EMPLOYMENT LAW OVERVIEW
FOR THE GENERAL PRACTITIONER

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EMPLOYMENT LAW FOR THE GENERAL PRACTITIONER

I. EMPLOYMENT ISSUES UNDER ALABAMA STATE LAW

A. “Employment at Will” is still the law.
   1. Termination can be Good Reason, Bad Reason, v. No Reason.
      Id.
      a. Good Reason – Employee stealing.
      b. Bad Reason – Violation of public policy in the absence of
         statutory rule.
         Harold v. Wolff Broadcasting Corp.,
         611 So.2d 307, 312 (Ala. 1992).
      c. No Reason - Bosarge v. Bankers Life Co.,
         541 So.2d 499, 501 (Ala. 1989).
   2. Courts decline to create public policy exceptions

B. Statutory exceptions to employment at will created when Courts did not
   create judicial exceptions.
      429 So.2d 814 (Ala. 1984).
      (no public policy exception for termination arising out of workers
      compensation claim).
   2. Alabama Code §25-5-11.1
      (passed in 1984, created a cause of action “solely” for filing a
      workers’ compensation claim).
   3. Bender Ship Repair, Inc. v. Stevens
      379 So.2d 594 (Ala.1980).
      (termination for serving on grand jury does not justify exception to
      employment at will).
4. Code of Alabama §12-16-8.1
(passed in 1980, created an exception to employment at will if termination is solely for serving on jury).

Code of Alabama §25-1-20, et seq.
   a. See Section on Federal Statutes (II.c.) below.
   b. If no charge of discrimination is filed, suit must be filed in state court within 180 days of discriminatory act.
   c. If charge of discrimination is filed with the EEOC within 180 days of discriminatory act, suit must be filed within 90 day of charging party’s receipt of right to sue (as required by federal ADEA).

C. Contracts may maintain or alter employment at will status.

1. Written Agreements - Can say whether you want them to – as long as they are not void for violating Public Policy.
   State v. Metcalfe, 75 Ala. 42 (Ala. 1883).
   (contract by probate court for convict to perform hard labor was void as against public policy).

2. Verbal Agreement – Enforceable if no violation of Statute of Frauds
   (oral agreement must be capable of being performed within one year or is void under Statute of Frauds).
   Code of Alabama, §8-9-2(1).
   a. Oral promise of employment for specific period of time more than a year violates the Statute of Frauds.
      Horton v. Wolner, 71 Ala. 452 (Ala. 1882).
   b. Verbal promise of lifetime employment not void under Statute of Frauds because it could be performed within one year.
      Kitsos v. Mobile Gas Service Corp.,
      404 So.2d 40, 42 (Ala. 1981).

3. Written documents may become contracts even though they were not intended to be binding.
a. Specific “terms” in Handbook that are offered to employee by issuance of a Handbook (or other means), can become a contract if the employee “accepts” those terms by retaining employment after employee becomes generally aware of the offer. Performance following awareness of terms is employee’s consideration. 

_Paseur v. City of Huntsville_,
642 So.2d 969 (Ala. 1994).
(affirming doctrine of unilateral contracts, but finding none because document could not reasonably be construed as an offer of employment).

b. If employer does not want policies in Handbook to become offer for unilateral contract, employer may say so. 

_Hoffman-LaRoche, Inc. v. Campbell_,
512 So.2d 725, 734 (Ala. 1987).

II. FEDERAL EMPLOYMENT LAW

A. Title VII

1. Unlawful for employer to discriminate against any individual regarding compensation, terms, conditions, or privileges of employment because of that individual’s race, color, religion, sex, or national origin. 


2. Claims under Title VII may generally be made for harassment on the basis of a protected characteristic. 

_Miller v. Kenworth of Dothan, Inc._,
277 F.3d 1269 (11th Cir. 2002).
(to be actionable, harassment must be based on protected characteristic of employee, is unwanted, is sufficiently severe and pervasive to alter terms and conditions of employment and create a discriminatorily abusive work environment, and employer is responsible, either vicariously or directly).

a. Employer will be directly liable for harassment of one employee by another if employer knew or should have known of conduct, but failed to take prompt remedial action.
1. Actual notice for purposes of direct liability may be established by proof that management knew of the harassment.

2. Constructive notice may arise when harassment is so severe and pervasive that employer should have known of harassing behavior.

b. Employer will be vicariously liable if actions (or inactions) which create hostile work environments are made by employee with immediate (or successively higher) authority over employee.
Faragher v. City of Boca Raton,

1. Strict liability against company if supervisor takes tangible employment action against victim.

2. If no tangible employment action taken, vicarious liability may be defended by proof that employer exercised reasonable care to prevent and promptly correct harassing behavior, and that employee unreasonably failed to take advantage of preventative or corrective opportunities provided by employer or to avoid harm.

(a) Must be pled as an affirmative defense.

(b) Employer complaint procedure or anti-discrimination policies must be effective, comprehensive, and aggressively and thoroughly disseminated to employees in order to prevent constructive knowledge from being attributed to employer.

(i) Posting.

(ii) Training of employees and supervisors.

(iii) Practical complaint procedure with prompt investigation, and logical resolution.
3. Claims for retaliation may be made by employee or applicant who suffers materially adverse actions by employer, which might have dissuaded reasonable worker from making his or her own charge of discrimination, or supporting the charge of another.


1. Prohibits discrimination against a qualified individual on the basis of disability in regard to job application procedures, hiring, advancement, or discharge of employees, compensation, job training, and other terms, conditions, and privileges of employment.

   a. Requires making reasonable accommodation to known physical or mental limitations of an otherwise qualified individual with a disability unless such reasonable accommodation would cause undue hardship.

   b. Prohibits medical examinations or inquiries with regard to disability of applicants.

   c. Allows pre-employment medical examinations once a conditional offer of employment has been made so long as all entering employees are subject to same examination regardless of disability; and information is used only in accordance with ability to perform essential functions of the job.

   d. Examinations and inquiries of employees with regard to whether such employees are individuals with disabilities may be made only if such is consistent with business necessity and is job-related.

2. Disability is defined to mean:

   a. A physical or mental impairment that substantially limits one or more major life activities;

   b. A record of such impairment; or
c. Being regarded as having such impairment.

d. Major life activities include, caring for oneself, lifting, standing, walking, etc.

e. Major life activities include major bodily functions such as the immune system, digestive system, endocrine system, and reproductive functions.

f. Being “regarded as” having such impairment means that the individual is perceived as having a physical or mental impairment, whether or not the impairment limits, or is perceived to limit a major life activity, unless the perceived impairment is one that is transitory and minor (limited to a duration of 6 months or more or less).

Cobb v. Florence Bd. Of Educ.,
2013 WL 5295777
(knee injury was transitory in nature).

3. An individual covered under the ADA and the ADAAA must be a qualified individual with a disability who, with or without reasonable accommodation can perform the essential functions of the job.

a. An essential function is one that is central to the performance of a particular job, based on various factors, determined on a case-by-case basis.

b. Employer’s “judgment as to which functions are essential is given consideration, including employer’s written job descriptions.

c. Marginal or non-essential functions may be assigned to other employees who can perform them.

D-Angelo v. ConAgra Foods, Inc.,
422 F.3d 1220, 1229-35 (11th Cir.2005).
(question of fact existed as to whether working on conveyor belt was an essential function of the job of “product transporter”, using three bases articulated by EEOC).
4. Reasonable Accommodation
   
a. Discrimination claim may be based on failure to accommodate.

b. Plaintiff must identify reasonable accommodations that would allow the individual to perform the essential functions of the job.

c. Employer must then show that requested accommodations would pose "undue hardship."
   Id.

d. A "reasonable accommodation" is one that would allow an employee with a disability to enjoy same benefits and privileges as those enjoyed by other employees without disabilities.

e. Reasonable accommodation does not require the creation of a new position.
   Id. (internal citations omitted).

C. Age Discrimination in Employment Act ("ADEA")

1. Over the age of 40.

2. No upper age limit (except in limited circumstances, such as pilots and judges).

3. Supreme Court has said that alleged discrimination must be "because of" age; therefore, "mixed motive" jury instructions are inappropriate.

4. Employer must have 20 or more employees to be covered by ADEA.

5. Charge of discrimination must be filed with the EEOC in order to file suit in court.
III. FILING A CHARGE OF DISCRIMINATION

A. A charge of discrimination must be filed with the EEOC within 180 days of discriminatory act under:

1. Title VII (15 employee threshold),

2. ADA (15 employee threshold), and

3. ADEA (20 employee threshold).

B. A charge of discrimination may be filed with the EEOC in Alabama Age Discrimination cases within 180 days of discriminatory act, or the matter may be filed in Alabama Circuit Court within 180 days of discriminatory act.

C. When the EEOC concludes its investigation, a “right to sue letter” will be issued; suit must be filed within 90 days of the receipt of the right to sue or that right is lost.


E. Representations made by Charging Party in the EEOC Charge, and by Respondent Employer in the Position Statement can be used to impeach later inconsistent statements.

F. EEOC file may be requested by Charging Party when right to sue letter has been received and by employer when suit has been filed.

G. EEOC file may contain valuable information including names of witnesses and other factual assertions made by Charging Party outside of the Charge of Discrimination.


A. Protects against racial discrimination and harassment on nearly identical basis as Title VII.

B. Has four year statute of limitations.  

C. Does not require that charge be filed.
917 So.2d 833
Court of Civil Appeals of Alabama.

Alicia MASSEY
v.
KRISPY KREME DOUGHNUT CORPORATION.


Synopsis
Background: Former employee brought action against employer, alleging retaliatory discharge, breach of contract and fraud. The Circuit Court, Madison County, No. CV-01-566, Bruce E. Williams, J., entered summary judgment in favor of employer. Employee appealed.

Holdings: The Court of Civil Appeals, Murdock, J., held that:

[1] fact question as to existence of causal link between employee’s filing claim for workers’ compensation benefits and the termination of her employment precluded summary judgment;

[2] employee’s signing “Standards of Conduct” document did not abrogate employee’s employment-at-will status; and


Affirmed in part, reversed in part, and remanded.

Thompson and Bryan, JJ., concurred in the result.

West Headnotes (7)

[1] Appeal and Error
  ➵ Final Judgments or Decrees
  Final judgment from which appeal can be taken is one that completely adjudicates all matters in controversy between all the parties. Code 1975, § 12-22-2.

[2] Appeal and Error

 Determination of Part of Controversy
Trial court’s summary judgment in favor of employer on employee’s retaliatory-discharge claim, which did not dispose of employee’s claims against other defendant, was not final and appealable until trial court certified the summary judgment as final. Rules Civ.Proc., Rule 54(b).

1 Cases that cite this headnote

[3] Labor and Employment
  ➵ Termination; Cause or Reason in General
  Employment contract is generally terminable at will by either party, with or without cause or justification, i.e., for a good reason, a wrong reason, or no reason at all.

1 Cases that cite this headnote

  ➵ Labor and Employment
  Genuine issue of material fact as to existence of causal link between employee’s filing claim for workers’ compensation benefits and the termination of her employment precluded summary judgment in favor of employer in employee’s wrongful-termination action against employer; termination occurred soon after employee’s claim for benefits, employee denied allegation of insubordination, and employer had failed to discharge other employees who had shown disrespect and insubordination.

3 Cases that cite this headnote

[5] Labor and Employment
  ➵ Manuals, Handbooks, and Policy Statements
  Employment-at-will relationship may be modified by provisions in an employee handbook if language contained in the handbook is specific enough to constitute an offer, if the offer has been communicated to the employee by issuance of handbook or otherwise, and if the employee has accepted the offer by retaining employment after he has become generally aware of the offer, as his actual performance supplies necessary consideration.
Labor and Employment

Employee's signing "Standards of Conduct" document provided by employer, whereby employee agreed to comply with the company's standards as outlined, did not abrogate employee's employment-at-will status, where employee subsequently signed document expressly acknowledging that employment was on an employment-at-will basis.

Fraud

Employer did not commit fraud by terminating employee who had signed "Standards of Conduct" document provided by employer, thereby agreeing to comply with the company's standards as outlined; even if fraudulent representation could be implied, employee signed document expressly acknowledging that employment was on an employment-at-will basis.

Attorneys and Law Firms

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Opinion

MURDOCK, Judge.

Alicia Massey appeals from a summary judgment entered in favor of Krispy Kreme Doughnut Corporation ("Krispy Kreme") as to her claims alleging retaliatory discharge in violation of Ala.Code 1975, § 25-5-111.1, breach of contract, and fraud.

Massey was hired by Krispy Kreme on November 6, 2000. The employment application signed by Massey stated that she was an "at-will" employee. On December 3, 2000, Massey suffered an on-the-job injury when she slipped and fell while working at a Krispy Kreme store located in Huntsville. She reported the fall to the bookkeeper of the store and worked the remainder of her shift, thinking that she was not hurt. Massey did not work the next two days, which were scheduled off days.

According to Massey's deposition testimony, however, Massey realized on the day after her fall that her back and neck were hurting. Massey called Allen Woodward, the manager of Krispy Kreme's Huntsville store, and advised him of her injury. Woodward advised Massey to see Dr. William Walley. Massey was examined by Dr. Walley, who advised her that she could return to work immediately. However, Massey did not return to work on her next scheduled shift, on December 6, because, according to Massey, she was "swollen up and hurting." Massey testified that, instead, she went to the emergency room at the Huntsville Hospital. According to Massey, as a result of her visit to the Huntsville Hospital emergency room she obtained an "off-work slip," pursuant to which she was supposed to return to work on December 9.

On December 8, 2000, Massey returned to Krispy Kreme's store to give Woodward copies of paperwork from her medical providers and to pick up her paycheck. During that visit, Massey told the bookkeeper that her paycheck was incorrect. After a discussion between Massey and the bookkeeper about the correct number of hours and the procedure for clocking in, Massey was asked to go into Woodward's office. After a discussion between Massey and Woodward, Woodward discharged Massey.

The parties disagree as to the material facts concerning the termination of Massey's employment. Krispy Kreme presented evidence tending to indicate that, on December 8, Massey was "smart" or rude to Krispy Kreme's bookkeeper and that she was loud and used profanity and was insubordinate to Woodward.

Massey, on the other hand, gave a different account of the meeting with Woodward. She testified in her deposition that Woodward was already upset with her before she went into his office and that he was harsh with her and that, as a result, she cried during their meeting. She also testified that she was not rude to the bookkeeper and that she never used profanity toward Woodward. Massey also testified that Woodward told her that he had received a complaint as to Massey but refused to answer any questions about it. Massey
testified that, during this meeting, she told Woodward that “for him to be a manager he had a bad attitude.” According to Massey, Woodward responded: “Well, you don’t have to worry about that because you no longer work here.”

On March 19, 2001, Massey filed a complaint against Krispy Kreme and Krispy Kreme Doughnut Company (“Krispy Kreme Company”). The initial complaint sought workers’ compensation benefits and damages for retaliatory discharge in violation of § 25-5-11.1, and it included a demand for a jury trial. Krispy Kreme was served with the summons and complaint and, on April 18, 2001, filed an answer. Krispy Kreme subsequently filed a motion to strike the jury demand or, in the alternative, to conduct a separate trial for the workers’ compensation claim. The trial court granted the motion for separate trials.

Massey subsequently filed an amended complaint against both Krispy Kreme and Krispy Kreme Company, adding claims asserting breach of contract and fraud allegedly arising out of the termination of Massey’s employment. Thereafter, Krispy Kreme filed an answer to the amended complaint and, subsequently, a motion for a summary judgment, together with evidentiary attachments. Massey filed a reply, together with evidentiary materials. By an order dated February 21, 2003, the trial court granted the motion for a summary judgment as to all claims asserted against Krispy Kreme except the workers’ compensation claim.

Although Krispy Kreme Company was served with both the complaint and the amended complaint, at no time did it file an answer or other responsive pleading.

On March 21, 2003, Massey filed a motion to alter, amend, or vacate the summary judgment, which was denied on May 19, 2003. Subsequently, Massey and Krispy Kreme settled the workers’ compensation claim. The settlement was presented to and approved by the trial court on September 9, 2003.

The trial court’s February 21, 2003, summary judgment did not purport to address Massey’s claims asserted against Krispy Kreme Company. Thus, on October 2, 2003, Massey filed a motion requesting that the trial court certify that summary judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. In response to Massey’s motion, the trial court entered an order certifying as final the summary judgment in favor of Krispy Kreme. Thereafter, Massey appealed to the Alabama Supreme Court, that Court transferred the appeal to this court, pursuant to § 12-2-7, Ala. Code 1975.

In this appeal, Massey contends that the trial court erred in entering the summary judgment because, she says, there was substantial evidence to support each of her three claims. Krispy Kreme argues on appeal that the summary judgment was proper, and it also contends that Massey’s appeal is untimely.

Because it raises a question as to this court’s jurisdiction, we first consider Krispy Kreme’s contention that Massey’s appeal is untimely. Specifically, Krispy Kreme contends that Massey’s time to appeal began to run on May 19, 2003, when the trial court denied her motion to alter, *836 amend, or vacate the summary judgment in favor of Krispy Kreme.

[1] Ordinarily, an appeal can be taken only from a final judgment. Ala.Code 1975, § 12-22-2. “A final judgment is one that completely adjudicates all matters in controversy between all the parties.” Eubanks v. McCallum, 828 So.2d 935, 937 (Ala.Civ.App.2002). In Eubanks, one of the parties had been served, but had not appeared, and the trial court did not adjudicate the claims against that defendant in the judgment from which an appeal was taken. Unlike the present case, no certification was made under Rule 54(b). Because the judgment at issue in Eubanks was not final as to all parties, this court dismissed the appeal. 828 So.2d at 937.

[2] Similarly, in the present case, Krispy Kreme Company was served with the complaint, but did not answer or otherwise respond to it, and the summary judgment in favor of Krispy Kreme did not purport to adjudicate Massey’s claims against Krispy Kreme Company. Therefore, until the trial court’s entry of its certification under Rule 54(b), the summary judgment was not final and appealable. Massey filed her appeal within 42 days after the entry of the certification under Rule 54(b). Her appeal therefore was timely.

Accordingly, we now address the merits of the summary judgment itself.

“We review a summary judgment de novo, applying the same standard as was applied in the trial court. A motion for a summary judgment is to be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. A party moving for a summary judgment must make a prima facie showing ‘that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ Rule 56(c)(3), Ala. R.

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Civ. P. The court must view the evidence in a light most favorable to the nonmoving party and must resolve all reasonable doubts against the movant. \textit{Hanners v. Balfour Guthrie, Inc.}, 564 So.2d 412 (Ala.1990). If the movant meets this burden, `the burden then shifts to the nonmovant to rebut the movant's prima facie showing by "substantial evidence."' \textit{Lee v. City of Gadsden}, 592 So.2d 1036, 1038 (Ala.1992).


[3] We turn first to Massey's retaliatory-discharge claim. Under Alabama law, “an employment contract is generally terminable at will by either party, with or without cause or justification-for a good reason, a wrong reason, or no reason at all.” \textit{Culbreth v. Woodham Plumbing Co.}, 599 So.2d 1120, 1121 (Ala.1992). One exception to this general rule is contained in § 25-5-11.1, which provides:

“No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter...”

In \textit{Alabama Power Co. v. Aldridge}, 854 So.2d 554 (Ala.2003), our Supreme Court reiterated the elements of a claim under § 25-5-11.1:

“1) an employment relationship, 2) an on-the-job injury, 3) knowledge on the part of the employer of an on-the-job injury, and 4) subsequent termination of "837 employment based solely upon the employee's on-the-job injury and the filing of a workers' compensation claim.”

854 So.2d at 563.

“In \textit{Twilley v. Daubert Coated Products, Inc.}, 536 So.2d 1364 (Ala.1988), this Court interpreted this retaliatory discharge statute as it regards the prohibition against discharging an employee 'solely' because the employee has made a worker's compensation claim. The Court stated the following test:

"We hold that an employee may establish a prima facie case of retaliatory discharge by proving that he was "terminated" because he sought to recover worker's compensation benefits, which would be an impermissible reason. The burden would then shift to the defendant employer to come forward with evidence that the employee was terminated for a legitimate reason, whereupon the employee must prove that the reason given by the employer was not true but a pretext for an otherwise impermissible termination.'

"Twilley, 536 So.2d at 1369."

\textit{Culbreth}, 599 So.2d at 1122.

“A plaintiff, therefore, has the burden of presenting sufficient evidence indicating that the plaintiff was discharged because he or she filed a claim for workers' compensation benefits, but if there is uncontradicted evidence of an independently sufficient basis for the discharge then the defendant is entitled to a judgment as a matter of law... An employer's stated basis for a discharge is sufficient as a matter of law when the underlying facts surrounding the stated basis for the discharge are undisputed and there is no substantial evidence indicating (a) that the stated basis has been applied in a discriminatory manner to employees who have filed workers' compensation claims, (b) that the stated basis conflicts with express company policy on grounds for discharge, or (c) that the employer has disavowed the stated reason or has otherwise acknowledged its pretextual status.”

\textit{Aldridge}, 854 So.2d at 568.

Citing \textit{Culbreth} and several other Alabama cases, Massey argues that the temporal proximity between her filing of a workers' compensation claim and her subsequent discharge satisfies her initial burden of presenting evidence of a
causal connection between the filing of that claim and her discharge. See also Rickard v. Shoals Distribs., Inc., 645 So.2d 1378 (Ala.1994); Overton v. Amerex Corp., 642 So.2d 450 (Ala.1994); and Graham v. Shoals Distribs., Inc., 630 So.2d 417 (Ala.1993). In addition, Massey argues that evidence in the record of her satisfactory work performance before her discharge, evidence indicating that Woodward was irritated when Massey telephoned him to advise him of her injury, evidence indicating that the reasons given by Krispy Kreme for her discharge were false, evidence indicating that Krispy Kreme has not terminated the employment of others who have cursed at Woodward or acted insubordinately toward him, and evidence that Krispy Kreme has discharged other employees who have filed workers' compensation claims constitute proof of causation.

In Aldridge, our Supreme Court stated:

“Our caselaw has not addressed in detail the evidence a plaintiff must present to show that he was fired solely because of his workers' compensation claim. 6 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 104.07[3] (2001), states: 'Proximity in time between the claim and the firing is a typical beginning-point, coupled with evidence of satisfactory work performance and supervisory *838 evaluations. Any evidence of an actual pattern of retaliatory conduct is, of course, very persuasive.' We have also found several circumstances considered by other jurisdictions to indicate that a plaintiff has made a sufficient showing of a causal connection so as to establish a prima facie case.

'However, the statutes in most states do not use the word 'solely' in defining a cause of action for retaliatory discharge. Some states, such as Texas and South Carolina, use a 'but for' test, which requires an employee to prove 'that, but for the filing of the workers' compensation claim, the discharge would not have occurred when it did.' Wal-Mart Stores, Inc. v. Amos, 79 S.W.3d 178, 184 (Tex.Ct.App.2002); see also Wallace v. Milliken & Co., 305 S.C. 118, 121, 406 S.E.2d 358, 360 (1991). Other states require less, merely calling for a causal connection between the claim for workers' compensation benefits and the discharge....

"....

"Texas considers the following factors as circumstantial evidence of a causal relation between the filing of a workers' compensation claim and an employee's discharge:

"1) knowledge of the compensation claim by those making the decision on termination, 2) expression of a negative attitude toward the employee's injured condition, 3) failure to adhere to established company policy, 4) discriminatory treatment in comparison to similarly situated employees, 5) sudden changes in an employee's work performance evaluations following a workers' compensation claim, and 6) evidence that the stated reason for the discharge was false.'


Aldridge, 854 So.2d at 564-65 (footnote omitted). See also Coca-Cola Bottling Co. Consol. v. Hollandier, 885 So.2d 125, 131 (Ala.2003) (plurality opinion) (citing Hayden v. Bruno's, Inc., 588 So.2d 874 (Ala.1991), for the proposition that "mere closeness in time typically is not sufficient evidence of a retaliatory discharge," and stating that "[c]lose temporal proximity between the claim and the termination must be so coincidental as to raise an inference that the claim caused the termination"). The Aldridge Court then explained that, provided the issue of causation is otherwise due to be presented to a jury,

"[c]ases from jurisdictions providing a remedy for retaliatory discharge when an employee has suffered an on-the-job injury and has then filed a claim for workers' compensation benefits that do not require the employee to prove sole causation are illustrative of the circumstantial evidence sufficient to establish a prima facie case of causation."

Aldridge, 854 So.2d at 566.

[4] Based on a careful review of the evidence in the record before us, and in light of the foregoing authority, we conclude
that Massey presented sufficient evidence to satisfy her burden of showing a causal link between her filing of a claim for workers' compensation benefits and the termination of her employment.

Krispy Kreme responded to this showing by coming forward with evidence that Massey's employment was terminated for a legitimate reason, namely, that Massey cursed at Allen Woodward during their meeting on December 8, 2000, and was otherwise insubordinate. It also makes note of evidence to the effect that Massey acted rudely to the bookkeeper for Krispy Kreme immediately before Massey's meeting with Woodward.

In response to Krispy Kreme's evidence of a legitimate reason for terminating Massey's employment, Massey points to testimony by her that paints a quite different picture of the events of December 8 than that given by Woodward. Massey's testimony, which we have previously described, if believed by a jury, could reasonably lead to a finding that Massey was not rude to the bookkeeper and did not curse at or act insubordinate to Woodward. We therefore agree with Massey that there is a genuine issue of material fact as to whether the meeting between Massey and Woodward occurred in the manner described by Woodward.

Furthermore, as to whether Woodward's stated reason for the discharge was not the true reason for that discharge, Massey also relies upon affidavits from two former employees of Krispy Kreme in which testimony is given that other employees have cursed at and otherwise shown disrespect and insubordination toward Woodward without suffering either discharge or other disciplinary action. She also points to testimony in one of those affidavits that it was common for Woodward to curse at employees in the workplace. This testimony also supports Massey's contention that the record does not satisfy the Aldridge requirement that there be "no substantial evidence indicating ... that the ... basis [stated by the employer] has been applied in a discriminatory manner to employees who had filed workers' compensation claims." 854 So.2d at 568.

In summary, although the evidence presented by Massey in this case is, in the main, disputed by Krispy Kreme, we are required to view the evidence, in its entirety, in the light most favorable to Massey. On that basis, we conclude that Massey has presented substantial evidence that creates genuine issues of material fact. Accordingly, the trial court erred in entering the summary judgment on Massey's retaliatory-discharge claim.

We turn next to Massey's contention that her discharge violated the terms of an employment contract that she alleges arose from a two-page document entitled "Standards of Conduct" signed by Massey on the day she began her employment with Krispy Kreme, November 6, 2000. By signing this document, Massey acknowledged to the company that she had "read and understood the standards" set forth therein and that she "agree[d] to comply with the company's standards as outlined." *840

In Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725, 728 (Ala.1987), our Supreme Court stated:

"The rule is well settled in Alabama that an employee contract at will may be terminated by either party with or without cause or justification. This means a good reason, a wrong reason, or no reason.

"The cases reveal that three elements must be shown to establish that an employment contract is one other than one terminable at will: (1) that there was a clear and unequivocal offer of lifetime employment or employment of definite duration; (2) that the hiring agent had authority to bind the principal to a permanent employment contract; and (3) that the employee provided substantial consideration for the contract separate from the services to be rendered."

(Emphasis and citations omitted.) It has been held that an "employment-at-will" relationship can be modified by provisions in an employee handbook by which an employer promises not to discharge an employee except by specified procedures or for specified causes." Campisi v. Scafe Cadillac, Inc., 611 So.2d 296, 298 (Ala.1992).

5] [6] Assuming for the sake of discussion that the "Standards of Conduct" signed by Massey on November 6, 2000, should be treated as an "employee handbook" for purposes of applying the principles articulated in Hoffman-La Roche, Inc., whether those "Standards of Conduct" are sufficient to create specific contractual duties by Krispy Kreme that have been breached in this case depends on the following factors:

"First, the language contained in the handbook must be examined to see if it is specific enough to
constitute an offer. Second, the offer must have been communicated to the employee by issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by retaining employment after the offer has become generally aware of the offer. His actual performance supplies the necessary consideration."

Hoffman-La Roche, Inc., 512 So.2d at 735. Based on a careful review of the record before us, we conclude that the trial court properly could have determined that the conditions necessary for the "Standards of Conduct" to abrogate Massey's employment-at-will status were not in place. In addition to having examined the provisions of the "Standards of Conduct" from which Massey contends a contract was implied, we are influenced by the undisputed fact that, on November 7, 2000, the day after she signed the "Standards of Conduct," Massey signed an employment application that contained the following express acknowledgment by her: "Employment at Krispy Kreme is on an 'at will' basis. This implies that either the employee or the company may terminate the employment relationship at any time, for any reason, with or without cause or prior notice." See Hoffman-La Roche, Inc., 512 So.2d at 734 (holding that whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties" and that therefore an employer that does not wish the policies contained in an employee handbook to be construed as an offer of unilateral contract may so state in the handbook); see also Bell v. South Central Bell, 564 So.2d 46, 48 (Ala.1990) ("Whether the language in the handbook was intended to be an offer is determined by reference to the reasonable meaning of the parties' external and objective manifestations, rather than by their uncommunicated beliefs.").

[7] Finally, we turn to Massey's argument that the trial court erred in entering the summary judgment on her claim alleging fraud. According to Massey, her discharge by Woodward rendered false a representation implied in the "Standards of Conduct" that she would be discharged only after receiving progressive discipline. Among other things, the trial court found that the record did not support a fraud claim against Krispy Kreme. Based on our review of the pertinent documents, as discussed above, we find no error by the trial court in this regard. 4

Based on the foregoing, we affirm the summary judgment entered by the trial court with respect to Massey's breach-of-contract and fraud claims; we reverse the summary judgment entered by the trial court against Massey on her retaliatory-discharge claim, and we remand the cause for further proceedings.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

CRAWLEY, P.J., and PITTMAN, J., concur.

THOMPSON and BRYAN, JJ., concur in the result, without writing.

Parallel Citations

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Footnotes

1 Krispy Kreme paid the costs of Massey's visit to Dr. Walley, and for subsequent visits to Huntsville Hospital.

2 Krispy Kreme argues that, because Massey admitted telling Woodward that he had a "bad attitude," there is no factual dispute as to whether Massey was in fact insubordinate. The issue actually presented in this regard is whether Woodward believed Massey to be insubordinate and then acted on that belief. Whether Massey's words reasonably could be construed as being insubordinate therefore becomes relevant. In turn, such factors as the context and the tone of voice in which Massey made her comment to Woodward become relevant. In light of the conflicting evidence tending to show two different versions of the meeting in question, we cannot conclude that there is no genuine issue of fact as to whether Massey was insubordinate.

3 The "Standards of Conduct" which Massey signed begins with an introductory section that states, in part: "Krispy Kreme expects employees to observe 'common sense' rules of honesty, good conduct, general job interest, safe practices, and to adhere to generally accepted customs of good taste in our relations with each other. In our company, as in any group with a common purpose, standards are necessary. Employee cooperation and good judgment will benefit the well being of all. These rules apply to all employees of Krispy Kreme. They list examples of certain practices which cannot be tolerated, and as such are not all inclusive."

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"Failure to observe the company Standards of Conduct may be cause for either immediate dismissal or dismissal after warning, depending upon the seriousness of the offense as determined by supervision."

(Emphasis added.) Following this introductory section is a section that begins with the statement: "Violation of these rules may lead to immediate discharge or final written warning depending upon the seriousness of the circumstances," after which are listed 17 specific infractions. After those 17 infractions are listed, another section of the “Standards of Conduct” begins as follows:

"The first violation of any rule in this group may result in a verbal discussion or written warning.

"The second violation of that rule or any other rule in this group may result in a final written warning or termination."

(Emphasis in original.) Following these two statements is a list of 20 specific infractions, including “[u]se of profane language or otherwise causing embarrassment to, or friction among other employees or customers.”

All of the foregoing is on the first page of the “Standards of Conduct.” On the second page are found two additional sections titled “Solicitation” and “Employee Sanitation Standards,” respectively, each of which list additional specific standards of conduct required of employees in regard to the matters indicated by those titles.

In addition, even if one assumed that a fraudulent representation by Krispy Kreme to Massey could be implied by the “Standards of Conduct,” this would in turn beg the question of the reasonableness of any reliance by Massey on that representation in light of the fact that, on the day after she signed the “Standards of Conduct,” she signed a document in which she expressly agreed that her employment was to be “on an ‘at will’ basis” and that the company could terminate the employment relationship “at any time, for any reason, with or without cause or prior notice.” See generally Foremost Ins. Co. v. Parham, 693 So.2d 409, 421 (Ala. 1997).
Permanent or lifetime employment contract of plaintiff with defendant was capable of being performed in less than one year, since plaintiff could die before expiration of one year thereby terminating the contract, and thus contract was not made void by the statute of frauds. Code 1975, § 8-9-2(1).

8 Cases that cite this headnote

Attorneys and Law Firms

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Robert G. Kendall, Mobile, for appellee.

Opinion

FAULKNER, Justice.

Plaintiff, Christopher Kitsos, appeals from a summary judgment granted in favor of defendant, Mobile Gas Service Corporation for breach of an oral "permanent" or "lifetime" employment contract with defendant. The evidence shows that Mobile Gas Service Corporation employed Christopher Kitsos in October, 1959, to work in Mobile, Alabama. Defendant terminated Kitsos in June of 1977 for allegedly playing golf on company time. Whether he was in violation of company rules by playing golf is a disputed question of fact.

In 1962, Kitsos, decided to accept a position with Atlanta Gas Light Company in Atlanta, Georgia. The position in Atlanta offered new career opportunities and would permit Kitsos to be closer to his relatives. Plaintiff claims that an officer of defendant, John A. Castle, persuaded him to remain with the company in Mobile. Kitsos relied on Castle's oral representations that Kitsos would have excellent opportunities for advancement and promotion, and could be assured of a lifetime or permanent job with Mobile Gas Service Corporation. As a result of these representations, Kitsos claims he declined the job in Atlanta, removed his house from the market, and remained in Mobile as an employee of defendant.

[1] The issue on appeal is whether an oral contract to employ a person permanently or for his or her lifetime is voided by the Statute of Frauds. Section 8-9-2(1) of the Alabama Code provides: "Every agreement which, by its terms, is not to be performed within one year from the making thereof" is void
unless it is evidenced by some writing. In order to bring a contract within the purview of this section of the Statute of Frauds, the contract must be incapable of being performed within one year. Land v. Cooper, 250 Ala. 271, 34 So.2d 318 (1948); McLarty v. Wright, 56 Ala.App. 346, 321 So.2d 687 (Civ.App.1975).

This Court has never specifically addressed the question of whether permanent or lifetime employment contracts fall within the Statute of Frauds. Cf. Seroggin v. Blackwell, 36 Ala. 351 (1860) (one year oral employment contract to commence in the future); Roddy v. McGee, 49 Ala. 159 (1873) ("permanent" in employment contract means permanent for one year); Alabama Mills, Inc. v. Smith, 237 Ala. 296, 186 So. 699 (1939) (court affirms recovery by employee on oral employment contract of 42 without addressing Statute of Frauds issue). In construing the terms of a contract, a reasonable construction that will give effect to the contract rather than destroy it is favored. Roddy v. McGee, 49 Ala. 159 (1873). The majority of courts construe a "permanent" employment contract to be a contract that terminates on the death of the employee. See, e.g., Fibreboard Products v. Townsend, 202 F.2d 180 (9th Cir. 1953); Spindel v. National Homes Corp., 110 Ga.App. 12, 137 S.E.2d 724 (1964); Miller v. Rialta Cadillac Co., 517 S.W.2d 173 (Tex.1974); 2 A. Corbin, Contracts § 446 (2d ed. 1952). The contract is thus capable of being performed within a year since the employee may die before the expiration. Id.

[2] If a condition terminating a contract may occur within one year, this Court has said the contract is performable within one year, even though performance may in fact extend beyond that period. See Brown & Sons Lumber Co. v. Rattray, 238 Ala. 408, 192 So. 851 (1939). We hold that the permanent or lifetime employment contract of Kitsos with Mobile Gas Service Corporation was capable of being performed in less than one year, and it is thus not made void by the Statute of Frauds. The trial judge erred in granting defendant's motion for summary judgment.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

TORBERT, C.J., and MADDOX, BEATTY and ADAMS, JJ., concur.

JONES, ALMON, SHORES and EMBRY, JJ., dissent.

JONES, Justice (dissenting).

I concur completely with Justice Embry's dissent and add one comment: I am persuaded that the cases from other jurisdictions supportive of the majority opinion take their lead from the textwriters who disagree with the underlying policy of the Statute of Frauds. They grasp for every conceivable exception in order to narrow the Statute's field of operation but the policy call is not the Court's to make. This prerogative has been exercised by the legislature.

If ever the application of the Statute's express policy is called into play, it is within the context of the instant facts. Certainty as to the terms of duration of an employment contract is a requisite to its fair enforcement; otherwise, fraud is its probable incident. Moreover, a contract should be enforced according to the mutual contemplation of the parties. To hold that these parties contemplated performance of a lifetime employment contract within one year, thus falling outside the purview of the Statute is to attribute the worst of motives to either one or both of them suicide on the part of the one or murder on the part of the other.

EMBRY, Justice (dissenting):

In this case, Kitsos claimed he was persuaded by John A. Castle, an officer of defendant, to remain with the company in Mobile on the basis of Castle's oral representations that Kitsos would have excellent opportunities for advancement and promotion and a lifetime job with Mobile Gas Service. Kitsos says that as a result he changed his mind, declined the job in Atlanta, removed his house from the market where it was being offered for sale in anticipation of his moving to Atlanta, and remained in Mobile in the employ of defendant.

As is well known, every agreement which, by its terms, is not to be performed within one year from the making thereof, is void unless such agreement, or some note or memorandum thereof expressing the consideration, is in writing and subscribed by the party to be charged therewith or some other person by him thereunto lawfully authorized in writing to do so. Code 1975, § 8-9-2. Clearly no written contract or note or memorandum thereof was executed by either of the parties. In order to bring a particular oral contract within the influence of the statute, there must be a negation of the right or possibility to perform it within a year, that is, by its terms it is not to be or is incapable of being so performed. Land v. Cooper, 250 Ala. 271, 34 So.2d 313 (1948), citing W. P. Brown & Sons Lumber Co. v. Rattray, 238 Ala. 406, 192 So. 851 (1939).
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Kitsos relies upon an alleged representation that his employment with Mobile Gas Service could be permanent, or for life, as the basis of his contract claim. This representation was allegedly made in 1962, fifteen years before Kitsos was terminated. By its very terms this contract was not intended to be performed within one year. I am not persuaded to conclude that this was a contract without our statute of frauds, by the fact that Kitsos might possibly have died prior to the expiration of a year from the date of the representation. To permit an oral contract to arise from the representation allegedly made in this case and to fix its duration by events rather than by time increments merely because of the possibility, however remote, that a specified event, death of appellant, might occur within a year, would undermine one of the very purposes for which the Statute of Frauds exists. The memory of individuals and the recollection of events fade in time to the extent that there must be some point beyond which oral contracts are not enforceable.

It is clear from the perspective of the present that there is no reasonable way to determine the duration of the alleged contract. I therefore conclude that, as a matter of law, the use of the terms “permanent” or “for life” in a contract for employment is sufficient to negate the intent that the contract be performed within one year.

JONES, ALMON and SHORES, JJ., concur.

Parallel Citations
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End of Document

5 Cases that cite this headnote

⇒ Taking Case from Jury
The Court of Appeals will uphold a district court's denial of a judgment as a matter of law if the Court of Appeals determines that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. Fed.Rules Civ.Proc.Rule 50(a), 28 U.S.C.A.

1 Cases that cite this headnote

⇒ Taking Case from Jury
The Court of Appeals will reverse a denial of a motion for judgment as a matter of law only if it concludes that the facts and inferences point overwhelmingly in favor of the moving party, such that reasonable people could not arrive at a contrary verdict. Fed.Rules Civ.Proc.Rule 50(a), 28 U.S.C.A.

11 Cases that cite this headnote

[5] Civil Rights
⇒ Hostile Environment; Severity, Pervasiveness, and Frequency
A hostile work environment claim under Title VII is established upon proof that 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. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

184 Cases that cite this headnote

[6] Civil Rights
⇒ Hostile Environment; Severity, Pervasiveness, and Frequency
To establish a hostile work environment claim under Title VII, an employee must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

306 Cases that cite this headnote

[7] **Civil Rights**

⇐ Hostile Environment; Severity, Pervasiveness, and Frequency

The requirement that harassment must be sufficiently severe or pervasive to alter the terms or conditions of employment in order to be actionable under Title VII contains both an objective and a subjective component; thus, the behavior must result in both an environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceives to be abusive. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

109 Cases that cite this headnote

[8] **Civil Rights**

⇐ Hostile Environment; Severity, Pervasiveness, and Frequency

In evaluating the objective severity of the harassment underlying a Title VII claim, the Court of Appeals considers, among other factors: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

61 Cases that cite this headnote

[9] **Civil Rights**

⇐ Hostile Environment; Severity, Pervasiveness, and Frequency

Any failure by employee to show how coemployee's alleged harassing conduct unreasonably interfered with employee's work performance did not necessarily constitute failure to satisfy objectiveness prong of requirement that harassment underlying Title VII claim be sufficiently severe or pervasive to alter terms or conditions of employment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

120 Cases that cite this headnote

[10] **Civil Rights**

⇐ Hostile Environment; Severity, Pervasiveness, and Frequency

The Court of Appeals takes a totality of the circumstances approach in determining whether the harassment underlying a Title VII claim is sufficiently severe or pervasive to alter terms or conditions of employment. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

32 Cases that cite this headnote

[11] **Civil Rights**

⇐ Questions of Law or Fact

Issue whether Mexican-American employee suffered severe and pervasive harassment sufficient to alter terms or conditions of his employment at tractor-trailer dealership was for jury in Title VII action; coemployee hurled ethnic slurs at employee three or four times a day, coemployees used derogatory names in intimidating manner, such incidents were humiliating and degrading, and harassment bothered employee enough that he informed coemployees he had consulted attorney. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.
12 Cases that cite this headnote

[12] Civil Rights
⇒ Hostile Environment; Severity, Pervasiveness, and Frequency
It is repeated incidents of verbal harassment that continue despite the employee's objections that are indicative of a hostile work environment within the meaning of Title VII, and not simply some "magic number" of racial or ethnic insults. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

30 Cases that cite this headnote

[13] Civil Rights
⇒ Vicarious Liability; Respondent Superior
Under Title VII, an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

[14] Civil Rights
⇒ Vicarious Liability; Respondent Superior
Under Title VII, an employer will be strictly liable for a hostile environment created by a supervisor if the supervisor takes tangible employment action against the victim. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2 Cases that cite this headnote

[15] Civil Rights
⇒ Knowledge or Notice; Preventive or Remedial Measures

Civil Rights
⇒ Vicarious Liability; Respondent Superior
When an employee has established a claim for vicarious liability under Title VII based on a hostile environment created by a supervisor, but no tangible employment action was taken, a defending employer may raise as an affirmative defense to liability or damages: (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

15 Cases that cite this headnote

[16] Civil Rights
⇒ Knowledge or Notice; Preventive or Remedial Measures

Where the perpetrator of harassment is merely a coemployee of the victim, the employer will be held directly liable under Title VII if it knew or should have known of the harassing conduct but failed to take prompt remedial action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

26 Cases that cite this headnote

[17] Civil Rights
⇒ Knowledge or Notice; Preventive or Remedial Measures

For an employer to be held directly liable under Title VII for a coworker's harassment of an employee, the victim of the harassment must show either actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

11 Cases that cite this headnote

[18] Civil Rights
⇒ Knowledge or Notice; Preventive or Remedial Measures

Actual notice to an employer of harassment of an employee by a coworker is established, for purposes of determining whether the employer
is directly liable under Title VII, by proof that management knew of the harassment, whereas constructive notice will be found where the harassment was so severe and pervasive that management should have known of it. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

7 Cases that cite this headnote

[19] Civil Rights

≈ Knowledge or Notice; Preventive or Remedial Measures

Mexican-American employee's alleged comment to manager "to tell [coworker] he needs to watch what he says to me" was insufficient to give employer actual notice of any harassment by coworker, for purposes of determining whether employer was directly liable under Title VII. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

[20] Civil Rights

≈ Weight and Sufficiency of Evidence

Jury's finding that employer had constructive knowledge of harassment of Mexican-American employee by coworker, for purposes of determining whether employer was directly liable for harassment under Title VII, was supported by sufficient evidence, including evidence that manager was present when coworker shouted ethnic insults at employee and that abuse continued on daily basis. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

[21] Civil Rights

≈ Questions of Law or Fact

Issue whether manager of tractor-trailer dealership's service department was of sufficiently high level that his constructive notice of harassment of Mexican-American employee by coworker constituted notice to dealership's owner, such that employer was liable for harassment, was for jury in Title VII action; in contrast to a corporate giant, manager was separated from employer's owner by only one person, and there was only one other manager on site where harassment occurred. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[22] Civil Rights

≈ Questions of Law or Fact

Issue whether employer's anti-discrimination policy prevented employer from having constructive notice of harassment of Mexican-American employee by coworker, for purposes of determining whether employer was directly liable under Title VII, was for jury; despite employer's claims of policy's effectiveness, no member of management hierarchy was familiar with it, it was not posted in workplace, and it was inexplicably missing from employee's personnel file. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[23] Civil Rights

≈ Knowledge or Notice; Preventive or Remedial Measures

An employer's anti-harassment policy must be found ineffective, for purposes of determining whether the employer is liable under Title VII for harassment of an employee by a coworker, when company practice indicates a tolerance towards harassment or discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5 Cases that cite this headnote

[24] Civil Rights

≈ Exemplary or Punitive Damages

Evidence was insufficient to support jury's finding that employer acted with malice or reckless indifference with respect to harassment of Mexican-American employee by coworker, such that punitive damages were appropriate under § 1981, which guarantees equal rights to
make and enforce contracts; employer had only constructive, not actual, notice of harassment. 42 U.S.C.A. § 1981.

13 Cases that cite this headnote

[25] Civil Rights

Questions of Law or Fact

Civil Rights

Exemplary or Punitive Damages

For the issue of punitive damages to reach the jury in case under § 1981, which guarantees equal rights to make and enforce contracts, the plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights. 42 U.S.C.A. § 1981.

10 Cases that cite this headnote

[26] Civil Rights

Exemplary or Punitive Damages

An employee seeking punitive damages from an employer under § 1981, which guarantees equal rights to make and enforce contracts, establishes malice or reckless indifference by showing that the employer discriminated in the face of the knowledge that its actions would violate federal law. 42 U.S.C.A. § 1981.

10 Cases that cite this headnote

Attorneys and Law Firms

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Banks Thomas Smith, Nancy S. Pittman, Hall & Smith, Nancy Catherine Smith Pitman, Dothan, AL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

Opinion

TJOFLAT, Circuit Judge:

The appeal in this Title VII case presents two issues: (1) whether the plaintiff made out a hostile work environment claim sufficient for the jury, and (2) whether the evidence showed that the employer acted with actual malice or reckless indifference to the plaintiff's federally protected rights. We resolve the first issue in favor of the plaintiff, and the second in favor of the employer.

I.

A.

The employer is Kenworth of Dothan, Inc. ("Kenworth"). Its owner and president is Robert Mitchell, who also owns and manages Kenworth of Birmingham, Inc. Both companies are tractor-trailer dealerships. They are supervised by the following officers, stationed in Birmingham: Andy Thurmond, Director of Operations; Jeff Weaver, Director of Parts and Services; and Laura Box, Sales Manager. Weaver and Box alternately travel from Birmingham to Dothan to supervise the dealership there. The only managers located in Dothan on a permanent basis are Tommy Davenport, manager of the Parts Department, and David Brooks, manager of the Service Department. Both of these managers report directly to Weaver.

Bradley Miller, a Mexican-American, was employed in Dothan's Parts Department as the back counter parts salesman from September to December 22, 1997, when Mitchell fired him. During that time his job duties consisted of distributing parts to the service technicians in the Service Department. The Service Department consisted of eight technicians and one shop foreman, Randy Galpin, who was hired in November 1997.

Shortly after Miller came to work in September, his coworkers in the two departments gave him several nicknames, principally "Julio," "Chico," and "Taco." Miller did not complain about his coworkers' use of these nicknames until Galpin came to work, and started calling him "Welback," "Spic," and "Mexican Mother F-----." He told Brooks, Galpin's direct supervisor, "to tell [Galpin]...to watch what he says to me." Brooks knew what Galpin was doing;
his office was located in the shop, where much of the name-calling occurred, and on some occasions he was actually present. Although he had the authority and responsibility to intervene, Brooks did nothing; he neither disciplined Galpin nor reported the matter to Weaver.

When, during a visit to the Dothan location, Box overheard another employee refer to Miller as "Jullio" or "Taco," she immediately reported the incident to Weaver, who, in turn, reported the problem to Mitchell. In response, Mitchell instructed Thurmond to review the company's anti-discrimination policies with the employees in Dothan at the November safety meeting, to be held the following week.

Brooks, Galpin, and Miller were among those present at that meeting. Focusing on the use of ethnic slurs, Thurmond warned the employees that anyone using such slurs would be terminated immediately, and instructed them to report any such incidents. After the meeting, Miller's coworkers stopped using the derogatory nicknames, except for Galpin. Thurmond's warning notwithstanding, he persisted in calling Miller "Wetback," "Spic," or "Mexican Mother F-----" until Miller was fired, on December 22, 1997.

B.

After filing a complaint with the Equal Employment Opportunity Commission and obtaining a right to sue letter, Miller brought this suit against Kenworth, under 42 U.S.C. § 2000e-1 to 2000e-17, and 42 U.S.C. § 1981. Claiming that Kenworth had subjected him to an ethnically hostile work environment and had retaliated against him for complaining about it, Miller sought legal relief in the form of compensatory and punitive damages and equitable relief. Answering Miller's complaint, Kenworth denied (1) that Miller had been subjected to ethnic discrimination sufficient to create a hostile work environment; (2) that, even assuming a hostile work environment, it had notice thereof; and (3) that it terminated Miller's employment for discriminatory reasons. It terminated his employment, Kenworth asserted, because of his poor work performance and his "vengeful attitude towards management."

The case proceeded to trial on Miller's claims. At the close of the plaintiff's evidence, Kenworth made an oral motion for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. The court did not rule on the motion, and, at the close of all of the evidence, Kenworth moved once again for judgment as a matter of law pursuant to Rule 50(a). The court reserved ruling on the motion and submitted the case to the jury under special interrogatories. The jury found against Miller on his retaliatory discharge claim, but found for him on his hostile environment claim, awarding him $25,000 in compensatory damages. The jury also found that Kenworth had acted with malice and reckless indifference in creating the ethnically hostile work environment and therefore awarded Miller $50,000 in punitive damages.

*1275 The district court thereafter addressed Kenworth's Rule 50(a) motion for judgment as a matter of law and denied it. Kenworth now appeals.

II.

[1] [2] [3] [4] We review a district court's denial of a motion for judgment as a matter of law de novo. See Mendoza v. Borden, Inc., 195 F.3d 1238, 1244 (11th Cir.1999). We therefore "review all of the evidence in the light most favorable to, and with all reasonable inferences drawn in favor of, the non-moving party." Walker v. NationsBank of Florida, N.A., 53 F.3d 1548, 1555 (11th Cir.1995). We will uphold the district court's denial if we determine that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." Id. We will reverse that denial only if we conclude that "the facts and inferences point overwhelmingly in favor of [the moving party], such that reasonable people could not arrive at a contrary verdict." Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir.1997) (citation omitted).

[5] [6] Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). A hostile work environment claim under Title VII is established upon proof that "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." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). This court has repeatedly instructed that a plaintiff wishing to establish a hostile work environment claim show: (1) that he belongs to
a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability. See, e.g., *Mendoza*, 195 F.3d at 1245 (applying these factors in the context of a hostile environment sexual harassment claim). Kenworth does not dispute that Miller belongs to a protected group (Mexican-Americans), or that the offensive comments were based on Miller's national origin and were unwelcome. Rather, Kenworth asserts that Miller failed to present substantial evidence to support findings in his favor on the fourth and fifth elements. We consider these elements in turn.

[7] Kenworth contends that Miller failed to present substantial evidence that the harassing conduct of Galpin was sufficiently severe or pervasive to alter the terms or conditions of his employment. This requirement, as defined by the Supreme Court, contains both an objective and a subjective component. See *Harris*, 510 U.S. at 21-22, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295. Thus, to be actionable, this behavior must result in both an environment "that a reasonable person would find hostile or abusive" and an environment that the victim "subjectively perceive[s] ... to be abusive." *Id*. Kenworth argues that Miller failed to carry his burden with respect to both criteria, and, as such, the district court erred in refusing to grant its motion for judgment as a matter of law.

[8] [9] [10] [11] In evaluating the objective severity of derogatory names in an intimidating manner, shouting them at Miller during the course of berating him for his job performance, or when they were "arguing with him," were "mad with him," or were "taunting him." This conduct rose above the level of off-handed comments in the course of casual conversation that the Supreme Court has refused to find actionable. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 2284, 141 L.Ed.2d 662 (1998). Third, the testimony makes it clear that these incidents were humiliating and degrading to Miller. The very nature of the coworkers' utterances, coupled with the fact that they were directed at Miller and were sometimes used in the course of reprimanding him in front of others, establishes this factor.
Finally, there was evidence that Galpin's behavior prevented Miller from performing his job, on at least one occasion. Kenworth emphasizes testimony that Miller engaged in horse play at work, used his time to make personal phone calls, and was often seen loafing with other employees, and suggests these as alternative reasons for Miller's poor job performance. Even if true, this would not prevent the jury from reasonably finding that Galpin's conduct also interfered with Miller's job performance. The Supreme Court has cautioned that harassment need not be shown to be so extreme that it produces tangible effects on job performance in order to be actionable. See Harris, 510 U.S. at 22, 114 S.Ct. at 371. Thus, having established the frequency, severity, and humiliating nature of the conduct, Miller's failure to establish convincingly how Galpin's conduct interfered with his duties is not fatal to his hostile environment claim, given the totality of the circumstances. We therefore cannot conclude that the jury unrealistically found Galpin's conduct to be sufficiently severe and pervasive such that the terms or conditions of Miller's employment were altered.

Kenworth also argues that Miller failed to establish his subjective belief that Galpin's conduct was abusive. Miller testified that he told Galpin "no, don't say it any more," or "I am tired of hearing that." It bothered him enough that, prior to his termination, he informed coworkers that he had consulted a lawyer regarding Galpin's harassment. Kenworth points us instead to Miller's failure to address any complaints about Galpin's conduct to Davenport, his immediate supervisor, and to provide Brooks with sufficient details of Galpin's behavior at the time he asked Brooks "to tell [Galpin] he needs to watch what he says to me." Kenworth suggests that these failures, coupled with Miller's having heard Thurmond's statement at the November safety meeting that employees making ethnic slurs were to be reported to management, and having witnessed Box reprimand a coworker who addressed Miller as "Taco" and "Julio," demonstrate that Miller did not subjectively believe that Galpin's conduct was abusive or discriminatory. We cannot agree that these facts, while relevant, would prevent a reasonable jury from finding that Miller subjectively perceived Galpin's conduct as abusive. Miller did ask Galpin's own supervisor, Brooks, to tell Galpin to "watch what he [said] to [him]." Moreover, Miller knew that Brooks was present when Galpin used the epithets, yet did nothing, and he knew that Galpin had been undeterred by the warnings given by Thurmond at the November safety meeting. In the face of these experiences, we cannot conclude that Miller's failure to report Galpin's subsequent conduct is dispositive.

Kenworth contends that Miller failed to establish the fifth element of a hostile work environment claim—that, as the employer, it is responsible for the hostile work environment under either a theory of vicarious or direct liability. An employer "is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S.Ct. 2275, 2292-93, 141 L.Ed.2d 662 (1998). The employer will be strictly liable for the hostile environment if the supervisor takes tangible employment action against the victim. See id. at 807, 118 S.Ct. at 2293. However, when an employee has established a claim for vicarious liability but where no tangible employment action was taken, a defending employer may raise as an affirmative defense to liability or damages: "(a) that the employer exercised reasonable care to prevent and correct promptly any ... harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id. at 807, 118 S.Ct. at 2292-93. Where the perpetrator of the harassment is merely a co-employee of the victim, the employer will be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action. See Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir.2000).

Thus, a victim of coworker harassment must show either actual knowledge on the part of the employer or conduct sufficiently severe and pervasive as to constitute constructive knowledge to the employer. See id.

If Miller made out a case for the jury on either of these theories, the district court ruled correctly when it denied Kenworth's Rule 50(b) motion for judgment as a matter of law. Since we conclude that Miller presented evidence sufficient to establish that Kenworth had constructive knowledge of coworker harassment, and that Kenworth failed to take remedial action, we need not consider whether Miller established a case of vicarious liability.
he needs to watch what he says to me” was sufficient to give Kenworth actual notice of the harassment. We have held that merely showing a supervising manager a sexually suggestive note, received by an employee from a coworker, did not adequately apprise the manager of “the dimensions of the problem or even that there was a problem that required his attention,” and therefore did not rise to the level of “actual notice” to the employer necessary to impose liability under Title VII. See Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1365 (11th Cir.1999). Miller’s generalized comment to Brooks would similarly not constitute actual notice for which we would impose direct liability.

[20] Unfortunately for Kenworth, this was not the only notice Brooks received. There is ample evidence in the record establishing that Brooks had constructive knowledge of Galpin’s abusive comments. We have held the following factors to be germane to the issue of constructive notice of harassment: “(1) the remoteness of the location of the harassment as compared to the location of management; (2) whether the harassment occurs intermittently over a long period of time; (3) whether the victims were employed on a part-time or full-time basis; and (4) whether there were only a few, discrete instances of harassment.” Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir.1997). Brooks’ office was located in the Service Department shop, where much of Miller’s abuse occurred. Viewed in the light most favorable to Miller, the evidence presented at trial established that Brooks was actually present at times when Galpin shouted the ethnic insults at Miller. The abuse occurred on a daily basis for the month that Galpin and Miller were both full-time employees of Kenworth. Finally, Galpin’s harassment of Miller occurred up to three to four times a day, and was often directed at Miller in the presence of others. Considering the relevant factors, we find that the evidence set forth in the record, viewed in the light most favorable to Miller, was sufficient to support a jury finding of constructive notice on the part of Kenworth.

[21] Even if we find Brooks had constructive knowledge of the abuse of Miller, Kenworth argues that this cannot constitute notice to Kenworth, since Brooks is not a part of Kenworth’s “higher management,” which it claims includes only Mitchell, “arguably” Thurmond and Weaver, and “possibly” Box. The district court disagreed, and concluded that as one of only two managerial employees permanently assigned to Kenworth, Brooks constituted part of that company’s “higher management.” In Dudley v. Wal-Mart Stores, Inc., we held that actual notice of racial discrimination to two Wal-Mart store managers could not serve as notice to the corporation because they were not sufficiently high up the corporate ladder. Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1323 (11th Cir.1999). Kenworth is not similarly situated to the defendant in Dudley to justify the application of that holding to the present facts. Rather than a corporate giant where employees are separated from higher management by many intermediate-level managers, Brooks was separated from Mitchell, president and owner of Kenworth, by only one person—Weaver. This organizational structure, in conjunction with the fact that Brooks was one of only two managers on-site at Dothan, would allow a reasonable jury to conclude that Brooks was of a sufficiently high level in the company such that notice to him of the hostile work environment would serve as notice to Kenworth.

[22] Kenworth further argues that its “valid, effective and disseminated policy prohibiting harassment” precludes it from being charged with constructive notice. We have held that “[w]here there is no policy, or where there is an ineffective or incomplete policy, the employer remains liable for conduct that is so severe and pervasive as to confer constructive knowledge,” but when an employer has “promulgated an effective and comprehensive” anti-harassment policy that is “aggressively and thoroughly disseminated” to its employees, an employee’s failure to utilize the policy’s grievance process will prevent constructive knowledge of such harassment from adhering to the employer. See Farley v. Am. Cast Iron Pipe Co., 115 F.3d 1548, 1554 (11th Cir.1997). We cannot find Kenworth’s Work Place Conduct Policy to be either comprehensive or effective. It was certainly not aggressively or thoroughly disseminated. Despite Kenworth’s claims of its policy’s effectiveness, no member of the management hierarchy was familiar with it, it was not posted in the workplace, and it was inexplicably missing from Miller’s personnel file. Furthermore, a policy must be found ineffective when company practice indicates a tolerance towards harassment or discrimination. Despite the presentation given to the Dothan employees by Thurmond at the November safety meeting, Galpin’s abusive treatment of Miller continued without any intervention by Brooks, indicating acceptance and tolerance of the behavior. We cannot therefore conclude that the mere existence of Kenworth’s general anti-discrimination policy would prevent a reasonable jury from charging Kenworth with constructive notice of Galpin’s harassment of Miller.

In light of the constructive notice Kenworth had of the hostile work environment suffered by Miller, the jury could reasonably have found it directly liable to Miller if it concluded that Kenworth failed to take immediate and appropriate corrective action. There is absolutely no evidence in the record to indicate that Kenworth took any action whatsoever against Galpin, let alone that which would rise to the level of appropriate and immediate. See Fleming v. Boeing Co., 120 F.3d 242, 247 (11th Cir.1997). It was thus reasonable for the jury to conclude that Kenworth was directly liable for the hostile work environment it should reasonably have known of, yet failed to remedy.

C.

[24] [25] [26] Finally, Kenworth asks this court to hold erroneous the district court’s submission of the punitive damages issue to the jury. The Supreme Court has directed that, for the issue of punitive damages to reach the jury in a section 1981 case, the plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights. See Kolstad v. Am. Dental Ass’n., 527 U.S. 511, 536-37, 119 S.Ct. 2118, 2125-26, 144 L.Ed.2d 494 (1999). Malice or reckless indifference is established by a showing that the employer discriminated in the face of the knowledge that its actions would violate federal law. See id. at 536, 119 S.Ct. at 2125. We have held that “punitive damages will ordinarily not be assessed against employers with only constructive knowledge” of harassment; rather, punitive damages may only be considered in cases where the “discriminating employee was high[ ] up the corporate hierarchy” or where “higher management countenanced or approved [his] behavior.” Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1323 (11th Cir.1999) (internal citations omitted). Finally, the Supreme Court has held that employers may assert a good faith defense to vicarious liability for punitive damages where the “employment decisions of managerial agents ... are contrary to the employer’s ‘good-faith efforts to comply with Title VII.’ ” Kolstad, 527 U.S. at 545, 119 S.Ct. at 2129.

As discussed in part B, supra, Kenworth did not have actual notice. Even viewing the evidence in the light most favorable to Miller, we do not find sufficient evidence on the record to support the necessary finding of malice or reckless indifference by Kenworth for the federal rights of Miller to justify the award of punitive damages.

III.

Kenworth has not demonstrated that a reasonable jury could not find it directly liable for the hostile work environment suffered by Miller. The appeal from the district court’s denial of Kenworth’s motion for judgment as a matter of law is therefore DENIED. However, the assessment against Kenworth of punitive damages is contrary to the law as articulated by the Supreme Court and this circuit, and the district court’s denial of Kenworth’s motion for judgment as a matter of law on this issue is therefore REVERSED *1281 and the award of punitive damages to Miller is VACATED.

SO ORDERED.

Parallel Citations

Footnotes
* Honorable Robert L. Vining, U.S. District Judge for the Northern District of Georgia, sitting by designation.

1 Kenworth had two written discrimination policies: a “Sexual Harassment Policy” and a “Work Place Conduct Policy.” The latter policy states:

All employees of this Company are to conduct themselves in a professional, mature manner and be polite and cordial to all customers, vendors, and other employees. The following is a list of behaviors that will not be tolerated. The list includes but is not limited to the use ofprofanity, vulgar language, fighting, discriminatory remarks or name calling.

The policy contained no reference to discrimination or harassment based on national origin.

2 Because the sole question before us is whether the district court erred in denying Kenworth’s motion for judgment as a matter of law made at the close of all the evidence, the interrogatories the court submitted to the jury are irrelevant for purposes of this appeal.

3 The district court treated the jury’s finding on the retaliatory termination claim as dispositive of Miller’s claim for equitable relief. Miller does not cross-appeal the denial of equitable relief.
The district court's judgment was entered pursuant to the jury's verdict on December 29, 1999. On January 12, 2000, Kenworth served a Rule 50(b) motion for judgment as a matter of law and an alternative motion for a new trial. The motion was not filed, however, until the next day, January 13. The Rule 50(b) motion was unnecessary because the district court had reserved ruling on Kenworth's Rule 50(a) motion until after the jury returned its verdict. The alternative motion for a new trial, though, was untimely. Rule 59(b) requires that “[a]ny motion for a new trial shall be filed no later than 10 days after entry of the judgment.” (Emphasis added). Since the judgment was entered on Wednesday, December 29, 1999, the 10-day period expired on Wednesday, January 12, 2000 (taking into account the Saturdays, Sundays, and legal holidays that were not counted pursuant to Fed.R.Civ.P. 6(a)). On January 18, 2000, the court denied Kenworth's alternative post-trial motions and denied Kenworth's Rule 50(a) motion made at the close of all the evidence. We have taken the evidence in the light most favorable to Miller in setting out the facts in part I.A.

In Johnson, we concluded that "roughly fifteen separate instances of harassment over the course of four months" was sufficiently frequent, and distinguishable from Mendoza "where there were fewer instances of less objectionable conduct over longer periods of time." Johnson, 234 F.3d at 509.

Kenworth's practice was to present newly hired employees with copies of the two discrimination policies and then sign written acknowledgments of receipt, which were placed in the employees' personnel files.
BURLINGTON NORTHERN & SANTA FE RAILWAY CO., Petitioner, v. Sheila WHITE.


Synopsis

Background: Employee of railroad brought Title VII action against railroad, alleging sex discrimination and retaliation. The United States District Court for the Western District of Tennessee, Jon P. McCalla, J., entered judgment on jury verdict for employee on retaliation claim and against employee on sex discrimination and punitive damages claims, and denied railroad's motion for judgment as a matter of law. The United States Court of Appeals for the Sixth Circuit, 310 F.3d 443, reversed in part and remanded. On rehearing en banc, the Court of Appeals, 364 F.3d 789, affirmed denial of judgment as a matter of law, but remanded as to punitive damages. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Breyer, held that:


[2] retaliation provision contains materiality requirement and objective standard;

[3] whether reassignment of duties constituted materially adverse action was jury question; and

[4] whether 37-day suspension constituted materially adverse action also was jury question.

Affirmed.

Justice Alito filed opinion concurring in the judgment.

West Headnotes (6)

[1] Civil Rights

⇒ Adverse Actions in General

Application of Title VII retaliation provision is not limited to employer's actions that affect terms, conditions or status of employment, or those that occur at workplace, i.e. scope of retaliation provision is broader than that of Title VII's substantive discrimination provision; abrogating Von Gunten v. Maryland, 243 F.3d 858; Robinson v. Pittsburgh, 120 F.3d 1286; Mattern v. Eastman Kodak Co., 104 F.3d 702; Manning v. Metropolitan Life Ins. Co., 127 F.3d 686. Civil Rights Act of 1964, §§ 703(a), 704(a), 42 U.S.C.A. §§ 2000e-2(a), 2000e-3(a).

626 Cases that cite this headnote

[2] Civil Rights

⇒ Adverse Actions in General

Title VII retaliation provision contains materiality requirement and objective standard; thus, provision requires showing that reasonable employee would have found employer's challenged action materially adverse, i.e. that challenged action could well dissuade reasonable employee from protected conduct. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

3711 Cases that cite this headnote

[3] Civil Rights

⇒ Questions of Law or Fact

Whether reassignment of railroad employee from forklift operator to track labor duties rose to level of materially adverse employer action was for jury, in employee's Title VII retaliation action, given evidence that forklift operator position had higher prestige, was considered better job, and was less arduous than track laborer position. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).
Civil Rights

Adverse Actions in General
Reassignment of duties can potentially constitute retaliatory discrimination within scope of Title VII retaliation provision, even though unaccompanied by demotion; whether reassignment rises to level of retaliation depends on whether it is materially adverse to reasonable employee. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

Civil Rights

Discipline
Civil Rights

Back Pay or Lost Earnings
Fact that employer that had suspended employee without pay during investigation into insubordination charge had later reinstated employee with back pay, on finding of no insubordination, did not, by itself, preclude employee's obtaining compensatory damages under Title VII retaliation provision. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

Questions of Law or Fact
Whether 37-day unpaid investigatory suspension of employee, later rescinded with back pay, rose to level of materially adverse employer action, was for jury, in employee's Title VII retaliation action; reasonable employee could have found like period of time without paycheck to be serious hardship that would act as deterrent to protected activity. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), and its antiretaliation provision forbids "discrimination [on] against" an employee or job applicant who, inter alia, has "made a charge, testimony, assisted, or participated in" a Title VII proceeding or investigation, § 2000e-3(a). Respondent White, the only woman in her department, operated the forklift at the Tennessee Yard of petitioner Burlington Northern & Santa Fe Railway Co. (Burlington). After she complained, her immediate supervisor was disciplined for sexual harassment, but she was removed from forklift duty to standard track laborer tasks. She filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming that the reassignment was unlawful gender discrimination and retaliation for her complaint. Subsequently, she was suspended without pay for insubordination. Burlington later found that she was not insubordinate, reinstated her, and awarded her backpay for the 37 days she was suspended. The suspension led to another EEOC retaliation charge. After exhausting her administrative remedies, White filed an action against Burlington in federal court claiming, as relevant here, that Burlington's actions in changing her job responsibilities and suspending her for 37 days amounted to unlawful retaliation under Title VII. A jury awarded her compensatory damages. In affirming, the Sixth Circuit applied the same standard for retaliation that it applies to a substantive discrimination offense, holding that a retaliation plaintiff must show an "adverse employment action," defined as a "materially adverse change in the terms and conditions" of employment. The Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Held:

1. The antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. The language of the substantive and antiretaliation provisions differ in important ways.

The terms "hire," "discharge," "compensation," "terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" explicitly limit the substantive provision's scope to actions that affect employment or alter workplace conditions. The
antiretaliation provision has no such limiting words. This Court presumes that, where words differ as they do here, Congress has acted intentionally and purposely. There is strong reason to believe that Congress intended the differences here, for the two provisions differ not only in language but also in purpose. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their status, while the antiretaliation provision seeks to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. To secure the first objective, Congress needed only to prohibit employment-related discrimination. But this would not achieve the second objective because it would not deter the many forms that effective retaliation can take, therefore failing to fully achieve the antiretaliation provision's purpose of "[m]aintaining unfettered access to statutory remedial mechanisms," Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808. Thus, purpose reinforces what the language says, namely, that the antiretaliation provision is not limited to actions affecting employment terms and conditions. Neither this Court's precedent nor the EEOC's interpretations support a contrary conclusion. Nor is it anomalous to read the statute to provide broader protection for retaliation victims than for victims of discrimination. Congress has provided similar protection from retaliation in comparable statutes. And differences in the purpose of the two Title VII provisions remove any perceived "anomaly," for they justify this difference in interpretation. Pp. 2411–2414.

2. The antiretaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee or applicant. This Court agrees with the Seventh and District of Columbia Circuits that the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Rochen v. Gonzales, 438 F.3d 1211, 1219. The Court refers to material adversity to separate significant from trivial harms. The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms by prohibiting employer actions that are likely to deter discrimination victims from complaining to the EEOC, the courts, and employers. Robinson, supra, at 346, 117 S.Ct. 843. The Court refers to a reasonable employee's reactions because the provision's standard for judging harm must be objective, and thus judicially administrable. The standard is phrased in general terms because the significance of any given act of retaliation may depend upon the particular circumstances. Pp. 2414–2416.

3. Applying the standard to the facts of this case, there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim. Contrary to Burlington's claim, a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. That is presumably why the EEOC has consistently recognized retaliatory work assignments as forbidden retaliation. Here, the jury had considerable evidence that the track laborer duties were more arduous and dirtier than the forklift operator position, and that the latter position was considered a better job by male employees who resented White for occupying it. Based on this record, a jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee. Burlington also argues that the 37-day suspension without pay lacked statutory significance because White was reinstated with backpay. The significance of the congressional judgment that victims of intentional discrimination can recover compensatory and punitive damages to make them whole would be undermined if employers could avoid liability in these circumstances. Any insufficient evidence claim is unconvincing. White received backpay, but many reasonable employees would find a month without pay a serious hardship. White described her physical and emotional hardship to the jury, noting that she obtained medical treatment for emotional distress. An indefinite suspension without pay could well act as a deterrent to the filing of a discrimination complaint, even if the suspended employee eventually receives backpay. Thus, the jury's conclusion that the suspension was materially adverse was reasonable. Pp. 2416–2418.

364 F.3d 789, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, post, p. 2418.

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Opinion

Justice BREYER delivered the opinion of the Court.

*56 Title VII of the Civil Rights Act of 1964 forbids employment discrimination against “any individual” based on that individual’s “race, color, religion, sex, or national origin.” Pub.L. 88–352, § 704, 78 Stat. 257, as amended, 42 U.S.C. § 2000e–2(a). A separate section of the Act—its antiretaliation provision—prohibits an employer from “discriminat[ing] against” an employee or job applicant because that individual “opposed any practice” made unlawful by Title VII or “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation. § 2000e–3(a).

*57 The Courts of Appeals have come to different conclusions about the scope of the Act’s antiretaliation provision, particularly the reach of its phrase “discriminate against.” Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?

*2409 We conclude that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer’s actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

This case arises out of actions that supervisors at petitioner Burlington Northern & Santa Fe Railway Company took against respondent Sheila White, the only woman working in the Maintenance of Way department at Burlington’s Tennessee Yard. In June 1997, Burlington’s roadmaster, Marvin Brown, interviewed White and expressed interest in her previous experience operating forklifts. Burlington hired White as a “track laborer,” a job that involves removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Soon after White arrived on the job, a co-worker who had previously operated the forklift chose to assume other responsibilities. Brown immediately assigned White to operate the forklift. While she also performed some of the other track laborer tasks, operating the forklift was White’s primary responsibility.

*58 In September 1997, White complained to Burlington officials that her immediate supervisor, Bill Joiner, had repeatedly told her that women should not be working in the Maintenance of Way department. Joiner, White said, had also made insulting and inappropriate remarks to her in front of her male colleagues. After an internal investigation, Burlington suspended Joiner for 10 days and ordered him to attend a sexual-harassment training session.

On September 26, Brown told White about Joiner’s discipline. At the same time, he told White that he was removing her from forklift duty and assigning her to perform only standard track laborer tasks. Brown explained that the reassignment reflected co-workers’ complaints that, in fairness, a “more senior man” should have the “less arduous and cleaner job” of forklift operator. 364 F.3d 789, 792 (C.A.6 2004) (case below).

On October 10, White filed a complaint with the Equal Employment Opportunity Commission (EEOC or Commission). She claimed that the reassignment of her duties amounted to unlawful gender-based discrimination and retaliation for her having earlier complained about Joiner. In early December, White filed a second retaliation charge with the Commission, claiming that Brown had placed her under surveillance and was monitoring her daily activities. That charge was mailed to Brown on December 8.
A few days later, White and her immediate supervisor, Percy Sharkey, disagreed about which truck should transport White from one location to another. The specific facts of the disagreement are in dispute, but the upshot is that Sharkey told Brown later that afternoon that White had been insubordinate. Brown immediately suspended White without pay. White invoked internal grievance procedures. Those procedures led Burlington to conclude that White had not been insubordinate. Burlington reinstated White to her position and awarded her backpay for the 37 days she was *suspended. White filed an additional retaliation charge with the EEOC based on the suspension.

**2410 B**

After exhausting administrative remedies, White filed this Title VII action against Burlington in federal court. As relevant here, she claimed that Burlington's actions—(1) changing her job responsibilities, and (2) suspending her for 37 days without pay—amounted to unlawful retaliation in violation of Title VII. § 2000e-3(a). A jury found in White's favor on both of these claims. It awarded her $43,500 in compensatory damages, including $3,250 in medical expenses. The District Court denied Burlington's post-trial motion for judgment as a matter of law. See Fed. Rule Civ. Proc. 50(b).

Initially, a divided Sixth Circuit panel reversed the judgment and found in Burlington's favor on the retaliation claims. 310 F.3d 443 (2002). The full Court of Appeals vacated the panel's decision, however, and heard the matter en banc. The court then affirmed the District Court's judgment in White's favor on both retaliation claims. While all members of the en banc court voted to uphold the District Court's judgment, they differed as to the proper standard to apply. Compare 364 F.3d, at 795–800, with id., at 809 (Clay, J., concurring).

II

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." § 2000e–3(a). No one doubts that the term "discriminate against" refers to distinctions or differences in treatment that injure protected individuals. See Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 174, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005); Price Waterhouse v. Hopkins, 490 U.S. 228, 244, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion); see also 4 Oxford English Dictionary 758 (2d ed.1989) (def.3b). But different Circuits have come to different conclusions about whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.

Some Circuits have insisted upon a close relationship between the retaliatory action and employment. The Sixth Circuit majority in this case, for example, said that a plaintiff must show an "adverse employment action," which it defined as a "materially adverse change in the terms and conditions" of employment. 364 F.3d, at 795 (internal quotation marks omitted). The Sixth Circuit has thus joined those Courts of Appeals that apply the same standard for retaliation that they apply to a substantive discrimination offense, holding that the challenged action must "result in an adverse effect on the "terms, conditions, or benefits" of employment." Von Gunten v. Maryland, 243 F.3d 858, 866 (C.A.4 2001); see Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (C.A.3 1997). The Fifth and the Eighth Circuits have adopted a more restrictive approach. They employ an "ultimate employment decision[n]" standard, which limits actionable retaliatory conduct to acts "such as firing, granting leave, discharging, promoting, and compensating." Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (C.A.5 1997); see Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (C.A.8 1997).

Other Circuits have not so limited the scope of the provision. The Seventh and the District of Columbia Circuits have said that the plaintiff must show that the "employer's challenged action would have been material to a reasonable employee," which in contexts like the present one means that **2411 it would likely have "discouraged a reasonable worker from making or supporting a charge of discrimination." Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 662 (C.A.7 2005); see Rochon v. Gonzales, 438 F.3d 1211, 1217–1218 (C.A.D.C.2006). And the Ninth Circuit, following EEOC *61 guidance, has said that the plaintiff must simply establish "adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." Ray v. Henderson, 217 F.3d 1234, 1242–1243 (2000). The concurring judges below would have applied this last mentioned standard. 364 F.3d, at 809 (opinion of Clay, J.).
We granted certiorari to resolve this disagreement. To do so requires us to decide whether Title VII's antiretaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace. And we must characterize how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope.

A

[1] Petitioner and the Solicitor General both argue that the Sixth Circuit is correct to require a link between the challenged retaliatory action and the terms, conditions, or status of employment. They note that Title VII's substantive antidiscrimination provision protects an individual only from employment-related discrimination. They add that the antiretaliation provision should be read in pari materia with the antidiscrimination provision. And they conclude that the employer actions prohibited by the antiretaliation provision should similarly be limited to conduct that “affects the employee's ‘compensation, terms, conditions, or privileges of employment.’” Brief for United States as Amicus Curiae 13 (quoting § 2000e-2(a)(1)); see Brief for Petitioner 13 (same).

We cannot agree. The language of the substantive provision differs from that of the antiretaliation provision in important ways. Section 703(a) sets forth Title VII's core antidiscrimination provision in the following terms:

“It shall be an unlawful employment practice for an employer—

*(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

*(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.” § 2000e-2(a) (emphasis added).

Section 704(a) sets forth Title VII's antiretaliation provision in the following terms:

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” § 2000e-3(a) (emphasis added).

The italicized words in the substantive provision—“hire,” “discharge,” “compensation, terms, conditions, or privileges of employment,” “employment opportunities,” and “status as an employee”—explicitly **2412 limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision. Given these linguistic differences, the question here is not whether identical or similar words should be read in pari materia to mean the same thing. See, e.g., Pasquantino v. United States, 544 U.S. 349, 355, n. 2, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005); McFarland v. Scott, 512 U.S. 849, 858, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994); Sullivan v. Everhart, 494 U.S. 83, 92, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990). Rather, the question is whether Congress intended its different *63 words to make a legal difference. We normally presume that, where words differ as they differ here, “Congress acts intentionally and purposely in the disparate inclusion or exclusion.” * Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983).

There is strong reason to believe that Congress intended the differences in its language suggests, for the two provisions differ not only in language but in purpose as well. The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–801, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.
"equality of employment opportunities" and the elimination of practices that tend to bring about "stratified work environments," id., at 800, 93 S.Ct. 1817, would be achieved were all employment-related discrimination miraculously eliminated.

But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the antiretaliation provision's objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. See, e.g., Rachon v. Richmond, 653 F.3d at 1213 (Federal Bureau of Investigation retaliation against employee "took the form of the FBI's refusal, contrary to policy, to investigate death of a federal officer" (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination)). A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

Thus, purpose reinforces what language already indicates, namely, that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. Cf. Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 319, 126 S.Ct. 941, 952, 163 L.Ed.2d 797 (2006) (rejecting statutory construction that would "[r]eject[ ] [s]ubject-matter jurisdiction prescriptions as in part materia because doing so would "overlook[ ] the discrete offices of those concepts").

Our precedent does not compel a contrary conclusion. Indeed, we have found no case in this Court that offers petitioner or the United States significant support. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), as petitioner notes, speaks of a Title VII requirement that violations involve "tangible employment action" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Id., at 761, 118 S.Ct. 2257. But Ellerth does so only to "identify a class of [hostile work environment] cases" in which an employer should be held vicariously liable (without an affirmative defense) for the acts of supervisors. Id., at 760, 118 S.Ct. 2257, see also Pennsylvania State Police v. Suders, 552 U.S. 129, 143, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004) (explaining holdings in Ellerth and Faragher v. Boca Raton, 552 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), as dividing hostile work environment claims into two categories, one in which the employer is strictly liable because a tangible employment action is taken and one in which the employer can make an affirmative defense). Ellerth did not discuss the scope of the general antidiscrimination provision. See 552 U.S., at 761, 118 S.Ct. 2257 (using "concept of a tangible employment action [that] appears in numerous cases in the Courts of Appeals" only "for resolution of the vicarious liability issue"). And Ellerth did not mention Title VII's antiretaliation provision at all. At most, Ellerth sets forth a standard that petitioner and the Solicitor General believe the antiretaliation provision ought to contain. But it does not compel acceptance of their view.

Nor can we find significant support for their view in the EEOC's interpretations of the provision. We concede that the EEOC stated in its 1991 and 1988 Compliance Manuals that the antiretaliation provision is limited to "adverse employment-related action." 2 EEOC Compliance Manual § 614.1(d), p. 614–5 (1991) (hereinafter EEOC 1991 Manual); EEOC Compliance Manual § 614.1(d), p. 614–5 (1988) (hereinafter EEOC 1988 Manual). But in those same manuals the EEOC lists the "[e]ssential [e]lements" of a retaliation claim along with language suggesting a broader interpretation. EEOC 1991 Manual § 614.3(d), pp. 614–8 to 614–9 (complainant must show "that the complaint was in some manner subjected to adverse treatment by the respondent because of the protest or opposition"); EEOC 1988 Manual § 614.3(d), pp. 614–8 to 614–9 (same).

adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity”). And the **2414 EEOC 1998 — Manual, which offers the Commission’s only direct statement on the question of whether the antiretaliation provision is limited to the same employment-related activity covered by the antidiscrimination provision, answers that question in the negative—directly contrary to petitioner’s reading of the Act. *Ibid.*

Finally, we do not accept petitioner’s and the Solicitor General’s view that it is “anomalous” to read the statute to provide broader protection for victims of retaliation than for those whom Title VII primarily seeks to protect, namely, victims of race-based, ethnic-based, religion-based, or gender-based discrimination. *Brief for Petitioner 17; Brief for United States as Amicus Curiae 14–15.* Congress has provided similar kinds of protection from retaliation in comparable statutes without any judicial suggestion that those provisions are limited to the conduct prohibited by the primary substantive provisions. The National Labor Relations Act, to which this Court has “drawn analogies ... in other Title VII contexts,” *Hishon v. King & Spalding*, 467 U.S. 69, 76, n. 8, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), provides an illustrative example. Compare 29 U.S.C. § 158(a)(3) (substantive provision prohibiting employer “discrimination in regard to ... any term or condition of employment to encourage or discourage membership in any labor organization”) with § 158(a)(4) (retaliatory provision making it unlawful for an employer to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter”); see also *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) (construing antiretaliation provision to “prohibit[e] a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees *67 in the exercise of protected activities,” including the retaliatory filing of a lawsuit against an employee); *NLRB v. Scrivener*, 405 U.S. 117, 121–122, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972) (purpose of the antiretaliation provision is to ensure that employees are “completely free from coercion against reporting”) unlawful practices).

In any event, as we have explained, differences in the purpose of the two provisions remove any perceived “anomaly,” for they justify this difference of interpretation. See *supra*, at 2412. Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. “Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.” *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960). Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.

For these reasons, we conclude that Title VII’s substantive provision and its antiretaliation provision are not coterminous. The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called “ultimate employment decisions.” See *supra*, at 2410.

### B

[2] The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. As we have explained, the **2415 Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. *68 In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Rochon*, 438 F.3d, at 1219 (quoting *Washington*, 420 F.3d, at 662).

We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code for the American workplace.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); see *Faragher*, 524 U.S., at 788, 118 S.Ct. 2275 (judicial standards for sexual harassment must “filter out complaints attacking ‘the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing’ ”). An employee’s decision to report discriminatory behavior cannot immunize that employee from those petty slights
or minor annoyances that often take place at work and that all employees experience. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 669 (3d ed. 1996) (noting that "courts have held that personality conflicts at work that generate antipathy" and "'snubbing' by supervisors and co-workers" are not actionable under § 704(a)). The antiretaliation provision seeks to prevent employer interference with "unfettered access," to Title VII's remedial mechanisms. Robinson, 519 U.S., at 346, 117 S.Ct. 843. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employees. Ibid. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8–13.

We refer to reactions of a reasonable employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here. See, e.g., Suders, 542 U.S., at 141, 124 S.Ct. 2342 (constructive discharge doctrine); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (hostile work environment doctrine).

We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." Oncale, supra, at 81–82, 118 S.Ct. 998. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. Cf., e.g., Washington, supra, at 662 (finding flex-time schedule critical to employee with disabled child). A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. See 2 EEOC 1998 Manual § 8, p. 8–14. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." Washington, supra, at 661.

Finally, we note that contrary to the claim of the concurrence, this standard does not require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge." Post, at 2420 (ALITO, J., concurring in judgment). Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

III

Applying this standard to the facts of this case, we believe that there was a sufficient evidentiary basis to support the jury's verdict on White's retaliation claim. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150–151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The jury found that two of Burlington's actions amounted to retaliation: the reassignment of White from forklift duty to standard laborer tasks and the 37-day suspension without pay.

[3] Burlington does not question the jury's determination that the motivation for these acts was retaliatory. But it does question the statutory significance of the harm these acts caused. The District Court instructed the jury to determine whether respondent "suffered a materially adverse change in the terms or conditions of her employment," App. 63, and the Sixth Circuit upheld the jury's finding based on that same stringent interpretation of the anti-retaliation provision (the interpretation that limits § 704 to the same employment-related conduct forbidden by § 703). Our holding today makes clear that the jury was not required to find that the challenged actions were related to the terms or conditions of employment. And insofar as the jury also found that the actions were "materially adverse," its findings are adequately supported.

[4] First, Burlington argues that a reassignment of duties cannot constitute retaliatory discrimination where, as here, both the former and present duties fall within the same
throughout its history, Title VII has provided for injunctions to “bar like discrimination in the future,” Albermarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (internal quotation marks omitted), an important form of relief. Pub.L. 88–352, § 706(g), 78 Stat. 261, as amended, 42 U.S.C. § 2000e–5(g). And we have no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay. In any event, Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory (as White received here) and punitive damages, concluding that the additional remedies were necessary to “help make victims whole.” West v. Gibson, 527 U.S. 212, 219, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999) (citing H.R.Rep. No. 102–40, pt. 1, pp. 64–65 (1991), U.S.Code Cong. & Admin.News 1991, pp. 549, 602–603); see 42 U.S.C. §§ 1981a(a)(1), (b). We would undermine the significance of that congressional judgment were we to conclude that employers could avoid liability in these circumstances.

To be sure, reassignment of job duties is not automatically actionable. Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and “should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.” Oncale, 523 U.S., at 81, 118 S.Ct. 998. But here, the jury had before it considerable evidence that the track laborer duties were “by all accounts more arduous and dirtier”; that the “forklift operator position required more qualifications, which is an indication of prestige”; and that the “forklift operator position was objectively considered a better job and the male employees resented White for occupying it.” 364 F.3d, at 803 (internal quotation marks omitted). Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.

Second, Burlington argues that the 37–day suspension without pay lacked statutory significance because Burlington ultimately reinstated White with backpay. Burlington says that “it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full *72 back pay” to be unlawful, particularly because Title VII, throughout much of its history, provided no relief in an equitable action for victims in White’s position. Brief for Petitioner 36.

We do not find Burlington’s last mentioned reference to the nature of Title VII’s remedies convincing. After all,
For these reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice ALITO, concurring in the judgment.
I concur in the judgment, but I disagree with the Court’s interpretation of the antiretaliation provision of Title VII of the Civil Rights Act of 1964, § 704(a), 78 Stat. 257, as amended, 42 U.S.C. § 2000e-3(a). The majority’s interpretation has no basis in the statutory language and will, I fear, lead to practical problems.

I

Two provisions of Title VII are important here. Section 703(a) prohibits a broad range of discriminatory employment practices. Among other things, § 703(a) makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

A complementary and closely related provision, § 704(a), makes it unlawful to “discriminate against” an employee for retaliatory purposes. Section 704(a) states in pertinent part:

“No other affirmative action shall be required of any employer as a result of the bringing of any charge, complaint, hearing, or proceeding under this subchapter, or because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a) (emphasis added).

In this case, we must ascertain the meaning of the term “discriminate” in § 704(a). Two possible interpretations are suggested by the language of §§ 703(a) and 704(a).

The first is the interpretation that immediately springs to mind if § 704(a) is read by itself—i.e., that the term “discriminate” in § 704(a) means what the term literally means, to treat differently. Respondent staunchly defends this interpretation, which the majority does not embrace, but this interpretation presents problems that are at least sufficient to raise doubts about its correctness. Respondent’s interpretation makes § 703(a) narrower in scope than § 704(a) and thus implies that the persons whom Title VII is principally designed to protect—victims of discrimination based on race, color, sex, national origin, or religion—receive less protection than victims of retaliation. In addition, respondent’s interpretation makes a federal case of any small difference in the way an employee who has engaged in protected conduct is treated. On respondent’s view, a retaliation claim must go to the jury if the employee creates a genuine issue on such questions as whether the employee was given any more or less work than others, was subjected to any more or less supervision, or was treated in a somewhat less friendly manner because of his protected activity. There is reason to doubt that Congress meant to burden the federal courts with claims involving relatively trivial differences in treatment. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); Faragher v. Boca Raton, 524 U.S. 775, 786-788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

The other plausible interpretation, and the one I favor, reads §§ 703(a) and 704(a) together. Under this reading, “discriminator[i]on” under § 704(a) means the discriminatory acts reached by § 703(a)—chiefly, discrimination “with respect to ... compensation, terms, conditions, or privileges of employment.” This is not, admittedly, the most straightforward reading of the bare language of § 704(a), but it is a reasonable reading that harmonizes §§ 703(a) and 704(a). It also provides an objective standard that permits insignificant claims to be weeded out at the summary judgment stage, while providing ample protection for employees who are subjected to real retaliation.

The Courts of Appeals that have interpreted § 704(a) in this way state that it requires a materially adverse employment action. See, e.g., Von Gunten v. Maryland, 243 F.3d 858, 865 (C.A.4 2001); Gupta v. Florida Bd. of Regents, 212 F.3d 571, 587 (C.A.11 2000), cert. denied, 531 U.S. 1076, 121 S.Ct. 772, 148 L.Ed.2d 671 (2001); Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (C.A.3 1997). In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761-762, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), we “imported” this test for use in a different context—to define the term “tangible employment action,” a concept we used to limit an employer’s liability for harassment carried out by its supervisors. We explained that “[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different

responsibilities, or a decision causing a significant change in benefits.” Id., at 761, 118 S.Ct. 2257.

II

The majority does not adopt either of the two interpretations noted above. In Part II–A of its opinion, the majority criticizes the interpretation that harmonizes §§ 703(a) and 704(a) as not sufficiently faithful to the language of § 704(a). Although we found the materially adverse employment action test worthy of “import[ation]” in Ellerth, the majority now argues that this test is too narrow because it permits employers to take retaliatory measures outside the workplace. Ante, at 2412 (citing Rochon v. Gonzales, 438 F.3d 1211, 1213 (C.A.D.C.2006); Berry v. Stevinson Chevrolet, 74 F.3d 980, 984, 986 (C.A.10 1996)). But the majority’s concern is misplaced.

First, an employer who wishes to retaliate against an employee for engaging in protected conduct is much more likely to do so on the job. There are far more opportunities for retaliation in that setting, and many forms of retaliation off the job constitute crimes and are therefore especially risky.

Second, the materially adverse employment action test is not limited to on-the-job retaliation, as Rochon, one of the cases cited by the majority, illustrates. There, a Federal Bureau of Investigation agent claimed that the Bureau had retaliated against him by failing to provide the off-duty security that would otherwise have been furnished. See 438 F.3d, at 1213–1214. But, for an FBI agent whose life may be threatened during off-duty hours, providing security easily qualifies as a term, condition, or privilege of employment. Certainly, if the FBI had a policy of denying protection to agents of a particular race, such discrimination would be actionable under § 703(a).

But in Part II–B, rather than adopting the more literal interpretation based on the language of § 704(a) alone, the majority instead puts that language aside and adopts a third interpretation—one that has no grounding in the statutory language. According to the majority, § 704(a) does not reach all retaliatory differences in treatment but only those retaliatory acts that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Ante, at 2415 (internal quotation marks omitted).

I see no sound basis for this test. The language of § 704(a), which employs the unadorned term “discriminate,” does not support this test. The unstated premise of the majority’s reasoning seems to be that § 704(a)’s only purpose is to prevent employers from taking those actions that are likely to stop employees from complaining about discrimination, but this unstated premise is unfounded. While surely one of the purposes of § 704(a) is to prevent employers from engaging in retaliatory measures that dissuade employees from engaging in protected conduct, there is no reason to suppose that this is § 704(a)’s only purpose. Indeed, the majority itself identifies another purpose of the antiretaliatory provision: “to prevent harm to individuals” who assert their rights. Ante, at 2412. Under the majority’s test, however, employer conduct that causes harm to an employee is permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination.

III

The practical consequences of the test that the majority adopts strongly suggest that this test is not what Congress intended.

First, the majority’s test leads logically to perverse results. Under the majority’s test, § 704(a) reaches retaliation that well might dissuade an employee from making or supporting “a charge of discrimination.” Ante, at 2415 (internal quotation marks omitted). I take it that the phrase “a charge of discrimination” means the particular charge that *78 the employee in question filed, * and if that is the proper interpretation, the nature of the discrimination that led to the filing of the charge must be taken into account in applying § 704(a). Specifically, the majority’s interpretation logically implies that the degree of protection afforded to a victim of retaliation is inversely proportional to the severity of the original act of discrimination that prompted the retaliation. A reasonable employee who is subjected to the most severe discrimination will not easily be dissuaded from filing a charge by the threat of retaliation; the costs of filing the charge, including possible retaliation, will have to be great to outweigh the benefits, such as preventing the continuation of the discrimination in the future and obtaining damages and other relief for past discrimination. Because the possibility of relatively severe retaliation will not easily dissuade this employee, the employer will be able to engage in relatively severe retaliation without incurring liability under § 704(a). On the other hand, an employee who is subjected
to a much milder form of discrimination will be much more easily dissuaded. For this employee, the costs of complaining, including possible retaliation, will not have to be great to outweigh the lesser benefits that might be obtained by filing a charge. These topsy-turvy results make no sense.

Second, the majority's conception of a reasonable worker is unclear. Although the majority first states that its test is whether a "reasonable worker" might well be dissuaded, ante, at 2415 (internal quotation marks omitted), it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account. The majority comments that "the significance of any given act of retaliation will often depend upon the particular circumstances," and provides the following illustration: "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." Ibid.

This illustration suggests that the majority's test is not whether an act of retaliation well might dissuade the average reasonable worker, putting aside all individual characteristics, but, rather, whether the act well might dissuade a reasonable worker who shares at least some individual characteristics with the actual victim. The majority's illustration introduces three individual characteristics: age, gender, and family responsibilities. How many more individual characteristics a court or jury may or must consider is unclear.

Finally, the majority's interpretation contains a loose and unfamiliar causation standard. As noted, the majority's test asks whether an employer's retaliatory act "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Ibid. (internal quotation marks omitted; emphasis added). Especially in an area of the law in which standards of causation are already complex, the introduction of this new and unclear standard is unwelcome.

For these reasons, I would not adopt the majority's test but would hold that § 704(a) reaches only those discriminatory practices covered by § 703(a).

Footnotes
*
The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

ISection 703(a) states in pertinent part:

"It shall be an unlawful employment practice for an employer—

IV

Applying this interpretation, I would affirm the decision of the Court of Appeals. The actions taken against respondent—her assignment to new and substantially less desirable duties and her suspension without pay—fall within the definition of an "adverse employment action."

*80 With respect to respondent's reassignment, Eilerth specifically identified a "reassignment with significantly different responsibilities" as a "tangible employment action." 524 U.S., at 761, 118 S.Ct. 2257. Here, as the Court of Appeals stated, "[i]n essence, ... the reassignment was a demotion." 364 F.3d 789, 803 (C.A.6 2004). The "new position was by all accounts more arduous and 'dirtier,' " Ibid., and petitioner's **2422 sole stated rationale for the reassignment was that respondent's prior duties were better suited for someone with greater seniority. This was virtually an admission that respondent was demoted when those responsibilities were taken away from her.

I would hold that respondent's suspension without pay likewise satisfied the materially adverse employment action test. Accordingly, although I would hold that a plaintiff asserting a § 704(a) retaliation claim must show the same type of materially adverse employment action that is required for a § 703(a) discrimination claim, I would hold that respondent met that standard in this case, and I, therefore, concur in the judgment.

Parallel Citations

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a) (emphasis added).

2 The alternative interpretation—that “a charge” does not mean the specific charge filed by the employee but an average or generic charge—would be unworkable. Without gauging the severity of the initial alleged discrimination, a jury cannot possibly compare the costs and benefits of filing a charge and, thus, cannot possibly decide whether the employer’s alleged retaliatory conduct is severe enough to dissuade the filing of a charge. A jury will have no way of assessing the severity of the average alleged act of discrimination that leads to the filing of a charge, and, therefore, if “a charge” means an average or generic charge, the majority’s test will leave juries hopelessly at sea.
2 Cases that cite this headnote

[3] Civil Rights
   ⇦ Motive or Intent; Pretext
   Even assuming reasonable jury could find discriminatory animus on part of city in
   recommending termination of female police officer, causal link between that animus and her
   termination was broken by civil service board's hearing and independent decision to actually
   terminate her, thus defeating officer's sex discrimination claim, absent any evidence that
   city's alleged discriminatory animus influenced board's decision, or that the board, which had
   sole power and discretion to terminate police officers under Alabama law, acted as a “cat's
   paw” or rubber stamp for city's recommendation.
   Civil Rights Act of 1964, § 703(a)(1), 42
   249, § 1 et seq.

66 Cases that cite this headnote

[4] Civil Rights
   ⇦ Practices Prohibited or Required in General;
   Elements
   Civil Rights
   ⇦ Discharge or Layoff
   To prove intentional discrimination in terms and conditions of employment, plaintiff must establish (1) employer's discriminatory animus towards employee based on employee's protected characteristic; (2) a discharge or other significant change in terms or conditions of employment; and (3) a causal link between the two. Civil Rights Act of 1964, § 703(a)(1), 42

5 Cases that cite this headnote

[5] Civil Rights
   ⇦ Discharge or Layoff
   Civil Rights
   ⇦ Presumptions, Inferences, and Burden of
   Proof
   When biased recommender and actual decisionmaker are not the same person or
persons, Title VII plaintiff may not benefit from inference of causation that would arise from their common identity, but, instead, plaintiff must prove that discriminatory animus behind the recommendation, and not underlying employee misconduct identified in recommendation, was an actual cause of the other party’s decision to terminate the employee. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

59 Cases that cite this headnote

[6] Civil Rights
  ⇔ Motive or Intent; Pretext

Under “cat’s paw” theory, causation element of Title VII claim may be established if plaintiff shows that decisionmaker followed biased recommendation without independently investigating complaint against employee; in such a case, the recommender is using decisionmaker as a mere conduit, or “cat’s paw,” to give effect to recommender’s discriminatory animus. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

105 Cases that cite this headnote

I. BACKGROUND

Sandra Stimpson was employed as a police officer by the city of Tuscaloosa since 1975. Over the course of her employment, she had a troubled disciplinary record. She received various forms of punishments ranging from reprimands to suspensions, for such transgressions as: giving beer to a prisoner; several instances of deception, including lying about making secret tape recordings of conversations with a superior officer; rudeness to the public; insubordination; several unexcused absences, including at least one while moonlighting; and one instance of threatening to shoot her partner. Despite the repetitive and serious nature of some of these violations, Stimpson was given many chances to improve her behavior.

In September of 1992, Stimpson came to work with her hand and wrist immobilized in a splint. She presented a note from her doctor, Dr. Ikard, stating that she was fit to return to work. After seeing the splint, Stimpson’s superiors became concerned that her immobilized hand might hinder her ability to perform some of her official duties safely. Chief Swindle decided that the City needed to verify that Dr. Ikard knew what Stimpson’s job duties were and took those duties into account when he deemed her fit to return to work. When Assistant Chief Wilkins contacted Dr. Ikard to clarify these issues, Ikard refused to discuss the matter unless Stimpson signed a medical release. Wilkins next sent Stimpson’s sergeant to get her to execute a release, but Stimpson refused to sign. The next day, Wilkins himself requested that she sign the release, but *1330 Stimpson again refused. The following day, Wilkins again approached Stimpson. This time he had developed a new “return to work” form that described a patrol officer’s job duties and explained that there was no alternative “light-duty” assignment available. He asked Stimpson to return to Dr. Ikard and have him sign the new form. Stimpson refused. He then ordered Stimpson to go to the Emergi-Care clinic to have a different doctor examine her hand and wrist and determine whether she could safely perform her job functions. Faced with suspension if she did not comply, Stimpson went to the clinic.
District of Alabama under Title VII and the ADEA. She eventually added counts under 42 U.S.C. § 1983 against Swindle and Wilkins and added the members of the Civil Service Board as defendants in their official capacity. Before trial, the § 1983 claims were dropped and the Civil Service Board's motion for summary judgment was granted. The Board was subsequently reintroduced as a Rule 19 defendant because it would be needed procedurally if reinstatement was granted to Stimpson, but the Board was no longer a defendant for liability purposes.

Prior to the introduction of evidence at trial, Stimpson voluntarily dismissed her age discrimination claim. Before and at trial, Stimpson's case was based on trying to show that the City's decision to recommend her termination was the discriminatory adverse employment action. At no time did Stimpson ever introduce any evidence or even make a concrete allegation that the Board's decision to terminate her was based on her sex. The City moved for judgment as a matter of law on several grounds, including that it had not actually terminated Stimpson, and that she had not proven that the decision to terminate her, made by the Board, was based on sex. Following the district court's denial of the motion, the jury returned a verdict in favor of Stimpson. The court's final judgment ordered her reinstatement and awarded her $300,000 damages plus back pay and attorneys fees. Appellants filed timely notice of appeal and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

[1] [2] We review denial of a motion for judgment as a matter of law de novo, using the same legal standard as the district court. Walls v. Button Gwinnett Bancorp, Inc., 1 F.3d 1198, 1200 (11th Cir.1993). Under this standard, we must view the evidence in the light most favorable to the non-moving party. Id.

III. DISCUSSION

[3] [4] Appellants argue that Stimpson failed to produce any evidence that the Civil Service Board's decision to terminate her was based on sex. Stimpson contends that the motivation of the Board is irrelevant, and that the City's recommendation that she be terminated is actionable in and of itself. We disagree. Title VII prohibits the discharge of an employee, or other discrimination with respect to terms
and conditions of a person's employment, based on the employee's sex. 42 U.S.C. § 2000e-2(p)(1). In order to prove intentional discrimination under this section, a plaintiff must establish (1) the employer's discriminatory animus towards the employee based on the employee's protected characteristic; (2) a discharge or other significant change in the terms or conditions of employment; and (3) a causal link between the two. Llamallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir.1998). In this case, there is no question that Stimpson was discharged. Although we have grave reservations about the disparate treatment evidence presented by Stimpson, we need not address that issue because even assuming, arguendo, that she introduced sufficient evidence to allow a reasonable jury to find discriminatory animus on the part of the City, the causal link between that animus and her termination is broken by the Board's hearing and independent decision to actually terminate her.

We note at the outset that under Alabama law, the City has no power to terminate police officers such as Stimpson. Under Act No. 249 of the Alabama legislature, 1947 Ala. Acts 174, only the Civil Service Board has the power to do so. The Board has the discretion to terminate, give a lesser form of punishment to, or entirely vindicate a police officer brought before it. Consequently, the City's recommendation that the Board terminate Stimpson does not, itself, constitute a change in the terms or conditions of employment absent a sufficient causal link between the termination and the discriminatory animus behind the recommendation.

[5] We have previously stated the general proposition that in some cases, a discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291, 294 (11th Cir.1988). However, as we have recently explained, this causation must be truly direct. When the biased recommender and the actual decisionmaker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee. Llamallas, 163 F.3d at 1248.

*1332 [6] One way of proving that the discriminatory animus behind the recommendation caused the discharge is under the "cat's paw" theory. This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. In such a case, the recommender is using the decisionmaker as a mere conduit, or "cat's paw" to give effect to the recommender's discriminatory animus. Id. at 1249.

In this case, Stimpson has not introduced any evidence that could reasonably indicate that the City's alleged discriminatory animus influenced the Board's decision to terminate her. Furthermore, she has not introduced any evidence to show that the Board acted as a "cat's paw" or rubber stamp for the City's recommendation. To the contrary, the evidence shows that the Board has the sole power and discretion to terminate police officers, that its members are appointed by the Governor of Alabama, that it conducted a three day hearing to investigate the charges, and that during the hearing Stimpson was represented by legal counsel and was allowed to put on defense evidence and witnesses. It is hard to imagine any other procedural device that would ensure a more fair and independent decision than that of the Civil Service Board. We need not announce a bright line at which an independent investigation becomes a rubber stamp to resolve this case, because the record before us does not contain any hint of a cat's paw arrangement. Consequently, we hold that Stimpson has failed to produce sufficient evidence to allow a reasonable jury to find causation between the City's alleged discriminatory animus and the Board's decision to terminate her. We VACATE the district court's Order of Final Judgment and Permanent Injunction and REMAND with instructions to enter judgment for appellants, consistent with this opinion.

Parallel Citations

Footnotes
* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.
1. Appellants raise sixteen other grounds for reversal. Because the issue we address is dispositive of the case, we need not sort out the wheat from the chaff in the other claims of error. Appellee also filed a cross-appeal in this case, attacking the trial court's decision to grant summary judgment for the Civil Service Board. In her brief, Stimpson makes this cross appeal contingent on this Court reversing the trial court's joinder of the Board as a Rule 19 party. Because we do not reverse that ruling, we need not address Stimpson's cross-appeal.

2. We curiously note that Stimpson apparently never mentioned any discriminatory motive behind the charges at her hearing before the Civil Service Board. It seems like that would have been an ideal time and place to do so.
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Only the Westlaw citation is currently available.
United States District Court,
N.D. Alabama,
Northeastern Division.

Vincent Edward COBB, Plaintiff,
v.
FLORENCE CITY BOARD
OF EDUCATION, Defendant.


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Opinion

MEMORANDUM OPINION AND ORDER

C. LYNWOOD SMITH, JR., District Judge.

*1 Plaintiff, Vincent Edward Cobb, brought this action on December 8, 2011, asserting claims against his former employer, the Florence City Board of Education, for: (1) sex discrimination, race discrimination, and retaliation pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (“Title VII”); (2) sex discrimination, race discrimination, and retaliation pursuant to 42 U.S.C. § 1981 and the Fourteenth Amendment to the United States Constitution; (3) disability discrimination pursuant to the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (the “ADA”); (4) retaliation pursuant to the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. (the “FMLA”); and (5) age discrimination pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (the “ADEA”). *1 The court later dismissed the ADEA, sex discrimination, and race discrimination claims upon plaintiff’s motion. *2 Thus, the only remaining claims are: (1) the ADA claim; (2) the FMLA claim; (3) the retaliation claim under Title VII; and (4) the retaliation claim under 42 U.S.C. §§ 1981 and 1983. Defendant has moved for summary judgment on all of those claims. *3 Upon consideration of the motion for summary judgment, the briefs, and the evidentiary submissions, the court concludes the motion should be granted, and summary judgment should be entered in defendant’s favor on all of plaintiff’s claims.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that a 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). In other words, summary judgment is proper “after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). “In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment.” Chapman v. AI Transp., 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (quoting Havens v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1995)). Inferences in favor of the non-moving party are not unqualified, however. “[A]n inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on the evidence, but is pure conjecture and speculation.” Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1983) (alteration supplied). Moreover,

[I]n the mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

*2 Chapman, 229 F.3d at 1023 (quoting Havens, 52 F.3d at 921) (emphasis and alteration supplied). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986) (asking “whether the evidence presents a sufficient disagreement to
require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

II. SUMMARY OF FACTS

A. Plaintiff's Educational Background and Non-Board Employment History

Plaintiff, Vincent Edward Cobb, received a Bachelor of Science degree in Physical Education from the University of North Alabama in 1990 or 1991. He did not attend graduate school or receive a teaching certification from the Alabama State Department of Education. Instead, from 1987 to 2004, plaintiff worked for the United Parcel Service ("UPS") in various positions, including unloader, preloader, and driver. Sometimes his job duties for UPS required him to clean a building. Plaintiff also served in the United States Naval Reserves from 1986 to 1994, performing clerical work and radio communications duties. From 1992 to 1993, plaintiff worked for the City of Russellville, Alabama, Park and Recreation Department as the Director of the "Chuckie Mullins Center." There, he conducted recreational and extracurricular programs for at-risk youth in the community. In 2007, plaintiff started a private lawn care business, providing services such as cutting grass, weed eating, trimming shrubs, applying mulch, maintaining flower beds, pulling weeds, and removing debris.

B. Plaintiff's Employment With the Board

Plaintiff first became employed by the Florence City Board of Education ("the Board") during the summer of 2004 as a Special Needs Teaching Assistant at Burrell-Slater Community Education Center, where the Board was conducting a summer program for special needs students. In that position, plaintiff's primary duty was to make sure the students had enough activities to keep them busy. He played games with the students, took them outside to play, and assisted them with arts and crafts projects.

From the beginning of the 2004–2005 school year to January of 2005, plaintiff transferred to Florence High School to assist a teacher with a special needs student who had suffered a brain injury and sometimes exhibited behavioral problems. The student was a large male who had injured a teacher in the past, so the Board wanted to hire an adult male aide to work with the student. Plaintiff's task was to keep the student calm while the teacher presented classroom lessons in math, reading, and other basic academic subjects.

Between January and July of 2005, plaintiff worked at Weeden Elementary School. One of his tasks was to assist four different kindergarten teachers with reading instruction as part of the Alabama Reading Initiative program. He worked one-on-one with students who were struggling with reading, as directed by the classroom teacher. Plaintiff also worked with third- and fourth-grade special education students at Weeden, again assisting those students with subjects in which they were struggling, as directed by the classroom teacher.

*3 At the beginning of the 2005–2006 school year, plaintiff began working as a Campus Security Officer at the Florence Middle School/Freshman Center ("Freshman Center"), a new school that housed seventh-through ninth-graders who had formerly attended two rival schools. The Freshman Center already had a School Resource Officer, who was a uniformed officer of the Florence Police Department assigned solely to the school. Even so, the Board hired a Campus Security Officer at the Freshman Center, as well as at the newly consolidated High School, to provide extra security because fights were expected as a result of combining the two rival schools. As Campus Security Officer, plaintiff assisted the School Resource Officer in breaking up fights and escorting students to in-school suspension. He also patrolled the campus, made sure students were reporting to class on time, prevented horseplay in the hallways, maintained order in the cafeteria, made sure the buses left safely and on time, and attended extra-curricular activities during school hours. He also helped the cafeteria workers clean up the cafeteria.

C. Plaintiff's Knee Injury

In 1996, prior to plaintiff's employment by the Board and while he was working as a UPS driver, plaintiff tore the meniscus in his knee when he stepped out of his delivery truck. The condition was treated with cortisone shots and an orthoscopic procedure, and plaintiff continued to work. In 2002 or 2003, however, plaintiff continued to experience problems with his knee, so he underwent a total knee replacement procedure. He did not return to work for UPS after his surgery, but his knee did improve, and he generally was able to do all the things he wanted to do. The only subsequent knee problem plaintiff experienced was
the development of scar tissue, which was removed through another orthoscopic procedure in 2004. 16

Plaintiff also underwent a third orthoscopic procedure in 2010, after he became employed by the Board. He asked Rod Shepard, the Principal of the Freshman Center, if he could use accrued sick leave for the procedure, and Shepard informed plaintiff that would not be a problem. 17 Plaintiff remained absent from work from February 22 to May 17, 2010, while recovering from the third orthoscopic procedure. 18 While plaintiff was out on leave, Sheppard told him that his presence at the school was missed, and that Sheppard would be glad when plaintiff could return to work. Sheppard did not use a “mean” or “malicious” tone when conveying that message. 19

Plaintiff's knee responded well to the third orthoscopic procedure, and he was able to return to his job as Campus Security Officer from May 17, 2010 to May 28, 2010, the last day of school. Plaintiff also was able to resume his lawn care business in May of 2010. At the time of his September 24, 2012 deposition, plaintiff still maintained his lawn care business, and he also walked four miles approximately twice a week for exercise. Plaintiff never requested any job accommodations from the Board as a result of his knee problems, because he was able to perform the duties of his job, except for when he was out of work recovering from surgery in 2010. 20

D. Termination of Plaintiff’s Employment by the Board

4 Faced with budget cuts at the end of the 2009–2010 school year, the Board decided to eliminate the Security Officer positions at the Freshman Center and High School because the security concerns that led to the creation of those positions no longer were present. 21 Plaintiff appealed the Board's decision to eliminate his position. He lost the appeal, but he was placed on administrative leave, and he continued to be paid by the Board during the pendency of the appeal. 22

Kendy Behrends, the Board's Superintendent at the end of the 2009–2010 school year, found it “unfortunate” that plaintiff and Charles Johnson, the Security Officer at the High School, had lost their positions for reasons completely unrelated to their job performance, so she tried to assist both men in finding other employment with the Board. 23 Behrends asked the Freshman Center and High School principals to tell plaintiff and Johnson that the Board still wanted them as employees, and that they should watch for new job postings. She also asked that both plaintiffs and Johnson's e-mail accounts be left open, so they could correspond about job openings. 24 Two positions in the Child Nutrition Program (“CNP”) at the Freshman Center came open during the summer of 2010, and Behrends held both positions open for plaintiff. She instructed the principal not to fill the positions until plaintiff had an opportunity to apply. She also sent two e-mails to plaintiff inviting him to apply, and she asked plaintiff's Alabama Education Association (“AEA”) representative to inform him of the openings. If plaintiff had applied for either of the CNP jobs, Behrends intended to recommend that the Board hire him. 25 However, plaintiff chose not to apply for the CNP position because it paid less than he had earned as a Campus Security Officer. 26

E. The Board’s Process for Making Hiring Decisions

When a job announcement is posted, current employees of the Board apply by submitting a resume or letter of interest. Non–Board–employees apply online. The principal of the school is responsible for identifying the best applicants for each position. The principal generally will form a committee of people familiar with the requirements of the position. The committee reviews the applications, selects applicants to interview, and conducts the interviews. After the interviews, the committee will inform the Superintendent which candidate it believes to be most qualified. The Superintendent will then make a formal recommendation to the Board to hire that candidate, unless the Superintendent disagrees with the committee's selection. The Superintendent's recommendation usually has been accepted by the Board. In fact, Dr. Womack testified that she could not recall any occasion on which the Board disagreed with her recommendation for any position. 27

F. Timeline For Plaintiff’s Employment Applications and Complaints of Discrimination

Plaintiff has complained that the Board wrongfully failed to hire him for the following six positions:

5 a. Special Education Teaching Asst., Florence Middle School/Freshman Ctr., posted 5/11/10, filled by Charles Johnson (filled after use of FMLA only)

b. Custodian, Florence Middle School/Freshman Ctr., posted 5/25/11, filled by Dwight Perkins (filled after filing of EEOC Charge and Amended Charge)
c. Special Education Teaching Asst., Freshman Ctr., posted 8/1/11, filled by Christopher Lanzenstiel (filled after filing of EEOC Charge and Amended Charge)

d. Custodian, Florence Middle School/Freshman Ctr., posted 1/1/17[ sic ], filled by Joey Franklin (filled after filing of EEOC Charge, Amended Charge and Complaint)

e. Custodian, Florence Middle School/Freshman Ctr., filled 5/18/12 by Coretha Perkins (filled after filing of EEOC Charge, Amended Charge and Complaint)

f. Custodian, Florence Middle School/Freshman Ctr., filled 5/18/12 by Howard Brummett (filled after filing of EEOC Charge, Amended Charge and Complaint). 28

1. Special Education Teaching Assistant position at the Freshman Center in May of 2010

Plaintiff applied for a position as a Special Education Assistant at the Freshman Center in May of 2010. 29 Roderick Sheppard, the Principal at the Freshman Center, formed an interview committee for that position, together with Marie Matlock, the Assistant Principal at the Middle School. Dr. Behrends asked the committee to strongly consider the applications of both plaintiff and Charles Johnson, the other Security Officer whose position also had been eliminated. 30

The Job Description for the Special Education Assistant position states the minimum qualifications as being a high school diploma or its equivalent. 31 The “Job Goal” is to “help the teacher accomplish teaching objectives by working with individual students or small groups to help them achieve the skill levels of the class as a whole.” 32 The Performance Responsibilities for the position include:

1. Administers, scores and records such achievement and diagnostic tests as the teacher recommends for individual students.

2. Works with individual students or small groups of students to reinforce learning of material or skills initially introduced by the teacher.

3. Assists the teacher in devising special strategies for reinforcing material or skills based on a sympathetic understanding of individual students, their needs, interests and abilities.

4. Operates and cares for equipment used in the classroom for instructional purposes.

5. Helps students master equipment of instructional materials.

6. Distributes and collects workbooks, papers and other materials for instruction.

7. Guides independent study, enrichment work and remedial work set up and assigned by the teacher.

8. Assists with the supervision of students during emergency drills, assemblies and field trips.

9. Alerts the teacher to any problem or special information about an individual student.

10. Serves as the chief source of information and assistance to a substitute teacher.

*6 11. Maintains the same high level of ethical behavior and confidentiality of information about students as is expected of fully licensed teachers.

12. Participates in in-service training programs, as assigned. 33

Plaintiff and Johnson both interviewed for the position, and the committee recommended Johnson. Sheppard stated that Johnson was selected because he had a good rapport with all students at the High School while serving as Security Officer, because he was a demonstrated community leader, and because he had worked with special needs children at the Alternative School. 34 Even so, Johnson had never actually served as a Teaching Assistant in special education. 35 There also is no evidence of Johnson ever taking medical leave or having any sort of disability while employed by the Board. 36

Additionally, Sheppard and Matlock had indicated to the selection committee that, when plaintiff was employed at the Freshman Center, there were many occasions on which they looked for him but could not find him, because he was not working where he was supposed to be working. 37 Plaintiff denies ever being absent from his assigned work station “without permission or without having signed out in the office.” 38 He explained that the hand-held radio he carried to maintain contact with school administrators had
poor reception and did not always pick up the administrators' calls. He also stated that he did not always have a single assigned work station, because he often was required to walk around the campus to ensure that students were not skipping class. Plaintiff was never reprimanded or written up for being away from his assigned work station, or for any other infraction. The only occasion on which plaintiff could recall discussing an absence from campus with Sheppard was when plaintiff had to leave campus to renew a license. Plaintiff followed the appropriate procedure by signing out before he left campus. The renewal process took longer than anticipated, so Sheppard called plaintiff to ask when he would be able to return. Plaintiff informed Sheppard that he might need to take a half-day of vacation to cover the time he would be away. Sheppard did not indicate to plaintiff that he disapproved of plaintiff's absence that day.

Based on the committee's selection, Dr. Behrends recommended Johnson for the Special Education Teaching Assistant position. When she made that recommendation, Dr. Behrends was unaware that plaintiff had any problems with his knee, or that he had left for knee surgery. The Board approved Dr. Behrends' recommendation, and it made the final decision to hire Johnson on June 3, 2010.

2. Plaintiff's EEOC charges

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on December 17, 2010. He alleged discrimination on the basis of race, color, sex, age, disability, and retaliation in the termination of his employment, and in the Board's failure to award four positions for which he had submitted applications. Those positions included the Special Education Teaching Assistant position from May of 2010, as well as three other positions that are not at issue in this lawsuit. He filed an amended charge on May 3, 2011, alleging that he failed to receive a position as Custodian at Weeden Elementary School in January of 2011 as a result of retaliation and discrimination on the basis of race, color, sex, age, and disability.

3. Custodian position at the Freshman Center in May of 2011

Plaintiff applied for a position as Custodian at the Freshman Center that was posted on-line in May of 2011. The Board received thirty-three applications for that position. Sheppard formed an interview committee and selected candidates to be interviewed. Plaintiff was not among the candidates who received an interview. The interview committee recommended that the Superintendent select Dwight Perkins. Perkins had more than ten years of experience as a custodian in another school system, for the University of North Alabama, and for a private business. He also had served as a substitute custodian at the Freshman Center and done a good job.

Sheppard stated that, when the interview committee recommended Perkins for the Custodian position at the Freshman Center in May of 2011, he did not know that plaintiff had filed an EEOC charge or otherwise complained of discrimination or retaliation. Dr. Womack—who succeeded Dr. Behrends as the Superintendent of Education upon Behrends' retirement on July 1, 2010—testified that she had discussed some of the allegations in plaintiff's EEOC charge with Sheppard before the Board submitted its response to the charge on January 18, 2011. For confidentiality reasons, however, she did not directly inform Sheppard that plaintiff had filed an EEOC charge. Instead, she simply told him that the Board was dealing with "a legal question." It is undisputed that, after plaintiff filed his EEOC charge, he was never selected to interview for any other position for which he applied.

Based on the committee's selection of Perkins, Dr. Womack recommended that the Board hire Perkins for the position, and the recommendation was approved. Dr. Womack was not aware at the time she recommended Perkins that plaintiff had applied for the position.

4. Special Education Teaching Assistant position at the Freshman Center in August of 2011

Plaintiff applied for a position as a Special Education Teaching Assistant at the Freshman Center that was posted on-line in August 2011. This Teaching Assistant position was to assist the special education teacher in providing classroom instruction, and not to provide one-on-one caretaker duties for a specific student. The Board received seventy-three applications for that position. Sheppard formed an interview committee that included Special Education Coordinator Lynn Sharp. Plaintiff was not among the candidates who received an interview. The interview committee recommended that the Superintendent select Christopher Lenzentiel for the position. Sheppard
thought Lanzentiel had a good interview, and he also had three years of experience as a special education teacher in Germany.\textsuperscript{67} Based upon the committee’s selection of Lanzentiel, as well as upon Lanzentiel’s experience, Dr. Womack recommended that the Board hire Lanzentiel for the position, and the recommendation was approved. When she made that recommendation, Dr. Womack did not know that plaintiff had applied for the position.\textsuperscript{58}

5. Plaintiff’s complaint in this case

Plaintiff did not file an amended or additional EEOC charge addressing his failure to receive any employment positions after February of 2011.\textsuperscript{59} He filed this case on December 8, 2011.\textsuperscript{60}

6. Custodian position at the Freshman Center in January of 2012

Dwight Perkins, who received the position as Custodian at the Freshman Center in May of 2011, transferred to Florence High School in January of 2012.\textsuperscript{61} The Board then advertised to fill Perkins’ vacant position as the Custodian at the Freshman Center. Plaintiff applied for that position, as did thirty-two other people.\textsuperscript{62} Sheppard and Auty Horn, the Assistant Principal of Florence Middle School, formed an interview committee. Plaintiff was not among the candidates who received an interview.\textsuperscript{63} The interview committee recommended that the Superintendent select Joey Franklin for the position. Franklin had a good interview, and he had experience performing custodial duties at a church where he also served as pastor.\textsuperscript{64} Based upon the committee’s selection of Franklin, Dr. Womack recommended that the Board hire Franklin for the position, and the recommendation was approved. When Dr. Womack made that recommendation, she did not know that plaintiff had applied for the position.\textsuperscript{65}

7. Two Custodian positions at the Freshman Center in May of 2012

The Board advertised two open positions for Custodian at the Freshman Center during May of 2012. Plaintiff applied for both positions, but he did not receive an interview for either.\textsuperscript{66} The interview committee, which was formed by Sheppard and Horn, selected Howard Brummett and Ceretha Perkins as the best candidates for the two positions. Brummett had experience as a custodian in another state, and he had done a good job as a substitute custodian at the Freshman Center. Perkins had experience as a housekeeper, and she had done such a good job as a substitute custodian at the Freshman Center that many of the teachers lobbied for her to receive the permanent Custodian position.\textsuperscript{67} Based upon the committee’s selection of Brummett and Perkins, as well as on those candidates’ experience, Dr. Womack recommended that the Board hire Brummett and Perkins for the two Custodian positions, and the recommendation was approved. When she made those recommendations, Dr. Womack did not know that plaintiff had applied for either Custodian position.\textsuperscript{68}

III. DISCUSSION

A. Claims Abandoned by Plaintiff

In plaintiff’s brief in response to defendant’s motion for summary judgment, he “concedes that he cannot prove that the elimination of his position as a Security Officer in May 2010 violated [the FMLA, Title VII, 42 U.S.C. § 1981, 42 U.S.C. § 1983,] or the 14th Amendment.”\textsuperscript{69} Thus, plaintiff cannot proceed with any claim related to the termination of his employment.

Moreover, plaintiff has narrowed his failure to hire claims to the six positions listed in Section II(F), supra. The court will not consider any claims related to plaintiff’s failure to receive any other positions.

B. Americans With Disabilities Act

Plaintiff has conceded that any ADA claim related to the Special Education Teaching Assistant position at the Freshman Center that was filled by Charles Johnson in May 2010 would be time-barred.\textsuperscript{70} He maintains, nevertheless, that defendant’s failure to hire him for the other five positions specified in Section II(F), supra, constituted disability discrimination in violation of the ADA.

"In the absence of direct evidence of discrimination, a plaintiff may establish a prima facie case of an ADA violation through circumstantial evidence using the familiar burden-shifting analysis employed in Title VII employment
To establish a prima facie case of disability discrimination, plaintiff must demonstrate: (1) that he has a “disability” within the meaning of the Act; (2) that he is a “qualified individual with a disability,” meaning that he can perform the essential functions of the employment position he holds or seeks, with or without reasonable accommodation being made by the employer; and (3) that he suffered an adverse employment action because of his disability. See, e.g., Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1255 (11th Cir.2001); Reed v. Heli Co., 206 F.3d 1055, 1061 (11th Cir.2000); Davis v. Florida Power & Light Co., 205 F.3d 1301, 1305 (11th Cir.2000).

Plaintiff cannot establish a prima facie case because he cannot show that he has a “disability” within the meaning of the ADA. The Act defines the concept of “disability” three ways—that is, as including any person: (A) who has a “physical or mental impairment that substantially limits one or more major life activities of such individual”; or (B) who has a “record” of such an impairment; or (C) who is “regarded as” having such an impairment. 42 U.S.C. § 12102(1); see also 29 C.F.R. § 1630.2(g). “An individual is deemed to be ‘disabled’ for purposes of the ADA if he satisfies any one of these three enumerated definitions.” Gordon v. E.L. Hamm & Associates, Inc., 100 F.3d 907, 911 (11th Cir.1996).

Plaintiff has not argued that he has an impairment that substantially limits one of his major life activities. Stated differently, he has not asserted that he actually is under a “disability,” as defined by the ADA. Instead, he contends that defendant regarded him as being disabled. The ADA provides that

[a]n individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

42 U.S.C. 12102(3)(A) (alteration supplied). An individual will not be “regarded as” having a disability based on “impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.” 42 U.S.C. 12102(3)(A). See also 29 C.F.R. §§ 1630.2(g)(1)(ii), 1630.2(f).

Plaintiff asserts that Sheppard regarded him as being disabled because of his knee problems. According to plaintiff,

Sheppard was aware of Cobb’s knee problems and that he had to miss a substantial amount of work for surgery and recovery related to his knee. Prior to his becoming symptomatic, Sheppard had not written Cobb up for poor performance or for allegedly not being at his work station. After Cobb’s position was eliminated, he applied for multiple positions which all required substantial walking and standing. Although he had done the duties of a Special Education Teaching Assistant and custodial duties while employed by the Defendant, Sheppard refused to place Cobb in any of the positions for which he applied and refused even to offer him an interview for the last five positions.

The evidence does support plaintiff’s assertion that Sheppard was aware of plaintiff’s knee surgery and subsequent absence from work. Even so, plaintiff’s knee problem cannot be considered any more than a transitory or minor impairment. The only knee-related problem plaintiff suffered while employed by the Board was an orthoscopic procedure in 2010. He was out of work for approximately three months, from February 22 to May 17, 2010, to recover from the procedure. There is no indication that plaintiff suffered any significant impairments as a result of the procedure after May of 2010. To the contrary, plaintiff not only returned to his job as a Campus Security Officer at the Freshman Center at the end of May; he also resumed his lawn care business, and he was able to walk four miles approximately twice each week.

Moreover, even if plaintiff’s knee surgery could be considered more than a minor or transitory impairment, there is no evidence connecting that impairment to the Board’s decisions.
not to hire plaintiff for the five positions still at issue. The first position of which plaintiff complains is the Freshman Center Custodian from May of 2011. By that time, more than a year had passed since plaintiff returned to work from the orthoscopic procedure, and there is no indication that the Board perceived plaintiff as continuing to suffer from any impairment. See Butler v. Advance/Newhouse Partnership, No. 6:11-cv-1958–00rl–28GJK, 2013 WL 1233002, *8 (M.D. Fla. Mar. 26, 2013) (slip copy) (“At most, there is evidence that Advance knew that Butler was experiencing some back pain, was about to have back surgery, and was about to take FMLA leave to recover for that surgery; this alone, however, is not evidence that Advance regarded her as disabled within the meaning of the ADA.”).

*11 Based on the foregoing, the court concludes that plaintiff does not have sufficient evidence to survive defendant’s motion for summary judgment on his ADA claim. Moreover, because summary judgment is due to be granted on the merits on plaintiff’s ADA claim, there is no need to consider defendant’s alternative argument: i.e., that plaintiff failed to exhaust his administrative remedies on that claim.

C. Retaliation
Plaintiff also has alleged that his failure to receive all six positions identified above was the result of unlawful retaliation, in violation of Title VII, the FMLA, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

1. 42 U.S.C. § 1983
Plaintiff’s § 1983 claim is based upon alleged violations of the Equal Protection Clause of the Fourteenth Amendment. The Eleventh Circuit has clearly held that “a constitutional claim for retaliation may be brought under 42 U.S.C. § 1983 pursuant to the first amendment, not the equal protection clause.” Ratliff v. DeKalb County, Ga., 62 F.3d 338, 341 (11th Cir.1995) (italics emphasized in original, boldface emphasis supplied). Accordingly, summary judgment will be granted on all of plaintiff’s retaliation claims asserted pursuant to § 1983 and the Fourteenth Amendment.

2. Title VII, the FMLA, and 42 U.S.C. § 1981
a. Principles of law common to all statutes
The FMLA grants an eligible employee the right to take up to twelve workweeks of unpaid leave annually for any one (or more than one) of several reasons specified in the Act, including “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D) (alteration supplied). The FMLA creates a private right of action against employers who “interfere with, restrain, or deny the exercise of or the attempt to exercise” rights provided by the Act. 29 U.S.C. §§ 2615(a)(1), 2617(a); see also, e.g., Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 724–25 (2003); Hurlbert v. St. Mary’s Health Care, 439 F.3d 1286, 1293–94 (11th Cir.2006).

The Eleventh Circuit has recognized that “ § 2615(a) creates two types of claims: *interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, and retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act.” Hulbert, 439 F.3d at 1293 (quoting Strickland v. Water Works & Sewer Board of the City of Birmingham, 239 F.3d 1199, 1206 (11th Cir.2001)) (emphasis supplied, internal citations omitted). Plaintiff has asserted the latter type of claim in this case.

In order to establish a claim for FMLA retaliation, “an employer must show that his employer intentionally discriminated against him for exercising an FMLA right.” Martin v. Brevard County Public Schools, 543 F.3d 1261, 1267 (11th Cir.2008); see also 29 U.S.C. § 2615(n)(2); 29 C.F.R. § 825.220(c). Unlike an interference claim, an employer “bringing a retaliation claim faces the increased burden of showing that his employer’s actions were motivated by an impermissible retaliatory or discriminatory animus.” Strickland, 239 F.3d at 1207 (internal quotation marks omitted). Where, as here, the plaintiff seeks to prove intentional retaliation with circumstantial evidence, the court must analyze the case under the McDonnell Douglas burden-shifting framework. See, e.g., Strickland, 239 F.3d at 1207. Under that framework, the plaintiff bears the initial burden of presenting sufficient evidence to allow a reasonable factfinder to determine that he has satisfied the elements of a prima facie case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). A prima facie case of retaliation under the FMLA requires a showing that: (1) the employee engaged in statutorily protected conduct; (2) the employee suffered an adverse employment action; and (3) there is a causal connection between the two. See, e.g., Smith v. BellSouth Telecommunications, Inc., 273 F.3d 1303, 1314 (11th Cir.2001).
The process is much the same for evaluating a claim of retaliation under Title VII. "Retaliation is a separate violation of Title VII." Gupta v. Florida Board of Regents, 212 F.3d 571, 586 (11th Cir.2000). A plaintiff generally must prove three elements to establish a prima facie case: (1) she engaged in statutorily protected expression; (2) she suffered an adverse employment action; and (3) there was a causal linkage between the protected conduct and the adverse employment action. See, e.g., Shannon v. BellSouth Telecommunications, Inc., 292 F.3d 712, 715 (11th Cir.2002).

Once plaintiff establishes a prima facie case of retaliation by proving only that the protected activity and the negative employment action are not completely unrelated, the burden shifts to the defendant to proffer a legitimate reason for the adverse action.... The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the "legitimate" reason is merely pretext for prohibited, retaliatory conduct.

Sierminski v. Transouth Financial Corporation, 216 F.3d 945, 950 (11th Cir.2000) (citations omitted) (alteration supplied).

Finally, the Eleventh Circuit has held that the elements of proof for any claim of discrimination or retaliation are the same under both Title VII and § 1981. See, e.g., Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 1330 (11th Cir.1998).

Thus, the same analysis will be used to evaluate all of plaintiff's retaliation claims, regardless of whether they arise under the FMLA, Title VII, or 42 U.S.C. § 1981.

b. Evaluation of each position for which plaintiff applied

i. Special Education Teaching Assistant position at the Freshman Center in May of 2010

Plaintiff acknowledges that this claim can be pursued only under the FMLA. It is not entirely clear from defendant's briefs whether defendant contests plaintiff's ability to satisfy the prima facie case for FMLA retaliation with regard to this position. Even so, a brief analysis reveals that plaintiff can satisfy all the requisite elements. Plaintiff returned to work from protected FMLA leave on May 17, 2010, and the Special Education Teaching Assistant position at the Freshman Center, which was posted in May of 2010, was awarded to another candidate on June 3, 2010. The close temporal proximity between plaintiff's return from leave and his failure to receive the position indicates a causal connection between his protected activity and the subsequent adverse employment action. See, e.g., Martin, 543 F.3d at 1268 ("[T]he close temporal proximity between the two—Martin was terminated while on FMLA leave—is more than sufficient to create a genuine issue of material fact of causal connection.") (citing Hulbert, 439 F.3d at 1298 (alteration supplied); Former v. Bisk Education, Inc., No. 8:08-cv-00239-JDW-EAJ, 2009 WL 2246137, at *5 (M.D.Fla. July 27, 2009) ("The general rule is that close temporal proximity between the employee's protected conduct and the adverse employment action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection.") (quoting Brungart v. BellSouth Telecommunications, Inc., 231 F.3d 791, 799 (11th Cir.2000) (internal quotation marks omitted).

The Board offered legitimate, non-discriminatory reasons for choosing Charles Johnson over plaintiff for the Special Education Teaching Assistant position:

The interview committee interviewed both [plaintiff Vincent Edward] Cobb and Charles Johnson and it found Johnson to be the better candidate. While Johnson worked as a security officer at Florence High School, he had demonstrated a very good rapport with students and did a good job of developing relationships with students. Johnson had shown an ability to work with special needs children at the Alternative School. Johnson had also shown outside of school that he was a community leader.

Plaintiff asserts that these proffered reasons are actually a pretext for retaliatory animus. Plaintiff's burden at the pretext stage is that of "cast [ing] sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered 'legitimate reasons were not what actually motivated its conduct'..." Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir.1997) (quoting Cooper-Houston v. Southern Railway Co., 37 F.3d 603, 605 (11th Cir.1994)) (alterations supplied); see also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 135 (2000)
plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."") (alteration supplied). Plaintiff shoulders that burden by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." Combs, 106 F.3d at 1538 (quoting Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir.1996) (en banc)) (internal quotation marks omitted).

Plaintiff first asserts that "there is no dispute but that Cobb brought the minimum qualifications for the position[ ] for which he applied and that he had more experience in that position than Johnson." 76 Plaintiff does not explain what conclusory statement any further, nor does he point to any evidence to support it. "In the context of a promotion, a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted." Springer v. Convergys Customer Management Group Inc., 509 F.3d 1344, 1349 (11th Cir.2007) (citing Brooks v. County Comm'n of Jefferson County, 446 F.3d 1160, 1163 (11th Cir.2006) (in turn citing Alexander v. Fulton County, 207 F.3d 1303, 1339 (11th Cir.2000)) (alteration in original). "Instead, a plaintiff must show that the disparities between the successful applicant's and his own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.' " Springer, 509 F.3d at 1349 (citing Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir.2004)). See also Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006).

*14 The record does not demonstrate that plaintiff was so much more qualified than Johnson that no reasonable decision maker could have chosen Johnson over plaintiff. Plaintiff did have experience as a Special Education Teaching Assistant, but his assignment was to work one-on-one with a student with behavioral issues in order to keep the student calm and controlled in furtherance of the learning environment. The position for which plaintiff applied in May of 2010, in contrast, had more instructional requirements, including administering tests, reinforcing learned material, assisting with use of instructional equipment, and distributing assignment materials. The position also required the Assistant to work with groups of students in a classroom setting or during field trips, not the one-on-one work plaintiff to which plaintiff was accustomed in his previous position. Johnson, on the other hand, had experience working with larger numbers of special needs students at the alternative school, and he demonstrated during his service as a Security Officer at the High School that he was skilled at developing relationships with students. Neither applicant had previous experience in the exact position for which both had applied, and it was not unreasonable, or unlawful, for the Board to consider Johnson's previous experience and demonstrated skill set to be more valuable to the position than plaintiff's.

Plaintiff's second pretext argument is that "Sheppard was on the selection and interview panels for that position and Sheppard had indicated to Cobb that Cobb's presence was needed at the school while he was on FMLA leave and that Cobb's being out of school for his knee was not an option." The record does not support plaintiff's assertion. Although plaintiff did allege in his complaint that Sheppard had made those statements, 78 he testified during his deposition that Sheppard's statements were of a very different nature. For clarity, the court will reiterate the relevant portion of plaintiff's deposition in full:

Q: And then the last sentence [of the EEOC charge] says, "The Principal indicated to me on more than one occasion that my presence would be needed at the school as per my employment and being out for me was not option."

A. No, he had said that my absence was missed, that he missed—my absence being there due to the fact that they were [sic] only one officer present. And that he would be—appreciate it if I could get back to work as soon as possible.

Q. So when you say "he," we are talking about Mr. Sheppard, correct?

A. Yeah, um-hum.

Q. When did Mr. Sheppard say that to you?

A. I don't remember the actual date. But, like I said, I think I visited the school once or twice during that time that I had surgery. And he would ask me when I had planned on coming back to work.

Q. Okay. Is this between—Did he say this to you between February 22nd, 2010, and May 17th, 2010?
A Yes, sir.

*15 Q. Okay. And what exactly, I mean, what specifically did he say to you?

A. It wasn't anything mean and malicious. He just said that my presence was missed and that he would be glad when I can turn—that he hoped I can return back to work as soon as possible.

Q. Okay. Did he say anything else that you can recall?

A. Huh-uh, that was the gist of his conversation. That was all that was said.79

Sheppard's statements as they were recounted in plaintiff's deposition testimony do not indicate a retaliatory motive, and they do nothing to discredit any of defendant's proffered legitimate reasons for choosing Johnson over plaintiff for the position.

Finally, plaintiff attempts to discredit any suggestion by defendant that he could not always be found at his assigned work station. As plaintiff's absence from his work station was not one of defendant's proffered legitimate, non-retaliatory reasons for not choosing plaintiff for the position, the truth or falsity of defendant's claims is irrelevant.

ii. Custodian position at the Freshman Center in May of 2011

Defendant asserts that plaintiff cannot establish a prima facie case of retaliation for this position because he cannot demonstrate a causal connection between any protected activity and the adverse employment action.80 To establish a causal connection at the summary judgment stage, "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Meeks v. Computer Associates International, 15 F.3d 1013, 1021 (11th Cir.1994) (quoting EEOC v. Reichhold Chemical, Inc., 988 F.2d 1564, 1571–72 (11th Cir.1993)). "At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action." Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 919 (11th Cir.1993). Accord Ramsey v. Vinson Guard Service, Inc., 120 F.3d 1192, 1197 (11th Cir.1997) ("[A] plaintiff must, at a minimum, generally establish that the defendant was actually aware of the protected expression at the time the defendant took the adverse employment action.") (alteration supplied).

See also, e.g., Gupta, 212 F.3d at 590 ("[A] plaintiff must show that 'the decisionmakers were aware of the protected conduct,' and 'that the protected activity and the adverse action were not wholly unrelated.'"") (quoting Farley v. Nationwide Mut. Ins., 197 F.3d 1322, 1337 (11th Cir.1999)) (alteration supplied). "Close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." Bass v. Bd. of County Commissioners, 256 F.3d 1095, 1119 (11th Cir.2001) (citing Gupta, 212 F.3d at 590) (emphasis supplied).

With regard to plaintiff's FMLA retaliation claim, he cannot demonstrate a causal connection because the decision about the Custodian position at the Freshman Center was not made until May of 2011, a full year after plaintiff returned from FMLA leave. The Eleventh Circuit has held that a time gap of even a few months is too long to support a causal connection. See Higdon v. Jackson, 393 F.3d 1211, 1221 (11th Cir.2004). The year-long gap here clearly is too long, standing alone, to support a causal connection. Plaintiff responds to this point by stating that, "between December 2010, and January 18, 2011, a jury could conclude Sheppard was reminded of Plaintiff's FMLA leave when Womack contacted him about Plaintiff's charge of discrimination, thus restarting the time clock on temporal proximity."81 Plaintiff cites no authority, and the court knows of none, to support this "restarting the time clock" theory. Moreover, there is no evidence in the record to support the theory. Plaintiff's attorney never asked Sheppard any questions during his deposition regarding whether he was reminded of plaintiff's FMLA leave when Womack asked him about some of the allegations in plaintiff's EEOC charge. Plaintiff's argument is too speculative; therefore, plaintiff cannot support a prima facie of retaliation under the FMLA for this position.

*16 With regard to plaintiff's Title VII and § 1981 retaliation claims, defendant asserts that plaintiff cannot establish a causal connection because "[t]here is no evidence that anyone on the interview committee knew Cobb had filed an EEOC Charge or otherwise complained of discrimination or retaliation."82 It is true that Sheppard stated in his affidavit that, when the interview committee selected Perkins for the Custodian position at the Freshman Center in May of 2011, he did not know that plaintiff had filed an EEOC charge or otherwise complained of discrimination or retaliation. Even so, plaintiff has presented contradictory evidence. Dr. Womack testified that she had discussed some of the allegations in plaintiff's EEOC charge with Sheppard before the Board submitted its response to the charge on January
18, 2011. Even though Dr. Womack did not specifically inform Sheppard that plaintiff had filed an EEOC charge, she did tell Sheppard that her questions about plaintiff related to a “legal problem.” Thus, even if Sheppard did not have specific knowledge that plaintiff had filed an EEOC charge, a reasonable jury could conclude that plaintiff was aware that plaintiff had filed some sort of discrimination complaint. Sheppard's knowledge, coupled with the close temporal proximity between the date of plaintiff's amended charge (May 3, 2011) and the Board's decision not to award him the Custodian position at the Freshman Center in May of 2011 is enough to establish a causal connection. Accordingly, plaintiff has satisfied the *prima facie* case for his claim of retaliation relating to this position.

Even so, defendant has proffered a legitimate, non-retaliatory reason for selecting Dwight Perkins instead of plaintiff for the position. Defendant states that Perkins was more *qualified* for the position because he had over ten years of experience as a custodian, including work for a university and a private business. Plaintiff, in contrast, had never held a custodian position, even though some of his previous jobs had required him to perform some custodial duties.

Plaintiff asserts that defendant's proffered reason is merely a pretext for retaliation. Specifically, he states:

> [G]iven that Cobb was not allowed to interview for the position, that part of Cobb's duties as Security Officer involved custodial duties, the comments Sheppard had made about Cobb's leave for his knee surgery and recovery, that Womack had discussed the allegations of the EEOC charge with Sheppard some time between December 17, 2010 and January 18, 2011, and that Perkins was not *disabled*, had not filed an EEOC charge and had not utilized FMLA leave, a jury could conclude that Defendant's articulated reason for its actions was pretextual for unlawful retaliation.

Sheppard's comments about plaintiff's FMLA leave, Perkins' non-use of FMLA leave, and Perkins' lack of a *disability* are not relevant to plaintiff's retaliation claim under Title VII and § 1981. Sheppard's awareness of plaintiff's EEOC charge was relevant to plaintiff's *prima facie* case, but it does nothing to undercut defendant's proffered legitimate, non-discriminatory reasons. The fact that Perkins, unlike plaintiff, had never filed a EEOC charge might constitute some evidence to support plaintiff's retaliation claim, but it does not disprove defendant's proffered legitimate, non-discriminatory reasons. Most importantly, given Perkins' ten years of experience as a custodian, including in an educational setting, there is no evidence of such a disparity between plaintiff's and Perkins' qualifications that no reasonable person could have selected Perkins over plaintiff. See *Springer*, 509 F.3d at 1349. Finally, the fact that plaintiff did not receive an interview serves only to reinforce defendant's view that plaintiff was not as *qualified* as other candidates, including Perkins.

*17 Because plaintiff has not demonstrated that defendant's proffered legitimate reasons for not selecting plaintiff for the Custodian position at the Freshman Center in May of 2011 were a mere pretext for retaliation, summary judgment is due to be granted with regard to that position.

iii. Special Education Teaching Assistant position at the Freshman Center in August of 2011

As with the previous position, defendant asserts that plaintiff cannot establish a *prima facie* case of retaliation for the Special Education Teaching Assistant position at the Freshman Center in August of 2011 because he cannot show a causal connection between any protected activity and the adverse employment action. As with the previous position, plaintiff cannot demonstrate a causal connection for his FMLA retaliation *prima facie* case on this position because the hiring decision was not made until more than a year after plaintiff returned from FMLA leave. Plaintiff can, however, establish a *prima facie* case with regard to his Title VII and § 1981 retaliation claims, because a reasonable jury could conclude that Sheppard was aware that plaintiff had filed a discrimination complaint, and that the temporal proximity between plaintiff's amended EEOC charge and the Board's decision not to hire him for the position indicates a causal connection.

Even so, defendant has offered a legitimate, non-retaliatory reason for selecting Christopher Lanzenstiel instead of plaintiff for the position. Defendant states that Lanzenstiel was more *qualified* than plaintiff because he had three years of experience instructing children with various *disabilities* as a Special Education Teacher in Germany. Plaintiff, in contrast, did not have any experience as a teacher. He had

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experience as a Special Education Teaching Assistant, but he did not have any instructional responsibilities in that position. Instead, he was assigned to a single student with behavioral issues to maintain order and calmness.

Plaintiff asserts that defendant’s proffered reason is really a mere pretext for retaliation. Specifically, plaintiff states:

"Given that the position did not require teaching experience, that Cobb was not allowed to interview for the position, that Cobb had previously done the job, the comments she made about Cobb’s leave for his knee surgery and recovery, that Plaintiff had filed an EEOC charge some nine (9) months before, that Womack had discussed the allegations of the EEOC charge with Sheppard some time between December 17, 2010, and January 18, 2011, and that Lanzenstiel was not disabled, had not filed an EEOC charge and had not utilized FMLA leave, a jury could conclude that Defendant’s articulated reason for its actions was pretextual for retaliation."

As discussed in connection with the previous position, these arguments do nothing to disprove or discredit defendant’s proffered legitimate, non-retaliatory reasons. Most importantly, there is no evidence of such a disparity between plaintiff’s and Lanzenstiel’s qualifications that no reasonable person, in the exercise of impartial judgment, could have selected Lanzenstiel over plaintiff. While plaintiff had served as a Special Education Teaching Assistant before, it was only to work with a large male special needs student who had suffered a brain injury and sometimes was a behavioral problem, but not to provide instruction. Lanzenstiel, on the other hand, had instructional experience as a Special Education teacher in Germany. Even though teaching experience was not a requirement for the Special Education Teaching Assistant position, it was reasonable for the Board to value Lanzenstiel’s instructional experience as a teacher over plaintiff’s less relevant experience as a Teaching Assistant assigned to maintain the calmness and order of a single student. Finally, the fact that plaintiff did not receive an interview serves only to reinforce defendant’s view that plaintiff was not as qualified as other candidates, including Lanzenstiel; it does not indicate retaliation.

*18 Because plaintiff has not demonstrated that defendant’s proffered legitimate reasons for not selecting plaintiff for the Special Education Teaching Assistant position at the Freshman Center in August of 2011 were a pretext for retaliation, summary judgment is due to be granted with regard to that position.

iv. Custodian position at the Freshman Center in January of 2012

Defendant again asserts that plaintiff cannot establish a prima facie case of retaliation with regard to this position because he cannot demonstrate a causal connection between any protected activity and his failure to receive the position. With regard to plaintiff’s FMLA retaliation claim, this court agrees, because the decision not to hire plaintiff for this position was made a year and nine months after plaintiff returned to work from FMLA leave. That is far too great of a temporal gap to support a causal connection. With regard to the retaliation claim under Title VII and 42 U.S.C. § 1981, the temporal proximity between even plaintiff’s amended EEOC charge (filed in May of 2011) and the employment decision (in January of 2012) would be too great to support a causal connection. Even so, a reasonable jury could conclude that the temporal gap between plaintiff’s protected activity of filing the complaint in this case in December of 2011 and the employment decision in January of 2012 is insufficiently close to support a causal connection.

Once again, however, defendant has offered a legitimate, non-retaliatory reason for choosing Joey Franklin for this position instead of plaintiff; that is, Franklin had a very good interview and had performed some custodial duties while he was the pastor of a small church.

Plaintiff argues that defendant’s proffered reason really is a mere pretext for retaliation. Specifically, he states:

"[G]iven that the that [sic] Cobb was not even allowed to interview for the position, that part of Cobb’s duties as Security Officer involved custodial duties, the comments she made about Cobb’s leave for his knee surgery and recovery, that Womack had discussed the allegations of the EEOC charge with Sheppard, that"
Cobb had filed suit making allegations under the FMLA and the other statutes in December of 2011, that Franklin had not filed an EEOC charge, was not disabled and had not utilized FMLA leave, a jury could conclude that Defendant's articulated reason for its actions was pretextual for retaliation and disability discrimination. 86

Most of these arguments are the same ones plaintiff has asserted with regard to the other positions, and they are unpersuasive for the reasons already stated. Plaintiff's assertion that he had performed some custodial duties as a Security Officer also is not persuasive. Neither plaintiff nor Franklin had ever served as a full-time custodian, but both had performed some cleaning duties as part of previous positions. Even assuming plaintiff's responsibility for cleaning the cafeteria while he was a Security Officer was equal to Franklin's custodial duties as a pastor, that would render the two candidates more or less equally qualified. It cannot be said that the difference in the two men's qualifications was so great that no reasonable person would have chosen Franklin over plaintiff for the position.

*19 Because plaintiff has not demonstrated that defendant's proffered legitimate reasons for not selecting plaintiff for the Custodian position at the Freshman Center in January of 2012 were a mere pretext for retaliation, summary judgment is due to be granted with regard to that position.

v. Custodian positions at the Freshman Center in May of 2012

Plaintiff cannot establish a prima facie case of retaliation with regard to either of the Custodian positions at the Freshman Center in May of 2012 because he cannot demonstrate a causal connection between any protected activity and the decisions not to hire him for those positions. The temporal proximity between any protected activity—regardless of whether it be plaintiff's FMLA leave, EEOC charge, or the complaint filed in this case—and the employment decisions is too great, and there is no additional evidence to support a causal connection.

Even if plaintiff could establish a prima facie case with regard to these two positions, defendant has offered a legitimate, non-retaliatory reason for not selecting plaintiff. Defendant states that it selected Howard Brummett for one of the positions because Mr. Brummett had previous experience as a custodian in Indiana, and he had also served as a substitute custodian at the Freshman Center. Defendant selected Ceretha Perkins for the other position because she had experience as a housekeeper and as a substitute custodian at the Freshman Center. Additionally, many teachers thought Perkins did such a good job as a substitute custodian that they lobbied for her to receive the permanent position. Plaintiff, in contrast, had never had a full-time job as a custodian, although he had performed some cleaning duties as part of his previous jobs.

Plaintiff argues that these proffered reasons are actually a mere pretext for retaliation. Specifically, he states:

[G]iven that the that [sic] Cobb was not even allowed to interview for the positions, that part of Cobb's duties as Security Officer involved custodial duties, the comments Sheppard had made about Cobb's leave for his knee surgery and recovery, that Womack had discussed the allegations of the EEOC charge with Sheppard some time between December 17, 2010 and January 18, 2011, and that neither Brummett or Perkins had filed an EEOC charge, had a disability or had utilized FMLA leave, a jury could conclude that Defendant's articulated reason for its actions was pretextual for retaliation and disability discrimination. 87

These are the same arguments plaintiff has raised with regard to the other positions, and for the same reasons previously stated, the court is not persuaded by them.

Because plaintiff cannot establish a prima facie case of retaliation, and because he has not demonstrated that defendant's proffered legitimate reasons for not selecting plaintiff for the Custodian positions at the Freshman Center in May of 2012 were a mere pretext for retaliation, summary judgment is due to be granted with regard to those positions.

c. Conclusion

*20 Because plaintiff either cannot establish a prima facie case of retaliation, or cannot demonstrate that defendant's proffered legitimate, non-retaliatory reasons are actually a
mere pretext for retaliation, summary judgment is due to be granted on all of plaintiff's retaliation claims pursuant to the FMLA, Title VII, and 42 U.S.C. § 1981. Furthermore, because defendant is entitled to summary judgment on the merits on all of plaintiff's retaliation claims, the court need not consider plaintiff's alternative argument that plaintiff failed to exhaust his administrative remedies.88

In accordance with the foregoing, the court finds there are no genuine issues of material fact, and defendant is entitled to judgment as a matter of law on all of plaintiff's claims. Accordingly, defendant's motion for summary judgment is GRANTED, and all claims are DISMISSED with prejudice. Costs are taxed to plaintiff. The Clerk is directed to close this file.

DONE and ORDERED.

IV. CONCLUSION

Footnotes

1 See dec. no. 1 (Complaint).
2 See dec. no. 19 (Order Dismissing Fewer Than All Claims).
3 Doc. no. 20.
4 Defendant's evidentiary submission, Exhibit A (Deposition of Vincent Edward Cobb), at 19.
5 Id. at 23–25.
6 Id. at 21–22; see also Cobb Deposition, at Exhibit 1 (Resume of Vincent E. Cobb).
7 Cobb Deposition, at 25–26; see also Cobb Resume.
9 Id. at 50–53.
10 Id. at 53–56.
11 Id. at 56–57, 63–66.
12 Id. at 63–65.
13 Id. at 65–66.
14 Cobb Deposition, at 66, 72–74.
15 Id. at 222–23.
16 Id. at 37–41.
17 Id. at 45–46, 78–79.
18 Id. at 41–47, 77.
19 Id. at 162–63.
20 Cobb Deposition, at 41–47, 77, 93–94.
21 Defendant's evidentiary submission, Exhibit N (Affidavit of Dr. Kendy Behrends) ¶ 5.
22 Cobb Deposition, at 75–76, 84–87, 91.
23 Defendant's evidentiary submission, Exhibit B (Deposition of Kendy Behrends), at 17–18.
24 Id. at 18–19.
25 Id.; see also defendant's evidentiary submission, Exhibit I (Affidavit of Dr. Janet Womack), Exhibit D (Transcript of September 2, 2010 administrative hearing), at 91–99.
26 Cobb Deposition, at 92.
27 Defendant's evidentiary submission, Exhibit C (Deposition of Dr. Janet Womack), at 19–22, 30–35.
28 Doc. no. 30, at 16 n. 3. Plaintiff originally complained about his failure to receive additional positions, but he subsequently narrowed his claims. See id. at 18 n. 5 ("Plaintiff focuses his complaints of retaliation and/or discrimination with respect to this Summary Judgment response on the six positions in which Roderick Sheppard was a decision maker and which are listed in Footnote 3. Although Plaintiff believes that he was retaliated against by others at the Board's main office, given that he was never granted an interview after he filed his Charge of Discrimination, his discovery did not reveal any information upon which he can rely to overcome summary judgment other than with respect to positions for which Roderick Sheppard was a member of the interview committee which made the recommendation of whom to hire to the Superintendent.").
29 Cobb Deposition, at 97.

30 Cobb Deposition, at Exhibit 11; Behrends Deposition, at 41–42; defendant's evidentiary submission, Exhibit E (Deposition of Roderick Sheppard), at 34–35.

By way of background, what the court has been referring to as the “Freshman Center” actually was comprised of both Florence Middle School and Florence Freshman Center—two separate schools on a shared campus. Roderick Sheppard is the Principal at Florence Freshman Center, and Aimée Rainey is the Principal at Florence Middle School. The two schools have shared responsibility for the Child Nutrition Program, custodial services, School Resource Officers, transportation services, and library/media services. Rainey primarily oversees the shared transportation program, and Sheppard primarily oversees the shared custodial program. Womack Affidavit ¶ 24.

31 Womack Deposition, at Exhibit 15 (Job Description). The copy of the job description in the record states that is for a “Teacher Aide” position, but it appears undisputed that it is the same position as “Special Education Assistant.”

32 Id. at 1.

33 Id.

34 Sheppard Deposition, at 40–46; defendant's evidentiary submission, Exhibit G (Deposition of Lynn Sharp), at 20–22.

35 Sheppard Deposition, at 40–41.

36 Id. at 42–43.

37 Id. at 26–28, 56–57, 78–80; Sharp Deposition, at 23.

38 Plaintiff's evidentiary submission, Exhibit A (Declaration of Vincent E. Cobb) ¶ 4.

39 Id. ¶ 5.

40 Id. ¶ 6.

41 Id. ¶ 7.

42 Id. ¶ 7.

43 Behrends Affidavit ¶ 8.

44 See Complaint, at Exhibit A (December 17, 2010 EEOC Charge). Even though plaintiff is not specifically complaining of his failure to receive the three other positions as part of his claims in this lawsuit, the fact that he filed an EEOC charge with regard to those positions is relevant to his later claims of retaliation.

45 See Complaint, at Exhibit B (May 3, 2011 EEOC Charge). Again, plaintiff is not specifically complaining of his failure to receive the Custodian position at Weeden Elementary School as part of his claims in this case, but the fact that he filed an amended EEOC charge with regard to that position is relevant to his later claims of retaliation.

46 Cobb Deposition, at 220.

47 Defendant's evidentiary submission, Exhibit J (Affidavit of Roderick Sheppard) ¶ 6.

48 Id. ¶ 7.

49 Id.

50 Womack Deposition, at 48–50, 102.

51 Id. at 48–50. See also Sheppard Deposition, at 63–65.

52 Cobb Declaration ¶ 8.

53 Womack Affidavit ¶ 31; see also Womack Deposition, at 17.

54 Cobb Deposition, at 223–25.

55 Sheppard Affidavit ¶ 8.

56 Id. ¶ 9; Cobb Deposition, at 233–34; Womack Affidavit ¶ 35.

57 Sheppard Affidavit ¶ 10; Womack Affidavit ¶ 36.

58 Womack Affidavit ¶ 37.

59 Id. ¶ 49.

60 See Complaint.

61 Plaintiff also applied for the position at the High School, but his failure to receive that position is not part of his claims in this case. See Cobb Deposition, at 241.

62 Id. at 247–48; Sheppard Affidavit ¶ 12.

63 Sheppard Affidavit ¶ 12.

64 Id. ¶ 13.

65 Womack Affidavit ¶ 42.

66 Cobb Deposition, at 251–60.

67 Sheppard Affidavit ¶ 16.
Womack Affidavit ¶¶ 44–45.

Doc. no. 30 (plaintiff's response brief), at 16 n. 2 (alteration supplied).

See doc. no. 30, at 30 n. 10.

See 42 U.S.C. § 12111(8) (defining “qualified individual with a disability” as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”); see also 29 C.F.R. § 1630.2(m) (“The term ‘qualified,’ with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.”).

Doc. no. 30, at 31–32.

See, e.g., Complaint ¶ 18 (“Defendant violated Plaintiffs ... Fourteenth Amendment equal protection rights by terminating him from his position and retaliated against him by refusing to place Plaintiff in other positions for which he was qualified or the most qualified applicant after he made a complaint of discrimination.”).

Doc. no. 30, at 18 n. 5 (“[F]or this particular position, [plaintiff] limits his claim to FMLA retaliation.”) (alterations supplied).

See doc. no. 30, at 34 (alteration supplied).

Doc. no. 30, at 20 (alteration supplied).

Doc. no. 30, at 20.

Doc. no. 30, at 20.

See Complaint ¶ 9 (“Plaintiff had been informed by the principal after his surgery that his presence was needed at the school and that being out for Plaintiff's knee was not an option.”); id. at Exhibit A (December 17, 2010 EEOC Charge) (“The Principal had indicated to me on more than one occasion that my presence would be needed at the school as per my employment and being out for my knee was not an option.”).

Cobb Deposition, at 162–64 (emphasis and alteration supplied).

Defendant does not contest the other elements of the prima facie case. Indeed, it is clear that plaintiff engaged in protected activity when he took FMLA leave and filed an EEOC charge, and that he suffered an adverse employment action when he did not receive the position.

Doc. no. 30, at 25.

Doc. no. 25, at 42 (alteration supplied).

Because plaintiff has established Sheppard's knowledge of his protected activity, there is no need to consider plaintiff's alternative argument that Dr. Womack, who undisputedly knew about plaintiff's EEOC charge, was merely Sheppard's “cat's paw.”

Doc. no. 30, at 26 (alteration supplied).

Doc. no. 30, at 27 (alteration supplied).

Doc. no. 30, at 28 (alterations supplied).

Id. at 30 (alterations supplied).