No. 21-733

IN THE
SUPREME COURT OF THE UNITED STATES

CLYDE DANDRIDGE,
Petitioner,

v.

WAL-MART STORES, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CLYDE DANDRIDGE
PRO SE
P.O. Box 1647
Titusville, FL 32781
Telephone: (321) 291-0124

QUESTION PRESENTED

The question presented which has caused a split in the Circuit Courts of Appeal application of the law pertaining to Retaliation cases under Title VII Civil Rights of 1964.

Does a petitioner who files an EEOC charge and asserts a claim of retaliatory discrimination for engaging in protected activities under the anti-retaliation Title VII Civil Rights of 1964, 42 U.S.C. §2000e-3(a), must show that he suffered a materially adverse employment action based on precedent standard established by the U.S. Supreme Court using the framework "Whether mistreatment well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" providing proof of retaliation using "but for" causation or is a petitioner required to provide proof of retaliation utilizing the more stringent "Burden Shifting" McDonnell Douglas framework?

PARTIES TO THE PROCEEDING

The petitioner is Clyde Dandridge.

The respondent is Wal-Mart Stores, Inc.

LIST OF ALL PROCEEDINGS

Clyde Dandridge v. Wal-Mart Stores Inc., No. 6:19-cv-385-Orl-40GJK, United States Middle District Court of Orlando. Judgment entered May 18, 2020.

Clyde Dandridge v. Wal-Mart Stores Inc., No. 20-12257, United States Court of Appeals for the Eleventh Circuit. Judgment entered February 10, 2021.

Clyde Dandridge v. Wal-Mart Stores Inc., No. 20-12257, United States Court of Appeals for the Eleventh Circuit. Judgment entered April 21, 2021.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Clyde Dandridge respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The order denying petition for Rehearing En Banc with no judge in regular active service on the Eleventh Circuit Court requesting that the Court be polled on Rehearing En Banc is set out a (Petitioner Appendix A) page 1a. The opinion of the Eleventh Circuit Court of Appeals is unpublished and set out at (Petitioner Appendix B) pages 2a-6a. The opinion of the Middle District Court of Orlando order is set out at (Petitioner Appendix C) pages 7a-32a.

JURISDICTION

The decision of the Eleventh Circuit was entered on February 10, 2021. A timely petition for Rehearing En Banc Pro Se was submitted on March 15, 2021. The Eleventh Circuit denied petition for Rehearing En Banc Pro Se on April 21, 2021. On July 19, 2021 this Court entered a standing order, the effect of which extends the time within which to file a Petition for a Writ of Certiorari in this case to September 20, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The section of Title VII applicable to private-sector employees, 42 U.S.C. § 2000e-3(a), states the following:

> It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment....because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

The FCRA prohibits employers from retaliating against employees "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e-3(a). Retaliation is a separate offense from discrimination, and an employee need not prove the underlying discrimination to avail himself of the statue. *Sullivan v. Nat'l R.R. Passenger Corp.*, 170 F.3d 1056,1059 (11th Cir. 1999).

STATEMENT OF THE CASE

The case presents this Court the opportunity to resolve the discrepancies of thousands of Title VII retaliation cases filed by private-sector employees across the United States. In the present case, the panel of the Eleventh Circuit Court of Appeals made a decision February 10, 2021 that the older *McDonnell Douglas* test they required Petitioner to utilize to prove Title VII retaliation contradicted their prior decision they made in *Monaghan* which reset the standard for retaliation cases on April 2, 2020. A court may only grant "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. Legal Background

This Court has supplied the standard for materially adverse actions in retaliatory claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). "Whether mistreatment well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" under this standard a jury had to decide the retaliation claim. It was confirmed by the Eleventh Circuit Court of Appeals in *Crawford v. Carroll*, 529 F.3d 961, 974 (11th Cir. 2008).

On June 24, 2013 this Court clarified the standard of proof required to succeed in a retaliation claim under Title VII of the Civil Rights Act of 1964. The Court addressed whether, to be successful in bringing an action under Title VII's retaliation provision, an employee must prove that:(1) the employer's discriminatory motive was a "motivating factor' in the employer's decision to take the action; or (2) the employer would not have taken the adverse action, unless the employer had a retaliatory motive-what the courts have referred to as "but for" causation.

In a 5-4 decision, the Court held that the second, more restrictive test applies to Title VII retaliation claims. In other words, to be successful in a retaliation claim an employee must prove that the employer would not have taken an adverse employment action, unless it was retaliating against the employee for complaining about or opposing discrimination or harassment.

Noris Babb v. Secretary, Department of Veterans Affairs 992 F.3d 1193 (2020) was filed in this Court on appeal from the Eleventh Circuit Court petition for rehearing. The Court granted certiorari on Babb's age-discrimination claim and reversed on remand back to the Eleventh Circuit Court for Title VII retaliation and hostile work-environment claims on April 6, 2020.

B. Factual Background

Wal-Mart has an anti-discrimination policy that allows associates to grieve any disciplinary action in a number of ways. One method is to utilize their "Open Door Policy". This policy allows any associate to bring questions, observations or concerns to any supervisor or manager, without fear of retaliation. If any associate does not feel comfortable utilizing the open door policy, he or she can contact Global Ethics office to report a complaint or issue.

In December of 2012, Robinson stated to Dandridge that it was his new year's resolution to have him demoted. The following month, Robinson held true to his promise and issued Dandridge a first coaching. The coaching was based on Dandridge assigning an associate to electronics, which was a typical practice and not against company policy. Other White associates such as Marinez, Melissa Allen, engaged in similar action but were not written up.

Dandridge grieved his coaching to Cathy Luffy of HR. He informed Luffy of Robinson's statement about his new year's resolution as well. HR required him to apologize to

Dandridge. Robinson eventually was promoted to market manager, responsible for a set number of stores within a particular region.

Marinez became Dandridge's supervisor once Robinson was promoted in 2015. On July 1, 2015 Dandridge sent an email to Glenn Weinger of HR conveying his desire to be promoted. Within days of submitting the email about promotion opportunities Marinez issued a first coaching against Dandridge. This was the first coaching he received in over two years after Robinson had to apologize for his threatening statement. Dandridge was disciplined because associates left pallets on the floor close to the exit door, allegedly creating a potential fire hazard. The associates were not coached, only Dandridge.

The District Court order on May 18, 2020 (Petitioner Appx. C) pg. 11a states " Then, on July 28, 2015 Plaintiff's new supervisor, store manager Katarzyna Marinez, issued him a First Written Coaching for Facility/Housekeeping standards. When an auditor issues a compliance violation to Walmart, the associate who is responsible for the violation generally receives a coaching." Wal-Mart policy dictated that the person who committed the violation would receive the coaching. However, Marinez issued the coaching to Dandridge not the associate who committed the violation of leaving a pallet near the exit door.

One portion of Dandridge's job responsibility was to properly stock the shelves. Part of the stocking process required that overstock product be placed in bins until they could be placed on the shelf. The bins were critical to facilitating the zoning and stocking process and execute his duties. Marinez implemented a process mandating a section of the bins be taped off and unavailable for use which was not a procedure listed in the Walmart CAP program in 2016.

Marinez's insistence on taping the bins prevented Dandridge from successfully completing his task. As a result,

Marinez issued Dandridge a second coaching in on July 2, 2016, stating she entered the store with Darrin Mooney and it was not zoned properly. The District order states as follows on (Petitioner Appx. C) pg. 12a, The Market Manager, who arrived at the store that morning at the same time as Marinez, directed Marinez to coach the Associate who was responsible for the store not being zoned, which resulted in Plaintiff's Second Written Coaching. (Doc. 34-1, 70:16– 71:10, 98:2–20).

The coaching document 16964544 indicates the time stamp of 6:30 when Marinez coached Dandridge. This would mean Marinez and the Market Manager Darrin Mooney would have entered the store before the time of 6:30 am. In Marinez deposition, On cross examine she changed her testimony when she stated "no we didn't enter the same time but he came in later in the morning." Dandridge grieved the coaching by making an open door complaint to Weinger. Moreover, no other person received a write up for the store. He also emailed Mooney as well, but never received a response.

Prior to going to Weinger, Dandridge informed Marinez of his intent to making an open door complaint to upper management regarding his coaching. This material fact was reflected on coaching document no. 16964544 signed by Marinez and Dandridge on July 2, 2016. In between this statement and him speaking to Weinger, a bullet casing (already shot from a gun) was left conspicuously on the desk that Dandridge used to conduct business. It was an identical bullet casing that Marinez kept in her office on her shelf. The placement of the bullet casing and its uniqueness led Dandridge to believe it was meant as intimidation and retaliation because he said he would open door his coaching. In addition to the bullet casing, Dandridge's schedule changed after he grieved his second coaching in August 2016. EEOC Questions and Answers issued August 26, 2016 states threats are considered material adverse actions.

Also, in August Dandridge reported the use of a racial slur by an associate named David Manly on or about August 8, 2016 (Rec. 37-1:239-49). Manly made statements to another White employee that he did not want to work with " that fat, lazy nigger," referring to an African American associate. The same associate who reported this incident provided Dandridge with a statement that Manly showed him a tattoo of a tree with a noose hanging from it. He also displayed other racist and anti-Semitic tattoos.(Rec. 37-1:240). Dandridge a co-manager on duty was tasked with reporting this to the ethics hotline, and corporate opened an investigation placing him in charge of investigation. See Judge Byron order (Petitioner Appx. C) pg. 13a-14a. Dandridge went on vacation and when he returned he asked Marinez about the investigation. She informed him Manly was terminated for absenteeism and she instructed him to email corporate.

The day after Dandridge formally submitted the racial slur incident to ethics hotline, on August 9, 2016 Marinez informed him that she would be issuing him a third coaching. (Doc. 39-1, Ex.23) see (Petitioner Appx. C) pg. 14a. In the document she again mentioned zoning issues and pallets of product not being binned. However, during this period Marinez continued to tape up the bins, preventing Dandridge and other associates from successfully completing their tasks. He objected to the coaching within the document, noting how he believe he was being asked to act contrary to Wal-Mart's policy. "I have tried to follow Walmart company overnight stocking program. My supervisors have been telling me to do programs contrary to Walmart company program." Dandridge typed this statement on coaching document 17191090. Marinez coached Dandridge August 23, 2016, the same day she asked him to contact corporate and inform them Manly was no longer working for Wal-Mart.

Dandridge open doored his coaching in August 2016 by contacting Allison Doll of HR. (Rec.37-1:269-70). In his conversation with Doll he stated that he believed Marinez's

actions were discriminatory. He also stated his belief that his overall working history with Wal-Mart subjected him to discrimination. Doll stated that she would "look into it," but eventually she stopped responding to his emails without explanation. *Id* at 271 These emails between Dandridge and Doll were submitted as exhibits in Opposition to Defendant's Summary Judgment as Exhibit 45-6 on February 3, 2020.

Wal-Mart's failure to address his concerns led Dandridge to file a formal charge with the Equal Employment Opportunity Commission (hereinafter EEOC) on or about September 19, 2016. Less than two months after filing a charge with the EEOC, Marinez terminated Dandridge. The incident occurred on November 1, 2016 as Marinez walked the store with Dandridge. She asked why certain items were not stocked, and he again told her that the taping of the bins prevented him from completing his tasks. He also stated that an associate named Crystal informed him earlier that she was told by her supervisor to not to assist him with zoning the store.

After explaining the issues, he stated that he wanted to contact the company President. Marinez responded by immediately saying, "You're terminated." He was told to turn in his keys and radio, and if he wanted to discuss the matter with Mooney he was free to do so. Marinez did not provide the required paperwork for his termination, however Dandridge left and never returned to work at the Port Orange store.

During his entire tenure working with Wal-Mart, Dandridge's annual overall performance rating on the reviews from 2010 to 2018 was solid performer."(Doc.39-1,Ex 11,13,15,17,18,19,21,24 (Petitioner Appx. C) pg. 16a-17a.This is the same rating Robinson and Marinez received. Dandridge contacted HR and informed them he was terminated. Allison Doll called Dandridge back and informed him Marinez said she didn't terminate him but she wanted him out of her store. Dandridge was relocated to Sanford.

Then he was transferred to Melbourne at the end of November 2016. Melbourne was not as desirable a location for Dandridge. This store was in a less prestigious location and he earned less in bonuses. Dandridge was also placed back in the presence of Robinson who he had filed a complaint against in 2013.

At the Melbourne location Store Manager Camilla Roundtree, an African American female, was his supervisor. He had no disciplinary issues under her. In January 2018 store meeting addressing workplace harassment. Roundtree concluded the meeting with a comment meant to mock Dandridge, stating, " if you all have a problem with harassment or retaliation, see Clyde." The room erupted with laughter. Dandridge did not find the incident comical and emailed details of this incident to Jeff Worthy on January 23, 2018.

Three days after complaining to Worthy, on January 26, 2018 Dandridge was told that he was going to be terminated from his position due to a restructuring. He was officially terminated on March 30, 2018. He was denied severance pay totaling approximately $45,000 because he would not waive his right to pursue his claims of discrimination and retaliation. On May 18, 2018 Dandridge filed another EEOC charge alleging retaliation. He had worked at Walmart for 17 years when he was terminated from Wal-Mart.

C. Procedural Background

On September 19, 2016, Dandridge timely filed a complaint with the EEOC and Florida Commission on Human Relations (FCHR). He filed a subsequent charge on May 18, 2018 asserting retaliation.

Wal-Mart submitted a position statement dated May 25, 2017 to EEOC. On page 4, third paragraph it states: "When Mr. Dandridge spoke to Ms. Doll concerning the Third

Written Coaching in August 2016, he stated he felt Ms. Marinez generally treated him differently based on his race. In addition, Wal-Mart initially denied the August 2016 "racial incident" occurred in their own position statement. On page 5 third paragraph it states: "In support of this claim, he alleges Ms. Marinez issued the aforementioned Third Written Coaching in retaliation for his reporting an unspecified "racial incident" to Mr. Weinger in August 2016. Neither Mr. Weinger nor Ms. Doll is aware that Mr. Dandridge made any such report." The FCHR failed to render a decision within 180 days, and pursuant to F.S.A. § 760.11(8) Dandridge filed suit in the Eighteenth Circuit in Brevard County, Florida on January 23, 2019. In the Complaint Dandridge alleged five counts of discrimination based on race and retaliation. Wal-Mart removed the case from state court to Middle District Court of Florida on February 27, 2019.

On October 23, 2019 Dandridge and Wal-Mart agreed to having a mediation conducted by mediator Kay Wolf. Prior to the mediation Wolf failed to disclose to Dandridge that she was an equity partner in the firm Ford Harrison who represented Wal-Mart in 2014 in an unrelated lawsuit. Dandridge would have chosen another mediator if he was made aware of the conflict of interest in advance.

On November 26, 2019 Dandridge filed a motion requesting an order to repeat mediation . The district court denied the motion on March 31, 2020, stating that "Ms. Wolf did not have a conflict of interest when she mediated the instant case." Dandridge filed a motion for reconsideration, which was also denied.

Subsequent to the district court's denial of Dandridge's motion, Dandridge filed a complaint with the State of Florida. The Mediator Qualification and Discipline Review Board Rule Violation Complaint Committee (RVCC) assigned to the case found probable cause that Wolf had indeed violated 10.340 (Conflict of Interest) of Florida Rules for Certified and Court Approved Mediators. As a result, Kay Wolf agreed to

various remedial actions including reimbursing Dandridge mediation fees (which Dandridge refused to accept) and taking continuing mediator education courses dealing with conflict of interest.

On November 26, 2019 Dandridge submitted his motion to repeat mediation due to conflict of interest of Kay Wolf. On February 20, 2020 Kay Wolf was removed as mediator in case no. 6:19-cv-01144 *Pajak v. Walmart.* On March 31, 2020 the Middle District Court ruled mediator Kay Wolf did not have a conflict of interest in *Dandridge v. Wal-Mart Stores Inc.*

After discovery, Wal-Mart filed motions for summary judgment. The District Court granted Wal-Mart's dispositive motions thereby dismissing the case on May 18, 2020. Dandridge filed a motion for Reconsideration on June 12, 2020, which was denied on June 15, 2020. Dandridge timely filed a notice of appeal on June 17, 2020. Eleventh Circuit denied Dandridge appeal on February 10, 2021. Dandridge attorney withdrew as counsel on March 12, 2021.Dandridge filed a Petition for Rehearing En banc Pro Se on March 15, 2021.Eleventh Circuit denied Petition for Rehearing En banc Pro Se stating no judge in active service requested a poll vote on April 21, 2021.

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit's decision conflicts with this Court.

The Eleventh Circuit Court decision on Petitioner retaliation claims on February 10, 2021 conflicts with the decision of this Court. The Eleventh Circuit affirmed the lower court grant of summary judgment and required Dandridge to apply "Burden Shifting" McDonnell Douglas framework instead of the correct framework "Whether mistreatment well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" providing proof using "but for" causation.

A decision on April 1, 2021 was published in *Noris Babb v. Secretary, Department of Veterans Affairs* 992 F.3d 1193 (2021). The Eleventh Circuit held that the Supreme Court's decision on Babb's case undermined Trask to the point of abrogation and that the standard that the Court articulated there now controls cases arising under Title VII's nearly identical text. They further held that *Monaghan* clarified the law governing "retaliatory-hostile-work-environment" claims, and that the standard for such claims is, the less onerous "might have dissuaded a reasonable worker" test articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006), and *Crawford v. Carroll*, 529 F.3d 961, 974 (11th Cir. 2008), rather than the more stringent "severe or pervasive" test found in *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012). The Eleventh Circuit vacated the district's court's grant of summary judgment on Babb's Title VII retaliation and hostile-work-environment claims and remanded for the district court to consider those claims under the proper standards.

In the *Babb's* order dated April 1, 2021 The Eleventh Circuit acknowledged that the *Monaghan* Court took pains to separate out the various sorts of claims involved in Title VII litigation. The Circuit Court assigned archetypal Title VII claims with the following names and definitions:

> (1) The disparate-treatment claim, i.e., " a claim that an employee has suffered a tangible employment action based on race or other prohibited characteristics."
>
> (2) The hostile-environment claim, i.e., claim stemming from mistreatment based on a protected characteristic that "is sufficiently severe or pervasive" that it can be said to alter the terms, conditions, or privileges of employment."

> (3) The retaliation claim, i.e., a claim stemming from "retaliation for protected conduct" where the mistreatment "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The first two, the *Monaghan* Court explained arise -at least in a private-sector case-under 42 U.S.C. §2000e-2(a)(1), Title VII's private-sector anti-discrimination provision. Id at 860-61. The third, however emanates from 42 U.S.C. §2000e-3(a), Title VII's private-sector anti-retaliation provision. Id at 861. Petitioner retaliation case falls under category three private-sector anti-retaliation provision.

For Count III on July 7, 2016, Petitioner was engaged in a protected activity when he emailed Weinger to lodge a complaint against Marinez July 2, 2016 coaching that he felt was discriminatory. Petitioner experienced a material adverse employment action when a bullet casing was placed at the desk where he performed his work. Petitioner emailed Weinger about the two bullet casings he found on July 15, 2016. One bullet casing was placed at the desk Petitioner worked and an identical bullet casing was on the shelf in the store manager's office.

EEOC Enforcement guidelines Questions and Answers issued August 25, 2016, lists work-related threats, warnings, or reprimands as being "materially adverse" retaliation actions. Wal-Mart provided a Declaration from Weinger which corroborates Dandridge claims he perceived the bullet being placed at the desk he worked at as a threat. (Rec.45-5, Exh Weinger email; Rec. 37-1:223, 224-25). The close temporal proximity between these two incidents is very clear. " "The correct retaliation framework that should have been used in this case is, "A reasonable worker in Petitioner's position may well be dissuaded from using an open door policy and filing a complaint for what he perceived as a discriminatory coaching, if he knew in retaliation a bullet

casing would be placed at the desk he worked at to threaten him."

For Count IV Petitioner was engaged in a protected activity when he reported the racial incident to corporate on August 8, 2016. EEOC Enforcement Guidelines issued August 25, 2016 states, Employers must not retaliate against an individual for "opposing a perceived unlawful EEO practice. For example: complaining or threatening to complain about alleged discrimination against oneself or others. Providing information in an employer's internal investigation of an EEO manner. In addition Petitioner was reprimanded for being involved in an investigation which is a "material adverse action" listed under other adverse actions of EEOC Enforcement Guidelines issued August 25, 2016.

Petitioner emailed Allision Doll about the "racial incident" on August 5, 2016. Corporate opened an official investigation August 8, 2016 and Petitioner was tasked with gathering statements from workers involved in the racial incident. Petitioner emailed Amanda Culmer on August 23, 2016 informing her the Associate at the center of the racial incident was terminated. That same day store manager Marinez completed and issued Dandridge his coaching on August 23, 2016 at 5:48. The material evidence coaching document 17191090 shows Marinez initiated a coaching against Dandridge on August 9, 2016. Petitioner experienced a material adverse employment action after he reported the racial incident. Marinez officially coached Dandridge on August 23, 2016 the same day he was instructed by Marinez to email corporate and inform them Manly was no longer working for Wal-Mart. The close temporal proximity between these two incidents is very clear. There was only one day between when Petitioner submitted the racial incident to corporate on August 8, 2016 and an investigation was opened and when Marinez stated she observed Dandridge behavior on August 9, 2016. "A reasonable worker in Petitioner's position may well be dissuaded from reporting and participating in a corporate racial investigation after

reporting a discriminatory act of a worker, if he knew in retaliation he would be issued a written reprimand.

For Count V, on September 19, 2016 Petitioner filed an EEOC complaint against Wal-Mart claiming discrimination and retaliation. On November 1, 2016 Marinez coached Dandridge and he requested to speak to the President of Wal-Mart and utilize his open door policy to complain about his verbal coaching. Again, EEOC Enforcement Guidelines issued August 25, 2016 states terminating an employee for communicating opposition to a perceived EEO violation because they participated in an investigation or exercised their right to file a complaint is a "material adverse action." Dandridge experienced a material adverse employment action when Marinez responded by immediately saying," You're terminated". *Id.* He was told to turn in his keys and radio and if he wanted to discuss the matter with someone higher up, he was free to do so. *Id* at 277-78,279. Robinson's testimony substantiated Petitioner's claim that Marinez terminated him. To wit, during Robinson's deposition he was asked when he would typically demand that an associate turn in his or her keys and radio. Robinson testified that occurs when he terminates an employee. (Rec. 35-1: 35) see Reply brief dated November 4, 2020. Dandridge was then moved to a lower tier store in the presence of Robinson who he filed a complaint against. "A reasonable worker in Petitioner's position may well be dissuaded from utilizing an open door policy and requesting to speak with the corporate president to file a complaint if he knew in retaliation he would be told you are terminated, turn in your keys, leave the store, then moved to a lower tier store.

2. The Eleventh Circuit's decision conflicts with their own Court decision which reset the Title VII retaliation.

The Eleventh Circuit Court decision conflicts with their own Court decision in which they reset the Title VII retaliation standard April 2, 2020. The Eleventh Circuit

Court on April 2, 2020 in *Susan Monaghan v. Worldpay US, Inc.* 955 F.3d 855 (2020) following a review of the record reversed and remanded. Susan Monaghan appealed from the district Court grant of summary judgment in favor of her former employer Worldpay U.S. Inc. on her claim of retaliation under Title VII of the Civil rights Act 42 U.S.C. §2000e-3(a).

The Circuit Court held, the district court applied our decision in *Gowski v. Peake*, 682 F.3d 1299, 1312 (11th Cir. 2012), and required Ms. Monaghan to show that the alleged retaliation was sufficiently pervasive to alter the conditions of her employment. But the proper standard in a retaliation case is the one set out by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006) confirmed by the circuit in *Crawford v. Carroll*, 529 F.3d 961, 974 (11th Cir. 2008) the retaliation is material if it "well might have dissuaded [d] a reasonable worker from making or supporting a charge of discrimination." Under this standard, a jury must decide Ms. Monaghan's retaliation claim.

The Circuit Court also held a Third, mistreatment based on retaliation for protected conduct for example, making or supporting a charge of discrimination-is actionable whether or not the mistreatment rises to the level of a tangible employment action, but only if the mistreatment "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006) at 68 (quoting *Rochon v, Gonzales*, 438 F .3d 1211, 1219 (D.C. Cir. 2006). Burlington Northern recognized that this retaliation standard protects employees more broadly-and is more easily satisfied than the standard applicable to claims of discrimination. See id. At 67, Claims of this kind retaliation arise under 42 U.S.C. §2000e-3(a).

In Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008), the Circuit Court recognized that *Burlington Northern*

set out a different standard for retaliation claims. They held that under *Burlington Northern*, "in the context of a Title VII retaliation claim, a materially adverse action means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. At 964 (quoting standard again in *Alvarez v. Royal Atl. Developers, Inc.* 610 F.3d 1253, 1268 (11th Cir. 2010).

3. The Eleventh Circuit decision is wrong.

Dandridge filed an EEOC charge and his case was moved to federal district court alleging discrimination and retaliation. Petitioner correctly argued the retaliation claim initially in Plaintiff's Response to Defendant's Motion For Summary Judgment on February 3, 2020 in the District Court of Florida Orlando (Doc. 45). On Page eleven it states: Title VII retaliation claims require proof that the desire to retaliate was the "but-for" cause of the challenged employment action. See *Gross*, supra, at 176, 129 S. T. 2343, 174 L. Ed. 2d 119. *Univ. of Tex. SW. Med. Crt. V. Nassar*, 570 U.S. 338, 353,133 S, Ct. 257,2528 (2013). On page eleven and twelve: it states: In private sector and state and local government retaliation cases under the statutes the EEOC enforces, the causation standard requires the evidence to show that "but for" retaliatory motive, the employer would not have taken the adverse action, as set forth by the Supreme Court". Twenty (20) exhibits of material evidence were attached to (Doc. 45) to prove Dandridge retaliation claims.

The District Court did not agree with Petitioner's opposition to defendant's motion for summary judgment argument concerning Dandridge retaliation claim and granted Wal-Mart summary judgment. In the Middle District Court order (Petitioner Appx. C) pgs. 27a-31a. under Retaliation Claims (Counts II -V) the court held that the McDonnell Douglas burden-shifting framework applied and plaintiff must bear the initial burden of showing a prima facia case of retaliation. The District Court also held to

establish a prima facie case of retaliation, Plaintiff must demonstrate three elements: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the adverse employment action was causally related to his protected activity. *Wideman v. Walmart Stores, Inc.* 141 F.3d 1453, 1454 (11th Cir, 1998).

In addition the District Court also held that once Plaintiff satisfied the above requirements Wal-Mart would have the opportunity to articulate a legitimate nondiscriminatory explanation for its challenged decision. Once this was satisfied then the burden shifts back to Plaintiff to prove that Wal-Marts' reasons were a pretext for intentional discrimination or retaliation.

The Eleventh Circuit before William Pryor, Chief Judge, Jordan, and Grant on February 10, 2021 (Petitioner Appx. B) pgs. 2a-6a, affirmed Middle District summary judgment in favor of Wal-Mart Stores Inc. in Dandridge complaint of discrimination and retaliation under the Florida Civil Rights Act of 1964.

In retaliation claims an employee must prove the following under Title VII Civil Rights of 1964: (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the adverse employment action was causally related to his protected activity. The Eleventh Circuit applied the wrong standard of the law that pertained to Dandridge retaliation claims. Title VII retaliation is based on a different standard than discrimination. It appears the Eleventh Circuit made their decision on February 10, 2021 in Dandridge case and applied the "Burden Shifting" McDonnell Douglas framework for both the discrimination and retaliation claims.

The Eleventh Circuit had already reset the retaliation standard under Title VII in *Susan Monaghan v. Worldpay US,* Inc.*Inc.* 955 F.3d 855 (2020) on April 2, 2020 before they ruled on Dandridge retaliation claim on February 10, 2021.

In addition Circuit Judge Jordan was on the 3 panel of judges in both *Monaghan* and *Dandridge* case. Therefore, the Eleventh Circuit knew of the precedent case their Court had already established in Monaghan concerning Title VII retaliation claims in the private-sector which made it easier for a Plaintiff to succeed in a retaliation case. The Eleventh Circuit knew at the time they ruled on *Dandridge* case they were affirming the wrong application of the law as it pertained to retaliation.

In *Monaghan* case the Petitioner was White and Respondent Worldpay US, Inc. a private company. The person alleged of retaliating was Black. The Eleventh Circuit on April 2, 2020 applied the correct framework of retaliation outlined by this Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). There was no reference made in the order about circumstantial or direct evidence in Monaghan case.

In *Dandridge* case the Petitioner is Black and Respondent Wal-Mart is a private company. The person alleged of retaliating is White. In this case, the Eleventh Circuit on February 10, 2021 applied the older more stringent "Burden Shifting" McDonnel Douglas framework. The Circuit Court stated the prohibition was patterned after Title VII, and claims of retaliation using the framework *Wilbur v. Corr. Servs. Corp.*, 303 F.3d 1192, 1195 n. (11th Cir. 2004). There was no reference made in the Circuit Court order about circumstantial or direct evidence in *Dandridge* case. (Petitioner Appx. B) pgs. 2a-6a. In addition the Circuit Court order never mentioned the *Burlington* precedent case that was established by this Court in 2006, nor did they reference the *Monaghan* case which reset retaliation cases in the Eleventh Circuit Court on April 2, 2020.

On February 10, 2021 the Eleventh Circuit affirmed the District Court grant of Summary Judgment on Dandridge retaliation claims (Petitioner Appx. B) pg. 5a-6a. The Eleventh Circuit stated:

> Dandridge failed to established Prima Facie case of retaliation because he did not prove causal connection between protected activity and the adverse action. In addition, he failed to mention any alleged discrimination racial or otherwise and did not present evidence that Walmart's proffered reasons for issuing a written coaching August 23, 2016 was false.

This above statement is not true because in Respondent's own position statement dated May 25, 2017 it states as follows: "When Mr. Dandridge spoke to Ms. Doll concerning the Third Written coaching in August 2016, he stated he felt Ms. Marinez generally treated him different because of his race." Walmart Position Statement was submitted in Petitioner's Motion of Opposition for Summary Judgment (Doc. 45 Exhibit 20 pg. 4 third paragraph). Walmart initially denied that Mr. Weinger nor Ms. Doll was aware of Mr. Dandridge making a "racial incident" report (Doc. 45 Exhibit 20 pg. 5 third paragraph).

The Eleventh Circuit held for Count Five, even if the transfer to another store following the incident on November 1, 2016 qualified as an adverse employment action Dandridge claim would fail as a matter of law because he presented no evidence that the decisionmaker knew of Dandridge's earlier EEOC charge. The Circuit held Dandridge failed to establish a causal connection between the protected activity and the alleged adverse action (Petitioner Appx. B) page 6a.

On May 18, 2020 in the Middle District Court order (Petitioner Appx. C) pages 27a-31a the Judge addressed retaliation claims. In Judge Byron order on bottom of page 29a in footnote 5 it states the following: "As to the protected activity serving the basis of Count IV, Plaintiff testified at his deposition that he told Marinez about the racial incident (Doc. 37-1,244:1). Viewing the record in the light most favorable to Plaintiff, it can be inferred that Marinez knew about his Ethics Hotline complaint regarding the incident."

The District Court held that Count IV failed because Dandridge did not demonstrate pretext. The judge recorded all of the other counts of retaliation in the body of his order but recorded his response to Count IV as a footnote at the bottom of page 29a. Most importantly, Pretext is not a requirement Dandridge had to demonstrate in order to satisfy his retaliation claims under Title VII 42 U.S.C. § 2000e-3(a).

What one can conclude from both the District and Circuit Court in both orders they admit that a material adverse employment action did occur. If that was the opinion of the District and Circuit Court, Dandridge would satisfy the three criteria for retaliation claim under EEOC Title VII Civil Rights and the correct application of the law framework to use is "Whether mistreatment may have dissuaded a reasonable worker from making or supporting a discrimination charge" providing proof using "but for causation. The older standard "Burden shifting" framework required Dandridge to establish prima facie case of retaliation, protected activity, causal connection between protected activity and adverse action, and pretext.

The Eleventh Circuit in its order (Petitioner Appx. B) pg. 6a admitted that Dandridge experienced an adverse employment action. Second, the Eleventh Circuit was presented with the review of Babb's case again to review the retaliation claim after this Court remanded it back to the Eleventh Circuit Court. This means the Circuit Court on April 1, 2021 knew of the precedent case this Court established concerning retaliation. The Eleventh Circuit knew the right application of the law for retaliation claims if an employee experienced a material adverse employment action is "Whether the mistreatment well might have dissuaded a reasonable person for supporting of making a discrimination claim". This standard requires a "but for" causation and the Circuit Court should not have required the Petitioner to utilize the older "Burden Shifting framework which required proving a Prima Facia case, protected

activity, adverse employment action, causal connections between material adverse action and protected activity, and pretext.

The Eleventh Circuit Court submitted its opinion on *Noris Babb v. Secretary, Department of Veterans Affairs* 992 F.3d 1193 (2021), sending it back to the lower court to address the retaliation using the correct framework. The Eleventh Circuit vacated the Babb's Title VII retaliation and hostile-work environment claims and remanded for the district court to consider those claims under the proper standards. Then on April 21, 2021, The Eleventh Circuit denied Dandridge request for Rehearing En banc on April 21, 2021 on his retaliation claims when the Circuit Court knew the application of the law of proof of retaliation framework the district court required Dandridge to adhere to was incorrect.

4. There is a split in the Circuits on which framework to apply when ruling on Title VII Retaliation 42 U.S.C. §2000e-3(a)

In *Atron Castlebery, John Brown v. STI Group Chesapeake Energy Corporation* 863 F.3d 259 (2017), Plaintiffs appealed the dismissal of their retaliation claim, which alleged that they were fired for reporting the racially discriminatory remark by their supervisor. The Third Circuit on July 14, 2017 decided that a single incident can amount to unlawful activity, particularly when applying the correct standard. The court held the case should be remanded back to the district court on the retaliation claim.

In *Malin v. Hospira Inc.* 762 F.3d 552 (2014), Plaintiff Deborah Malin appealed the district court's grant of summary judgment in favor of her employer on her retaliation claim under Title VII of Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a). The Seventh Court held on August 7, 2014 that *Malin* was required to provide evidence of proof that (1) she engaged in a statutorily protected activity, (2) her

employer took a materially adverse action against her, and (3) there was a causal connection between the two. The Seventh Circuit concluded that *Malin* presented evidence that would allow a reasonable jury to find a causal connection between her 2003 complaint to Human Resources about Shah and the adverse actions Hospira took against her during and after the 2006 reorganization of her department. Despite the name of the direct method of proof, The Seventh Circuit considered both direct and circumstantial evidence in evaluating the retaliation claims. *Malin* was free to rely on both to support her position, the Seventh Circuit held the record contained evidence to support the inference that Hospira retaliated against *Malin* and the case was remanded back to the district court.

In *Tammi Ladner v. Walmart* on November 3, 2020, the Fifth Circuit held that Title VII prohibits an employer from discriminating against an employee because that individual made a charge, testified, assisted, or participated in a Title VII proceeding or investigation. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57 (2006). Where the retaliation claim is "based on circumstantial evidence, we apply the McDonnell Douglas framework". This court further held that McDonnel Douglas provides a three-step framework for analyzing retaliation claims. First, plaintiff must "establish a prima facie case of unlawful retaliation. Second, if the plaintiff does so, the employer must then articulate a legitimate, non-discriminatory reason for its actions. Third, if it does so, the plaintiff must prove that the proffered reason was a pretext for unlawful retaliation.

On April 20, 2021, The Eleventh Circuit ruled on case no. 19-10014 in *Erin Tonkyro, Dana Strauser, Kara Mitchell-Davis, Yenny Hernandez v. Secretary, Department of Veteran Affairs*. On page 23 of this order it states the following: We vacate the District Court's entry of Summary Judgment with respect to Plaintiffs discrete retaliation claim and retaliatory hostile work environment claims and remand with

instructions that the Court reconsider those claims in light of *Babb and Monaghan.*

Jean Eddy Debe v. State Farm Mutual Automobile Insurance Company No, 20-111331 proceeding pro-se appealed summary judgment on his retaliatory harassment claim. The Eleventh Circuit held on June 8, 2021 that Under the anti-retaliation provision in Title VII of the Civil Rights Act, an employer may not retaliate against an employee because the employee "had opposed any practice made an unlawful employment practice "or" has made a charge" about an unlawful employment practice under Title VII. 42 U.S.C. § 2000e-3(a). When a plaintiff relies on circumstantial rather than direct evidence for a retaliation claim, we generally use the burden-shifting framework laid out in McDonnell Douglas.

Direct evidence refers to any piece of evidence that stands along to prove an assertion. Petitioner retaliation case is based on direct material evidence of emails to district managers and corporate office concerning two bullet casing and photos, photos of taped up bins, "racial incident" report and statements from associates, coaching documents, deposition statements from Marinez and Robinson, and Wal-Mart Position Statement. These exhibits were included in documents filed February 3, 2020, September 1, 2020, and November 4, 2020.

The Circuits are not consistent in applying the right framework for retaliation cases. In *Dandridge* case The Eleventh Circuit never mentioned anything in their order that his retaliation claim was based on circumstantial evidence that would justify their reason for requiring Dandridge to utilize the "Burden Shifting" McDonnell Douglas framework in his retaliation claim like the cases above. In the above cases the Seventh Circuit in *Malin* did not require proof of pretext of retaliation. However; in the Fifth Circuit in Tammi Lander plaintiff had to prove pretext for unlawful retaliation.

In *Susan Monaghan v. Worldpay US, Inc.* 955 F.3d 855 (2020) order on April 2, 2020 there is nothing mentioned that her retaliation case was based on direct evidence or circumstantial evidence. However; in *Monaghan* the Eleventh Circuit Court applied the framework of "Whether mistreatment might have dissuaded a reasonable worker from making or supporting a charge of discrimination" not the "Burden Shifting" framework that the Court required *Dandridge* to satisfy although both are private-sector companies not federal companies.

Some Circuit Courts appears to be eliminating retaliation cases by classifying them as containing circumstantial evidence then requiring them to utilize the more stringent "Burden Shifting" framework before the case gets before a jury. In *Susan Monaghan v. Worldpay US, Inc.* 955 F.3d 855 (2020) order April 2, 2020 the Circuit Court did not discuss circumstantial and direct evidence when they assigned the archetypal Title VII retaliation claims. It is pertinent this Court address the split among circuits on how the application of the law pertaining to retaliation claims in private-sector should be handled.

CONCLUSION

As set forth above, the Eleventh Circuit Court has decided an important question pertaining to *Dandridge* retaliation claims in a manner which conflicts with their own application of the law of retaliation that was reset when they ruled on *Susan Monaghan v. Worldpay US, Inc.* 955 F.3d 855 (2020) on April 2, 2020. In *Monaghan* case the Circuit court stated the ruling favored the employees. The Circuit's decision in *Dandridge* case appears to blatantly disregard the precedent decisions of this Court, as well as the decisions of other circuit courts pertaining to retaliation claims. The Fourteenth Amendment of the constitution prohibits states from violating an individual's rights of due process and equal protection.

For this reason petitioner request this Court grant Writ of Certiorari.