

ORIGINAL

No. 24-

603

IN THE
Supreme Court of the United States

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SUPREME COURT, U.S.

ESTHER DARNELL,

Petitioner,

vs.

DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT
ADMINISTRATION; WILLIAM P. BARR,
U.S. ATTORNEY GENERAL; TIMOTHY SHEA,
ACTING ADMINISTRATOR OF THE DRUG
ENFORCEMENT ADMINISTRATION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit committed error when it affirmed the district court's acceptance of DEA's Notice of Discovery Compliance including a declaration from a DEA Senior Employment Attorney with no personal knowledge of all matters in his declaration which left Darnell with no discovery to defend herself in summary judgment.
2. Whether the Fifth Circuit committed error when it affirmed the district court's final decision that Darnell's termination claims did not meet the *McDonnell Douglas* burden-shifting framework.
3. Whether the Fifth Circuit erred in denying Darnell's overtime pay claims including claims under the continuing violations doctrine in a hostile work environment.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, states that,

- (a) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color religion, sex, or national origin.

Petitioner maintains that, at all relevant times in this cause, she was a contract employee of DEA (Drug Enforcement Administration and Respondents) and therefore brings this cause of action under Title 42 U.S.C. §2000e et seq. The Fifth Circuit below held, in part, that,

“Darnell must show she was replaced by someone outside her protected class, or that other similarly situated persons were treated more favorably. Darnell has presented no facts suggesting she was treated differently, and she was not replaced at all—her position was closed. Darnell’s claims fail. Finally, the district court did not abuse its discretion by accepting Defendants’ notice of discovery. Defendants reasonably complied with Darnell’s request.”

PARTIES TO THE PROCEEDINGS

The parties are Petitioner Esther Darnell and Respondents are Department of Justice, Drug Enforcement Administration, et al.

RELATED PROCEEDINGS

None.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Esther Darnell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit. Pet. App. 1a is unpubish. *See* 5th Cir. R. 47.5. The opinion of the United States District Court for the Southern District of Texas is at S.D. Tex. USDC No. 4:20-CV-4143.

JURISDICTION

The Fifth Circuit entered judgment on July 1, 2024, Justice Alito extended the time to file this petition for a writ of certiorari to and including November 28, 2024, *See* No. 24A300. This Court has jurisdiction under 28 U.S.C. §1254.

RELEVANT STATUTORY PROVISION

42 U.S.C. §2000e-2, states that,

(a) It shall be an unlawful employment practice for an employer—

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

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

STATEMENT OF THE CASE

I. Factual background

Petitioner, Esther Darnell, from August 10, 2010, to July 21, 2015, a black female, retired IRS Supervisory Special Agent was hired by Professional Risk Management to work as a DEA Senior Financial Investigator (FI), CA5ROA 1486.

United States Court of Appeals for the Fifth Circuit Court affirmed the district court's granting of Respondents', Drug Enforcement Administration, et al. (DEA), motion for summary judgment and the dismissal of all of Petitioner Esther Darnell's claims, pp 23a-24a of Appendix D. Petitioner's Final and Second Amended Complaint demanded the right by jury trial in accordance with Fed. R. Civ. P. Rule 38(b)(1). CAR0A 218.

Contract employee. At all times during this litigation, Darnell has maintained that she was a contract employee and brings her claims under Title VII. *Appellant's Br., Darnell v. Dept. of Justice, DEA et al.*, No. 23-20399 (5th Cir. November 29, 2023) 4. In the alternative, in Darnell's final and Second Amended Complaint, Darnell maintains that, if she is deemed by DEA (Respondents) to have been an independent contractor, she was nonetheless

discriminated by DEA and brings this cause of action under 42 U.S.C. §1981. CA5ROA 237, 240-241.

Darnell was a contract employee because 1) DEA controlled 99 percent of her time by assigning her to mission-critical grand jury work with only DEA employees that required overtime hours to meet deadlines of the mission-critical grand jury investigation. CA5ROA 1681. 2) Like other DEA employees, Darnell had to email her DEA supervisor for approval to take leave. CA5ROA 1592, 1594. 3) DEA controlled and wrongful interfered with Darnell's job duties per email restricting Darnell's preparation of subpoena request forms for financial records to only the receipt of financial records from DEA Agents and Task Force Officers, which caused a very angry backlash. Darnell was the only FI with these restrictions. CA5ROA 1335, 1682. 4) Darnell's DEA Supervisor signed her monthly timesheets. CA5R0A 1267, 1316. 5) Finally, this was Darnell's only full-time job. CA5ROA 1264-1316.

Darnell's claim of **contract employee** was unaddressed during the district court's litigation. CA5ROA 1791-1810.

Introduction Discovery. There was no discovery for Darnell. To sum briefly, Darnell hired a forensic computer examiner to analyze metadata and electronic log information for emails with evidence tampering on its face. DEA attorney very early during the discovery period sent Darnell a declaration stating no metadata because it would impose an undue burden on DEA. DEA held onto this declaration for four (4) months before DEA gave the declaration to Darnell. During the four-month period DEA gave Darnell's computer expert two 2 CDs that were supposed to have metadata, but it didn't. Darnell

filed Motion to Compel and a Motion for Sanctions with no success. **DEA engaged in bad faith discovery.** Details are below.

A. Notice of Discovery Compliance

Procedural History. On September 2, 2022, Darnell served her First request for Production of documents pursuant to Rule 34(a)(1)(2) Fed. R. Civ. P (Rule 34 documents). CA5ROA 784-790. Discovery period ended January 16, 2023.

On September 28, 2022, DEA requested and received a two-week extension to October 13, 2022. CA5ROA.704.

On October 20, 2022, Gregg Hannnd, DEA Senior Attorney, Employment and Litigation stated in his declaration that he was responsible for searching for and producing documents responsive to Plaintiff's (Darnell) September 2, 2022, First Request for Production of Documents.

He stated that the documents that were discovered and produced to Darnell were saved and maintained by DEA in Portable Document Format, or "PDF. They were produced to Darnell in the same PDF format. CA5ROA 1662-1663. **Note: Darnell did not receive these documents which were PDF copies from DEA's old administrative file until four months (4) later on February 16, 2023, after the end of all discovery deadlines.** CA5ROA 927.

On October 24, 2022, Darnell, received via certified mail a discovery CD from DEA and mailed the CD to Darnell's Josh Lorencz a Digital Forensic Examiner whose hourly rated is \$250. CA5ROA 728

November 30, 2022, Darnell received the Forensic Examiner's report. He stated that he attempted to open the folder called Disclosed Documents using two forensic machines. He advised Darnell that the data was not retrievable in its current format.

December 8, 2022, Darnell filed Motion to Compel for DEA to provide responsive discovery and to stay completion of discovery deadline to four (4) weeks after the Motion to Compel decision. CA4ROA 653-668.

December 20, 2022, district court ordered (ECF 82) that Darnell's Motion for Discovery was granted in part, and DEA had to produce documents by December 22, 2022, and denied in part because all the unexpired Scheduling Order deadlines remained in place. CA5ROA 653-668.

December 20, 2022, the district court granted in part and denied in part Darnell's Motion to Compel and ordered DEA to provide discovery documents December 22, 2022. CA5ROA 774.

On December 22, 2022, Darnell received more than 1000 pages of the documents from old administrative records for example, copies of DEA's administrative Motion for Summary Judgment and Darnell's Opposition to DEA's to Summary Judgment. CA5ROA 811. Darnell still did not receive the below requested discovery documents.

January 13, 2023, Darnell filed Rule 37 Motion for Sanctions for failure to follow the district court's discovery order. CA5ROA.775-779.

February 7, 2023, the district court granted in part and denied in part Darnell's Motion to Compel Discovery. The judge denied Darnell's request for sanctions and in response to Darnell's granted in part Motion to Compel Discovery the district court ordered "that on or before February 21, 2023, Defendant (DEA) shall file a Notice affirming that it has fully complied with the Court's December 22, 2022, Order (ECF 82--Darnell's Motion for Discovery ECF 78; specifically describing the documents and information it has (regarding original emails with meta data); and confirming that it has produced all responsive documents in its possession, custody, or control." Docket Sheet No. 87. CA5ROA 11. DEA filed a Notice of Compliance in response to the district court's Motion to Compel Discovery orders. CA5ROA 637-652, 653-668.

On February 15, 2023, DEA filed a **Notice of full Compliance with the Court's discovery order**. This Notice was a response to Darnell's Motion for Discovery that the district court granted. CA5ROA 923.

February 21, 2023, Darnell filed a Motion to Strike Notice of Discovery Compliance. See Appendix 25a-26a. Darnell filed the motion because DEA did not attach the attorney's declaration to DEA's Notice of Discovery Compliance that was filed in court, but DEA testified about the statements that the attorney made in his declaration, which is hearsay, and also violated local rule 7.7. and local rule 11.4 Sanctions, states "that a paper that does not conform to the local or federal rules or that is otherwise objectionable may be struck on the motion of a party or by the Court." Fed. R. Evid. 802. S.D. Tex. R. 7.7, 11.4. CA5ROA 784-785, 924, 1662-1663. Darnell believes that

the declaration was not attached because DEA did not want the Court to see that DEA, in fact, did not have full compliance with the district court's discovery order. This was detailed in Darnell's objections along with the objection that the declaration, which was dated October 20, 2022, and **lacked personal first-hand knowledge, because the attorney stated that the declaration is based on his personal knowledge or "information provided to him in his official capacity,"** which is a violation of Federal Rules of Evidence 602. CA5ROA 927, 1662-1663. Fed. R. Evid. 602.

On February 16, 2023, Darnell received the declaration dated October 20, 2022. CA5ROA 927.

Darnell also objected that DEA violated Rule 26(a) (1)(A)(i), a duty to disclose, because DEA should not have withheld the declaration for more than four (4) months and the declaration should have been disclosed to Darnell within a few days after October 20, 2022. Fed. R. Civ. P. 26(a)(1)(A)(i). CA5ROA 1076, 1662-63. DEA had the declaration, which stated only PDF copies were available and no metadata, in part, because it was too expensive to produce in its possession during the December 20, 2022, discovery hearing. DEA withheld this declaration from Darnell during a courtroom telephone discovery hearing in which the judge ordered DEA to provide the metadata for the four emails and for Darnell to assume responsibility for the expert forensics computer fees. CA5ROA 1753. This declaration was not disclosed to the district court until Darnell received it February 16, 2023, as full compliance for only one request item out of 14 request items for documents. Darnell and the computer expert witness have accepted the receipt of alleged

discovery documents and metadata twice, October 24, 2022, and December 21-22, 2022. CA5ROA 776, 792-793. The computer expert was only able to retrieve DEA's objections from the October 24, 2022, discovery CD. Both the computer expert (PDF copies of the old administrative four emails) and Darnell, more than 1,000 pages of multiple duplicate copies, have been given copies of documents from the old administrative case. Again, no disclosure of the October 20, 2022, declaration by DEA. CA5ROA 727, 811. Darnell's paid financial responsibility for the computer expert fee was \$1,000. CA5ROA 777. Darnell has exercised due diligence in her discovery efforts.

Again, to sum, DEA engaged in very bad faith discovery. The following objections and motions were filed: for stays and extensions, to strike CA5ROA 926 to compel discovery, for sanctions, for Rules 59(e) CA5ROA 1642. and 56(d) CA5ROA 1683. These motions were filed with no success because, again, to date the only discovery documents Darnell has received are DEA's objections and DEA's attorney declaration about one request item and its undue burden and more than one thousand (1,000) pages of duplicate copies of documents from the old administrative case. CA5ROA 727.

The district court and the Fifth Circuit Court of Appeals committed an error when it affirmed the district court's acceptance of the Notice of Discovery Compliance and by not holding DEA accountable and no sanctions, especially during the district court's December 20, 2022, telephone hearing in which the judge ordered DEA to provide the metadata for the four emails and for Darnell to assume responsibility for the payment of \$1,000 for

the expert forensics computer fees, while DEA knew at that time that Darnell's expert forensic computer examiner would not receive any metadata only scans of memorandums and emails from the old administrative case that were saved in PDF because DEA was withholding at that time the October 20, 2022, declaration from the DEA attorney who stated "the documents that were discovered and produced to Plaintiff (Darnell) were saved and maintained by DEA in Portable Document Format, or "PDF." They were produced to Plaintiff (Darnell) in that same PDF format." *Esther Darnell v. Department of Justice Drug Enforcement Administration*, Case No. 4:20-cv-04143, Transcript of Telephone Conference, at pages 1753-1754. CA5ROA 1662-1663. This declaration was not disclosed to the district court until Darnell received it February 16, 2023, as full compliance for only one request item out of 14 request items for documents. CA5ROA 926-927, 1662-1663.

Darnell filed objections and a Motion to Strike DEA's Notice of Discovery Compliance because it referenced a declaration and its statements that were not in the district court's records. CA5ROA 1662-1663. The district court denied Darnell's motion to strike May 31, 2023. Appendix E 26a. Thereafter, again to Darnell's surprise, the district issued its Recommendations and Memorandum granting DEA its summary judgment. Appendix B, pages 6a-20a. In district court based its decision, in part, on Darnell's inability to give the race and sex of the person who replaced her in the job position. Below are other related discovery matters and the Procedural History.

September 2, 2022, was Darnell's First Request for Production. On the Rule 34 document request list was

critical information Darnell needed to defend herself in an employment summary judgment proceeding.

First, Darnell requested documents for the race and sex of the person who replaced Darnell when her position was closed and moved to Little Rock, AK. CA5ROA 788.

Then, a document request for Darnell's comparator Richard Woodfork's group seizures to rebut DEA's alleged legitimate reason for Darnell's termination was low seizures. CA5ROA 788.

Darnell requested a copy of the email that Richard Wagner, Darnell's comparator for severe discrimination in a hostile workplace environment. Wagner asked Darnell to transfer to him Darnell's grand jury financial report for the seizure warrants Darnell needed this information to prove that they had identical responsibilities. CA5ROA 786.

Darnell also requested the email from the AUSA assigned to the grand jury investigation who praised her work, job well done, on Darnell's written financial seizure report to counter SAC Brown's statement that Darnell did not know what she was doing, and he was not going to approve her overtime. CA5ROA 786.

A legible readable copy of DEA Organizational Chart for DEA New Orleans Field Division was requested to provide proof of discrimination and that DEA had available a staff of 15 financial investigators (FIs) to help Darnell to avoid unpaid overtime hours. CA5ROA 788.

Finally, metadata and log information for authors, dates of creation and times for the emails where someone

with DEA allegedly committed a felony crime of evidence tampering by changing the time-stamped times on three June 22, 2015, emails, Darnell and her co-worker previously reported to management alleged sexual harassment of a DEA clerk by a DEA supervisor. The coworker stated in her affidavit that SAC Brown told her not to talk to Darnell and that it was odd. CA5ROA.234-235. Then on June 22, 2015, this same coworker applied for an EEO job vacancy, despite, Darnell begged her coworker not to upset SAC Brown by applying for EEO job vacancy. She applied and on that same day, June 22, 2015, a few hours after she applied Darnell's job position was terminated, two months before it ended automatically on September 30, 2015. CA5ROA 235.

The EEO job vacancy announcement and the two (2) June 22, 2015, emails are fraudulent on its face because the electronic "time and date" for the coworker's email "reply" to the EEO job vacancy announcement was *before* the electronic date and time stamp for the email "announcement" of the EEO job vacancy in the same time zone. CA5ROA 1052-1053, 235.

The June 22, 2015, email closing Darnell's job position in Jackson, MS, which resulted in her job termination, did not exist during the EEO administrative investigation. CA5ROA 1055. In SAC Brown's affidavit, in the EEO administrative investigation, DEA No. 2015-02106, SAC Brown stated, in response to questions about the closing of Darnell's job position, that there were *no persons* who had relevant information and that the only documentation was reports and statistical summaries. CA5ROA 1062, 798. A year later, New Orleans Field Division has a June 22, 2015, email moving Darnell's job position to Little Rock, AK, involving three (3) people. CA5ROA 1055.

B. Unlawful Termination and Discrimination

Unlawful termination. The above discrimination resulting from unlawful practices was severe because Darnell endured an ancient form of discrimination forced free labor while working with painful cysts on her hands, from typing long hours on the computer to avoid losing her only job. CA5ROA 780. Darnell then lost her job right after her free labor was used in a complex income tax and money laundering investigation which required labor-intensive “Al Capone” forensic investigative skills. CA5ROA 219-220. Right after a successful case with seizures and what was Darnell’s reward, abrupt termination, after 5 years of service, two months before the automatic end of her employment contract. CA5ROA 220, 991,1517, 1790.

DOJ, DEA, alleged legitimate business reason for Darnell’s termination is a June 22, 2015, email, which states in part, the New Orleans Field Division would like the position currently in Jackson, MS moved to Little Rock District Office. CA5ROA 1055. Darnell’s assertion is that the June 22, 2015, email is pretext for unlawful discrimination. CA5ROA 797.

Darnell believes she received the termination notice, in part, because she and her co-worker previously reported to management alleged sexual harassment of a DEA clerk by a DEA supervisor. The coworker stated in her affidavit that SAC Brown told her not to talk to Darnell and that it was odd. CA5ROA 234-235.

Then on June 22, 2015, this same coworker applied for an EEO job vacancy, despite, Darnell’s pleas not to upset and make SAC Brown angry by applying for EEO

job vacancy. She applied and on that same day, June 22, 2015, a few hours after she applied Darnell's job position was terminated, two months before it ended automatically on September 30, 2015. CA5ROA 235.

With reference to the EEO job vacancy announcement, the two (2) June 22, 2015, emails are fraudulent on its face because the electronic "time and date" for the coworker's email "reply" to the EEO job vacancy announcement was *before* the electronic date and time stamp for the email announcement of the EEO job vacancy in the same time zone. CA5ROA 1052-1053, 235.

Again, with reference to the June 22, 2015, email closing Darnell's job position in Jackson, MS, which resulted in her job termination, this email did not exist during the EEO administrative investigation. CA5ROA 1055. In SAC Brown's affidavit, in the EEO administrative investigation, DEA No. 2015-02106, SAC Brown stated, in response to questions about the closing of Darnell's job position, that there were *no persons* who had relevant information and that the only documentation was reports and statistical summaries. CA5ROA 1062, 798. A year later, New Orleans Field Division has a June 22, 2015, email moving Darnell's job position to Little Rock, AK, involving three (3) people. CA5ROA 1055.

As previously discussed above, after five years with DEA as a Senior Financial Investigator and two months before Darnell's employment contract automatically ended September 30, 2015, on its own, an email dated June 22, 2015, was sent from Ferdinand Large to Glenn Haad with a copy to Alice Arnold that transferred Darnell's FI job position from Jackson, MS to Little Rock, AK. ROA.1790.

Darnell applied for the Little Rock, AK Senior Financial Investigator's position but was not selected. CA5ROA 1790, 1260.

There were fifteen, 15 Financial Investigators, including Darnell, who were assigned to the New Orleans Field Division's Office under SAC Brown's leadership and only Darnell, black female, lost her job. CA5ROA 402, 105. In an email dated August 25, 2014, Floyd Baker, Assistant Special Agent, reminded Darnell that Financial Investigators are assigned to the New Orleans Field Division Office and I had to work cases in Gulfport. CA5ROA 1059. Three of the financial investigators were assigned to the same company as Darnell, Professional Risk Management. CA5ROA 1059. They were Richard Woodfolk, African American male, Gloria Newport, Hispanic female and Calvin Boyer, white male. Using the McDonnell Douglass Framework, these individuals are Darnell's valid comparators, especially Richard Woodfork, in matters dealing with her Senior Financial Investigator's job position termination because they were similarly situated like Darnell and not matters dealing with overtime pay on the grand jury investigation. CA5ROA.1536, 1565, 1561.

According to DEA's organizational chart, fifteen, 15 FIs including Darnell, and three other financial investigators, were **assigned to the New Orleans Field Division's Office** under the leadership of DEA SAC (Special Agent in Charge) Raymond Keith Brown's CA5ROA 953,1057, 1363, 1526. Darnell and the three other financial investigators were hired by the same company, Professional Risk Management (PRM), a subcontractor for Maximus Federal Services, Inc. (Maximus).

In Alice Arnold's, DEA's Headquarters Contracting Officer's Representative for Maximus, declaration she stated that from May 2014 through July 2015, financial investigators, Complainant (Darnell) and the three other financial investigators, Richard Woodfork, Gloria Newport, and Calvin Boyer were employed by PRM, and were **assigned to the New Orleans Field Division** to provide financial investigators' service to DEA in accordance with the contracting task order. CA5ROA.1596-1597.

According to their declarations', Richard Woodfork, black male, Gloria Newport, Hispanic female and Calvin Boyer, white male and Darnell's, black female, deposition and declaration, all had nearly identical duties and responsibilities as financial investigators. Woodfork's, Newport's, Boyer's and Darnell's duties and responsibilities included conducting financial investigations and preparing financial investigative reports for the purpose of identifying assets that may be subject for forfeiture. CA5ROA 1536-1538, 1565-1567, 1561-1563, 1362-1365, 1087. Specifically, Richard Woodfork, had identical skills and responsibilities like Darnell because both were in DEA's tactical diversion groups. CA5ROA 1365, 1536. Tactical diversion groups investigate prescription drugs, medical doctors and medical businesses. narcotics' violations. CA5ROA 1368.

In Darnell's deposition she stated that she worked on investigations in Louisiana and Gulfport (Mississippi) and specifically, she assisted FI Richard Woodfork in Louisiana with his investigations while working on the grand jury investigation. CA5ROA 1364, 1365, 1375. In FIs Boyer's and Newport's declarations they stated that they are assigned to the New Division Office, and worked

cases in Mississippi, Alabama and Arkansas. CA5ROA 1563, 1566. In Woodfork's declaration he stated that he worked on cases in the New Orleans Division Office in Alabama and Louisiana.

In an email dated August 25, 2014, Floyd Baker, Assistant Special Agent (ASAC) in charge of Jackson, MS office also told Darnell that Financial Investigators are assigned to the "entire" New Orleans Field Division Office (NOFD) and are not tasked by any group supervisor (GS). CA5ROA 1520.

Darnell was assigned to a high-profile complex grand jury investigation with income tax and money laundering violations. CA5ROA.220. The investigation required overtime hours because it had more than 40 targets, \$17,000,000 in currency transactions, and 30 bank accounts to analyze CA5ROA.221. CA5ROA.407. In addition, Darnell had a U.S. Attorney's Office and DEA Chain of Command's management directive for Darnell to complete her financial write-up for the financial seizure warrants by May 7, 2015. CA5ROA 1088.

Darnell requested but did not receive assistance from DEA's Staff FIs, which included Woodfork, Boyer and Newport. In Darnell's DEA Supervisor's deposition, he stated that everyone else on the grand jury received assistance but Darnell. CA5ROA 962, 232.

Discrimination resulting from unlawful practices was severe because Darnell endured an ancient form of discrimination forced free labor while working with painful cysts on her hands, from typing long hours on the computer to avoid losing her only job. CA5ROA 780.

Darnell then lost her job right after her free labor was used in a complex income tax and money laundering investigation which required labor-intensive "Al Capone" forensic investigative skills. CA5ROA 219-220. Right after a successful case with seizures and what was Darnell's reward, abrupt termination, after 5 years of service, two months before the automatic end of her employment contract. CA5ROA 220, 991,1517, 1790.

DEA, alleged legitimate business reason for Darnell's termination is a June 22, 2015, email, which states in part, the New Orleans Field Division would like the position currently in Jackson, MS moved to Little Rock District Office. CA5ROA 1055. Darnell's assertion is that the June 22, 2015, email is pretext for unlawful discrimination. CA5ROA 797.

Darnell believes she received the termination notice, in part, because she and her co-worker previously reported to management alleged sexual harassment of a DEA clerk by a DEA supervisor. The coworker stated in her affidavit that SAC Brown told her not to talk to Darnell and that it was odd. CA5ROA 234-235.

Then on June 22, 2015, this same coworker applied for an EEO job vacancy, despite, Darnell's pleas not to upset and make SAC Brown angry by applying for EEO job vacancy. She applied and on that same day, June 22, 2015, a few hours after she applied Darnell's job position was terminated, two months before it ended automatically on September 30, 2015. CA5ROA 235.

With reference to the EEO job vacancy announcement, the two (2) June 22, 2015, emails are fraudulent on its face

because the electronic “time and date” for the coworker’s email “reply” to the EEO job vacancy announcement was *before* the electronic date and time stamp for the email announcement of the EEO job vacancy in the same time zone. CA5ROA 1052-1053, 235.

Again, with reference to the June 22, 2015, email closing Darnell’s job position in Jackson, MS, which resulted in her job termination, this email did not exist during the EEO administrative investigation. CA5ROA 1055. In SAC Brown’s affidavit, in the EEO administrative investigation, DEA No. 2015-02106, SAC Brown stated, in response to questions about the closing of Darnell’s job position, that there were *no persons* who had relevant information and that the only documentation was reports and statistical summaries. CA5ROA 1062, 798. A year later, New Orleans Field Division has a June 22, 2015, email moving Darnell’s job position to Little Rock, AK, involving three (3) people. CA5ROA 1055.

As previously discussed above, after five years with DEA as a Senior Financial Investigator and two months before Darnell’s employment contract automatically ended September 30, 2015, on its own, an email dated June 22, 2015, was sent from Ferdinand Large to Glenn Haad with a copy to Alice Arnold that transferred Darnell’s FI job position from Jackson, MS to Little Rock, AK. ROA.1790. Darnell applied for the Little Rock, AK Senior Financial Investigator’s position but was not selected. CA5ROA 1790, 1260.

There were fifteen, 15 Financial Investigators, including Darnell, who were assigned to the New Orleans Field Division’s Office under SAC Brown’s leadership

and only Darnell, black female, lost her job. CA5ROA 402, 105. In an email dated August 25, 2014, Floyd Baker, Assistant Special Agent, reminded Darnell that Financial Investigators are assigned to the New Orleans Field Division Office and I had to work cases in Gulfport. CA5ROA 1059. Three of the financial investigators were assigned to the same company as Darnell, Professional Risk Management. CA5ROA 1059. They were Richard Woodfolk, African American male, Gloria Newport, Hispanic female and Calvin Boyer, white male. Using the McDonnell Douglass Framework, these individuals are Darnell's valid comparators, especially Richard Woodfork, in matters dealing with her Senior Financial Investigator's job position termination because they were similarly situated like Darnell. CA5ROA.1536, 1565, 1561.

C. Overtime Pay Claims, Continuing Violations' Doctrine and Hostile Work Environment

With no DEA financial investigators' assistance, the U.S. Attorney's Office and DEA Chain of Command's management directive for Darnell was to complete her financial write-up for the seizure warrants by a pending date of May 7, 2015, and the way DEA implemented Darnell's contract from May 2014 through July 21, 2015, forced Darnell to work in a toxic and hostile work environment under extreme duress hundreds of mission-critical additional overtime work hours without compensation to avoid termination. CA5ROA 1088, 1265-1316. If Darnell refused to work or failed to meet the deadlines, she would have been removed from DEA offices, and her top-secret security clearance immediately revoked. CA5ROA 1008-1009.

Darnell submitted to DEA Chain of Command a detailed grand jury investigative workplan request of the urgent need to work additional overtime hours. CA5ROA 1520-1522. In Darnell's DEA Group Supervisor's deposition, he stated that he approved the additional overtime hours Darnell worked. CA5ROA 964.

In former DEA Supervisor Miles' deposition, he stated that SAC Brown told him that he does not believe that Darnell knows what she is doing and that he would not authorize overtime hours for her. CA5ROA.977. Darnell's supervisor's response was that from all of his interactions with Darnell she knew exactly what she was doing and that she was doing a good job. CA5ROA.1114.

From December 2013 to February 2015, SAC Brown had five (5) active EEO investigations during his two (2) year tenure as SAC of the New Orleans Field Division. CA5ROA 220, 398, 400, 401, 403.

Hostile Discriminatory Workplace Environment. Pursuant to Darnell's employment contract, Darnell received prior approval from her grand jury DEA supervisor, Kenneth Miles, to work overtime hours on the grand jury investigation, per her employment contract, but did not receive overtime compensation, while all others on the grand jury received overtime compensation. CA5ROA 797, 963-964, 1000.

Unpaid Overtime hours in a hostile and discriminatory environment. From May 2014 through July 21, 2015, Darnell worked in a toxic, hostile, discriminatory workplace environment because DEA treated her the same way as a DEA employee and assigned

her, along with two other DEA employees to the mission-critical grand jury work that required overtime hours. Darnell was forced to work under duress uncompensated overtime hours, in order not to be terminated, because as previously stated, per her employment contract, if Darnell refused any duty under the contract, she would be immediately removed, and Darnell would have lost her top-secret clearance. The job was Darnell's only full-time job. Others on the grand jury received compensation. CA5ROA 797,1008-1009, 1600.

Darnell, then, at age 67, worked "abusive" hours under duress, in order to meet U.S. Attorney Office's deadline date of May 7, 2015, to complete her write-up for financial: seizure warrants from April 20-29, 2015, eight (8) consecutive 13-hour workdays; on what should have been Darnell's off day, April 30, 2015, she worked 12 hours; May 1, 2015, she worked 11 hours; May 2, 2015, she worked 10 hours and May 3, 2015, 14 hours. CA5ROA 1303-1310, 233. Darnell spent so much time on the computer until she developed painful cysts on her fingers. CA5ROA 780. Shortly after the successful grand jury investigation's seizures of cash, cars, and a boat, on June 22, 2015, Darnell received abrupt notice of the closure of her job position in Jackson, MS. CA5ROA 1055.

Members of the grand jury under the supervision of Darnell's supervisor, Kenneth Miles, from May 2014 to July 21, 2015 were Esther Darnell, black female, retired IRS Supervisory Special Agent and DEA contract employee CA5ROA 1486; Richard Wagner, white male, per Darnell's observation, IRS Special Agent, CA5ROA 1486; Kimball Hardeman, African-American male, DEA Special Agent, CA5ROA 1487; Francisco "Frank"

Altieri, Hispanic male, local Mississippi State Task Force Officer, per Darnell's observation and he is from Puerto Rico, CA5ROA 1487 and Norita Persaud, DEA Diversion Investigator, female Asian descent CA5ROA 1487, were all assigned to the grand jury investigation under the supervision of Kenneth Miles.

As previously stated, Darnell continuously worked under duress hundreds of hours from May 2014 to June 2015. CA5ROA 1265-1707. For the month of June 2015 Darnell had 12 hours of overtime. CA5ROA 1311. Last day of overtime worked was June 18, 2015, CA5ROA 1311. In July 13, 2015, email Darnell had a meeting with DEA about overtime and other issues. CA5ROA 1669. In July 20, 2015, email Darnell filed her EEO complaint and additional overtime hours were discussed. CA5ROA 194-195.

Subpoena request form restrictions in a toxic, hostile and discriminatory workplace environment. On July 11, 2014, after a meeting with Darnell's DEA Supervisor, Kenneth Miles, Darnell sent the following email, with a copy to her DEA Supervisor, Sean Baudier and Mary Waltman. CA5ROA 953. Per guidelines from SAC Brown, the email took away Darnell's principal FI duty, which was preparing grand jury subpoena request forms, a request for U.S. Attorney's Office to issue a grand jury subpoena as reflected in the sample redacted grand jury subpoena request form. CA5ROA 1341-1343. Darnell's duty now was only to take receipt of subpoenaed bank records from agents or task force officers and to make sure Darnell's name was on the grand jury Rule 6(e) disclosure list. CA5ROA 1335. Darnell thought that these new subpoena request form restrictions applied to all of

the Senior Financial Investigators because this is what her supervisor told her during the meeting. CA5ROA 1335.

SAC Brown's restrictions for subpoena request forms only applied to Darnell. DEA Senior Financial Investigator Richard Woodfork, African American male, Gloria Newport, Hispanic female and Calvin Boyer, white male, all stated in their declarations stated that they had no knowledge about Darnell and subpoenas restrictions. CA5ROA 1559, 1567, 1563. This is race and sex discrimination with a *McDonnell Test* comparator.

FI Richard Woodfolk, per his FI's report for DEA Headquarters, prepared a grand jury subpoena, while Darnell, a black female, who was also a FI, could not prepare a subpoena request form for bank records for a mission-critical grand jury investigation. CA5ROA 1338, 1335. Again this is race and sex discrimination in a hostile environment.

DEA's overt acts of intentional discrimination. While Darnell could not prepare or hand a grand jury subpoena request form to coworkers. CA5ROA 1335. Darnell's comparator, a black male, FI Richard Woodfork, was allowed to prepare and serve grand jury subpoenas. Richard Woodfork's Monthly Report. CA5ROA 1540. This is discrimination based on race and sex.

Darnell submitted an investigative workplan to DEA management with investigative plans for 30 bank accounts, 31 subpoenas, \$17 million in currency transactions. The investigative plan demanded additional labor or overtime hours. DEA had a 15-member Financial Investigative

Group and not one person assisted Darnell. CA5ROA 1345-1347, 1526.

In Kathryn Barrett's affidavit, Darnell's coworker whose desk was next to Darnell's said that "SAC Brown told me not to talk to Ms. Darnell. I do not know what went on with them or why he told me this." CA5ROA 1516. Darnell experienced segregation in the office, not only from this coworker but from agents and task force officers. Id.

Hostile Workplace Environment. Darnell had a hostile work environment based on unpaid hours of overtime under duress and singled-out treatment for grand jury subpoena request form restrictions only for Darnell. ROA.1265-.1316. The unpaid overtime hostile environment while Richard Wagner, white male was paid overtime was very severe because being forced to work without pay is degrading and is the most ancient form of discrimination. CA5ROA 1073

In Darnell's deposition, "Did anyone scream at you?" "Yes Dan," (Dan during the meeting with backlash from the group about SAC's subpoena request restrictions—not allowing Darnell to prepare financial subpoena request forms for financial records)

"He raised his voice and was nasty to me. I get chills. It was degrading. It made me feel awful. This was verbal abuse." CA5ROA 1457-1458.

"Question: Do you believe the subpoena restrictions were put in place based on your race and gender?" Answer:

"I think it was race and gender because things were happening to me where I was the only one and it---it---it---made my life miserable, and I suffered." CA5ROA 1396-1411.

In Darnell's deposition, "Question: Do you believe the denial of request to work extra hours or overtime was based on race or gender?" Darnell: "Yes. I believe it was because I was the only one—everybody on the operation had a way of being compensated for additional hours on the operation and I was singled out. CA5ROA 1397.

To sum, Richard Woodfork, a black male is a valid *McDonnell Tested* comparator for subpoena restrictions and for unpaid overtime hours in a hostile environment because the failure of DEA to provide DEA FI staff assistance caused Darnell to incur unpaid overtime hours in the hostile environment. As previously stated, Darnell requested but did not receive assistance from DEA's Staff FIs, which included Woodfork, Boyer and Newport, valid comparators. In Darnell's DEA Supervisor's deposition, he stated that everyone else on the grand jury received assistance but Darnell. CA5ROA 962, 232. With regard to the hostile environment test, Richard Wagner, white male on same grand jury with nearly identical responsibilities met all requirements for a comparator for a hostile environment.

Darnell's unpaid overtime, subpoena request forms restrictions, lack of FI staff assistance were continuous, thus, the hostile work environment continued from May 2014 until July 2015, Darnell's termination.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to continue providing coherence and clarity to the framework applicable to federal discrimination claims.

The circuit courts continue to be split about conclusory affidavits and declarations. However, the split is lop-sided because the Fifth Circuit is the only circuit accepting conclusory affidavits and declarations.

The Fourth Circuit in *Rachan Reddy v. Rashid Butter* No. 20-1633 (4th Cir. 2022) held affidavits and declarations are inadequate in summary motion judgment.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) held affidavits and declarations are inadequate in summary motion judgment.

To establish a *prima facie* case of a hostile work environment. This Court has stated that “as long as an employee files her complaint while at least one act which comprises the hostile work environment claim is still timely, “the entire time period of the hostile environment may be considered by a court for the purpose of determining liability.” *Hartz v. Administrators of Tulane Educ. Fund*, 275 Fed. Appx. 281, 289 (5th Cir. 2008).

To establish a *prima facie* hostile work environment claim under Title VII, a plaintiff must show (1) she belongs to a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on the protected class; (4) the harassment affected a “term,

condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action."

Lan v. Univ. of Tex. at San Antonio, No. SA-22-CV-00769-FB, 2023 WL 3066231, at *5 (W.D. Tex. Apr. 24, 2023), *report and recommendation adopted*, No. SA-22-CV-769-FB, 2023 WL 6119955 (W.D. Tex. Sept. 16, 2023).

Darnell had a hostile work environment based on unpaid hours of overtime under duress and singled-out treatment for subpoena form restrictions only for Darnell. ROA.1265-1316. The unpaid overtime hostile environment while Richard Wagner, white male was paid overtime was very severe because being forced to work without pay is degrading and is the most ancient form of discrimination. ROA.1073

In Darnell's Deposition, ECF 98-5, Darnell's Summary Judgment Exhibit N: Page 110, right side, lines 23-25, "Did anyone scream at you?" Page 111, right side, lines 1-5, "Yes Dan" (Dan during the meeting with backlash from the group about SAC's subpoena restrictions—not allowing Darnell to prepare financial subpoena request.

"He raised his voice and was nasty to me. I get chills. It was degrading. It made me feel awful. This was verbal abuse." ROA.1457-1458.

Darnell's unpaid overtime, subpoena request forms restrictions, were continuous, thus, the hostile work environment continued from May 2014 until July 2015, Darnell's termination. Each one is considered to be one

an unlawful employment practice because they were based on Darnell's race and sex and disparate treatment. Richard Woodfork, a black male and a valid comparator for subpoena restrictions and job termination who met all the test requirements of *McDonnell* framework and *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309, 316-317 (5th Cir. 2004), hostile environment test, Richard Wagner, white male on same grand jury with identical responsibilities met all requirements of *McDonnell Douglas* tests Darnell's overtime claims. The discrimination resulting from these unlawful practices was so severe because Darnell endured an ancient form of discrimination forced free labor while working with painful cysts on her hands, from typing long hours on the computer to avoid losing her only job. ROA.780. Then, while Darnell worked hundreds of hour under duress to avoid losing your job. Darnell then lost her job right after her free labor was used on a complex income tax and money laundering investigation. Right after a successful case with seizures and Darnell's reward is abrupt termination, after 5 years of service, two months before the automatic end of her employment contract.

Because Darnell had a hostile environment, Darnell's overtime claims are timely. The statute does not separate individual acts that are part of the hostile environment claim from whole for the purposes of timely filing and liability. *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002).

With reference to DOJ, DEA's assertion that the overtime claims are untimely, On July 13, 2015, Darnell met with DEA management to discuss multiple issues including overtime. None of the issues were resolved. In

a July 20, 2015, email Darnell filed her EEO complaint with EEO counselors. ROA.1669, (RE20); ¶5 at ROA.941., (RE14); CA5ROA.194-195.

Darnell worked hundreds of hours continuously under duress from May 2014 to June 2015. ROA.1265-1707. For the month of June 2015 Darnell had 12 hours of overtime. ROA.1311. Last day of overtime worked was June 18, 2015. ROA.1311. July 13, 2015, meeting with DEA about overtime. ¶3 at ROA.1669. In July 20, 2015, email Darnell filed an EEO complaint and additional overtime hours were discussed in this email. CA5ROA.194-195.

With reference to DOJ, DEA's assertion that the overtime claims are untimely, the statute does not separate individual acts that are part of the hostile environment claim from whole for the purposes of timely filing and liability. *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002). Darnell. In other words, Darnell had the 12 hours that she worked to June 1w, 2015. These 12 hours for June 2015 are not the only hours that are timely for EEO purposes. Because Darnell work in a hostile and toxic environment, the 12 hours and previous hours back to the beginning of the hostile environment are also timely filed for EEO purposes. The continuous overtime hours she had worked from May 2014 to July 2015 in a hostile work environment are also timely under the continuous violation doctrine. Darnell met the criteria for a hostile work environment.

The district erred in using dates of requests for overtime claims as opposed to the continuing violations' doctrine.

These overtime hours were worked in a hostile work environment as reflected in Darnell's deposition Page 98, right side, lines 23-25 and Page 99, right side, lines 1-7 and line 25. Question: "Do you believe the subpoena restrictions were put in place based on your race and gender?" Answer: "I think it was race and gender because things were happening to me where I was the only one and it---it---it---made my life miserable, and I suffered." (Note: Darnell is a member of a protected group. She was the sole black female on the grand jury investigation and the sole black female that was a Senior Financial Investigator) believes this because the multitude of overt negative acts that only worsens the situation. ROA.1396-.1411.

In Darnell's Deposition, ECF 98-5, Exhibit Page 50, left side, lines 15-22, Question: "Do you believe the denial of request to work extra hours or overtime was based on race or gender?" Darnell: "Yes." Why? "I believe it was because I was the only one—everybody on the operation had a way of being compensated for additional hours on the operation and I was singled out. ROA.1397.

- (1) Darnell belonged to a protected group, black female (2) Darnell was subjected to unwelcome harassment from group members on a daily basis and in group meetings because of the subpoena request forms restrictions (3) the harassment complained of was based on the membership in the protected group, because I was the only Senior Financial Investigator with these restrictions and Richard Woodfork a black male was serving subpoenas. (4) the harassment complained of affected

Darnell's pay, a term, condition, or privilege of employment; (5) her supervisor knew of the harassment in question and failed to take prompt remedial action. ROA.1335. ROA. 1338. *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

According to the district court, Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Dispute about a material fact is "genuine" if the evidence could lead to a reasonable jury to find for the nonmoving party. *Hyatt v. Thomas*, 843 F.3d 172, 177 (5th Cir. 2016). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002).

When parties file cross motions for summary judgment, each movant bears the burden of establishing there are no genuine issue of material fact and that it is entitled to summary judgment. *CareFlite v. Office & Pro'l Emps. Int'l Union, AFL-CIO*, 612 F.3d 314, 318 (5th Cir. 2010) (citing *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533 539 (5th Cir. 2004)). Each motion must be considered with evidence and inferences taken in the light most favorable to the non-moving party. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001).

In ruling on motions for summary judgment the court does not "weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence. *Honore v. Douglas*, 833 F.3d 565 567 (5th Cir. 1987). However, conclusory allegations and denials,

speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (citation omitted).to act on an unsigned, and the court must strike it unless a signature is promptly supplied after omission is called to the attorney's or party's attention.

Am Nat. Gen. Ins. Co. v. Ryan, 274 F.3d 319, 323 (5th Cir. 2001). The plain language of an insurance policy, like that of any other contract, will be given effect when the parties' intent may be discerned from the language.

Discussion

Darnell filed for a partial summary judgment because no genuine issues of material fact exist. Darnell's last authority quoted above is for contract law. In *Am Nat. Gen. Ins. Co v. Ryan*, the plain language of the contract governs.

In Darnell's Supervisor's affidavit attached to his deposition he stated that SAC Brown told him that he does not believe that Darnell knows what she is doing and that he would not authorize overtime for her. ROA.977. In his deposition, Darnell's Supervisor stated that the hours that Darnell put in he approved and, sent them up the chain, but they came back disapproved. ROA.964. Darnell's employment contract states that contractors shall not work more hours in a given month than the total of 8 hours times the number of U.S. Government workdays in a month, without obtaining prior written approval from the DEA supervisor. ROA.1000. In Darnell's deposition

she stated that she had prior written approval to work overtime hours from her supervisor and that he showed her the paperwork. ROA.1389.

Darnell worked hundreds of hours continuously under duress from May 2014 to June 2015. ROA.1265-1707.

Darnell employment contract states that she could incur overtime hours if she had prior written approval from her DEA supervisor. This is contract law and the courts decisions are based on the language in the contract. The partial summary judgment should have been granted.

The district court comments about Darnell's summary judgment had no specific comments or details. It was one sentence, Plaintiff, has failed to meet her burden to create a genuine issue of material fact in response to DEA's evidence and arguments.

CONCLUSION

The petitioner requests that the Court grant the petition.

Respectfully submitted,
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