No. 24-5885

ORIGINAL

FILED
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

SHERRELL DOWDELL-MCELHANEY - PETITIONER

vs.

GLOBAL PAYMENTS, INC. AND TOTAL SYSTEM SERVICES, LLC. -

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

11TH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the 11th District Court had jurisdiction over this matter, which presented a plethora of important issues, regarding the scope of protected oppositional activity under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a); as well as claims for age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq.; race discrimination, gender discrimination, and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.; disability discrimination, failure to provide reasonable accommodation, and retaliation under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq.; the claims for failure to promote and wrongful discharge; and failure to pay overtime pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. § 2000e-2 (a) (1). Section 1981 of the Civil Rights Act of 1866 provides "[a]ll persons" in the United States "the same right" "to make and enforce contracts" as is "enjoyed by white citizens," including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a), (b).

Title VII bars an employer from retaliating against "any" employee because she has, *inter alia*, "opposed any practice made unlawful by Title VII 42 U.S.C Sections 2000e-3(a). The District Court held that Plaintiff's actions bringing an employee's race, age, gender, retaliation, ADA, and FLSA's Complaint to the attention of management did not qualify as protected opposition activity. And that Defendants therefore could retaliate against her for taking those actions. The Court based its ruling solely on the basis that there was no genuine issues of material fact and the Defendants were entitled to judgment as a matter of law. The main issues are whether the District Court erred in concluding that the Plaintiff had no genuine issues of material facts in which she was entitled to relief under Title VII (Age, Race, Gender and Retaliation), FLSA and ADA and the Defendants were entitled to Summary Judgment as well as Judgment for Costs as a matter of law.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from Federal Courts:

The opinion of the United States Court of Appeals for the 11th Circuit at Appendix C to the petition and is unpublished.

The opinion of the United States Court of Appeals for the 11th Circuit at Appendix B to the petition and is reported at the Court.

The opinion of the United States District Court for The Middle District of Georgia at Appendix A to the petition and is reported at the Court.

JURISDICTION

For cases from Federal Courts:

The date on which the United States Court of Appeals for the 11th Circuit decided my case was May 31, 2024.

An untimely Petition for Rehearing was granted by the United States Court of Appeals for the 11th Circuit on the following date: August 2, 2024, and a copy of the Order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiff in her very First Complaint with the District Court for the Middle District of Georgia, Columbus Division, put the Court on notice that the jurisdiction of that Court was invoked pursuant to 28 U.S.C. §§§ 1331, § 1343(3), § 1343(4) and 42 U.S.C. §2000-(5) f, conferring original jurisdiction upon that Court of any Civil Action to recover Damages or to secure equitable relief under any Act of Congress, providing for the protection of Civil Rights, under the Declaratory Judgment Statute, 22 U.S.C. §2201, under 42 U.S.C. §§ 1981 AND 1983, AND UNDER Title VII, 42 U.S.C. §§ 2000E, ET. Seq. and the Thirteenth Amendment to the United States Constitution.

Plaintiff originally as well as properly stated Defendants acted under color of state law and therefore an amendment was unnecessary. Thus, Plaintiff, Pro Se, was determined to make certain that every aspect of her claims was properly invoked. Defendants' acts have relentlessly as well as willfully deprived Plaintiff of her constitutional rights, according to 42 U.S.C. Section 1983. Therefore, the Defendants have in fact, acted under color of state law. Hence, in an abundance of caution, the 11th Cir. in 2002, explained that a district court should give the "pro se" plaintiff an opportunity to amend his complaint if such amendment would not be futile.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." United States v. Classic, 313 U.S. 299, 326 (1941). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. S 1983 (1988). Thus, Plaintiff has provided ample evidence to her Attorney of Record that Defendants acted under color of state law in her pleadings. And it was in fact, his job to continue with said claims. Accordingly, the Defendants have in fact, acted under color of state law and as a result relentlessly as well as willfully violated Plaintiff's "on-going" constitutional rights.

STATEMENT OF THE CASE

Plaintiff Sherrell Dowdell-McElhaney, contends that Defendants Global Payments Inc. and Total System Services, Inc. /TSYS denied her of equal opportunities, and discriminated against her with respect to her terms, conditions, pay, or privileges of employment, on account of retaliation, race (African-American), gender (female), age (55) and disability. Defendants Global Payments Inc. and Total System Services, Inc. /TSYS had employed the devices of secrecy and subterfuge to willfully discriminate against Plaintiff and exclude Plaintiff from various opportunities or otherwise adversely affected her status as an employee, because of her age, race, gender, and disability, which resulted in harassment, bullying, intimidation and retaliation.

Clarence "Kenny" Anderson, her immediate Supervisor and a member of Management, hand selected much younger White team members (males) for promotions, even if they were not qualified. Hence, Plaintiff's credentials (Bachelor of Arts in Political Science, Doctor of Jurisprudence, and a LL.M. in Litigation), work experience, job performance, productivity, and attendance far exceeded her fellow white and much younger (male) co-workers. She applied for more than 60 positions within the almost five (5) years of employment. However, she was not interviewed for a single position.

After she filed her First Charge of Discrimination with the Equal Employment Opportunity Commission on September 16, 2019, Mr. Anderson and Management subjected her to a very hostile work environment by nitpicking her work, increased her workload, harassed, intimidated, and bullied her. Hence, this Plaintiff has immense respect for fairness of our judicial system and highly believes in substantial justice for all. This is why she continues to fight for her God given Civil Rights, which were enacted in1964 - the year in which she was born. Thus, "equality" should look the same all the way across the board, regardless of your age, race, gender or disability.

May 22, 2019, Plaintiff was informed by Michael Murphy, Caucasian male, that he was selected to serve on the First Party Fraud ("FPF") Team, a NEWLY selected team Plaintiff knew absolutely nothing about. Michael was a team member she had helped train when he came to her Review Later ("RVL") Team. Most importantly, Plaintiff's credentials, education, and work experience far exceeded Michael Murphy's. In fact, Michael Murphy was only a high school graduate.

On or about July 25, 2019, Plaintiff filed a Complaint against Total System Services, Inc. /TSYS with the Equal Employment Opportunity Commission

("EEOC"), which alleged discrimination of race, gender, age, toxic work environment, harassment, bullying, intimidation, and retaliation. And on September 16, 2019, she filed numerous Charges with the EEOC. However, she was only granted the Age Discrimination Charge (EEOC Charge No.: 410-2019-07370). The Case File with the EEOC consisted of over 500 pages of documents and she was granted a Charge for Age Discrimination on said date; within exactly two (2) days later, September 18, 2019, TSYS was acquired by Defendant Global Payments, Inc. of Atlanta, Georgia.

During the pendency of the investigation, the Defendants Global Payments Inc. and Total System Services, LLC/TSYS continued to maintain its retaliation discriminatory practices with regard to the disparate treatment of Plaintiff, and subjected Plaintiff to a very "hostile and toxic work environment." The Team Members committed excessive absenteeism – almost daily "callouts" (mostly on Mondays and Fridays) and "walkouts" (a revolving door); excessive tardiness; daily insubordinations; call avoidances; Team Members and Management violating policies and procedures of Banks; Management openly gossiping and disrespecting Team Members (including Plaintiff, however Plaintiff never did so) and vice versa; extramarital affairs between management members, directly on Dowdell-McElhaney's team and between Management and Team Members as well; daily missed deadlines (SLA) for banks, which caused losses of huge contracts with big as well as small banks; daily use of profanity between Team Members and Management; drug sniffing dogs were brought to the workplace for over a 3-day period; sporadic huddles of team meetings by Management; Team Members had moments notices of cancelling scheduled assignments to banks; and, not having a competent daily Master Plan by Management to attack the banks with the most fraud, which occurred on a regular basis. Thus, over 900 work "real-time" emails will substantiate this very "hostile and toxic" work environment.

Also, during this time period, Plaintiff was continually denied reasonable and/or inexpensive accommodations regarding her physical disability. Said Defendants denied accommodations in regards to her restriction in violation of the Title I of the Americans with Disabilities Act of 1990 ("ADA") as amended, and Title I of the Civil Rights Act of 1990 corrects unlawful employment practices on the basis of disability; and she was adversely affected by such practices. Defendants engaged in intentional discrimination against Plaintiff with her severe and ongoing lower "chronic" back pain, since October 1, 2019.

Said effect of the practice by Defendants deprived Plaintiff of an equal opportunity and, otherwise, adversely affected her status as an employee with a disability. The acts of the Defendants were intentional and done with reckless indifference to the federally protected rights of Plaintiff. Also, in early October of 2019, Plaintiff was "escorted" throughout Bay 3 of over 100 plus Team Members as well as out of the workplace for doing absolutely nothing wrong and treated very much like a "common criminal." Hence, she was totally humiliated as well as embarrassed by the entire ordeal. Because, she had never been treated as such in her entire life! Therefore, her one (1) day suspension was in fact, part of her independent retaliation claims.

When she was approaching her vehicle, she was met with a "plain-clothes" police detective. Who impeded the walkway towards her vehicle and his and Defendants adverse actions were absolutely very intimidating to her. Said egregious conduct by the Defendants occurred just seventeen (17) days (on October 3rd) after Plaintiff had filed her Age Discrimination Charge with the EEOC in Atlanta. Most importantly, a full, immediate and inter-company investigation was conducted; and it revealed that Plaintiff had done "absolutely nothing wrong." In fact, the Defendants requested that she return to work the very next day.

On April 20, 2020, Corporate Human Resources granted her permission to work from home, due to the Global Pandemic - after a lot of persistence on her part. As she had a disability of "acute" lower back pain and was the caregiver for her husband, who had serious health problems. On November 11, 2020, Mr. Anderson and Management informed her that she did not notate an account correctly; and she informed them via an email that she may have had a "slight typo," but nothing was done improperly. During the almost seven (7) month period while working remotely from home, Plaintiff productivity increased vastly and she received "outstanding" evaluations from her immediate supervisor, Clarence "Kenny" Anderson. Moreover, said evaluations totally contradicts his Declaratory Statement, which was filed during Discovery.

Plaintiff's remote status was certainly not revoked on November 11, 2020 by Management. She was asked to report back to the facility, because there were concerns for the Team's performance as a whole. And it had nothing to do with Appellant directly, when she asked Management about it. However, she continued to be assigned to the most difficult banks and still met her production; when she was not being harassed by Management.

On November 18, 2020, Plaintiff was wrongfully terminated about two (2) days, prior to her filing her Complaint timely for Employment Discrimination against said Defendants in Federal District Court for the Middle District of Georgia, Columbus Division. While participating in a complaint process this is protected

from retaliation under all circumstances under Federal Law. Hence, prior to filing with the EEOC, she had absolutely no "write-ups" about call avoidance whatsoever.

Later, recent performances' reprimands and/or evaluations were drastic and over exaggerated on November 12, 2020, where Plaintiff calls to Cardholders was placed under immense scrutiny. Said actions had never been the case, prior to her filing discrimination charges with the EEOC. Moreover, Plaintiff's work became more difficult with assigned banks (going from bank-to-bank and expected to spend no more than two (2) minutes per call per Cardholder), even when dealing with a lot of fraud daily. Also, Plaintiff was given absolutely no room to grow with the team or company whatsoever; and remained on the Review Later (RVL) Team, which struggled daily because of high volume turnovers, with Team Members often quitting on moment notices. Because on any given day, the banks' rules and regulations changed very frequently. And sometimes in the middle of the day per Management. In fact, it was not unusual for co-workers to quit during the middle of the work day.

Plaintiff performed exceptionally well in Defendants' Global Payments, Inc. and Total System Services, LLC /TSYS employment for almost five (5) years. She had received favorable reviews for providing amazing Customer Service from Cardholders, Supervisors, and Team Members on a regular basis, prior to her filing her EEOC's First Charge. Thus, Plaintiff is requesting this Honorable Court to hold Defendants accountable via making sure that Discovery was fully transparent on their part. This was certainly not the case, because Plaintiff's over 900 "work" emails have not been forthcoming by the Defendants. Said "real-time" work emails alone can prove all of Plaintiff's discriminatory claims.

Mr. Tim Sanders, Associate Director of Human Resources, just refused to provide her with any assistance whatsoever. Thus, the jobs were given to much younger white Team Members, and mostly males. Moreover, during all this time, Plaintiff performed the duties of Defendants Global Payments, Inc. and Total System Services, LLC /TSYS assigned to her in a competent, efficient, very professional, and workmanlike manner daily, again, for almost five (5) years.

In addition, Plaintiff suffered retaliation for requesting not to return to the facility for a day after working from home, since April 20, 2020. Plaintiff was ordered to return to the facility on November 11th for the day; when it was just reported by ALL news outlets that the United States of America had the most COVID-19 cases ever in the country in ALL fifty (50) states. Thus, this was certainly "sheer retaliation" on the part of the Defendants. Plaintiff conveyed her

sentiments to them immensely that she was terrified of returning, because of the Global Pandemic.

Plaintiff timely charged Defendants Global Payments Inc. and Total System Services, LLC /TSYS with an unlawful employment practice, via commencing this action, and had exhausted the administrative remedies afforded to her by 42 U.S.C. sections 200e, et seq.

Consequently, Plaintiff filed a Second Charge of Discrimination with the EEOC on April 27, 2021, checking the boxes for race, sex, disability discrimination and retaliation. She contends that she was denied promotions, wrongfully discharged, punished harshly for "slight" errors, and subjected to a discriminatory and retaliatory hostile work environment. This was caused by Management (who later filed false Declaratory Statements against her during Discovery, as opposed to filing sworn Affidavits and/or Depositions). Thus, the Defendants' horrific behavior made for a very "toxic" work environment. And ALL said Declaratory Statements should be inadmissible in court. Said Defendants have intentionally been dishonest and hidden their "unlawful deeds" by not being forthcoming during Discovery, especially with handing over Plaintiff's over 900 "work" emails. This will more than corroborate all of her discriminatory claims, as a result of their adverse employment actions. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." United States v. Classic, 313 U.S. 299, 326 (1941).

The Defendants have certainly withheld very important Discovery documentation and/or materials, and by doing so, they have misrepresented the Court. Their conduct have been frivolous, reckless, egregious and a total disregard for the truth. Moreover, Grimes, Owen, and Anderson's primary consideration for the FPF Team was to discriminate against Plaintiff based on her age, sex, race, and disability, especially after filing her Internal Complaint as well as EEOC's Charges she filed in Atlanta, Georgia. Because, Plaintiff's Pleadings, Deposition, telephone calls, and over 900 "work" emails speak for themselves. The "continuing actions" by the Defendants were "well-spelled" out, even though Plaintiff did not check the "continuing action" boxes on her EEOC's Charges, both on the First (September 16, 2019) and Second (January 27, 2021) one.

Defendants' decisions were certainly not based on legitimate, non-discriminatory and document-supported performance reasons, based on her past outstanding evaluations by her immediate supervisor, Clarence "Kenny" Anderson.

Therefore, Defendants' Management witnesses need to be deposed under oath; in essence they have a serious creditability problem.

Hence, Plaintiff's Attorney of Record provided absolutely no Depositions and should have taken several Depositions and/or provided sworn Affidavits of key witnesses. Thus, at the very least, he should have taken Depositions of both Clarence "Kenny" Anderson, her immediate supervisor, and Michael Murphy, Team Member of her exact team (RVL), whom she trained and was promoted twice over her. Michael also received another promotion to Capital One Bank. Moreover, Plaintiff's entire Case File is still with her Attorney of Record's office.

On March 8, 2022, the Federal Court for the Middle District of Georgia, Columbus Division, granted in part and denied in part Defendants' Motion for Partial Judgment on the Pleadings. The Court dismissed all claims except Dowdell-McElhaney's (1) ADEA claim based on her non-selection to the First Party Fraud Team; (2) retaliation claims related to other claims that are not dismissed; (3) Title VII, ADA, and ADEA claims related to allegations in the second Charge which occurred on or after October 29, 2020; and (4) FLSA claim. Thus, Plaintiff believed that the Honorable Court had made a correct ruling for the most part; by in fact, allowing her to continue with at least most of her claims.

On January 11, 2023, the Federal Court for the Middle District of Georgia, Columbus Division, significantly erred and entered an Order for judgment for Summary Judgment, as well as a Judgment for Costs in favor of the Defendants. This disposed all of Plaintiff-Appellant's claims. Because the Defendants' egregious actions were not all disclosed during Discovery and as a result their "dirty deeds" were not revealed to the Court. Hence, they come to this Court with very "unclean hands!" The Discovery certainly did not reveal any new surprises, other than the fact that the Defendants were not forthcoming with very important key evidence, which was in Plaintiff's favor.

Finally, Plaintiff filed a timely Notice of Appeal and Notice to Counsel/Parties with the Federal Court for the Middle District of Georgia, Columbus Division, on January 31, 2023, before filing an Appellate Brief with the United States Court of Appeal for the 11th Circuit. Also, the Plaintiff-Appellant filed a Reply Brief under Federal Rule of Appellate Procedure 29(a). With jurisdictions ALL referenced-above, a Panel of that Honorable Court affirmed the District Court's decision on May 31, 2024. An untimely Petition for Rehearing was granted by the United States Court of Appeals for the 11th Circuit on the following date: August 2, 2024, and a copy of

the Order denying the rehearing appears at Appendix C.

This Petition for Writ of Certiorari arises from a grant of Summary Judgment, and this Honorable Court should "view the evidence and draw all reasonable inferences" in Dowdell-McElhaney's favor. She seeks an Appeal of ALL of her discrimination claims. Because the District Court granted Defendants' Motion for Summary Judgment on ALL said claims. The Court held that Dowdell-McElhaney had not been subjected to actionable discrimination because she had suffered no "adverse employment action" under the Court's precedent. According to the Court, being placed on paid leave is not an objectively harmful employment decision like discriminatory "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Although Dowdell-McElhaney may have been highly offended" by the suspension, the Court held that "an employee's subjective view" is irrelevant. The United States Court of Appeal for the 11th Circuit's Panel affirmed, acknowledging that whether a discriminatory paid suspension is actionable under Title VII and Section 1981 was a question of first impression.

Also, the Panel held that Dowdell-McElhaney's suspension as well as other related discrimination claims could not proceed because Defendants had not subjected her to an adverse employment action, which are employer decisions "that affect continued employment or pay—things like terminations, demotions, suspensions without pay and pay raises or cuts— as well as other things that are similarly significant standing alone." (Citing Monaghan v. Worldpay US, Inc., 955 F.3d 855, 860 (11th Cir. 2020)). Thus this holding, according to the Panel, aligned with sister circuits' precedent that "a simple paid suspension is not an adverse employment action." Hence, Dowdell-McElhaney totally disagrees with the Court, since it was ALL done with discriminatory intent, which violated in fact, Title IV Civil Rights Act.

REASONS FOR GRANTING THE PETITION

I. A. Failure to Promote Claim

Dowdell-McElhaney contends that TSYS, the Defendant, did not select her for the First Party Fraud Team because of her age, race, and gender. She was told by her fellow Team Members who were selected that the newly formed Team would result in a pay increase and was considered a "promotion." The Court failed to analyze that the decisions on the part of the Defendants were in fact, an adverse employment action. And that direct evidence of discrimination exists therein. Moreover, Plaintiff's over sixty-one (61) applications for jobs continued to be rejected within hours of applying for them. Even though some of the positions, in which she was applying for were directly in her field as well as her exceeding the qualifications for them.

The First Party Fraud Team received out-right pay raises and it had absolutely nothing to do with merit raises; Defendants' Team Members in fact, received pay raises for their promotions as well as merit raises for their prior quarterly performances. Therefore, Appellant strongly disagrees with the United States Court of Appeals for the 11th Circuit's assertions that Plaintiff speculated the Team Members' raises must have been due to their selection; despite the fact that the merit raises occurred prior to the selection to the Team. Second, she provided both Courts with a Witness List of 61 (some members), who will collaborate that they did in fact, received pay raises – their testimonies will substantiate that their positions accompanied pay raises.

The District Court erred in its entry of Summary Judgment on Dowdell-McElhaney's failure to promote claims, because (1.) she did show that non-selection to the First Party Fraud Team did in fact, constitute an adverse employment action and thus, made a prima facie discrimination case; (2.) she provided a Witness List of Team Members who will testify that they did in fact, received pay raises for their new promotions to the FPF Team; and (3.) that it was certainly not legitimate reasons for not signing her to the Team. Hence, it was a pretext for a discriminatory purpose–Michael Murphy (early twenties and Caucasian) stated this himself that his father worked for TSYS and of course, it brought him certain favors for new positions.

Plaintiff-Appellant made it abundantly clear that Michael Murphy stated this to her; and therefore, she was not "foggy" when it came to the exact details. Therefore, the Defendants took an adverse employment action against her because of her age, race, and gender. Liebman v. Mero. Lie Ins. Cos., 808 F3d 1294, 1298 (11th Cir. 2015). Appellant has been extremely clear throughout all of her Pleadings of the details on Michael Murphy's as well as other Team Member's promotions. The evidence of Michael Murphy's white male, early twenties and with no higher education was well established via her Deposition. Moreover, she had seniority, black female, in fifties, an outstanding Team Member and a plethora of degrees (Bachelor of Arts Degree in Political Science (Cum Laude) with a Minor in Criminal Justice from Morris Brown College in Atlanta, Georgia, Doctorate of Jurisprudence degree from Atlanta's John Marshall School of Law, and a Master of Law degree from Atlanta Law School. Also, most importantly, she was by far the most educated on her Team and her evaluations by her immediate supervisor, Clarence "Kenny" Anderson, was outstanding throughout her almost five (5) years of employment with the Defendants.

Appellant not being selected to the FPF Team was based on her age, race, and gender alone and that there was enough evidence to show the reason for an adverse employment action was clearly illegal discrimination. Tynes v. Florida Dept. of Juvenile Justice, No. 21-13245 (11th Cir. 2023). A reasonable juror could conclude that Michael Murphy (white, much younger male and with only a high school diploma) was chosen over her clearly because of her age, race, and gender. Since her legal background and credentials far exceeded his; thus, Michael Murphy had only a high school diploma.

Under the McDonnell Douglas' framework, Dowdell-McElhaney has proven all four elements as required in that case. Lewis v. City of Union City, 918 F.3d at 1220–21. Dowdell-McElhaney has argued as well as demonstrated a convincing mosaic of circumstantial evidence that merits an inference of intentional discrimination on all of her claims. Evidence from which a jury could conclude that TSYS's decision not to assign her to the First Party Fraud Team was a pretext for unlawful discrimination. Because

what company would allow wasted talent as McElhaney, by refusing to provide her with any opportunities whatsoever, given her vast legal background.

McElhaney has certainly satisfied her burden in McDonnell Douglas, 411 U.S. at 805, that "either directly, by persuading the Court that a discriminatory reason more than likely motivated the employer, or indirectly, by persuading the Court that the proffered reason for the employment decision is not worthy of belief." Mizell v. Miami-Dade County, Florida, 342 F. Supp. 2d at 1090 (S.D. Fla. 2004). Notwithstanding, the burden-shifting framework, the Plaintiff carries the "burden of persuading the trier of fact that the Defendants' intentionally; discriminated against Plaintiff. And she had certainly done so with both Courts.

Apparently, Defendant TSYS did not have any "shame" whatsoever of assigning African-American females, who had Doctors of Jurisprudence degrees in its Call Centers. Nadine Brown (Southern University Law School graduate in Baton Rouge, Louisiana) was assigned to Defendant's Call Center at the same location as Dowdell-McElhaney. Also, Morgan Caro-Whipple (Mercer University School of Law graduate in Macon, Georgia) was assigned to the McDonough, Georgia's Call Center. Ms. Brown was also terminated by Defendant TSYS from her position as well for advocating for a legal position. However, Ms. Caro resigned after working only a couple of months for Defendant TSYS; because she stated that she just refused to work in that capacity.

Here, this Honorable United States Supreme Court can write the wrong for many years of discrimination by the Defendant TSYS, "once and for all!" Since, Defendants have in fact, done so on at least two (2) other occasions with Nadine Brown and Morgan Caro-Whipple. This is certainly the very fabric of who these companies really are; allowing Team Members with Doctor of Jurisprudence degrees to work in a Call Center and not having an opportunity to work in their Legal Departments whatsoever. Hence, these discrimination claims go far beyond the Appellant and this Honorable United States Supreme Court should hold the Defendants accountable for violating Appellant's constitutional Civil Rights by ruling in her favor.

TSYS' pay records should in fact, show that the employees selected to the

FPF Team received pay raises directly because of their selections. Dowdell-McElhaney had produced evidence to Attorney of Record that the failure to select her to the Team otherwise altered the term, conditions, or privileges of her employment. 29 U.S.C. 623. Accordingly, Appellant did not fail to make out a prima facie case of Age Discrimination for TSYS' failure to assign her to the First Party Fraud Team.

Dowdell-McElhaney's Supervisor, Clarence "Kenny" Anderson, did not provide these Courts with a sworn Deposition and/or Affidavit, but a Declaratory Statement, instead. And his evaluations were immensely inconsistent with his Declaratory Statement. Noting, he always gave outstanding evaluations prior to filing her Complaint with the EEOC's Regional Office in Atlanta, Georgia. Appellant has asserted that she provided evidence throughout her Deposition to show that this proffered reason by her supervisor was in fact, pretext for discrimination.

In sum, Dowdell-McElhaney will call some of these Team Members to testify that they received said new jobs at a higher pay grade. Evidence that being designated as a member of the First Party Fraud Team and/or being transferred to that position is sufficiently significant. Such that not being chosen for it would be a serious and material change in the terms, conditions, or privileges of employment. Because Plaintiff had been seeking better opportunities with the Defendants for almost all five (5) years of her employment. Accordingly, whether the non-selection is framed as a failure to promote or the denial of a lateral transfer, it most certainly rises to the level of an adverse employment action. Dowdell-McElhaney has created a genuine fact dispute on this essential element of her claim; therefore, the Defendants were not entitled to Summary Judgment. Dowdell-McElhaney had created a definite jury question on the adverse employment action element of her claim as well. And she will prevail in showing that TSYS's discriminatory reason for its decision not to select her was in fact pretextual. Because in Plaintiff's case, a whole new FPF Team was established and not just reassigning of job tasks by Management.

B. Discriminatory and Retaliatory Termination

Dowdell-McElhaney also claims that Defendants terminated her because of her age, sex, race, disability and in retaliation for filing her first EEOC's Charge. To prevail on her discriminatory termination claims under the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) framework, Dowdell-McElhaney must first produce evidence "that her employer treated similarly

situated employees outside her class more favorably." Lewis v. City of Union City, 918 F.3d at 1220–21 (internal quotation marks omitted). A similarly situated comparator employee generally needs to have engaged in the same basic misconduct, been subjected to the same employment policies, been supervised by the same supervisor, and shared a similar employment and disciplinary history as the plaintiff. Id. at 1227-28. Dowdell-McElhaney was terminated because of illegal discrimination, period. Numerous other Team Members were not even reprimanded for their egregious actions.

Appellant still contends that the District Court did in fact, erred in granting Summary Judgment to TSYS and Global Payment, Inc. on Dowdell-McElhaney's retaliation claims. She still contends that their retaliatory actions got worse after filing her Complaints (first and second) with the EEOC in Atlanta, Georgia as well.

She contends that TSYS and Global Payments, Inc. proffer is not legitimate, but discriminatory, and was retaliatory reasons for terminating her employment. She has provided strong evidence via her Deposition that she did not engage in a pattern of "call avoidances," and did not falsely indicate she contacted consumers regarding potential fraud. The records will reflect that dropped calls did in fact happen and she had absolutely no intentions to avoid Cardholders.

However, the Court must focus on whether other employees violated similar policies and yet were not terminated, especially when their failure to comply with company policies ultimately resulted in huge monetary losses (millions of dollars in just one year) to the company of Defendants. Dowdell-McEhlhaney had witnessed Team Members engaged in "call avoidances" daily and/or removing holds off accounts, without first speaking to Cardholders. As well as not going over all the fraud with Cardholders and they were not terminated. Troy Johnson, Jason Petty, and Lauren Nelson were all properly identified as comparators, who were directly on her RVL's Team. Therefore, Dowdell-MElhaney has met her burden of proof to prove a prima facie case of discrimination, because they were White and/an Asian. Thus, she also testified via her Deposition about Team Members (Jason Petty, Troy Johnson, and Lauren Nelson) whose conduct along with others, resulted in million dollars losses for the Defendant TSYS. Moreover, Jason Petty was a native of Thomaston, Georgia, directly on the RVL Team with Dowdell-McElhaney, and was rewarded/promoted to the IT Department, even after his huge losses by Defendant TSYS. However, the Defendants denied

Jason Petty was in fact, an employee.

Her comparators (Fraud Department's Team Members) used profanity and hung up on Cardholders; lost a free-standing building – Capital One Bank, due to excessive losses; and had huge losses in the millions of dollars in the Fraud Department as well. Dowdell-McElhaney was terminated because of age, race and gender, period. The comparator employees she presented were very well similarly situated in all material respects as outlined in the McDonnell Douglas framework. Hence, numerous other Team Members were just reprimanded for their egregious actions, and certainly not terminated from their employment.

Furthermost, Jason Petty once visited Dowdell-McElhaney at his old Fraud Department and was completely "shocked" that she had not been promoted to the Legal Department at the Headquarters in Downtown Columbus, Georgia. Because he and Appellant had worked alongside each other daily and knew each other's work ethics extremely well. Also, he stated that he was so sorry to find her still there at that position.

These persons were valid comparators, because their behavior and losses were no comparison to what Plaintiff was accused of doing. Moreover, their histories did bear out McElhaney's contentions because she heard it directly from the three (3) Team Members, who were on her exact RVL Team. However, they were not terminated for committing huge losses for the company. She pointed to evidence that Team Members engaged in "call avoidances" as well as profanity to Cardholders when they became upset. There is a vast amount of evidence throughout the company that Team Members shared the same employment, disciplinary history, and supervisor.

In Tynes v. Florida Department of Juvenile Justice, No. 21-13245 (2023), the United States Court of Appeals for the Eleventh Circuit affirmed the district court's judgment. The appellate court ruled that the Department's focus on the McDonnell Douglas framework and the adequacy of Tynes's comparators missed the ultimate question in a discrimination case, which is whether there is enough evidence to show that the reason for an adverse employment action was illegal discrimination. The jury found that the Department had intentionally discriminated against Tynes, and the Department did not challenge the sufficiency of the evidence for that conclusion on appeal. Therefore, the Department's arguments regarding the adequacy of Tynes's comparators and the insufficiency of her prima facie case were irrelevant and did not disturb the jury's verdict.

Her fellow Team Members were coached by Management with "one-on one" verbal reprimand sessions on the huge losses and not terminated. Also, they signed off on the Acknowledgment Forms of their individual huge losses; as well as discussed what would happen moving forward, in the event of additional losses. Again, Plaintiff has provided ample evidence to create a genuine factual dispute as to Defendants' reason for her termination was a pretext for discrimination. Dowdell-McElhaney has denied categorically a continuing pattern of "call avoidances."

Appellant has proven via her Deposition and statements from other Team Members to "demonstrate that their proferred reason was merely a pretext for unlawful discrimination. Accordingly, she met her burden and the District Court's grant of Summary Judgment on her termination claims was in error. Again, no actions were taken against her, prior to filing her EEOC's claims. Moreover, Appellant would like to reiterate that she received outstanding evaluations by her immediate supervisor, Clarence "Kenny" Anderson. Hence, Appellant will bring forth an eyewitness who will testify that Defendants pressured her immediate supervisor to write his "bogus" Declaratory Statement; pleading with him to just find some sort of bad information on her. And on numerous visits with pressuring him, he did not have any. However, in the end, he merely just agreed with his superiors in an effort to save his job.

Prior to September 28, 2020, Plaintiff had no issues whatsoever with losses and/or removing holds off Cardholders' accounts without prior verification by them. However, for the very first time, after filing her Charge with the EEOC in 2019, TSYS accused her of the same. This is something she had never been accused of before. Especially, since the systems had a way of monitoring every aspect of Team Members' daily work activities, regardless of the banks.

McElhaney did not and will not admit to the State Farm Bank's loss of $1,910.55, because it never happened. She followed all applicable procedures, and TSYS incurring $1,910.55 in expenses were clearly attributable to another Team Member's error, and not the Plaintiff. She knew the importance of handling each interaction with Cardholders and following the rules and regulations of each bank, after doing so for almost five (5) years. In essence, her outstanding five (5) years of amazing service speaks for itself. Furthermore, it is well established throughout the Fraud Department that a hold is never, ever removed on an account without first verifying the fraud on the account with the Cardholders. Moreover, it is also, so ironic that this all occurred in an effort of "on-going" retaliation, after filing her charge of Age

Discrimination with the EEOC in Atlanta, Georgia on September 16, 2019.

Plaintiff has produced evidence that this conclusion by TSYS was so weak, implausible, inconsistent, or contradictory that the fact finder could find it unworthy of belief. In fact, evidence of the record will supports Plaintiff and not TSYS's conclusion. Because Plaintiff may have completed human errors, but not intentional call avoidances. Dowdell-McElhaney certainly blamed her mistakes on unintentional technical difficulties. She also attributed dropped calls to distractions from Team Members and Management, along with "feeling overwhelmed" with meeting work obligations, especially when most Team Members did not report to work on a daily basis – especially on Mondays and Fridays. Pl.'s Dep. Ex. 17, Email from Sherrell Dowdell-McElhaney to Loretta Owen et al. (Nov. 11, 2020, 11:46 AM), ECF No. 58-3 at 92; Pl.'s Dep. 148:17-23.

Daily Management's incompetency highly contributed to calls being dropped and not avoided as well. McElhaney has provided a prima facie case of retaliation. She has shown throughout this process (1.) she engaged in statutorily protected expression; (2.) she suffered an adverse employment action; and (3.) there was in fact a causal link between the two. Therefore, she has met Defendants' proffered reasons for its termination head-on and rebuts them with evidence showing that TSYS's "reason was false, and that discrimination was the real reason." Accordingly, her discriminatory termination claim does not fail as a matter of law.

Therefore, Dowdell-McElhaney's retaliation claim does not suffer the same fate. TSYS terminated her in retaliation for filing her First EEOC Charge, which complained of age discrimination under the ADEA. To prevail on her ADEA retaliation claim, she "must first establish a prima facie case by showing that: (1) [she] engaged in a statutorily protected activity; (2) [she] suffered an adverse employment action; and (3) [she] established a causal link between the protected activity and the adverse action." Bryant v. Jones, 575 F.3d 1281, 1307–08 (11th Cir. 2009) (providing the Title VII retaliation framework); Stone v. Geico Gen. Ins. Co., 279 F. App'x.

TSYS' Motion for Summary Judgment on the ADEA retaliation claim based on her wrongful suspension should be denied as well. Thus, the Court should conclude that it was in fact, an "independent claim" for a wrongful retaliatory suspension, since it complies with an ADEA retaliation claim under the Title VII framework. Dowdell-McElhaney's retaliation claim is sufficient evidence from which a reasonable jury could conclude that a causal link exists between the filing of her First EEOC's Charge and her

termination. Because, Plaintiff was in fact, fired just 2 to 3 days before the statute was to expire on her Age Discrimination case.

Plaintiff has pointed to direct evidence of causation. Thus, she must rely upon circumstantial evidence, which can consist of temporal proximity between her protected conduct and the adverse employment action. But that temporal proximity must be close. TSYS terminated her after filing One (1) Charge with the EEOC, and within three (3) days of the statute, running on her federal claims of employment discrimination. After filing One (1) Charge with the EEOC, and within three (3) days of the statute running on her case, she has shown more than sufficiently close temporal proximity to support an inference on causation.

Most importantly, Dowdell-McElhaney points to her Right to Sue letter issued by the EEOC to her on August 21, 2020, which was less than three months before her termination. Plaintiff had several conversations with her immediate supervisor, Clarence "Kenny" Anderson, and even allowed him to read the Complaint Letter that she had filed with the EEOC in July of 2019. Therefore, TSYS certainly had prior notice of the claims, within days after Plaintiff made contact with the EEOC from the beginning.

Furthermore, the District Judge nonetheless concluded that Dowdell-McElhaney could not establish a prima facie case of discrimination or retaliation because of her age, race, gender, disability and FLSA, and Defendants terminated her for call avoidances. Each determination is legally and factually flawed.

Again, McElhaney has provided a prima facie case of retaliation. She has shown throughout this process (1.) she engaged in statutorily protected expression; (2.) she suffered an adverse employment action; and (3.) there was in fact a causal link between the two. Therefore, under the correct legal standards, several open factual questions precluded Summary Judgment on Dowdell-McElhaney's claims.

It is well settled that temporal evidence alone can establish a causal relationship at the prima facie stage. With respect to retaliation claims, the Eleventh Circuit has long held that "[a] 'close temporal proximity' between [an employee's] protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case," *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004), and "will generally be enough to create a factual issue on the causation element," *Singleton v. Pub. Health Tr. of Miami-Dade Cnty.*, 725 F. App'x

736, 738 (11th Cir. 2018).

Similarly, temporal evidence can support an inference of discrimination when "the adverse employment action is very close in time to a discrete event, such as when employers learned about the basis for the alleged discrimination." *Barber v. Cellco P'ship*, 808 F. App'x 929, 935 (11th Cir. 2020). For example, a close temporal proximity between an employee's "disclosure of a potentially debilitating condition" and an adverse employment action is "sufficient to put the employer to its proofs—the purpose of the burden-shifting scheme." *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1113-14 (8th Cir. 2001); *see also Dennis v. Fitzsimons*, 850 F. App'x 598, 602 (10th Cir. 2021) ("[A] close temporal proximity between the employer learning about the disability and taking adverse employment action may give rise to an inference of discrimination.").

Here, Defendants terminated Dowdell-McElhaney on November 18, 2020, just two to three days before the statute was going to run on her federal claims. At the prima facie stage, that evidence was sufficient to raise an inference of causation for both her discrimination and retaliation claims.

By focusing on Defendants' rationale for terminating Dowdell-McElhaney, the District Judge ignored this timing evidence and conflated Dowdell- McElhaney's prima facie case with Defendants' burden to articulate neutral, non-discriminatory, and non-retaliatory reasons for its actions. *See* R.56 at 13 n. 3 (purporting to resolve case at prima facie stage). Even assuming the District Judge implicitly determined that Defendants had satisfied that burden, Dowdell-McElhaney provided additional evidence that those reasons were pretextual. In her deposition, Dowdell-McElhaney refuted Defendants' assertions that they terminated her because of call avoidances. Dowdell-McElhaney has testified under oath, regarding all of her employment discrimination claims. Unlike the Defendants who merely submitted untruthful Declaratory Statements, as opposed to going under oath like Plaintiff. Thus, ALL said Declaratory Statements by the Defendants should be inadmissible and not considered neither for this Appeal and/or for Trial. Because Defendants' documentation is plain evidence of wasted talent of Plaintiff, fraud and "cover-up"; as well as false statements of official records, which are truly lacking truthfulness and transparency. Since, the Defendants refused to provide a sworn testimony and/or Affidavit of any kind whatsoever to date.

Considering all of Dowdell-McElhaney's testimony via her "sworn" Deposition of detailed instances of discrimination based on age, race, gender,

and outright denial of her disability, accommodation requests, and her wrongful termination, a reasonable jury could conclude that Defendants' proffered reasons were pretextual. *See* Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997) (where "a reasonable jury could conclude that the employer's proffered reasons were not the real reason for its decision," District Court "may not preempt the jury's role of determining whether to draw an inference of intentional discrimination from the plaintiff's prima facie case taken together with rejection of the employer's explanations for its action"); *see also* Pastran v. K-Mart Corp., 210 F.3d 1201, 1206 (10th Cir. 2000) (temporal proximity "is a factor in determining whether the employer's proffered reason is a pretext for retaliation").

McElhaney filed her First and Second Charges and had been discriminated against ever since. And she can show a causal link between those two events and beyond via over 900 "work" emails. Thus, with all her "work" emails, she will be able to show a causal connection between Management's retaliations and her termination based on the same. Said decisions about McElhaney's discipline and termination, Grimes, Owens, and Anderson did consider her age, gender, race, disability, and especially her internal Complaint as well as EEOC's Charges that she filed.

Defendants have only decided to defame Plaintiff's character. She addressed the reasons directly over couple of emails to Management. She contended the calls at issue were only 0.76% of her monthly accounts worked with amazing customer service. Also, she contends that discrimination by the Defendants over promotions as well as other issues are actionable and should be taken with the utmost consideration for said Appeal. She has met Defendants' explanation head-on and rebutted it with evidence that it was not credible and was a subterfuge for discrimination as well as retaliation. Hornsby-Culpepper v. Ware, 906 F.3d 1302, 1313 (11th Cir. 2018). Hence, she has in fact, adduced a plethora of evidence via her Attorney of Record to support all of her claims.

The highly disputed record shows Defendants made decisions based on non-legitimate, discriminatory and non-document supported performance reasons. In essence : 1.) Plaintiff was punished for taking part in a legally protected activity, such as filing two (2) Charges with the EEOC, regarding discrimination and harassment, and requesting workplace accommodations; 2.) Plaintiff was passed over for ANY type of promotion, despite meeting and/or exceeding credentials for the job and expectations; 3.) The Defendants continued to keep her on the RVL (Review Later) Team that had an absolute revolving door throughout Plaintiff's almost five (5) years of outstanding

service; 4.) Supervisors purposely caused Plaintiff to make human errors, by demanding two (2) minutes per fraud account, when a plethora of fraud was on the accounts; and 5.) Plaintiff had a history of positive performance reviews; however, after filing her Charges with the EECOC, she started receiving negative performance reviews that didn't align with her work quality. Therefore, Plaintiff has certainly provided a mounting of evidence on retaliation and as a result, the Motion for Summary Judgment as well as the Judgment for Costs against the Plaintiff was certainly in error.

C. FLSA Overtime Hours Claim

Appellant has repeatedly argued thoroughly below that Summary Judgment was not warranted on her FLSA claim: And she therefore did not waive an argument to the contrary on Appeal. Defendants also moved for Summary Judgment on Dowdell-McElhaney's FLSA claim, which was based on a failure to comply with the FLSA overtime wage requirements.

The fact that Plaintiff was earning at times only $28,000 per year should be alarming to this Court, given her amazing credentials as well as extensive work experience in the legal profession. Moreover, the Defendants in the Court's Order, dated March 8, 2002, Footnote 2, stated that they did not seek dismissal of Dowdell-McElhaney's FLSA claim. This should be acknowledged as an admission, since it was not disputed by them.

Hence, this claim was in fact, an admission on their part and should be considered as such. Because that was the perfect time to dispute said claim and they failed to do so. Therefore, the Defendants are not entitled to Summary Judgment on Dowdell-McElhaney's FLSA claim. Furthermore, because she worked long extensive hours way below her credentials and pay scale. Most importantly, the Defendants had a huge pay gap with the male team members verses the female team members as well. Accordingly, the Court of Appeals erred in affirming the District Court's grant of Summary Judgment on Dowdell-McElhaney's FLSA overtime claim.

D. Disability Claim

Both Courts failed to even address her "on-going" disability claim. Hence, Dowdell-McElhaney also explained why her lower back condition deteriorated after the Defendants refused to provide her with reasonable accommodations for a "Sit and Stand." The Courts did not provide an analysis at all in assessing the Plaintiff's request for her disability. The District Judge likewise erred in not determining that the accommodation Dowdell-McElhaney

requested was reasonable as a matter of law. Thus, the relevant question is whether the Defendants refused to provide Plaintiff with a "Sit and Stand" to no avail, even after she provided them with her doctors' statements, requesting the same. Because the record is absolutely silent on that issue, and neither Defendants nor the District Judge addressed it below, the appropriate remedy is for this Honorable Court to remand for the District Court to reconsider the issue in the first instance. Moreover, Plaintiff was in fact, never provided a "Sit and Stand" by the Defendants. Under these explanations, the claim was more than sufficient to survive Summary Judgment.

Title I of the ADA prohibits discrimination on the basis of disability for job application procedures; hiring, advancement, or discharge of employees; compensation; job training; and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Plaintiffs raising claims under Title I of the ADA must comply with the same procedural requirements articulated in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (incorporating the procedures set forth in 42 U.S.C. § 2000e-5). Fickling v. United States, 507 F.3d 1302, 1304 (11th Cir. 2007).

If the moving party meets that burden, the nonmoving party must point to specific facts in the record showing that a reasonable jury could find in her favor. Id.; Fed. R. Civ. P. 56(c) (1) (A). The nonmoving party cannot defeat Summary Judgment by relying on conclusory allegations. See Holifield v. Reno, 115 F.3d 1555, 1564 n.6 (11th Cir. 1997). 12112(b) (5) (A); Holly, 492 F.3d at 1262. The burden of identifying an accommodation that would allow the employee to perform the essential functions of her job rests with the employee, as does the ultimate burden of persuasion on showing that the accommodation is reasonable. Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000).

To establish a prima facie case of disability discrimination, a plaintiff must show that he (i) has a disability, (ii) is a qualified individual, and (iii) was subjected to unlawful discrimination because of his disability. *Samson v. Fed. Express Corp.*, 746 F.3d 1196, 1200 (11th Cir. 2014). An employer's failure to provide a reasonable accommodation qualifies as unlawful discrimination, satisfying the third prong. *Holly v. Clairson* Indus., LLC, 492 F.3d 1247, 1249 (11th Cir. 2007); 42 U.S.C. § 12112(b)(5)(A). Similarly, to establish a prima facie case of retaliation, a plaintiff must show that (i) he engaged in protected activity, (ii) he suffered an adverse employment action, and (iii) there was a causal link between the two. *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016). An

employee engages in protected activity when he makes "a request for a reasonable accommodation." *Id.*

Reasonable accommodation means a modification or adjustment to the work environment, or the manner or circumstances under which the work is customarily performed, that enables a qualified person to perform the essential functions of her position. 29 C.F.R. § 1630.2(o) (1) (ii). A reasonable accommodation may include job-restructuring, permitting a part-time or modified work schedule, reassigning the employee to a vacant position, or acquiring or modifying equipment or devices. Id. § 1630.2(o) (2) (ii). An accommodation is reasonable and necessary under the ADA only when it enables the employee to perform the essential functions of her position. Holly, 492 F.3d at 1256. Discrimination against a qualified individual includes the failure to make a reasonable accommodation to the known physical or mental limitations of the individual, unless the accommodation would cause the employer undue hardship. 42 U.S.C. § 12112(b) (5) (A); Holly, 492 F.3d at 1262. The burden of identifying an accommodation that would allow the employee to perform the essential functions of her job rests with the employee, as does the ultimate burden of persuasion on showing that the accommodation is reasonable. Earl v. Mervyns, Inc., 207 F.3d 1361, 1367 (11th Cir. 2000).

The relevant question under the ADA is whether a plaintiff is a qualified individual when he requests—and his employer denies—an accommodation. *See* Minter v. District of Columbia, 809 F.3d 66, 70 (D.C. Cir. 2015) ("The plaintiff must establish her ability to perform those functions (with or without reasonable accommodation) *at the time the employer denied her request for accommodation.*") (emphasis added); *Basden v. Pro. Transp., Inc.*, 714 F.3d 1034, 1037 (7th Cir. 2013) ("[The employee's] ability to come to work, or to otherwise perform the essential functions of her job, is examined *as of the time of the adverse employment decision* at issue.") (emphasis added); Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. § 1630.2(m) (same). There are also open factual questions about whether the accommodations Dowdell-McElhaney requested were timely as well as reasonable. Under these facts, a reasonable jury could find that Dowdell-McElhaney was a qualified individual and the disability was certainly "on-going"; the "Sit and Stand" was a timely and reasonable accommodation, and certainly did not provide an undue hardship to the Defendants. In fact, the Defendants installed the same "Sit and Stand" for other Team Members as well as Management, directly on

her team as well as all around her.

Again, neither Defendants nor the District Judge or the United States Court of Appeals for the 11th Circuit addressed this request or explained why it was not reasonable. At a minimum, Dowdell-McElhaney's various requests may have been enough to trigger Defendants' duty to engage in an "interactive process" to determine an appropriate reasonable accommodation. 29 C.F.R. § 1630.2(o) (3).

Dowdell-McElhaney continue to contends, among other things, that the Defendants discriminated against her by refusing to provide a reasonable accommodation; and both discriminated and retaliated against her by firing her just 2 to 3 days before the statute would expire on her Federal claims. To no avail, the Defendants never provided her with a much needed "Sit and Stand." Therefore, that issue is certainly not predated on October 29, 2020. And is therefore actionable based on her Second Charges as well as her First Charge with the EEOC. Currently, she still suffers from "acute" lower back pain, which she has provided medical records to substantiate her disability. Thus, on August 21, 2023, Appellant was declared legally disabled by the United States Social Security Administration.

There is in fact, absolutely NO dispute that Dowdell-McElhaney had an "ongoing" disability and suffered an adverse employment action. Therefore, the District Court did not properly limit her claims to adverse employment actions that occurred after October 29, 2020. Furthermore, the District Judge nonetheless concluded that Dowdell-McElhaney could not establish a prima facie case of discrimination or retaliation because of her age, race, gender, disability and FLSA, and Defendants terminated her for "call avoidances." Each determination is legally and factually flawed.

Thus, Dowdell-McElhaney has provided prima facie case of retaliation. She has shown throughout this process (1.) she engaged in statutorily protected expression; (2.) she suffered an adverse employment action; and (3.) there was in fact a causal link between the two. Therefore, under the correct legal standards, several open factual questions precluded Summary Judgment on Dowdell-McElhaney's discrimination claims. Accordingly, the United States Court of Appeal for the 11th Circuit erred in affirming the District Court's grant of Summary Judgment on Dowdell-McElhaney's disability claim as well.

II. The Panel's decision was wrong.

A. The Panel's decision disregards the statutory text and authorizes discrimination prohibited by Title VII and Section 1981.

Although the phrase "adverse employment action" appears nowhere in Title VII or Section 1981's text, the Court requires plaintiffs alleging disparate treatment to prove that they suffered one. See, e.g., Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238-39 (11th Cir. 2001). Under the adverse-employment-action doctrine, only "[t]angible employment actions" that "affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone" are actionable. Monaghan v. Worldpay US, Inc., 955 F.3d 855, 860 (11th Cir. 2020).

This interpretation—which led the Panel to conclude that, even when motivated by discrimination, "a simple paid suspension" is not actionable. This is at war with Title VII's text and the Supreme Court's interpretation of the statute. This Petition seeks rehearing for both Dowdell-McElhaney's Title VII and Section 1981 claims. The Title VII and Section 1981 liability standards are the same. See, e.g., Chapter 7 Tr. v. Gate Gourmet, Inc., 683 F.3d 1249, 1256-57 (11th Cir. 2012). Therefore, to avoid redundancy, we refer below to Title VII alone, as did the Panel in analyzing Dowdell-McElhaney's discrimination claims. Under Title VII, an employer may not "discriminate" with respect to an individual's "compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. §2000e-2 (a) (1).

"It's not even clear that we need dictionaries to confirm what fluent speakers of English know" about the meaning of the ordinary English words contained in Section 703(a)(1), Threat v. City of Cleveland, 6 F.4th 672, 677 (6th Cir. 2021) (Sutton, J.), and the definitions of the words "discriminate" "compensation," "terms," "conditions," and "privileges" are not ambiguous. "Discriminate" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Discriminate, Webster's Third New International Dictionary 647-48 (1961) (Webster's Third). "As used in Title VII, the term 'discriminate against'" thus "refers to 'distinctions or differences in treatment that injure protected individuals.'" Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020) (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 59 (2006)).

"Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." Terms, Webster's Third 2358. A "condition," is "something established or agreed upon as a requisite to the doing or taking effect of something else." Condition, Webster's Third 473. "Privilege" means to enjoy "a peculiar right, immunity, prerogative, or other benefit." Privilege, Webster's Third 1805. These words, taken together, refer to "the entire spectrum of disparate treatment"—the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (citation omitted). Title VII is thus not just limited to employment practices that impose pocketbook injuries or those that employers or courts view as particularly harmful.

Quite the contrary, the statute establishes no minimum level of actionable harm. In using the phrase "terms, conditions, or privileges," "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity." Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (emphasis added). "The emphasis of both the language and the legislative history of the statute are on eliminating discrimination in employment." Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 (1977) (emphasis added). Title VII thus "tolerates no racial discrimination." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

The statutory phrase "terms, conditions, or privileges" is a catchall for all incidents of an employment relationship, and the Panel's contrary decision impermissibly "rewrite[s] the statute that Congress has enacted." Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 629 (2018). Here, by handling complaints against Dowdell-McElhaney in a manner less favorable than how it addressed complaints against whites, much younger, males and much less educated, the Defendants treated Dowdell-McElhaney differently based on race, age and gender; thus, discriminating against her. A paid suspension can be a useful tool for an employer to hit 'pause' and investigate when an employee has been accused of wrongdoing. However, an employer, may not, be inconsistent with Title VII, apply one disciplinary rule to a Black employee and another to a white one. Such as the case here with Dowdell-McElhaney.

Employers thus retain the right to suspend employees accused of

wrongdoing but not when the plaintiff can prove that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin—that is, the employer's actions must have been taken "because of" one of these protected characteristics, 42 U.S.C. § 2000e-2(a)(1); see Tex. Dep't Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). That requirement, should not, however, be conflated with the distinct requirement that the employment practice must be "with respect" to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); see Ernest F. Lidge III, The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer' Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action was Materially Adverse or Ultimate, 47 U. Kan. L. Rev. 333, 368 (1999).

Because proving that an employer acted with discriminatory intent can be a substantial burden, see Burdine, 450 U.S. at 257-59; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509-12 (1993), revisiting the panel's decision would not impose any unreasonable obligations on employers legitimately seeking to address employee misconduct, but, rather, would apply federal anti- discrimination law as it was written and intended.

Disciplinary actions including "reprimands, warnings, [and] suspensions" are terms or conditions of employment that cannot be discriminatorily imposed. EEOC Compl. Man., § 612.1, 2006 WL 4672691 (2006). As the Sixth Circuit recently explained, "the when of employment" must be a "term of employment." Threat v. City of Cleveland, 6 F.4th at 677; see also EEOC Compl. Man., § 613.3, 2006 WL 4672703 (2009).

By suspending Dowdell-McElhaney with pay, Defendants disciplined Dowdell-McElhaney and decided when Dowdell-McElhaney could (or in this case, could not) work, thus imposing new "terms" and "conditions" of employment. After Defendants suspended Dowdell-McElhaney, she was escorted out the building, precisely because contrary terms and conditions were imposed by her employer. That Defendants posted a Detective of the Columbus Police Department to enforce Dowdell-McElhaney's suspension, underscores this point.

A benefit may be a privilege of employment even if it is not expressed in an agreement, but simply accorded by custom. Hishon v. King & Spalding, 467 U.S. 69, 75 (1984). And an employment benefit "may not be doled out in a

discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.*

Here, Defendants' disciplinary protocol called for complaints against other Team Members were totally different from Dowdell-McElhaney's discipline. White employees were allowed to remain on the job with huge losses, when they were the subject of complaints but denied Dowdell-McElhaney, who is Black, this privilege of employment when complaints were lodged against her.

B. The Panel's decision creates intra-circuit confusion and conflicts with out-of-circuit precedent even under an impermissibly narrow understanding of Title VII and Section 1981.

As shown, the conduct at issue here altered the "terms, conditions, or privileges" of Dowdell-McElhaney's employment on a discriminatory basis, which is all that Title VII's text demands. But even if this Honorable Court is disinclined to revisit the conflict between Title VII's text and the judicially-created requirement that employees prove an "adverse employment action," the Court's existing, controlling precedent demonstrates that a discriminatory paid suspension causing reputational harm qualifies. Indeed, the Court has consistently rejected a "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable." The "adverse action" framework is meant simply to separate "substantial" from "trivial" harms. Monaghan, 955 F.3d at 860. Adverse employment decisions thus include all practices that "affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone," id. (emphasis added), including reputational harm.

On a daily basis, Appellant had to investigate suspected fraud "where the nature of the fraud was less certain." And she excelled in working with difficult clients all day long, who were very upset. And after almost five (5) years, Appellant had earned the right to receive a new job within the company. Where she could utilize her amazing legal skill sets.

In Hinson v. Clinch County, 231 F.3d 821, 829 (11th Cir. 2000), for example, a principal alleged that her employer discriminatorily transferred

her to a position that might have been "seen by some as a promotion," but that "could be seen as" involving a "loss of prestige." Id. at 824, 829. This was certainly the case with Dowdell-McElhaney, when she was transferred to the RVL Team. In contrast to the Panel's decision here, the Court concluded there, that because the employment action resulted in "a loss of prestige and responsibility," it was actionable under Section 703(a) (1). Id. at 830.

The Panel's rule immunizing paid suspensions from Title VII coverage conflicts with Hinson and other controlling precedent recognizing that a plaintiff need not suffer a cut in pay or benefits to have experienced an adverse employment action. See Kidd v. Mando Am. Corp., 731 F.3d 1196, 1203 (11th Cir. 2013) (acknowledging that an adverse action may be found without change in pay if a plaintiff is reassigned to role with "significantly different" duties). Rehearing is thus necessary—even if this Court wishes to maintain its adverse-employment-action doctrine—to resolve the confusion within this Circuit about what kinds of discriminatory conduct violate Title VII, or, put differently, what constitutes an "adverse employment action."

In some other circuits, too, intangible harms that do not immediately affect continued employment or pay are actionable. In Rodriguez v. Board of Education, 620 F.2d 362 (2d Cir. 1980), the Second Circuit held that an employment decision "interfere[d] with a condition or privilege of employment" where a teacher's salary, workload, and teaching subject did not change, but the teacher was professionally dissatisfied because of a job transfer. Id. at 364, 366. "[I]nconvenience resulting from a less favorable schedule," Ginger v. District of Columbia, 527 F.3d 1340, 1344 (D.C. Cir. 2008), a change in responsibilities that leaves an employee "unchallenged," Spees v. James Marine, Inc., 617 F.3d 380, 392 (6th Cir. 010), and giving an employee a workplace "status" that threatens future termination without ultimately resulting in termination, are covered employment harms.

The Sixth Circuit's adverse-employment-action doctrine excludes only de minimis harms, narrowly understood. See Threat v. City of Cleveland, 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, J.). And the D.C. Circuit recently granted rehearing en banc on its own motion to reconsider its adverse-employment-action precedent. See Chambers v. District of Columbia, No. 19-7098, 2021 WL 1784792, at *1 (D.C. Cir. May 5, 2021). Moreover, no other circuit has concluded, as the Panel did, that a paid suspension

inconsistent with an employer's internal disciplinary rules fails to meet Title VII's adversity requirement.

The Panel ignored the reputational injury Dowdell-McElhaney suffered—harm that elevated the suspension to an adverse employment action under the Court's existing (incorrect) precedent. In the Panel's view, because Defendants suspension was so short, it was not actionable. But Global Payment's and TSYS' intent matter only to the question of whether the suspension was discriminatory - that the differential treatment Dowdell-McElhaney experienced was in fact discriminatory. Because the suspension diminished Dowdell-McElhaney's name and reputation throughout the company for participating in some sort of wrongdoing—she was treated like a criminal—and led to rumors that harmed her reputation and future job prospects, the employment decision was not a "simple paid suspension." It thus amounted to an adverse employment action, even under the Court's anti-textual precedent.

III. The issue presented is important and recurring.

A. The Panel's decision has far-reaching consequences.

Limiting actionable discrimination to adverse employment actions with only economic consequences effectively blesses an array of discriminatory practices beyond the paid suspension at issue in this case. Discriminatory shift assignments, Jackson v. Hall Cnty. Gov't, 518 F. App'x 771, 773 (11th Cir. 2013), negative performance evaluations, Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001), and denials of training are not actionable, Johnson v. Gestamp Alabama, LLC, 946 F. Supp. 2d 1180, 1202 (N.D. Ala. 2013). The same goes for discriminatory office-space assignments (such is the case with Dowdell-McElhaney here). Griffin v. GMAC Com. Fin., L.L.C., 2008 WL 11322925, at *23 (N.D. Ga. Jan. 10, 2008), report and recommendation adopted, 2008 WL 11334068 (N.D. Ga. Mar. 5, 2008).

The potential ramifications of the adverse-employment-action doctrine—as applied to a range of federal laws aimed at eliminating workplace discrimination including the Americans with Disabilities Act and the Age Discrimination in Employment Act—are also not fully reflected in the litigated decisions. Such as the case here with Dowdell-McElhaney's case. Because, according to the Panel, discrimination is permissible if it does not

impose pocketbook or other similarly significant harm, an employer could, without legal consequence, require all of its Black employees to work under white supervisors, women to stand in meetings while male counterparts sit comfortably, disabled people to work in a "disabled-persons" annex, and older employees to write periodic reports about their retirement plans. Decades after Title VII, Section 1981, the ADA, and the ADEA were enacted to eliminate the workplace indignities of Jim Crow and sex-based stereotypes and the marginalization of disabled and older Americans, those results defy the plain language and intent of these federal anti-discrimination laws.

Consequently, the Honorable Clay D. Land of the Middle District of Georgia allowed a Reverse Discrimination (a similar Title VII, 1964 Civil Rights Acts) case to continue in his Court, which later resulted in a Settlement with the Columbus Consolidated Government in July of 2023. The city paid out $600,000 to Officer Ralph Dowe and Tony Little. The two White Police Officers filed the lawsuit back in March of 2022 for what they say boiled down to "reverse discrimination." Hence, the City decided to settle claims that a Black Former Police Chief racially discriminated against the two White officers by not promoting them.

Both the White officers said they believed former Police Chief Freddie Blackmon overlooked them for promotions within the department. Thus, the settlement was reached only after six months of work from attorneys on both sides. According to the lawsuit claim, the two officers desired positions to be on the department's command staff. Similarly to Sherrell Dowdell-McElhaney, the Petitioner's, desired position to work in the Defendants' Legal Department for over three (3) years.

B. The United States acknowledges the importance of the issue presented—whether discrimination without economic loss is actionable under Title VII—and agrees with Dowdell-McElhaney. It has argued to the Supreme Court that the adverse-employment-action doctrine has "no foundation" in Title VII's text, Congress's purpose, or Supreme Court precedent. U.S. Peterson Br., 2020 WL 1433451, at *6; accord Br. in Opp'n at 13, Forgus v. Shanahan, No. 18-942, 2019 WL 2006239 (May 6, 2019), cert. denied, 141 S. Ct. 234 (2020) (Mem.).

The United States is in fact, a frequent Defendant in employment-discrimination litigation, see 42 U.S.C. § 2000e-16, and the EEOC rules on thousands of employment-discrimination charges annually.

Here, the Plaintiff-Appellant has received two (2) employment discrimination charges. Since March 2020, the Government has reiterated its disagreement with the adverse-employment-action precedent before six circuits. See EEOC, All Statutes (Charges filed with EEOC) FY 2020, ttps://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 (last visited December 23, 2021). There can be no serious dispute, then, that the issues presented here are important and ripe for this Honorable Court's reevaluation, especially when such discrimination took place during the height of the "Global Pandemic!"

CONCLUSION

For the above reasons, as well as the fact that everyone in America should be able to get a fair shot at gainful employment when they are beyond qualified and not be discriminated against. Therefore, the United States Court of Appeals for the 11th Circuit has erred in affirming the Middle District Court of Georgia's Judgment on January 11, 2023.

Hence, the lower Court of the Middle District of Georgia allowed the case to continue, which led to a fairly recent settlement in July of 2023. The said Court presided over the Reverse Discrimination claims for the two White Police Officers of Columbus, Georgia to continue with very similar civil rights claims as Appellant. Notwithstanding, ruling against Dowdell-McElhaney in her Title VII of 1964 Civil Rights claims on January 11, 2023. Everyone work and talents should be valued in the workplace, regardless of their race, age, gender or disability.

Most importantly, there was a significant pay gap with her and said male counterparts as well. Furthermore, Americans certainly should not be retaliated against, harassed, abused, intimidated, humiliated and bullied in the workplace, after filing legitimate Civil Rights claims with the U.S. Equal Employment Opportunity Commission. Accordingly, Dowdell-McElhaney had a "Front Seat at the Table to Age, Race, Gender and Disability Discrimination," period.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Sherrell Dowdell-McElhaney, Pro Se

Date: October 22, 2024

CERTIFICATE OF COMPLIANCE

No.

SHERRELL DOWDELL-MCELHANEY - PETITIONER

vs.

GLOBAL PAYMENTS, INC. AND TOTAL SYSTEM SERVICES, LLC. -

RESPONDENTS

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 34 pages, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2024.

Sherrell Dowdell-McElhaney, Pro Se