No. 22-11140

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

N. Sugumaran Narayanan,

Plaintiff-Appellant,

v.

Midwestern State University,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF THE EEOC AND THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL ON THE ISSUES ADDRESSED HEREIN

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel
ANNE NOEL OCCHIALINO
Assistant General Counsel
CHELSEA C. SHARON
Attorney
Equal Employment Opportunity Commission
Office of General Counsel
131 M St. NE, Fifth Floor
Washington, D.C. 20507
(202) 921-2751
Annenoel.Occhialino@eeoc.gov

KRISTEN CLARKE
Assistant Attorney General

NICOLAS Y. RILEY
BARBARA SCHWABAUER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4278

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Statement of Interest

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, bars discrimination on the basis of a protected characteristic and retaliation for engaging in protected activity. *Id.* §§ 2000e-2(a)(1), 2000e-3(a). The EEOC and the Attorney General share enforcement responsibility under Title VII. *Id.* § 2000e-5(a) & (f)(1).

This appeal raises important questions regarding the proper standards for determining what conduct is actionable under Title VII's anti-discrimination and anti-retaliation provisions. Because the EEOC and the Attorney General have a substantial interest in ensuring proper interpretation of the laws they enforce, they file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Statement of the Issues

1. Under this Court's existing standard for Title VII discrimination claims, an action implicating an individual's compensation amounts to the requisite "ultimate employment decision" necessary to sustain the claim. Should this case be remanded for the district court to consider whether the employer's denial of Plaintiff's request to teach summer classes deprived

him of compensation and thus satisfied the "ultimate employment decision" standard?

2. The Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), specifically rejected application of an "ultimate employment decision" standard to retaliation claims, instead holding that Title VII's anti-retaliation provision covers any employer action that might dissuade a reasonable worker from engaging in protected activity. *Id.* at 67-68. Did the district court err by nonetheless requiring Plaintiff to show an "ultimate employment decision" to sustain his retaliation claim?[1]

Statement of the Case

A. Statement of Facts

N. Sugumaran Narayanan, an individual of Malaysian origin, filed this suit against Midwestern State University (MSU), asserting Title VII discrimination and retaliation claims, as well as disability discrimination

[1] The EEOC and the Attorney General take no position on any other issue in this case.

and retaliation claims.[2] ROA.48-60. MSU employed Narayanan as a professor of political science from 2007 to 2020. ROA.727 at ¶ 1. In 2016, Narayanan filed a lawsuit against MSU claiming discriminatory and retaliatory denial of a promotion in violation of Title VII, which ultimately settled. ROA.729 at ¶ 6; ROA.759.

As relevant here, Narayanan alleges that he had planned to teach summer classes in the summer of 2018 but that MSU denied his request to do so, causing him lost income. ROA.51 at ¶¶ 15-17; ROA.560; ROA.729-30 at ¶ 7. Narayanan claims that this was in retaliation for his 2016 lawsuit and also amounted to discrimination on the basis of his race, color, and national origin in violation of Title VII. ROA.55-56 at ¶¶ 34-35, 40, 42; ROA.345. MSU subsequently terminated Narayanan's employment in 2020. ROA.497-99; ROA.727 at ¶ 1.

[2] The EEOC and the Attorney General present these facts in the light most favorable to Narayanan, consistent with the standard of review for an award of summary judgment. *See Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 478 (5th Cir. 2008).

B. District Court's Decision

Narayanan alleged that MSU's denial of the opportunity to teach summer classes amounted to discrimination and retaliation in violation of Title VII. ROA.51, 55, 56 at ¶¶ 16, 34-35, 40-42; ROA.345. On MSU's motion for summary judgment, the district court held that Narayanan failed to establish an adverse action sufficient to sustain either claim. ROA.784, 786.

With respect to the discrimination claim, the district court concluded that "[a]dverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating," ROA.784 (quoting *Ackel v. Nat'l Commc'ns, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003)), and that the "failure to grant Plaintiff desired summer teaching assignments does not rise to [this] level," ROA.784. The district court applied the same "ultimate employment decision" standard to Narayanan's retaliation claim and reached the same conclusion that the denial of summer teaching could not satisfy this standard. ROA.786.

Summary of Argument

Remand is warranted for proper application of the standards governing adverse actions for Title VII discrimination and retaliation claims.

First, remand is warranted for the district court to consider whether the denial of summer teaching opportunities affected Narayanan's compensation and thus amounted to an "ultimate employment decision" under this Court's existing standard for Title VII discrimination claims. The text of Title VII's anti-discrimination provision states, *inter alia*, that it is unlawful for an employer to discriminate against an individual "with respect to his *compensation*." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In keeping with the text, this Court's precedent recognizes that discrimination implicating an individual's compensation is actionable. *See, e.g.*, *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 193-94 (5th Cir. 2001), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 521 (5th Cir. 2001). Here, Narayanan alleged in his Amended Complaint that the denial of summer teaching

opportunities caused him lost income. ROA.51 at ¶¶ 15, 17. To the extent the record supports that allegation, the lost income is actionable as an ultimate employment decision.

Second, the district court improperly required Narayanan to show an "ultimate employment decision" to sustain his Title VII retaliation claim. That standard, which this Court applies to discrimination claims, does not apply to retaliation claims. To the contrary, the Supreme Court has held—and this Court has recognized—that a plaintiff may establish an adverse action for a retaliation claim by showing "that a reasonable employee would have found the challenged action materially adverse," that is, that "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (internal quotation marks omitted); *Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 945 (5th Cir. 2015) (recognizing this standard).

Argument

I. Remand is warranted for the district court to consider whether the denial of summer teaching opportunities affected Narayanan's compensation and thus amounted to an "ultimate employment decision" under this Court's existing standard for Title VII discrimination claims. [3]

Under the governing "ultimate employment decision" standard this Court applies to Title VII discrimination claims, discriminatory actions implicating a plaintiff's compensation are actionable. *See, e.g.*, *Fierros*, 274 F.3d at 194 ("[O]ur cases recognize that employment actions affecting compensation are often 'ultimate employment decisions' . . . ."); *Mota*, 261 F.3d at 521 ("The University's discontinuation of Mota's $2,500 stipend . . . is a compensation decision, thereby qualifying as an adverse employment action."); *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007) (ultimate employment decisions include "hiring, granting leave,

[3] It is somewhat unclear whether Narayanan is continuing to pursue this discrimination claim. *Compare* Appellant's Br. at 4 (referring generally to "Title VII claims related to teaching summer classes in 2018"), at 33 (referring generally to "Title VII claims related to teaching summer classes"), and at 34 (citing three decisions of this Court analyzing the adverse action standard for discrimination claims), *with id.* at 33 (referring only to "retaliation claims").

discharging, promoting, *or compensating*") (emphasis added) (internal quotation marks omitted). Indeed, the text of Title VII's anti-discrimination provision compels that result. 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination "with respect to *compensation*, terms, conditions, or privileges of employment") (emphasis added).

In reaching the conclusion that "failure to grant Plaintiff desired summer teaching assignments does not rise to [the] level of an 'ultimate employment decision,'" the district court did not consider whether the denial of summer teaching opportunities implicated Narayanan's compensation. ROA.784. Narayanan alleged that it did in his Amended Complaint, ROA.51 at ¶¶ 15, 17 (alleging that denial of summer teaching denied him "additional paid work" and "caused lost income"), but the district court did not address whether the record supports this allegation. The district court instead relied on *Oller v. Roussel*, 609 F. App'x 770 (5th Cir. 2015) (per curiam), for the proposition that failure to assign particular classes cannot qualify as an adverse employment action. ROA.784. But *Oller*, a First Amendment retaliation case, is distinguishable because the

plaintiff there made no allegation that the failure to grant desired teaching assignments caused a deprivation of compensation. The plaintiff in *Oller* claimed that the university failed "to assign [him] to teach particular . . . classes" in a particular department, 609 F. App'x at 773, not that the university denied him the opportunity to teach classes *at all* (and to gain attendant compensation) for a given period of time, as Narayanan claims here, ROA.51 at ¶¶ 15, 17 (Amended Complaint alleging deprivation of income); ROA.217-18 (declaration of former MSU Political Science Chair confirming Narayanan not assigned to teach any summer classes); ROA.729 at ¶ 6 (Narayanan declaration stating he "was denied the ability to teach summer classes" entirely).

This Court should remand Narayanan's discrimination claim for the district court to consider whether the denial of the opportunity to teach summer classes implicated Narayanan's compensation and thus qualified as an "ultimate employment decision" under the governing standard.[4]

[4] This Court, sitting en banc, heard oral argument on January 24, 2023, to revisit its "ultimate employment decision" standard for Title VII

II. The "ultimate employment decision" standard that this Court applies to Title VII discrimination claims does not apply to retaliation claims.

The district court required Narayanan to show an "ultimate employment decision" for his retaliation claim, ROA.786, but that is this Court's current standard for assessing adverse actions for *discrimination* claims. Title VII's anti-retaliation provision makes it unlawful "for an employer to discriminate against any of his employees or applicants" for engaging in activity protected by Title VII. 42 U.S.C. § 2000e-3(a). The prima facie case requires an individual to show an adverse action with a causal connection to the protected activity. *Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 835 (5th Cir. 2022). The Supreme Court in *Burlington Northern* held that the adverse action standard for Title VII retaliation claims requires only an action that may dissuade a reasonable worker from engaging in protected activity. 548 U.S. at 68. But the district court here did

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discrimination claims. *Hamilton v. Dallas Cnty.*, 42 F.4th 550 (5th Cir.), *vacated and reh'g en banc granted,* 50 F.4th 1216 (5th Cir. 2022). If the en banc Court rejects or alters the existing standard, remand would also be appropriate to consider Narayanan's claim under the revised standard.

not cite *Burlington Northern* or acknowledge the dissuade-a-reasonable-worker standard, instead requiring an "ultimate employment decision." ROA.786. The EEOC and the Attorney General therefore request that this Court reaffirm that a retaliatory adverse action need not be an "ultimate employment decision."

To be sure, this Court once interpreted Title VII to require an "ultimate employment decision" for both discrimination and retaliation claims. *See, e.g.*, *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). But the Supreme Court rejected that approach in *Burlington Northern.* The *Burlington Northern* Court recognized a circuit split on the level of harm required for a retaliation claim under Title VII. 548 U.S. at 60-61. Some circuits used a dissuade-a-reasonable-worker standard, while others required "an adverse employment action." *Id.* at 60. Quoting *Mattern*, the Supreme Court observed that "[t]he Fifth and the Eighth Circuits have adopted a more restrictive approach," using "an 'ultimate employment decisio[n]' standard, which limits actionable retaliatory conduct to acts

'such as hiring, granting leave, discharging, promoting, and compensating.'" *Id.* (second alteration in original).

The Supreme Court resolved this circuit split by explicitly "reject[ing] the standards applied in the Courts of Appeals that have . . . limited actionable retaliation to so-called 'ultimate employment decisions.'" *Id.* at 67. The Court reached this conclusion by looking first to Title VII's language. Title VII's anti-discrimination provision prohibits discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment" based on a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). The anti-retaliation provision, the Court noted, does not use this language. *Burlington N.*, 548 U.S. at 61-62. Instead, it provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" because that employee or applicant has engaged in protected activity. 42 U.S.C. § 2000e-3(a). The Supreme Court compared these two provisions and noted that Title VII's anti-discrimination provision "explicitly limit[s]" its reach "to actions that affect employment or alter the conditions of the workplace," whereas the

anti-retaliation provision contains "[n]o such limiting words." *Burlington N.*, 548 U.S. at 62.

Next, the Supreme Court emphasized that Title VII's prohibition on retaliation serves a different purpose than the prohibition on discrimination. Title VII, the Court observed, prohibited discrimination in order to "seek[] a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status." *Id.* at 63. Title VII's prohibition on retaliation, meanwhile, serves "to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* Congress, the Supreme Court explained, could secure the first objective by prohibiting only "employment-related discrimination," but could not "secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace" because that "would not deter the many forms that effective retaliation can take." *Id.* at 63-64. Thus, the Court reasoned, "purpose reinforces what language already indicates, namely,

that the antiretaliation provision, unlike the substantive [anti-discrimination] provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64. Instead, the Supreme Court held, the anti-retaliation provision prohibits retaliatory actions that are "materially adverse," meaning they might have dissuaded a reasonable worker from engaging in protected activity. *Id.* at 68.

This Court has long recognized *Burlington Northern*'s effect. Acknowledging that it had "historically held" that Title VII required "ultimate employment decisions" for both discrimination claims and retaliation claims, this Court recognized that "the Supreme Court abrogated [that] approach in the *retaliation* context." *McCoy*, 492 F.3d at 559 (internal quotation marks omitted); *see also Wheat v. Fla. Par. Juv. Just. Comm'n*, 811 F.3d 702, 706 & n.1 (5th Cir. 2016) (recognizing that *Burlington Northern* changed this Court's adverse action standard for retaliation claims); *Porter*, 810 F.3d at 945-46 (same); *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 484 n.9 (5th Cir. 2008) (same). As a result, applying the "ultimate employment decision" standard to a retaliation claim reflects "an

outdated and mistaken understanding of the law." *Stancu v. Hyatt Corp./Hyatt Regency Dallas*, 791 F. App'x 446, 451 (5th Cir. 2019) (per curiam) (internal quotation marks omitted).

The district court did not engage with this change in the governing standard or acknowledge *Burlington Northern*. In assessing Narayanan's retaliation claim, it never determined whether a jury could find that the denial of summer teaching opportunities might have dissuaded a reasonable worker from engaging in protected activity. ROA.786. Instead, the district court relied on pre-*Burlington Northern* case law for the proposition that "[a]dverse employment actions include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating." ROA.786 (alterations in original) (quoting *Ackel*, 339 F.3d at 385). But the district court failed to acknowledge that *Burlington Northern* expressly abrogated this prior approach. *See Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195, 206 (5th Cir. 2007) (per curiam) (noting that *Burlington Northern* specifically rejected the prior "ultimate employment decision" standard for retaliation claims articulated

in *Ackel*) (internal quotation marks omitted). By failing to assess whether a jury could find that the denial of summer teaching might deter a reasonable employee from engaging in protected activity, the district court held Narayanan to an inappropriately high standard—a standard that the Supreme Court long since set aside.

This Court should remand for application of the correct standard to Narayanan's retaliation claim here.

Conclusion

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

Respectfully submitted,

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel
ANNE NOEL OCCHIALINO
Assistant General Counsel

CHELSEA C. SHARON
Attorney

s/ *Anne Noel Occhialino*

Assistant General Counsel
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2751

KRISTEN CLARKE
Assistant Attorney General

NICOLAS Y. RILEY
BARBARA SCHWABAUER
Attorneys
Department of Justice

Civil Rights Division
Appellate Section,

Ben Franklin Station

P.O. Box 14404
Washington, D.C. 20044-4403
(202) 305-4278

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s/ *Anne Noel Occhialino*
Anne Noel Occhialino
Chelsea C. Sharon
Attorneys
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2889
Annenoel.occhialino@eeoc.gov
chelsea.sharon@eeoc.gov

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