

In the  
Supreme Court of the United States

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TAMMY H. HEPBURN,

*Petitioner,*

v.

TELEPERFORMANCE,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit**

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**BRIEF IN OPPOSITION OF RESPONDENT  
TELEPERFORMANCE**

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## QUESTIONS PRESENTED

Although Hepburn's Opening Brief lists six issues for review by this Court, on review of those issues and the procedural history of this case, it is clear there are only two main issues on review that are properly preserved. They are:

1. Whether the District Court was correct in granting summary judgment against Hepburn and in favor of Teleperformance upon a finding that:
  - a. Hepburn had presented no evidence she was subjected to harassment on a protected basis;
  - b. Hepburn had presented no evidence she was treated differently than similarly situated employees because of her race; and
  - c. Hepburn had presented no evidence she was subjected to adverse employment action.
2. Whether the District Court was correct in denying Hepburn's Motion for Default Judgment as a sanction under Rule 37 of the Federal Rules of Civil Procedure when Teleperformance refused to provide Hepburn with its discovery responses until Hepburn signed a Non-Disclosure Certificate, as previously ordered by the District Court.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Sup. Ct. R. 29.6, Respondent Teleperformance states that it does not have a parent corporation, and that no publicly held corporation owns 10 percent (10%) or more of the stock of Respondent.

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## PROCEDURAL HISTORY AND STATEMENT OF JURISDICTION

Hepburn initiated suit against Teleperformance *pro se*, in Superior Court for Cochise County, State of Arizona. Teleperformance filed its Notice of Removal in the District Court for the District of Arizona (“District Court”) on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332(a)(1). The District Court<sup>1</sup> had diversity subject matter jurisdiction under 28 U.S.C. § 1332 because Hepburn was a citizen of California, Defendant is a Delaware corporation doing business in Arizona, and the amount in controversy exceeded \$75,000.

After discovery, Teleperformance filed a Motion for Summary Judgment arguing that Hepburn had failed to present any evidence supporting her claims. Hepburn filed a Motion for Entry of Default Judgment as a sanction against Teleperformance for refusing to produce documents until Hepburn complied with the District Court’s protective order. The District Court granted Teleperformance’s Motion for Summary Judgement and denied Hepburn’s Motion for Entry of Default Judgment. The District Court entered final judgement on September 30, 2019. Hepburn appealed to the Ninth Circuit on October 15, 2019, pursuant to Fed. R. App. P. 4(a)(1)(A). On November 2, 2020, the Ninth Circuit affirmed. On November 24, 2020, the Ninth Circuit issued a mandate. In early January 2021, Hepburn filed a motion the Ninth Circuit construed as a motion to recall the mandate, which the Ninth Circuit

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<sup>1</sup> Both parties agreed to the exercise of jurisdiction by United States Magistrate Judge.

granted “for the limited purpose of considering a petition for rehearing.” On February 9, 2021, Hepburn filed a Petition for panel rehearing which was denied on February 16, 2021. The Ninth Circuit issued a second mandate on February 16, 2021. Subsequent to the mandate, Hepburn filed a “Petition for Panel Rehearing En Banc.” The Ninth Circuit did not consider these motions filed after the mandate. Hepburn filed her petition for a writ of certiorari on May 20, 2021.



## **STATEMENT OF THE CASE**

### **A. Factual Background**

Tammy Hepburn worked at Teleperformance from September 9, 2013 until December 1, 2014, when she voluntarily submitted her resignation from employment. When Hepburn quit, she indicated that she was interested in transferring to a position in Virginia, so that she could be closer to family.

Hepburn was initially hired as a temporary Customer Service Representative, and worked in this position until she applied for, and was accepted to, the position of Human Resources (“HR”) Receptionist in May 2014. Hepburn received a pay increase when she became a Receptionist. In July of 2014, Teleperformance experienced a seasonal increase in hiring in the Sierra Vista area. Because of this increase in hiring, Hepburn was assigned the job duties of controlling employee files, conducting background checks, assisting the recruiting team, and overseeing the reception area. Hepburn was assigned an office in the HR Department to fulfill these duties.

After being assigned new duties and an office in the HR Department, Hepburn alleged that she stopped receiving company update emails she received as a Receptionist. Hepburn alleged that Margaret McClanahan, the new receptionist, began receiving those emails.

On September 10, 2014, Hepburn sent an email to Judy Morris, the Senior Vice President (“VP”) of HR, and Niti Prothi, Associate VP of HR. In that email, Hepburn attached a letter in which she claimed someone was going into her office and “sabotaging” her work by rearranging the employee files. After receiving this email, Prothi investigated Hepburn’s allegations, which were denied by all of Hepburn’s colleagues. Due to the nature of the employee files, several people in the HR and Recruiting department required access to and worked with those same files.

On September 16, 2014, Hepburn emailed Morris again to state that McClanahan had referred to Hepburn using the “N” word. Morris promptly responded to Hepburn and indicated that Prothi would follow up.

On September 17, 2014, Hepburn participated in a conference call with Prothi and Joseph Lu, the Manager of the Legal Department. During the call, it was decided that Prothi would remind the HR Department of company policies on professional conduct and limiting access to confidential files to those in HR. The allegation of McClanahan’s use of racial slurs was also discussed, and it was decided that Rhonda Reinartz, HR Assistant, would investigate.

Thereafter, neither Prothi nor Reinartz were able to corroborate Hepburn’s claim regarding the use of racial slurs. McClanahan denied ever using such language in

reference to Hepburn. Regardless, McClanahan was coached on proper workplace behavior. Hepburn admits that, after the investigation and training took place, no one used racially derogatory language or engaged in any racially based discrimination.<sup>2</sup>

On October 6, 2014, Hepburn again raised her claims of file “sabotage” and McClanahan’s alleged use of the “N” word to the new HR Manager, Yolanda Bay. Like Prothi and Reinartz before her, Bay investigated the allegations and spoke with McClanahan who, again, denied ever using such language. Bay also spoke with Reinartz who informed her that McClanahan had previously denied using such language. Throughout the investigative process, no one was able to substantiate any of Hepburn’s claims.

After litigation began, Hepburn also alleged that Reinartz used the “N” word in her presence and, on two separate occasions, showed Hepburn an electronic photograph of a black and white herder dog with a knife next to it, captioned: “Mary had a little lamb.” Hepburn had previously requested that Reinartz conduct the investigation of McClanahan’s alleged use of the “N” word because she wanted the investigation conducted “professionally, honestly, and fairly.” Reinartz denies ever showing Hepburn such a photograph.

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<sup>2</sup> In Hepburn’s deposition, she testified as follows:

- Q. From the time you talked to Mr. Lu and Ms. Prothi in that conference call, to the time you quit, were you ever referred to as the N-word again, within the company context?
  - A. No.
- Q. Did you suffer any racial problems, discrimination, changes in your employment, conditions of your employment because of your race?
  - A. No.

Finally, at her deposition Hepburn stated her belief that someone placed a substance resembling sperm in a container of vinegar in her home. Apparently, Hepburn believes that if people at Teleperformance were able to go into her office, where she kept her purse, they could get access to the keys of her home.

### **1. Teleperformance’s Motion for Summary Judgment**

On November 1, 2018, Teleperformance moved for summary judgment on Hepburn’s claims of discrimination and retaliation under Title VII. On December 14, 2018, Hepburn filed an “Opposition to Defendant’s Motion for Summary Judgment,” but failed to properly address Teleperformance’s Statement of Facts or otherwise submit controverting facts as required under Rule 56 of the Federal Rules of Civil Procedure.

On December 21, 2018, the District Court notified Hepburn of the requirements to properly oppose summary judgment and granted Hepburn leave to file a supplement to her response. Rather than submit a properly supported separate statement of facts or controverting statement of facts, Hepburn submitted a “supplement” containing only statements of the procedural and disclosure history involved in the case. On January 23, 2019, Teleperformance filed its Reply in Support of its Motion for Summary Judgment.

### **2. Hepburn’s Motion for Default Judgment**

During discovery, Teleperformance moved for a protective order, which was granted by the District Court on October 3, 2018. The District Court specifically ordered all Qualified Persons, including Hepburn, to sign a Non-Disclosure

Certificate in order to receive confidential information. Despite the District Court's order, Hepburn refused to sign the Non-Disclosure Certificate. Instead, on October 25, 2018, Hepburn moved for entry of default judgment ("Hepburn's Sanctions Motion"), seeking a sanction under Rule 37(5)(2)(A)(vi)<sup>3</sup> of the Federal Rules of Civil Procedure for failure to comply with a discovery order. On November 8, 2018, the same day Teleperformance filed its Response to Hepburn's Sanctions Motion, Hepburn signed the Non-Disclosure Certificate.

At all points prior to November 8, 2018, Teleperformance refused to provide Hepburn with documents due to her refusal to comply with the protective order. Teleperformance correctly conditioned production of those documents on Hepburn's signature on a Non-Disclosure Certificate. On November 26, 2018, Teleperformance served its responses to Hepburn's discovery requests. These documents were produced before Hepburn was required to respond to Teleperformance's Motion for Summary Judgment.

## **B. At-Issue Rulings**

On September 30, 2019, the District Court granted Teleperformance's Motion for Summary Judgment. The District Court did not give Hepburn's unsworn bare factual allegations and conclusory statements any weight. The District Court determined that Hepburn failed to meet her burden of showing a hostile work

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<sup>3</sup> Hepburn cited Rule 37(5)(2)(A)(vi) of the Federal Rules of Civil Procedure. That subsection does not exist. Regardless, Hepburn stated her Motion was for failure to comply with a discovery order, seemingly under Rule 37(b)(2)(A).

environment under Title VII, and failed to establish a *prima facie* case for disparate treatment because there was no adverse employment action and Hepburn failed to even allege she was treated differently than similarly situated employees. The District Court also determined that, because there was no adverse employment action, she had not suffered retaliation.

In that same order, the District Court denied Hepburn's Sanctions Motion because Rule 37 sanctions are only available for violations of a court's discovery order. The Court found no violation where Teleperformance's refusal to produce documents was predicated only on Hepburn's refusal to certify she would not disclose sensitive employee information. Additionally, the District Court recognized that Teleperformance served its supplemental discovery after receiving Hepburn's certification. The District Court directed the clerk to enter judgment in favor of Teleperformance and dismiss Hepburn's case with prejudice. On September 30, 2019, the clerk of the District Court entered judgment in favor of Teleperformance and dismissed Hepburn's case with prejudice.

On October 15, 2019, Hepburn filed her Notice of Appeal of the District Court's September 30, 2019 order and judgment. On November 2, 2020, the Ninth Circuit affirmed the District Court as to Hepburn's disparate treatment claim because "Hepburn failed to raise a genuine dispute of material fact as to whether Teleperformance's proffered non-discriminatory, legitimate reasons for any adverse employment actions, including changing Hepburn's job duties and work location, were pretextual." The Ninth Circuit affirmed the District Court as to Hepburn's

hostile work environment claim “because Hepburn failed to raise a genuine issue of material fact as to whether defendant failed to take adequate remedial and disciplinary action in response to a non-supervisory employee’s use of offensive racial slurs or any other alleged conduct.” Finally, the Ninth Circuit affirmed the District Court as to Hepburn’s retaliation claim “because Hepburn failed to raise a genuine issue of material fact as to whether there was a causal relationship between any protected activity and a materially adverse employment action.” The Ninth Circuit also noted that arguments had been raised for the first time on appeal.



## **SUMMARY OF THE ARGUMENT**

Hepburn's claims fail for one simple reason: Hepburn failed to provide evidence. Specifically, Hepburn failed to provide any evidence that (1) she was subjected to an objectively hostile work environment, (2) she suffered an adverse employment action, or (3) she was treated differently than similarly situated employees.

Hepburn's allegations appear to arise under Title VII and, taking them in the light most favorable to her, involve being assigned additional duties during a busy period for Teleperformance, being assigned an office to fulfill those duties, not receiving an increase in salary for those additional duties, "sabotaging" of employee files (because they conflicted with her own "filing system"), the use of the "N" word by two co-workers, being shown a picture of a black and white dog next to a knife with the caption "Mary had a little lamb," and a lack of company update emails.

Notably, Hepburn admitted no negative employment action ever occurred and admitted she was not discriminated against in any way after Teleperformance conducted an investigation and implemented trainings for other employees in response to her allegation that an employee had used the "N" word. Hepburn never presented any evidence she was treated differently than a similarly situated employee. Furthermore, although Hepburn has consistently made clear that she *subjectively* felt that the environment was hostile and adverse to her because of her race, no reasonable person in Hepburn's position would have felt the same way. Without evidence of an objectively hostile work environment or objectively adverse

employment action, Hepburn's Title VII claims failed as a matter of law. Therefore, Rule 56 of the Federal Rules of Civil Procedure dictated entry of judgment in favor of Teleperformance, and the District Court did not err.

As to Hepburn's Motion for Default Judgment, Hepburn submitted her motion seeking default judgment as a sanction under Rule 37 of the Federal Rules of Civil procedure because Teleperformance refused to provide Hepburn with its responses to her Requests for Production until she signed a Non-Disclosure Certificate. Prior to Hepburn's motion for default judgment, Teleperformance moved for a Protective Order, which was granted by the District Court. The District Court's order specifically required Hepburn to sign a Non-Disclosure Certificate to receive the information she requested from Teleperformance. Once Teleperformance received Hepburn's signed Non-Disclosure Certificate, Teleperformance served Hepburn its responses. Therefore, Teleperformance never failed to comply with a discovery order. Thus, the District Court never had any basis to sanction Teleperformance.



## ARGUMENT

### I. FURTHER APPELLATE REVIEW IS INAPPROPRIATE IN THIS CASE.

There is no good reason to grant certiorari in this case. The District Court granted summary judgment because Hepburn failed to present any admissible evidence supporting her claims after substantial opportunity for discovery. The underlying rulings were entirely focused on a failure to meet the burden of proof.

In arguing summary judgment was improper, Hepburn does not meaningfully present an error related to the summary judgment standard, ask this Court to resolve a circuit split, or raise any issues of nationwide importance. This case does not implicate any important federal question determined by a state court of last resort. In fact, there are no important federal questions posed in this case at all. Instead, Hepburn asks this Court to review the propriety of a decision to grant summary judgment where Hepburn failed to plead cognizable claims or present any evidence that her rights under Title VII were violated. This constitutes an allegation of “erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

Teleperformance files this Brief in Opposition primarily on the basis of this Court’s admonition that undersigned counsel have “an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made

in the petition.” Sup. Ct. R. 15.2. The Petition in this case is teeming with misstatements of both the facts and the law.

As Teleperformance has argued to both the District Court and the Ninth Circuit Court of Appeals, none of the evidence or Hepburn’s allegations demonstrate that there is a triable issue of material fact. Both courts below applied the correct legal standard, all relevant authorities are still good law, and there is no basis for re-examining those legal doctrines. And “error correction . . . is outside the mainstream of the Court’s functions and . . . not among the ‘compelling reasons’ . . . that govern the grant of certiorari.” *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020), (Breyer, J. and Kagan, J. dissenting). Hepburn merely asks this Court to review and correct errors that are primarily factual in nature. This is not the function of this Court, and these issues are not appropriate for further appellate review.

## **II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN TELEPERFORMANCE’S FAVOR ON ALL OF HEPBURN’S TITLE VII CLAIMS BECAUSE HEPBURN FAILED TO PROVIDE EVIDENCE THAT WOULD SUPPORT LIABILITY FOR RACE DISCRIMINATION UNDER TITLE VII.**

### **A. Standard of Review**

Summary judgment is reviewed de novo. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, n.10 (1992). “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, 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). “Only

disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

### **B. Hepburn Failed to Properly Oppose Summary Judgment.**

After Teleperformance submitted its Motion for Summary Judgment (“Teleperformance’s MSJ”), Hepburn filed her response to summary judgment. Hepburn failed to present any admissible or controverting evidence, or otherwise point to sworn statements supporting any of the “factual” statements she made. Instead of submitting admissible evidence, Hepburn merely “denied” certain pages and lines in what appeared to be a response to the factual portion of Teleperformance’s Motion and Statement of Facts. Additionally, in her Opposition, Hepburn included a section in which she “denied” the statements in the affidavits of Yolanda Bay and Rhonda Reinartz without pointing to any admissible or controverting evidence, per Rule 56(c) of the Federal Rules of Civil Procedure. Hepburn did not verify the pleading and did not attach an affidavit or declaration sworn under penalty of perjury.

On December 21, 2018, the District Court notified Hepburn of the requirements to properly oppose summary judgment and granted Hepburn leave to file a supplement to her response. Rather than submit any properly supported facts, Hepburn submitted a Supplement containing only statements of the procedural and disclosure history involved in the case.

In the District Court’s September 30, 2019 order, from which this appeal arises, the District Court ruled that it would not give any weight to “bare factual allegations and conclusory statements.” Again, Hepburn did not even present her own testamentary evidence to rebut the evidence proffered by Teleperformance. The District Court was not presented with any evidence sufficient to create a genuine issue of material fact, and was required by Rule 56 to grant summary judgment. Fed. R. Civ. P. 56(a) (“court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact . . . ” (emphasis added)).

**C. The District Court Properly Granted Summary Judgment on Hepburn’s Hostile Work Environment Claim Because Hepburn Failed to Point to Evidence Creating a Genuine Issue of Material Fact as to Whether Hepburn Was Subjected to an Objectively Hostile Work Environment.**

In order to prevail on a claim of discrimination under a hostile work environment theory, a plaintiff must demonstrate that the “workplace [was] permeated with discriminatory intimidation . . . that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.” *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000) (alterations in original) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, (1993)). The environment must be both subjectively and objectively abusive. *Id.* (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995)). The objectivity requirement is viewed from the standpoint of a reasonable person. *Brooks*, 229 F.3d at 930. The court will “use a totality of the circumstances test to determine whether a plaintiff’s allegations make out a colorable claim of hostile work environment.”

*Brooks*, 229 F.3d at 923. The “frequency, severity and level of interference with work performance [are] among the factors particularly relevant to the inquiry.” *Brooks*, 229 F.3d at 923-4.

“Because only the employer can change the terms and conditions of employment, an isolated incident of harassment by a co-worker will rarely (if ever) give rise to a reasonable fear that [discriminatory] harassment has become a permanent feature of the employment relationship.” *Brooks*, 229 F.3d at 924. If the workplace is not perceived as objectively hostile, no relief is afforded under Title VII. *Brooks*, 229 F.3d at 925.

In this case, no reasonable juror could ever find that the conduct alleged by Hepburn would create an objectively hostile work environment under Title VII. Hepburn’s allegations consist of the “sabotaging of files,” the use of a racial slur on two isolated occasions by two coworkers, one of whom was then investigated and trained, the presentation of a picture of a black and white dog with a knife captioned “Mary had a little lamb,” and the lack of company update emails. None of this demonstrates that Hepburn’s work environment was “permeated with discriminatory intimidation.” *Brooks*, 229 F.3d at 923. Case law makes clear that the “mere utterance of an . . . epithet which engenders offensive feelings in a[n] employee,’ does not sufficiently affect the conditions of employment to implicate Title VII.” *Harris*, 510 U.S. at 21 (internal citation omitted); *see also Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991). Apart from this allegation, the other allegedly hostile acts are in no way severe, pervasive, or even intimidating to a

reasonable person. Even if Hepburn was subjectively impacted by these alleged events, no relief is available to her under Title VII because, objectively, no reasonable person would feel that these events created an environment permeated with discriminatory intimidation. Therefore, Hepburn failed to point to evidence that would create a genuine issue of material fact as to a hostile work environment, and the District Court was correct in granting summary judgment in favor of Teleperformance.

**D. The District Court Properly Granted Summary Judgment on Hepburn's Disparate Treatment Claim Because There Was No Evidence That Hepburn Was Subjected to Adverse Employment Action, or Otherwise Treated Differently than Similarly Situated Employees.**

To establish a *prima facie* case of discrimination under Title VII, a plaintiff can use either the framework established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), “or provide direct or circumstantial evidence of discriminatory intent.” *Vasquez v. County. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). Stray remarks are insufficient to establish discriminatory treatment. *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990).

Under the *McDonnell Douglas Corp.* framework, a plaintiff must show that:

(1) that the plaintiff belongs to a class of persons protected by Title VII; (2) that the plaintiff performed his or her job satisfactorily; (3) that the plaintiff suffered an adverse employment action; and (4) that the plaintiff's employer treated the plaintiff differently than a similarly situated employee who does not belong to the same protected class as the plaintiff.

*Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006).

Even if a plaintiff is able to establish a *prima facie* case using the *McDonnell Douglas* framework, an employer may rebut this by offering proof of a legitimate

non-discriminatory reason for its actions. *McDonnell Douglas Corp.*, 411 U.S. at 802. The plaintiff must then come forward with evidence establishing that the employer's legitimate non-discriminatory reason is pretextual. *Vasquez*, 349 F.3d at 640.

"[W]hen evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890-91 (9th Cir. 1994) (emphasis in original); *see also Schuler v. Chronicle Broadcasting Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986) ("To withstand an employer's motion for summary judgment in a discrimination suit, the employee must do more than establish a *prima facie* case and deny the credibility of the employer's witnesses.").

Here, Hepburn failed to establish a *prima facie* case under either the *McDonnell Douglas* framework or through evidence of discriminatory intent. Although Hepburn is a member of a protected class, the record is devoid of evidence that Teleperformance subjected Hepburn to any adverse employment action or treated her differently than similarly situated employees outside of her protected class. Hepburn herself testified that she did not "suffer any racial problems, discrimination, [or] changes in [her] employment [or] [the] conditions of [her] employment because of [her] race."

In fact, Teleperformance hired Hepburn as a temporary Customer Service Representative and accepted her to the position of HR Receptionist. Hepburn was

trusted with additional duties and assigned an office in the HR Department. Hepburn was given a raise when she became a Receptionist. Hepburn was never fired or disciplined. Hepburn left her employment with Teleperformance of her own accord

Even if this Court found that acts of assigning Hepburn additional duties and providing Hepburn with an office to fulfill those duties amounted to an “adverse employment action,” Hepburn points to no similarly situated employee who was treated differently. Indeed, it was Hepburn, not Margaret McClanahan, who had already been working in the HR Department when there was an increase in hiring and assigned additional duties. Hepburn and McClanahan were clearly not similarly situated because, as Hepburn makes clear, Hepburn had been with Teleperformance longer than McClanahan. Hepburn has pointed to no one in a similarly situated position that was treated differently. As such, Hepburn cannot establish a *prima facie* claim under the *McDonnell Douglas* framework.<sup>4</sup>

As to any direct or circumstantial evidence of discriminatory intent, the only circumstance that Hepburn can point to is her claim that McClanahan, a non-decision maker, and Rhonda Reinartz used the “N” word. But Hepburn can point to no evidence that these stray remarks had any impact on any employment decision. Therefore, they do not constitute evidence of discriminatory intent on behalf of Teleperformance. *See Vasquez*, 349 F.3d at 640 (“The only evidence Vasquez offers

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<sup>4</sup> Additionally, Teleperformance articulated a legitimate, non-discriminatory reason for assigning Hepburn additional duties in the HR department; at that time, Teleperformance was experiencing a seasonal increase in employee hiring.

are the remarks of Berglund. However, Berglund was not the decisionmaker, and Vasquez has offered no evidence of discriminatory remarks made by Leeds. Therefore, Vasquez must show a nexus between Berglund's discriminatory remarks and Leeds' subsequent employment decisions.”).

Hepburn did not point to a similarly situated employee being treated differently, or an adverse employment action by Teleperformance. Hepburn therefore failed to state a *prima facie* claim of disparate treatment under Title VII. Therefore, the District Court was correct in granting summary judgment in favor of Teleperformance.

**E. The District Court Properly Granted Summary Judgment on Hepburn's Retaliation Claim Because Hepburn Failed to Point to Any Evidence of Adverse Employment Action.**

To state a *prima facie* claim for discriminatory retaliation, a plaintiff must show: “(1) [s]he engaged in activity protected under Title VII, (2) h[er] employer subjected h[er] to an adverse employment action, and (3) the employer's action is *causally linked* to the protected activity.” *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987) (emphasis added).

Under the anti-retaliation provisions of Title VII, “adverse employment action” is action that a reasonable employee would find to be *materially* adverse. *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (emphasis added). This is an objective standard. *Id.* Employment actions are materially adverse if they would “dissuade[] a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern*, 548 U.S. at 77. (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). “[N]ormally petty slights, minor annoyances,

and simple lack of good manners will not create such deterrence.” *Id.* Furthermore, “ostracism suffered at the hands of coworkers cannot constitute an adverse employment action.” *Brooks*, 229 F.3d at 929.

On appeal, Hepburn has argued that Reinartz’ actions in showing her the picture of a black and white dog next to a knife with the caption “Mary had a little lamb” was retaliatory conduct.<sup>5</sup> If true, this is nothing more than a petty slight or minor annoyance. *See Burlington Northern & Santa Fe Ry.*, 548 U.S. at 68. Regardless, no reasonable worker would be dissuaded from making or supporting a charge of discrimination based on this conduct. As such, it is not a materially adverse employment action.

Apart from this, the other instances that Hepburn claimed occurred, *e.g.*, the “sabotaging” of files, additional duties, lack of company emails, hiring a new receptionist, and McClanahan’s use of the “N” word, occurred prior to Hepburn engaging in protected activity and could not have been causally linked.

Hepburn can point to no adverse employment action by Teleperformance. In the absence of such action, Hepburn is missing an essential element of her retaliation claim. *See Jurado*, 813 F.2d at 1411. Thus, the District Court properly granted summary judgment in favor of Teleperformance on Hepburn’s retaliation claim.

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<sup>5</sup> Hepburn did not claim the picture amounted to retaliation at the District Court. The Ninth Circuit properly recognized this was waived.

**III. THE DISTRICT COURT PROPERLY DENIED HEPBURN'S MOTION FOR DEFAULT JUDGMENT FOR FAILURE TO COMPLY WITH A DISCOVERY ORDER BECAUSE TELEPERFORMANCE DID NOT VIOLATE A DISCOVERY ORDER AND DID NOT SPOIL ANY EVIDENCE.**

**A. Standard of Review**

The imposition or refusal to impose discovery sanctions is reviewed for an abuse of discretion. *See Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 822 (9th Cir. 2011); *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1010 (9th Cir. 2004); *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164-65 (9th Cir. 2003).

**B. The District Court Had No Basis to Impose Default Judgment as a Discovery Sanction Because Teleperformance Did Not Violate a Discovery Order.**

In Hepburn's Motion for Default Judgment, she sought entry of default judgment for "failure to comply with the discovery order in accordance with the provisions of Rule 37(5)(2)(A)(vi)." In her Motion, Hepburn stated that:

On 6/19/2018, the Plaintiff sent the Defendant a Request for Production of Documents . . . The Defendant informed the Plaintiff that she was not going to get any information pertaining to the case without signing a protective order . . . As of 10/22/2018 the Defendant has failed to release information related to the Plaintiff case.

In the Protective Order, the District Court specifically ordered that "[p]rior to being permitted access to 'Confidential Information' subject to this Protective Order, a 'Qualified Person' shall sign a Certification . . . stating that he/she has read and understands the terms of this Protective Order." As a party to the action, Hepburn was a "Qualified Person." When she filed her Motion for Default Judgment, Hepburn had refused to sign the required Non-Disclosure Certificate.

In Response to Hepburn's Motion, Teleperformance, through undersigned counsel, explained that the refusal to serve Hepburn with responses to her discovery requests was because of her refusal to sign the Non-Disclosure Certificate. The day that Teleperformance filed its response, Hepburn executed and returned the Non-Disclosure Certificate to Teleperformance. On November 26, 2018, Teleperformance served Hepburn with its discovery responses.

The District Court denied Hepburn's Motion for Default Judgment for failure to comply with a discovery order because it determined that Teleperformance's refusal to serve discovery responses without a signed Non-Disclosure Certificate, as ordered by the court, did not violate any order. In light of Hepburn's failure to timely sign the Non-Disclosure Certificate, it is clear the District Court did not abuse its discretion in denying Hepburn's request for default judgment as a discovery sanction.

Furthermore, although Hepburn argues Teleperformance failed to preserve electronic information in her Petition, Hepburn never raised failure to preserve evidence under Rule 37(e) in her Motion for Default Judgment, or otherwise properly moved for sanctions for failure to preserve evidence under Rule 37(e) in the proceedings below. As such, any argument Hepburn is raising on appeal regarding preservation of evidence is waived. *See Amphastar Pharms. Inc. v. Aventis Pharma SA*, 856 F.3d 696, 708 (9th Cir. 2017) (stating failure to raise argument under Rule 37 in proceedings below waives issue); *see also Tolliver v. Fed. Republic of Nigeria*, 265 F. Supp. 2d 873, 880 (W.D. Mich. 2003) ("As for issues not raised under Rule 37,

the failure to timely raise discovery non-compliance under Rule 37 constitutes a waiver of such rights.”).



## CONCLUSION

For the foregoing reasons, this Court should deny Hepburn’s Petition for a Writ of Certiorari. There was no error below, nor is there any other basis for this Court to grant certiorari.

Respectfully submitted,

/S/ THOM K. COPE

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