No. 21-

IN THE

Supreme Court of the United States

ELIJAH ANTHONY OLIVAREZ,

Petitioner,

versus

T-MOBILE USA, INCORPORATED;
BROADSPIRE SERVICES, INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court for the Southern District of Texas dismissed Petitioner's complaint alleging violation of Title VII because he did not plead facts alleging other employees held the same job or responsibilities, worked for the same supervisor, had comparable violation histories, and engaged in nearly identical conduct resulting in dissimilar employment decisions. The Court concluded Petitioner "therefore fails to sufficiently allege a prima facie case of discrimination under Title VII.

The question presented is:

At the pleading stage of a Title VII discrimination claim (42 U.S.C. § 2000e et seq.), in which there is no direct evidence of discrimination, must the plaintiff show "circumstances that support an inference of discrimination," as required by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002), by pleading specific facts showing they were treated less favorably than other employees outside the protected category holding the same job or responsibilities, who worked for the same supervisor, had comparable violation histories, and engaged in nearly identical conduct resulting in dissimilar employment decisions, in order to state a valid claim that the protected category was a motivating factor for an adverse employment action under 42 U.S.C. § 2000e-2(m) and Fed. R. Civ. P. 8(a)?

PARTIES TO THE PROCEEDINGS

Petitioner is Elijah Olivarez.

Respondents are T-Mobile USA, Incorporated and Broadspire Services, Incorporated.

RELATED PROCEEDINGS

Olivarez v. T-Mobile USA, Incorporated, et al., No. 4:19-cv-04452 U.S. District Court for the Southern District of Texas. Judgment entered June 10, 2020.

Olivarez v. T-Mobile USA, Incorporated, et al., No. 20-20463, U.S. Court of Appeals for the Fifth Circuit. Judgment entered May 14, 2021.

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PETITION FOR WRIT OF CERTIORARI

Elijah Olivarez is a transgender man formerly employed by the Respondents. Mr. Olivarez brought several claims based on his termination from employment by Respondents. One of these asserted that his termination from employment was motivated by bias based on his gender identity. Mr. Olivarez alleged that he had suffered harassment from a biased individual in the workplace, but that HR had not taken action to stop the harassment. He alleged that when he requested leave for a medical procedure related to his gender identity, a biased individual processed his leave requests, which were for reasons of bias untimely and incorrectly processed. He alleged that he was terminated, ostensibly because he requested additional medical leave, but in reality because of bias based on his gender identity from the person responsible for the decision. He did not did not allege facts regarding the treatment of similarly situated individuals in the workplace outside of his protected category.

The District Court dismissed Petitioner's complaint, reasoning as follows:

> Olivarez does not plead facts alleging other employees held the same job or responsibilities, worked for the same supervisor, had comparable violation histories, or engaged in nearly identical conduct resulting in dissimilar employment decisions. Olivarez does not allege he was treated less favorably than a similarly-situated employee outside his protected group. Olivarez therefore fails to sufficiently allege a prima facie case of discrimination under Title VII. Accordingly, the motions to dismiss are

granted as to the claim for discrimination under Title VII.

The *McDonnell Douglas* burden-shifting factors have long been a source of confusion for courts and litigants. This schema was originally created to ease the evidentiary burden of job discrimination plaintiffs. It avoided the need to provide direct evidence showing, without inference, that discrimination was the but-for cause of an adverse action. Instead, it has been used to impose the impossible requirement of finding a virtually identical comparator where none may exist, especially in small employment settings, even though there is otherwise evidence of bias-motivated employment decisions. Courts are faced with a myriad of decisions pointing every which way, within their own Circuit and without. Court opinions freely mix the burdens on a motion to dismiss with that of summary judgment and of trial. Thus, they require that a complaint must state in excruciating factual detail the inner workings of the employer despite the mere requirement of a short and plain statement under Rule 8. This puts the cart before the horse, in that these cases demand that the plaintiff, at the pleading stage, discover information about their co-workers that they would ordinarily receive at the discovery stage. These decisions are then routinely cited in cases far afield from Title VII, such as cases involving Title II, § 1981, FHA and the ACA.

This Court's precedents are clear that there is no such burden at the pleading stage. Yet courts in many Circuits routinely cite those precedents, and immediately proceed to look for proof of a comparator. The Court's guidance is needed to provide the Circuits and the District Courts with a clear understanding of the plaintiff's pleading burden for a valid complaint of employment discrimination.

OPINIONS BELOW

Olivarez v. T-Mobile USA, Incorporated, et al., 2020 WL 5269754 (S. D. Tex 2020) [Appendix B]

Olivarez v. T-Mobile USA, Incorporated, et al., 997 F.3d 595 (5th Cir. 2021) [Appendix A]

JURISDICTION

The court of appeals entered judgment on May 14, 2021. By Order of the Court on July 19, 2021, in any case in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order. This Court has jurisdiction under 28 U.S.C.1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 USC 2000E-2(M) provides:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. 42 U.S.C.A. § 2000e-2

FEDERAL RULE 8(a) provides:

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief. Fed. R. Civ. P. 8

STATEMENT OF THE CASE

I. Background

U.S. courts statistics show that about one thousand civil rights cases are dismissed every year. See https://www.uscourts.gov/data-table-numbers/c-4 This dismissal rate is affecting a particularly vulnerable community, that of victims of bias and discrimination

II. The lower courts dismissed the case because of failure to plead a comparator.

Petitioner Elijah Olivarez brought several claims based on his termination from employment by Respondents. One of these asserted that his termination from employment was motivated by bias based on his gender identity. Mr.

Olivarez alleged in his complaint that he had suffered harassment from a specifically-named biased individual in the workplace, but that HR had not taken action to stop the harassment. He alleged that when he requested leave for a medical procedure related to his gender identity, another specifically-named individual raised questions about his gender identity and the entitlement to leave that suggested bias, and thereafter processed his leave requests for reasons of bias in an untimely and incorrectly manner. He alleged that he was terminated, ostensibly because he requested additional medical leave, but in reality because of bias based on his gender identity from the specifically-named person responsible for the decision. He did not allege facts regarding the treatment of similarly situated individuals in the workplace outside of his protected category.

The District Court dismissed the Second Amended Complaint because plaintiff did not plead a comparator.

> Olivarez does not plead facts alleging other employees held the same job or responsibilities, worked for the same supervisor, had comparable violation histories, or engaged in nearly identical conduct resulting in dissimilar employment decisions. Olivarez does not allege he was treated less favorably than a similarly-situated employee outside his protected group. Olivarez therefore fails to sufficiently allege a prima facie case of discrimination

Appendix B at 20a. The Court specifically stated that it was not deciding any of the other grounds asserted by Defendants. Id. at 20b, n. 12.

The District Court explicitly relied on Fifth Circuit precedent holding that a comparator is required at the pleading stage of a Title VII action, citing *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017), *Warren v. Fed. Nat'l Mortg. Ass'n*, 733 F.App'x 753, 761 (5th Cir. 2018) (per curiam) and *Chhim v. Univ of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016).

The Fifth Circuit acknowledged that *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002) holds that a comparator is not required. See Appendix A at 6a. However, even though not required, it held that the *McDonnell Douglas* factors are "instructive" and therefore the complaint could be dismissed for failure to plead a comparator.

> [W]hen a plaintiff's Title VII disparate treatment discrimination claim depends on circumstantial evidence, as Olivarez's does, the plaintiff "will 'ultimately have to show' that he can satisfy the *McDonnell Douglas* framework." *Cicalese*, 924 F.3d at 767 (quoting *Chhim*, 836 F.3d at 470). "In such cases, we have said that it can be 'helpful to reference' that framework when the court is determining whether a plaintiff has plausibly alleged the ultimate elements of the disparate treatment claim." Id. (quoting *Chhim*, 836 F.3d at 470)…. However, Olivarez has failed to plead any facts indicating less favorable treatment than others "similarly situated" outside of the asserted protected class. *See id.* In fact, the Second Amended Complaint does not contain any facts about any comparators at all.

Appendix A at 6a-7a.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's decision deepens a circuit split over the requirement of a comparator in pleading Title VII employment discrimination.

This Court recognized in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) that there is a perceived tension between its ruling in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), and the requirements enunciated in *Twombly*. The Court harmonized the perceived tensions as follows.

> *Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." 313 F.Supp.2d, at 181 (citation and footnote omitted). Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading

> requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief. *Id.*, at 508, 122 S.Ct. 992.

Twombly, 550 U.S. at 569–70. Under this formulation, so long as the plaintiff provides events leading to termination, relevant dates, information regarding the protected category of any relevant persons involved with termination, the complaint is sufficient under Fed. R. Civ. P. 8. Requiring additional information applies "what amount[s] to a heightened pleading requirement." *Id.*

Some courts have understood Twombly and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) to require heightened pleading, as in this statement from the Fourth Circuit:

> Moreover, in finding the complaint sufficient, the Supreme Court in *Swierkiewicz* applied a different pleading standard than that which it now requires under *Iqbal* and *Twombly*. See *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir.2012) (noting that *Iqbal* and *Twombly* "require more specificity from complaints in federal civil cases than was heretofore the case").

McCleary-Evans v. Maryland Dep't of Transp., State Highway Admin., 780 F.3d 582, 586 (4th Cir. 2015)

The requirement of a comparator is particularly problematic where, as here, a plaintiff alleges that the employer was motivated by bias, despite the presence of legitimate, non-discriminatory reason. Under 42 U.S.C.

§2000e-2(m), the presence of such a legitimate reason does not invalidate the plaintiff's case. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) as recognizing that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination."). *See also, e.g., Burns v. Johnson*, 829 F.3d 1, 12 (1st Cir. 2016) (mixed-motive plaintiff not required to use *McDonnell Douglas*); *Quigg v. Thomas County School District*, 14 F.3d 1227 (11th Cir. 2016) (McDonnell Douglas comparator requirement cannot apply in mixed motive case); *White v. Baxter Health Corp.*, 533 F.3d 381 (6th Cir. 2008) (same).

The response of Judge James Wynn, in dissent, well illustrates the problem in detail, and in the clearest possible manner:

> The apparent tension between the Court's decisions in *Iqbal* and *Swierkiewicz* is well-documented. [fn1]
>
> [fn1] See, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 623 (7th Cir.2011) (Hamilton, dissenting) ("*Iqbal* ... created tension with *Swierkiewicz* by endorsing its holding while simultaneously appearing to require the same sort of fact-specific pleading of discriminatory intent that the *Swierkiewicz* Court rejected."); *Starr v. Baca*, 652 F.3d 1202, 1215 (9th Cir.2011) ("The juxtaposition of *Swierkiewicz* ... on the one hand, and ... Iqbal, on the other, is perplexing"); Arthur R. Miller, From Conley to

> Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 31 (2010) (noting that the tension between *Iqbal* and *Swierkiewicz* has "caus[ed] confusion and disarray among judges and lawyers").

McCleary-Evans, 780 F.3d at 590 (4th Cir. 2015) (Wynn, J., dissenting). Judge Wynn then reviews the complaint in detail, explaining how the plaintiff's allegations go beyond what *Swierkiewicz* found sufficient to satisfy Rule 8(a)(2). She applied for two positions with the Maryland Department of Transportation's State Highway Administration. She laid out in immense detail her qualifications. She identified the employees responsible for denying her applications. She alleged that she and other African Americans were denied employment in favor of non-African American applicants. She provided information regarding her interview experience and what a discriminatory history of hires. He found it plausible. *McCleary-Evans*, 780 F.3d at 591 (Wynn, J., dissenting). He notes that courts are concerned with litigation costs, and provides a countervailing consideration that must be considered.

> Yet if we are to consider litigation costs in the application of federal pleading standards, we must take care not to ignore the costs borne by plaintiffs and society as a whole when meritorious discrimination lawsuits are prematurely dismissed. See *Miller*, supra at 61. We ought not forget that asymmetric discovery burdens are often the byproduct of asymmetric information. The district court's decision below exemplifies the risks posed by

> an overly broad reading of *Twombly* and *Iqbal*. The district court faulted McCleary–Evans for failing to allege how much control the Highway Administration employees named in the complaint "wield[ed]" over other members of the hiring committee and failing to identify the qualifications of the selected candidates. J.A. 27–28. It is simply unrealistic to expect McCleary–Evans to allege such facts without the benefit of at least some limited discovery. When we impose unrealistic expectations on plaintiffs at the pleading stage of a lawsuit, we fail to apply our "judicial experience and common sense" to the highly "context-specific task" of deciding whether to permit a lawsuit to proceed to discovery. *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. At the early stages of Title VII litigation, borderline conclusory allegations may be all that is available to even the most diligent of plaintiffs. The requisite proof of the defendant's discriminatory intent is often in the exclusive control of the defendant, behind doors slammed shut by an unlawful termination.

McCleary-Evans, 780 F.3d at 591–92 (Wynn, J. dissenting). As Judge Wynn notes, without the benefit of at least some limited discovery, the requisite proof of discriminatory intent is often in exclusive control of the defendant. Where that is the case, complaints must not be dismissed for failure to cite comparators of which plaintiffs can only have, at best, haphazard knowledge. The danger here is the danger of lip service and the undermining of confidence in the law and in this Court. Courts that say one thing, and do another, are not courts following the rule of law. As Judge Wynn states:

> Under the majority's view, what remains of *Swierkiewicz* after *Twombly* is the bare holding that courts should not use the magic words of *McDonnell Douglas* to assess the sufficiency of Title VII claims at the 12(b)(6) stage. Thus, the majority would render *Swierkiewicz* a hollow shell and mute its primary thrust—namely, that discriminatory intent need not be pled with specific facts. But the Supreme Court in *Swierkiewicz* specifically forbade using judicial interpretation to limit the scope of its holding. Indeed, in *Swierkiewicz*, in response to the argument that the Court's holding would "burden the courts" by "allowing lawsuits based on conclusory allegations of discrimination to go forward," *Swierkiewicz*, 534 U.S. at 514, 122 S.Ct. 992, Justice Thomas, writing for a unanimous Court, stated that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.' " Id. (emphasis added) (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168–169, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). As far as I am aware, no amendment to the Federal Rules has taken effect since the Court's ruling in *Swierkiewicz* that would require the level of specificity that the majority by its own "judicial interpretation" demands from McCleary–Evans.

McCleary-Evans, 780 F.3d at 591–92 (Wynn, J. dissenting).

The District Court in the present case required additional information amounting to a heightened pleading requirement. The District Court may be forgiven for doing so. Its reasoning was unsurprising, given the tangled web of case law holding and implying in dicta that information on a specific comparator similarly situated in regard to job, title, supervisor, disciplinary history and other similar factors.

It was not only the District Court that had some trouble with the doctrine. The Fifth Circuit initially issued an opinion, withdrawn two days later, in which it held that a comparator is required. In its earlier, subsequently withdrawn opinion, it stated:

> The Title VII discrimination claim presented here "relies entirely on circumstantial evidence, and is therefore subject to the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017). Under *McDonnell Douglas*, a plaintiff must establish a prima facie case of discrimination. 411 U.S. at 802, 93 S.Ct. 1817. Specifically, a plaintiff must allege facts sufficient to support a finding "that he was treated less favorably than others outside of his protected class." *Alkhawaldeh*, 851 F.3d at 427.
>
> Olivarez has failed to plead any facts indicating less favorable treatment than others "similarly situated" outside of the asserted protected class. See id. In fact, the Second Amended

> Complaint does not contain any facts about any comparators at all.

Olivarez v. T-Mobile USA, Inc., No. 20-20463, 2021 WL 1904592, at *2 (5th Cir. May 12, 2021), opinion withdrawn and superseded, No. 20-20463, 2021 WL 1945680 (5th Cir. May 14, 2021). If even the Fifth Circuit needs two tries to get it right, then the doctrine is in serious need of shoring up.

1. Many Circuits have recognized that requiring a comparator at the pleading stage of a Title VII case is an inappropriate "heightened pleading requirement" that *Swierkiewicz* eliminated.

It should be noted that all Title VII Circuit cases contain statements that they adhere to *Swierciewicz*. Only the Circuits cited in this section, however, actually follow the requirements of *Swierciewicz*. Many of the cases cited in subsection 2, below, which go on to dismiss complaints for failure to cite comparators, also pay homage to *Swierciewicz*, and then proceed largely to ignore it.

Second Circuit: *Patane v. Clark*, 508 F.3d 106, 112 n.3 (2d Cir. 2007) (noting that the District Court's recitation of the *McDonnell Douglas* factors was inappropriate.)

Amron v. Morgan Stanley Inv. Advisors, Inc., 464 F.3d 338, 343 (2d Cir.2006) (Recognizing that *McDonnell Douglas* standard inappropriate in 12(b)(6) context of Title VII cases)

Third Circuit: *Castleberry v. STI Grp.*, 863 F.3d 259, 266 (3d Cir. 2017) ("But most importantly, what Defendants

and the District Court ignore is that in every case they cite the claim was resolved at summary judgment. Under the McDonnell-Douglas framework, a claim of employment discrimination necessarily survives a motion to dismiss so long as the requisite prima facie elements have been established. That is so because "it may be difficult" for a plaintiff to prove discrimination "[b]efore discovery has unearthed relevant facts and evidence." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Here, Plaintiffs have established those elements, and thus their claims should not have been dismissed at this early stage of the litigation.")

Sixth Circuit: *Masaebi v. Arby's Corp.*, 852 F. App'x 903, 908 (6th Cir. 2021) ("the prima facie case under McDonnell Douglas is an evidentiary standard applicable at summary judgment or trial, not a pleading requirement.")

Seventh Circuit: *Freeman v. Metro. Water Reclamation Dist. of Greater Chicago*, 927 F.3d 961, 965 (7th Cir. 2019) (Rather, to proceed against the District under § 1983 or Title VII, Freeman needed only to allege—as he did here—that the District fired him because of his race."… His failure to plead the evidentiary element about comparable coworkers, therefore, is not fatal.)

Carlson v. CSX Transp., Inc., 758 F.3d 819, 827 (7th Cir. 2014) ("The plaintiff is not required to include allegations—such as the existence of a similarly situated comparator—that would establish a prima facie case of discrimination under the "indirect" method of proof.")

Tenth Circuit: *Frappied v. Affinity Gaming Black Hawk, LLC,* 966 F.3d 1038, 1050-51 (10th Cir. 2020) ([W]e do not require plaintiffs to establish a prima facie case…. [A] Title VII plaintiff bringing a claim of employment discrimination in a termination decision must show four elements: "(1) he [or she] belongs to a protected class; (2) he [or she] was qualified for his [or her] job; (3) despite his [or her] qualifications, he [or she] was discharged; and (4) the job was not eliminated after his [or her] discharge."

Eleventh Circuit: *Powers v. Sec'y, U.S. Homeland Sec.*, 846 F. App'x 754, 758 (11th Cir. 2021) ("Both the Supreme Court and this Court have held that it is error to require an employment discrimination plaintiff to plead the elements of a *McDonnell Douglas* prima facie case at the pleading stage. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Surtain*, 789 F.3d at 1246.")

2. Circuits also have caselaw requiring a comparator, or stating that none is required and then dismissing for failure to provide comparator information, creating confusion among courts and counsel.

Fourth Circuit: *Swaso v. Onslow Cty. Bd. of Educ.*, 698 F. App'x 745, 748-9 (4th Cir. 2017), as amended (Aug. 11, 2017) ("A plaintiff is not required to identify a similarly situated white comparator to prove her discrimination claim…[H]owever, Swaso failed to provide any factual enhancement regarding the alleged comparators—such as the medical conditions or restrictions of the white teachers who were allowed to return, or the positions or job requirements of those employees allowed to return

with standing restrictions—that would permit the court to reasonably infer their similarity.")

Eighth Circuit: *Warmington v. Bd. of Regents of Univ. of Minnesota*, 998 F.3d 789, 798 (8th Cir. 2021) ("She does not specify the sex of all the "other coaches" she was treated differently than, leaving this court unable to conclude she was only treated differently than other male coaches.")

Ninth Circuit: *Sheets v. City of Winslow*, No. 20-16278, 2021 WL 2555714, at *1 (9th Cir. June 22, 2021) ("To plead a claim for race-based disparate treatment under Title VII, a plaintiff must allege sufficient facts to show that "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004).")

Eleventh Circuit: *Uppal v. Hosp. Corp. of Am.*, 482 F. App'x 394, 396 (11th Cir. 2012) (Although a plaintiff need not satisfy the McDonnell Douglas1 framework at the pleading stage in order to state a claim for disparate treatment, the "ordinary rules for assessing the sufficiency of a complaint [still] apply." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511, 122 S.Ct. 992, 997, 152 L.Ed.2d 1 (2002); see also Davis v. Coca–Cola Bottling Co. Consol., 516 F.3d 955, 974 (11th Cir.2008) ("Although a Title VII complaint need not allege facts sufficient to make out a classic *McDonnell Douglas* prima facie case…However,

Dr. Uppal never once supplements these allegations of disparate treatment with any factual detail, such as even a brief description of how the alleged comparator employees were outside of her protected class.)

As a result of these conflicting opinions, persons subjected to discrimination can never be certain whether they will be judged under the lower standard or the heightened standard. They can never be certain whether they will have the opportunity to proceed past the pleadings to obtain the discovery often necessary to find comparators. This injustice should not be permitted to continue.

B. This case raises exceptionally important questions.

This case presents a question of profound importance with wide-ranging implications for the thousands of Title VII discrimination plaintiffs, and other plaintiffs bringing other types of discrimination complaints, and the lawyers who are advising potential plaintiffs of the likelihood of success in filing a discrimination action. Given the long, unhappy history of this country with discrimination, and the desire of the American people to rectify these wrongs by giving discrimination victims legal recourse, it is crucial to the integrity of the judiciary and our country to ensure that this be addressed as soon as possible. *Swierkiewicz* was decided almost twenty years ago. It is incumbent upon us to ensure that the legacy of *Swierkiewicz* is not forgotten.

CONCLUSION

For all these reasons, the Court should grant a writ of certiorari.

Respectfully submitted.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 14, 2021

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-20463

ELIJAH ANTHONY OLIVAREZ,

Plaintiff-Appellant,

versus

T-MOBILE USA, INCORPORATED; BROADSPIRE SERVICES, INCORPORATED,

Defendants-Appellees.

May 14, 2021, Filed

Appeal from the United States District Court
for the Southern District of Texas
No. 4:19-CV-4452.

Before SMITH, STEWART, and HO, *Circuit Judges*.

JAMES C. HO., *Circuit Judge*:

We withdraw the court's prior opinion of May 12, 2021 and substitute the following opinion.

Appendix A

Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing]" against any individual with respect to employment "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Under *Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020), discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination under Title VII. Accordingly, a plaintiff who alleges transgender discrimination is entitled to the same benefits—but also subject to the same burdens—as any other plaintiff who claims sex discrimination under Title VII.

Elijah Olivarez alleges transgender discrimination under Title VII. But Olivarez does not allege facts sufficient to support an inference of transgender discrimination—that is, that T-Mobile would have behaved differently toward an employee with a different gender identity. So we are left with this: An employer discharged a sales employee who happens to be transgender—but who took six months of leave, and then sought further leave for the indefinite future. That is not discrimination—that is ordinary business practice. And Olivarez's remaining issues on appeal are likewise meritless. We accordingly affirm.

I.

Olivarez was employed as a retail store associate for T-Mobile from approximately December 21, 2015 to April 27, 2018.

Appendix A

During the first half of 2016, a supervisor allegedly made demeaning and inappropriate comments about Olivarez's transgender status. Second Amended Complaint, ¶¶ 7-8. Olivarez filed a complaint with human resources. *Id.* at ¶8. In response, T-Mobile allegedly retaliated by reducing Olivarez's hours to part-time from September to November 2016. *Id.* at ¶ 9.

In September 2017, Olivarez stopped coming to work in order to undergo egg preservation and a hysterectomy. *Id.* at ¶ 10. The next month, Olivarez requested leave to be applied retroactively from September to December 2017. *Id.* Broadspire Services administers T-Mobile's leave programs. *Id.* It granted Olivarez unpaid leave from September 23 to December 17, and paid medical leave from December 17 to December 31. *Id.* at ¶¶ 11, 13. In addition, the company granted Olivarez's request for an extension of leave through February 18, 2018. *Id.* at ¶ 14. But it denied a further extension of leave in March 2018. *Id.* at ¶ 15-16.

T-Mobile fired Olivarez on April 27, 2018. The Equal Employment Opportunity Commission issued a right-to-sue letter to Olivarez on August 15, 2019.

On November 12, 2019, Olivarez filed suit against T-Mobile and Broadspire. The first complaint asserted (1) interference, discrimination, and retaliation under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (2) discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and (3) discrimination under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*

The district court granted Olivarez's motion to amend the complaint on November 22, 2019, and Olivarez filed a First Amended Complaint the same day. The amended complaint asserted the same claims and allegations.

On February 13, 2020, the district court entered a scheduling order pursuant to Federal Rule of Civil Procedure 16. That order set a deadline of March 13 to amend pleadings "with leave of court." Both T-Mobile and Broadspire moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Olivarez opposed both motions and asserted the right to further amend the complaint under Federal Rule of Civil Procedure 15(a).

On March 27, 2020, the district court denied T-Mobile's and Broadspire's motions without prejudice and allowed Olivarez to further amend the complaint by April 17. The district court expressly stated that Olivarez's pleadings were deficient and granted leave to amend the complaint "so that it is responsive to the issues raised by the Moving Defendants' motions to dismiss."

Olivarez filed a Second Amended Complaint on April 16, 2020. As relevant to this appeal, that complaint presented the same facts and claims. On April 30, T-Mobile and Broadspire moved to dismiss under Rule 12(b)(6). Olivarez opposed these motions, but did not request leave to further amend the complaint.

The district court granted both motions to dismiss. The court dismissed the Title VII discrimination claim

on the ground that the Second Amended Complaint failed to allege that Olivarez was treated less favorably than similarly situated employees outside Olivarez's protected class. The court dismissed the ADA discrimination claim because the Second Amended Complaint did not allege sufficient facts to show Olivarez was disabled.

Olivarez filed a motion for reconsideration of the final judgment pursuant to Federal Rule of Civil Procedure 59(e) and a motion to further amend the complaint under Rule 15(a). The district court denied both motions. The district court's order did not discuss the reasons for denying reconsideration, but it stated that it denied the motion to amend pursuant to Rule 16(b). Olivarez timely appealed, but raises only the Title VII and ADA claims.

We "review the grant of a motion to dismiss under Rule 12(b)(6) de novo, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[]." *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018) (quotation omitted). Rule 12(b)(6) governs dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than . . . 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). And "[a] complaint survives a motion to dismiss only if it

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Meador*, 911 F.3d at 264 (quotation omitted).

II.

At the Rule 12(b)(6) stage, our analysis of the Title VII claim is governed by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)—and not the evidentiary standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under *Swierkiewicz*, we have explained, "there are two ultimate elements a plaintiff must plead to support a disparate treatment claim under Title VII: (1) an adverse employment action, (2) taken against a plaintiff *because of* her protected status." *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762, 767 (5th Cir. 2019) (quotations omitted) (citing *Raj v. La. State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013)).

But "[a]lthough [a plaintiff does] not have to submit evidence to establish a prima facie case of discrimination [under *McDonnell Douglas*] at this stage, he [must] plead sufficient facts on all of the ultimate elements of a disparate treatment claim to make his case plausible." *Chhim v. Univ. of Texas at Austin*, 836 F.3d 467, 470 (5th Cir. 2016). And when a plaintiff's Title VII disparate treatment discrimination claim depends on circumstantial evidence, as Olivarez's does, the plaintiff "will 'ultimately have to show' that he can satisfy the *McDonnell Douglas* framework." *Cicalese*, 924 F.3d at 767 (quoting *Chhim*,

836 F.3d at 470). "In such cases, we have said that it can be 'helpful to reference' that framework when the court is determining whether a plaintiff has plausibly alleged the ultimate elements of the disparate treatment claim." *Id.* (quoting *Chhim*, 836 F.3d at 470).

Under *McDonnell Douglas*, a plaintiff must establish a prima facie case of discrimination. 411 U.S. at 802. Specifically, a plaintiff must allege facts sufficient to support a finding "that he was treated less favorably than others *outside of his protected class*." *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 427 (5th Cir. 2017).

Accordingly, when a complaint purports to allege a case of circumstantial evidence of discrimination, it may be helpful to refer to *McDonnell Douglas* to understand whether a plaintiff has sufficiently pleaded an adverse employment action taken "*because of*" his protected status as required under *Swierkiewicz*. *Cicalese*, 924 F.3d at 767 (quotation omitted).

Applying these principles here, there is no dispute that Olivarez suffered an adverse employment action. However, Olivarez has failed to plead any facts indicating less favorable treatment than others "similarly situated" outside of the asserted protected class. *See id.* In fact, the Second Amended Complaint does not contain any facts about any comparators at all. The complaint simply indicates that Olivarez took six months of leave from September 2017 to February 2018—including an extension granted by T-Mobile and Broadspire—and that when Olivarez requested additional leave in March 2018,

T-Mobile denied the request and terminated Olivarez's employment in April 2018.

Notably, there is no allegation that any non-transgender employee with a similar job and supervisor and who engaged in the same conduct as Olivarez received more favorable treatment. And comparator allegations aside, the complaint presents no other facts sufficient to "nudge[] [the] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 547. In sum, the complaint does not plead any facts that would permit a reasonable inference that T-Mobile terminated Olivarez because of gender identity.

Olivarez's ADA discrimination claim fails for similar reasons. A claim of discrimination under the ADA requires a plaintiff to allege a disability, that he was qualified for his position, and that he suffered an adverse employment action because of his disability. *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013). Olivarez failed to sufficiently allege an adverse employment action *because of* disability. *See id.* At most, Olivarez made a conclusory allegation that T-Mobile and Broadspire "discriminated against [Olivarez] based on [a] disability." But the Rule 8 pleading standard demands more than conclusory statements. *Iqbal*, 556 U.S. at 678. "A complaint survives a motion to dismiss only if it pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Meador*, 911 F.3d at 264 (quotation omitted).

Finally, as for retaliation under Title VII, the claim is untimely. Title VII requires a plaintiff to file an administrative charge no later than 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Olivarez alleges retaliation for complaining about a supervisor's demeaning and inappropriate comments in 2016, but did not file an administrative charge until 2018. As a result, the retaliation claim is untimely—a contention Olivarez does not dispute on appeal. *See Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 746 (5th Cir. 1987) (explaining that, when an appellant fails to identify any error in the district court's analysis, it is the same as if the appellant had not appealed).

III.

According to Olivarez, the district court should have reconsidered its decision to dismiss the gender discrimination claims under Federal Rule of Civil Procedure 59(e). Rule 59(e) allows a party to seek to alter or amend a judgment "when there has been an intervening change in the controlling law." *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567-68 (5th Cir. 2003). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). As a result, "[w]e review the denial of a Rule 59(e) motion only for abuse of discretion." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990).

Olivarez contends that, after the district court granted the motions to dismiss, *Bostock* changed the law and created a lower standard for those alleging discrimination based on gender identity. T-Mobile and Broadspire argue that *Bostock* did no such thing.

We agree with T-Mobile and Broadspire. *Bostock* defined sex discrimination to encompass sexual orientation and gender identity discrimination. But it did not alter the meaning of discrimination itself. At the pleading stage, a Title VII plaintiff must plead sufficient facts to make it plausible that he was discriminated against "*because of*" his protected status. *Cicalese*, 924 F.3d at 767 (quotation omitted). At the summary judgment stage, when the claim relies on circumstantial evidence, a Title VII plaintiff must identify a more favorably treated comparator in order to establish discrimination. *Bostock* does not alter either of those standards.

To the contrary, *Bostock* expressly reaffirms these principles. It states that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." 140 S. Ct. at 1737. Moreover, *Bostock* employs various hypothetical comparators to support its analysis. *See*, *e.g.*, *id.* at 1741 ("Consider . . . an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.").

Accordingly, there is no intervening change of law that warrants reconsideration under Rule 59(e).[1]

IV.

Finally, Olivarez argues that the district court abused its discretion in denying leave to amend the complaint, because the good cause standard under Federal Rule of Civil Procedure 16(b) does not apply here.

"We review for abuse of discretion the district court's denial of leave to amend." *S&W Enters., L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 535 (5th Cir. 2003). "A district court possesses broad discretion in its decision whether to permit amended complaints." *Crostley v. Lamar Cnty.*, 717 F.3d 410, 420 (5th Cir. 2013).

We have "ma[d]e clear that Rule 16(b) governs amendment of pleadings after a scheduling order deadline has expired." *S&W Enters.*, 315 F.3d at 536. A scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The good cause standard requires a showing by the movant that "the deadlines cannot reasonably be met despite the diligence of the party needing the extension." *S&W Enters.*, 315

1. Olivarez also argues that the district court erred in refusing to reconsider the dismissal of the ADA claim. However, in the motion for reconsideration, Olivarez only argued for reconsideration of the Title VII discrimination claim. "This court will not consider arguments first raised on appeal." *Estate of Duncan v. Comm'r of Internal Revenue*, 890 F.3d 192, 202 (5th Cir. 2018). Olivarez has therefore forfeited this argument.

F.3d at 535 (quotation omitted). It is "[o]nly upon the movant's demonstration of good cause to modify the scheduling order [that] the more liberal standard of Rule 15(a) appl[ies] to the district court's decision to grant or deny leave." *Id.* at 536.

The district court's scheduling order set a deadline of March 13, 2020 for amendments with leave of court. Olivarez requested leave to amend the First Amended Complaint on February 12, 2020. After denying the defendants' initial motions to dismiss, the court allowed Olivarez to file a Second Amended Complaint on April 16, 2020. The court then granted the defendants' second motions to dismiss on April 30, 2020.

Olivarez filed a motion to submit a Third Amended Complaint on July 7, 2020—well after the court's March 13 deadline. Accordingly, the district court was correct to apply the good cause standard of Rule 16(b). *Id.* And Olivarez failed to meet that standard. There is no explanation for the five-month delay before pleading the facts and allegations in the Third Amended Complaint. Nor is there any suggestion that any of those facts were unavailable when filing the previous three complaints. Nor did Olivarez request an opportunity to replead in response to the second motion to dismiss. In sum, there is no good cause here to justify further amendment to the complaint. The district court accordingly did not abuse its discretion in denying further leave to amend.[2]

2. Separate and apart from Rule 16(b), there is also the matter of Rule 15(a). Under Rule 15(a), a district court may deny leave to amend when there has been "undue delay" or "repeated failure to

"Title VII protects every American, regardless of sexual orientation or transgender status. It simply requires proof of sex discrimination." *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 340 (5th Cir. 2019) (Ho, J., concurring). That was true before *Bostock*, and it remains true after *Bostock*. Under *Bostock*, transgender discrimination is a form of sex discrimination under Title VII. But a plaintiff claiming transgender discrimination under *Bostock* must plead and prove just that—discrimination. We affirm.

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cure deficiencies by amendments previously allowed." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003) (quotations omitted). The district court here noted Olivarez "previously filed two amended complaints." Olivarez failed to cure the defects in those complaints despite notice from both the district court and the defendants. *See Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 567 (5th Cir. 2002) (explaining that, where the plaintiffs had "already filed an original complaint and two amended complaints, each alleging [similar] claims," they had been "given ample opportunity to plead their statutory claims," and therefore it was not an abuse of discretion to deny leave to amend further). Denial was therefore proper under Rule 15(a) as well as Rule 16(b).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED JUNE 19, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-19-4452

ELIJAH ANTHONY OLIVAREZ,

Plaintiff,

v.

T-MOBILE USA INC. *et al.*,

Defendants.

June 9, 2020, Decided; June 9, 2020
Filed; June 10, 2020, Entered

ORDER

Pending before the Court are Defendant T-Mobile USA Inc.'s 12(b)(6) Motion to Dismiss the Second Amended Complaint (Document No. 30) and the Motion of Defendant Broadspire Services Inc. to Dismiss the Second Amended Complaint (Document No. 31). Having considered the motions, submissions, and applicable law, the Court determines the motions should be granted.

Appendix B

I. BACKGROUND

This is an alleged employment discrimination case. Plaintiff Elijah Olivarez ("Olivarez") is an alleged former employee of Defendants T-Mobile USA Inc. ("T-Mobile") and Broadspire Services Inc. ("Broadspire"). Specifically, in December 2015, Olivarez alleges he commenced working for T-Mobile and Broadspire (collectively, "Defendants")—-his joint employer—as a retail store associate. While working for Defendants, Olivarez alleges he experienced discrimination and retaliation and further alleges Defendants interfered with his right to take protected leave. In April 2018, Olivarez's employment was allegedly terminated.

Based on the foregoing, on November 12, 2019, Olivarez filed this lawsuit against Defendants, asserting claims for discrimination and retaliation. On November 22, 2019, Olivarez filed a first amended complaint. On April 16, 2020, Olivarez filed a second amended complaint.[1] The live claims assert: (1) interference, discrimination, and retaliation under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* (the "FMLA Claims"); (2) discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (the "Title VII Claims"); and (3) discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the "ADA

1. The second amended complaint was filed, with the Court's leave, after the Court denied without prejudice Defendants' prior motions to dismiss. *Order*, Document No. 27.

Claim").[2] On April 30, 2020, Defendants each filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).[3]

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) governs dismissal for failure "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than . . . 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

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2. The Court notes Olivarez makes allegations of joint-employer status that appear to be set forth as a standalone claim for relief. *See Second Amended Complaint*, Document No. 28, ¶¶ 19-22 [hereinafter *Live Complaint*]. Olivarez cites no authority showing joint-employer status is a standalone claim for relief. The Court therefore does not construe Olivarez's allegations as to joint-employer status as a standalone claim for relief.

3. Olivarez and Defendants rely, in part, on extrinsic evidence (the "Extrinsic Evidence"). Rule 12(b)(6) generally precludes consideration of materials beyond the pleadings. Fed. R. Civ. P. 12(d). The Court may, however, consider materials beyond the pleadings by giving notice and converting a motion to dismiss into a motion for summary judgment. *Id.* Because Rule 12(b)(6) precludes consideration of the Extrinsic Evidence, and because the Court declines to convert the motions to dismiss into motions for summary judgment, the Court does not consider the Extrinsic Evidence.

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. If "the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558).

III. LAW & ANALYSIS

Defendants move to dismiss the FMLA Claims, the Title VII Claims, and the ADA Claim. The Court addresses Defendants' contentions as to the FMLA Claims, the Title VII Claims, and the ADA Claim in turn.

A. The FMLA Claims

Defendants contend the FMLA Claims—specifically, for interference, discrimination, and retaliation—fail because Olivarez does not sufficiently allege he was entitled to FMLA leave. A *prima facie* case of interference under the FMLA requires a plaintiff to allege, *inter alia*, he was an "eligible employee" entitled to leave under the FMLA. *Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017). Under the FMLA, an eligible employee entitled

to leave is an employee who worked for the employer for at least 1,250 hours during the preceding twelve-month period. 29 U.S.C. § 2611(2)(A). Further, a *prima facie* case of "discrimination or retaliation" under the FMLA requires the plaintiff to allege, *inter alia*, he was "protected under the FMLA." *Bocalbos v. Natl W. Life Ins. Co.*, 162 F.3d 379, 383 (5th Cir. 1998). The plaintiff is not protected under the FMLA if he was not an eligible employee entitled to FMLA leave at the time leave was requested or at the time requested leave would have been taken. *Amsel v. Tex. Water Dev. Bd.*, 464 F. App'x 395, 401 n.7 (5th Cir. 2012) (per curiam).

On December 21, 2015, Olivarez alleges he commenced working for Defendants "as a full-time retail store associate."[4] From September 2016 to November 2016, Olivarez alleges his "hours were reduced to part-time[.]"[5] On October 10, 2017, Olivarez alleges he requested leave "from 9/23/17 until 12/31/17."[6] On December 21, 2017, Olivarez alleges he requested to "be out another six weeks."[7] On March 20, 2018, Olivarez alleges he requested "additional leave."[8]

Olivarez does not allege facts showing he worked at least 1,250 hours during the twelve-month period

4. *Live Complaint, supra* note 2, ¶ 6.

5. *Live Complaint, supra* note 2, ¶ 9.

6. *Live Complaint, supra* note 2, ¶ 10.

7. *Live Complaint, supra* note 2, ¶ 14.

8. *Live Complaint, supra* note 2, ¶ 15.

preceding the alleged initial request for leave commencing September 23, 2017. Further, Olivarez does not allege facts showing he worked at least 1,250 hours during the twelve-month period preceding the alleged requests for leave on December 21, 2017, and March 20, 2018. While Olivarez allegedly initially worked "full-time,"[9] Olivarez alleges his hours were reduced to "part-time."[10] Olivarez does not allege he returned to working on a full-time basis.

Olivarez fails to sufficiently allege he was an eligible employee entitled to FMLA leave and further fails to sufficiently allege he was protected under the FMLA. The FMLA Claims therefore fail as a matter of law. Accordingly, the motions to dismiss are granted as to the FMLA Claims.[11]

B. The Title VII Claims

Defendants contend the Title VII Claims should be dismissed. The Court addresses Defendants' contentions as to each of the Title VII Claims—specifically, discrimination and retaliation—in turn.

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9. *Live Complaint, supra* note 2, ¶ 6.

10. *Live Complaint, supra* note 2, ¶ 9.

11. T-Mobile further contends the FMLA Claims should be dismissed because Olivarez fails to distinguish between Defendants and further contends the claim for retaliation under the FMLA should be dismissed because Olivarez fails to allege protected activity or a causal connection between protected activity and an adverse action. In light of the Court's holding, the Court need not address these contentions.

Appendix B

1. Discrimination

Defendants contend the claim for discrimination under Title VII fails because Olivarez does not sufficiently allege he was treated differently than other employees. A *prima facie* case of discrimination under Title VII requires a plaintiff to allege, *inter alia*, he was treated less favorably than similarly-situated employees outside his protected group. *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 426 (5th Cir. 2017). "Employees are similarly situated if: (1) they 'held the same job or responsibilities'; (2) they worked for 'the same supervisor or had their employment status determined by the same person'; (3) they had 'essentially comparable violation histories'; and 'critically' (4) the employees' conduct drawing adverse consequences was 'nearly identical' but resulted in 'dissimilar employment decisions.'" *Warren v. Fed. Nat'l Mortg. Ass'n*, 733 F. App'x 753, 761 (5th Cir. 2018) (per curiam) (quoting *Lee v. Kan. City. S. Ry. Co.*, 574 F.3d 253, 259-60 (5th Cir. 2009)). Under Rule 12(b)(6), the plaintiff must plead sufficient facts as to the ultimate elements of the *prima facie* case. *Chhim v. Univ, of Tex. at Austin*, 836 F.3d 467, 470 (5th Cir. 2016).

Olivarez does not plead facts alleging other employees held the same job or responsibilities, worked for the same supervisor, had comparable violation histories, or engaged in nearly identical conduct resulting in dissimilar employment decisions. Olivarez does not allege he was treated less favorably than a similarly-situated employee outside his protected group. Olivarez therefore fails to sufficiently allege a *prima facie* case of discrimination

under Title VII. Accordingly, the motions to dismiss are granted as to the claim for discrimination under Title VII.[12]

2. Retaliation

Defendants contend the claim for retaliation under Title VII is untimely. Under Title VII, a plaintiff must file an administrative charge within, at most, 300 days after the alleged unlawful employment practice occurs. 42 U.S.C. § 2000e-5(e)(1); *EEOC v. WC & M Enters., Inc.*, 496 F.3d 393, 398 (5th Cir. 2007). A timely administrative charge is a prerequisite to judicial relief. *E.g., Tucker v. United Parcel Serv., Inc.*, 734 F. App'x 937, 940 (5th Cir. 2018) (per curiam). Olivarez alleges he filed an administrative charge in June 2018.[13] Olivarez alleges he experienced retaliation "in 2016[.]"[14] The June 2018 administrative charge's 300-day period does not extend to alleged retaliation in 2016. Aside from allegations of 2016 retaliation, Olivarez does not identify other or

12. T-Mobile further contends the claim for discrimination under Title VII should be dismissed because Olivarez fails to: (1) distinguish between Defendants; (2) allege he belongs to a protected group; (3) allege timely acts of discrimination; and (4) sufficiently respond to the motions to dismiss. Broadspire further contends the claim for discrimination under Title VII should be dismissed because Olivarez fails to: (1) allege he belongs to a protected group; (2) allege timely acts of discrimination; (3) allege an adverse action; and (4) sufficiently respond to the motions to dismiss. In light of the Court's holding, the Court need not address these contentions.

13. *Live Complaint, supra* note 2, ¶ 17.

14. *Live Complaint, supra* note 2, ¶ 24.

more recent acts of alleged retaliation under Title VII.[15] Taking Olivarez's allegations as true—as Rule 12(b)(6) requires—the claim for retaliation under Title VII is untimely. Accordingly, the motions to dismiss are granted as to the claim for retaliation under Title VII.[16]

C. The ADA Claim

Defendants contend the ADA Claim fails because Olivarez does not sufficiently allege a disability. A *prima facie* case of discrimination under the ADA requires a plaintiff to allege, *inter alia*, a disability. *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013). Under the ADA, "disability" means: (1) "a physical or mental impairment that substantially limits one or more of the major life activities"; (2) "a record of such an impairment"; or (3) "regarded as having such an impairment[.]" 42 U.S.C. § 12102(1); *see also* 29 C.F.R. § 1630.2(h) (defining "[p]hysical or mental impairment").

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15. Although Olivarez alleges the termination of his employment is "evidence of retaliation" under the FMLA, he does not make that allegation under Title VII. *See Live Complaint, supra* note 2, ¶ 29; *see also Live Complaint, supra* note 2, ¶ 33. Nor does Olivarez contend tolling or the continuing-violation doctrine apply.

16. T-Mobile further contends the claim for retaliation under Title VII should be dismissed because Olivarez fails to distinguish between Defendants or identify any specific act of alleged retaliation. Broadspire further contends the claim for retaliation under Title VII should be dismissed because a 180-day limitation applies. In light of the Court's holding, the Court need not address these contentions.

Olivarez alleges he required leave "for egg preservation and a hysterectomy"[17] (the "Procedures"). Olivarez does not allege a physical or mental impairment related to, or caused the need for, the Procedures. Olivarez alleges "mental health problems . . . ensued due to th[e P]rocedures[.]"[18] Olivarez does not, however, plead any further allegations as to alleged mental health problems associated with the Procedures. Olivarez does not allege facts showing he had a physical or mental impairment substantially limiting a major life activity, a record of such an impairment, or he was regarded as having such an impairment. Olivarez fails to sufficiently allege a disability under the ADA. The ADA Claim thus fails as a matter of law. Accordingly, the motions to dismiss are granted as to the ADA Claim.[19]

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17. *Live Complaint, supra* note 2, ¶ 10.

18. *Live Complaint, supra* note 2, ¶ 27.

19. T-Mobile further contends the ADA Claim should be dismissed because Olivarez fails to: (1) distinguish between Defendants; (2) allege T-Mobile knew of any disability or delayed or denied leave; (3) allege a causal connection between a disability and an adverse action; and (4) sufficiently respond to the motions to dismiss. Broadspire further contends the ADA Claim should be dismissed because Olivarez fails to: (1) allege timely acts of discrimination; (2) allege an adverse action; (3) allege a causal connection between a disability and an adverse action; and (4) sufficiently respond to the motions to dismiss. In light of the Court's holding, the Court need not address these contentions.

IV. CONCLUSION

Accordingly, the Court hereby

ORDERS that Defendant T-Mobile USA Inc.'s 12(b)(6) Motion to Dismiss the Second Amended Complaint (Document No. 30) is **GRANTED**. The Court further

ORDERS that the Motion of Defendant Broadspire Services Inc. to Dismiss the Second Amended Complaint (Document No. 31) is **GRANTED**.

The Court will issue a separate final judgment.

SIGNED at Houston, Texas, on this 9 day of June, 2020.

/s/ David Hittner
DAVID HITTNER
United States District Judge