in part and dissent in part.

All Citations

49 F.4th 918

Footnotes

1 Ms. Bye does not challenge on appeal the district court's rejection of her disparate-treatment claims.

2 In support of this holding, the Court cited an employment discrimination case for the proposition that "imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2),' " thus suggesting that this conclusion is not limited to the § 1983 context. *Johnson*, 574 U.S. at 11, 135 S. Ct. at 347 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 998, 152 L.Ed.2d 1 (2002)); *see also, e.g.*, *Melvin v. Barr Roofing Co.*, 806 F. App'x 301, 308 (5th Cir. 2020) (unpublished) (*Johnson* applied to hostile work environment claim); *Thomas v. S. Farm Bureau Life Ins. Co.*, 751 F. App'x 538, 540 n.9 (5th Cir. 2018) (unpublished) (*Johnson* applied to wrongful discharge claim). Unpublished cases from this court are, however, non-precedential.

3 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

4 *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009).

5 FAQs pertinent to Section 207(r), at dol.gov/agencies/whd/nursing-mothers/faq, visited 9/27/2022.

1 *See, e.g.*, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073-01, 80078 (Dec. 21, 2010) ("Section 7(r) of the **FLSA** does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. 216(b). Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks."); *see also* 29 U.S.C. § 207(r)(2) ("An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.").

End of Document

EXHIBIT 5

ND

31 F.4th 990
United States Court of Appeals, Fifth Circuit.

Lesley Ann SAKETKOO, Medical Doctor, Master of Public Health, Plaintiff—Appellant,

v.

ADMINISTRATORS OF the TULANE EDUCATIONAL FUND, Defendant—Appellee.

No. 21-30055

FILED April 21, 2022

Synopsis

Background: Former associate professor, a female physician, brought employment discrimination action against administrators of educational fund for private university's school of medicine, asserting claims for gender discrimination, retaliation, and hostile work environment under Title VII. The United States District Court for the Eastern District of Louisiana, Lance M. Africk, J., 510 F.Supp.3d 376, granted summary judgment in favor of administrators. Associate professor appealed.

Holdings: The Court of Appeals, Stewart, Circuit Judge, held that:

[1] male physicians proffered by associate professor were not valid comparators for establishing "similarly situated" prong of prima facie case of gender discrimination based on disparate treatment;

[2] non-discriminatory reasons proffered by administrators for declining to renew associate professor's contract were not pretextual;

[3] associate professor did not engage in protected activity before administrators made decision not to renew her contract, and, thus, associate professor failed to make prima facie case of retaliation;

[4] associate professor's comments to dean about male supervisor's discrimination were not "but for" cause of alleged adverse employment action, and, thus, professor could not prevail on retaliation claim; and

[5] supervisor's sporadic and abrasive conduct over the course of four years was insufficiently severe or pervasive to support hostile work environment claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (35)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews a district court's grant of summary judgment de novo. Fed. R. Civ. P. 56(a).

[2] **Federal Civil Procedure** Materiality and genuineness of fact issue

A fact is "material" if its resolution in favor of one party on a motion for summary judgment might affect the outcome of the lawsuit under governing law. Fed. R. Civ. P. 56(a).

[3] **Federal Civil Procedure** Materiality and genuineness of fact issue

An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party on a motion for summary judgment. Fed. R. Civ. P. 56(a).

[4] **Civil Rights** Disparate treatment

In a disparate treatment case under Title VII, an employee must establish that her employer had a discriminatory intent or motive for taking a job-related action. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[5] **Civil Rights** Effect of prima facie case; shifting burden

When an employee offers circumstantial evidence showing discriminatory intent or

motive for taking a job-related action to support a disparate treatment claim under Title VII, courts carry out the burden-shifting analysis introduced in *McDonnell Douglas*, which first requires the employee to establish a prima facie case of discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[6] **Civil Rights** Disparate treatment

To establish a **prima facie** case of **sex discrimination** based on disparate treatment under Title VII, an employee generally must demonstrate that: (1) she is a member of a protected class; (2) she was qualified for the position she sought; (3) she suffered an adverse employment action; and (4) others similarly situated but outside the protected class were treated more favorably. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[7] **Civil Rights** Disparate treatment

To satisfy the "similarly situated" prong for establishing a **prima facie** case of **sex discrimination** based on disparate treatment under Title VII, the employee carries out a comparator analysis. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[8] **Civil Rights** Disparate treatment

Under the comparator analysis, as used to satisfy the "similarly situated" prong of a **prima facie** case of **sex discrimination** based on disparate treatment under Title VII, the employee must establish that she was treated less favorably than a similarly situated employee outside of her protected class in nearly identical circumstances. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[9] **Civil Rights** Disparate treatment

A variety of factors are considered when determining whether a comparator is similarly situated, for purposes of "similarly situated" prong of a **prima facie** case of **sex discrimination** based on disparate treatment under Title VII, including job responsibility, experience, and qualifications. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[10] **Civil Rights** Disparate treatment

An employee is required to show that the comparator's conduct is "nearly identical," not strictly identical in order to satisfy the "similarly situated" prong of a **prima facie** case of **sex discrimination** based on disparate treatment under Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[11] **Civil Rights** Disparate treatment

Male physicians proffered by former associate professor, a female physician, were not valid comparators for establishing "similarly situated" prong of prima facie case of gender discrimination based on disparate treatment under Title VII against administrators of educational fund for private university's school of medicine; male physicians did not share professor's research responsibilities, section assignments, or historical performances, and, although several male physicians were expected at some point to not earn enough to pay their salaries, professor did not earn enough to pay her salary every year of her employment with the school, resulting in her contract not being renewed. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[12] **Civil Rights** Disparate treatment

Non-discriminatory reasons proffered by administrators of educational fund for private university's school of medicine, including that associate professor, a female physician, was not earning enough to pay her salary, for declining to renew professor's contract were not pretextual, and, thus, professor could not prevail on her claim for gender discrimination

based on disparate treatment under Title VII; administrators had policy of retaining physicians operating at deficits who were heavily involved in medical education and mission-critical practices, including several male physicians that were identified as comparators, and sub-subspecialty that professor preferred to practice was not mission critical to the school. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[13] **Civil Rights** Sex discrimination

After an employee makes a **prima facie** case under the *McDonnell Douglas* framework of **sex discrimination** based on disparate treatment under Title VII, the burden of production shifts to the employer to offer an alternative non-discriminatory explanation for the adverse employment action, at which point the employee must show that this explanation is pretextual. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[14] **Civil Rights** Sex discrimination

The burden of proof remains with the employee throughout the burden-shifting analysis set forth in *McDonnell Douglas* for evaluating claims of sex discrimination based on disparate treatment under Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[15] **Civil Rights** Retaliation claims

The allocation of the burden of proof in Title VII retaliation cases depends on the nature of the plaintiff's evidence supporting the causation element. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[16] **Civil Rights** Retaliation claims

Where a plaintiff seeks to prove causation by circumstantial evidence, she carries the initial burden of establishing a prima facie case of retaliation under Title VII, and the retaliation claim is analyzed under a *McDonnell Douglas* burden-shifting framework. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[17] **Civil Rights** Practices prohibited or required in general; elements

To establish a prima facie case of retaliation under Title VII, an employee must show (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

2 Cases that cite this headnote

[18] **Civil Rights** Retaliation claims

If plaintiff establishes a prima facie case of retaliation under Title VII, then employer has the burden of production to provide a legitimate, nondiscriminatory reason for the adverse employment action; if the employer meets this burden, then plaintiff has the burden to prove that the proffered reason is pretextual. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[19] **Civil Rights** Retaliation claims

The burden of persuasion remains with the employee throughout the burden shifting analysis set forth in *McDonnell Douglas* for evaluating a retaliation claim under Title VII. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[20] **Civil Rights** Activities protected

Education Retaliation; whistleblowing

Associate professor, a female physician, did not engage in protected activity before

administrators of educational fund for private university's school of medicine made decision not to renew professor's contract, and, thus, professor failed to make prima facie case of retaliation under Title VII against administrators; although professor contacted school's office of institutional equity after male supervisor's alleged outburst, she did not file report or otherwise communicate that she was being discriminated against based on her gender, professor described supervisor's behavior as regrettably harsh, and first time professor notified administrators of supervisor's potential discrimination was during conversation with dean after being told about non-renewal. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[21] **Civil Rights** Activities protected

In a retaliation claim of protected opposition under Title VII, an employee must at least have referred to conduct that could plausibly be considered discriminatory in intent or effect, thereby alerting the employer of its discriminatory practices; a general allegation of hostility is not enough. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[22] **Civil Rights** Causal connection; temporal proximity

The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a "but for" cause of the adverse employment decision; the standard for establishing the causal link element of the plaintiff's prima facie case is much less stringent. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

1 Cases that cite this headnote

[23] **Civil Rights** Motive or intent; pretext

Civil Rights Causal connection; temporal proximity

To demonstrate that a causal link exists between the protected activity and the adverse employment action at the prima facie stage of a retaliation claim under Title VII, an employee can show close enough timing between her protected activity and the adverse employment action; alternatively, she can show "cat's paw causation" if a person who has retaliatory animus uses a decisionmaker to bring about an intended retaliatory action. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

2 Cases that cite this headnote

[24] **Civil Rights** Causal connection; temporal proximity

Education Retaliation; whistleblowing

Associate professor's comments to dean about supervisor's discrimination on the basis of gender were not "but for" cause of alleged adverse employment action, and, thus, professor could not prevail on retaliation claim under Title VII against administrators of educational fund for private university's school of medicine with respect to conversation between dean and prospective employer in which dean allegedly directed prospective employer not to hire professor; although prospective employer made statements to professor implying dean told him not to hire professor, prospective employer clarified that he made the statements of his own volition because it would be inappropriate to act contrary to decision of faculty practice partner by hiring professor whose contract school did not renew. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[25] **Civil Rights** Practices prohibited or required in general; elements

Even an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason for adverse employment action in a retaliation case under Title VII. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[26] **Civil Rights** Motive or intent; pretext

An employee can establish pretext in the context of retaliation under Title VII by showing that a discriminatory motive more likely motivated her employer's decision. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[27] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

In order to survive a motion for summary judgment on a retaliation claim under Title VII, the plaintiff must show a conflict in substantial evidence on the issue of whether proffered non-discriminatory reason for adverse employment action is pretextual. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[28] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

In determining whether a plaintiff has shown a conflict in substantial evidence on the issue of whether proffered non-discriminatory reason for adverse employment action is pretextual, as required to survive a motion for summary judgment on retaliation claim under Title VII, courts consider numerous factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e-3(a).

[29] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

A claim of hostile environment sex discrimination is actionable under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[30] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

An employee who brings a hostile work environment claim based on sex discrimination under Title VII must show that (1) she belongs to a protected class; (2) she was subjected to harassment; (3) harassment was based on sex; (4) harassment affected a term, condition, or privilege of employment; and (5) employer knew or should have known of harassment and failed to take remedial action. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

[31] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

To affect a term, condition, or privilege of employment, as required to support a hostile work environment claim under Title VII, the harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

[32] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Whether an environment is hostile or abusive, as would support a hostile work environment claim under Title VII, depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

[33] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment in the

context of a hostile work environment claim under Title VII. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

[34] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Male supervisor's sporadic and abrasive conduct over the course of four years was insufficiently severe or pervasive to support hostile work environment claim based on gender discrimination under Title VII asserted by associate professor, a female physician, against administrators of educational fund for private university's school of medicine, although other women at the school may have experienced severe or pervasive treatment; supervisor cut professor off and told her it was "not her place" to discuss the needs of the clinic, flailed his arms and yelled "I'm sick of this" when professor inquired about the use of funds, and chastised her for teaching undergraduate class. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

[35] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Even if male supervisor's sporadic and abrasive conduct toward associate professor, a female physician, was severe enough to constitute harassment, supervisor's actions were not based on professor's gender, and, thus, professor could not prevail on hostile work environment claim under Title VII against administrators of educational fund for private university's school of medicine, where supervisor treated male physicians in similarly abrasive manner and male physicians complained about supervisor's behavior. Civil Rights Act of 1964, § 701 et seq.; 42 U.S.C.A. § 2000e et seq.

***995** Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:19-CV-12578, Lance M. Africk, U.S. District Judge

Attorneys and Law Firms

Michael R. Allweiss, Melanie C. Lockett, Lowe, Stein, Hoffman, Allweiss & Hauver, L.L.P., New Orleans, LA, Jessica M. Vasquez, New Orleans, LA, for Plaintiff—Appellant.

Julie Durel Livaudais, Esq., Douglas L. Grundmeyer, Esq., Rosalie Haug, Chaffe McCall, L.L.P., New Orleans, LA, for Defendant—Appellee.

Before Stewart, Ho, and Engelhardt, Circuit Judges.

Opinion

Carl E. Stewart, Circuit Judge:

In this employment discrimination suit, Dr. Lesley Ann Saketkoo challenges the district court's summary judgment in favor of the Administrators of the Tulane Educational Fund ("the Administrators"). According to Dr. Saketkoo, the district court erred in dismissing her claims for gender discrimination,[1] retaliation, and hostile work environment under Title VII of the Civil Rights Act of 1964 ("Title VII"). Because we identify no genuine material factual dispute as to her claims, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2014, Dr. Saketkoo accepted a clinical appointment as an associate professor at Tulane's School of Medicine ("the School"). Her one-year contract was continually renewed until 2019. She was initially hired into the School's Allergy and Immunology Section and transferred to the Pulmonary Section in 2017. Prior to her transfer, Dr. Saketkoo's supervisor was Dr. Laurianne Wild, Chief of the Allergy and Immunology Section. After her transfer, her supervisor was Dr. Joseph Lasky, Chief of the Pulmonary Section and a doctor with whom she had previously worked. According to Dr. Saketkoo, Dr. Lasky mistreated her throughout her time at the School, and ***996** the bulk of her claims arise from interactions with him.

First, Dr. Saketkoo accuses Dr. Lasky of discriminatory treatment by failing to support her research as her supervisor. Specifically, she alleges that: (1) he excluded her from a research opportunity that she brought to him, only to assign a male physician to the principal investigator role; (2) he did not allow her to move a study forward when he allowed a male physician to move a study forward; and (3) he used funding from one of her research grants to support other personnel.

Next, Dr. Saketkoo recounts several instances in which Dr. Lasky ridiculed her, such as when she suggested clinic changes, asked about compensation, and explained new research topics. She notes that Dr. Lasky called other women "very difficult to work with" and the "enemy." She also claims that a female physician who she found crying after an interaction with Dr. Lasky confided in her that he "does this to strong women."

Finally, Dr. Saketkoo describes an incident in September 2018 where Dr. Lasky berated her for failing to disclose that she was teaching an undergraduate class. According to Dr. Saketkoo, she replied that she had already told him about it, and Dr. Lasky proceeded to demand that they discuss the matter further. She attests that she was so intimidated by his conduct that she ended the conversation and walked away. Following this incident, Dr. Saketkoo complained about Dr. Lasky and her toxic work environment to other doctors in her section and Tulane's Office of Institutional Equity ("OIE"). She also complained to three superiors, including Dr. Wild.

In February 2019, Dr. Saketkoo met with Dr. Lee Hamm, Dean of the School, and learned that her employment contract would not be renewed. Dean Hamm explained that the decision had been made because she was not earning enough to pay her salary. In this meeting, Dr. Saketkoo expressly raised concerns that Dr. Lasky had discriminated against her and other women on the basis of gender. Dean Hamm told her that the behavior would be investigated but this would not change the decision on her contract. The OIE subsequently began an investigation, and Dr. Saketkoo ceased to be an associate professor at the School that June.

Meanwhile, Dr. Saketkoo alleges that sometime thereafter Dean Hamm told Dr. Nirav Patel not to hire her at the University Medical Center ("UMC"). In a September 2019 phone call that Dr. Saketkoo surreptitiously recorded, Dr. Patel told her, "if Dean Hamm comes and says Patel don't hire this person, this person explicitly ... by name ... you know that's a pretty clear directive." According to Dr. Patel's affidavit, he "remember[s] a conversation with Dean Hamm in the summer of 2019" and "remember[s] ... [he] made statements that implied that Dean Hamm told [him] not to hire Dr. Saketkoo." However, "Dean Hamm did not at any time tell [him] not to hire Dr. Saketkoo, nor did [Dean Hamm] ever request that [Dr. Patel] not hire her." Rather, "[Dr. Patel] made these statements because it would not be appropriate, nor was it necessary, for UMC to act contrary to the decisions of Tulane, one of [its] faculty practice partners."

Shortly after this phone call, Dr. Saketkoo filed suit in federal district court against the Administrators, the School, Dean Hamm, and Dr. Lasky, asserting claims under Title VII, the Equal Pay Act, and corresponding state law. She voluntarily dismissed her state law claims, and the School, Dean Hamm, and Dr. Lasky were dismissed as defendants by stipulation. In December 2020, the district court granted summary judgment in favor of the ***997** Administrators, holding that Dr. Saketkoo did not make a successful prima facie case of gender discrimination, retaliation, and hostile work environment. She now appeals the judgment as to her Title VII claims. [2]

II. STANDARD OF REVIEW

[1] **[2]** **[3]** We review a district court's grant of summary judgment de novo. *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347, 350 (5th Cir. 2014). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam). "An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Id.*

III. DISCUSSION

Dr. Saketkoo argues that the district court erroneously entered summary judgment in favor of the Administrators on her gender discrimination, retaliation, and hostile work environment claims. We discuss each in turn.

A. Gender Discrimination

[4] **[5]** Under Title VII, it is unlawful to discriminate against an employee on the basis of sex. 42 U.S.C. § 2000e–2(a). In a disparate treatment case, an employee must establish that her employer had a discriminatory intent or motive for taking a job-related action. *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). As direct evidence of discriminatory intent is rare, an employee ordinarily proves her claim through circumstantial evidence. *Scales v. Slater*, 181 F.3d 703, 709 (5th Cir. 1999). When an employee offers circumstantial evidence, we carry out the burden-shifting analysis introduced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), which first requires the employee to establish a prima facie case of discrimination. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001).

In *McDonnell Douglas*, the Supreme Court set out "an appropriate model for a prima facie case of racial discrimination." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 n.6, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In doing so, it observed that "the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13, 93 S.Ct. 1817; *see also* *Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 892 (5th Cir. 2012) ("The prima facie case is necessarily a flexible standard that must be adapted to the factual circumstances of the case."). Although the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the precise formulation for making a prima facie case can vary by circuit and, more granularly, by protected class and adverse employment action.

[6] **[7]** **[8]** **[9]** **[10]** To establish a prima facie case of sex discrimination based on disparate treatment in the Fifth Circuit, an employee generally must demonstrate that "(1) she is a member of a protected class; (2) ***998** she was qualified for the position she sought; (3) she suffered an adverse employment action; and (4) others similarly situated but outside the protected class were treated more favorably." *Alvarado v. Tex. Rangers*, 492 F.3d 605, 611 (5th Cir. 2007). To satisfy the "similarly situated" prong, the employee carries out a comparator analysis. *See* *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253 (5th Cir. 2009).[3] Under this analysis, the employee must establish that she was treated less favorably than a similarly situated employee outside of her protected class in nearly identical circumstances. *See* *id.* at 259–60 (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817). The similarly situated employee is known as a comparator. "A variety of factors are considered when determining whether a comparator is similarly situated, including job responsibility, experience, and qualifications." *Herster v. Bd. of Supervisors of La. State Univ.*, 887 F.3d 177, 185 (5th Cir. 2018). Moreover, we require an employee to show that the comparator's conduct is "nearly identical," not strictly identical.[4] *Lee*, 574 F.3d at 260 n.25.

[11] On appeal, Dr. Saketkoo argues that the district court improperly required her to demonstrate that her proffered comparators were strictly identical. We disagree. The district court applied the correct standard, but Dr. Saketkoo failed to present evidence that any male physicians shared her research responsibilities, section assignments, historical performances, or other attributes that would render them similarly situated.

At the School, each faculty member is required to earn her salary by generating revenue at least equal to it, and whether she can generate such revenue is an important factor in renewal decisions. Dr. Saketkoo emphasizes that there were several male physicians supervised by Dr. Lasky who were not earning enough to pay their salaries and that she was the only one whose contract was not renewed for this reason.[5] However, as she acknowledges, it is common for physicians in the Department of Medicine to run deficits.[6] Moreover, many physicians run deficits in some years but not others, whereas Dr. Saketkoo ran a deficit every year of her employment at the School. The fact that male physicians under Dr. Lasky's supervision were at some point expected to run a deficit is not sufficient to render their ***999** experiences of nearly identical in the field of academic medicine—especially when, as the district court determined, "[Dr.] Saketkoo has offered the [c]ourt no explanation as to why these individuals, despite their disparate job titles and presumably different responsibilities, are appropriate comparators."

We therefore agree with the district court that the male physicians Dr. Saketkoo presented were not valid comparators for establishing a prima facie case, and she has not otherwise demonstrated that she was discriminated against because of her sex. *See* *Rutherford v. Harris Cnty.*, 197 F.3d 173, 179 (5th Cir. 1999); *see also Dileo v. Ashcroft*, 201 F. App'x 190, 191 (5th Cir. 2006) (per curiam) (holding that comparator evidence was insufficient to establish a prima facie case of sex discrimination and "[a]s [the plaintiff] did not present any other evidence sufficient to raise a genuine issue of material fact, summary judgment was proper").

[12] **[13]** **[14]** Even if Dr. Saketkoo had established a prima facie case of sex discrimination, her claim would fail because she did not rebut the Administrators' legitimate, non-discriminatory reasons for declining to renew her contract. It is well-established that after an employee makes a prima facie case under the *McDonnell Douglas* framework, the burden of production shifts to the employer to offer an alternative non-discriminatory explanation for the adverse employment action, at which point the employee must show that this explanation is pretextual. *See* *Lee*, 574 F.3d at 259 (citing *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817). Notably, the burden of proof remains with the employee throughout. *See* *id.* at 259 n.13; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 518, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (quoting *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.")).

Here, Dr. Saketkoo failed to meet this burden. The Administrators explained that they have a policy of retaining physicians operating at deficits who are heavily involved in medical education and mission-critical practices, including several male physicians she identified as comparators. Further, they emphasized that "the sub-subspecialty of rheumatology that Dr. Saketkoo prefers to practice is not mission[-]critical to Tulane Medical School." Although Dr. Saketkoo addressed the Administrators' allegations of performance issues, attaching several declarations to contradict the suggestion that she was "disruptive," she did not rebut the Administrators' contention that other physicians operating at deficits added value in ways that she did not. Thus, she did not demonstrate that the Administrators' non-discriminatory reasons were pretextual.

Accordingly, we affirm summary judgment in favor of the Administrators on Dr. Saketkoo's gender discrimination claim.

B. Retaliation

[15] **[16]** "Title VII's antiretaliation provision forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing.' " *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (quoting 42 U.S.C. § 2000e–3(a)). "The allocation of the burden of proof in Title VII retaliation cases depends on the nature of the plaintiff's evidence supporting the causation element." *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003) (quoting ***1000** *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 191 (5th Cir. 2001)). "Where, as here, the plaintiff[ ] seek[s] to prove causation by circumstantial evidence, [she] carr[ies] the initial burden of establishing a prima facie case of retaliation," and the retaliation claim is analyzed under a *McDonnell Douglas* burden-shifting framework. *Id.*; *Wheat v. Fla. Par. Juv. Just. Comm'n*, 811 F.3d 702, 705 (5th Cir. 2016).

[17] **[18]** **[19]** To establish a prima facie case of retaliation, an employee must show "(1) she engaged in a protected activity; (2) 'she suffered an adverse employment action'; and (3) 'a causal connection exists between the protected activity and the adverse employment action.' " *Brown v. Wal-Mart Stores E., L.P.*, 969 F.3d 571, 577 (5th Cir. 2020) (quoting *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000)). "If the plaintiff establishes a prima facie case, then the employer has the burden of production to provide 'a legitimate, non-discriminatory reason' for the adverse employment action." *Id.* (quoting *Patrick v. Ridge*, 394 F.3d 311, 315 (5th Cir. 2004)). "If the employer meets this burden, then the plaintiff has the burden to prove that the proffered reason is pretextual." *Id.* Again, the burden of persuasion remains with the employee throughout. *See* *id.*

i. Contract Non-Renewal

[20] **[21]** On appeal, Dr. Saketkoo's first allegation of retaliation relates to the Administrators' decision not to renew her contract. She argues that they made this decision in retaliation for her complaining about Dr. Lasky's discriminatory behavior. Yet nothing in the record supports the claim that she reported his behavior as discriminatory before the Administrators made the decision not to renew her contract. "In a claim of protected opposition, an employee must at least have referred to conduct that could plausibly be considered discriminatory in intent or effect, thereby alerting the employer of its discriminatory practices." *Allen v. Envirogreen Landscape Pros., Inc.*, 721 F. App'x 322, 326 (5th Cir. 2017) (per curiam). A general allegation of hostility is not enough. *Id.*

Although Dr. Saketkoo contacted the OIE after Dr. Lasky's alleged outburst in September 2018, she did not file a report or otherwise communicate that she was being discriminated against based on her gender. Similarly, the record reflects that she described his behavior to her superiors as regrettably harsh, not as potentially discriminatory. In her declaration, Dr. Saketkoo stated that she "reported [to Dr. Wild] what [Dr. Lasky] did and his continuing abusive treatment." Meanwhile, she told others that he was "out of control," "not approachable," and "untenable." She did not, however, allege that she complained about experiencing gender-based discrimination sufficient to put the Administrators on notice. The first time Dr. Saketkoo notified the Administrators of Dr. Lasky's potential discrimination was during her conversation with Dean Hamm in February 2019, after he had told her that her contract would not be renewed. Because there is no evidence that Dr. Saketkoo engaged in protected activity before this decision, she has failed to make a prima facie case of retaliation with respect to her contract non-renewal.

ii. Conversation Between Dean Hamm and Dr. Patel

Dr. Saketkoo's second allegation of retaliation relates to the conversation in which Dean Hamm allegedly directed Dr. Patel not to hire her. She argues that the Administrators retaliated against her by sabotaging her attempt to secure employment at UMC. Both parties agree that Dr. Saketkoo's comments during the February 2019 meeting and the OIE investigation that followed were protected activities. ***1001** And reading the facts in the light most favorable to Dr. Saketkoo, the conversation between Dean Hamm and Dr. Patel was an adverse employment action. This leaves the question of whether there was a causal link between the two as required to make a prima facie case of retaliation.

[22] "At first glance, the ultimate issue in an unlawful retaliation case—whether the defendant discriminated against the plaintiff because the plaintiff engaged in conduct protected by Title VII—seems identical to the third element of the plaintiff's prima facie case—whether a causal link exists between the adverse employment action and the protected activity." *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996) (emphases omitted). "However, the standards of proof applicable to these questions differ significantly." *Id.* "The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision." *Id.* "The standard for establishing the 'causal link' element of the plaintiff's prima facie case is much less stringent." *Id.*

[23] To demonstrate that a causal link exists between the protected activity and the adverse employment action at the prima facie stage, an employee can show close enough timing between her protected activity and the adverse employment action. *See* *Brown*, 969 F.3d at 578. Alternatively, she can show "cat's paw causation" if a person who has retaliatory animus uses a decisionmaker to bring about an intended retaliatory action. *See* *Gee v. Principi*, 289 F.3d 342, 346 (5th Cir. 2002). However, here the conversation between Dean Hamm and Dr. Patel was too far removed from the non-renewal meeting and the OIE investigation to establish a causal link through time alone.[7] And similarly, there is no evidence in the record that Dr. Lasky brought about the conversation between Dean Hamm and Dr. Patel as is necessary for establishing cat's paw causation.

But this court has also held that an employee can establish a causal link at the prima facie stage when evidence demonstrates that the adverse action was "based in part on knowledge of the employee's protected activity." *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001). In *Medina*, we decided that an employee whose manager terminated him and had knowledge about his protected activity met the causal link element of his prima facie case at the summary judgment stage because the evidence demonstrated that the manager's knowledge was "not wholly unrelated to the termination." *Id.* Here, as the district court

acknowledged, Dean Hamm was aware of Dr. Saketkoo's protected activity when he made the decision to speak about her to Dr. Patel. Construing the evidence in the light most favorable to Dr. Saketkoo, such knowledge was "not wholly unrelated" to the alleged direction not to hire her.

[24] **[25]** **[26]** **[27]** **[28]** However, even so, it is clear that she has not created a triable issue of fact as to "[t]he ultimate determination in an unlawful retaliation case," "whether the conduct protected by Title VII was a 'but ***1002** for' cause of the adverse employment decision." *Long*, 88 F.3d at 305 n.4. Because the Administrators have carried their burden of production,[8] this court turns to whether Dr. Saketkoo can prove her claim according to traditional principles of "but for" causation and carry her burden of demonstrating that their proffered non-discriminatory reason is pretextual. An employee can establish pretext in the context of retaliation "by showing that a discriminatory motive more likely motivated her employer's decision." *Brown*, 969 F.3d at 577 (quoting *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 363 (5th Cir. 2013)). In order to survive a motion for summary judgment, the plaintiff must show a "conflict in substantial evidence" on this issue. *Id.* (quoting *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 561 (5th Cir. 2019)). At this juncture, we consider "numerous factors, including the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered." *Id.* (quoting *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002)).

"[T]here will be cases where a plaintiff has [ ] established a prima facie case ... yet no rational factfinder could conclude that the action was discriminatory." *Id.* Here, to survive a motion for summary judgment, Dr. Saketkoo must show a conflict in substantial evidence as to whether Dean Hamm would not have made retaliatory comments to Dr. Patel but for Dr. Saketkoo's reporting of potentially discriminatory behavior and involvement in an OIE investigation. Yet Dr. Saketkoo only proffers the transcript of her surreptitiously recorded telephone conversation with Dr. Patel. And this transcript is itself insufficient to create a conflict in substantial evidence as to whether "a discriminatory motive more likely motivated" Dean Hamm. *Id.*

Dr. Saketkoo's transcript tells us that Dr. Patel made statements implying Dean Hamm told him not to hire Dr. Saketkoo. There is no question that Dr. Patel made such statements. Indeed, in his affidavit, Dr. Patel expressly acknowledges that he made statements implying Dean Hamm told him not to hire Dr. Saketkoo. But he also clarifies that "Dean Hamm did not at any time tell [him] not to hire Dr. Saketkoo" and that he made the statements of his own volition "because it would not be appropriate ... for UMC to act contrary to the decisions of Tulane, one of [its] faculty practice partners[,]" by hiring a physician whose employment contract the School did not renew.

Crucially, Dr. Saketkoo does not allege that Dr. Patel lied in his affidavit about what Dean Hamm told him in their summer 2019 conversation. If she had made this allegation, reading the evidence in the light most favorable to Dr. Saketkoo, she would be correct that "[Dr.] Patel's own words" would "clearly raise a disputed issue of material fact" as to what was said and whether a discriminatory motive more likely motivated Dean Hamm. However, Dr. Saketkoo instead alleges that the affidavit demonstrates "what [Dr. Patel] told [*her*] on the September[ ] 2019 call was not true." And this is neither disputed nor material. Dr. Patel acknowledges that he ***1003** mischaracterized his conversation with Dean Hamm on the phone with Dr. Saketkoo. That Dr. Patel mischaracterized their conversation cannot confer a discriminatory motive on Dean Hamm, let alone support the proposition that Dean Hamm would not have made retaliatory comments but for Dr. Saketkoo's actions.

Although this court has previously held that a "combination of suspicious timing with other significant evidence of pretext can be sufficient to survive summary judgment in a Title VII retaliation action," *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 409 (5th Cir. 1999), Dr. Saketkoo has failed to produce the significant evidence of pretext necessary for survival. We conclude that a reasonable jury could not establish that her protected conduct was the "but for" cause of the alleged adverse employment action based on the record before us.

We therefore affirm summary judgment in favor of the Administrators on Dr. Saketkoo's retaliation claim.

C. Hostile Work Environment

[29] **[30]** "A claim of 'hostile environment' sex discrimination is actionable under Title VII." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). An employee who brings a hostile work environment claim must show that (1) she belongs to a protected class; (2) she was subjected to harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Septimus v. Univ. of Hous.*, 399 F.3d 601, 611 (5th Cir. 2005).

[31] **[32]** **[33]** To affect a term, condition, or privilege of employment, the harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment. *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 479 (5th Cir. 2008). "Whether an environment is hostile or abusive depends on a totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996). "[I]solated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Butler v. Ysleta Indep. Sch. Dist.*, 161 F.3d 263, 269 n.3 (5th Cir. 1998) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998)).

[34] On appeal, Dr. Saketkoo argues that Dr. Lasky's history of demeaning conduct at the School evidences a hostile work environment and that genuine material facts remain in dispute. We disagree. Although she presented evidence that Dr. Lasky demeaned her, the district court correctly noted that the incidents described were insufficiently severe or pervasive to sustain her hostile work environment claim.

Dr. Saketkoo points our attention to sporadic and abrasive conduct over the course of four years. This includes when Dr. Lasky (1) cut her off and told her it was "not her place" to discuss the needs of the clinic; (2) flailed his arms and yelled "I'm sick of this!" when she inquired about the use of funds; (3) hovered over her and shouted "I already told you what it was!" while documenting heart catheterization results; (4) mockingly asked her if she had "danced away scleroderma," upon which he interrupted, "We don't need you thinking! We need you working."; and (5) chastised her for teaching an undergraduate class, telling her to "[s]top it now!" However, we ***1004** have routinely held that similarly sporadic and abrasive conduct is neither severe nor pervasive.[9] And the fact that other women at the School may have experienced severe or pervasive treatment does not save Dr. Saketkoo's claim. *See* *Septimus*, 399 F.3d at 612 (observing that alleged harassment a plaintiff did not personally experience was inadequate to render her alleged harassment severe or pervasive).

[35] Finally, even if we assume that Dr. Lasky's treatment of Dr. Saketkoo was severe enough to constitute harassment, her claim still fails. Although she presented evidence of his tendency to degrade her, Dr. Saketkoo did not demonstrate that his actions were based on her gender. The record shows that Dr. Lasky treated male physicians in a similarly abrasive manner and that they also complained about his behavior. The consistency of Dr. Lasky's workplace demeanor is lamentable, but that circumstance does not supplant a plaintiff's burden to satisfy each element of a Title VII cause of action.

Accordingly, we affirm summary judgment in favor of the Administrators on Dr. Saketkoo's hostile work environment claim.

IV. CONCLUSION

For the aforementioned reasons, the judgment of the district court is AFFIRMED.

All Citations

31 F.4th 990

Footnotes

1 As the district court observed, "[b]oth parties refer to this claim as a claim of '[g]ender [d]iscrimination' rather than disparate treatment," though that is the form of unlawful employment discrimination at issue. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (" 'Disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin ... Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

2 Dr. Saketkoo did not appeal the district court's summary judgment in favor of the Administrators on her Equal Pay Act claim.

3 *Lee* sets out the requirements for conducting the comparator analysis. Although it does not affirmatively state that such an analysis is required to satisfy the fourth prong and make a prima facie case, our court has since interpreted *Lee* this way. *See, e.g.*, *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017) ("The 'similarly situated' prong requires a Title VII claimant to identify at least one coworker outside of his protected class who was treated more favorably 'under nearly identical circumstances.' " (quoting *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009))).

4 *Compare* *Lee*, 574 F.3d at 260, *with* *Coleman v. Donahoe*, 667 F.3d 835, 846 (7th Cir. 2012) (quoting *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007) ("So long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied.")), *and* *Lewis v. City of Union City*, 918 F.3d 1213, 1218 (11th Cir. 2019) (en banc) (rejecting the Seventh Circuit's standard and holding that a plaintiff must demonstrate that she and her proffered comparators were "similarly situated in all material respects").

5 She also argues that her "expected deficits" were less than those of male physicians in the Pulmonary Section. For instance, according to Dr. Saketkoo, one male physician had an expected deficit of $95,586 for 2017–18, whereas she had an expected deficit of $71,897.

6 In support of this proposition, she cites the testimony of Department of Medicine Vice Chair, Dr. Vecihi Batuman.

7 As the district court explained, we have held that a two-and-a-half month gap is sufficient to show causation, *see* *Garcia v. Pro. Cont. Servs., Inc.*, 938 F.3d 236, 243 (5th Cir. 2019), and the Supreme Court has suggested that a three-month gap is insufficient. *See* *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam). Dr. Patel suggests that he spoke with Dean Hamm at some point after June 2019, and even if the conversation occurred on July 1, 2019, this is too far removed from the February 2019 meeting and the March 2019 instigation of the OIE complaint for temporal proximity to establish a causal link.

8 The Administrators disputed that the conversation between Dean Hamm and Dr. Patel constituted an adverse employment action, so they did not discuss additional non-discriminatory reasons in the context of this claim. However, the performance issues that the Administrators emphasized in their discussion of non-discriminatory reasons for gender discrimination evidently apply. "[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason." *Little v. Republic Refin. Co.*, 924 F.2d 93, 97 (5th Cir. 1991)*Little v. Republic Refin. Co.*, 924 F.2d 93, 97 (5th Cir. 1991).

9 *See Kumar v. Shinseki*, 495 F. App'x 541, 543 (5th Cir. 2012) (per curiam) (affirming summary judgment rejecting a hostile work environment claim when "alleged hostility occurred sporadically over a 27-month period"); *Williams v. U.S. Dep't of Navy*, 149 F. App'x 264, 268 (5th Cir. 2005) (per curiam) (affirming summary judgment rejecting a hostile work environment claim involving an alleged harasser "yelling and displaying anger toward [plaintiff] over fax machine toner"); *see also Pennington v. Tex. Dep't of Fam. & Protective Servs.*, No. A-09-CA-287-SS, 2010 WL 11519268, at *10 (W.D. Tex. Nov. 23, 2010), *aff'd*, 469 F. App'x 332 (5th Cir. 2012) (holding plaintiff failed to establish a hostile work environment where the employer was "always hostile [and] threatening," screamed at plaintiff, and violated plaintiff's space by slamming files and doors).

End of Document

EXHIBIT 6

29 F.4th 284
United States Court of Appeals, Fifth Circuit.

Anthony J. WOODS, Plaintiff—Appellant,

v.

LaToya CANTRELL, Mayor, officially; New Orleans City, officially; French Market Corporation, officially; Rhonda Sidney, officially and individually; N'Gai Smith, officially and individually; Robert Matthews, officially; Elizabeth S. Robins, officially and individually, Defendants—Appellees.

No.
21
-
30150
|
FILED March 24, 2022

Synopsis

Background: Employee brought action asserting former employer violated Title VII by discriminating against him on the basis of race and religion and by subjecting him to a hostile work environment, and asserting violations of § 1981 for race discrimination, § 1983 for violating his First Amendment right to speech and Fourteenth Amendment right to due process, and violation of civil rights conspiracy statute. The United States District Court for the Eastern District of Louisiana, Lance M. Africk, J., 2021 WL 981612, granted employer's motion to dismiss for failure to state a claim. Employee appealed pro se.

[Holding:] The Court of Appeals, Jolly, Circuit Judge, held that employee's allegation that, in the presence of other employees, his supervisor directly called him a racial epithet was sufficient to state hostile work environment claim.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (2)

[1] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Employee's allegation that, in the presence of other employees, his supervisor directly called him a racial epithet was sufficient to state Title VII hostile work environment claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

[2] **Civil Rights** Hostile environment; severity, pervasiveness, and frequency

Under "totality of the circumstances" test, a single incident of harassment, if sufficiently severe, can give rise to a viable Title VII claim. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:20-CV-482, Lance M. Africk, U.S. District Judge

Attorneys and Law Firms

Anthony J. Woods, pro se.

Renee Goudeau, Corwin M. St. Raymond, City Attorney's Office for the City of New Orleans, Law Department, New Orleans, LA, for Defendants-Appellees.

Katherine Elmlinger Lamm, Attorney, Erin Helene Flynn, Esq., U.S. Department of Justice, Civil Rights Division, Appellate Section, Washington, DC, for Amicus Curiae United States of America.

Before Jolly, Willett, and Oldham, Circuit Judges.

Opinion

E. Grady Jolly, Circuit Judge:

EXHIBIT 6

This case comes to us from a Rule 12(b)(6) dismissal of Anthony J. Woods's complaint. Woods's complaint alleges that his prior employer, French Market Corporation, violated Title VII by discriminating against him on the basis of race and religion and by subjecting him to a hostile work environment. He also alleges violations of other civil rights statutes, including section 1981 for race discrimination, section 1983 for violating his First Amendment right to speech and Fourteenth Amendment right to due process, and section ***285** 1985 for conspiracy to violate his civil rights. Most of the claims Woods alleged are conclusory and cannot support any cognizable, triable claim.

Liberally construing Woods's *pro se* appeal, Woods raises many of the same issues that he alleges in his complaint, and it is certainly true that his complaint is extensive. But it is also true that the district court issued a detailed Order and Reasons of forty-four pages responding to each claim, which we have carefully examined. We can find no reversible error in the district court's Order and Reasons, except in one respect: the hostile work environment claim.

[1] For his hostile work environment claim, Woods's complaint specifically alleges that in the presence of other employees, Woods's supervisor, N'Gai Smith, a person of Hispanic descent, directly called him a "Lazy Monkey A__ N____."[1] This allegation is specific, and unlike the majority of Woods's other allegations, non-conclusory. The district court dismissed Woods's hostile work environment claim because "a single utterance of a racial epithet, despicable as it is, cannot support a hostile work environment claim."

[2] We think that the district court erred in this one respect. It is true that this court has indicated that a single instance of a racial epithet does not, in itself, support a claim of hostile work environment. *See, e.g., Mosley v. Marion Cnty.*, 111 F. App'x 726, 728 (5th Cir. 2004) (per curiam) (finding no hostile work environment despite three incidents involving a racial slur). We have further said, however, that "[u]nder the totality of the circumstances test, a single incident of harassment, if sufficiently severe, [can] give rise to a viable Title VII claim." *See, e.g., EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400 (5th Cir. 2007).

As other circuits have recognized, "[p]erhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as [the N-word] by a supervisor in the presence of his subordinates." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)); *see also Alston v. Town of Brookline*, 997 F.3d 23, 47 (1st Cir. 2021); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015); *Ellis v. Houston*, 742 F.3d 307, 325-26 (8th Cir. 2014); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (per curiam); *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2014); *McGinest v. GTE Serv.*, 360 F.3d 1103, 1116 (9th Cir. 2004). The N-word has been further described as "a term that sums up ... all the bitter years of insult and struggle in America, [a] pure anathema to African-Americans, [and] probably the most offensive word in English." *Ayissi-Etoh*, 712 F.3d at 580 (Kavanaugh, J., concurring) (citations omitted).

The incident Woods has pleaded—that his supervisor directly called him a "Lazy Monkey A__ N___" in front of his fellow employees—states an actionable claim of hostile work environment. *Ayissi-Etoh*, 712 F.3d at 580 (Kavanaugh, J., concurring) ("[I]n my view, being called the n-word by a supervisor—as [plaintiff] alleges happened to him—suffices by itself to establish a racially hostile work environment."). Furthermore, if supported with adequate proof, Woods could be entitled to emotional and other damages that have been alleged. *See* 42 U.S.C. § 1981a (allowing ***286** compensatory damages, including for "emotional pain" and "mental anguish," and punitive damages for certain claims brought under the civil rights statutes); *see also Henry v. Corpcar Servs. Hous., Ltd.*, 625 F. App'x 607, 617 (5th Cir. 2015) (per curiam) (affirming the award of damages for a hostile work environment claim involving a single incident of racial harassment).

Accordingly, we remand for further consideration not inconsistent with this opinion. In all other respects, the district court judgment is affirmed.

AFFIRMED in part. REVERSED in part. REMANDED.

All Citations

29 F.4th 284, 106 Empl. Prac. Dec. P 46,959

Footnotes

1 The racial epithet is not further spelled out anywhere in the record.

EXHIBIT 7

35 F.4th 397
United States Court of Appeals, Fifth Circuit.

Dana BAILEY, Plaintiff—Appellant,

v.

KS MANAGEMENT SERVICES, L.L.C., Defendant—Appellee.

No. 21-20335

FILED May 26, 2022

Synopsis

Background: Employee brought action against employer, alleging violation of the Age Discrimination in Employment Act (ADEA). After denial of employee's motions for discovery and to defer consideration of summary judgment, the United States District Court for the Southern District of Texas, No. 4:20-CV-59, Lynn N. Hughes, J., 2021 WL 2677424, granted summary judgment to employer. Employee appealed.

Holdings: The Court of Appeals held that:

[1] district court abused its discretion in precluding discovery of documents related to alleged suspension and subsequent reinstatement of employee's position;

[2] district court abused its discretion in precluding discovery of comparator evidence;

[3] district court abused its discretion in precluding discovery as to alleged causal link between employee's protected activity and adverse employment action; and

[4] employee diligently pursued discovery, as would support her motion for discovery prior to ruling on summary judgment; but

[5] reassignment of case on remand was unwarranted.

Reversed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Extend Time for Discovery; Motion to Disqualify or Recuse a Judge.

West Headnotes (13)

[1] **Federal Courts** Continuance and stay

Court of Appeals reviews for abuse of discretion a district court's denial of a motion to defer consideration of a summary-judgment motion or allow time for discovery before ruling on summary-judgment motion. Fed. R. Civ. P. 56(d).

1 Cases that cite this headnote

[2] **Federal Civil Procedure** Time for consideration of motion

Summary judgment is appropriate only where the plaintiff has had a full opportunity to conduct discovery. Fed. R. Civ. P. 56(d).

[3] **Federal Civil Procedure** Time for consideration of motion

To win relief, the party seeking to defer consideration of a summary-judgment motion or obtain discovery prior to court's ruling on summary-judgment motion must make two showings: (a) that additional discovery will create a genuine issue of material fact, and (b) that she diligently pursued discovery. Fed. R. Civ. P. 56(d).

[4] **Federal Civil Procedure** Time for consideration of motion

The party seeking to defer consideration of a summary-judgment motion or obtain discovery prior to court's ruling on summary-judgment motion must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion. Fed. R. Civ. P. 56(d).

[5] **Federal Civil Procedure** ⬅ Time for consideration of motion

Party seeking to defer consideration of a summary-judgment motion or obtain discovery prior to court's ruling on summary-judgment motion may not simply rely on vague assertions that discovery will produce needed, but unspecified, facts. Fed. R. Civ. P. 56(d).

[6] **Civil Rights** ⬅ Discharge or layoff

To establish a prima facie case of age discrimination in violation of the ADEA, plaintiff must show that she was fired, was qualified for the position, was within the protected class at the time she was fired, and was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of her age. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[7] **Federal Civil Procedure** ⬅ Time for consideration of motion

District court abused its discretion in precluding discovery of documents related to alleged suspension and subsequent reinstatement of employee's position, prior to granting summary judgment to employer in employee's action alleging age discrimination in violation of ADEA arising from her alleged constructive discharge, where parties disagreed on whether or not employee's position was filled after her resignation, and employer's assertion that position was not filled was supported only by an affidavit and not by any documentary evidence. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed. R. Civ. P. 56(d).

[8] **Federal Civil Procedure** ⬅ Time for consideration of motion

District court abused its discretion in precluding discovery of comparator evidence prior to granting summary judgment to employer, in employee's action alleging age discrimination in violation of ADEA arising from her firing from role as nurse, which employer asserted was due to patient medication-administration errors, where employer admitted there were other employees who had made medication-administration errors, and employee sought to determine whether those employees were similarly situated and whether treatment of the employees showed pretext in employer's proffered reason for termination. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed. R. Civ. P. 56(d).

[9] **Civil Rights** ⬅ Practices prohibited or required in general; elements

To make a prima facie showing of retaliation under the ADEA, plaintiff must show that she engaged in a protected activity, that she suffered an adverse employment action, and that a causal link connects them. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

[10] **Federal Civil Procedure** ⬅ Time for consideration of motion

District court abused its discretion in precluding discovery as to alleged causal link between employee's protected activity and adverse employment action, prior to granting summary judgment to employer in employee's action alleging retaliation in violation of ADEA, where employee pointed to the specific category of evidence she needed to establish the causal connection, namely a third party's fabrication of allegations of errors by employee in retaliation for employee's age-discrimination complaint, and discovery sought was correspondence discussing the allegedly fabricated incidents. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed. R. Civ. P. 56(d).

[11] **Federal Civil Procedure** Time for consideration of motion

Employee diligently pursued discovery, as would support her motion for discovery prior to district court's ruling on employer's motion for summary judgment in employee's ADEA action against employer; district court's pretrial order prohibited interrogatories, requests for admission, or depositions without court approval, employee first sought such approval six days after parties' initial conference, and after first motion for approval was denied, employee brought three further such motions. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed. R. Civ. P. 56(d).

[12] **Federal Courts** Reassignment to new judge on remand

Court of Appeals' power to reassign cases on remand is an extraordinary one and is rarely invoked.

[13] **Federal Courts** Reassignment to new judge on remand

Reassignment of case on remand was unwarranted, after Court of Appeals reversed district court's denial of employee's motion for discovery prior to district court's grant of summary judgment to employer in employee's ADEA action, even though case was the third time Court of Appeals had reversed similar discovery orders from same district court; Court of Appeals would trust that, on remand, district court would heed civil procedure rules and mandates of precedent. Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Fed. R. Civ. P. 56(d).

***399** Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:20-CV-59, Lynn N. Hughes, U.S. District Judge

Attorneys and Law Firms

Edwin Enrique Villa, Matthew P. Swiger, Villa Law Firm, Houston, TX, for Plaintiff-Appellant.

Kimberly Rose Stuart, Juliann Hale Panagos, Crain, Caton & James, P.C., Houston, TX, for Defendant-Appellee.

Before Jones, Southwick, and Oldham, Circuit Judges.

Opinion

Per Curiam:

This is the third time we have been asked to consider whether a particular district court can deny discovery rights protected by the Federal Rules of Civil Procedure because, in the district court's view, that discovery is unnecessary. We have twice held no. *Miller v. Sam Houston State Univ.*, 986 F.3d 880 (5th Cir. 2021); *McCoy v. Energy XXI GOM, LLC*, 695 F. App'x 750 (5th Cir. 2017) (per curiam). Today we so hold a third time.

I.

Plaintiff-Appellant Dana Bailey worked for KS Management Services, LLC ("KSM") from March 24, 2014 until March 8, 2019. She was hired as a nurse and promoted to nurse coordinator in September 2016. She resigned from the nurse coordinator position and returned to her role as a nurse in March 2018. She was terminated from that role one year later.

On January 7, 2020, Bailey sued KSM under the Age Discrimination in Employment Act ("ADEA"), claiming that KSM engaged in unlawful age discrimination and retaliation. The next day, January 8, the district court entered an order setting the date for an initial pretrial conference. That order instructed the parties to exchange initial disclosures but ordered that "[n]o interrogatories, requests for admission, or depositions ... be done without court approval."

***400** On January 9, 2020, the district court entered an "Order for Disclosure." The order requires the company to furnish certain information (*e.g.*, the worker's emails), and it requires the worker to furnish certain other information (*e.g.*, a list of others who can corroborate the worker's allegations of mistreatment). The order concludes:

3. The company and worker will file a *joint* chronology from the time the worker applied to work until he left or sued. This will include only significant events given in an objective, factual form; legal posturing, abstractions, and quibbling will be crushed.

4. The parties may not delay exchanging this information, even by agreement. If a particular in this order docs not fit your case, make similar disclosures that reasonably fit your issues.

The order thus purports to create a one-size-fits-all system of rough justice; it both recognizes that particular requirements might be inapplicable and threatens to "crush[ ]" discovery efforts that run afoul of the district court's expectations. Both parties (understandably) attempted to comply with it.

The district court held its initial pretrial conference on September 10, 2020. It then entered an order permitting KSM to move for summary judgment by September 16 and Bailey to respond by October 2. But it declined to authorize any discovery other than the initial disclosures compelled by the "Order on Disclosure." KSM moved for summary judgment on September 15.

The next day, Bailey filed an unopposed motion to extend time to respond to KSM's motion for summary judgment, noting she "need[ed] to do discovery (requests for production, depositions, etc.)," but had so far been barred by the court's January 8 order, which prohibited such discovery. She requested additional time so that KSM could respond to her requests for production, and then so she could "take depositions" and "have ... adequate time to review said production and respond." The court denied the motion.

Bailey next filed an unopposed Rule 56(d) motion to defer consideration of KSM's summary-judgment motion and allow time for Bailey to take discovery, or in the alternative to deny KSM's motion. *See* FED. R. CIV. P. 56(d). She argued she was unable to "present facts (through supporting documents not accessible to her) essential to justify her opposition to certain allegations made by KSM" in its motion.

The court declined to rule on the 56(d) motion and instead entered a discovery order with three instructions. First, the court ordered there would be "no further discovery until Dana Bailey is deposed by October 15, 2020." Second, the court said it would consider other discovery requests—but only *after* Bailey's deposition. Third, the court suspended the deadline for Bailey to respond to KSM's summary-judgment motion.

October 15 came and went, and KSM elected not to depose Bailey. After the October 15 deadline passed, Bailey filed a motion asking permission to depose three witnesses to gather evidence needed to respond to KSM's summary-judgment motion. The court denied the motion without explanation and ordered Bailey to respond to the summary-judgment motion by October 30.

On October 27, Bailey filed a supplement to her Rule 56(d) motion, again asking the court to defer consideration of KSM's summary-judgment motion and allow Bailey to conduct discovery, or alternatively, deny KSM's motion. Again, Bailey explained that she was unable to ***401** "properly and fully respond to the claims and allegations made in KSM's MSJ" without conducting discovery. The court denied the Rule 56(d) motion and supplement—again without explanation—and maintained its deadline for Bailey to respond to the pending summary-judgment motion.

Bailey filed her response to KSM's motion for summary judgment. The district court granted KSM's motion and entered final judgment for KSM. Bailey timely appealed.

II.

[1] [2] We review a district court's denial of a Rule 56(d) motion for abuse of discretion. *See Prospect Cap. Corp. v. Mut. of Omaha Bank*, 819 F.3d 754, 757 (5th Cir. 2016). Rule 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or take discovery; or (3) issue any other appropriate order.

FED. R. CIV. P. 56(d). Summary judgment is appropriate only where "the plaintiff has had a full opportunity to conduct discovery." *McCoy v. Energy XXI GOM, L.L.C.*,

695 F. App'x 750, 758–59 (5th Cir. 2017) (per curiam) (emphasis omitted) (quoting *Brown v. Miss. Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002)). And Rule 56(d) permits "further discovery to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013) (quotation omitted).

[3] To win relief, the Rule 56(d) movant must make two showings. She first must show (A) that "additional discovery will create a genuine issue of material fact." *Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 816 (5th Cir. 2017) (quotation omitted). Then she must show (B) that she "diligently pursued discovery." *Id.* (quotation omitted). Bailey made both showings, and the district court abused its discretion in holding otherwise.

A.

[4] [5] A Rule 56(d) movant first must demonstrate that additional discovery will create a genuine issue of material fact. *See Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 422–23 (5th Cir. 2016). "More specifically, the non-moving party must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* at 423 (quoting *Am. Family Life Assurance Co. v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013)). "The nonmovant may not simply rely on vague assertions that discovery will produce needed, but unspecified, facts." *Id.* (quoting *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990)). Our court "generally assesses whether the evidence requested would affect the outcome of a summary judgment motion" and has found an abuse of discretion "where it can identify a specific piece of evidence that would likely create a material fact issue." *Id.* Bailey has identified such evidence for (1) her age-discrimination claim, and (2) her retaliation claim.

1.

[6] To establish a prima facie case of age discrimination, Bailey must show that she was fired, was qualified for the position, was within the protected class at the time she was fired, and was replaced by someone outside the protected class, replaced by someone younger, or otherwise ***402** discharged because of her age. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309 (5th Cir. 2004). Bailey argues she suffered discrimination in two instances: First, she argues age discrimination caused her constructive discharge from the nurse coordinator position. Second, she argues age discrimination caused her eventual termination from her position as a nurse.

a.

[7] We start with Bailey's constructive discharge from the nurse coordinator role. As part of her prima facie case, Bailey must establish she was replaced in that position by someone outside her protected class. The district court concluded she was not. But the parties disagreed on this point. Bailey says "she was replaced by Tamara Ballew and then Paul Chavez, both of whom are younger than Bailey and outside of her protected class[.]" KSM said, and the district court agreed, that those two individuals "only assisted with answering the telephones," and the "nurse coordinator position remained unfilled until Oluwatoyin Clay, 57, was promoted to it."

The district court rested its conclusion on KSM's summary-judgment motion and the Declaration of Denise Backus. Backus explained that the nurse coordinator position "was not filled after Bailey's resignation because the ASC patient census did not dictate a need for the position." Backus further explained that after Bailey resigned from the nurse coordinator position in March 2018, KSM didn't replace Bailey until January 2019 when it "determined the RN Coordinator position was again needed because the ASC patient census had greatly increased." In other words, Ballew and Chavez didn't replace Backus—they just absorbed some of her duties until KSM decided a proper replacement was needed.

Bailey argued this assertion was "solely being supported by an unchallenged affidavit and absolutely no actual documentary evidence, even though specific documents, i.e. ASC patient censuses, are being referenced." She requested discovery of the ASC patient censuses and "other documents related to the alleged suspension and subsequent reinstatement of the Nurse Coordinator position," as well as an opportunity to depose Backus. If Bailey was in fact replaced in the nurse coordinator position by someone younger or outside her protected class, that would alter the district court's conclusion that she could

not establish a prima facie case of age discrimination. This is the sort of specific evidence likely to create a material fact issue, *see* *Biles*, 714 F.3d at 894, and the district court abused its discretion by forbidding discovery on this point.

b.

[8] Second, Bailey claims age discrimination was the reason she was fired from her position as a nurse. Although the parties again disputed whether Bailey was replaced by a younger nurse, the district court assumed Bailey had established a prima facie case and shifted the burden to KSM to supply a legitimate nondiscriminatory reason for the discharge. KSM said Bailey was fired because she was counseled for performance concerns and responsible for "two serious patient medication administration errors in 2018 and 2019."

Bailey sought comparator evidence to show KSM's given reason was pretextual. *See* *Rachid*, 376 F.3d at 312 (if defendant "articulate[s] a legitimate, non-discriminatory reason ... plaintiff must then offer sufficient evidence" showing defendant's reason is "a pretext for discrimination"); *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001) (plaintiff "may ***403** establish pretext" through "evidence of disparate treatment"). KSM admitted there were other employees who had made medication administration errors and been counseled. And Bailey sought documentation of those incidents to determine whether those "other employees are similarly situated to Bailey, if they are not in Bailey's protected class, or if they were treated more favorably than Bailey." If that evidence were to suggest "a discriminatory motive more likely motivated" KSM's decision to fire Bailey, *Wallace*, 271 F.3d at 220 (quotation omitted), it would create a triable fact issue. But the district court did not address the possibility that Bailey might be able to use this comparator evidence to show disparate treatment. Its refusal to permit any discovery on this issue was likewise an abuse of discretion.

2.

[9] [10] To make a *prima facie* showing of retaliation under the ADEA, Bailey must show that she engaged in a protected activity, suffered an adverse employment action, and that a causal link connects them. *Heggemeier v. Caldwell Cnty.*, 826 F.3d 861, 869 (5th Cir. 2016). Bailey claims that KSM engaged in unlawful retaliation after she reported age discrimination internally and filed a Charge of Discrimination with the EEOC and TWC. The district court found that Bailey could not establish a causal link: It concluded there was "no evidence of a causal connection" between Bailey's protected activities and her ultimate termination, and that the "sole 'evidence' that Bailey gives is a record of her complaints against Baron and a report of her fears of retaliation."

But Bailey pointed to the specific category of evidence she needed to establish the causal connection: She argued Baron fabricated allegations against her in retaliation for her complaints. And she argued those fabricated allegations led to her eventual termination. She requested permission to depose Baron and sought discovery of correspondence discussing the (allegedly fabricated) incidents. Her goal was to "delve into the discrepancies created by Defendant's production that directly involve Ms. Baron and call into question Ms. Baron's motives." It was an abuse of discretion for the district court to deny Bailey the opportunity to conduct discovery on this issue, and then fault her for having "no evidence of a causal connection" between her protected activity and the adverse employment actions.

B.

[11] Bailey must also demonstrate she has "diligently pursued discovery" to show her entitlement to relief under Rule 56(d). *Jacked Up*, 854 F.3d at 816 (quotation omitted). She has made that showing here.

From the start of this litigation, Bailey sought discovery as soon as the opportunity arose. Before the district court held its initial conference, two obstacles stood in Bailey's way: First was Rule 26, which prohibited her from seeking discovery until after the initial conference. *See* FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)[.]"); FED. R. CIV. P. 26(f) (providing instructions for initial conference). Second was the district court's January 8 order, which prohibited any "interrogatories, requests for admission, or depositions ... without court approval."

The district court held its initial conference on September 10, 2020, removing the first obstacle. But the second obstacle remained: Bailey could not conduct further discovery without

court approval. KSM moved for summary judgment on September 15. On September 16, Bailey moved to extend time to respond to the MSJ and ***404** requested the court's permission to conduct further discovery. The very next day, the court denied that motion without explanation.

On September 23, Bailey tried again: She filed her Rule 56(d) motion to defer consideration of the MSJ and allow her time to take discovery. She explained the discovery she sought and why she sought it. Again the court denied the request quickly and without explanation, ordering that there would be "no further discovery until Dana Bailey is deposed by October 15, 2020," and that it might "consider other discovery requests after Bailey has told her side under oath."

After the October 15 deadline passed and KSM declined to depose her, Bailey again moved to take depositions. That motion, too, was denied quickly and without explanation. Bailey then filed the supplement to her Rule 56(d) motion, again asking the court to allow her to conduct further discovery. The court denied the Rule 56(d) motion and supplement the next day—again without explanation.

Bailey's repeated requests for court permission to conduct discovery show anything but a lack of diligence. KSM's only response is that the district court "may have reasonably concluded Bailey did not diligently pursue discovery" because she never was deposed. But KSM does not point to any case where this court has held a movant lacked diligence solely because she was never deposed. In other cases where we've found a lack of diligence, it was because the movant failed to conduct discovery during a period in which it was permitted to do so. *See, e.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1397 (5th Cir. 1994) (movant "undertook no discovery ... for more than one year"); *Jacked Up*, 854 F.3d at 816 (movant "did not move to compel production of these documents during the discovery period"); *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001) ("Beattie became aware that she needed to depose school board members ... [and had] sixteen days before the end of discovery to seek an extension. Instead, she waited until after defendants had filed their motion for summary judgment."). Here, by contrast, there was no discovery period at all—Bailey had no opportunity to conduct discovery absent court approval. She promptly and repeatedly sought such approval. That her requests were repeatedly denied does not reveal a lack of diligence on her part.

III.

[12] **[13]** Bailey also asks us to reassign her case to a different judge upon remand. Our court's power to reassign cases on remand "is an extraordinary one" and "is rarely invoked." *Miller*, 986 F.3d at 892 (quotation omitted). To determine whether reassignment is warranted, this court has applied two tests. The first, more stringent test considers:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his mind or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

In re DaimlerChrysler Corp., 294 F.3d 697, 700–01 (5th Cir. 2002) (quotation omitted). The second, more lenient test looks at whether the judge's role "might reasonably cause an objective observer to question the judge's impartiality." *Id.* at 701 (quotation omitted).

***405** We are not persuaded that reassignment is necessary under either test. That said, we have now entertained a series of appeals from this same district court involving similar discovery orders. And this is the third time we have reversed. In *McCoy*, the district court denied almost all discovery requests and "permitted only the deposition of [the plaintiff]" and disclosure of a limited number of documents. *McCoy*, 695 F. App'x at 753. We reversed, noting the court below had abused its discretion by "refusing to allow [the plaintiff] to conduct sufficient discovery." *Id.* at 759.

In *Miller*, we reviewed a "strikingly similar" discovery plan and expressed a "sense of déjà vu." *Miller*, 986 F.3d

at 891. There too, the same district judge permitted only the plaintiff to be deposed and denied the plaintiff the opportunity to depose any witnesses before summary-judgment briefing was complete. We again reversed, concluding the court below had abused its discretion and that its "discovery restrictions suffocated any chance for [the plaintiff] fairly to present her claims." *Id.* at 892.

Today, it is "déjà vu all over again." *United States v. Lee*, 966 F.3d 310, 323 (5th Cir. 2020) (quoting Yogi Berra). And we reverse. Again. But we trust that the district court will heed the Federal Rules and the mandates of our precedent.

* * *

We REVERSE the order denying plaintiff's Rule 56(d) motion and supplement, VACATE the order granting summary judgment to KSM, and REMAND for further proceedings consistent with this opinion.

All Citations

35 F.4th 397

End of Document

EXHIBIT 8

45 F.4th 833
United States Court of Appeals, Fifth Circuit.

Byron TAYLOR, on behalf of himself and on behalf of all others similarly situated; Lonnie Treaudo; Kendall Matthews; Kenneth Hunter; Terraine R. Dennis; John Edmond; George Triche; Alfred Edmond, Plaintiffs—Appellants,

v.

HD AND ASSOCIATES, L.L.C.; John Davillier, Defendants—Appellees.

No. 20-30815

FILED August 16, 2022

Synopsis

Background: Employees who worked as cable technicians brought putative collective action against employer, alleging that they did not receive overtime compensation in violation of the Fair Labor Standards Act (**FLSA**). The United States District Court for the Eastern District of Louisiana, Ivan L.R. Lemelle, Senior District Judge, 2020 WL 7075348, granted summary judgment in favor of employer. Employees appealed.

Holdings: The Court of Appeals held that:

[1] as a matter of apparent first impression, cable technicians were "covered employees" under the **FLSA**;

[2] employer did not waive affirmative defense that bona fide commission exemption applied; and

[3] as a matter of apparent first impression, bona fide commission exemption to **FLSA's** overtime requirements applied.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (17)

[1] **Federal Courts** ⬅ Summary judgment

Federal Courts ⬅ Summary judgment

The Court of Appeals reviews a grant of summary judgment de novo, viewing all evidence and drawing reasonable inferences in favor of the non-moving party. Fed. R. Civ. P. 56(a).

[2] **Federal Civil Procedure** ⬅ Materiality and genuineness of fact issue

A factual dispute is "genuine," as will defeat a motion for summary judgment, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Fed. R. Civ. P. 56(a).

[3] **Federal Courts** ⬅ Theory and Grounds of Decision of Lower Court

The Court of Appeals may affirm the grant of summary judgment on any ground supported by the record and presented to the district court. Fed. R. Civ. P. 56(a).

[4] **Labor and Employment** ⬅ Persons and Employments Within Regulations

A court deciding a claim for overtime compensation under the **FLSA** must address whether the workers are covered by the **FLSA**, before addressing any claimed exemptions. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1).

[5] **Commerce** ⬅ Particular employees

Labor and Employment ⬅ Particular employees

Cable technicians engaged in interstate commerce, so that they qualified as "covered employees" under the **FLSA**; technicians worked directly on the instrumentalities of

interstate commerce, including phone and internet service. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1).

[6] **Commerce** ← Engagement in commerce
Commerce ← Production
Labor and Employment ← Employees Included

Individual employee is covered under the **FLSA** and must be paid overtime if they engage in commerce or in production of goods for commerce. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1).

[7] **Commerce** ← Engagement in commerce
Labor and Employment ← Employees Included

A court applies a practical test to determine if an employee is engaged in interstate commerce, as will establish that employee was covered by the **FLSA**, analyzing whether the work is directly and vitally related to the functioning of an instrumentality or facility of interstate commerce. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1).

[8] **Commerce** ← Engagement in commerce
Labor and Employment ← Employees Included

There is no de minimis requirement for determining whether an employee is covered by the **FLSA** because he engages in interstate commerce; any regular contact with commerce, no matter how small, will result in coverage. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1).

[9] **Federal Civil Procedure** ← Affirmative Defense or Avoidance

Employer did not waive affirmative defense that bona fide commission exemption from **FLSA's** overtime compensation requirement applied to employees who worked as cable technicians by failing to specifically assert the exemption in their answer to employees' **FLSA** action; how and how much employer paid the technicians was clearly at issue in the suit, so that employees were on notice that employer would claim exemption. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. §§ 207(a)(1), 207(i); Fed. R. Civ. P. 8(c).

[10] **Labor and Employment** ← Defenses

The bona fide commission exemption under the **FLSA** is an affirmative defense to a claim for overtime compensation under the **FLSA**. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(i).

[11] **Federal Civil Procedure** ← Affirmative Defense or Avoidance

A technical failure to comply precisely federal rule of civil procedure requiring defendant to affirmatively plead an affirmative defense in its answer is not fatal; a defendant does not waive a defense if it was raised at a pragmatically sufficient time and did not prejudice the plaintiff in its ability to respond. Fed. R. Civ. P. 8(c).

[12] **Federal Civil Procedure** ← Affirmative Defense or Avoidance

FLSA defendants need not plead specific exemptions as affirmative defenses to the overtime compensation requirement because plaintiffs are put on notice by very nature of the suit that these exemptions would be relevant to determination of liability. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(a)(1); Fed. R. Civ. P. 8(c).

[13] **Labor and Employment** ← Retail or service establishments
Labor and Employment ← Exemptions

Whether a payment to an employee is a commission for the purpose of the bona fide commission exemption to the **FLSA's** overtime compensation requirement is a question of law that relies on how a payment works in practice, rather than what it is called. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(i).

[14] **Labor and Employment** Retail or service establishments

In determining whether a payment to an employee qualifies as a commission, for the purpose of the bona fide commission exemption to the **FLSA's** overtime compensation requirement, the court considers the following: (1) whether the payment is a percentage or proportion of the ultimate price passed on to the consumer; (2) whether the payment is decoupled from actual time worked, so that there is an incentive for the employee to work more efficiently and effectively; (3) the type of work is such that its peculiar nature does not lend itself to a standard eight-hour work day; and (4) whether the payment system offends the purposes of the **FLSA**. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. §§ 207(a)(1), 207(i).

[15] **Labor and Employment** Retail or service establishments

Where a system of pay is industry-wide, it is persuasive, for purpose of determining whether a payment qualifies as a commission under the bona fide commission exemption to the **FLSA's** overtime compensation requirements, that the whole industry is not violating the **FLSA** overtime provisions. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. §§ 207(a)(1), 207(i).

[16] **Labor and Employment** Retail or service establishments

Employer paid "commission" to its employees who worked as cable technicians, so that bona fide commission exemption to the **FLSA's** overtime requirements applied to technicians; technicians were paid percentage of ultimate price paid by cable company customers, technicians' work did not lend itself to standard workday, cable industry as a whole used similar commission-pay system, and payment system incentivized the technicians to work faster. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. §§ 207(a)(1), 207(i).

[17] **Labor and Employment** Retail or service establishments

Decoupling the time worked from money earned, as will support finding that payment to employee qualified as a commission, for purpose of bona fide commission exemption to **FLSA** overtime compensation requirement, does not require a guarantee that the employee earn more money, only an incentive for them to do so. Fair Labor Standards Act of 1938 § 7, 29 U.S.C.A. § 207(i).

***836** Appeal from the United States District Court for the Eastern District of Louisiana, USDC No. 2:19-CV-10635, Ivan L. R. Lemelle, U.S. District Judge

Attorneys and Law Firms

Preston L. Hayes, Barry W. Sartin, Jr., Esq., HMS, L.L.C., Metairie, LA, for Plaintiffs—Appellants.

Charles Ferrier Zimmer, II, Litigation Counsel, Davillier Law Group, L.L.C., New Orleans, LA, for Defendants—Appellees.

Sarah Roberts, U.S. Department of Labor, Office of the Solicitor, Washington, DC, for Amicus Curiae.

Before Higginbotham, Willett, and Duncan, Circuit Judges.

Opinion

Per Curiam:

Cable technicians working for HD and Associates (HDA) alleged that they did not receive overtime pay, in violation of the Fair Labor Standards Act (**FLSA**). Granting summary judgment to HDA, the district court ruled that the technicians and HDA were not covered by the **FLSA**, and that even if they were covered, the technicians qualified for the bona fide commission exemption and thus were exempt from the overtime provisions. The technicians appealed. We affirm.

I.

HDA, a subcontractor of Cox Communications (Cox), installs and repairs cable and telephone equipment for Cox's residential customers in Louisiana.[1] HDA technicians are assigned work directly by Cox, based on service requests from customers. HDA is located in Louisiana and all of the work that HDA performed for Cox in the relevant period was in Louisiana. Cox creates work orders for customer service requests in a digital platform, CX Connect; Cox then bundles the work orders for a given day and creates routes for the technicians, with arrival times for each work order assigned based on the time estimate for that type of work order. Cox and HDA also use CX Connect to track technicians' location and completion of assignments, and to update technicians' routes and assignments as needed. Each work order is allocated a point-value between zero and fifty which dictates how much a technician is paid for each work order.[2] If a technician does not finish their ***837** route, incomplete jobs are reassigned to technicians who have completed their assignments. Due to fluctuations in customer demand, the number of work orders fluctuates.

Byron Taylor filed this collective action on behalf of himself and all others similarly situated, alleging that he and other technicians worked over 40 hours per week but did not receive overtime pay as required by the **FLSA**. The district court granted conditional certification of the collective action for cable technicians who had worked at HDA in the one year prior to the filing of the collective action.[3] HDA moved for partial summary judgment, arguing that HDA was not covered by the **FLSA**, or alternatively that it was exempt from the **FLSA's** overtime requirement based on the bona fide commission exemption. The district court granted summary judgment, finding HDA was not covered by the **FLSA** and that even if it were, the technicians would still be exempt from the overtime requirement due to the bona fide commission and Motor Carrier Act exemptions. The technicians timely appealed.

II.

[1] [2] [3] We review a grant of summary judgment *de novo*, viewing all evidence and drawing reasonable inferences in favor of the non-moving party.[4] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5] "[A] factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[6] We may "affirm the ... grant of summary judgment on any ground supported by the record and presented to the district court."[7]

III.

[4] We address whether the technicians or HDA are covered by the **FLSA**, before addressing any exemptions. There are two distinct methods for establishing **FLSA** coverage: individual and enterprise-wide coverage.[8] The standards for each method differ, however the district court looked only to the requirements of individual coverage.[9]

[5] [6] [7] [8] An individual employee is covered and must be paid overtime if they "engage[ ] in commerce or in the production of goods for commerce."[10] We apply a ***838** "practical test" to determine if an employee is engaged in interstate commerce, analyzing "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce.... There is no de minimis requirement. Any regular contact with commerce, no matter how small, will result in coverage."[11] The district court found that the technicians were not covered by the **FLSA**. Although we have not previously addressed whether cable technicians are engaged in interstate commerce, we are persuaded that they are. Because the technicians work directly on the instrumentalities of interstate commerce, including phone and internet service, they are individually covered by the **FLSA** overtime protections.[12]

Alternatively, HDA could be a covered enterprise under the **FLSA**. The district court briefly addressed this possibility but mistakenly relied on cases from our individual coverage

precedent and did not develop the record necessary for this determination. As we have established that there is individual coverage of the technicians, we need not address this alternate basis.

IV.

Having established that the technicians are covered by the FLSA, we address whether they are exempt from the overtime pay requirement due to the bona fide commission exemption.

[9] [10] [11] [12] The bona fide commission exemption is an affirmative defense.[13] Under Rule 8(c), a defendant must affirmatively state an affirmative defense in its response with "enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced."[14] Failure to do so waives the defense.[15] The technicians contend that HDA did not specifically plead the bona fide commission exemption and waived it. However, "a technical failure to comply precisely with Rule 8(c) is not fatal. A defendant does not waive a defense if it was raised at a pragmatically sufficient time and did not prejudice the plaintiff in its ability to respond."[16] FLSA defendants need not plead specific exemptions because plaintiffs are "put on notice by the very nature of the suit that these exemptions would be relevant to the determination of [HDA's] liability."[17] "[T]here is some play in the joints" as long *839 as the plaintiff is not surprised by the affirmative defense, nor prejudiced in their ability to respond.[18] How and how much HDA paid technicians was clearly at issue. The technicians were on notice of this defense and HDA did not waive it.

[13] [14] [15] [16] The bona fide commission exemption exempts employers from the FLSA overtime provisions where (1) they are retail or service establishments; (2) the regular rate of pay for their employees is in excess of one and one-half times the applicable minimum hourly rate; and (3) more than half of the compensation represents commissions on goods or services.[19] Neither party disputes that HDA is a service establishment[20] and that its regular rate of pay for employees is in excess of one and one-half times the applicable minimum hourly rate. At issue is only whether HDA pays technicians a commission.[21] Whether a payment is a commission for the purposes of this exception is a question of law that relies on how a payment works in practice, rather than what it is called.[22] Neither the text of the FLSA nor this Court has defined "commission."[23] Other courts have described a commission as having distinct features and we adopt their definition:

> (1) whether the commission is a "percentage or proportion of the ultimate price passed on to the consumer;" (2) whether the commission is "decoupled from actual time worked, so that there is an incentive for the employee to work more efficiently and effectively;" (3) the type of work is such that its "peculiar nature" does not lend itself to a standard eight-hour work day; and (4) whether the commission system "offend[s] the purposes of the FLSA."[24]

"No factor appears dispositive in the case law, but the first two seem to carry the most weight."[25] Here, the commission paid is a percentage of the ultimate price passed onto Cox customers and the amount earned is tied to customer demand.[26] Given the nature of cable repairs, the work does not lend itself to a standard *840 workday and this payment system does not offend the purposes of the FLSA. As Judge Posner notes, where a system of pay is industry-wide, it is persuasive that the whole industry is not violating FLSA overtime provisions.[27] The cable technician industry uses this payment method widely; it does not offend the purposes of the FLSA.

The determining factor is thus whether the amount of income earned is decoupled from the time worked. Alternatively, this can be understood as whether the compensation plan incentivizes faster work—if by working harder, rather than longer, one earns more, the payment is a commission.[28] For example, while a tennis pro could satisfy the other factors, they can only sell one hour of instruction per hour worked—the time worked is coupled to the amount earned.[29] By comparison, Judge Posner found that window washers, who were paid on a points per job system, were making a commission because time worked was decoupled from money earned. Window washing jobs were assigned a point value based on difficulty, so a five-point job could be finished by different window washers in varying amounts of time. Because that payment system incentivized the window washers to work faster in order to earn more, it was a commission.[30]

[17] Here, a technician makes the same amount for a five-point job regardless of how long it takes to complete,

incentivizing the technician to work faster to receive more work orders. Although receiving more work orders was not guaranteed, it was clearly incentivized by the payment structure. Decoupling time worked from money earned, does not require a *guarantee* that the employee earn more money, only an incentive for them to do so.[31] Moreover, this compensation structure is not a piece-rate system, where one is paid by the item made and able to stock inventory. Rather the technicians are only paid by the service rendered, subject to customer demand.[32] Because compensation goes up or down by the number of work orders completed, not the number of hours worked, HDA technicians are paid a bona fide commission and are exempt from **FLSA** overtime requirements.

Finally, the district court held that, were HDA covered by the **FLSA**, it would also fall into the Motor Carrier Act (MCA) exemption to the **FLSA** overtime provisions.[33] We note that although the district court determined that the MCA applied, HDA did not assert it below. Moreover, the district court relied solely on cases predating the Technical Corrections Act of 2008, and thus never considered whether the technicians used vehicles weighing more than 10,000 pounds, which would make the MCA exemption inapplicable. As the technicians are not covered by the **FLSA** overtime provisions due to the bona fide commission exemption, we do not address this exemption.

***841** V.

HDA technicians are paid a bona fide commission and are exempt from **FLSA** overtime compensation requirements. Accordingly, we AFFIRM the judgment of the district court.

All Citations

45 F.4th 833

Footnotes

1 John Davillier is the sole managing member of HDA.

2 Cox pays HDA $4 per point, and HDA pays technicians $1.80 per point if the technician uses an HDA vehicle or $2.05 if they use their own vehicle.

3 Plaintiffs worked for HDA as technicians between May 22, 2018, and May 22, 2019. Still at issue below is whether the HDA technicians are independent contractors or employees. For the sake of clarity, we will refer to the plaintiffs as technicians, however if they are independent contractors, **FLSA** overtime protections do not apply.

4 *Ratliff v. Aransas Cnty.*, 948 F.3d 281, 287 (5th Cir. 2020).

5 FED. R. CIV. P. 56(a).

6 *Harville v. City of Houston*, 945 F.3d 870, 874 (5th Cir. 2019) (internal quotations omitted).

7 *Mahmoud v. De Moss Owners Ass'n, Inc.*, 865 F.3d 322, 328 (5th Cir. 2017).

8 29 U.S.C. § 207(a)(1) (employers must pay overtime wages to any employee who "is engaged in commerce or in the production of goods for commerce," or "is employed in an enterprise engaged in commerce or in the production of goods for commerce"); 29 C.F.R. § 783.19.

9 *E.g.*, *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 320–21, 80 S.Ct. 739, 4 L.Ed.2d 753 (1960).

10 29 U.S.C. § 207(a)(1); *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 428–29, 75 S.Ct. 860, 99 L.Ed. 1196 (1955); *Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir. 2007) (per curiam).

11 *Sobrinio*, 474 F.3d at 829 (internal quotations and citations omitted).

12 The Department of Labor has issued regulatory guidance that employees who work on the "maintenance, repair, or improvement of existing instrumentalities of commerce," including telephone lines, are engaged in interstate commerce. 29 C.F.R. § 776.11(a)–(b); *see also* *Thorne v. All Restoration Servs. Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006) (holding those "working for an instrumentality of interstate commerce, *e.g.*, transportation or communication industry employees" are covered individually by **FLSA**); *St. Elien v. All Cnty. Env't Servs., Inc.*, 991 F.3d 1197, 1199 (11th Cir. 2021) (holding that regularly using the instrumentalities of interstate commerce, such as making interstate phone calls, is also sufficient to show that an employee is engaging in interstate commerce).

13 *Allen v. Coil Tubing Servs., L.L.C.*, 755 F.3d 279, 283 (5th Cir. 2014); *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1254 (11th Cir. 2001).

14 *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999).

15 FED. R. CIV. P. 8(c); *Woodfield*, 193 F.3d at 362.

16 *LSREF2 Baron, L.L.C. v. Tauch*, 751 F.3d 394, 398 (5th Cir. 2014) (internal quotations and citations omitted).

17 *Crofts v. DoubleBarrel Downhole Techs.*, No. 4:15-CV-00919, 2017 WL 11198916, at *3 (S.D. Tex. Aug. 16, 2017).

18 *Rogers v. McDorman*, 521 F.3d 381, 385–86 (5th Cir. 2008).

19 29 U.S.C. § 207(i).

20 *See also, e.g.*, *Jones v. Tucker Commc'ns, Inc.*, No. 5:11-CV-398 MTT, 2013 WL 6072966, at *9 (M.D. Ga. Nov. 18, 2013) (finding that a cable installation company was service establishment).

21 Because technicians are paid based on the points system, if the points system is a commission, it is also undisputed that 100% of their pay would be a commission.

22 *See* *Alvarado v. Corp. Cleaning Servs., Inc.*, 782 F.3d 365, 367 (7th Cir. 2015); *Klinedinst*, 260 F.3d at 1254.

23 *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007); *Casanova v. Gold's Tex. Holdings Grp., Inc.*, No. 5:13-CV-1, 2016 WL 1241548, at *5 (W.D. Tex. Mar. 23, 2016).

24 *Crawford v. Saks & Co.*, No. CV H-14-3665, 2016 WL 3090781, at *5 (S.D. Tex. June 2, 2016) (Rosenthal, J.) (alteration in original) (citations omitted) (quoting *Casanova*, 2016 WL 1241548, at *8; *Parker v. NutriSystem, Inc.*, 620 F.3d 274, 283–84 (3d Cir. 2010); *Yi*, 480 F.3d at 508; *Alvarado*, 782 F.3d at 368). Courts in the Second Circuit have adopted slightly different factors; however, the primary inquiry is the same.

See, e.g., *Almanzar v. C & I Assocs., Inc.*, 175 F. Supp. 3d 270, 275 (S.D.N.Y. 2016) ("(1) the employee's compensation must be tied to customer demand or the quantity of sales; (2) the compensation plan must provide performance-based incentives for the employee to increase his or her income; and (3) there must be proportionality between the value of the goods or services sold and the rate paid to the employee.").

25 *Casanova*, 2016 WL 1241548, at *8.

26 The technicians' earnings are directly proportional to HDA's earnings.

27 *Yi*, 480 F.3d at 510–11.

28 *Id.* at 509; *Almanzar*, 175 F. Supp. 3d at 278.

29 *E.g.*, *Casanova*, 2016 WL 1241548, at *9.

30 *Alvarado*, 782 F.3d at 366–68.

31 *Jones*, 2013 WL 6072966, at *11.

32 *Alvarado*, 782 F.3d at 367 (Posner, J.) ("Thus the scarf worker is paid for making scarves even if they haven't been sold—that is, even if he's producing for inventory—while the shoe salesman is paid only when he makes a sale.").

33 *See* 29 U.S.C. § 213(b)(1); 49 U.S.C. § 31502; SAFETEA–LU Technical Corrections Act of 2008, Pub. L. No. 110–244, 122 Stat. 1572 (2008).

End of Document

EXHIBIT 9

35 F.4th 1013
United States Court of Appeals, Fifth Circuit.

Joel FIELD, Plaintiff—Appellee,

v.

ANADARKO PETROLEUM CORPORATION, Defendant—Appellee,

v.

Rusco Operating, L.L.C.; Planning Thru Completion, L.L.C., Appellants.

No. 22-20054

FILED June 7, 2022

Synopsis

Background: Oilfield workers brought collective action against oil-and-gas operator, alleging operator misclassified workers as independent contractors and failed to pay overtime as required by Fair Labor Standards Act (**FLSA**). Developers of online applications through which oilfield workers could find work with oil-and-gas operators moved to intervene as of right or, alternatively, for permissive intervention. The United States District Court for the Southern District of Texas, George C. Hanks, Jr., J., adopted report and recommendations of magistrate judge and denied intervention. Application developers appealed.

Holdings: The Court of Appeals, Cory T. Wilson, Circuit Judge, held that:

[1] district court acted within discretion in finding motion to intervene timely;

[2] developers had sufficient interest in action to support intervention of right;

[3] disposition of action would potentially impair or impeded developers' interests; and

[4] developers had adverse interests to operator.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Intervene.

West Headnotes (18)

[1] **Federal Courts** ⬅ Parties and Process

Denial of motion to intervene of right is an appealable final order. Fed. R. Civ. P. 24(a).

[2] **Federal Courts** ⬅ Parties

Court of Appeals reviews denial of motion to intervene of right de novo. Fed. R. Civ. P. 24(a).

[3] **Federal Courts** ⬅ Parties and Process

Federal Courts ⬅ Parties

Court of Appeals has provisional jurisdiction to review district court's order denying permissive intervention; this means that Court of Appeals reviews a denial of a motion for permissive intervention for abuse of discretion and, if Court finds the district court did not abuse its discretion in denying the intervention, Court must dismiss the appeal for lack of jurisdiction. Fed. R. Civ. P. 24.

[4] **Federal Civil Procedure** ⬅ Grounds and Factors

To intervene of right, a putative intervenor must show that (1) the application was timely; (2) it has an interest relating to the property or transaction which is the subject of the action; (3) it is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and, (4) its interest is inadequately represented by the existing parties to the suit. Fed. R. Civ. P. 24(a).

[5] **Federal Civil Procedure** ⬅ Time for intervention

Timeliness of a motion to intervene of right is to be determined from all the circumstances, and the point to which a suit has progressed is not solely dispositive. Fed. R. Civ. P. 24(a).

[6] **Federal Civil Procedure** ⬅ Time for intervention

Generally, filing a motion to intervene of right as soon as intervenor realizes its interests are not adequately protected is sufficient to meet timeliness requirement. Fed. R. Civ. P. 24(a).

[7] **Federal Courts** ⬅ Parties

A district court's determination of whether a motion to intervene of right is timely is generally reviewed for abuse of discretion. Fed. R. Civ. P. 24(a).

[8] **Federal Civil Procedure** ⬅ Time for intervention

District court acted within discretion in finding application developer's motion to intervene of right timely, in oilfield workers' Fair Labor Standards Act (**FLSA**) collective action against oil-and-gas operator, in which developer of application that connected oilfield workers with oil-and-gas operators sought to intervene on basis that a win by workers would affect developer's contract with certain plaintiffs and would destroy developer's business model, even if developer was aware of suit a year prior to seeking intervention; developer's alleged interests in case only arose when workers with whom developer had actually contracted, through workers' use of application, became party to action, and developer moved to intervene about two weeks after learning of this. Fair Labor Standards Act of 1938 § 1 et seq., 29 U.S.C.A. § 201 et seq.; Fed. R. Civ. P. 24(a).

[9] **Federal Civil Procedure** ⬅ Time for intervention

In determining timeliness of a motion to intervene of right, the question is not when intervenor knew or should have known that its interests would be adversely affected but, instead, when it knew that it had an interest in the case. Fed. R. Civ. P. 24(a).

1 Cases that cite this headnote

[10] **Federal Civil Procedure** ⬅ Interest of applicant in general

An interest in the action, as element required for intervention as of right, is met when an intervenor shows a direct, substantial, legally protectable interest in the proceedings; essentially, what is important is whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way. Fed. R. Civ. P. 24(a).

[11] **Federal Civil Procedure** ⬅ Interest of applicant in general

In analysis of whether putative intervenor of right has interest in action, what is important is whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way. Fed. R. Civ. P. 24(a).

[12] **Federal Civil Procedure** ⬅ Interest of applicant in general

Property interests are the quintessential rights protected by the rule governing intervention as of right, but they are not the only interests that may support intervention. Fed. R. Civ. P. 24(a).

[13] **Federal Civil Procedure** ⬅ Interest of applicant in general

A purported interest is insufficiently direct to support intervention as of right when it requires vindication in a separate legal action or the intervenor is too removed from the dispute. Fed. R. Civ. P. 24(a).

[14] **Federal Civil Procedure** ⬅ Interest of applicant in general

An interest that is purely ideological, economic, or precedential is insufficient to support intervention as of right. Fed. R. Civ. P. 24(a).

[15] **Federal Civil Procedure** ⬅ Particular Intervenors

Existence of contracts between developer of online application, which connected oilfield workers with oil-and-gas operators, and certain plaintiff oilfield workers was a sufficient interest in action on part of developer that would support intervention as of right, in Fair Labor Standards Act (**FLSA**) collective action by workers, some of whom had been hired using developer's application, against oil-and-gas operator, alleging operator misclassified workers as independent contractors; contracts between developer and workers had potentially-applicable arbitration agreement, and those contracts expressly encompassed third-party beneficiaries like operator. Fair Labor Standards Act of 1938 § 1 et seq., 29 U.S.C.A. § 201 et seq.; Fed. R. Civ. P. 24(a).

[16] **Federal Civil Procedure** ⬅ Interest of applicant in general

Though the impairment of an interest must be practical, and not merely theoretical, in order to support intervention of right, the intervenor need only show that if it cannot intervene, there is a possibility that its interest could be impaired or impeded. Fed. R. Civ. P. 24(a).

[17] **Federal Civil Procedure** ⬅ Particular Intervenors

Disposition of oilfield workers' Fair Labor Standards Act (**FLSA**) collective action against oil-and-gas operator would potentially impair or impede interests of developer of online application which connected oilfield workers and oil-and-gas operators, supporting developer's intervention of right in action, in which workers, some of whom had been hired using application, alleged operator misclassified them as independent contractors, where developer's contracts with workers had potentially-applicable arbitration agreement, and, even if operator could invoke arbitration agreement as to workers hired through application as third-party beneficiary of that agreement, operator had not attempted to do so. Fair Labor Standards Act of 1938 § 1 et seq., 29 U.S.C.A. § 201 et seq.; Fed. R. Civ. P. 24(a).

[18] **Federal Civil Procedure** ⬅ Particular Intervenors

Developer of online application for connecting oilfield workers to oil-and-gas operators had adverse interests to the operator which was defendant in Fair Labor Standards Act (**FLSA**) collective action by workers, some of whom had been hired using the application, supporting developer's intervention of right in action, in which workers alleged operator misclassified them as independent contractors, where contract between developer and operator allowed operator to hold developer liable if operator were to misclassify individuals as independent contractors, and operator had indicated it intended to exercise that right. Fair Labor Standards Act of 1938 § 1 et seq., 29 U.S.C.A. § 201 et seq.; Fed. R. Civ. P. 24(a).

***1016** Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:20-CV-00575, George C. Hanks, Jr., U.S. District Judge

Attorneys and Law Firms

Richard J. Burch, Houston, TX, Andrew Wells Dunlap, Carl A. Fitz, Lindsay R. Reimer, Josephson Dunlap Law Firm, Houston, TX, for Plaintiff—Appellee.

David B. Jordan, Jessica L. Craft, Littler Mendelson, P.C., Houston, TX, for Defendant—Appellee Anadarko Petroleum Corporation.

Rachel Cowen, Counsel, John Barrick Bollman, McDermott Will & Emery, L.L.P., Chicago, IL, Megan Marie Coker, Workrise Technologies, Incorporated, Austin, TX, for Appellants.

Before Willett, Engelhardt, and Wilson, Circuit Judges.

Opinion

Cory T. Wilson, Circuit Judge:

A movant attempting to intervene in an action must show that it has a sufficient interest in the litigation to do so. Our would-be intervenors today are two companies that offer an online application (an "app" in today's parlance) that connects oil field workers looking for work with oil-and-gas operators looking for workers. The companies seek to intervene here because some app-using workers have opted-in as plaintiffs alleging claims for unpaid overtime, under the Fair Labor Standards Act, against an operator that used the app to hire them. The app companies' asserted interests in the litigation relate to arbitration agreements between them and the workers, their belief that a win by the workers would destroy their business model, and a demand for indemnity allegedly made by the defendant operator for liability it might incur as to plaintiffs' claims. The district court found these interests insufficient to justify intervention and denied leave. Because we conclude that the arbitration agreements at issue give rise to a sufficient interest in this action to support the app companies' intervention, we reverse the judgment of the district court and remand for further proceedings.

I.

Rusco Operating, L.L.C. and Planning Thru Completion, L.L.C. (the Intervenors) developed an app that connects oilfield workers with oil-and-gas operators. Using the app, individuals find work, and operators find the skilled workers they need for their oilfield endeavors. Before would-be workers can use the app, the Intervenors require that they execute agreements in which users expressly identify themselves as "independent professionals," and agree to arbitrate "every claim, controversy, allegation, or dispute arising out of or relating in any way to [a] Project, the Project Details, or this Agreement[.]"[1] These agreements further provide that they encompass ***1017** disputes between the workers, the Intervenors, and "intended third party beneficiar[ies] of [the] Dispute Resolution Section[,]" including operators that hire "independent professionals" using the app, like defendant Anadarko Petroleum Corporation.

In February 2020, plaintiff Joel Field filed this collective action against Anadarko alleging violations of the Fair Labor Standards Act (**FLSA**), 29 U.S.C. § 201. Specifically, Field alleged that Anadarko misclassified him and others as independent contractors rather than employees and did not pay them for overtime as the **FLSA** requires. Other individual plaintiffs have since opted-in to the collective action, including some who connected with Anadarko via the Intervenors' app.

The Intervenors were served with subpoenas in December 2020, as Field sought to discover and contact potential plaintiffs. After workers who had used their app opted-in to the collective action, the Intervenors filed a motion to intervene of right and, alternatively, for permissive intervention. In the motion, the Intervenors asserted that they should be allowed to intervene in this case because they have an interest in enforcing their arbitration agreements with the plaintiffs and in defending their business model, which rests on classifying their users as independent contractors. A magistrate judge held a hearing on the motion and recommended that the request to intervene be denied. The magistrate judge determined that the Intervenors had failed to demonstrate any of the elements necessary for intervention of right (beyond timeliness of their motion) and that the Intervenors had not offered any compelling argument for permissive intervention. The district court adopted the magistrate judge's recommendations in a brief order over the Intervenors' objections. The Intervenors now appeal.

II.

[1] [2] [3] We have jurisdiction over a denial of a motion to intervene of right because it is an appealable final order. *Edwards v. City of Hous.*, 78 F.3d 983, 992 (5th Cir. 1996) (citing *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1202 n.5 (5th Cir. 1992); *Piambino v. Bailey*, 610 F.2d 1306, 1320 (5th Cir. 1980)). We review such a denial *de novo*. *Rotstain v. Mendez*, 986 F.3d 931, 936 (5th Cir. 2021).[2]

[4] To intervene of right under Federal Rule of Civil Procedure 24(a), a putative intervenor must show that "(1) the application ... [was] timely"; (2) that it has "an interest relating to the property or transaction which is the subject of the action"; (3) that it is "so situated that the disposition of the action may, as a practical matter, impair or impede [its] ability

to protect that interest"; and, finally, (4) that its interest is "inadequately represented by the existing parties to the suit." *DeOtte v. State*, 20 F.4th 1055, 1067 (5th Cir. 2021) (quoting *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016)).

A.

[5] [6] [7] [8] " 'Timeliness is to be determined from all the circumstances' and 'the point ***1018** to which [a] suit has progressed is ... not solely dispositive[.]" *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, — U.S. —, 142 S. Ct. 1002, 1012, 212 L.Ed.2d 114 (2022) (quoting *NAACP v. New York*, 413 U.S. 345, 365–66, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973)). Generally, filing a motion to intervene as soon as an intervenor realizes its interests are not adequately protected is sufficient to meet the timeliness requirement. *Id.* (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977)). A district court's determination of whether a motion to intervene is timely "is generally reviewed for abuse of discretion[.]" *Sierra Club v. Espy*, 18 F.3d 1202, 1250 n.2 (5th Cir. 1994) (citing *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 926 (5th Cir. 1984)).

Here, the magistrate judge and the district court determined that the Intervenors timely filed their motion to intervene on December 17, 2021. The Intervenors attached to their motion a declaration asserting that they first learned on December 2, 2021, that eleven individuals, hired by Anadarko using their app, had opted in as plaintiffs on September 17, 2021. Field does not challenge the veracity of this statement. Instead, Field asserts that the Intervenors should have been aware of the potential impact on their interests as soon as the class-action lawsuit was filed, or at least by the time they were served with third party subpoenas in December of 2020.

[9] Field argues the wrong standard. The question "is 'not when [an intervenor] knew or should have known that [its] interests would be adversely affected but, instead, when [it] knew that it had an interest in the case.' " *St. Bernard Par. v. Lafarge N. Am., Inc.*, 914 F.3d 969, 974 (5th Cir. 2019) (quoting *Sommers v. Bank of Am., N.A.*, 835 F.3d 509, 513 (5th Cir. 2016)). The Intervenors' alleged interests (considered substantively *infra*) of enforcing arbitration agreements with the plaintiffs, protecting their business model, and, to the extent timely raised, indemnity obligations as to Anadarko, only materialized when individuals with whom the Intervenors had actually contracted became party to the lawsuit. That was September 17, 2021. Field does not dispute this timeline. Field also does not dispute the district court's finding that the Intervenors did not learn of these plaintiffs until December 2, 2021, and then moved to intervene just over two weeks later. Therefore, Field has failed to demonstrate that the district court abused its discretion in finding the Intervenors' motion to have been timely filed.

B.

[10] [11] [12] [13] [14] The second element, an interest in the action, is met when an intervenor shows a "direct, substantial, legally protectable interest in the proceedings." *DeOtte*, 20 F.4th at 1068 (internal quotation marks omitted) (quoting *Edwards v. City of Hous.*, 78 F.3d 983, 1004 (5th Cir. 1996)). Essentially, "[w]hat is important is 'whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way[.]' " *Id.* (quoting *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)). "Property interests are the quintessential rights Rule 24(a) protects," but they are not the only interests that may support intervention. *La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305 (5th Cir. 2022). However, a purported interest "is insufficiently direct when it requires vindication in a separate legal action or the intervenor is too removed from the dispute." *DeOtte*, 20 F.4th at 1068 (internal quotation marks omitted) (citing *Wal-Mart Stores*, 834 F.3d at 568). An interest that is "purely 'ideological, economic, or precedential' " is also insufficient. ***1019** *La Union del Pueblo Entero*, 29 F.4th at 305 (quoting *Texas*, 805 F.3d at 657).

[15] The Intervenors posit three interests in this case that they contend warrant intervention: enforcement of their arbitration agreements with the plaintiffs; the impact of this case on their business model; and, perhaps belatedly,[3] potential indemnity obligations to Anadarko. We begin by examining the Intervenors' contractual rights and obligations. We end there too, as we conclude Intervenors' arbitration agreements with the plaintiffs give the Intervenors "a stake in the matter" sufficient to warrant intervention. *DeOtte*, 20 F.4th at 1068 (internal quotation marks and citation omitted). And, at least

to some degree, the Intervenors' other proffered grounds dovetail with their contractual interest.

The Intervenors entered contracts with both the plaintiffs who used their app and Anadarko. Those agreements define a choreographed set of relationships between app-using workers, the Intervenors, and Anadarko, well beyond simple check-the-box boilerplate terms for using the Intervenors' app. For instance, while their work was assigned by Anadarko, the workers were actually compensated by the Intervenors. The contracts with individual plaintiffs stipulate, among other things, that the plaintiffs are "independent professionals." The contracts also provide that any disputes between the plaintiffs and the Intervenors, or between the plaintiffs and "intended third party beneficiar[ies]," including operators like Anadarko that use the app to hire workers for "Projects," are subject to binding arbitration. The contract with Anadarko obligates the Intervenors to provide independent contractors to Anadarko and allows Anadarko to hold the Intervenors liable if they misclassify individuals as independent contractors. [4]

The plaintiffs thus represented in their contracts with the Intervenors that they were "independent professionals"—somewhat in tension with the plaintiffs' current litigation position that they were really Anadarko's employees. More importantly, the plaintiffs agreed to arbitrate "every claim, controversy, allegation, or dispute arising out of or relating in any way to" not only their relationship with the Intervenors, but also their resulting work placements with Anadarko. And the contracts expressly encompass third party beneficiaries like Anadarko. Thus the Intervenors' interest in enforcing their arbitration agreements, particularly given the interrelatedness of the parties' contractual relationships ***1020** and the plaintiffs' claims, is "a stake in the matter that goes beyond a generalized preference that the case come out a certain way[.]" *DeOtte*, 20 F.4th at 1068.

C.

[16] [17] Regarding the third element, "[t]hough the impairment must be 'practical' and not merely 'theoretical,' the [intervenor] need only show that if [it] cannot intervene, there is a possibility that [its] interest could be impaired or impeded." *La Union del Pueblo Entero*, 29 F.4th at 307 (citing *Brumfield v. Dodd*, 749 F.3d 339, 344–45 (5th Cir. 2014)).

The Intervenors more easily demonstrate this element. To date in the litigation, Anadarko has not taken any action to compel arbitration against any of the plaintiffs who contracted with the Intervenors. Indeed, as a non-signatory to the agreements, there is at least some question as to whether Anadarko *could* invoke the Intervenors' arbitration agreements with the plaintiffs. *See* *Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530–31 (5th Cir. 2019) (listing some situations where non-parties may enforce arbitration agreements, i.e., through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel" (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009))). But as long as that question remains a hypothetical one, the Intervenors' interest in enforcing their arbitration agreements with the plaintiffs is, as a practical matter, at risk of being lost as this litigation proceeds.

More broadly, while Anadarko's incentives to vindicate the other terms of the plaintiffs' contracts may be somewhat aligned with those of the Intervenors, the respective motivations of Anadarko and the Intervenors are not so compatible to ensure that the Intervenors' contracts are not "impaired or impeded" during the course of the litigation. *La Union del Pueblo Entero*, 29 F.4th at 307 (citation omitted). This is particularly so given that the plaintiffs seemingly are essentially *flaunting* the terms of the contracts they entered with the Intervenors, including their agreement to arbitrate, by opting-in to this action and alleging that they were really Anadarko's employees all along.

D.

[18] Finally, the fourth element, inadequate representation, requires that the would-be intervenors at least establish "adversity of interest, collusion, or nonfeasance on the part of the existing party" that "has the same ultimate objective" for the lawsuit as the party seeking to intervene. *Id.* at 308 (internal quotation marks omitted) (quoting *Edwards*, 78 F.3d at 1005; *Texas*, 805 F.3d at 661–62). The Intervenors substantiate "adversity of interest" between Anadarko and them sufficient to merit intervention. *Id.* (citations omitted). Anadarko has thus far not pressed the plaintiffs' agreement to arbitrate their disputes. No one else

in this action will, to be sure. By contrast, Anadarko has given every indication that it intends to exercise the rights it has under its own contract with the Intervenors, including the possibility of seeking indemnity against them for liability as to the plaintiffs' claims. That in itself demonstrates that Anadarko's and the Intervenors' respective interests are adverse for the purposes of Rule 24(a)(2).

III.

Rusco Operating, L.L.C. and Planning Thru Completion, L.L.C. timely moved to intervene in this action. They have shown an adequate interest in the subject of this lawsuit by virtue of their contracts with ***1021** the parties, and "disposing of the action may as a practical matter impair or impede the [Intervenors'] ability to protect [their] interest." FED. R. CIV. P. 24(a)(2). By contrast, no other party in this action will adequately represent the Intervenors' interest. They should therefore be allowed to intervene of right, and the district court erred in denying their motion to do so. We REVERSE the district court's ruling and REMAND for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

All Citations

35 F.4th 1013, 112 Fed.R.Serv.3d 1891

Footnotes

1 The contracts define "Project" this way: "From time to time, Companies [operators] will post proposed projects via the [app], setting for the nature of the services required." They describe "Project Details" as "desired skills, location, date, start time (as applicable), project length (as applicable), proposed pay rate, invoicing terms and any required certifications."

2 We have " 'provisional jurisdiction' to review a district court's order denying permissive intervention." *Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 308 (5th Cir. 2021) (internal quotation marks omitted) (quoting *Rotstain*, 986 F.3d at 942). This means that we review a denial of a motion for permissive intervention for abuse of discretion and, if we find the district court did not abuse its discretion in denying the intervention, we "must dismiss the appeal for lack of jurisdiction." *Id.* (internal quotation marks omitted) (quoting *Rotstain*, 986 F.3d at 942). Because we conclude that the Intervenors may properly intervene of right, we do not address their alternative request for permissive intervention.

3 The Intervenors may have forfeited their argument related to possible indemnity, at least based on the record before us, because it is not clear they raised this issue until they filed objections to the magistrate judge's report and recommendation to deny their motion to intervene. *See* *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994) ("By waiting until after the magistrate court had issued its findings and recommendations ... Respondent has waived [the arguments]."). But we need not delve more deeply into this question given that the Intervenors' arbitration agreements with the plaintiffs constitute a sufficient interest to justify intervention.

4 The Master Services Agreement (MSA) between the Intervenors and Anadarko addresses the relationship between workers referred by the Intervenors' app and Anadarko in some detail. As examples, the MSA provides that a worker hired through the app "shall be an independent contractor with respect to all Services," and shall have no right "to any pension or welfare plans, including, without limitation, savings, retirement, medical, dental, insurance, or vacation plans sponsored by [Anadarko]." Workers also must agree "to comply with all applicable state and federal payroll tax withholding requirements" themselves. Because the

Intervenors do not invoke their agreement with Anadarko as a basis for intervening, other than the contract's indemnity provisions, *see supra* n.3, we do not address that contract in detail here.

End of Document

EXHIBIT 10

23 F.4th 393
United States Court of Appeals, Fifth Circuit.

Kenneth NEWMAN, individually and, on behalf of All Others Similarly Situated, Plaintiff—Appellee,
Cypress Environmental Management-TIR, L.L.C., Intervenor—Appellee,
v.
PLAINS ALL AMERICAN PIPELINE, L.P., Defendant—Appellant.

No.
21
-
50253
|
FILED January 7, 2022

Synopsis

Background: Employees, who performed work for a client of their employer, brought collective action against client for alleged Fair Labor Standards Act (FLSA) violations. United States District Court for the Western District of Texas, David Counts, J., denied client's motion to compel arbitration pursuant to arbitration provision in employment agreement between employees and employer. Employer intervened and client appealed.

Holdings: The Court of Appeals, Willett, Circuit Judge, held that:

[1] under Texas law, client was not a third-party beneficiary of employment agreement between employer and employee, who could enforce arbitration provision in agreement against employee;

[2] under Texas law, as predicted by Court of Appeals, employer and client did not have a "close relationship," and thus, intertwined-claims estoppel did not apply to allow client to enforce arbitration provision; and

[3] under Texas law, artful-pleading estoppel did not apply to allow client to enforce arbitration provision.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration.

West Headnotes (22)

[1] **Alternative Dispute Resolution** Scope and standards of review

Court of Appeals reviews denial of motion to compel arbitration de novo, as it does contract-interpretation issues generally.

1 Cases that cite this headnote

[2] **Federal Courts** Contracts

Whether district court properly refused to equitably enforce contract is reviewed for abuse of discretion.

[3] **Alternative Dispute Resolution** Existence and validity of agreement

When court decides whether arbitration agreement exists, it necessarily decides its enforceability between parties; therefore, deciding arbitration agreement's enforceability between parties remains question for courts.

7 Cases that cite this headnote

[4] **Courts** Number of judges concurring in opinion, and opinion by divided court

Rule of orderliness, under which a court is bound by the earlier of two conflicting published panel opinions, applies as equally to panel's implicit reasoning as it does to its express holdings.

1 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Matters to Be Determined by Court

In cases in which an arbitration agreement's enforceability can reach strangers to the contract, court must ask whether a written arbitration provision exists that is made enforceable against, or for the benefit of, a third party under state

contract law, at first step to decide a motion to compel arbitration.

3 Cases that cite this headnote

[6] **Contracts** ⬅ Presumptions and burden of proof

Under Texas law, to overcome presumption that noncontracting parties are not third-party beneficiaries, the parties to the contract must have intended to secure a benefit to a third party and entered into the contract directly for the third party's benefit.

[7] **Alternative Dispute Resolution** ⬅ Presentation and reservation of grounds for review

Court of Appeals would not address client's argument, raised for the first time in its reply brief, that employer's subsidiary's agreement to indemnify client clearly and fully spelled out a benefit under employment agreement between employer and employees, such that it was a third-party beneficiary to agreement under Texas law, and could enforce arbitration provision in agreement against employees, in collective action brought by employees for alleged FLSA violations; employees did not raise a new issue in their brief warranting such new argument. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[8] **Contracts** ⬅ Agreement for Benefit of Third Person

Under Texas law, to determine whether the parties to a contract intended to secure a benefit to a third party, court must look at the entire contract, giving effect to all its provisions.

[9] **Contracts** ⬅ Agreement for Benefit of Third Person

Under Texas law, for a contract to secure benefit to third party, it must have clearly and fully spelled it out, and benefit itself must be more than incidental; only benefit that would confer third party the status of a claimant in event of breach will do.

[10] **Contracts** ⬅ Agreement for Benefit of Third Person

Under Texas law, whatever a third party's expectations were, they are irrelevant to question of whether the third party is beneficiary to contract; without the parties to the contract clearly and fully spelling it out in the contract, whatever benefit third party hoped it had must be denied.

[11] **Contracts** ⬅ Agreement for Benefit of Third Person

Under Texas law, where third-party-beneficiary status is doubtful, it must be denied.

[12] **Federal Courts** ⬅ Failure to mention or inadequacy of treatment of error in appellate briefs

Court of Appeals does not entertain arguments raised for the first time in a reply brief unless a new issue is raised in the appellee's brief and the appellant responds in his reply brief.

[13] **Alternative Dispute Resolution** ⬅ Persons entitled to enforce

Under Texas law, client of employer was not a third-party beneficiary of employment agreement between employer and employee, who could enforce arbitration provision in agreement against employee in collective action brought by employee for alleged FLSA violations; although employee's employment was based on a specific project to be performed for client, employee's incorporated-by-reference pay letter did not clearly and fully spell out that client could take legal action if either employer or employee breached its terms, and it expressly provided that employer, not client, controlled employee's pay, and employment agreement itself did not clearly and fully spell out that client

could take legal action if employee decided to breach its other terms. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[14] **Alternative Dispute Resolution** Persons entitled to enforce

Under Texas law, as predicted by Court of Appeals, employer and its client did not have a "close relationship," and thus, intertwined-claims estoppel did not apply to allow client to enforce arbitration provision in employment agreement between employer and employee, in collective action brought by employee for alleged FLSA violations; client and employer were independent business entities, employee did not treat employer and client as a single unit in his pleading, and although employer's subsidiary agreed to indemnify client in connection with employees' claims, a reasonable signatory to an arbitration agreement would not foresee that a corporate subsidiary, with which he had no affiliation, could unilaterally change his arbitration rights merely by agreeing to indemnify a client. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

1 Cases that cite this headnote

[15] **Estoppel** Contracts

Under Texas law, as predicted by the Court of Appeals, intertwined-claims estoppel applies when: (1) a nonsignatory to a contract has a close relationship with one of the signatories, and (2) the claims are intimately founded in and intertwined with the underlying contract obligations.

5 Cases that cite this headnote

[16] **Estoppel** Contracts

For a nonsignatory to a contract to have a "close relationship" with one of the signatories, as required for intertwined-claims estoppel to apply under Texas law, as predicted by the Court of Appeals, the relationship must be closer than merely independent participants in a business transaction.

4 Cases that cite this headnote

[17] **Estoppel** Contracts

When considering whether a nonsignatory to a contract has a "close relationship" with one of the signatories, as required for intertwined-claims estoppel to apply under Texas law, as predicted by the Court of Appeals, the test is one of consent, not coercion.

1 Cases that cite this headnote

[18] **Alternative Dispute Resolution** Persons affected or bound

Alternative Dispute Resolution Review

Client of employer did not waive for appeal its argument that it had a close relationship with employer because a subsidiary of employer contractually agreed to indemnify client in connection with employee's FLSA claims, in supports of its assertion that intertwined-claims estoppel allowed it to enforce arbitration provision in employment agreement between employer and employee; client's' motion to compel arbitration plainly argued that one of the reasons it was entitled to intertwined-claims estoppel was because of the indemnity agreement. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[19] **Federal Courts** In general; necessity

Court of Appeals will not consider arguments first raised on appeal.

[20] **Alternative Dispute Resolution** Persons entitled to enforce

Under Texas law, artful-pleading estoppel did not apply to allow client of employer to enforce arbitration provision in employment agreement between employer and employee, in collective action brought by employee for alleged FLSA violations; employee did not

name any individual agent of employer's in his complaint as a defendant, but rather, he named a separate business, nor was his suit in substance against client or employer in either's capacity as a principal, as he sued client directly for its alleged FLSA violations. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[21] **Alternative Dispute Resolution** ← Pleading

Artful-pleading estoppel in Texas requires two things: (1) naming individual agents of the party to the arbitration clause and suing them in their individual capacity; and (2) bringing a suit that in substance is against those agents' principal.

1 Cases that cite this headnote

[22] **Alternative Dispute Resolution** ← Contractual or consensual basis

Arbitration under the Federal Arbitration Act (FAA) is a matter of contract. 9 U.S.C.A. § 2.

***396** Appeal from the United States District Court for the Western District of Texas, USDC No. 7:19-CV-244, Walter David Counts, III, U.S. District Judge

Attorneys and Law Firms

Richard J. Burch, Andrew Wells Dunlap, Julianne Lomax, Josephson Dunlap Law Firm, Houston, TX, for Plaintiff-Appellee.

Rachel Cowen, Counsel, McDermott Will & Emery, L.L.P., Chicago, IL, Nicole Figueroa, McDermott Will & Emery, L.L.P., Dallas, TX, for Intervenor-Appellee.

Mark Douglas Temple, Esq., Paul Michael Knettel, Peter Justin Stuhldreher, Esq., Baker & Hostetler, L.L.P., Houston, TX, for Defendant-Appellant.

Before King, Costa, and Willett, Circuit Judges.

Opinion

Don R. Willett, Circuit Judge:

***397** A pipeline-inspection firm hired some inspectors. Their employment agreement contained an arbitration provision. The firm sent the inspectors off to work for a client company. The inspectors eventually sued the client for alleged Fair Labor Standards Act violations. They did not sue their firm. The client moved to compel arbitration. The district court denied its motion, reasoning that the client could not enforce the arbitration agreement between the inspectors and their firm. The firm intervened, and the client company appealed. For the reasons below, we AFFIRM.

I

Cypress Environmental Management-TIR, L.L.C. ("Cypress"), staffs pipeline inspectors to various client-company projects. It hired Newman and his co-plaintiffs—who we will collectively refer to as Newman, for simplicity's sake—to work as independent pipeline inspectors for Plains All American Pipeline ("Plains"). As part of his job, Newman signed an Employment Agreement with Cypress. The Employment Agreement contained an arbitration agreement. Newman and Cypress agreed "that the Federal Arbitration Act ('FAA') applie[d]"; "to arbitrate all claims that have arisen or will arise out of [his] employment with or termination from [Cypress]"; and that any "[a]rbitration [would] be conducted in accordance with the American Arbitration Association Employment Arbitration Rules," the AAA Rules. [1]

Newman's Employment Agreement did not expressly mention Plains. But it did specify that Cypress had hired Newman "based on a specific project" and "for a designated customer." It also incorporated by reference a certain Pay Letter. This Pay Letter named Plains as the designated customer that Newman was to work for.

Newman never signed any agreement with Plains. But a Cypress subsidiary did. That subsidiary, Tulsa Inspection Resources, LLC ("TIR"), signed the contract that governed Cypress's business relationship with Plains. As part of that contract, TIR agreed to indemnify Plains for any claims relating to "any violation or alleged violation of state or federal law related to the payment, employment, or employment status of any of [Cypress's] employees."

Newman eventually brought a collective action against Plains. He alleged that Plains owes him unpaid overtime under the FLSA. Conspicuously absent from his complaint

were any claims against Cypress. After Newman filed suit, Plains moved to compel arbitration. The district court did not compel arbitration, and in a detailed order it reasoned that our prior decision in *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*[2] was distinguishable; that Plains was not a third-party beneficiary to the Newman–Cypress Employment Agreement under Texas law; and that it would not allow Plains to enforce the arbitration agreement using intertwined-claims estoppel.

After the district court denied Plains's motion to compel arbitration, Cypress moved to intervene. The district court ***398** granted its motion.[3] Plains then appealed the district court's denial of its motion to compel arbitration.

II

[1] [2] We review the denial of a motion to compel arbitration de novo[4]—as we do contract-interpretation issues generally.[5] As for whether the district court properly refused to equitably enforce a contract, we review that for abuse of discretion.[6]

III

The parties vigorously dispute whether the district court should have decided whether Plains can enforce the Newman–Cypress arbitration agreement. Cypress admits that deciding whether an arbitration agreement exists between the parties is "always for the court."[7] But both it and Plains see a distinction between deciding whether an arbitration agreement *exists* (a question for the court) and deciding who it is *enforceable against* (a question they say is delegable to the arbitrator). Newman sees no distinction. Under controlling caselaw, says Newman, we must decide whether Plains can enforce the Newman–Cypress arbitration agreement; not an arbitrator.

[3] We agree with Newman. When a court decides whether an arbitration agreement exists, it necessarily decides its enforceability between parties. Therefore, deciding an arbitration agreement's enforceability between parties remains a question for courts.

A

We have explained before that courts must decide "at the outset" whether an enforceable arbitration agreement exists at all.[8] The parties cannot delegate disputes over "the very *existence* of an[ ] [arbitration] agreement."[9] The Supreme Court recently "reaffirmed" this rule.[10] It explained in *Henry Schein, Inc. v. Archer and White Sales, Inc.* that the FAA requires courts to first "determine[ ] whether a valid arbitration agreement exists" before granting motions to compel arbitration.[11]

To that end, deciding enforceability between the parties and an arbitration agreement's existence are two sides of the same coin. We said as much in ***399** *Sherer v. Green Tree Servicing LLC.*[12] Under "the first step in determining whether a valid agreement to arbitrate exists," we look first to "the 'terms of the agreement,' " which "dictate '[w]ho is actually bound by an arbitration agreement.' "[13] Then, "[i]f that fails," we "look to theories such as equitable estoppel to determine whether a nonsignatory may compel arbitration."[14] Under both the Supreme Court's and our caselaw, then, Newman has the better view. It is up to us—not an arbitrator—to decide whether Plains can enforce the Newman–Cypress arbitration agreement.

B

Still, Plains and Cypress disagree. They contend that part of our decision in *Brittania-U* supports that deciding an arbitration agreement's enforceability between the parties is an arbitrability question, which would make it delegable to an arbitrator. We disagree and, in any event, find that *Brittania-U* addressed a distinguishable situation.

In *Brittania-U*, a disappointed bidder for some oil leases sued the seller and two of its agents involved in the bidding process. As part of the bidding process, the bidder and seller had signed an arbitration agreement. That arbitration agreement contained a delegation clause: a clause that delegates arbitrability questions to the arbitrator. The seller's agents never signed the bidder–seller arbitration agreement.

Nonetheless, both the seller and its nonsignatory agents moved to compel arbitration based on it. [15]

We held that they could. [16] We noted that before we could reach whether the delegation clause was valid, we had to decide the first-step, formation question. [17] Specific to the agents, that meant looking to " 'background principles' of state contract law," like equitable estoppel, to see if they could enforce the bidder–seller arbitration agreement as nonsignatories. [18] When we looked to those background principles, we found the Second Circuit's decision in *Contec v. Remote Solution, Co.* "instructive." [19] In that case the Second Circuit held that a nonsignatory —a corporation's successor in interest—could enforce an arbitration agreement since it had a "sufficient relationship" with both the predecessor-in-interest signatory "and to the rights created under the agreement." [20] We found *Contec* indistinguishable in *Brittania-U*: "Like in *Contec*, the [seller and its agents]—a signatory and two nonsignatories—are attempting to enforce the arbitration provision against [the signatory bidder]." [21] Since we also held that the delegation ***400** clause was valid, the seller's agents could therefore compel arbitration. [22]

But we are not faced today with the same situation we confronted in *Brittania-U*. The district court below correctly explained what made *Brittania-U* different: in that case, an "agency relationship" existed between the agents and the seller, and "estoppel principles were at play." As we explain more thoroughly below, those facts are not present here. And, even more unlike *Brittania-U*, Cypress was not even a party to this suit until it intervened. Newman has still brought no claims against it.

But to the principal thrust of Plains and Cypress's argument —that *Brittania-U* held that enforceability between the parties is a second-step, arbitrability question—we cannot agree. We already highlighted above how *Brittania-U* supports that we decide that issue as part of the first-step, formation question. What supports Plains and Cypress's argument is nothing more than some imprecise language. True, we did say in *Brittania-U* that we had to "first determine whether claims against [the agents] were ... clearly and unmistakably delegated to the arbitrator" before we could address whether the agents could enforce the bidder–seller arbitration agreement as nonsignatories. [23] But in holding that they could, we explicitly relied on *Contec*. [24] And in *Contec*, the Second Circuit plainly reasoned that enforceability goes to the first-step, formation question that is determined by the courts. [25]

[4] But even if *Brittania-U* could not be reconciled with our decision today, we would still be bound to disagree with Plains and Cypress. In general, the rule of orderliness binds us to follow a prior panel's decision on an issue. [26] But when two published panel decisions conflict, we must follow the earlier. [27] Plains and Cypress's reading of *Brittania-U* would create just such a conflict between it and our earlier decision in *Sherer*. [28] So, we are hemmed in. We could not read *Brittania-U* as Plains and Cypress invite us to even if we were so inclined.

IV

Still, our work is far from done. We explained in *Kubala v. Supreme Production Services, Inc.* that the first step to decide a motion to compel arbitration is to ask a state-law, contract-formation question: Did "the *parties* enter[ ] into *any* ***401** *arbitration agreement at all.*" [29] In cases like *Kubala*, where Texas law deemed that both parties accepted the same arbitration agreement at issue, that ends our first-step inquiry. [30] But sometimes an arbitration agreement's enforceability can reach "strangers to the contract." [31] In these so-called "nonsignatory," [32] "third party," or "nonpart[y]" cases, [33] we must inquire further.

[5] In making that further inquiry, the Supreme Court's decision in *Arthur Andersen LLP v. Carlisle* is instructive. There, the Supreme Court explained that "background principles of state contract law" govern "who is *bound*" by an arbitration agreement. [34] And those principles can expand the arbitration agreement's enforceability beyond its signatory parties through "traditional" doctrines; doctrines like "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." [35] So in third-party cases we must ask

an additional question: Does "a written arbitration provision" exist that "is made enforceable against (or for the benefit of) a third party under state contract law"? [36]

The parties agree that Texas law governs our first-step analysis. Neither Plains nor Cypress contends that Newman actually entered into an arbitration agreement with Plains. [37] What Plains and Cypress *do* contend, though, is that Plains can *enforce* the Newman–Cypress arbitration agreement. Newman adamantly disagrees. We agree with Newman.

A

[6] Plains contends that it is a third-party beneficiary to the Newman–Cypress Employment Agreement. Newman disagrees. As he points out, the Supreme Court of Texas has explained that Texas law presumes that noncontracting parties are not third-party beneficiaries. [38] To overcome that presumption, "the parties to the contract"—Newman and Cypress—must have "intended to secure a benefit to [a] third party"—Plains—"*and* entered into the contract directly for the third party's benefit." [39]

[7] [8] [9] [10] [11] [12] Still, as Plains accurately notes, we must decide if Newman and Cypress intended to secure a benefit to it by looking at the "entire" Employment Agreement, and "giv[ing] effect to all its provisions." ***402** [40] To secure a benefit to Plains, the Employment Agreement must have "clearly and fully spelled [it] out." [41] And the benefit, itself, "must be more than incidental." [42] Only a benefit that would confer Plains the status of a "claimant[ ]" in the event of breach will do. [43] Whatever Plains's expectations were, they are "irrelevant." [44] Without Newman and Cypress clearly and fully spelling it out in the contract, whatever benefit Plains hoped it had "must be denied." [45] And where third-party-beneficiary status is "doubt[ful]," it too must be denied. [46] Applying that standard, Plains cannot overcome the presumption against third-party-beneficiary status for two reasons. [47]

[13] *First*, Newman's incorporated-by-reference Pay Letter did not clearly and fully spell out that Plains could take legal action if either Newman or Cypress breached its terms. To the extent that it named Plains at all, the Pay Letter merely list "Plains-Pipeline" as the "Client." [48] Further, the Pay Letter expressly provided that Cypress—not Plains—controlled Newman's pay. Cypress only "based" Newman's pay on his job "classification" and a *separate* "agreement" that it had with Plains. And, as the Employment Agreement makes plain, Newman's pay could "be changed over time *at the discretion* of [Cypress] whether based on changes in job classification or assignment, changes in [Cypress's] agreement with [Plains], *or otherwise*." Cypress agrees that it alone controlled Newman's pay: "Plains paid Cypress an all-inclusive rate to compensate it for the services it provided; from that amount, Cypress, in its sole discretion, determined how much to pay each of its inspectors." All that is to say, if Cypress unilaterally decided to pay Newman more or less, or if Newman, for example, failed to submit "a mileage log" for reimbursement purposes, Plains had no clearly and fully spelled out right to sue under the Pay Letter.

Second, the Employment Agreement itself did not clearly and fully spell out that ***403** Plains could take legal action if Newman decided to breach its other terms. For instance, Newman agreed to protect both Cypress's and Plains's "confidential business and trade secrets." But if he breached that agreement, the Employment Agreement did not expressly provide Plains the right to sue Newman. Rather, it provided that such a breach would "irreparably injure" Cypress by causing it to "violate the confidentiality provisions [it had] with its customers." And if Newman so injured Cypress, then the Employment Agreement expressly contemplated only Cypress, as the "Employer," suing Newman in court on "claims for injunctive relief." [49] Further, Newman and Cypress both agreed that, although Newman's "employment [was] based on a specific project to be performed for [Plains]," Newman's employment was "at will." [50] Newman could have walked off the job "at any time for any reason," and Cypress could likewise have fired him. Nowhere did Newman's Employment Agreement give Plains a clear and fully spelled out say in any of that.

For those two reasons, Plains was not a third-party beneficiary under Newman's Employment Agreement with Cypress. Plains's contrary arguments are unpersuasive. Although it reads Newman's Employment Agreement like we do, [51] Plains draws a different conclusion from that reading. It concludes that its express designation as the specific project client in Newman's Employment agreement entitled it to third-party-beneficiary status. Not so.

Plains hangs its hat here on the Texas Supreme Court's decision in *City of Houston v. Williams*.[52] In that case, firefighters sued their city for not properly paying "lump sums due upon termination of their employment."[53] In support, the firefighters pointed to two contracts that their union had negotiated with the city on their behalf.[54] These contracts expressly stated that one purpose was "to provide certain wages, hours, and conditions of employment" to the firefighters as the city's "employee[s]."[55] Though the firefighters themselves did not sign these agreements, the Supreme Court of Texas held that the firefighters had standing to sue the city on them as third-party beneficiaries.[56] Said the Court, the contracts "reflect[ed] an intent to benefit the firefighters" because the union had a duty to represent and seek benefits for them; the contracts' express purpose was to benefit them; and the contracts limited pay-related benefits to them, as opposed to offering pay benefits "to the world at large."[57]

This case is not *City of Houston*. The *City of Houston* firefighters sued to enforce specific "guarantees of compensation ... not promised to the [c]ity or to the ***404** [u]nion," but to *them*.[58] In other words, a right was clearly and fully spelled out for them in the contract. True, the Pay Letter did identify Plains as the designated customer that Cypress hired Newman to do work for. But as we already explained, Newman could have literally walked off the job at any point. If he had, his Employment Agreement with Cypress did not provide Plains with any clearly and fully spelled out right to recourse. Newman's Employment Agreement, at most, conferred a benefit to Cypress that was incidental and borderline doubtful. That is not enough to confer third-party-beneficiary status in Texas.[59]

B

[14] Plains and Cypress also contend that intertwined-claims estoppel allows Plains to enforce the Newman–Cypress arbitration agreement. Newman denies that intertwined-claims estoppel even exists under Texas law. He argues that the Texas Supreme Court has repeatedly refused to recognize intertwined-claims estoppel.

Newman does have some support. In *In re Merrill Lynch Trust Co. FSB*, the Supreme Court of Texas acknowledged that federal courts had applied the theory to allow nonsignatories to enforce arbitration agreements.[60] But it did not decide if the theory existed in Texas.[61] Over a decade later, the Texas Supreme Court in *Jody James Farms, JV v. Altman Group, Inc.* again acknowledged its existence, as well as our *Erie*-guess that intertwined-claims estoppel exists in Texas.[62] Yet the *Jody James* Court again declined to decide the question since, even if intertwined-claims estoppel did exist in Texas, the facts did not support its application.[63]

[15] Still, our hands are tied. We already made our *Erie*-guess,[64] and the Texas Supreme Court has not changed Texas law since. So, the rule of orderliness binds us to assume that intertwined-claims estoppel exists in Texas.[65] Under our *Erie*-guess, intertwined-claims estoppel applies when: (1) "a nonsignatory has a 'close relationship' with one of the signatories," and (2) "the claims are 'intimately founded in and intertwined with the underlying contract obligations.' "[66] But that only gets Plains and Cypress so far. That is because Plains and Cypress do not have a close relationship. Therefore, Newman is ultimately right that intertwined-claims estoppel does not apply.

[16] [17] Newman denies that Plains has a close relationship with Cypress.[67] He points out that, under Texas law, a *close relationship* is a term of art, generally ***405** requiring formal corporate affiliation.[68] The relationship between a typical insurance agency and an "independent broker or salesman," for instance, is not close enough in Texas.[69] The relationship "must be closer than merely independent participants in a business transaction."[70] The test is one of "consent, not coercion."[71] Would a reasonable signatory to the arbitration agreement anticipate being forced to arbitrate claims against the nonsignatory?[72] On the other hand, we have said that when plaintiffs treat multiple defendants "as a single unit" in their pleadings, "raising virtually indistinguishable factual allegations" against them, then that cuts in favor of a close relationship.[73]

Applying that standard here, Cypress and Plains do not have a close relationship. Cypress and Plains admit they are independent business entities. And Newman has not treated Cypress and Plains as a "single unit" in his pleading. In fact, Newman has not even sued Cypress; it intervened. Still,

Cypress and Plains contend that they have a close relationship under three different theories. None persuade.

First, Plains theorizes that two facts created a close relationship with Cypress: "Cypress utilized [Newman] specifically to provide services to Plains" and Newman has "alleged Plains is liable for [his] FLSA claims based on [the] allegation that Plains is [his] joint employer, along with Cypress." Plains relies on a Second Circuit case—*Ragone v. Atlantic Video at Manhattan Center*—in support.[74] Because intertwined-claims estoppel apparently differs between the Second Circuit and Texas law, though, *Ragone* does not change our analysis.

In *Ragone*, a makeup artist worked as an employee for a digital broadcaster and signed an arbitration agreement with it.[75] The digital broadcaster provided the makeup artist to one of its clients, a major sports network. There, the makeup artist allegedly experienced "pervasive and continuous sexual harassment."[76] The sports network never signed the arbitration agreement. Nor did any document that the makeup artist signed ever mention the sports network.[77] Yet the Second Circuit held that the sports network could compel arbitration, under intertwined-claims estoppel, when the makeup artist sued it.[78] Said the Second Circuit, the digital broadcaster and the sports network had a close relationship because the makeup artist "understood [the sports network] to be, to a considerable extent, her co-employer."[79]

Whatever *Ragone*'s persuasive force, though, it does not control here. Our inquiry is governed by *Texas* law. It is unclear from *Ragone* what law the Second Circuit ***406** was applying. Some language in the opinion suggests that it was applying New York law.[80] But when it came to intertwined-claims estoppel, the Second Circuit cited intra-circuit caselaw without reference to what New York law requires.[81] So to the extent the Second Circuit relied on either New York law or federal common law, we cannot follow its lead. The Supreme Court in *Arthur Andersen* was clear: *State law* governs whether an arbitration agreement is enforceable between parties, and the parties agree that Texas law governs.[82] And when it comes to that state law, the Second Circuit is apparently at odds with Texas.

Specifically, Texas law weighs the nonsignatory's status as an independent business against finding a close relationship heavier than the Second Circuit does. In *Merrill Lynch*, which we discuss more below, the Texas Supreme Court explicitly rejected applying equitable estoppel to allow two nonsignatory *subsidiaries* to enforce an arbitration agreement their corporate parent had with the plaintiff.[83] And it did so even after it discussed intertwined-claims estoppel as a theory that federal courts had applied before.[84] That stands in contrast to *Ragone*, where the Second Circuit found a close relationship between two non-subsidiary, independent businesses. And here, no party contends that Plains and Cypress were anything but completely independent businesses, let alone subsidiaries.

Second, Cypress theorizes that it has a close relationship with Plains based on Newman's joint-employment theory alone. In support, it relies on our unpublished decision in *Trujillo v. Volt Management Corp.*[85] Yet even if *Trujillo* were binding,[86] it remains distinguishable.

In *Trujillo*, a human-resources professional worked as an employee for a staffing company. The staffing company leased various employees to a client, with the human-resources professional providing on-site support for their human-resources needs. As part of her employment with the staffing company, the human-resources professional signed an arbitration agreement. She did not, however, ever sign one with the client company. When her request for a disability accommodation was denied, she sued the client company.[87] We affirmed the district court's conclusion that the client company could compel arbitration.[88] In so doing, we necessarily held that a close relationship existed between the client company and either or both the human-resources professional and staffing company.[89]

Even so, a critical fact was present in *Trujillo* that is missing here. In *Trujillo*, the district court *found* that "the parties, contracts, and controversies" were ***407** "tight[ly] related."[90] The district court did not do so here. Rather, it found that Plains "does not have any of those relationships with the signatory (Cypress)" that other courts have found to create a close relationship. As Newman points out, we must review the district court's non-application of intertwined-

claims estoppel for abuse of discretion.[91] Cypress points to no other facts that support the district court abused its discretion in making this finding. Therefore, Plains and Cypress's second theory is also unpersuasive.

[18] [19] *Third*, Plains theorizes that it has a close relationship with Cypress because TIR—a Cypress subsidiary—"contractually agreed to indemnify Plains in connection with [Newman's] FLSA claims." As an initial matter, Newman contends that Plains waived this argument by not making it below. It is true that we "will not consider arguments first raised on appeal."[92] However, Plains's motion to compel arbitration plainly argued that one of the reasons it was entitled to intertwined-claims estoppel was because of the TIR–Plains indemnity agreement. We can, therefore, review this argument.

That does not mean, though, that we are persuaded by it. The indemnity agreement in this case does not create a close relationship between Cypress and Plains for the purposes of estopping *Newman*. Again, a close relationship is about "consent, not coercion" in Texas.[93] Would a reasonable signatory to the arbitration agreement anticipate being forced to arbitrate claims against the nonsignatory?[94] The answer here is *no*. Between Newman and his six other co-plaintiffs, all seven signed their Employment Agreements directly with Cypress—not TIR. The *only* one of them that TIR even paid directly was Michael Crain. Cypress admits that it paid the rest. A reasonable signatory to an arbitration agreement would not foresee that a corporate subsidiary—with which he has no affiliation—can unilaterally change his arbitration rights merely by agreeing to indemnify a client. And even for Crain, who TIR directly paid, Plains cites no caselaw supporting that an employer can unilaterally expand the scope of its employee's consent to arbitrate—especially in an agreement it is not even a party to—by agreeing to indemnify a third-party client. Therefore, Plains and Cypress's third theory is unpersuasive as well.

C

[20] [21] Finally, Cypress contends that artful-pleading estoppel applies to allow Plains to enforce the Newman–Cypress arbitration agreement. Its best case is the Texas Supreme Court's decision in *Merrill Lynch*.[95] Newman disagrees, contending that decision supports him. Artful-pleading estoppel in Texas requires two things: (1) "naming individual agents of the party to the arbitration clause and suing them in their individual capacity"[96]; and (2) bringing ***408** a suit that in "substance" is against those agents' principal.[97] Neither element is present here. Newman has not named any individual agent of Cypress's in his complaint as a defendant. Rather, he has named a separate business: Plains. Nor is his suit in substance against Plains or Cypress in either's capacity *as a principal*. He is suing Plains *directly* for its alleged FLSA violations. Therefore, we agree with Newman: Artful-pleading estoppel does not apply.

The Texas Supreme Court's application of this rule in *Merrill Lynch* only bolsters our analysis. There the Court explicitly distinguished between suing a principal's employees and suing its subsidiaries.[98] When it came to the former, the principal's arbitration agreement would cover the employees so long as the suit's substance covered actions within the course and scope of their employment.[99] But when it came to the latter, "a contract with one corporation—including a contract to arbitrate disputes—is generally not a contract with any other corporate affiliates."[100] Although one separate business can, in theory, act as another's agent,[101] merely acting as a corporate subsidiary is not enough to invoke artful-pleading estoppel.[102] Since acting as a corporate *subsidiary* is not enough to equitably invoke artful-pleading estoppel in Texas, then it is beyond doubtful that the Texas Supreme Court would allow a completely separate business do it.

V

[22] Arbitration under the FAA is "a matter of contract."[103] But judges continue to play an important role. Where, as here, the parties dispute whether an enforceable arbitration agreement exists between them, it takes a court to decide. Applying Texas contract law and equitable doctrines to this case compels one conclusion: Plains cannot enforce the Newman–Cypress arbitration agreement. Accordingly, we AFFIRM the district court.

All Citations

23 F.4th 393, 171 Lab.Cas. P 36,910

Footnotes

1 All but one other plaintiff entered into the same Employment Agreement. The other plaintiff, John Smith, signed a substantively identical arbitration provision as part of his Employment Agreement.

2 866 F.3d 709 (5th Cir. 2017).

3 The district court denied Cypress's motion to compel. Cypress has appealed, but we denied Plains and Cypress's motion to consolidate that appeal with this one.

4 *Kubala v. Supreme Prod. Svcs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016).

5 *Sanchez Oil & Gas Corp. v. Crescent Drilling & Prod., Inc.*, 7 F.4th 301, 309 (5th Cir. 2021).

6 *See* *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) ("[W]hether to utilize equitable estoppel in this fashion is within the district court's discretion; we review to determine only whether it has been abused.").

7 Plains never squarely admits as much.

8 *Lloyd's Syndicate 457 v. FloaTEC, L.L.C.*, 921 F.3d 508, 514 (5th Cir. 2019) (quoting *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003)).

9 *Id.* (quoting *Will-Drill*, 352 F.3d at 218) (emphasis added).

10 *Id.* at 515 n.4.

11 —— U.S. ——, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019) (citing 9 U.S.C. § 2). At oral argument, Newman's counsel contended that *state* law governs whether enforceability between the parties is a first-step formation question, for the courts, or a second-step arbitrability question, potentially for arbitrators. As *Henry Schein* makes plain, though, it is *federal* law—the FAA, itself—that governs. *See* *id.* (pointing to the FAA's text as what compels courts to decide whether a valid arbitration agreement exists).

12 548 F.3d 379 (5th Cir. 2008) (per curiam).

13 *Id.* at 382.

14 *Id.*; *see also* *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 (5th Cir. 2003) ("Six theories for binding a nonsignatory to an arbitration agreement have been recognized: (a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing/alter ego; (e) estoppel; and (f) third-party beneficiary.").

15 *See* 866 F.3d at 711–12;*see also* *id.* at 714 (explaining that "a delegation clause giv[es] the arbitrator the primary power to rule on the arbitrability [question]" (quoting *Kubala*, 830 F.3d at 201)).

16 *Id.* at 715.

17 *Id.* at 714.

18 *Id.* at 715 (quoting *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 257 (5th Cir. 2014)).

19 *Id.* (citing 398 F.3d 205, 211 (2d Cir. 2005)).

20 *See* 398 F.3d at 209–211.

21 *Brittania-U*, 866 F.3d at 715.

22 *Id.* at 714–15.

23 *See id.* at 709.

24 *Id.* at 715.

25 398 F.3d at 209 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); *see also id.* ("[J]ust because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory.").

26 *See, e.g.*, *McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 385 (5th Cir. 2011) ("[Our] rule of orderliness prevents one panel from overruling the decision of a prior panel.").

27 *GlobeRanger Corp. v. Software AG USA, Inc.*, 836 F.3d 477, 497 (5th Cir. 2016).

28 *See Sherer*, 548 F.3d at 382 (explaining that "whether a valid agreement to arbitrate exists" turns on whether it can be enforced in *either* law or equity). The rule of orderliness applies as equally to a panel's implicit reasoning as it does to its express holdings. *See Arnold v. U.S. Dep't of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("[T]o the extent that a more recent case contradicts an older case, the newer language has no effect." (citing *Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999))).

29 830 F.3d at 201–02 (first emphasis added, second emphasis original).

30 *See id.* at 202–03 (explaining that the employee was "deemed" to have accepted the employer's arbitration agreement as a contract modification under Texas law).

31 *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009).

32 *Crawford Prof'l*, 748 F.3d at 257.

33 *Arthur Andersen*, 556 U.S. at 631, 129 S.Ct. 1896.

34 *Id.* at 630, 129 S.Ct. 1896 (emphasis added).

35 *Id.*

36 *Id.*; *Crawford Prof'l*, 748 F.3d at 257.

37 Cypress, for its part, apparently concedes that Newman never entered into an arbitration agreement with Plains. And Newman, naturally, emphatically denies that he ever agreed to an arbitration agreement with Plains.

38 *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 420 (Tex. 2011).

39 *Jody James Farms, JV v. Altman Group, Inc.*, 547 S.W.3d 624, 635 (Tex. 2018) (emphasis added) (quoting *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006)).

40 *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011).

41 *Jody James*, 547 S.W.3d at 635.

42 *Id.*

43 *See Corpus Christi Bank & Tr. v. Smith*, 525 S.W.2d 501, 505 (Tex. 1975) ("In our opinion, it appears that the City intended to protect the materialmen and subcontractors by its contractual requirement for an Article 5160 payment bond, but it does not 'clearly appear,' as required by Citizens that the City intended to make them claimants against the City on the contract.").

44 *Jody James*, 547 S.W.3d at 635.

45 *Id.*

46 *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011).

47 A third reason exists, too. In its Reply brief, Plains argues for the first time that TIR's separate agreement to indemnify it clearly and fully spelled out a benefit under the Newman–Cypress Employment agreement. But it did not raise that argument before the district court in its motion to compel arbitration. And it did not raise that argument before us in its opening brief. But "we have consistently held [that] 'arguments not raised before the district court are waived and cannot be raised for the first time on appeal.' " *Sindhi v. Raina*, 905 F.3d 327, 333 (5th Cir. 2018) (quoting *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007)). Further, we "do[ ] not entertain arguments raised for the first time in a reply brief [unless] a new issue is raised in the appellee's brief and the appellant responds in his reply brief." *United States v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009). Because Newman did not raise a *new issue* in his brief warranting this new argument, we need not address this argument by Plains.

48 Smith's Pay Letter similarly named "Plains All American" as the "Client" without further express reference to Plains.

49 Smith's Employment Agreement similarly provides that Plains as his "Employer" could "restrain" him from releasing "any trade secrets or confidential business information."

50 Smith's Employment Agreement is substantively identical, providing for an "at will" relationship that was terminable "with or without cause and for any reason."

51 Plains also reads Newman's Employment Agreement to "explicitly state[ ] that [his] employment [was] 'based on a specific project' and 'for a designated customer,' " with the Pay Letter "identifying Plains as that very customer."

52 353 S.W.3d 128 (Tex. 2011).

53 *Id.* at 131.

54 *Id.*

55 *Id.* at 146.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Tawes*, 340 S.W.3d at 425.

60 235 S.W.3d 185, 193–94 (Tex. 2007).

61 *Cf.* *id.*; *see also* *Jody James*, 547 S.W.3d at 639 ("In *In re Merrill Lynch Trust Co.*, we acknowledged the existence of this theory without deciding its validity in Texas.").

62 547 S.W.3d at 639 (citing *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 612 (5th Cir. 2016)).

63 *Id.*

64 *Hays*, 838 F.3d at 612.

65 *Jacobs v. Nat'l Drug Intelligence Center*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law ....").

66 *Hays*, 838 F.3d at 612 (quoting *Cotton Com. USA, Inc. v. Clear Creek Indep. Sch. Dist.*, 387 S.W.3d 99, 105 (Tex. Ct. App. 2012)); *Jody James*, 547 S.W.3d at 639.

67 Neither Cypress nor Plains contends that Plains has a close relationship with Newman.

68 *See* *Jody James*, 547 S.W.3d at 640 ("The Second Circuit's [intertwined-claims-estoppel] cases compelling arbitration typically involve some corporate affiliation between a signatory and non-signatory, not just a working relationship.").

69 *Id.*

70 *Id.*

71 *Id.* at 639.

72 *See id.* at 640 ("A reasonable consumer would not anticipate being forced to litigate complains against an independent insurance agent in the same manner they agreed to litigate disputes with the insurer.").

73 *Hays*, 838 F.3d at 612–613.

74 595 F.3d 115 (2d Cir. 2010).

75 *Id.* at 118.

76 *Id.* at 119.

77 *Id.*

78 *Id.* at 127.

79 *Id.*

80 *See id.* at 121 (discussing New York's unconscionability doctrine).

81 *See id.* at 126–27 (citing *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001)).

82 556 U.S. at 630–31, 129 S.Ct. 1896.

83 *See* 235 S.W.3d at 191–95.

84 *Id.* at 193–94.

85 846 F. App'x 233 (5th Cir. 2021) (per curiam).

86 *See United States v. Weatherton*, 567 F.3d 149, 153 n.2 (5th Cir. 2009) ("[A]n unpublished opinion issued after January 1, 1996 is not controlling precedent, [though] it may be considered as persuasive authority." (citation omitted)).

87 *Trujillo*, 846 F. App'x at 234–35.

88 *Id.* at 237.

89 *See id.*

90 *Id.*

91 *See* *Grigson*, 210 F.3d at 528 ("[W]hether to utilize equitable estoppel in this fashion is within the district court's discretion; we review to determine only whether it has been abused.").

92 *E.g.*, *Estate of Duncan v. Comm'r of Internal Revenue*, 890 F.3d 192, 202 (5th Cir. 2018) (citation omitted).

93 *Jody James*, 547 S.W.3d at 639.

94 *See* *id.* at 640 ("A reasonable consumer would not anticipate being forced to litigate complains against an independent insurance agent in the same manner they agreed to litigate disputes with the insurer.").

95 235 S.W.3d 185 (Tex. 2007).

96 *Id.* at 188 (quoting *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1318 (11th Cir. 2002) (internal quotations omitted)).

97 *Id.* at 189.

98 *See* *id.* at 194 ("As discussed above with reference to the employees, allowing litigation to proceed that is in substance against a signatory though in form against a nonsignatory would allow indirectly what cannot be done directly.").

99 *Id.* at 190.

100 *Id.* at 191 (citations omitted).

101 *See* *id.* at 189 ("The commission on this insurance transaction was paid directly to Merrill Lynch, not Medina; if the latter was acting as an agent for ML Life or ML Trust, then so was the former.").

102 *Cf.* *id.* at 195 (holding that the subsidiaries could not enforce their parent corporation's arbitration agreement with the plaintiff).

103 *Henry Schein*, 139 S. Ct. at 529 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)).

End of Document

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 5, 2022
Lyle W. Cayce
Clerk

No. 21-50253

KENNETH NEWMAN, *individually and, on behalf of* ALL OTHERS SIMILARLY SITUATED,

Plaintiff—Appellee,

CYPRESS ENVIRONMENTAL MANAGEMENT-TIR, L.L.C.,

Intervenor—Appellee,

versus

PLAINS ALL AMERICAN PIPELINE, L.P.,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 7:19-CV-244

ON PETITION FOR REHEARING EN BANC

Before KING, COSTA, and WILLETT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the

request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, 8 judges voted in favor of rehearing (Judges Jones, Smith, Elrod, Southwick, Ho, Duncan, Oldham, and Wilson), and 8 voted against rehearing (Chief Judge Richman, and Judges Stewart, Haynes, Graves, Higginson, Costa, Willett, and Engelhardt).

EDITH H. JONES, *Circuit Judge*, joined by SMITH and DUNCAN, *Circuit Judges*, dissenting from denial of en banc rehearing

With respect, the panel seriously misconstrues the law governing arbitration. We are now out-of-step with at least five other circuits (to say nothing of the Supreme Court) and appear to be in accord with none. The panel otherwise disregards our own precedents. This case should have been reheard en banc to harmonize our court with other circuits and to follow the Supreme Court. I respectfully dissent.

The panel opinion sets our court on a unique course concerning employees discontented with formal employment contracts that (a) envisioned their providing work on third-party projects and (b) contained full-throated AAA arbitration clauses. Contravening the Supreme Court in *Rent-A-Center, W., Inc. v. Jackson*[1] and numerous circuits, the panel opinion holds that, despite a delegation clause in the arbitration agreement, the "gateway question"—whether the plaintiff's dispute with the non-signatory project owner is arbitrable—was not for the arbitrator. But as an alternative, even if the question of arbitrability belonged to the federal court in the first instance, the panel should have concluded that Texas law would compel arbitration with the non-signatory project owner as a matter of intertwined claims estoppel. Each error deserves elaboration.

This case was filed by a plaintiff, Newman, who entered a written employment contract with an energy industry staffing company, Cypress, to perform work for a particular client, Plains. Cypress determined his rate of pay, cut his paychecks, handled Human Resources tasks, and prepared the parties' arbitration clause broadly covering all disputes arising from his employment. After he quit work with Cypress, Newman sued Plains—but not Cypress—for allegedly violating the FLSA.[2] Thus, he contrived to avoid his arbitration agreement with Cypress. If Newman eventually prevails against Plains, however, Cypress may well be on the hook for any unpaid overtime because of its affiliate's indemnity agreement with Plains. These arrangements, and a bevy of lawsuits like Newman's, have become common in the energy industry.

---

[1] 561 U.S. 63, 72-73, 130 S. Ct. 2772, 2779-80 (2010).

[2] Several other former Cypress employees opted in to Newman's suit pursuant to the FLSA.

I.

Compelling arbitration requires a two-step inquiry. *See Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). "[T]he only issue at the first step is whether there is *any agreement* to arbitrate *any set of claims*." *Id.* at 202. Here, Newman agreed in broad terms according to the AAA to arbitrate claims arising out of his employment. The second step inquiry is "whether . . . the claim currently before the court[]" falls within the set of claims covered by the arbitration agreement. *Id.* But the court *cannot* reach that second question if the parties delegated it to an arbitrator in the first place. *Id.* at 201.

The Supreme Court tells us that "parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as *whether the parties have agreed to arbitrate* or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 70, 130 S. Ct. at 2777 (citations omitted) (emphasis added). Another gateway issue includes "whether an arbitration clause binds persons who did not sign it[.]" 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3569 n.53 (3d ed. Apr. 2022 update). A delegation provision consenting to arbitrate these issues "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70, 130 S. Ct. at 2777-78. "[S]o the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1923 (1995) (emphasis in original). Consequently, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). "[*W*]*ho* decides whether a particular dispute is arbitrable[]" therefore precedes the question whether a dispute is arbitrable. *Peabody Holding Co. v. United Mine Workers*, 665 F.3d 96, 101 (4th Cir.2012) (emphasis in original). "If—but only if—the answer [to whether the parties delegated arbitrability] is *no*, the court must then proceed to determine on its own whether the parties' dispute falls within the scope of their agreement to arbitrate." *VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 326 (2d Cir. 2013).

Based on these principles, it should have been easy to conclude that an arbitrator must decide whether Newman must arbitrate with Plains. The Newman-Cypress agreement "clearly and unmistakably"[3] delegates to the arbitrator the "power to rule on his or her own jurisdiction, including *any* objections with respect to the existence, scope or validity of the arbitration agreement."[4] AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, R. 7(a) (Oct. 1, 2013), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf. Of course "[a]ny [objections] means all [objections], because any means all." *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir. 2003) (internal quotation marks and citations omitted). And Newman's "employment [was] based on a specific project to be performed for a designated customer[,]" Plains. That Plains was not a formal party to the arbitration agreement does not rule it out from potential arbitration according to state-law interpretive principles. *See, e.g., Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624 (Tex. 2018) (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 739)).

But the panel decision never touches the delegation provision because it mistakenly assesses "enforceability between the parties [i.e. whether a non-signatory can enforce an arbitration agreement]. . . . as part of the first-step, formation question." In doing so, it modifies the first step to address whether a valid agreement exists *between these specific parties*. Yet, "whether [a non-signatory like Plains] can enforce the arbitration agreement against [a signatory like Newman] presents a question of arbitrability that [the signatory's] arbitration agreement delegated to an arbitrator." *Swiger v. Rosette*, 989 F.3d 501, 507 (6th Cir. 2021). Courts can only assess the enforceability of a delegation clause by a non-signatory if the signatory "challenge[s] the delegation provision specifically[.]" *Rent-A-Center*, 561 U.S. at 72, 130 S. Ct. at 2779. Newman raised no such argument. Accordingly, "we must treat [the delegation provision] as valid under § 2 [of the FAA], and must enforce

---

[3] *See First Options of Chicago*, 514 U.S. at 944, 115 S. Ct. at 1924 (internal quotation marks and citations omitted) ("[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so.").

[4] "[T]he express adoption of [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (collecting cases); *see also Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 280 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 107 (2020), and *cert. denied*, 141 S. Ct. 113 (2020) (citation omitted).

it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.*

Allowing Newman to avoid arbitrating the arbitrability of his claim against Plains contravenes not only *Rent-A-Center* but also this court's precedent, which explains that "we must first determine whether claims against [non-signatories are] clearly and unmistakably delegated to the arbitrator."[5] *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017). Issues concerning the parties' relationships and the types of claims in the underlying suit are subordinate to the exclusive focus at this juncture, which is simply "*who should decide* whether the parties have to arbitrate the merits." *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020) (emphasis in original). *Brittania-U*, contrary to the panel's reasoning, mandates arbitration where, as here, the question of arbitrability was delegated to the arbitrator.[6]

[5] The panel opinion asserts that *Sherer v. Green Tree Servicing LLC* supports its reasoning. 548 F.3d 379 (5th Cir. 2008) (*per curiam*). There, a borrower brought various claims against his loan servicer; the servicer then sought to compel arbitration based on an agreement between the borrower and his lender. *Id.* at 380. The court first assessed "whether a valid agreement to arbitrate exist[d]" between the parties. *Id.* at 382-83. But there was no delegation clause, much less one governed by AAA Rules. *Sherer* is thus totally inapposite.

[6] Unlike the panel, lower courts in this circuit have adopted the core reasoning of *Brittania-U.* For example, in *Doucet v. Boardwalk Pipelines, L.P.*, "the worker chose to bring an FLSA claim against the company they were assigned to for work, not their employer[]" because they signed an arbitration agreement with the former. No. 4:20-CV-1793 2021 WL 3674975, *4 (S.D. Tex. Mar. 18, 2021). The magistrate judge found "that the scope of the delegation clause cover[ed] [the plaintiff's] claims[]" against the non-signatory defendant. *Id.* at *3. The district court then adopted that recommendation, ruling that "a valid arbitration clause exists with a delegation clause leaving the question of arbitrability to the arbitrator." No. 4:20-CV-1793, 2021 WL 5865704, *1 (Dec. 10, 2021).

Equally distressing, the panel's opinion puts this court out of step with at least five (if not more) of our sister circuits.[7] *Casa Arena Blanca LLC v. Rainwater*, 2022 WL 839800, *1 (10th Cir. Mar. 22, 2022) (unpublished); *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1099 (8th Cir. 2014); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 209-11 (2d Cir. 2005); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 472-74 (1st Cir. 1989).

Most notable is the panel decision's conflict with *Becker v. Delek US Energy, Inc.*, where an electrical inspector signed an employment agreement with Cypress that contained an arbitration clause. *See* 39 F.4th 351 (6th Cir. July 6, 2022). Cypress assigned the employee to work at the non-signatory defendant's facility. *Id.* at 354. The employee later sued the non-signatory defendant for FLSA violations. *Id.* Cypress intervened, and the district court denied its motion to compel arbitration along with one filed by the non-signatory defendant. *Id.* Sound familiar? The facts are identical to those at issue here. The Sixth Circuit reversed. The court first reiterated its understanding that "[w]hether a non-signatory can enforce a delegation clause is likewise a question of enforceability, not existence." *Id.* at 356. Because the employee did not "separate his analysis of the enforceability of the delegation provision from his analysis of the enforceability of the arbitration agreement as a whole[,]" the court enforced the delegation clause, "leaving the question whether [the employee could] enforce the arbitration agreement for an arbitrator to decide." *Id.*

The panel opinion diverged from *Becker* and numerous other courts without even acknowledging conflicting precedents. Because Newman clearly and unmistakably agreed to arbitrate arbitrability, the panel should have reversed and remanded with instructions to compel the arbitration of arbitrability. To conclude otherwise is manifest error. This decision is in accord with no other circuit (including our own) and renders delegation clauses second-class contracts in this circuit. So much for construing contracts "to give effect to the intent of the parties . . . so that every clause has some effect, and no clause is rendered meaningless." *REO Indus., Inc. v. Natural Gas Pipeline Co. of America*, 932 F.2d 447, 453 (5th Cir.1991) (citations omitted).

---

[7] Though the Seventh Circuit has not yet officially adopted this approach, at least one district court recently ruled that "the question of whether a purported non[-]signatory can enforce an arbitration

II.

Even if Newman had not entered a contract that delegates arbitrability to the arbitrator (which he did), the panel should have interpreted Texas law to compel his arbitration with Plains based on a theory of intertwined claims estoppel.

"[A]llowing litigation to proceed that is in substance against a signatory though in form against a nonsignatory would allow indirectly what cannot be done directly." *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 194 (Tex. 2007). With this principle in mind, the Texas Supreme Court has explained, without expressly adopting the theory, that non-signatories can invoke intertwined claims estoppel to "successfully compel arbitration when (1) they have a 'close relationship' with a signatory to a contract with an arbitration agreement and (2) the claims are 'intimately founded in and intertwined with the underlying contract obligations.'" *Jody James* Farms, 547 S.W.3d at 639 (quoting *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995)). In other words, the theory applies where there is "'tight relatedness of the parties, contracts, and controversies.'" *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 610 (5th Cir. 2016) (quoting *JLM Industries, Inc. v. Stolt-Nielsen, SA*, 387 F.3d 163, 177 (2d Cir. 2004)).

In *Jody James Farms*, the Texas Supreme Court rejected intertwined claims estoppel on the facts because the contractual relationship between an insurer and an independent insurance agency was too tenuous. 547 S.W.3d at 640. That relationship, however, is much different from the contracts among Newman, Cypress, and Plains. Cypress hired Newman, and he agreed to arbitrate any and all disputes arising out of his employment. Critically, his "initial compensation [was] set forth in [an] Inspector Pay Offer[]" that listed "Plains –

---

agreement concerns a question of arbitrability and, thus, must be decided by the arbitrator." *Grabowski v. Platepass, LLC*, No. 20-CV-7003, 2021 WL 1962379, *4 (N.D. Ill. May 17, 2021) (collecting case discussed below). At least two district courts within the Third Circuit are in accord. *See Altenhofen v. Energy Transfer Partners, LP*, No. 20-CV-200, 2020 WL 7336082, *1 & n.1 (W.D. Pa. Dec. 14, 2020) (citation omitted) (holding that, where plaintiffs sued their employer's non-signatory client for FLSA violations, "[w]hether [the client defendant] may enforce the agreements, as a non-signatory, is a question reserved for arbitration," and that "Plaintiffs cannot avoid their arbitration agreements by omitting claims against [the actual employers] or any like 'staffing' company"); *see also Robertson v. Enbridge (U.S.) Inc.*, No. 19-CV-1080, 2020 WL 5751641, *5 (W.D. Pa. July 31, 2020) (citations omitted), *report and recommendation adopted*, No. 2:19-cv-1080, 2020 WL 5702419 (Sept. 24, 2020) ("[i]n light of *Henry Schein* and the clear language of the Arbitration Agreement, whether [a non-signatory defendant] may enforce the Arbitration Agreement against [signatory] Plaintiffs is a question for the arbitrator.").

Pipeline" as the client for which he would provide services.[8] That offer was both referenced within and attached to the "inspector employment agreement" he signed. The employment agreement also made clear that Plains could tell Newman that his "services [were] no longer required[.]" A reasonable person in Newman's position would have therefore understood from the outset that his employment was subject to any agreements between Cypress and Plains. Indeed, the Master Services Contract between Plains and Cypress's affiliate, Tulsa Inspection Resources, LLC ("TIR"), separately required the staffing company to "release, protect, indemnify, hold harmless, and defend [Plains] . . . from and against any and all . . . 'claims' for or relating to . . . any violation or alleged violation of state or federal law related to the payment, employment, or employment status of any of [Cypress's] employees."[9] Plains has since demanded indemnity from Cypress as TIR's affiliate. Plains therefore has a sufficiently close relationship with Cypress to compel Newman to arbitrate pursuant to intertwined claims estoppel. The panel points to no Texas authorities rejecting intertwined claims estoppel in these circumstances. In particular, and contrary to the panel decision, no Texas case says that corporate affiliation is necessary to apply intertwined claims estoppel.

Moreover, the panel declined to follow this court's remarkably similar decision that did apply intertwined claims estoppel. *See Trujillo v. Volt Management Corp.*, 846 F. App'x 233 (5th Cir. 2021). There, a staffing company employed the plaintiff to "work[] as an on-site coordinator at [her employer's client] and handled human resources functions for employees that [her employer] leased to [the client]." *Id.* at 234. She later sued both her employer and its client, and the employer moved to compel arbitration based on her signed agreement with it. *Id.* at 235. The district court compelled the plaintiff to arbitrate with her employer's client (a non-signatory) "because the claims and factual allegations raised by [the plaintiff] against [her employer] and [its client were] indistinguishable and her claims against [the client were] intimately founded in and intertwined with [the plaintiff's] underlying contract with [her employer]." *Id.* at 237 (internal quotation marks and citation

---

[8] Another Plaintiff averred that he "was financially dependent on Plains through TIR[]" and "relied on Plains as [his] joint employer . . . ."

[9] "Cypress employs inspectors who staff projects contracted by [TIR]." TIR, in turn," directs Cypress' employees to provide the inspection services to Plains." Both are controlled by Cypress Energy Partners, L.P. And all three entities are referenced on Newman's pay offer letter.

omitted). "The district court also found a tight relatedness of the parties, contracts, and controversies." *Id.* This court affirmed. *Id.*[10] As in *Trujillo*, but unlike *Jody James*, the business relationships here reflect a "close relationship."

The sound reasoning of *Trujillo* is confirmed by the facts of this case. As Plains explained, Newman's claims are "based on (1) the work [he] performed providing services for Plains under [his] Employment Agreement, as to which work [he] allege[s] Plains was [his] alleged "joint employer" (with Cypress); and (2) the payments [he] received for such work as part of [his] employment with Cypress under [his] Employment Agreement." Absent the signed employment agreement, Newman and the other plaintiffs "(1) would not have been employed by Cypress, (2) would not have provided the services to Plains which they now claim entitle them to overtime pay from Plains, and (3) would not have the ability to make FLSA claims against Plains." Finally, the case against Plains is heavily dependent on personnel records and witnesses of Cypress, which, to repeat, has an indemnification agreement with Plains. If these circumstances do not suggest that Newman's claims against Plains are sufficiently intertwined with his employment agreement with Cypress, it is hard to envision what would suffice. And above all, the point of compelling a non-party to arbitrate its dispute with the signatory to an arbitration agreement is to prevent the patent inequity of allowing the signatory to circumvent arbitration, to the obvious detriment of its counter-party signatory.

[10] "[U]npublished decisions, of course, are not binding on our court; they are, however, persuasive." *United States v. Sauseda*, 596 F.3d 279, 282 (5th Cir. 2010) (citations omitted). Thus, while the majority is not technically bound by *Trujillo*, it must not refuse to apply its reasoning and holding to similar facts without explanation. To avoid applying unpublished decisions based on flimsy distinctions does not honor their persuasive weight, which does conflict with our rules and published decisions.

In sum, the panel has misconstrued Texas law.[11]

III.

Newman signed an agreement to delegate arbitrability that referenced not only TIR and Cypress but also Plains. By virtue of the delegation, an arbitrator should have addressed arbitrability in the first instance. In the alternative, under Texas law intertwined claims estoppel requires arbitrating the merits because the relationship between Plains and Cypress is sufficiently close and Newman's FLSA claim is intimately intertwined with his employment contract.

I respectfully dissent.

---

[11] Even if Newman did not agree to delegate arbitrability to the arbitrator, there is a strong argument that Cypress should be able to compel as an aggrieved party under Section 4 of the FAA. 9 U.S.C. § 4. Cypress became a party after intervening as a matter of right in the district court. *See Donovan v. Oil, Chemical, ect. Local 4-23*, 718 F.2d 1341, 1350 (5th Cir. 1983), *cert. denied*, 466 U.S. 971, 104 S. Ct. (1984) (quotations and citations omitted). Cypress is aggrieved because, as the district court ruled, it "clearly shares a defense with Plains that is central to the main case—that Newman was properly classified as overtime exempt under the FLSA." Indeed, "any judgment that Newman was not properly paid requires examining Cypress's actions in determining his exemption." And "Newman's avoidance of his individual arbitration agreement could end up costing Cypress significant amounts through either . . . indemnity or through joint liability." The panel should have consolidated the appeals of the two defendants, and Cypress had good grounds to litigate its indemnity or other obligations by compelling Newman to arbitrate even though his claims are nominally only against Plains. The panel in *Newman v. Cypress Environmental Mgmt.*, an appeal from the same district court, erred by holding otherwise. 2022 WL 1114407 (5th Cir. Apr. 14, 2022) (*per curiam*).

EXHIBIT 11

Color

33 F.4th 254
United States Court of Appeals, Fifth Circuit.

IN RE A&D INTERESTS, INCORPORATED, doing business as Heartbreakers Gentleman's Club; Mike Armstrong; Peggy Armstrong, Petitioners.

No.
22
-
40039
|
FILED May 3, 2022

Synopsis

Background: Plaintiffs, who were exotic dancers at a club, brought putative collective action against club owner and related defendants over misclassification and wage claims under the Fair Labor Standards Act (FLSA). The United States District Court for the Southern District of Texas, Andrew M. Edison, United States Magistrate Judge, 2020 WL 6292551, conditionally certified a collective action, vacated that conditional certification after an appellate decision did away with conditional certification in FLSA cases, and, at 2022 WL 92856, certified a collective action. Defendants appealed.

[Holding:] The Court of Appeals held that plaintiffs who were contractually subject to mandatory, individual, and one-on-one arbitration of disputes could not join the collective action.

Petition granted.

Higginson, Circuit Judge, dissented and filed opinion.

Procedural Posture(s): Petition for Writ of Mandamus; Motion to Certify Collective Action.

West Headnotes (8)

[1] **Mandamus** ⇐ Nature and scope of remedy in general

When deciding whether mandamus is warranted, Court of Appeals asks (1) whether petitioner has demonstrated that it has no other adequate means to attain relief it desires, (2) whether petitioner's right to issuance of writ is clear and indisputable, and (3) whether Court, in exercise of its discretion, is satisfied that writ is appropriate under circumstances.

[2] **Mandamus** ⇐ Modification or vacation of judgment or order

Other than a writ of mandamus, club owner and related defendants had no other adequate means for relief from certification of collective action in exotic dancers' action on misclassification and wage claims under the Fair Labor Standards Act (FLSA), as required for mandamus relief; the issue would become moot before defendants could file an appeal. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[3] **Mandamus** ⇐ Nature of questions involved

Requirement that the writ of mandamus be appropriate under the circumstances in order for writ to issue generally means that the moving party must show that the issues implicated have importance beyond the immediate case.

[4] **Mandamus** ⇐ Nature of questions involved

When considering if the writ of mandamus is appropriate under the circumstances, as required for the writ to issue, courts consider such factors as the need for judicial neutrality and the avoidance of rulings that unnecessarily stimulate litigation.

[5] **Mandamus** ⇐ Exercise of judicial powers and functions in general

Ensuring judicial neutrality and preventing district courts from needlessly stirring up litigation is good cause for a writ of mandamus to issue.

[6] **Mandamus** Exercise of judicial powers and functions in general

It is not enough for petitioners for the writ of mandamus to show that the district court erred or abused its discretion; rather, they must show that the district court clearly and indisputably erred such that there has been a usurpation of judicial power.

[7] **Labor and Employment** Notice and opting-in

When courts speak of "certification" of a collective action under the Fair Labor Standards Act (FLSA), courts are referring to the district court's exercise of its discretionary authority to oversee the notice and opt-in process. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

[8] **Alternative Dispute Resolution** Operation and Effect

Club's exotic dancers who were contractually subject to mandatory, individual, and one-on-one arbitration of disputes could not join collective action over misclassification and wage claims under the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

***255** Petition for a Writ of Mandamus to the United States District Court for the Southern District of Texas, USDC No. 3:20-CV-8, Andrew Michael Edison, U.S. Magistrate Judge

Attorneys and Law Firms

William King, Casey T. Wallace, Wallace & Allen, L.L.P., Houston, TX, for Petitioners.

Jarrett L. Ellzey, Leigh Skye Montgomery, Ghazzaleh Rezazadeh, Ellzey & Assciates, P.L.L.C., Houston, TX, for Respondent.

Before Smith, Higginson, and Willett, Circuit Judges.

Opinion

Per Curiam

A&D Interests, Incorporated (doing business as the "Heartbreakers Gentlemen's Club"), Mike Armstrong, and Peggy Armstrong, petition us for a writ of mandamus. They argue that the district court [1] should not have certified a Fair Labor Standards Act collective action comprised of "exotic" dancers who had worked at Heartbreakers in the last three years. We must decide whether the district court's decision to send notice to potential opt-in plaintiffs who signed arbitration agreements ran afoul of our holding in *In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 (5th Cir. 2019). And, if the district court did err, we must also decide whether Petitioners have cleared the remaining hurdles for mandamus relief. For the following reasons, we grant Petitioner's motion.

I

Respondent Stacey Kibodeaux worked as an exotic dancer for Petitioners in Dickinson, Texas. She alleges that Petitioners unlawfully misclassified her (along with all other exotic dancers) as an independent contractor, resulting in Petitioners' unlawfully withholding wages she was due in violation of the Fair Labor Standards Act ("FLSA"). 28 U.S.C. § 203 *et seq*. Shortly after Kibodeaux filed her complaint, three other former dancers joined the lawsuit. The plaintiffs moved the district court to certify the case as an FLSA "collective action" comprised of dancers who worked ***256** at Heartbreakers in the preceding three years.

The district court granted Kibodeaux's motion for "conditional certification." *Kibodeaux v. A&D Ints., Inc.*, No. 3:20-CV-00008, 2020 WL 6292551 (S.D. Tex. Oct. 27, 2020) ("*Kibodeaux I*"), *order vacated on reconsideration*, 2021 WL 6344723 (S.D. Tex. Mar. 4, 2021). Petitioners moved the district court for permission to seek interlocutory review of that order, which the district court denied. Petitioners then petitioned us for a writ of mandamus. We denied that petition. [2]

While the first mandamus action was pending, we decided *Swales v. KLLM Transport Services, L.L.C.*, which did away with conditional certification in FLSA cases. 985

F.3d 430, 436 (5th Cir. 2021). In light of this change in the law, the district court vacated its conditional certification order and ordered the parties to conduct preliminary discovery. Armed with new discovery, the district court granted the plaintiffs' motion for certification and issuance of notice. *Kibodeaux v. A&D Ints., Inc.*, No. 3:20-CV-008, — F.Supp.3d —, 2022 WL 92856 (S.D. Tex. Jan. 10, 2022) ("*Kibodeaux II*"). Petitioners then filed a second mandamus petition asking us to vacate the district court's order certifying the collective action. To facilitate orderly appellate review, the district court stayed its order certifying the collective action pending resolution of this petition.

II

[1] When deciding whether mandamus is warranted, "[w]e ask (1) whether the petitioner has demonstrated that it has 'no other adequate means to attain the relief [it] desires'; (2) whether the petitioner's 'right to issuance of the writ is clear and indisputable'; and (3) whether we, in the exercise of our discretion, are 'satisfied that the writ is appropriate under the circumstances.' " *In re Itron, Inc.*, 883 F.3d 553, 567 (5th Cir. 2018) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004)).

A

[2] The first requirement is that the error must be "truly 'irremediable on ordinary appeal.' " *JPMorgan*, 916 F.3d at 499 (quoting *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017)). While "[t]hat is a high bar," Petitioners meet it. *Id.* (quoting *Depuy*, 870 F.3d at 352–53) (alteration in original). In *JPMorgan* we held that orders facilitating notice to potential opt-in plaintiffs (called "conditional certification" before *Swales*) meet this requirement because the issue will be moot after notice is sent. *See id.*; *see also In re Citizens Bank, N.A.*, 15 F.4th 607, 621 (3d Cir. 2021) (noting that mandamus was the only remedy to address a district court's pretrial error in an FLSA opt-in collective action). The same is true here. Because this issue will become moot before Petitioners can file an appeal, the first requirement is met.

B

[3] [4] The second requirement is that we "must be satisfied that the writ is appropriate under the circumstances." *JPMorgan*, 916 F.3d at 499 (quoting *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576). This generally means that the moving party must show that "the issues implicated have 'importance beyond the immediate case.' " ***257** *Id.* (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc)). We also consider "such factors as the need for judicial neutrality and the avoidance of rulings that unnecessarily stimulate litigation." *In re Spiros Partners, Ltd.*, 816 F. App'x 985, 987 (5th Cir. 2020) (per curiam).

[5] The question of whether district courts may send notice of a collective action to plaintiffs who have signed arbitration agreements was important enough in *JPMorgan* to justify mandamus relief. 916 F.3d at 499–500. It remains important. Federal district courts have splintered over the issue, *see id.* at 499 n.6, and permitting district courts to ignore *JPMorgan*'s clear holding would sow needless confusion. Ensuring judicial neutrality and preventing district courts from needlessly stirring up litigation is good cause for a writ to issue. *See In re Spiros Partners, Ltd.*, 816 F. App'x at 987.

C

[6] Finally, mandamus is only appropriate if Petitioners can show a " 'clear and indisputable' right to the writ." *In re Am. Lebanese Syrian Associated Charities, Inc.*, 815 F.3d 204, 206 (5th Cir. 2016) (quoting *Cheney*, 542 U.S. at 380, 124 S.Ct. 2576). It is not enough for Petitioners to show that the district court erred or abused its discretion. *Id.* Rather, they must show that the district court clearly and indisputably erred such that "there has been a usurpation of judicial power." *JPMorgan*, 916 F.3d at 500 n.8 (quoting *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967)).

[7] Petitioners argue that the district court erred by "certifying"[3] the collective action runs afoul of our holding in *JPMorgan* that district courts may not issue notice to potential plaintiffs who have signed valid,

enforceable arbitration agreements.[4] The relevant language in *JPMorgan* is, "district courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action." 916 F.3d at 501.

The district court held that while it would be a "rare case in which a district court issues notice to a group of plaintiffs who have executed agreements calling for arbitration," "this is one of those atypical cases." *Kibodeaux I*, 2020 WL 6292551, at *5. The district court found that this case was atypical because while the arbitration agreement mandated that all claims (including FLSA claims) be resolved by arbitration, the agreement went on to say that no disputes between them may be handled through class action lawsuits. *Id.* at 3. This case involves a "collective action" not a class action, and the two mechanisms have important differences—chief among them being that plaintiffs must opt into collective actions, while members of a Rule 23 class action are bound unless they opt out. *See, e.g.,* ***258** *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013) (noting that "Rule 23 actions are fundamentally different from collective actions under the FLSA"); *Swales*, 985 F.3d at 435. And because of this difference, the district court found that the arbitration agreement bar on participating in class actions did not bar dancers from participating in collective actions.[5]

[8] This was in error. Mindful of the Supreme Court's instruction that courts must "rigorously enforce agreements to arbitrate," we look to the text of the arbitration agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). The arbitration agreement contains three separate provisions that govern how disputes between the parties would be handled. The first says that the parties "agree that any controversy or claim [between them] ... shall be resolved by arbitration." *Kibodeaux I*, 2020 WL 6292551, at *3.[6] The second says that "the only parties to the arbitration shall be [Petitioners] and [the individual dancer]." *Id.* (second alteration in original). The third says that "any dispute between them shall not be the subject of a class action lawsuit or arbitration proceeding." *Id.* While the district court correctly noted that the third clause does not bar potential plaintiffs from joining the collective action, that still leaves the other two clauses. Both make it equally impossible for potential opt-in plaintiffs who signed arbitration agreements to participate in a collective action in federal court. The first clause dictates that any dispute must be before an arbitrator, and not a court—including of course a federal district court. And the second clause dictates that the dispute must be an individual, one-on-one arbitration. That second clause rules out collective actions, class actions, joinder, and any other similar mechanism for joining multiple parties together. *See, e.g., Szilassy v. Ameriprise Fin. Servs., Inc.*, No. 07-CV-80559, 2007 WL 9677242, at *1 (S.D. Fla. Aug. 2, 2007) (arbitration agreement prevented plaintiffs from participating in a FLSA collective action in federal court). Even if the third clause left the door open to collective actions, the other two clauses slam that door shut.

Indeed, the district court seems to have recognized that these two clauses bar potential plaintiffs from joining the collective action. *See* *Kibodeaux I*, 2020 WL 6292551, at 5 (noting that the plaintiffs could pursue a collective action "at least for the time being"). But it justified sending notice to plaintiffs who signed admittedly valid arbitration agreements because Petitioners have not yet moved to compel arbitration. The district court reasoned that "[t]he parties can certainly waive or renounce their right to insist upon arbitration," and that it could send notice despite an apparently valid arbitration agreement until Petitioners moved to compel arbitration. *Kibodeaux I*, 2020 WL 6292551, at *3. But that would be true even if the arbitration agreement explicitly forbade participation in collective actions. The district court did not explain why an anti-collective action ***259** clause would have deserved respect, while other clauses that have the same effect lie dormant until a party moves to compel arbitration. The difference between the first, second, and third clauses—all of which have the same legal effect here—is a distinction without a difference.

Worse still, we rejected this exact argument in *JPMorgan*. That district court similarly reasoned that "even if [the petitioner] was correct that notice may not be sent to individuals who signed arbitration agreements and thus might be compelled to arbitrate, 'the Court cannot determine that there is no possibility that putative class members will be able to join the suit until Defendant files a motion to compel arbitration against specific individuals.' " *JPMorgan*, 916 F.3d at 498. We responded that the failure of the petitioner to

compel arbitration did not matter. *Id.* at 503 n.19.[7] Nor should it matter— far from waiving their right to enforce the arbitration agreement, Petitioners *have* attempted to enforce it by opposing certification. Instead, a district court's focus should be on whether those receiving notice will be able to "ultimately participate in the collective [action]." *Swales*, 985 F.3d at 441 (emphasis added) (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 502, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016)). Issuing notice to those who will not *ultimately* be able to participate " 'merely stirs up litigation,' which is what *Hoffmann-La Roche* flatly proscribes." *Id.* (citing *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989)).

In sum, the district court apparently recognized that the arbitration agreement would prevent the opt-in plaintiffs from ultimately participating in the collective action, but approved class notice anyways. This was not merely an erroneous exercise of discretion. In light of *JPMorgan*, it was wrong as a matter of law. Because the district court clearly and indisputably erred, mandamus relief is appropriate.

The petition for writ of mandamus is GRANTED.

Stephen A. Higginson, Circuit Judge, dissenting:
With respect, I dissent because I do not see that this lower court— devotedly applying our *JPMorgan*[1] decision two years ago in *Kibodeaux I*[2] and then, in the decision on review, equally devotedly applying *Swales*[3]—has been shown to have clearly and indisputably erred.

Preliminarily, to my eye, the petition we grant today is indistinguishable from the one our court denied two years ago in this same litigation. Our court's assessment then was searching, not only at the panel stage but also in our consideration of the petition for rehearing en banc, to which we ordered a response. It is difficult to see indisputable error justifying this "drastic and extraordinary remedy," *JPMorgan*, 916 F.3d at 499, when a previous panel and, on request, review by the full court found none.

More importantly, not only was mandamus denied in *JPMorgan*, 916 F.3d at 505, but that case, significantly, involved an agreement that explicitly precluded collective actions, which the agreement here does not.

***260** Relatedly, the potential plaintiffs here, unlike in *JPMorgan*, only waived their right to bring a collective action if their disputes are channeled to arbitration.[4] *Cf. Vine v. PLS Financial Servs., Inc.*, 807 F. App'x 320, 328 (5th Cir. 2020) (per curiam) (affirming the district court's determination that "a class action waiver in the middle of an arbitration provision" was not "an independently effective waiver of the right to pursue a class action outside of the arbitration context"). As of yet, Petitioners have not moved to compel arbitration and the district court has not addressed whether Petitioners waived their right to do so or whether the arbitration agreements are enforceable. *Cf. id.* *JPMorgan* did not hold that notice should *never* be sent to potential plaintiffs who might, at some point, be compelled to arbitrate, and if the case here proceeds, as it has, in federal court, "nothing in the agreement would prohibit [the potential plaintiffs] from participating in the collective action." *JPMorgan*, 916 F.3d at 503. No one would disagree that wronged employees should receive notice under the FLSA that their employer might have violated their federally protected rights unless they are prohibited from participating in the collective action.

In sum, at this stage, none of the three clauses of the arbitration agreement prohibits potential plaintiffs from participating in a collective action. Therefore, the district court's decision to grant the motion for certification and issuance of notice was not error, let alone indisputable error.

All Citations

33 F.4th 254

Footnotes

1 This matter was decided by the magistrate judge, to whom the parties jointly ceded authority per 28 U.S.C. § 636(c).

2 As our dissenting colleague notes, this petition involves the same legal question as another petition we denied two years ago in this same litigation. But no party argues that our prior decision bars Petitioners from raising the same argument under the doctrines of *res judicata*, the law of the case, or any other ground.

3 We use the word "certification" for simplicity. But as we noted in *Swales* "the word 'certification,' much less 'conditional certification,' appears nowhere in the FLSA." 985 F.3d at 434. When we speak of certification, we are really referring to the district court's exercise of its discretionary authority to oversee the notice and opt-in process—a process that differs in important ways from the certification of a Rule 23 class action. *See id.* at 435.

4 Petitioners also argue that the district court erred by authorizing notice to parties who were not "similarly situated," misapplying our holding in *Swales*. Because we find that mandamus relief is appropriate based on Petitioners' first theory, we need not reach this issue.

5 Our dissenting colleague cites *Vine v. PLS Financial Servs., Inc.* for the proposition that class or collective action waivers are in effect conditional, only effective after a party moves to compel arbitration. 807 F. App'x 320, 328 (5th Cir. 2020) (per curiam) (unpublished). Not so. *Vine* held that a party who waived an arbitration clause also waived a class action waiver because the two were intertwined. *See id.* Indeed, *Vine* provides support for our holding. We agree that a party gives up "their right to participate in a class action *by virtue of* their agreement to resolve disputes exclusively through individual arbitration." *Id.* The same logic holds here. By agreeing to individual arbitration, Respondents agreed not to participate in collective and class actions.

6 Quotations from the arbitration agreement have been placed in normal typeface rather than all caps for ease of reading.

7 In his twenty-page January 10, 2022, order that is under review, the magistrate judge—remarkably—never even mentioned our controlling decision in *JPMorgan*.

1 *In re JPMorgan Chase & Co.*, 916 F.3d 494 (5th Cir. 2019).

2 *Kibodeaux v. A&D Interests, Inc.*, No. 3:20-CV-00008, 2020 WL 6292551 (S.D. Tex. Oct. 27, 2020).

3 *Swales v. KLLM Transp. Servs. L.L.C.*, 985 F.3d 430 (5th Cir. 2021).

4 This is evident from the two provisions in the agreement on which the majority focuses: (1) "[The parties] agree that any controversy or claim arising out of or relating to this contract or relationship between the parties ... shall be resolved by arbitration," and (2) "The only parties *to the arbitration* shall be [Petitioners] and [the individual dancer]." (emphasis added). As the majority notes, the third clause governing disputes between the parties does not bar collective actions.

End of Document

EXHIBIT 12

37 F.4th 238
United States Court of Appeals, Fifth Circuit.

Scott EASOM; Adrian Howard; John Nau, Plaintiffs—Appellants,

v.

US WELL SERVICES, INCORPORATED, Defendant—Appellee.

No. 21-20202

FILED June 15, 2022

Synopsis

Background: Laid-off employees brought putative class action against employer, which was in the hydraulic-fracturing business, based on claim that employer violated the Worker Adjustment and Retraining Notification (WARN) Act. Both sides moved for summary judgment. The United States District Court for the Southern District of Texas, Lee H. Rosenthal, Chief Judge, 527 F.Supp.3d 898, denied both motions and denied employees' motion for reconsideration. Employees filed interlocutory appeal.

Holdings: The Court of Appeals, Stewart, Circuit Judge, held that:

[1] COVID-19 pandemic did not qualify as a "natural disaster" so as to trigger natural-disaster exception under the WARN Act, and

[2] as a matter of first impression, WARN Act's natural-disaster exception incorporates proximate causation.

Reversed and remanded.

Procedural Posture(s): Interlocutory Appeal; Motion for Summary Judgment.

West Headnotes (16)

[1] **Federal Courts** ⟵ On separate appeal from interlocutory judgment or order

Although a district court's summary judgment ruling is ordinarily reviewed de novo, the Court of Appeals' appellate jurisdiction under the statute authorizing interlocutory appeals extends only to controlling questions of law, and, thus, in reviewing a summary judgment ruling pursuant to such statute, the Court of Appeals reviews only the issue of law certified for appeal. 28 U.S.C.A. § 1292(b).

[2] **Labor and Employment** ⟵ In general; employment loss

Labor and Employment ⟵ Notice of Employment Loss

To prove a WARN Act claim, a plaintiff must demonstrate that: (1) the defendant was an employer; (2) the defendant ordered a plant closing or mass layoff; (3) the defendant failed to give to the plaintiff sixty days' notice of the closing or layoff; and (4) the plaintiff is an aggrieved or affected employee. Worker Adjustment and Retraining Notification Act § 3, 29 U.S.C.A. § 2102(a).

[3] **Labor and Employment** ⟵ Defenses

If a plaintiff establishes the requirements for a WARN Act claim, the employer may avoid liability by proving that it qualifies for the Act's "faltering company" exemption, or that the closing or layoff resulted from unforeseen business circumstances or a natural disaster. Worker Adjustment and Retraining Notification Act § 3, 29 U.S.C.A. § 2102(a).

[4] **Statutes** ⟵ Language

When interpreting a statute, a court must start with the specific statutory language in dispute.

[5] **Statutes** ⟵ Undefined terms

A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.

EXHIBIT 12

[6] **Statutes** Dictionaries

Ordinarily, for purposes of statutory interpretation, a word's usage accords with its dictionary definition; but the court does not make a fortress out of the dictionary.

[7] **Statutes** Associated terms and provisions; noscitur a sociis

"Noscitur a sociis" means it is known by its associates; this canon for statutory interpretation counsels that a word is given more precise content by the neighboring words with which it is associated.

[8] **Statutes** Associated terms and provisions; noscitur a sociis

Courts rely on the statutory interpretation canon of noscitur a sociis to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the acts of Congress.

[9] **Statutes** Express mention and implied exclusion; expressio unius est exclusio alterius

"Expressio unius est exclusio," as an aid for statutory interpretation, means that where the items expressed are members of an associated group or series, that justifies the inference that items not mentioned were excluded by deliberate choice, not inadvertence.

[10] **Labor and Employment** Defenses

COVID-19 pandemic did not qualify as a "natural disaster," so as to trigger the natural-disaster exception under the WARN Act, in action brought by employees who were laid off from jobs at an oil drilling site during the pandemic, notice of which was allegedly given after employees had finished a workday and returned from the field; appearance of "natural disaster" in list with "flood, earthquake, or drought" in the statute suggested that Congress intended to limit the term to hydrological, geological, and meteorological events, and general principle of narrow construction of exceptions justified not expanding the definition beyond what was justified by the Act's statutory language, context, and purpose. Worker Adjustment and Retraining Notification Act § 3, 29 U.S.C.A. § 2102(a).

[11] **Administrative Law and Procedure** Plain, literal, or clear meaning; ambiguity or silence

Administrative Law and Procedure Permissible or reasonable construction

When the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on a statute, as would be necessary in the absence of an administrative interpretation; rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

[12] **Administrative Law and Procedure** Statutory basis

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

[13] **Administrative Law and Procedure** Erroneous or unreasonable construction; conflict with statute

Legislative regulations promulgated by an agency in interpretation of a statute are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

[14] **Negligence** Possibility of multiple causes

Negligence In general; foreseeability of other cause

Under Texas law, there can be more than one proximate cause of an injury, but a new and independent, or superseding, cause may intervene between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.

[15] **Negligence** In general; foreseeability of other cause

In assessing whether an intervening cause disrupted the causal connection between the initial cause and the plaintiff's harm and constitutes a new and independent cause, Texas courts consider a variety of factors, including foreseeability.

[16] **Labor and Employment** Defenses

WARN Act's natural-disaster exception incorporates proximate causation. Worker Adjustment and Retraining Notification Act § 3, 29 U.S.C.A. § 2102(b)(2)(B); 20 C.F.R. § 639.9(c)(2).

Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:20-CV-2995, Lee H. Rosenthal, Chief Judge

Attorneys and Law Firms

Gabriel Amin Assaad, Matthew Stephen Yezierski, Attorney, McDonald Worley, P.C., Houston, TX, Galvin Bernard Kennedy, Kennedy Law Firm, L.L.P., Houston, TX, for Plaintiffs-Appellants.

David Matthew Korn, Esq., Clerc Higgins Cooper, Mark D. Fijman, Phelps Dunbar, L.L.P., New Orleans, LA, for Defendant-Appellee.

Jeffrey B. Dubner, Democracy Forward Foundation, Washington, DC, for Amici Curiae Communications Workers of America, Service Employees International Union, American Federation of Teachers, American Federation of State, County and Municipal Employees.

Gerard J. Sinzdak, Catherine Meredith Padhi, U.S. Department of Justice, Civil Division, Appellate Section, Washington, DC. for Amicus Curiae United States Department of Labor.

Philip Andrew Miscimarra, Bryan Michael Killian, Morgan, Lewis & Bockius, L.L.P., for Amicus Curiae Chamber of Commerce of the United States of America.

Before Stewart, Clement, and Elrod, Circuit Judges.

Opinion

Carl E. Stewart, Circuit Judge:

Scott Easom, Adrian Howard, and John Nau (collectively, "Appellants") filed this interlocutory appeal seeking reversal of the district court's order denying their motions for summary judgment and reconsideration. In its order denying Appellants' motions, the district court certified two questions for interlocutory appeal: (1) Does COVID-19 qualify as a natural disaster under the Worker Adjustment and Retraining Notification Act's ("**WARN Act**" or "the Act") natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B)?; (2) Does the **WARN Act's** natural-disaster exception, 29 U.S.C. § 2102(b)(2)(B), incorporate but-for or proximate causation?

In response, we hold that the COVID-19 pandemic is not a natural disaster under the **WARN Act** and that the natural-disaster exception incorporates proximate causation. We therefore REVERSE and REMAND for proceedings consistent with this opinion.

I. FACTS & PROCEEDINGS

Appellants filed a class action complaint against their former employer, US Well Services, Inc. ("US Well") for allegedly violating the **WARN Act** by terminating them without advance notice. The **WARN Act** requires covered employers to give affected employees sixty days' notice before a plant closing or mass layoff. 29 U.S.C. § 2102(a). The Act provides three exceptions to the notice requirement—including the natural-disaster exception, under which no notice is required. *Id.* § 2102(b).

By way of background, oil producers hire US Well to perform hydraulic fracturing services known as fracking. When the price of oil drops below a commercially viable price, oil producers—including those that hire US Well—often discontinue work. In early March 2020, oil prices plummeted to historic lows due to a price conflict between Saudi Arabia and Russia. This effect was compounded by a decline in travel and decreased demand for oil and gas during the COVID-19 pandemic. As a result, several of US Well's customers curtailed or completely shut down the fracking work US Well had been performing at multiple well sites in Texas. When crew members, including Appellants, returned from the well sites to their respective headquarters after shutting down operations, they were immediately informed that they were laid off. Appellants' termination letters, dated March 18, 2020, and effective immediately, stated: "Your termination of employment is due to unforeseeable business circumstances resulting from a lack of available customer work caused by the significant drop in oil prices and the unexpected adverse impact that the Coronavirus has caused."

Appellants filed this suit on August 26, 2020, and amended their complaint on October 14, 2020. The parties cross-moved for summary judgment. US Well argued that COVID-19 was a natural disaster under the WARN Act, and consequently, that it was exempt from the WARN Act's notice requirement pursuant to the natural-disaster exception. Appellants countered that COVID-19 was not a natural disaster and was not a direct cause of their layoffs. The district court concluded that COVID-19 was a natural disaster and that the natural-disaster exception uses but-for causation standards. It denied both motions for summary judgment, however, on grounds that the record did not show whether COVID-19 was the but-for cause of the layoffs. Appellants moved for reconsideration or, in the alternative, certification of three questions for interlocutory appeal. The district court denied the motion for reconsideration but certified two questions for interlocutory appeal: (1) Does COVID-19 qualify as a natural disaster under the WARN Act's natural-disaster exception?; (2) Does the WARN Act's natural-disaster exception incorporate but-for or proximate causation?

II. STANDARD OF REVIEW

[1] "Although we ordinarily review a district court's summary judgment ruling de novo, our appellate jurisdiction under § 1292(b) extends only to controlling questions of law, thus, we review only the [questions] of law certified for appeal." *Tanks v. Lockheed Martin Corp.*, 417 F.3d 456, 461 (5th Cir. 2005). We do not review whether either party has shown "that there is [a] genuine dispute as to any material fact" under Rule 56. FED. R. CIV. P. 56(a); *see La. Patients' Comp. Fund Oversight Bd. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 585, 588 (5th Cir. 2005); *Malbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004). Instead, we determine de novo whether the district court properly interpreted the WARN Act's natural-disaster exception. *See Tanks*, 417 F.3d at 461.

III. ANALYSIS

[2] The WARN Act prohibits an employer from ordering "a plant closing or mass layoff until the end of a [sixty]-day period after the employer serves written notice of such an order" to affected employees. 29 U.S.C. § 2102(a). Employers who violate § 2102 are required to provide aggrieved employees "back pay for each day of violation." *Id.* § 2104(a)(1)(A). "To prove a WARN Act claim, a plaintiff must demonstrate that: (1) the defendant was 'an employer'; (2) the defendant ordered a 'plant closing' or 'mass layoff'; (3) the defendant failed to give to the plaintiff sixty days['] notice of the closing or layoff; and (4) the plaintiff is an 'aggrieved' or 'affected' employee." *In re TWL Corp.*, 712 F.3d 886, 897 (5th Cir. 2013) (quoting §§ 2102, 2104).

[3] "If a plaintiff establishes these requirements, the employer may avoid liability by proving that it qualifies for the Act's 'faltering company' exemption, or that the closing or layoff resulted from 'unforeseen business circumstances' or a 'natural disaster.' " *Id.* at 897–98 (citing 20 C.F.R. § 639.9 (1989)). Relevant here, the WARN Act's natural-disaster exception provides that "[n]o notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B).

Section 2107(a) of the WARN Act requires the Secretary of Labor to "prescribe such regulations as may be necessary to carry out this chapter." 29 U.S.C. § 2107(a). "Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter."

Id. To that end, the Department of Labor has explained the following regarding the natural-disaster exception to the notice requirement:

> (1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.
>
> (2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.
>
> (3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in [20 C.F.R.] § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.
>
> (4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

20 C.F.R. § 639.9(c)(1)-(4) (the "DOL regulation"). Further, the Department of Labor has clarified that "[t]he employer bears the burden of proof that conditions for the exceptions have been met." *Id.* § 639.9. We now turn to the certified questions.

A. Whether COVID-19 qualifies as a natural disaster under the WARN Act's natural-disaster exception

Appellants argue that COVID-19 does not qualify as a natural disaster under the **WARN Act**. We agree.

[4] [5] When interpreting a statute, a court must "start with the specific statutory language in dispute." *Murphy v. Smith*, — U.S. —, 138 S. Ct. 784, 787, 200 L.Ed.2d 75 (2018). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979).

[6] Because the **WARN Act** does not define "natural disaster," we turn to the "ordinary meaning of the word ... as understood when the [Act] was enacted." *See Carcieri v. Salazar*, 555 U.S. 379, 388, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). "Ordinarily, a word's usage accords with its dictionary definition." *Yates v. United States*, 574 U.S. 528, 537, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015). "But we do not 'make a fortress out of the dictionary.' " *Chapman v. Durkin*, 214 F.2d 360, 362 (5th Cir. 1954) (quoting *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 764, 69 S.Ct. 1274, 93 L.Ed. 1672 (1949)).

When the **WARN Act** was enacted in 1988, the term "natural disaster" was not yet defined in leading dictionaries. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY (3d coll. ed. 1988); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d unabridged ed. 1987); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1976). So, our dictionary-based analysis of the term is limited to combining two component definitions. Taking the terms in isolation, "natural" was defined as "of or arising from nature; in accordance with what is found or expected in nature" and "produced or existing in nature; not artificial or manufactured." *Natural*, WEBSTER'S NEW WORLD DICTIONARY (3d coll. ed. 1988). "Disaster" was defined as "any happening that causes great harm or damage; serious or sudden misfortune; calamity." *Disaster*, WEBSTER'S NEW WORLD DICTIONARY (3d coll. ed. 1988). The district court reasoned that COVID-19 qualified as "natural" because human beings did not start or consciously spread it. *Easom v. US Well Servs., Inc.*, 527 F. Supp. 3d 898, 908 (S.D. Tex. 2021). It further reasoned that COVID-19 qualified as a "disaster" based on how many people were killed or infected by the virus. *Id.* Although the dictionary definitions of the words "natural" and "disaster" bear consideration, they are not dispositive of the meaning of "natural disaster" in the **WARN Act**. *See Yates*, 574 U.S. at 538, 135 S.Ct. 1074.

To supplement our combined dictionary definition of "natural disaster," we consider the term's statutory context. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). The natural-disaster exception provides that "[n]o notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, *such as* a flood,

earthquake, or the drought currently ravaging the farmlands of the United States." 29 U.S.C. § 2102(b)(2)(B) (emphasis added). Congress's use of the term "such as" "indicat[es] that there are includable other matters of the same kind which are not specifically enumerated by the standard." *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981) (relying on dictionaries from 1967 to 1971). By providing three examples after "such as," Congress indicated that the phrase, "natural disaster" includes events of the same kind as floods, earthquakes, and droughts. Traditional canons of statutory construction further support this interpretation.

[7] [8] In the proceedings below, Appellants argued that the district court should apply the canon of *noscitur a sociis*. *Noscitur a sociis* means "it is known by its associates." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 287, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010). This canon "counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). The district court rejected Appellants' argument on grounds that the phrase, "any form of natural disaster" signaled intentional breadth. *Easom*, 527 F. Supp. 3d at 910. But the Supreme Court has applied *noscitur a sociis* even where a list begins with the word "any,"[1] thus, we apply that canon here. Courts rely on the canon of *noscitur a sociis* to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Yates*, 574 U.S. at 543, 135 S.Ct. 1074. Applying *noscitur a sociis* to this case, the appearance of "natural disaster" in a list with "flood, earthquake, or drought" suggests that Congress intended to limit "natural disaster" to hydrological, geological, and meteorological events.

[9] The canon of *expressio unius est exclusio* is also helpful here. It means that where, as here, "the items expressed are members of an 'associated group or series,' [that] justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003). By the late 1980s, Congress was familiar with pandemics and infectious diseases—for instance, H1N1 (1918), H2N2 (1957-1958), and H3N2 (1968). *See Past Pandemics*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 10, 2018), https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html. As early as 1938, Congress specified coverage for "plant disease" in the Federal Crop Insurance Act, which authorized federal crop insurance to help agriculture recover after the Dust Bowl. 7 U.S.C. § 1508(g)(5)(A). So, by the time agriculture was hit by the North American drought of 1988, Congress knew how to, and could have, included terms like disease, pandemic, or virus in the statutory language of the **WARN Act**. That it chose not to justifies the inference that those terms were deliberately excluded. *See* *Barnhart*, 537 U.S. at 168, 123 S.Ct. 748.

Finally, we recognize that the **WARN Act** was "adopted in response to the extensive worker dislocation that occurred in the 1970s and 1980s." *Hotel Emps. & Rest. Emps. Int'l Union Loc. 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 182 (3d Cir. 1999). Under the Act, employers are required to provide notice to employees and to local government agencies to allow "some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a). This court has observed that the **WARN Act's** exceptions permitting a reduction of the notice period run counter to the Act's remedial purpose and thus, are to be "narrowly construed." *Carpenters Dist. Council of New Orleans v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1282 (5th Cir. 1994); *see also San Antonio Sav. Ass'n v. Comm'r*, 887 F.2d 577, 586 (5th Cir. 1989) (noting the "general principle of narrow construction of exceptions"). We therefore decline to expand the definition of "natural disaster" beyond what is justified by the Act's statutory language, context, and purpose.

[10] Accordingly, we hold that COVID-19 does not qualify as a natural disaster under the **WARN Act's** natural-disaster exception.

*B. Whether the **WARN Act's** natural-disaster exception incorporates but-for or proximate causation*

Appellants contend that the phrase "due to" in the natural-disaster exception requires proximate cause. In the alternative, they argue that the phrase, "due to" is ambiguous and that this court should thus defer to the DOL regulation requiring an employer to "demonstrate that its plant closing or mass layoff is a direct result of a natural disaster." 20

C.F.R. § 639.9(c)(2). We agree that deference is appropriate here.

[11] [12] [13] We first consider "whether Congress has directly spoken to the precise question at issue," here, whether the phrase "due to" in the natural-disaster exception requires but-for or proximate causation.[2] *See* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Congress has not. When "the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* at 843, 104 S.Ct. 2778. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843–44, 104 S.Ct. 2778. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778.

In light of these principles, we recognize that Congress explicitly left a gap for the Department of Labor to fill by requiring the Secretary of Labor to "prescribe such regulations as may be necessary to carry out [the WARN Act]." 29 U.S.C. § 2107(a). The Department of Labor's interpretation is not arbitrary, capricious, or manifestly contrary to the Act. Thus, we give controlling weight to the DOL regulation, 20 C.F.R. § 639.9(c)(2): "To qualify for [the natural-disaster] exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster."

Supreme Court and Fifth Circuit precedent equate direct causation and proximate causation. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 444, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014) ("The idea of proximate cause .... generally 'refers to the basic requirement that ... there must be "some direct relation between the injury asserted and the injurious conduct alleged[.]" ' "); *Dixie Pine Prods. Co. v. Md. Cas. Co.*, 133 F.2d 583, 585 (5th Cir. 1943) ("It is well settled that the words 'direct cause' ordinarily are synonymous in legal intendment with 'proximate cause[.]' "). This precedent leads us to the conclusion that the DOL regulation's "direct result" requirement imposes proximate causation.

US Well argues that the DOL regulation's direct causation requirement would require the natural disaster to be the sole cause of the mass layoff and would foreclose the application of the natural-disaster exception in any case with an intermediate event between the natural disaster and the layoff. It points to instances such as when a hurricane causes a power outage, which in turn causes layoffs, or when Hurricane Katrina caused a breach of the levees, which in turn caused the city of New Orleans to flood and forced businesses to shut down. But this argument belies traditional proximate cause principles.

The Supreme Court has explained that "[a]s a general matter, to say one event proximately caused another is a way of making two separate but related assertions." *Paroline*, 572 U.S. at 444, 134 S.Ct. 1710. "First, it means the former event caused the latter." *Id.* "This is known as actual cause or cause in fact." *Id.* Second, "[e]very event has many causes ... and only some of them are proximate"—to wit, those "with a sufficient connection to the result." *Id.* So proximate cause is not synonymous with sole cause. A proximate cause requirement merely "serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Id.* at 445, 134 S.Ct. 1710.

[14] [15] Under Texas law, "there can be more than one proximate cause of an injury," but "a new and independent, or superseding, cause may 'intervene[ ] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause.' " *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016) (alteration in original) (citation omitted). "In assessing whether an intervening cause disrupted the causal connection between the [initial cause] and the plaintiff's harm and constitutes a new and independent cause, [Texas courts] consider a variety of factors, including foreseeability." *Id.* at 98.

[16] Here, flooding, power outages, layoffs, and shutdowns are among the reasonably foreseeable consequences of hurricanes and other natural disasters. Thus, imposing a

proximate cause requirement on employers that must lay off employees due to a natural disaster would not foreclose the natural-disaster exception for all cases involving an intermediate cause.

Accordingly, based on the DOL regulation's "direct result" requirement and binding precedent equating direct cause with proximate cause, we hold that the **WARN Act's** natural-disaster exception incorporates proximate causation.

IV. CONCLUSION

For the reasons set forth above, we REVERSE the order of the district court and REMAND for further proceedings consistent with this opinion.

All Citations

37 F.4th 238

Footnotes

1 *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 544, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (holding that fish were not included within the term "tangible object" under the Sarbanes-Oxley Act because "tangible object" appeared in a list that began "any record [or] document" and thus must refer to tangible objects used to record or preserve information).

2 The district court began its causation analysis by reasoning that "due to" means "because of." *Easom*, 527 F. Supp. 3d at 912. It then cited *Bostock v. Clayton County*, —— U.S. ——, 140 S. Ct. 1731, 1739, 207 L.Ed.2d 218 (2020), *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 64 n.14, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007), and *Burrage v. United States*, 571 U.S. 204, 214, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), where the Supreme Court stated that "because of" incorporates but-for causation. But none of those cases held that "because of" necessarily excluded proximate causation. Indeed, neither *Bostock* nor *Safeco* mention proximate causation. The Sixth, Tenth, and D.C. Circuits have concluded that the phrase, "due to" is ambiguous. *See U.S. Postal Serv. v. Postal Regulatory Comm'n*, 640 F.3d 1263, 1268 (D.C. Cir. 2011); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999); *Adams v. Director, OWCP*, 886 F.2d 818, 821 (6th Cir. 1989). Specifically, the D.C. Circuit has observed that "[t]he phrase 'due to' is ambiguous [because it] 'has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.' " *U.S. Postal Serv.*, 640 F.3d at 1268 (quoting *Kimber*, 196 F.3d at 1100). We are persuaded by this reasoning and conclude the same.

EXHIBIT 13

645 S.W.3d 228
Supreme Court of Texas.

Thomas Brandon PERTHUIS, Petitioner,
v.
BAYLOR MIRACA GENETICS LABORATORIES, LLC, Respondent

No. 21-0036
|
Argued February 2, 2022
|
OPINION DELIVERED: May 20, 2022

Synopsis

Background: Former vice president sued genetic diagnostics company following his termination, alleging company had breached its agreement to pay him sales commissions. The 80th District Court, Harris County, Larry Weiman, J., 2018 WL 6335166, entered judgment on jury's verdict for former vice president. Diagnostics company appealed, and former vice president cross-appealed. The Houston Court of Appeals, First District, 639 S.W.3d 108, reversed. Former vice president petitioned for further review.

Holdings: The Supreme Court, Young, J., held that:

[1] procuring-cause doctrine applied to parties' contractual relationship;

[2] "at will" provision in employment contract did not displace procuring-cause doctrine;

[3] provision specifying amount of commissions to be paid did not displace procuring-cause doctrine; and

[4] employment contract was not ambiguous as to parties' intent regarding right to commissions after termination.

Reversed and remanded.

Huddle, J., filed dissenting opinion, in which Boyd, J., joined.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Judgment.

West Headnotes (28)

[1] **Brokers** Procuring cause of contract or transaction

Procuring-cause doctrine provides nothing more than a default, which applies only when valid agreement to pay commission does not address questions like how commission is realized or whether right to commission extends to sales closed after brokerage relationship ends.

[2] **Brokers** Procuring cause of contract or transaction

If plaintiff seeks to invoke procuring-cause doctrine, initial question is whether doctrine even applies to contractual relationship between parties.

[3] **Brokers** Ability and willingness of party procured to perform contract

Function of the procuring-cause doctrine is to credit a broker (or salesman, or other agent) for a commission-generating sale when a purchaser was produced through the broker's efforts, ready, able and willing to buy the property upon the contract terms.

[4] **Brokers** Procuring cause of contract or transaction

Under procuring-cause doctrine, broker's entitlement to commission vests on his having procured sale, not on his actual involvement in sale's execution or continued employment through final consummation of sale.

[5] **Contracts** Ambiguity in general

When an agreement's language can be given a certain or definite legal meaning or interpretation, courts determine that meaning as a matter of law; only if ambiguity remains after

EXHIBIT 13

applying the pertinent rules of construction could there be a fact question about intent.

[6] **Brokers** 🔑 Employment of broker

For contracts involving commissions, all the usual rules of construction apply, like the familiar presumptions favoring consistent usage, disfavoring surplusage, and using the plain meaning of undefined terms.

[7] **Contracts** 🔑 Construction by Parties

Judicial interpretations of contracts are governed by what the parties said in their contract, not by what one side or the other alleges they intended to say but did not.

[8] **Contracts** 🔑 Language of Instrument

Contracts 🔑 Presumptions and burden of proof

Parties to a contract may freely define an ordinary word to have an unusual meaning; when they do, they rebut the presumption of ordinary usage.

[9] **Contracts** 🔑 Language of Instrument

Without any textually expressed bespoke meaning, courts interpreting contract will adopt the ordinary usage as a matter of law.

[10] **Brokers** 🔑 Procuring cause of contract or transaction

Parties may freely provide their own rules for paying or withholding commissions; if they do, the procuring-cause doctrine becomes irrelevant.

[11] **Corporations and Business Organizations** 🔑 Contracts or resolutions providing therefor in general

Procuring-cause doctrine applied to contractual relationship between genetic diagnostics company and its former vice president, who negotiated deal between company and its customer just prior to termination of his employment, where vice president's employment contract with company promised commissions for sales.

[12] **Brokers** 🔑 Procuring cause of contract or transaction

Parties dissatisfied with procuring-cause doctrine remain free to provide, by contract, for additional or different rules.

[13] **Principal and Agent** 🔑 Termination of agency

When contract prescribes otherwise valid binding terms for how to handle posttermination commissions, courts will enforce them; contractual silence, however, leaves procuring-cause doctrine intact as to those contracts to which doctrine applies.

[14] **Corporations and Business Organizations** 🔑 Contracts or resolutions providing therefor in general

"At-will" provision in employment contract between genetic diagnostics company and its former vice president did not displace the procuring-cause doctrine, as relevant to vice president's right to commissions for deal he negotiated between company and its customer just prior to termination of his employment; vice president's termination did not inherently affect his entitlement to commissions for sales procured before termination.

[15] **Brokers** 🔑 Procuring cause of contract or transaction

The fact that the owner himself has negotiated a sale does not prevent the broker from being regarded in law as the procuring cause of the transaction.

[16] **Corporations and Business Organizations** 🔑 Contracts or resolutions providing therefor in general

Provision specifying amount of commissions to be paid for net sales in employment contract between genetic diagnostics company and its former vice president did not displace the procuring-cause doctrine, as relevant to vice president's right to commissions for deal he negotiated between company and its customer just prior to termination of his employment; nothing in provision addressed whether terminating vice president's employment would affect his entitlement to commissions for sales that he procured while still employed, but instead contract's statement that vice president would receive commissions for his sales implicated the doctrine.

[17] **Corporations and Business Organizations** 🔑 Contracts or resolutions providing therefor in general

Employment contract between genetic diagnostics company and its former vice president was not ambiguous as to parties' intent with regard to vice president's right to commissions after termination, and thus procuring-cause doctrine applied as default rule governing vice president's right to commissions for deal he negotiated between company and its customer just prior to termination of his employment; contract was silent about any exceptions to obligation to pay commissions, and had company intended continuing employment to be condition for vice president to receive commissions on sales he had already procured, contract could have said so.

[18] **Contracts** 🔑 Language of Instrument

Parties can define ordinary words to have bizarre meanings, but if they are silent, court will dismiss as unreasonable any post-litigation effort to give words peculiar meaning.

[19] **Contracts** 🔑 Language of contract

Courts interpreting a contract give effect to intent as expressed in writing, because it is objective, not subjective, intent that controls.

[20] **Corporations and Business Organizations** 🔑 Contracts or resolutions providing therefor in general

Even if employment contract between genetic diagnostics company and its former vice president was ambiguous as to parties' intent with regard to vice president's right to commissions after termination, procuring-cause doctrine applied as default rule governing vice president's right to commissions for deal he negotiated between company and its customer just prior to termination of his employment; any such ambiguity was to be resolved against company, as drafter of contract.

[21] **Brokers** 🔑 Procuring cause of contract or transaction

Even when procuring-cause doctrine applies to contractual relationship, plaintiff still must show that he was in fact procuring cause of specific sales.

[22] **Brokers** 🔑 Presumptions and Burden of Proof

Broker who properly invokes procuring-cause doctrine to recover sales commissions must prove that specific sale was direct and proximate result of plaintiff's efforts or services.

[23] **Contracts** 🔑 Grounds of action

Ordinary contractual causation standard requires plaintiff to show that damage sued for has resulted from conduct of defendant.

[24] **Damages** 🔑 Certainty as to amount or extent of damage

Courts will not award speculative damages, including for any claim that is too remote and dependent upon too many contingencies.

[25] **Damages** Weight and Sufficiency

Damages must always be proved with reasonable certainty.

[26] **Brokers** Questions for jury as to sufficiency of services of broker

Claims of procuring-cause status will usually present fact question; when they do, trial courts should give juries clear instructions regarding plaintiff's burden to show his status as procuring cause for each sale at issue and defendant's ability to defeat that showing, in whole or in part, with evidence that plaintiff's original role had been overtaken by events and changed circumstances.

[27] **Appeal and Error** Presumptions and burdens on review

When reviewing court of appeals' reversal of judgment entered on a jury verdict awarding former employee damages for breach of contract, standard of review required that record be viewed in light most favorable to jury's verdict.

[28] **Appeal and Error** Verdict, findings, and judgment

Remand was required following reversal of Court of Appeals' decision reversing judgment awarding genetic diagnostics company's former vice president amount for commissions on deal he negotiated between company and its customer just prior to termination of his employment, where Court of Appeals' reversal on erroneous ground that procuring-cause doctrine did not apply prevented Court from reaching company's other arguments predicated on evidence regarding extent of vice president's right to commissions as procuring cause.

***231** On Petition for Review from the Court of Appeals for the First District of Texas

Attorneys and Law Firms

Jarod Stewart, Houston, Michelle Stratton, Garland Murphy IV, Houston, for Respondent.

Paul D. Flack, Houston, Reagan Douglas Pratt, for Petitioner.

Opinion

Justice Young delivered the opinion of the Court, in which Chief Justice Hecht, Justice Lehrmann, Justice Devine, Justice Blacklock, Justice Busby, and Justice Bland joined.

When a seller agrees to pay sales commissions to a broker (or other agent), the parties are free to condition the obligation to pay commissions however they like. But if their contract says nothing more than that commissions will be paid for sales, Texas contract law applies a default rule called the "procuring-cause doctrine." Under that rule, the broker is entitled to a commission when "a purchaser [was] produced through [the broker's] efforts, ready, able and willing to buy the property upon the contracted terms ...." *Goodwin v. Gunter*, 109 Tex. 56, 185 S.W. 295, 296 (1916). In this case, the agreement between the parties was silent about any exceptions to the duty to pay commissions for sales that petitioner procured. The procuring-cause doctrine therefore applies. Because the court of appeals held otherwise, ***232** we reverse its judgment and remand for further proceedings.

I

Respondent Baylor Miraca Genetics Laboratories, LLC (BMGL) made petitioner Brandon Perthuis its Vice President of Sales and Marketing in early 2015. BMGL drafted the two-page employment agreement, which Perthuis signed without alteration. The agreement gave Perthuis an annual base salary of $145,000 and stated that Perthuis's employment would be "at-will." As to Perthuis's commissions, it provided: "Your commission will be 3.5% of your net sales." Nothing more—the employment agreement did not, for example, define "net sales" or place any other parameters on the commission obligation. The employment agreement also

noted that Perthuis would be eligible for retention bonuses; it referenced a separate "retention agreement," which Perthuis also signed the same day. The retention agreement expressly conditioned any retention bonus on Perthuis's continued employment.

BMGL develops and analyzes genetic tests. BMGL sells its tests to "channel partners," who return test specimens to BMGL after obtaining orders from physicians. Perthuis served BMGL by pursuing and negotiating contracts with channel partners, the most prominent of which was Natera, Inc. In 2015, Perthuis negotiated such a contract between Natera and BMGL. Natera agreed to purchase a minimum number of tests; in exchange, it received an exclusivity agreement, under which BMGL promised not to perform tests for Natera's direct competitors. Natera, moreover, would pay a penalty and forfeit that exclusivity if it failed to purchase the stated minimum. Perthuis's role with respect to the sales that flowed from the Natera agreement was then done; he did not, for example, solicit batches of particular test orders, send invoices, or collect payments. But he received commissions on all sales that arose under the Natera agreement. BMGL calculated those commissions by multiplying "net" sales (*i.e.*, gross sales to Natera under the contract, adjusted by a collection rate) by 3.5%.

Although the Natera agreement was drafted to last for five years, Natera completed its minimum-purchase requirement far more quickly. Natera was set to meet that requirement by the end of 2016, at which point Natera would have had no further obligation to continue buying any tests under the agreement (although Natera had the option to continue purchasing a certain number of tests each quarter to retain exclusivity until 2020). BMGL, unsurprisingly, preferred increasing its business with Natera to either losing that business or being forced to retain an exclusive relationship with only minimal ongoing sales.

BMGL therefore directed Perthuis to negotiate a contractual amendment. Perthuis spent months doing so and completed the negotiations in January 2017. The terms of the amended contract substantially increased Natera's minimum-purchase requirement, making it the largest such contract in BMGL's history.

Perthuis relayed his success to BMGL leadership on Thursday, January 19. The CEO immediately requested a meeting with Perthuis, which was set for the following Monday, January 23. The meeting, it turns out, was not to commend Perthuis, but to fire him. The very next day, January 24, BMGL executed the amendment that Perthuis had negotiated. [1]

***233** BMGL refused to pay Perthuis commissions on any sales that were finalized after his termination, including sales that flowed from the amended Natera contract. Nor did BMGL pay anyone else commissions for those sales. In fact, earlier in January—before Perthuis announced his breakthrough with Natera—BMGL's leadership had sought to cut costs by altering its commission and compensation plans. BMGL rolled out a new commission plan for its junior sales team, which expressly stated that commission fees would only "be made to employee if employed at the end of the commission period." BMGL did not, however, change Perthuis's commission structure.

Perthuis claimed that he was the procuring cause of all sales to Natera and other channel partners that were finalized in the period from his termination through trial in October 2018. [2] He sued BMGL for breach of contract, asserting that he was entitled to a commission on all those sales. [3] BMGL denied having any further commission-related obligations to Perthuis. It argued that the employment agreement's text clearly displaced any role for the procuring-cause doctrine. But even if the contract *were* silent and that doctrine *did* apply, BMGL argued that Perthuis could not meet his burden to show that he qualified as a "procuring cause" of any sales for which he claims unpaid commissions.

The case went to trial, and the court instructed the jury on the procuring-cause doctrine as follows:

> Perthuis' "sales" included all sales for which he was the procuring cause.
>
> A "procuring cause" of a sale is the principal and immediate cause of the sale. It need not be the sole cause, and an agent is said to be the procuring cause of a sale when his acts have so contributed to bringing about the sale that but for his acts the sale would not have been accomplished.
>
> The fact that Mr. Perthuis was discharged by BMGL prior to the time a sale was completed does not bar his right to a commission if he was the procuring cause of the sale.

The jury found for Perthuis as to Natera and other channel partners but did not award him the full amounts that he sought.

The trial court rendered judgment on the verdict but declined to award any attorneys' fees to Perthuis. [4]

BMGL appealed; Perthuis cross-appealed to challenge the denial of attorneys' fees. The court of appeals reversed and rendered judgment for BMGL. According to that court, the parties' contract unambiguously entitled Perthuis to commissions only for sales made during his employment, not for procuring potential buyers for sales that closed after he was terminated. The court of appeals thus declined to address BMGL's further challenges to the trial court's judgment. The court upheld the denial of attorneys' fees for Perthuis because Perthuis no longer was the prevailing party.

*234 II

[1] This Court most clearly articulated the procuring-cause doctrine in *Goodwin v. Gunter* over a century ago, describing it as a "settled and plain" rule. 185 S.W. at 296. The doctrine provides nothing more than a default, which applies only when a valid agreement to pay a commission does not address questions like how a commission is realized or whether the right to a commission extends to sales closed after the brokerage relationship ends.

When a plaintiff seeks to recover commissions under the procuring-cause doctrine, as in this case, three main questions arise. First, did the parties have the kind of contractual relationship to which the procuring-cause doctrine applies? If so, did the parties displace the doctrine by the terms of their contractual agreement? Finally, if the procuring-cause doctrine applies to the parties' dispute and was not displaced, to what extent does the doctrine impose liability for the specific commission payments that the plaintiff demands? We address these questions in turn.

A

[2] If a plaintiff seeks to invoke the procuring-cause doctrine, the initial question is whether the doctrine even applies to the contractual relationship between the parties. *Goodwin* and other cases make clear that the minimum prerequisite for the doctrine to apply is an agreement to pay a commission on a sale. *Id.* The quintessential example of such a contractual relationship is a broker seeking to procure a buyer for real property, as in *Goodwin* itself. Yet in cases far beyond the real-estate industry, Texas courts, [5] and those of many other jurisdictions, [6] have employed and continue to employ the procuring-cause doctrine. [7]

[3] [4] The function of the procuring-cause doctrine is to credit a broker (or salesman, or other agent) for a commission-generating sale when "a purchaser [was] produced through [the broker's] efforts, ready, able and willing to buy the property upon the contract terms ...." *Goodwin*, 185 S.W. at 296. Under this doctrine, the broker's entitlement to a commission vests on his having *procured* the *235 sale, not on his actual involvement in a sale's execution or continued employment through the final consummation of the sale. *Goodwin*'s analysis rested on the idea that—absent contractual language to the contrary—the contract deems a sale to be the broker's sale if the broker, while under contract with the owner, made the sale possible. The Court's essential holding was that "the commissions are earned and the broker is entitled to their payment according to the contract if, while it is in force, he procures a purchaser to whom the owner directly makes a sale upon terms which are satisfactory to himself...." *Id.*

"This is but a rule of fairness and right," the Court continued. *Id.* After all, when a broker fully complies with *his* obligations, "the owner receives the full benefit of the broker's effort. Through the diligence of the broker a buyer is produced." *Id.* Once a broker performs the task of "[h]aving interested a prospective buyer," an owner cannot deny the broker "a fair opportunity of making a sale to him upon the terms authorized." *Id.* Of course, an owner may always "take the matter into his own hands, avail himself of the broker's effort, [and] close a sale upon satisfactory terms," but if he does, the owner's right to "deny the broker's right of compensation, is a proposition not to be countenanced." *Id.*

We specifically rejected the argument, heavily pressed by BMGL, that eliminating a broker's role immediately before finalizing a sale means that the broker could not have taken the necessary final step to earn a commission:

> It is no answer in such a case to say that a purchaser has not been produced by the broker ... and the owner is therefore free to deal with the buyer, though produced by the broker, without any liability to the latter. That becomes unimportant in the face of the outstanding fact that it is by the broker the buyer is produced, and, before his negotiation is concluded, a sale is made, as the result of his effort .... The owner will therefore be deemed, in such a case, to have waived the terms to which the broker was confined, and the law declares him liable for the commissions fixed by the contract, for the reason that, except as to such waived provision, the broker's part of the contract has been fully performed....

Id. at 296–97; *see also* *Keener v. Cleveland*, 250 S.W. 151, 152 (Tex. Comm'n App. 1923, judgm't affirmed) (confirming that a broker is entitled to a contractual commission if he was the procuring cause of the sale even if the sale was concluded by the seller or another broker).

The procuring-cause doctrine is not a judicially created "term" for commission contracts. It does not add anything to a contract or take anything away. It does not restrict parties' ability to modify their contractual relationships and it does not change the law governing whether parties have entered into such a relationship in the first place. Parties certainly may condition the obligation to pay a commission on something other than procuring the sale—they need only say so. The doctrine provides nothing more than a default rule to enforce parties' existing agreements as set forth in their contract. Functionally, it precludes *post hoc* efforts to rewrite contracts by adding exceptions under the guise of ambiguity.

[5] **[6]** **[7]** When an agreement's "language can be given a certain or definite legal meaning or interpretation," courts determine that meaning "as a matter of law." *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012). Only if ambiguity remains "*after* applying the pertinent rules of construction" could there be a fact question about intent. *Id.* (emphasis added; internal quotation omitted).

***236** For contracts involving commissions, all the usual "rules of construction" apply, like the familiar presumptions favoring consistent usage, disfavoring surplusage, and using the plain meaning of undefined terms. *See, e.g.*, *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892–93 (Tex. 2017) (discussing several of the "well-established rules of contract construction"). The procuring-cause doctrine plays the same analytical role: allowing courts to ascertain and honor the parties' intent as expressed in their text. Judicial interpretations of contracts are "governed by what [the parties] said in [their] contract, not by what one side or the other alleges they intended to say but did not." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010).

[8] **[9]** **[10]** Thus, by analogy, parties may freely define an ordinary word to have an unusual meaning; when they do, they rebut the presumption of ordinary usage.[8] Without any textually expressed bespoke meaning, however, courts will adopt the ordinary usage as a matter of law. *See, e.g.*, *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 764 (Tex. 2018).[9] Likewise, parties may freely provide their own rules for paying or withholding commissions. If they do, the procuring-cause doctrine becomes irrelevant. But without such additional terms, courts will not indulge a party's effort to smuggle in limitations on commission payments that parties could have, but did not, textually express.

The procuring-cause doctrine, therefore, is just a manifestation of our larger refusal to countenance any effort by parties to override the authoritative constructions of contracts. Stability and predictability of contract law, and maintaining parties' incentives to write with clarity, require holding parties to the text as written—and require courts to read text as consistently as possible from case to case. The procuring-cause doctrine contributes to that stability by providing a default rule to understand what it means to promise to pay commissions for procuring a sale. We reiterate, however, that the doctrine imposes no substantive limits. Parties remain free to structure commission agreements as they choose.

To be clear—and as discussed in greater detail in Part II.C —the doctrine fully respects the factfinder's authority and obligation to determine *whether* the broker's action produced the purchaser, which generally is "purely a question of fact."

Goodwin, 185 S.W. at 297. Under this framework, at least since *Goodwin*, Texas courts have applied the doctrine's rule when it arises. [10]

***237** **[11]** Because the employment contract here promises commissions for sales, BMGL and Perthuis's contractual relationship is the kind to which the procuring-cause doctrine applies. [11] We thus proceed to the second question: Did the parties take any steps to displace the doctrine?

B

[12] We must ask the question because the procuring-cause doctrine is merely a default rule. "As always, parties dissatisfied with the common-law rule we [reaffirm] today remain free to provide, by contract, for additional or different rules ...." *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 203 n.12 (Tex. 2022) (Huddle, J.). If they do, they can displace the procuring-cause doctrine, and we will honor their choice.

Departing from the procuring-cause doctrine's default rule requires no magic language. A contract merely needs to provide terms that are inconsistent with the default rule—which is to say, terms that in some way cabin the textually imposed contractual obligation to pay a commission. The contract could deny the payment of commissions from procured sales absent continued employment; authorize commissions only on sales that close during the employment or brokerage relationship; condition commissions on the money from the sale being received within a particular time frame; provide a time limit after termination beyond which commissions from procured sales will not be paid; or include a myriad of other terms that could displace the procuring-cause doctrine in whole or in part.

[13] When a contract prescribes otherwise-valid binding terms for how to handle post-termination commissions, therefore, the courts will enforce them. Contractual silence, however, leaves the procuring-cause doctrine intact as to those contracts to which the doctrine applies.

The parties before us were entitled to freely depart from the procuring-cause doctrine's default rule. The core of BMGL's argument is that the parties *did* displace the doctrine—by signing the employment agreement. [12] BMGL's argument, ***238** therefore, depends on finding *something* in the employment agreement's text that addresses whether the parties intended to depart from the default rule. The agreement's at-will provision and its "your net sales" provision are the only textual possibilities, but they cannot displace the procuring-cause doctrine. Nor is there any ambiguity that creates a fact question.

1

[14] First, we cannot agree that the agreement's "at-will" provision displaces the procuring-cause doctrine. [13] This argument is not really based on the text between these two parties; rather, it reflects the far broader position that at-will employment is inherently inconsistent with the default rule. We disagree with that assertion.

Distinctions in employment status—for example, whether Perthuis was an at-will employee or an independent contractor or something else—have nothing to do with the question that implicates the procuring-cause doctrine. That question is whether *commissions* that would flow from sales procured while the employee was employed (or otherwise engaged) may be forfeited solely because, before the commission is paid, the employment ends.

Perthuis's termination certainly generated *other* important consequences for both parties. He was no longer entitled to his salary (because he was an at-will employee) or any retention bonus (because he signed an agreement that expressly disclaimed such a bonus if he was no longer employed). By making Perthuis an employee and paying him a salary—rather than leaving him as an independent contractor—BMGL gained Perthuis's exclusivity. Perthuis, in turn, had received the certainty of at least some income no matter what happened vis-à-vis his sales. The retention bonus played a similar role; it made it more attractive for Perthuis to stay with BMGL. Perthuis's termination ended these mutual benefits and obligations.

[15] Sales commissions, however, function differently. They rewarded the fruits of Perthuis's past labor. While Perthuis was employed by BMGL, he received continuing quarterly commissions as sales flowed in under the contracts he had previously negotiated with Natera and other channel partners. To receive those commissions quarter after quarter, nothing more was necessary *from him*. He did not need to be involved in the details of individual sales or the invoicing

and processing of batches of genetic tests. No such roles are inherently necessary for entitlement to sales commissions: "The fact that the owner himself has negotiated the sale does not prevent the broker from being regarded in law as the procuring cause of the transaction." *Hutchings v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 489 (Tex. [Comm'n Op.] 1943). [14]

***239** If the jury could conclude that Perthuis had "fully performed" his "part of the contract" by the time BMGL fired him, *Goodwin*, 185 S.W. at 297, then the termination made no difference. Perthuis presented his role as getting the larger deal done, just as with the original Natera contract. If this in fact reflected his duty to BMGL, then BMGL had extracted from Perthuis essentially everything that it would have gotten from him vis-à-vis the new Natera deal *whether he was fired or not.* [15] BMGL signed that deal the day after it fired Perthuis, without further work.

Accordingly, Perthuis's termination does not inherently affect his entitlement to commissions. Absent the parties' direction to deviate from the default rule, it is analytically unsound to derive any meaning from the at-will-employment context regarding the obligation to pay commissions for sales procured *before termination.* Just as salary may be owed for days of work completed before termination, so too may commission fees be owed for sales to buyers procured from work completed before termination. So long as Perthuis *was* the procuring cause of any particular sale (a question we address in Part II.C), then he was entitled to a commission absent some contractual language to the contrary. [16]

2

[16] The only other contractual provision that might displace the procuring-cause doctrine is the employment agreement's lone sentence that addresses commission fees: "Your commission will be 3.5% of your net sales." Neither in isolation nor read within the context of the short employment agreement of which it is a part, however, does anything in that spare sentence address whether terminating Perthuis's employment would affect his entitlement to commissions for sales that he procured while still employed.

To the contrary, far from *displacing* the procuring-cause doctrine, the employment agreement's statement that Perthuis would receive a "commission" for his "net sales" is the very text that *implicates* the doctrine. "[Y]our net sales" provides the trigger for paying commissions. The doctrine would not apply without a promise of a commission tethered to sales. The contract defines neither "commission" nor "net sales," and those terms' ordinary meanings do not suggest that firing Perthuis would end any entitlement he had to commissions for sales that his prior work procured.

3

[17] Finally, BMGL argues in the alternative that the contract is at least ambiguous about the parties' intent relative to what would happen upon Perthuis's termination. The dissent likewise finds ambiguity by contending that both parties offered ***240** "reasonable" interpretations of the commission provision. *Post* at 249-50. We agree that *if* there were insoluble ambiguity about the commission obligation, it would present a fact question for a jury. We cannot agree, however, that any fact question arises here. The contract is *silent* about any *exceptions* to the obligation to pay commissions; it is not ambiguous.

[18] **[19]** The procuring-cause doctrine does not preclude severing the obligation to pay sales commissions from procuring the sales. The doctrine's very function, however, is to deem silence about such an exception to reflect the parties' intent to foreclose such an exception. Said another way, it is unreasonable as a matter of law to allow for such an exception when the contract is silent. This analysis reflects how we deploy all other tools of contractual construction, whose function is to reduce the range of interpretations that qualify as "reasonable." Parties *can* define ordinary words to have bizarre meanings, for example; but if they are silent, we will dismiss as unreasonable any post-litigation effort to give words a peculiar meaning. [17]

Accordingly, there is only one reasonable interpretation here: that BMGL and Perthuis did not agree to cancel, upon termination of Perthuis's employment, commissions he otherwise would be owed. No fact issue on contract interpretation exists. Our conclusion is consistent with our goal of giving effect to the parties' "intent as expressed in the written document." *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 744 (Tex. 2020). In no way does it "remake their contract by reading additional provisions into it." *Gilbert Tex. Constr.*, 327 S.W.3d at 126. Quite the contrary; the procuring-cause doctrine functions to ensure that *no one* can

inject "additional provisions"—including the sort that BMGL suggests. [18] Had BMGL intended continuing employment to be a condition for Perthuis to receive commissions *241 on sales that he had already procured, then "it would have been simple to have said so." *Id.* at 127. If BMGL had done so and Perthuis had accepted it, we would enforce it. Notably, BMGL *did* use such language elsewhere—in the retention agreement, which Perthuis signed the same day as the employment agreement, and in the new policy governing more junior employees' commissions, which BMGL announced the very month that it fired Perthuis.

[20] We find no ambiguity. Regardless, latent ambiguity would not change the result. BMGL's counsel drafted the employment agreement, which Perthuis accepted as presented. Even assuming for argument's sake that the words "your net sales" were ambiguous, a court would resolve ambiguity about whether the parties intended to displace the procuring-cause doctrine against BMGL, the drafter of the employment agreement. *See, e.g.*, *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990) (requiring the construction of contractual ambiguity "against the party who drafted it since the drafter is responsible for the language used"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 42, 151 (2012) (endorsing "the venerable principle that an ambiguity should be resolved against the party responsible for drafting the document" and "the rule that ambiguities in contracts will be interpreted against the party that prepared the contract"). [19]

Accordingly, the court of appeals' error was to misapprehend the consequence of its correct observation that "[n]othing in the language of the [employment agreement] indicated that the parties intended to pay commissions under a procuring-cause standard or that Perthuis was entitled to commissions based solely on the [contracts with the channel partners]." [20] The court was right that the contractual text does not itself *adopt* the procuring-cause standard in the employment agreement. But no such "opt-in" is required. Likewise, a contract has no obligation to expressly define a word to use its ordinary meaning. In both instances, the default rule requires *opting out*, not the other way around. The legal consequence of silence is that the default rule remains intact.

* * *

We hold that nothing in the agreement between the parties before us displaced the procuring-cause doctrine.

C

[21] We arrive at the third question. Even when the procuring-cause doctrine applies to a contractual relationship, as it does here, the plaintiff still must show that he was in fact the procuring cause of specific sales.

1

[22] [23] A plaintiff who properly invokes the procuring-cause doctrine to recover sales commissions must prove that *242 the specific sale was the direct and proximate result of the plaintiff's efforts or services. *See* *Keener*, 250 S.W. at 152 (referring to the "general rule" that a broker earns a commission when the broker's "efforts were the primary, proximate, and procuring cause of the deal negotiated" and where "the transaction is directly attributable to the broker" (quotation omitted)). [21] A plaintiff meets that burden by proving the plaintiff set in motion "a chain of events ... which, without a break in their continuity, cause the buyer and seller to reach agreement on the sale" as a primary and direct result of the plaintiff's efforts. 49 Am. Jur. *Proof of Facts* 3d 399 § 13 (1998). [22] This necessarily requires the plaintiff to be both the "proximate" and "but for" cause of those sales. *Embrey v. W.L. Ligon & Co.*, 118 Tex. 124, 12 S.W.2d 106, 108 (Tex. [Comm'n Op.] 1929). [23]

A plaintiff could satisfy this standard by proving that he was the procuring cause of a single contract that, without further negotiations or modifications, produced a stream of sales. Or he could show that any changes to the contract were immaterial and his role was still the primary and direct cause of the sales. But it would not be enough for a plaintiff to simply identify and claim credit for a general relationship, like BMGL's relationship with Natera.

These requirements ensure both that a plaintiff recovers commissions that are due and that a defendant is not obligated to pay commissions that are attenuated from the plaintiff's role. A "rule of fairness and right," *Goodwin*, 185 S.W. at 296, after all, requires fairness for the defendant as well as the plaintiff. The defendant must be free to show that the causal link was severed. As this Court has explained, for example, a salesman who "made an unsuccessful effort to

induce the buyer to purchase the property and had ceased his efforts to accomplish that result, all without fault on the part of the owner," is not the procuring cause when the sale was later made "as the result of independent negotiations directly between the owner and the buyer, or through the medium of some other broker." *Air Conditioning, Inc. v. Harrison-Wilson-Pearson*, 151 Tex. 635, 253 S.W.2d 422, 425 (1952) (quotation omitted); *see also, e.g., Shepard v. Wesson*, 266 S.W.2d 393, 395 (Tex. Civ. App.—Amarillo 1953, no writ) (upholding the jury's finding that the broker was the procuring cause of the sale when there was no intervening act between the broker's actions and the sale).

Another manifestation of this principle is almost the reverse scenario—where the jury could find that the passage of time eventually severs the causal link between a plaintiff's initially *successful* role as broker or agent and some later sale. Even if the defendant must pay commissions for earlier sales, therefore, that defendant can defeat commissions beyond a given point by showing that, from then on, the plaintiff was at best only a remote and attenuated ***243** cause of the later sales, not a primary and direct cause. A binding, multi-year contract that a plaintiff brokered and that generates repeated sales with no material adjustments may require commissions throughout the full term, because all those sales could be attributed to the same labor on the plaintiff's part. But significant maintenance may be required for other contractual relationships to endure. If the efforts of others were indispensable to salvaging or preserving a foundering contractual relationship, or if the contract itself must be reworked, a jury could conclude that the entitlement to commissions no longer existed.

Likewise, a defendant could sever the causal link by establishing that no commissions would be due to the plaintiff *even if she had remained employed.* A plaintiff who *lacks* continuing employment could not recover commissions under the procuring-cause doctrine if the same person would not be entitled to them if still employed.

[24] **[25]** These consequences follow from the basic principle that the courts will not award speculative damages, including for any claim that is "too remote and depend[ent] upon too many contingencies ...." *Signature Indus. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 187 (Tex. 2022) (quotation omitted). Damages must always be "proved with reasonable certainty," *id.* at 186 (quotation omitted), a principle that "acknowledges the limited competence of courts to track the complex effects of a breach of contract in an interdependent marketplace." *Id.* at 187.

[26] Claims of procuring-cause status will usually present a fact question.[24] When they do, trial courts should give juries clear instructions regarding the plaintiff's burden to show his status as the procuring cause for each sale at issue and the defendant's ability to defeat that showing, in whole or in part, with evidence that the plaintiff's original role had been overtaken by events and changed circumstances.[25]

2

[27] The jury in this case found that Perthuis was in fact the procuring cause of at least some of BMGL's sales. The standard of review requires courts to view the record in the light most favorable to the jury's verdict. *See, e.g., Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex. 2009).

[28] But Perthuis must show his entitlement to commissions on sales even as the BMGL–Natera relationship evolved in various phases. At a certain point, even Perthuis acknowledges the theoretical possibility that his contribution could have become too attenuated to qualify as a "procuring cause" for any further sales. Both in his briefing and at oral argument, Perthuis agreed that if an entirely new contract with Natera had to be negotiated (at least for reasons other than a bad-faith attempt to escape the commission obligation), then Perthuis could claim no further commissions despite his central and significant role in maintaining the BMGL–Natera ***244** relationship early on. That is, Perthuis concedes that it would not be enough to say something like, "Without my efforts, Natera's business would have been lost forever, so I am still the procuring cause under a totally new contract."

Perthuis contended that the nature of the contractual relationship did *not* materially change, and that he remained the procuring cause of sales to Natera all the way up to trial. BMGL, of course, strenuously argued the opposite. The jury refused to award the full amounts that Perthuis requested, which suggests that at least some of BMGL's arguments regarding Perthuis's decreasing causal link to later sales persuaded the jury.

The court of appeals has not yet undertaken its sufficiency analysis under the proper legal framework because it reversed the judgment for Perthuis for an independent reason: its

conclusion that the procuring-cause doctrine did not apply to the parties' contract. The court of appeals' disposition made it unnecessary for that court to reach the remainder of BMGL's arguments that are predicated on the evidence presented at trial. Our decision today requires consideration of those arguments.

We therefore reverse the judgment of the court of appeals and remand the case to that court for further proceedings, including assessing any further challenges to the trial court's judgment that BMGL has preserved. We express no opinion on whether each or any of the relevant contractual amendments, or anything else, was sufficiently substantial to sever any causal link between Perthuis and sales to Natera (or other channel partners). We leave to the court of appeals in the first instance to determine the proper disposition of this case, and we disclaim any intention to limit the court of appeals' resolution of the case on remand. [26]

III

The court of appeals' judgment is reversed and the case is remanded to the court of appeals for further proceedings.

Justice Huddle filed a dissenting opinion, in which Justice Boyd joined.

Justice Huddle, joined by Justice Boyd, dissenting.

Parties frequently agree to written contracts that are incomplete, unclear, or both. When disputes over such contracts arise, Texas courts have long applied a settled methodology for discerning what the parties' agreement actually was. If a written contract is susceptible to two or more reasonable interpretations, it is deemed ambiguous, and the parties may introduce extrinsic evidence to shed light on its meaning. Following this methodology allows courts to enforce the contract upon which the parties actually agreed, even if they were less than perfect scriveners. This, in turn, allows courts to hew as closely as possible to our ideal of freedom of contract: the notion that parties are allowed to make—and a Texas court should enforce—any legal contract to which the parties saw fit to agree.

Today the Court replaces this well-settled methodology with a default rule—the procuring-cause doctrine—which our Court has barely mentioned in a century. The majority dusts it off, imports it from the broker context, and, for the first time, applies it in the at-will-employment context. The Court's adoption of this default rule threatens the expectations of at-will employers and employees who have agreed ***245** to a commission structure but, for whatever reason, failed to reduce it to writing with perfect clarity. They will be surprised to learn that, under the default rule the Court adopts today, an at-will salesperson is entitled to commissions for any sale—here, perhaps hundreds or thousands of sales—a jury determines the salesperson "set in motion." And they will be stunned to learn that, under the default rule, the entitlement to commissions may extend *years* after their employment relationship ended.

Today's decision is at odds with our precedents for resolving contractual disputes and with the common understanding of the nature of at-will relationships. And it is far-reaching: while reported decisions on commission disputes are relatively few, the Texas Workforce Commission adjudicates as many as 20,000 wage claims, including claims for unpaid commission, *each year*. I would not be so quick to expand the procuring-cause doctrine to the at-will-employment context. I would instead remand to the trial court for a new trial in which a jury would determine the meaning of the parties' agreement that Perthuis's commission "will be 3.5% of [his] net sales" based on the parties' extrinsic evidence regarding their own contract negotiations, the employer's policies and practices, and common industry practice. Because the Court does otherwise, I respectfully dissent.

I

Time and again, this Court has reiterated its commitment to protecting freedom of contract. [1] As stewards of this "paramount public policy," *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 738 (Tex. 2020) (quoting *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (1951)), we have made clear that "courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained." *In re Marriage of I.C. & Q.C.*, 551 S.W.3d 119, 124 (Tex. 2018) (quoting *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996)).

Our primary goal in interpreting any contract is, of course, to give effect to the parties' intent as expressed in the contract itself. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640

S.W.3d 195, 198–99 (Tex. 2022). To do so, we look first to the contract's text. *See* *U.S. Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 23 (Tex. 2015). We consider the writing in its entirety, harmonizing and giving effect to all its provisions so that none will be rendered meaningless. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). And we interpret each provision with reference to the entire agreement, as opposed to giving one provision controlling effect. *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 7 (Tex. 2014).

***246** When parties disagree about the meaning of their written contract (as they often do), we apply a well-settled methodology to resolve the dispute. The first step is to determine whether the contract is ambiguous. *See* *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd by agr.) ("There are two steps to an ambiguity analysis. First, we apply the applicable rules of construction and decide if the contract is ambiguous." (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983))). Whether a contract is ambiguous is a question of law, *Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC*, 639 S.W.3d 682, 690 (Tex. 2022), and the parties need not plead ambiguity for the court to determine that a contract is ambiguous. *See* *Progressive Cnty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 808 (Tex. 2009) (holding a contract ambiguous despite neither party arguing ambiguity).

The majority recognizes that a contract is unambiguous if its language can be "given a certain or definite legal meaning or interpretation." *Ante* at 235 (quoting *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012)). But our law also recognizes that, alas, some contracts *are* ambiguous. *See, e.g.*, *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 232 (Tex. 2003) ("[W]e conclude that the arbitration agreement is ambiguous."). An ambiguity exists when a contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction. *Id.* at 229. If a contract is ambiguous, our precedents make clear that the parties may introduce extrinsic evidence to shed light on its meaning, which becomes a fact issue for the jury. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 480 (Tex. 2019).

II

The majority offers various rationales for applying the procuring-cause doctrine rather than considering extrinsic evidence. First, it concludes the agreement is not ambiguous but merely silent about which sales constitute Perthuis's "net sales." *Ante* at 239-40. Next, it deems the procuring-cause doctrine itself to be a principle of contract construction that "reduce[s] the range of interpretations that qualify as 'reasonable.' " *Id.* Finally, it asserts that even if the agreement were ambiguous, there would be no need for extrinsic evidence because it should be construed against its drafter.[2] *Id.* at 240-41. The upshot, under any of these theories, is that we never reach the point at which the parties offer competing evidence of what their imperfectly drafted commission agreement actually meant, because the procuring-cause doctrine supplies the answer.

The majority, like Perthuis, relies on *Goodwin v. Gunter*[3] and ***247** *Keener v. Cleveland*.[4] But those cases involved seller–broker relationships in the nature of an independent-contractor relationship, each formed to consummate the sale of a single piece of real property. The procuring-cause doctrine makes sense in that context, and I do not suggest disturbing *Goodwin* or *Keener*. But the doctrine is a misfit in the employment-at-will context, in which the parties likely (1) understand their obligations to one another to end when their employer–employee relationship does, absent an express agreement to the contrary; and (2) adhere to established policies or industry practices, or both, in determining how commissions are paid, regardless of whether those policies or practices were reduced to writing upon hiring. Under the majority's approach, these considerations are meaningless if not fully set out in the parties' agreement. The procuring-cause doctrine trumps them. This is, in my view, a significant and ill-advised departure from both the at-will employment doctrine and the notion that Texas courts should enforce and not rewrite the terms of the parties' bargain.

My view that the procuring-cause doctrine is a misfit in the at-will employment context is borne out by Texas authorities in two respects. First, there are few Texas cases applying the doctrine in the last century, and courts that have applied it usually have done so in the context of real-estate brokers who were engaged on a one-time basis to sell a single piece of

real property. [5] By contrast, courts adjudicating commissions of employees do not apply the procuring-cause doctrine but instead follow our established methodology in which the factfinder considers extrinsic evidence to discern the meaning of ambiguous commission agreements. [6]

Second, the Texas Workforce Commission, which adjudicates approximately 20,000 wage claims per year, [7] does not employ the procuring-cause doctrine. Instead, TWC rules reflect that, unless otherwise agreed, an employer must pay commissions "earned as of the time of separation." [8] Thus, to the extent TWC's rules can be said to articulate a default rule, it is not the procuring-cause doctrine. It is that the end of the at-will relationship is the line of demarcation by which commissions, if they will ever be owed, must be earned and identifiable. In TWC's view, commissions ***248** do not become payable—i.e., can no longer be earned—*after* separation.

TWC rules also contemplate that the agreement made when the employee was first hired may not address all the particulars and that a determination of commissions due post-termination should consider "*any* special agreement" made upon separation. [9] This use of "any" signals that TWC would consider agreements that elucidate the terms of an earlier agreement, whether the agreement made upon separation is express or implicit, written or oral, industry-specific or not.

III

Here, BMGL offered Perthuis a position as its Vice President of Sales and Marketing in a two-page offer letter. As the court of appeals noted, the terms relating to commission are "sparse." 639 S.W.3d 108, 114 (Tex. App.—Houston [1st Dist.] 2020). The contract stated:

> Your annual base salary at the time of close will be $133,000. Provided the transaction has closed, your annual base salary will be $145,000 effective April 1, 2015. *Your commission will be 3.5% of your net sales.* You will also be eligible to participate in the BMGL [long-term incentive] plan effective April 1, 2015 with an LTI target of 40% of your annual base salary with BMGL.... In addition, you will be eligible to receive a retention bonus. [Emphasis added.]

The offer letter did not elaborate on the commission structure beyond the statement that Perthuis would be paid 3.5 percent of "your net sales." It did state that Perthuis's employment would be "at-will" and that he would be entitled to various employment benefits, including medical, dental, and life insurance, as well as a sponsored 401(k) plan.

Perthuis contends that the agreement entitles him to commissions on post-termination sales, while BMGL says it does not. The logical starting point, then, is to ask whether the agreement granting Perthuis a 3.5 percent commission on "your net sales" definitively answers that question. If its language unambiguously shows that Perthuis is (or isn't) entitled to commissions on sales after his termination, then we construe the contract as a matter of law. *See El Paso Field Servs.*, 389 S.W.3d at 806. But if Perthuis and BMGL have both proffered reasonable interpretations of the provision in question, then the agreement is ambiguous and the trial court should have tasked the jury with determining its meaning.

Neither party in this case pleaded ambiguity. Instead, each argued that the agreement's text unambiguously supported their respective interpretations. The thrust of Perthuis's argument was that a commission is compensation for sales procured and thus the employment agreement's promise to pay him a 3.5 percent commission on "[his] net sales" entitles him to the sales he procured under the Natera deal and others, including those that postdate his departure. Perthuis also pointed out that the employment agreement did not contain any limiting language conditioning commission payments on continued employment with BMGL. [10]

***249** BMGL, on the other hand, maintains the contract unambiguously does *not* entitle Perthuis to commissions on post-termination sales. It urges us to interpret the commission obligation in light of the employment agreement in its entirety. [11] BMGL notes Perthuis conceded at trial that the other benefits outlined in his employment agreement, including salary, health insurance, and the 401(k) contribution, ended the moment BMGL terminated his at-will employment, even when the contract did not say so explicitly. The commission provision, BMGL argues, should be interpreted the same way: once Perthuis's employment ended, BMGL's obligation to pay commissions on any sales

ceased. And because Natera sales did not occur during the term of employment, Perthuis's termination preceded the "commission-earning event." The court of appeals agreed with BMGL's interpretation, concluding "the plain language of the commission agreement indicates that it was intended as compensation for Perthuis's continued employment with BMGL." 639 S.W.3d at 115.

The trial court could have found the provision ambiguous and submitted it to the jury even if neither party pleaded ambiguity. *See* *Kelley*, 284 S.W.3d at 808. Both parties contemplated such a finding. Indeed, Perthuis's counsel discussed this possibility with the trial court at the pretrial conference:

> If you're arguing different meanings, then ... *the Court is supposed to determine, is it ambigu[ous] or not.* [Emphasis added.]

And at the charge conference, BMGL argued the procuring-cause doctrine should not have been submitted and alternatively asked the trial court to submit the meaning of "Your commission will be 3.5% of your net sales" to the jury, drawing the proposed question from Texas PJC 101.8 on ambiguous contracts. By submitting the procuring-cause doctrine—and decoupling at-will employment with BMGL from Perthuis's entitlement to commissions—the trial court leapfrogged the central contractual dispute in the case: did the parties intend Perthuis to earn commissions only on sales completed while he was employed with BMGL? Or on sales to customers he procured while employed by BMGL, for so long as they remained customers of BMGL? For a year following his separation? Or something else? Under the procuring-cause doctrine, it doesn't matter. No one need bother with what the parties intended and thought they had agreed.

I would hold that both parties proffered reasonable interpretations of the commission provision and thus it is ambiguous with respect to whether Perthuis is entitled to commissions on post-termination sales.[12] The agreement states that "Your commission will be 3.5% of your net sales." It provides no guidance on the meaning of "commission" on "*your* net sales," and it is not clear when a sale becomes *Perthuis's* sale such that he earns a commission. One possibility—the theory Perthuis advances—is that "your net sales" encompasses all sales Perthuis "set in motion" or had some hand in procuring, even if they were not placed, invoiced, or paid for until ***250** after BMGL terminated him. *Ante at* 241-42. But it is also reasonable to interpret the commission provision as entitling Perthuis to commissions only on "net sales" finalized (i.e., sales for which an order had been placed, invoice had been sent, or payment had been received) during the term of his employment.

In short, both sides advance contract-interpretation arguments that are reasonable. I would thus hold the commission provision ambiguous and remand for a new trial in which a jury would determine whether, considering the extrinsic evidence, the parties intended that BMGL would pay Perthuis commissions on post-termination sales.[13] *See* *Barrow-Shaver*, 590 S.W.3d at 480 ("When a court determines that a contract is ambiguous, the meaning becomes a fact issue for the jury and extraneous evidence may be admitted to help determine the language's meaning.").

* * *

The parties had many drafting options at their disposal. BMGL could have obtained its desired outcome by specifying in the agreement that Perthuis was entitled to commissions only on sales orders received while Perthuis was employed by BMGL. By the same token, Perthuis, a sophisticated sales executive, could have bargained for a tail provision, under which he would continue to be paid commissions for an agreed-upon period of time post-termination for sales to customers he procured during the term of his employment.[14] Skilled practitioners could no doubt think of countless other mechanisms by which to unambiguously specify the "sales" for which a salesperson is owed commission. And Texas courts would enforce any such provisions to the letter, all toward the end of effectuating precisely the deal the parties struck.

The problem with the majority's approach today is that it abandons the worthy goal of effectuating parties' intended meaning whenever a human drafter falls short of describing the agreement with perfect precision. In that case, says the majority, all bets are off: we dispense with the work of ascertaining and enforcing the agreement's true meaning, and instead apply the procuring-cause doctrine, regardless of whether it has any relation to what *these* parties intended

their contract to mean.[15] Because I cannot bless this methodological shortcut, I respectfully dissent.

All Citations

645 S.W.3d 228, 65 Tex. Sup. Ct. J. 1126

Footnotes

1 Just over two months after BMGL terminated Perthuis, BMGL and Natera executed another amendment, modifying the pricing terms. Six months later, BMGL and Natera again modified the pricing through a memorandum of understanding.

2 The parties (and the Court) focus on the sales to Natera because those sales dwarfed those to other channel partners and commissions for them constitute the bulk of the jury's award.

3 Perthuis also brought other claims, but only his breach-of-contract claim was tried to a jury, and only that claim is before us.

4 The judgment awarded Perthuis $962,336.89 in compensatory damages for unpaid commissions, $80,282.63 in prejudgment interest, and postjudgment interest at 5%.

5 Texas lower-court cases have applied the procuring-cause doctrine to contracts involving metal buildings, marine equipment, mules, and rose bushes, to offer but a few non-real-estate examples. *See, e.g., Murphy v. McDermott Inc.*, 807 S.W.2d 606, 607, 612 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (marine equipment); *Metal Structures Corp. v. Bigham*, 347 S.W.2d 270, 273 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.) (metal buildings); *Ray v. Robinson*, 271 S.W.2d 159, 163 (Tex. Civ. App.—Texarkana 1954, no writ) (rose bushes); *Gibbens v. Williams*, 4 S.W.2d 316, 317 (Tex. Civ. App.—Austin 1928, no writ) (mules).

6 To take two examples, *Zelensky v. Viking Equipment Co.*, 70 Wash.2d 78, 422 P.2d 293, 296–97 (1966), applied the procuring-cause doctrine to an electronic-device sale and *Gunderson v. North American Life & Casualty Co.*, 248 Minn. 114, 78 N.W.2d 328, 331–33 (1956), applied the doctrine to the sale of life insurance. *See also, e.g., Cisne v. Gen. Elec. Cap. Corp.*, 26 F. App'x 229, 232–33 (4th Cir. 2002) (sale of vehicle-service program to car dealers); *Mastaba, Inc. v. Lamb Weston Sales, Inc.*, 23 F. Supp. 3d 1283, 1298–99 (E.D. Wash. 2014) (frozen potato products).

7 The doctrine remains in active use in Texas courts. *See, e.g., Logan v. Randall*, No. 05-19-00043-CV, 2020 WL 948381, at *5 (Tex. App.—Dallas Feb. 27, 2020, pet. denied) (confirming and applying the doctrine's "general rule" in real-estate context); *Cohen-Sagi v. ProFinance Assocs., Inc.*, No. 04-08-00181-CV, 2009 WL 540217, at *2 (Tex. App.—San Antonio Mar. 4, 2009, pet. denied) (describing litigation involving the doctrine in the context of selling businesses). This Court has not needed to address the procuring-cause doctrine since 1952. *Air Conditioning, Inc. v. Harrison-Wilson-Pearson*, 151 Tex. 635, 253 S.W.2d 422 (1952).

8 *See, e.g., FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 64 (Tex. 2014) ("We cannot interpret a contract to ignore clearly defined terms ....").

9 The dissent contends that the parties should have been allowed to introduce extrinsic evidence to give meaning to the parties' written agreement. *Post* at 244-45, 249-50. In *URI*, however, the Court rejected the use of extrinsic evidence to "interpolate constraints not found in the contract's unambiguous language." 543 S.W.3d at 758, 769. As *URI* makes clear, extrinsic evidence only "elucidates the meaning of the words employed" and cannot prove that "the parties intended additional requirements or constraints that were not

expressed in the agreement—such as delivery by 5:00 p.m. or only on Sundays." *Id.* at 765–66. The same reasoning applies in this case, where the use of extrinsic evidence would be to prove a limitation on the commission obligation (specifically, continued employment) that the agreement does not include. Equally important, we reiterated that extrinsic evidence may not be used to "create ambiguity." *Id.* at 757 (quoting *Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 688 (Tex. 2017)).

10 *See, e.g.,* *Frady v. May*, 23 S.W.3d 558, 563 (Tex. App.—Fort Worth 2000, pet. denied) (collecting cases); *see also, e.g., Sec. & Commc'ns Sys., Inc. v. Hooper*, 575 S.W.2d 606, 607 (Tex. Civ. App.—Dallas 1978, no writ); *Metal Structures*, 347 S.W.2d at 273.

11 The dissent asserts that the procuring-cause doctrine is inconsistent with a Texas Workforce Commission (TWC) rule on commissions and bonuses. *Post* at 247-48. Neither party to this case has mentioned the TWC. The cited rule seems consistent with the doctrine: "Unless otherwise agreed, the employer shall pay, after separation, commissions or bonuses earned as of the time of separation." 40 Tex. Admin. Code § 821.26(b). The rule contemplates paying commissions "*after* separation." *Id.* (emphasis added). It confirms that commissions "are earned when the employee has met all the required conditions set forth in the applicable agreement with the employer." *Id.* § 821.26(a)(1). Nothing that we see poses any conflict with our resolution of the common-law question presented here. We reserve to a future day any potential conflict with TWC decisions. That day seems unlikely ever to come, because the statutory scheme administered by the TWC is "an alternative remedy that is cumulative of the common law" and "do[es] not abrogate common law claims against employers for an alleged failure to pay compensation." *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 88 (Tex. 2008), *superseded by statute on other grounds*, Act of Apr. 28, 2009, 81st Leg., R.S., ch. 21, §§ 1–2, 2009 Tex. Gen. Laws 40, 40 (codified at Tex. Lab. Code § 61.052(b-1)).

12 Indeed, BMGL's objection to the jury charge was not to its substance—that is, it did not contend that the trial court misstated the law of the procuring-cause doctrine. BMGL only contended that the procuring-cause instruction should not have been included at all, so BMGL's sufficiency challenge, discussed below, should be evaluated against the jury charge that was given. We thus need express no opinion about the particular language of that charge or the extent to which it would comply with today's opinion.

13 The employment agreement states: "Your employment will be 'at-will,' which means that you or BMGL may terminate your employment at any time for any reason, with or without cause, and with or without notice."

14 BMGL argues that completed "sales" that can generate commissions exist only once tests are "ordered, performed, and billed." But Perthuis does not argue, and we do not hold, that he would be entitled to commissions without sales that were completed that way. Rather, the question is whether Perthuis's work, during the time that he was employed, made him *the procuring cause* of such completed sales. In any event, the jury could reasonably regard the Natera agreement as having greater teeth than BMGL suggests, given Natera's affirmative promise (subject to financial consequences for breach) to buy a minimum number of genetic tests: "Natera shall purchase 36,000 Analytical Services using GeneAware ...."

15 We discuss the arguments in this conditional way because we leave it in the first instance to the court of appeals to review whether the evidence was both legally and factually sufficient. We recognize that the standard of review requires that all inferences favor the jury's verdict. Our point here is to illustrate how the legal analysis applies.

16 The dissent agrees that the procuring-cause doctrine "makes sense" for broker relationships in the real-estate context but doubts its applicability for at-will employees. *Post* at 246-47. But neither the dissent nor any party has shown any material distinction; no one has shown why offering a (potentially quite small) wage along with (potentially significant) commissions would change the nature *of the commissions.* Neither the dissent

nor BMGL cites—and we have not discovered—a case where a court, in Texas or elsewhere, held that at-will status alone forestalls the payment of commissions for sales completed *after* termination but procured from work done *before* termination.

17 Our disagreement with the dissent largely boils down to this point. The dissent faults the procuring-cause doctrine for not asking a jury to determine "what *these* parties intended *their* contract to mean." *Post* at 250 (original emphasis). That objection could apply to any number of tools that courts use to eliminate ambiguity, however. And if we were to endorse that objection and prioritize subjective intent to such a degree, we would surely see a surge in cases where clear contractual text is deemed ambiguous. We reaffirm, however, that courts give effect to intent as expressed in writing because "it is objective, not subjective, intent that controls." *Matagorda County Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (quotation omitted).

18 The dissent cites two cases for the proposition that ambiguous commission provisions warrant consideration of extrinsic evidence. *Post* at 247 n.6. We take no position on the correctness of those cases but note that they support rather than undermine our point. In *Tex–Fin, Inc. v. Ducharne*, the contract indicated that the employee would earn a sales bonus if certain conditions were met. 492 S.W.3d 430, 441–42 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Continued employment was not one of those conditions, and the court therefore concluded that the "plain language of the agreement [did] not condition earning a sales bonus on any annual employment requirement." *Id.* (holding that the TWC erred in relying on extrinsic evidence that the employer did not intend to pay a bonus based on a partial year of employment but that the TWC appropriately considered extrinsic evidence that bonuses were paid in December). Likewise, in *Vassar Group, Inc. v. Heeseon Ko*, the contract provided that, "[u]pon termination of this Contract," the contractor would be paid "any commission 'earned' in accordance with the [employer's] customary procedures ...." No. 05-18-00814-CV, 2019 WL 3759467, at *1 (Tex. App.—Dallas Aug. 9, 2019, no pet.). The contract expressly invoked those "customary procedures," the parties advanced differing theories on what " 'earned' in accordance with the [employer's] customary procedures" meant, and the court considered extrinsic evidence about the employer's usual practices. *Id.* at *5.

19 We need not quarrel with the dissent's contention that use of this tool is a last resort—after all, that is still *before* asking a jury what the parties intended. *See post* at 246 n.2. In any event, we do not rely on the fact that BMGL's counsel drafted and signed the employment agreement—we simply note that this undisputed fact would further undermine any effort to submit a fact question to a jury.

20 Likewise, the court observed, "Nothing in the parties' agreement ... indicates that BMGL agreed to compensate him for sales from customers that he had 'procured' even after Perthuis was no longer employed by BMGL. Nothing in the contract indicates that Perthuis was entitled to a commission for procuring channel partners or for negotiating Laboratory Services Agreements like the one with Natera."

21 Indeed, "[a]s used in that branch of the law relating to brokers' commissions, the terms 'procuring cause,' 'efficient cause,' and 'proximate cause' have substantially, if not quite, the same meaning and are often used interchangeably." 12 C.J.S. *Brokers* § 258 (2015).

22 *See* also 12 C.J.S. *Brokers* § 257 ("A sale or other transaction must be the direct and proximate result, or the immediate causal connection, of the broker's efforts or services, as distinguished from one that is indirect and remote, between the introduction of the broker and the consummation of the transaction." (footnotes omitted)).

23 By contrast, the ordinary contractual causation standard requires a plaintiff to show that "the damage sued for has resulted from the conduct of the defendant." *McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206, 209 (Tex. 1985).

24 That is, while the question of the doctrine's *applicability* is typically a legal question, whether the plaintiff actually had the *status* of a procuring cause generally requires factual assessment of the plaintiff's contribution to the sale at issue.

25 We accordingly find greatly overstated BMGL's repeatedly expressed concern that a plaintiff who establishes her direct and primary role in causing *some* sales might, by that mere fact, establish a "lifetime" commission on all future sales involving that buyer. Perthuis himself advocated no such rule, and our decision precludes recovery of such claimed commissions absent sufficient evidence regarding every sale for which the plaintiff claims to be the procuring cause.

26 Depending on its resolution of Perthuis's entitlement to commissions, the court of appeals should consider his cross-appeal with respect to attorneys' fees.

1 The examples are recent and abundant. *E.g.*, *Waste Mgmt. of Tex., Inc. v. Stevenson*, 622 S.W.3d 273, 286 (Tex. 2021) (" 'Texas strongly favors parties' freedom of contract,' under which parties may 'bargain for mutually agreeable terms and allocate risks as they see fit.' " (quoting *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007))); *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2019) ("We have long recognized the strongly embedded public policy favoring freedom of contract. And, absent a compelling reason, courts must respect and enforce the terms of a contract that the parties have freely and voluntarily made." (citations omitted)); *Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586, 595 (Tex. 2018) ("[T]he law's 'strong public policy favoring freedom of contract' compels courts to 'respect and enforce' the terms on which the parties have agreed." (quoting *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016))).

2 Texas courts have noted the doctrine of *contra proferentem* is one of last resort, *Evergreen Nat'l Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 676 (Tex. App.—Austin 2003, no pet.), and have applied it mostly in the insurance context. *See, e.g.*, *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). I harbor serious doubts that it would apply to resolve an ambiguity here. *See Horizon Pools & Landscapes, Inc. v. Sucarichi*, No. 01-15-01079-CV, 2016 WL 7164025, at *3 (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, no pet.) ("The ostensible rule of construction that ambiguities in a contract should be construed against its drafter plays no role 'in making a fact finding about what the parties intended.' " (quoting *GTE Mobilnet of S. Tex. Ltd. P'ship v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 291 (Tex. App.—Houston [1st Dist.] 1997, writ denied))).

3 109 Tex. 56, 185 S.W. 295, 296 (1916) (noting that for a real estate broker to earn a commission, "a purchaser must have been produced through his efforts, ready, able and willing to buy the property upon the contract terms").

4 250 S.W. 151, 152 (Tex. Comm'n App. 1923) (stating "when a real estate broker is instrumental in bringing together the seller and a purchaser who is acceptable to him, and they consummate a sale," the agent is "the procuring cause of the sale" and "is entitled to the commission agreed upon").

5 *See, e.g.*, *Frady v. May*, 23 S.W.3d 558, 565 (Tex. App.—Fort Worth 2000, pet. denied); *Ramesh v. Johnson*, 681 S.W.2d 256, 259 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

6 *See, e.g., Tex-Fin, Inc. v. Ducharne*, 492 S.W.3d 430, 443–44 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (considering extrinsic evidence to determine that substantial evidence supported the trial court's reversal of TWC's rejection of a salesperson's claim for post-termination compensation under a bonus/commission agreement); *Vassar Grp., Inc. v. Ko*, No. 05-18-00814-CV, 2019 WL 3759467, at *5 (Tex. App.—Dallas

Aug. 9, 2019, no pet.) (concluding an employment agreement where the parties had "differing theories as to when a commission is 'earned' and payable post termination" was "susceptible to at least two reasonable interpretations" and therefore "ambiguous, creating a fact issue on the parties' intent").

7 *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 82 (Tex. 2008) ("According to TWC, it receives approximately 20,000 wage claims per year for initial decision ....").

8 40 TEX. ADMIN. CODE § 821.26(b).

9 *Id.* § 821.26(c) (emphasis added).

10 *Cf.* *JCB, Inc. v. Horsburgh & Scott Co.*, No. 6:16-CV-146-RP, 2017 WL 6805045, at *3 (W.D. Tex. Oct. 25, 2017) (rejecting argument that plaintiff was entitled to commissions on post-termination sales because the agreement specified that commissions would be earned only "on sales from orders received by the Company *on or before the effective date of termination*" (emphasis added)), *vacated in part on other grounds*, 941 F.3d 144 (5th Cir. 2019).

11 *See Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005) (stating we interpret contractual provisions "with reference to the whole agreement" and "bearing in mind the particular business activity sought to be served" (quoting *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987))).

12 *See Vassar Grp., Inc.*, 2019 WL 3759467, at *5 (finding ambiguous an employment agreement where the parties had "differing theories as to when a commission is 'earned' and payable post termination").

13 This approach would, of course, require a jury to determine the meaning of the ambiguous contract, but the majority's approach yields the same result: a jury trial in every case in which the procuring-cause doctrine applies. *Ante* at 236 (noting that the procuring-cause doctrine "fully respects the factfinder's authority and obligation to determine *whether* the broker's action produced the purchaser, which generally is 'purely a question of fact' " (quoting *Goodwin*, 185 S.W. at 297)). Under my approach, the jury would resolve the meaning of a contract term, a fairly discrete task. Under the majority's, the jury will have to determine for which individual sales—out of potentially hundreds or thousands—a salesperson was the "procuring cause," a far more amorphous and potentially cumbersome task.

14 *See, e.g., Indus. III, Inc. v. Burns*, No. 14-13-00386-CV, 2014 WL 4202495, at *12 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, pet. denied) (rejecting plaintiff's claim that it was entitled to a fee for introducing the parties to a transaction because the transaction closed after the six-month tail lapsed).

15 The majority emphasizes that the procuring-cause doctrine contributes to the "[s]tability and predictability of contract law." *Ante* at 236. While those are worthy goals, we have also recently held that predictability through the use of mechanical default rules sometimes must yield to an intent-focused inquiry. *See Wenske v. Ealy*, 521 S.W.3d 791, 792 (Tex. 2017) (discouraging reliance on "default or arbitrary rules" and "reaffirming the paramount importance of ascertaining and effectuating the parties' intent"); *Hysaw v. Dawkins*, 483 S.W.3d 1, 4 (Tex. 2016) ("Though we acknowledge the call for more certain and predictable guidance, we reject bright-line rules of interpretation that are arbitrary and, thus, inimical to an intent-focused inquiry.").

Ogletree Deakins

State Developments, Texas, Wage and Hour

Texas Supreme Court Clarifies Standard for Payment of Commissions When an Employment Agreement Is Silent

May 26, 2022

Lawrence D. Smith

San Antonio

For many years, an oft-litigated question concerned whether a former employee was owed the commissions on sales made prior to the employee's discharge from employment. Sometimes employment agreements were clear on the issue, such as by providing unambiguously that commissions would be paid when the employer received payment for a completed sale. Frequently, however, employment agreements were less than clear as to when commissions would be paid to former employees. Over the years, courts ruled in different ways and applied different standards when determining whether a former employee was entitled to commissions on sales made prior to an employment termination. On May 20, 2022, in *Perthuis v. Baylor Miraca Genetics Laboratories, LLC*, the Supreme Court of Texas **clarified** the standard to be applied in those situations.

Background

Thomas Brandon Perthuis was vice president of sales and marketing for Baylor Miraca Genetics Laboratories. In early 2015, the company drafted, and Perthuis signed without alteration, a two-page employment agreement that provided the following: "Your commission will be 3.5% of your net sales." The agreement contained no other explanation concerning the commission arrangement. In January 2017, Perthuis completed negotiations on an amendment to a sales contract with a prominent client, making the contract the largest of its kind in the company's history. The company terminated Perthuis's employment on January 23, 2017. The next day, the client signed the contract amendment that Perthuis had negotiated. The company did not pay Perthuis any commission on the amended contract.

Perthuis sued, seeking payment of the unpaid commissions from the contract. A jury found for Perthuis on all claims, but it did not award him the full amount he sought. The trial court judge had instructed the jury on the "procuring-cause doctrine." Under

this rule of Texas contract law, Perthuis would be entitled to the commissions if he was the "procuring cause" of the sales; that is, if he was the but-for cause of the sales involved. Both the company and Perthuis appealed. The appellate court held that the procuring-cause doctrine did not apply and reversed the judgment for Perthuis. The appellate court determined that the employment agreement unambiguously entitled Perthuis to commissions only for sales made *during* his employment.

The Supreme Court of Texas's Analysis

The Supreme Court of Texas reversed the appellate court's decision, holding that in the absence of specific language delineating the terms of payment in a commission agreement, the procuring-cause doctrine controls. In so holding, the Supreme Court of Texas relied on a decision from 1916 that had adopted the procuring-cause doctrine in cases involving commissions owed to brokers in real-estate sales. The Texas high court indicated that parties are free to specify in an agreement whatever they want concerning when commissions are earned and paid, but in the absence of any language addressing the timing and entitlement to commissions, the procuring-cause doctrine applies. Under this standard, an employee will be entitled to a commission on sales, even after his or her employment is terminated, if the employee is the proximate and but-for cause of the specific sales.

Key Takeaways

The Supreme Court of Texas's decision provides clarity concerning situations where an employment agreement is not clear as to when a commission is earned or whether it will be paid after the termination of employment. The high court's decision specifically provides that the "procuring-cause doctrine" is the default standard to be utilized when commission agreements are silent concerning when commissions are earned or due. The decision also establishes that the employer and employee are free to establish their own guidelines concerning the payment of commissions. One lesson from this decision for Texas employers concerns the importance of clearly articulating in an agreement with a commissioned employee when a commission will or will not be paid (e.g., commissions will be paid only if the employee is still employed at the time of scheduled payment).

Ogletree Deakins will continue to monitor Texas employment law developments and will post updates on the firm's **Texas** and **Wage and Hour** blogs. Important information for employers is also available via the firm's **webinar** and **podcast** programs.

EXHIBIT 14

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 3, 2023
Lyle W. Cayce
Clerk

No. 21-30482

MAGAN WALLACE,

Plaintiff—Appellant,

versus

PERFORMANCE CONTRACTORS, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:19-CV-649

Before DAVIS, ELROD, and HAYNES, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:

Magan Wallace worked for a construction company. She sued under Title VII alleging sex discrimination, sexual harassment, and retaliation. The district court granted summary judgment to the construction company. Because we conclude that Wallace has raised genuine material fact issues on each claim, we REVERSE and REMAND.

I.

Performance Contractors is a construction company that was contracted to work at a chemical manufacturing complex. Performance hired

Magan Wallace in December 2016, laid her off as part of a reduction in force in April 2017, then rehired her shortly thereafter. Though Performance hired Wallace in her first stint as a "laborer," it hired her as a "helper" in her second stint. This was considered a promotion: at Performance, laborers do administrative work and keep the job site clean while helpers have a more hands-on role, following pipefitters and welders around the construction site to help with construction. In that role, helpers work either on the ground or "at elevation." Though laborers technically can work at elevation, only those with prior experience who express interest get to work at elevation. In practice, only helpers work at elevation. Wallace was the only female "helper" in her designated area.

Matthew Gautreau and Luke Terro, employees at Performance, recommended Wallace for the helper position. They were both previously Wallace's supervisors; Gautreau was an area manager, while Terro was a superintendent. Gautreau's job was to manage personnel and safety in the area of the worksite where Wallace worked. Gautreau supervised Terro; Terro, as a superintendent, supervised Charles Casey (a general foreman); Casey supervised Kris Tapley (Wallace's husband); and Tapley was Wallace's direct supervisor. Each of them at times supervised Wallace.

Before working at Performance, Wallace had worked for another construction company where she was allowed to work at elevation. Wallace claimed that she wanted to work at elevation at Performance to improve her skills because advancements would bring pay raises and advance her in her craft.

When Wallace started as a helper in her designated area, however, she was not allowed to work at elevation. Casey, the area's general foreman, told her in front of others that she had "t*** and an a**" and thus could not work at elevation. He further stated that women were not allowed "on the rack"

(i.e., scaffolding) because Performance did not have harnesses that fit women. He also said on another occasion, when doling out assignments to various helpers, that Wallace did not "count" for assignments at elevation because she was a woman with "t*** and an a**." Casey denied saying that directly to Wallace but acknowledged that he "very easily could have said [that]," in general, "due to t*** and an a**, no female is allowed on the rack."

On other occasions, Wallace witnessed conversations between Terro and Tapley in which they discussed the fact that their project manager, A.C. Ferachi, did not want women working on this particular project. Wallace claims that she complained to Gautreau and Terro several times about Casey preventing her from working at elevation. Still, only male helpers (and one male laborer) were allowed to work at elevation. On one occasion, Performance was short on helpers at elevation, so Wallace was allowed to work at elevation for three days. But according to Wallace, Performance's management saw Wallace up there and told Terro not to let her up at elevation again.

Comments about Wallace were not limited to her ability to work at elevation. Casey, who allegedly made the "t*** and an a**" comment regularly, also said (in Wallace's vicinity) that he needed "a bucket of b***jobs." He later noted that this type of behavior was common "in a construction setting" where "you are not always looking over your shoulder to see who you are going to offend." Wallace alleges that she complained to Terro and Gautreau about Casey's behavior several times.

Terro, while both he and Wallace were at work, allegedly texted Wallace a picture of his genitals and asked her to send back a picture of her breasts. Though Wallace immediately deleted the picture, she was around another female employee at the time, and Wallace told her about the picture

(though Wallace did not identify Terro as the sender). Wallace says she was "upset," "distraught," and "in shock," and that her fellow employee was also shocked. Wallace says that Terro later addressed the picture in question and did not deny sending it but instead said that it took "guts to send that" picture to her. On several other occasions, Wallace alleges that Terro asked to "grab and squeeze" her breasts. Wallace says she was too shocked to report all this to HR, but she did tell Tapley (her husband) who called and left messages with HR that were never returned.

Charles Laprairie was one of Performance's welders. The same month that Terro allegedly sent the picture to Wallace, Laprairie allegedly approached Wallace from behind and asked her how old she was. When she responded, Laprairie allegedly replied that at that age, Wallace was in her "sexual prime." When Wallace walked away and sat down, Laprairie again approached her from behind and began grabbing and massaging her shoulders. Justin Quebodeaux, another general foreman, witnessed the interaction along with other employees. Wallace immediately reported Laprairie to Tapley, who then spoke to Quebodeaux and Casey about the incident, and Terro and Gautreau learned of and spoke about the incident with Wallace. Though they spoke with Laprairie and allegedly vowed to reprimand him, Laprairie allegedly quit "to make more money" at another job before any action was taken.[1]

All of these experiences, according to Wallace, caused her severe anxiety and depression. This led her to seek medical assistance. When

[1] Wallace experienced other untoward conduct by her co-workers while at Performance. Quebodeaux and other male employees once allegedly pulled down their pants in front of Wallace and others on the jobsite, and though Gautreau was present, he never disciplined any of them. In addition, Ferachi, the project manager, once asked Tapley (Wallace's husband) whether he had seen a particular female employee's "chest" and that he "ought to [because] they are nice."

Wallace missed work to go to a doctor's appointment to treat her anxiety and depression, Performance suspended her. Wallace claims that she notified Performance that she had a doctor's appointment. Performance claims the suspension was based on Wallace's poor attendance and tardiness. According to Wallace, Performance had a three-strikes policy for tardiness or absences, and even though she had not been previously reprimanded for any absences, Performance assessed all three strikes at once and suspended her.

Wallace says she tried to call HR about her suspension, but was only able to leave a message, and no one ever called her back. When she visited HR in person, Wallace says no one was available to help her. Tapley also found out he was going to be fired for his absences, and he *was* able to speak with HR and had his termination reversed.[2] Wallace later sent in a letter of resignation, which Performance says it never received. A few weeks later, Performance formally terminated Wallace's employment.

Wallace filed a charge with the EEOC, received her right-to-sue notice, then sued Performance under Title VII. She brought three claims: (1) sex discrimination; (2) sexual harassment; and (3) retaliation. After discovery, Performance moved for summary judgment on all claims, which the district court granted.

As for Wallace's sex-discrimination claim, the district court held that Wallace did not face an adverse employment action. Specifically, the court held that Performance's restricting Wallace from working at elevation was

[2] In that conversation, Performance HR allegedly told Tapley that if an employee has not had previous reprimands or write-ups, the worst discipline warranted by a missed day of work is a verbal, written, and three-day suspension, but no termination.

not an "ultimate employment decision" which Title VII requires under binding Fifth Circuit precedent.

On the sexual-harassment claim, the district court held that Wallace *did* face severe or pervasive harassment. But the district court ultimately concluded that Wallace could not establish a nexus between that harassment and a "tangible employment action" by Performance. The district court further held that even if she could establish a nexus, Performance had established the *Ellerth/Faragher* affirmative defense,[3] meaning that Performance showed both: (1) that it exercised reasonable care to prevent and promptly correct any sexual harassment; and (2) that Wallace unreasonably failed to take advantage of the appropriate HR procedures for dealing with sexual harassment.

Finally, on her retaliation claim, the district court held that Wallace had not sufficiently "opposed" any unlawful action under Title VII, and as to Laprairie's conduct, that Wallace could not have "reasonably believed" his conduct ("sexual prime" comment and massaging of her) was actionable under Title VII. Wallace timely appealed.

II.

We review the grant of summary judgment *de novo*. *Lewis v. Sec'y of Pub. Safety & Corr.*, 870 F.3d 365, 368 (5th Cir. 2017). Summary judgment is proper if the movant shows that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. *Sanders v. Christwood*, 970 F.3d 558, 561 (5th Cir. 2020) (citing Fed. R. Civ. P. 56(a)). A fact is "material" if resolving it one way or another might make one outcome of the lawsuit more or less likely; it need not be dispositive.

---

[3] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Sossamon v. Lone Star State of Tex., 560 F.3d 316, 326 (5th Cir. 2009). A genuine dispute over that fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *McCarty v. Hillstone Rest. Grp., Inc.*, 864 F.3d 354, 357–58 (5th Cir. 2017) (quoting *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005)). We view the evidence in the light most favorable to the non-movant and resolve factual controversies in the nonmovant's favor. *Id.* (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*)).

Wallace argues that the district court erred in granting summary judgment to Performance on all her claims. First, she argues that when Performance prevented her from working at elevation because she was a woman, it effectively demoted her, which amounts to an adverse employment action. Second, Wallace argues that her hostile-work-environment claim survives summary judgment because Performance knew (or should have known) about the severe or pervasive harassment, and because Performance is not entitled to the *Ellerth/Faragher* affirmative defense. Third, she argues that a reasonable jury could find that Performance retaliated against her for opposing conduct that she reasonably believed would violate Title VII. We agree with her on each claim.

A.

Title VII forbids an employer from taking an adverse employment action against an employee because of her sex. *See* 42 U.S.C. § 2000e-2(a); *Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014) (noting that "adverse employment action" is "a judicially[ ]coined term referring to an employment decision that affects the terms and conditions of employment"). Wallace can establish a sex-discrimination claim by either direct or circumstantial evidence. *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 475 (5th Cir. 2015). If she has direct evidence of

discrimination, the court does not wade into the *McDonnell Douglas* test,[4] but instead the burden shifts to Performance to "prove by a preponderance of the evidence that the same decision would have been made regardless of the discriminatory animus." *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 992 (5th Cir. 2005). In any event, to have a sex-discrimination claim at all, Performance must have taken adverse employment action against Wallace. Adverse employment actions under Title VII include "ultimate employment decisions" such as "hiring, firing, demoting, promoting, granting leave, and compensating." *Thompson*, 764 F.3d at 503.[5]

The district court held that Performance did not take adverse employment action against Wallace in either (1) preventing Wallace from developing construction skills by working at elevation, or (2) failing to train Wallace to work at elevation. Specifically, the district court noted that Wallace cited "only her own testimony" to show that "the way to advance at Performance was to learn and practice new skills," relying on "common knowledge," without providing evidence "relating to specific comparators who advanced as a result of their wider range of skills or desired promotions."

---

[4] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973).

[5] We are bound by our circuit's precedent requiring an "adverse employment action" that includes *only* "ultimate employment decisions." *Thompson*, 764 F.3d at 503. We recognize that 42 U.S.C. § 20002-2(a)(1) prohibits sex discrimination "with respect to" an individual's "compensation, terms, conditions, or privileges of employment," and that "our liquidation" of those terms has left a gap between what Title VII says and what we require. *Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, J.); *see Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) (*en banc*) (overruling prior precedent, which required an "objectively tangible harm," because it was a "judicial gloss that lacks any textual support" in Title VII). A panel of our court recently acknowledged as much. *See Hamilton v. Dallas Cnty*, 42 F.4th 550, 557 (5th Cir. 2022) (panel opinion vacated, petition for rehearing en banc granted in *Hamilton v. Dallas Cnty.*, 50 F.4th 1216 (5th Cir. 2022)). As discussed in the text infra, we need not reach that issue here because we conclude that Wallace was effectively demoted when she was prohibited from working at elevation because of her sex.

Responding to Wallace's argument that keeping her on the ground was a "de facto demotion," the district court noted that her written job description "includes the cleaning tasks that Wallace complains of being asked to perform" and, in the "absence of more concrete evidence, such as a reduction in pay or the denial of a promotion, Wallace's testimony [was] insufficient to establish that she suffered any adverse employment action."

Though a "demotion" is considered an "ultimate" employment action under Title VII, "a change in or loss of job responsibilities" may still amount to "the equivalent of a demotion" if it is "so significant and material that it rises to the level of an adverse employment action." *Thompson*, 764 F.3d at 504. To be "equivalent to a demotion," the action need not "result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement." *Alvarado v. Tex. Rangers*, 492 F.3d 605, 612 (5th Cir. 2007).

Thompson is but one example. There, we held that an employer effectively demoted a detective when it "restricted his job description to such an extent that he no longer occupie[d] the position of a detective," but instead he ultimately "function[ed] as an assistant to other detectives." 764 F.3d at 505. And in *Alvarado*, we concluded that denying a woman a transfer from being a state trooper to becoming a Texas Ranger, allegedly based on sex, was equivalent to the denial of a promotion. 492 F.3d at 614–15. That was because, despite the pay-scale being the same, becoming a Texas Ranger was considered objectively better in that line of work. *Id.* at 615.

A reasonable juror could conclude that Wallace's being prevented from working at elevation effectively demoted her back to the laborer role she previously occupied. Wallace produced evidence to show that, to advance in this industry, she needed the experience of working at elevation, which

provides the most hands-on experience she could attain in this role. Working at elevation was the most beneficial and important aspect of the helper position. Working only on the ground made Wallace less "useful" and a less-valuable "asset" than if she worked at elevation. And it made it less likely that Wallace would be able to be promoted and advance in her career down the line. Even though Wallace's pay was no different while working on the ground, the opportunities she was afforded while working on the ground were significantly less than if she were working at elevation. *See Thompson*, 764 F.3d at 504. Thus, a reasonable juror could find that these facts support the conclusion that Wallace was effectively demoted because she was a woman.[6]

Performance's protestations to the contrary are based on material factual disputes that cannot be resolved at the summary-judgment stage. Performance claims, for example, that Wallace was inexperienced with working at elevation, even though Wallace claims she *did* have experience. Also relevant is the fact that, according to Performance, Wallace and Gautreau apparently had an agreement for her to work on the ground until "dance floors" (an addition to the scaffolding to make it longer and wider to work on) were placed "in the racks." But in the very next breath, Performance acknowledges that Wallace *did* work at elevation briefly *before* dance floors were installed, and as Wallace notes, she did not work at elevation even *after* dance floors were installed. All told, viewing the facts in the light most favorable to Wallace, a reasonable juror could find that

[6] A reasonable juror could also find that Performance failed to train her because she was a woman. As noted in the facts above, working at elevation provides the greatest possible opportunities for advancement in this industry. If Performance was preventing her from receiving this hands-on experience, a reasonable juror could consider this evidence more than "tangential evidence of a potential effect on compensation," *Brooks v. Firestone Polymers, LLC*, 640 F. App'x 393, 397 (5th Cir. 2016), and instead could conclude that it amounts to a failure to train.

Performance took adverse employment action against her by preventing her from working at elevation because she was a woman.

The next question is whether Performance discriminated against Wallace because of her sex. The district court did not address whether Performance discriminated against Wallace because of her sex and instead focused only on whether Performance took adverse employment action against her. In the district court, Performance did not address whether the evidence of discrimination was direct or circumstantial, but instead argued that: (1) Performance did not take adverse employment action against Wallace; and (2) Wallace failed to "show that she was treated less favorably than similarly situated male employees under nearly identical circumstances."

The latter argument, though, is only relevant when circumstantial evidence is necessary to establish a sex-discrimination claim under the *McDonnell Douglas* framework. *Hester v. Bd. of Supervisors of La. State Univ.*, 887 F.3d 177, 185–85 (5th Cir. 2018); *see Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir. 2009), which applied the *McDonnell Douglas* framework). But when the employee "presents credible direct evidence that discriminatory animus at least in part motivated, or was a substantial factor in the adverse employment action," the burden shifts to the employer "to prove by a preponderance of the evidence that the same decision would have been made regardless of the discriminatory animus." *Jones*, 427 F.3d at 992. We conclude that Wallace has presented direct evidence of discrimination.

Direct evidence is that which "proves the fact without inference or presumption." *Id.* at 992. This evidence includes "any statement or written document showing a discriminatory motive on its face." *Portis v. First Nat'l Bank of New Albany*, 34 F.3d 325, 329 (5th Cir. 1994). In *Portis*, we held that a supervisor's statements that women were not "worth as much as" men and

that an employee "would be paid less because she was a woman" were direct evidence of discrimination. *Id.* at 326. In *Etienne*, we held that direct evidence established race discrimination when the employee presented an affidavit stating that her supervisor did not allow "dark skin black persons to handle any money," and that the employee "was too black to do various tasks." 778 F.3d at 476–77.

Wallace's evidence provides a facially discriminatory motive "without inference or presumption." *Portis*, 34 F.3d at 329. Specifically, Wallace's supervisor stated repeatedly that she could not work at elevation because she had "t*** and an a**," and that "females stay on the ground." Thus, at the summary-judgment stage, Wallace has shown that Performance's reason for preventing her from working at elevation was motivated primarily by her being a woman. Because there is direct evidence of discrimination, Performance is wrong that the burden is on Wallace to show that she was treated less favorably than similarly situated male employees under nearly identical circumstances. Rather, the burden is on Performance "to prove by a preponderance of the evidence that the same decision would have been made regardless of the discriminatory animus." *Jones*, 427 F.3d at 992. Performance argues that she was not qualified or had inadequate experience to work at elevation, but Performance hired her at the helper position (which includes working at elevation as part of the job duties) and even allowed her to (briefly) work at elevation.

Performance was not entitled to summary judgment because reasonable jurors could find that Wallace was kept on the ground because she was a woman, and that she otherwise would have been allowed to work at elevation. Accordingly, we reverse the grant of summary judgment on the sex-discrimination claim.

B.

Title VII also prohibits sexual harassment as a form of employment discrimination. *EEOC v. Boh Bros. Const. Co., LLC*, 731 F.3d 444, 453 (5th Cir. 2013) (*en banc*) ("There are two types of sexual harassment under Title VII: *quid-pro-quo* and hostile-environment harassment."). For a *quid-pro-quo* claim, an employee must show "that the acceptance or rejection of a supervisor's alleged sexual harassment resulted in a 'tangible employment action.'" *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 772 (5th Cir. 2009). A "tangible employment action" is one that amounts to a "significant change in employment status," like "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* (quotation omitted). When a supervisor is the harasser, the employer is "vicariously liable *per se*" if there is a "nexus" between the harassment and the tangible employment action. *Casiano v. AT&T Corp.*, 213 F.3d 278, 283–84 (5th Cir. 2000).

For hostile-work-environment claims, an employee must show that: "(1) she belongs to a protected class; (2) she was subjected to harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action." *Saketkoo v. Admins. of Tulane Educ. Fund*, 31 F.4th 990, 1003 (5th Cir. 2022). When a supervisor is the harasser, the employee need not establish the fifth element. *Boh Bros.*, 731 F.3d at 453. Of those *prima facie* elements, the only contested issue is whether the harassment was "severe or pervasive enough" to "affect[] a term, condition, or privilege" of Wallace's employment. *See Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 399–400 (5th Cir. 2021).

The district court first held that Wallace *did* experience severe harassment. But then it held that: (1) Wallace did not establish a sufficient

nexus between the harassment and any "tangible employment action," thus foreclosing her *quid-pro-quo* claim; and (2) Performance was entitled to the *Ellerth/Faragher* affirmative defense, foreclosing her hostile-work-environment claim. We agree with the district court that Wallace experienced severe harassment, but we disagree, as set forth below, with the remainder of the district court's holding.

1.

We start with the tangible employment action. For *quid-pro-quo* claims, "proof that a tangible employment action did result from the employee's acceptance or rejection of sexual harassment by [her] supervisor make the employer vicariously liable, *ipso facto*; no affirmative defense will be heard." *Casiano*, 213 F.3d at 284. As discussed earlier, Wallace was effectively demoted when she was prevented from working at elevation, and "a demotion" is considered a tangible employment action. *See Lauderdale v. Tex. Dep't of Criminal Justice*, 512 F.3d 157, 162 (5th Cir. 2007) (citing *Faragher*, 524 U.S. at 786). But there is less of a nexus between the significant reduction of material responsibilities and the harassment by Wallace's supervisors, Terro and Casey—the demotion happened once she joined Performance as a helper, not in response to her acceptance or rejection of the supervisors' harassment. In other words, a reasonable jury could not find that there is a sufficient nexus between Wallace's demotion and her response to the harassment.

Wallace's suspension and termination, however, are both tangible employment actions. *Ellerth*, 524 U.S. at 761. Wallace experienced extensive harassment from Terro. He sent her a picture of his genitals; he specifically requested that Wallace send him a picture of her breasts; he later remarked that it "took guts" for him to send the picture to her; and throughout this time, he repeatedly asked to grab her breasts. A month later, Terro signed

Wallace's suspension notice, claiming it was because of her absences. But a reasonable jury could infer that this decision was made because of Wallace's "rejection" of Terro's "sexual harassment." *See Casiano*, 213 F.3d at 283. Even though the district court credited Gautreau's testimony that he directed Terro to fire Wallace, only Terro's signature appears on the suspension notice. In addition, Casey (another supervisor who arguably harassed Wallace) testified that he could have been involved in the decision to discipline Wallace. There is at least a material factual dispute about whether Terro fired Wallace (which he had the power to do) or Gautreau, and what role Casey played in the situation. *See Badgerow v. REJ Props., Inc.*, 974 F.3d 610, 616 (5th Cir. 2020) (stating that the court must view "all the facts and evidence in the light most favorable to the non-movant").

Thus, a reasonable jury could find that Terro suspended and later fired Wallace because of her rejection of his harassment. Therefore, we reverse the district court's dismissal of Wallace's *quid-pro-quo* sexual harassment claim.

2.

Even assuming *arguendo* that there was no tangible employment action for this claim, Wallace can survive summary judgment if a reasonable jury could find that her supervisors' conduct toward her was "severe or pervasive sexual harassment." *Casiano*, 213 F.3d at 284. The district court held that, at the summary-judgment stage, "there is enough [evidence] to possibly persuade a jury that the total amount of harassment alleged could have affected a term or condition of her employment." But it held that Performance had sufficiently established the affirmative defense detailed by the Supreme Court in *Ellerth* and *Faragher*. *See Casiano*, 213 F.3d at 284 (citing *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 805, 807).

We agree with the district court that a reasonable jury could find that this harassment was severe or pervasive. A hostile work environment exists when a workplace is "permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Johnson*, 7 F.4th at 399 (quotation omitted). Harassment is "severe or pervasive enough" when (1) a reasonable person in the plaintiff's position would find it hostile or abusive, and (2) the plaintiff subjectively perceived the harassment as abusive. *Id.* at 400. The objective element is determined based on all the facts and considers factors (each independently non-dispositive) such as: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

The district court summed up the key facts leading to its severe-or-pervasive conclusion: (1) Terro's sending a picture of his genitalia, asking for a picture of her breasts, and asking to touch her breasts; (2) Casey's referring to "t*** and an a**," and his statement that he could use a "bucket of b***jobs"; and (3) Laprairie's saying that Wallace was in her "sexual prime" and his nonconsensual massaging of her. Performance's response relies mostly on the fact that everyone thought the comments were a joke, or that Wallace was otherwise undisturbed by the comments. Performance also says that, with Terro's nude picture, Wallace never provided phone records or produced the picture, and that Wallace later invited Terro to her husband's birthday party.

Nonetheless, based on the totality of the evidence, a reasonable jury could find that this conduct was objectively hostile. *Johnson*, 7 F.4th at 400. Casey's comments about Wallace's "t***" and "a**" allegedly happened

at least weekly; Terro asked to grab her breasts on several occasions; Laprairie's sexual comment and massaging of her, though they only happened on one occasion, were physical and explicitly sexual. *See id.* And Wallace provided evidence that would establish that she subjectively considered the harassment hostile and abusive: she complained about the harassment, reported it to her supervisors, and suffered psychological harm as a result. Thus, the district court correctly concluded that Wallace established a *prima facie* hostile-work-environment claim.

3.

Next, we turn to the *Ellerth/Faragher* defense. "To succeed on summary judgment in reliance on an affirmative defense, the moving party must establish beyond peradventure all of the essential elements of the" "defense to warrant judgment in [its] favor." *Smith v. Ochsner Health Sys.*, 956 F.3d 681, 683 (5th Cir. 2020) (quotation omitted). Under the *Ellerth/Faragher* affirmative defense, "an employer will not be vicariously liable for harassment by a supervisor if it can show" that (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) the "employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Boh Bros.*, 731 F.3d at 462 (quotation omitted). Because Performance failed to carry its burden on the first prong, we need not address the second.

The district court held that Performance satisfied the first prong because it "had in place anti-harassment/discrimination policies and practices, which were communicated to Wallace at hiring." It further stated that "[u]nder these policies, sexual harassment is expressly forbidden and employees are directed to report any instance to Human Resources." While such a policy is evidence that Performance took some measures to prevent

harassment and discrimination, *Harvill v. Westward Comms., L.L.C.*, 433 F.3d 428, 432–39 (5th Cir. 2005), "[n]ot every policy eliminates liability," *Boh Bros.*, 731 F.3d at 463.

Here, Wallace testified that she tried several times to contact HR to no avail. As is discussed above, Wallace was also repeatedly subject to harassment by Terro and Casey. Terro purportedly sent a text message picture of his genitals to Wallace, and she informed another female employee about this. Terro further allegedly asked to inappropriately touch Wallace on several occasions, and, after Wallace told Tapley about this, he attempted to contact HR but never received a response to his outreach. In addition, Casey repeatedly made a variety of pejorative comments to Wallace in front of other employees. Wallace argues that Performance's HR policy notes that *anyone* who witnesses sexual harassment should report it to HR, and the fact that no one ever did implies that employees did not know about or understand the nature of sexual harassment. *See Pullen v. Caddo Par. Sch. Bd.*, 830 F.3d 205, 213 (5th Cir. 2016) (holding that the first *Ellerth/Faragher* element was not satisfied as a matter of law when evidence indicated that employees "were given no training or information about the sexual-harassment policy"). This, along with her supervisors' pervasive harassment despite the anti-harassment policy, further casts doubt on the district court's conclusion on this prong. Simply put, this evidence indicates that Performance had a policy in theory but not one in practice.

On this record, there is a material fact issue about whether Performance effectively implemented its anti-harassment policy. *See Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 482–84 (5th Cir. 2008). And in any event, a reasonable jury could conclude, based on Wallace's testimony, that Performance's HR policy was not implemented. That alone is enough to reverse on this affirmative defense. *Boh Bros.*, 731 F.3d at 466 (noting that the "two prongs of the *Ellerth/Faragher* affirmative defense are

conjunctive," so the court does not need to "consider prong two" if its determination on prong one is dispositive).

Thus, we conclude that Performance took tangible employment action against Wallace based on her rejection of Terro's (and to a lesser extent Casey's) harassment. In addition, we hold that Wallace established a *prima facie* hostile-work-environment claim and that Performance has not established its entitlement to the *Ellerth/Faragher* defense at this stage. Accordingly, we reverse the grant of summary judgment on the sexual-harassment claim as well.

C.

Title VII also forbids retaliation as a form of sex-based discrimination. To establish a retaliation claim, the employee must show that: (1) she "participated in an activity protected by Title VII;" (2) her "employer took an adverse employment action against" her; and (3) "a causal connection exists between the protected activity and the adverse employment action." *Newbury v. City of Windcrest*, 991 F.3d 672, 678 (5th Cir. 2021) (quotation omitted). Such claims require a burden-shifting framework like the *McDonnell Douglas* test.

If the employee establishes a *prima facie* retaliation claim, "the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision." *Feist v. La., Dep't of Justice, Off. of the Att'y Gen.*, 730 F.3d 450, 454 (5th Cir. 2013) (quotation omitted). If the employer provides one such reason, "the burden shifts back to the employee to demonstrate that the employer's reason is actually a pretext for retaliation, which the employee accomplishes by showing that the adverse action would not have occurred 'but for' the employer's retaliatory motive." *Id.* (quotation and citations omitted). To "avoid summary judgment," the employee must show "a conflict in substantial evidence" on the question "whether the employer

would not have taken the action 'but for' the protected activity." *Id.* (citation omitted). For the *prima facie* case, the only issue is the first element: whether Wallace engaged in protected activity. The district court concluded that Wallace did not establish that she engaged in protected activity, so it did not address whether Wallace could establish the remaining elements of her prima facie case.

1.

An employee engages in protected activity when she opposes an employment practice that she "reasonably believes" violated Title VII. *Badgerow*, 974 F.3d at 619. As the EEOC as amicus helpfully points out, stating one's belief that discrimination has occurred "virtually always" constitutes opposition, except in "eccentric cases." *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271, 276-77 (2009). Wallace claims that she engaged in protected activity when she complained about (1) her supervisors' decisions to prevent her from working at elevation, (2) Terro's obscene picture and remarks, and (3) Laprairie's sexual comment and his nonconsensual massaging of her. Puzzlingly, the district court dismissed these claims because (1) her complaints about not working at elevation were only "general gripes" and were not specifically about her being a female, and (2) Laprairie's conduct alone was not enough to give rise to a Title VII claim.

To start, the district court improperly resolved factual disputes in Performance's favor when it characterized Wallace's complaints as "general gripes." Wallace testified that she specifically told Terro and Gautreau that Casey would not let her work at elevation "because [she] was a female." Thus, by complaining to her supervisors about not being afforded opportunities based on her sex, she engaged in protected activity in making these complaints. *Cf. Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337,

348–49 (5th Cir. 2007); *see also Brown v. United Parcel Serv., Inc.*, 406 F. App'x 837, 840 (5th Cir. 2010) ("Magic words are not required" as long as the employee "alert[s] an employer to the employee's reasonable belief that unlawful discrimination is at issue."). Wallace also opposed Laprairie's conduct by complaining about it to her supervisors. The district court considered this one incident not "severe" or "pervasive enough" to amount to Title VII liability on its own. Though one sexual-harassment incident is sometimes not enough to establish a Title VII claim, sometimes it can be. *See EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 243–44 (5th Cir. 2016) (detailing such incidents).

The question is, based on the significant harassment that Wallace had endured up to this point, whether Wallace "reasonably believed" that Laprairie's comment (that she was in her "sexual prime") and his nonconsensual massaging of her were enough to establish Title VII liability. We have said that sexual remarks and intimate contact make harassment more severe, and thus even isolated incidents can amount to severe or pervasive harassment. *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 189 (5th Cir. 2012); *Harvill v. Westward Comms.*, 433 F.3d 428, 434 (5th Cir. 2005). We conclude that a reasonable jury could find that Laprairie's comment and nonconsensual massaging of Wallace was enough, based on the surrounding circumstances of Wallace's harassment, to be severe or pervasive enough. Thus, when Wallace complained about Laprairie's conduct, her belief was reasonable that his conduct amounted to unlawful discrimination.

As a result, both as to Casey's conduct *and* Laprairie's conduct, we conclude that Wallace's complaints were "protected activity." Therefore, we reverse the district court's summary-judgment dismissal of Wallace's retaliation claim and remand the claim for further proceedings.

* * *

Because we hold that the district court erred in granting summary judgment on all three claims, we REVERSE and REMAND for further proceedings consistent with this opinion.