

No. _____

IN THE
Supreme Court of the United States

JOANNE WALSH,
Petitioner,

v.

HNTB CORPORATION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), this Court held that an employee challenging discrimination “with respect to [her] . . . terms, conditions, or privileges of employment” need show only “some harm respecting an identifiable term or condition of employment,” not harm that is “significant.” *Id.* at 354-355. The Age Discrimination in Employment Act uses the same operative language. 29 U.S.C. § 623(a)(1).

Assuming that respondent placed petitioner on a formal performance improvement plan because of her age, the court of appeals held that the plan, which imposed biweekly progress meetings, monthly formal reviews, mandatory tasks, and a written warning that noncompliance “will lead to further disciplinary action, up to and including termination,” did not affect her terms or conditions of employment, because it did not change her title, pay, assigned duties, or advancement opportunities and she was employed at will.

The question presented is whether a formal performance improvement plan that subjects an employee to heightened supervision, mandatory tasks, and a written threat of discharge discriminates against her “with respect to [her] . . . terms, conditions, or privileges of employment” under *Muldrow*, even when the plan does not alter her title, pay, formal duties, or advancement opportunities and she is employed at will.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Joanne Walsh was the plaintiff in the district court and the appellant in the court of appeals.

Respondent HNTB Corporation was the defendant in the district court and the appellee in the court of appeals.

Because petitioner is an individual, no corporate disclosure statement is required under Rule 29.6.

RELATED PROCEEDINGS

Walsh v. HNTB Corp., No. 1:22-cv-10453-NMG (D. Mass.) (memorandum and order granting summary judgment entered Dec. 21, 2023).

Walsh v. HNTB Corp., No. 24-1499 (1st Cir.) (opinion and judgment entered Mar. 13, 2026; rehearing and rehearing en banc denied May 13, 2026).

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INTRODUCTION

In *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), this Court rejected, without dissent, a rule that had taken hold across the courts of appeals over decades: that an employee challenging discrimination “with respect to . . . terms, conditions, or privileges of employment” must prove that her injury was “significant” or otherwise cleared “a heightened bar.” *Id.* at 355. The statute requires only “some harm respecting an identifiable term or condition of employment.” *Id.* at 354-355.

The First Circuit has now held that an employer may place an employee of more than twenty-five years on a formal performance improvement plan (“PIP”) because of her age without discriminating with respect to her terms or conditions of employment. The court assumed “for argument’s sake that Walsh’s PIP was motivated by age bias.” App.18a. It acknowledged that the plan reserved HNTB’s right to fire her before the plan ended. App.17a. It recognized that “an objectively reasonable person may well experience distress from being placed on a PIP.” App.18a. Yet it held the plan non-actionable because it did not “assign Walsh new duties, alter her title or compensation, or limit her ability to seek other opportunities within the company,” and because Walsh, as an at-will employee, could have been fired at any time. App.17a.

That reasoning restores by another route the heightened-harm threshold *Muldrow* discarded. The panel’s checklist of title, compensation, duties, and advancement tracks the “tangible employment action[s]” catalogued in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), which *Ellerth*

defined as significant changes in employment status. *Muldrow* held that the statute reaches beyond the “economic or tangible.” 601 U.S. at 354. The panel’s at-will rationale goes further still. If it is correct, nearly all discriminatory discipline short of discharge falls outside the ADEA, and outside Title VII and the ADA, which use the same or similar text, for the large majority of American workers, who are employed at will.

The courts of appeals have divided over how *Muldrow* applies to discipline short of discharge, and the question arises constantly. Management-side commentary has already received the decision below as guidance for employers. This case, in which the operative document is undisputed, the age-based motive is assumed, and the adverse-action element was the sole ground of decision at every level, is an ideal vehicle to resolve the question.

OPINIONS BELOW

The opinion of the court of appeals (App.1a) is reported at 169 F.4th 330 (1st Cir. 2026). The judgment of the court of appeals (App.26a) and its order denying rehearing and rehearing en banc (App.41a) are unreported. The memorandum and order of the district court granting summary judgment (App.27a) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 13, 2026. App.1a. Petitioner’s timely petition for panel rehearing and rehearing en banc was denied on May 13, 2026. App.41a. On August 19, 2026, Justice Jackson extended the time within which to file

a petition for a writ of certiorari to and including October [12], 2026. No. 26A222. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1), provides:

It shall be unlawful for an employer . . . (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

STATEMENT OF THE CASE

A. *Muldrow* and the “terms, conditions, or privileges” clause

The ADEA’s prohibitions “were derived *in haec verba* from Title VII.” *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Both statutes make it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment” because of a protected characteristic. 29 U.S.C. § 623(a)(1); 42 U.S.C. § 2000e-2(a)(1).

For years, the First Circuit, like other courts of appeals, required plaintiffs invoking that language to show that the challenged action was “material,” meaning “more disruptive than a mere inconvenience or an alteration of job responsibilities.” App.14a. (quoting *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23

(1st Cir. 2002)). The district court granted summary judgment to HNTB under that regime, before *Muldrow* was decided. App.27a.

Muldrow rejected the materiality requirement:

What the transferee does not have to show, according to the relevant text, is that the harm incurred was “significant.” Or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar.

601 U.S. at 355 (citation omitted). The phrase “terms, conditions, or privileges of employment,” the Court reiterated, is not used “in the narrow contractual sense”; it “covers more than the ‘economic or tangible.’” *Id.* at 354 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998), and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). A plaintiff need show only “some harm respecting an identifiable term or condition of employment.” *Id.* at 354-355. “To demand ‘significance’ is to add words . . . to the statute Congress enacted.” *Id.* at 355. Applying that standard, the Court held that a transfer that changed neither rank nor pay, but altered the officer’s work, her schedule, and the perquisites of her position, was actionable: the transfer “must have left her worse off, but need not have left her significantly so.” *Id.* at 359.

The First Circuit held below that *Muldrow* governs the ADEA because the ADEA uses the same operative language, and it noted that other courts of appeals have done the same. App.14a-15a.

B. Factual background

Joanne Walsh worked in HNTB's information-technology group for more than twenty-six years, from January 1994 until September 2020, most recently as a Technology Support Representative II ("TSR II") supporting several HNTB offices, including the Boston office from which she worked. App.7a. Before August 2019, she had never received a written or verbal warning. C.A. App. 243.

In 2018, Jim Clark became Walsh's supervisor. App.7a. His 2018 review of Walsh credited her "diligence," "accuracy," and "timeliness," called her "[d]ependable and trustworthy," and noted her "high level of technical excellence." It rated her as having "[m]et [e]xpectations," though "at the lowest in the range." App.7a. It faulted her for lacking the "initiative to stretch beyond the day-to-day and status quo of the Boston area offices," App.7a, and warned that if acting creatively and flexibly remained a challenge, "she will struggle to maintain pace with what the business demands of us." C.A. App. 138. It closed by stating that her circumstances could "result in a performance improvement plan." App.7a. It is worth noting that Clark acknowledged Petitioner's good performance in front of end users.

On August 1, 2019, when Walsh was in her mid-fifties, HNTB placed her on a formal PIP. App.7a. Clark drafted it at the direction of his supervisors, and HNTB's Senior Human Resources Director reviewed it. App.7a-8a. The same day, HNTB placed Walsh's slightly older colleague, Lindsay Allinson, the only other TSR II supporting the Boston office and who had more HNTB experience, on a PIP that was "almost identical." App.8a.

The PIP's terms are undisputed. It opened with HNTB's determination that "[y]our work performance is unsatisfactory." It was "effective immediately" and would be "formally reviewed every thirty (30) days until 11/1/2019," and Clark would "meet with [her] biweekly to assess [her] progress." It warned: "HNTB reserves the right to terminate your employment before the end of the plan if you have not made sizeable improvements or serious policy violations occur." It faulted her for insufficient "willingness to take on additional duties and projects" and announced that "[t]he expectation is that you will take the initiative to look beyond day to day responsibilities to meet the changing needs of the office and the firm."

The PIP then listed five "improvements [that] are required and must be completed by the date indicated." It directed Walsh to "think beyond the offices you support"; to contribute to and respond to "questions/issues that are noted in IT Customer Support MS Teams" and to participate actively in meetings and conference calls; to pursue "partnering with other IT groups like networking, development, etc."; to "offer to join office meetings"; to make herself available "by not staying behind closed doors in an office or server room"; and to establish "contacts in other offices you support whereby someone can perform simple tasks for you in your absence." It also required her to clear out the Boston IT room by August 30, 2019, after which "[a] picture of the post cleanup will be taken and provided to" Clark. Walsh was required to sign, and did sign, an acknowledgment that "failing to meet the improvements outlined above will lead to further disciplinary action, up to and including termination of my employment."

While Walsh was on the PIP, Dan Vealey, the team leader responsible for helping her complete it, told her that “[t]he company is not getting its return on investment for you” and that she could “be replaced with younger, cheaper people.” When she tried to learn who had complained about her, Clark told her: “Stop asking. Stop talking to people. Shut up.” Vealey ultimately concluded that Walsh had completed the PIP, which ended on November 1, 2019, but Clark told her that she “had barely improved enough to get off the PIP.” Her next annual review rated her as having “[i]nconsistently [m]et [e]xpectations” and described 2019 as “a somewhat turbulent year.” On September 11, 2020, Walsh and Allinson resigned on the same day.

C. Proceedings below

Walsh sued HNTB in Massachusetts state court under the ADEA and Mass. Gen. Laws ch. 151B, together with a state common-law claim. HNTB removed the case and moved for summary judgment, arguing, among other things, that Walsh had suffered no adverse employment action. The district court granted the motion on that ground alone and did not reach HNTB’s other arguments. It held that Walsh had not been constructively discharged and, in a footnote, rejected her “argument that her placement on a PIP was an adverse employment action” because she “successfully completed the PIP period and thereafter she was neither demoted nor her pay reduced and any changes in her responsibilities were de minimis.” This ignored that Walsh became ineligible for a raise.

Walsh’s trial counsel then ended the representation. On January 19, 2024, within the

thirty-day appeal period, Walsh moved pro se to extend the time to file a notice of appeal, explaining that her “(former) attorney” had told her “that their firm does not handle appeals” and that she was “actively searching for a firm to represent [her].” The district court granted that motion and two later extensions, and Walsh filed a formal notice of appeal on May 15, 2024. In the interim, this Court decided *Muldrow*.

The First Circuit affirmed. It first rejected HNTB’s challenge to the timeliness of the appeal, holding under *Smith v. Barry*, 502 U.S. 244, 248-249 (1992), that Walsh’s timely pro se motion was the functional equivalent of a notice of appeal. Its judgment states that “[t]he appellant’s notice of appeal was timely filed.” App.26a. The court did not reach Walsh’s alternative argument that the district court had properly tolled the deadline.

On the merits, the court held that *Muldrow* governs the ADEA and assumed that it governs the Chapter 151B claim. App.27a. It recognized that the district court had granted summary judgment solely on the adverse-action element of the prima facie case. App.29a. It “beg[an] [its] analysis” with the PIP, explaining that “there is no one-size-fits-all answer for whether a PIP constitutes an adverse employment action” and that “the inquiry is fact-intensive and PIP-specific.” App.17a. Applying that approach, it reasoned:

The PIP did not assign Walsh new duties, alter her title or compensation, or limit her ability to seek other opportunities within the company. Its only reference to a term of

employment was the company’s reservation of its right to terminate Walsh’s employment before the end of the plan. But Walsh has not argued that she was anything other than an at-will employee before, during, or after the PIP. . . . Thus, that reference did not change the terms or conditions of Walsh’s employment. The PIP, on its face, appears to be nothing more than “documented counseling.”

App.17a (citation omitted). The court rejected “a per se rule that all PIPs constitute an adverse action,” and concluded that “even accepting for argument’s sake that Walsh’s PIP was motivated by age bias, and recognizing an objectively reasonable person may well experience distress from being placed on a PIP, Walsh still has not shown how it altered her employment conditions, which is the focus of our analysis post-*Muldrow*.” App.18a. The court also rejected Walsh’s remaining *Muldrow* theories and her constructive-discharge claim. App.20a-22a.¹

Walsh petitioned for rehearing en banc, arguing that the panel’s treatment of the PIP reimposed the heightened-harm requirement *Muldrow* forbids and that a plan threatening termination changes the terms and conditions of employment. The court denied the petition.

¹ Walsh does not seek review of the court of appeals’ constructive-discharge holding or its rejection of her pay-raise and job-duties theories. App.20a. Nor does the petition present any question of Massachusetts law. The court of appeals assumed that *Muldrow*’s standard applies to Walsh’s Chapter 151B claim and resolved both claims on the same federal analysis. The ADEA claim alone squarely presents the question.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Cannot Be Reconciled With *Muldrow*.

The panel did not say that Walsh’s harm was insufficiently “significant.” It reached the same result by a different route. It confined the “terms, conditions, or privileges of employment” to a job’s formal features (title, pay, assigned duties, and advancement), treated a written threat of discharge as legally irrelevant for an at-will employee, and on that basis held that a written, individually imposed regime of heightened supervision, compulsory tasks, and threatened discharge left Walsh no worse off. Each step contradicts *Muldrow*.

A. The panel’s test reimposes the tangible-harm requirement *Muldrow* rejected.

The panel asked whether the PIP “assign[ed] Walsh new duties, alter[ed] her title or compensation, or limit[ed] her ability to seek other opportunities within the company.” App.17a. Those categories mirror the “tangible employment action[s]” identified in *Ellerth*: “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” 524 U.S. at 761. The panel itself invoked that list as the paradigm of “[a]ctionable employer conduct.” App.13a. But *Ellerth* compiled the list to define a “significant change in employment status,” 524 U.S. at 761, and it did so to answer a different question: when an employer is vicariously liable for a supervisor’s harassment. A test built on *Ellerth*’s list imports precisely the significance requirement *Muldrow* rejected.

Muldrow did not treat those categories as exhaustive. It held the opposite: the statutory phrase “covers more than the ‘economic or tangible.’” 601 U.S. at 354. It “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” *Meritor*, 477 U.S. at 64 (citation omitted). And in applying the standard, *Muldrow* looked beyond the officer’s rank and pay to the character of her work, her schedule, and the perquisites of her position. 601 U.S. at 359. A schedule is not a title, and a perquisite is not a promotion. What mattered was whether the employer’s action left the employee worse off in the circumstances of her job. *Ibid.*

The “conditions” of a job, in any ordinary sense, include the circumstances under which the work is performed: how closely the employee is supervised, how often her work is formally evaluated², what she must accomplish and by when, and on what terms she keeps her position. Walsh’s PIP changed each of them. It imposed biweekly progress meetings and formal reviews every thirty days. It imposed specific, compulsory tasks, one with a hard deadline and photographic proof of completion. It required her to change where and how she worked, directing her to stop “staying behind closed doors in an office or server room,” to join meetings, to partner with other IT groups, and to recruit contacts in other offices to cover for her. It placed in her file HNTB’s determination that her work performance is unsatisfactory. And it converted her employment into an expressly conditional relationship under which failure to satisfy those requirements will lead to further disciplinary

² Which never happened.

action, up to and including termination. HNTB's own word, "further," confirms that the plan was itself disciplinary action, not mere "documented counseling." An employee subject to all of that is "worse off" in her conditions of employment than a coworker who is not. *Muldrow*, 601 U.S. at 359. What gets ignored is that Walsh's office was in a room tucked away and she was not secluding herself, and Walsh was never notified of any file update.

The panel's conclusion that the PIP "did not assign Walsh new duties," App.17a, illustrates the error. The PIP faulted Walsh for insufficient "willingness to take on additional duties and projects" and then required her to "think beyond the offices you support," to monitor and respond to issues in the IT Customer Support channel, to partner with other IT groups, to join office meetings, and to recruit backup contacts in other offices. The panel could treat those requirements as no change only by regarding mandatory new tasks as refinements of her existing job, and by regarding heightened supervision and a written termination warning as legally invisible. That is the "narrow contractual sense" of "terms [or] conditions" this Court has repeatedly rejected. *Muldrow*, 601 U.S. at 354; *Oncale*, 523 U.S. at 78.

Nor does it matter that Walsh ultimately completed the plan, a point on which the district court relied. *Muldrow* asks whether the challenged action left the employee worse off with respect to a term or condition of her employment. 601 U.S. at 354-355, 359. It does not ask whether she later overcame it. Ninety days of probationary employment under biweekly oversight and a written threat of discharge is a change in the conditions of employment for as long as it lasts.

B. The at-will rationale is wrong and sweeps far beyond this case.

The panel's treatment of the termination warning is the most consequential part of its decision. The court acknowledged that HNTB's reservation of the right to fire Walsh "before the end of the plan" was a "reference to a term of employment." App.17a. It held that the reference "did not change the terms or conditions of Walsh's employment" only because Walsh was an at-will employee "before, during, or after the PIP." App.17a.

That reasoning conflates what an employer may lawfully do with what it actually did. At-will status describes a legal baseline: absent a discriminatory motive, HNTB could have discharged Walsh at any time. It does not follow that an employer's decision to single out an employee for a formal, documented, time-limited probation, announcing in writing that her continued employment now depends on satisfying enumerated requirements, leaves her conditions of employment unchanged. Before August 1, 2019, Walsh's job was not conditioned on anything in particular. After that date, it was expressly conditioned on five enumerated requirements, monitored every two weeks, under a written finding that her performance was unsatisfactory.

This Court rejected the panel's inference in *Hishon v. King & Spalding*, 467 U.S. 69 (1984): "A benefit that is part and parcel of the employment relationship 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.* at 75. The same principle governs here. That HNTB was legally free to fire Walsh for a lawful

reason did not license it to subject her, because of her age, to a regime under which it had announced that her discharge was under active consideration.

Section 623(a)(1) is comparative. It asks whether the employer treated the employee worse than others because of a protected trait. See *Muldrow*, 601 U.S. at 354-355. The relevant comparison is therefore not between Walsh's job security under the PIP and her theoretical legal status, but between Walsh and coworkers who were not placed on PIPs. On that comparison the answer is not close. An employee who has been told in writing that she will be disciplined, up to discharge, unless she satisfies specified conditions within ninety days, and who must sign an acknowledgment saying so, holds her job on different and worse terms than one who has not.

The consequences of the panel's rule are sweeping. Employment at will is the default rule in every State but Montana, and the overwhelming majority of private-sector employees work under it. If an at-will employee's terms and conditions are unaffected by a written warning that she will be fired unless she improves, then no written warning, final warning, probationary period, or last-chance agreement short of discharge itself can ever constitute actionable discrimination for most of the American workforce, whatever the employer's motive. Nothing in the ADEA, Title VII, or the ADA exempts at-will employees from the protection of the "terms, conditions, or privileges" clause. A rule that rebuilds a heightened-harm threshold by narrowing what counts as a "term" or "condition" adds words to the statute just as surely as a materiality requirement does. See 601 U.S. at 355.

C. The panel’s rule permits openly age-based discipline.

The panel assumed that HNTB placed Walsh on the PIP because of her age. On that assumption, the court’s holding is that an employer may, because of an employee’s age, subject her to a formal disciplinary plan that threatens termination without violating the ADEA. It follows that an employer could place every employee over sixty on a ninety-day PIP, expressly because of age, so long as the plans changed no title, pay, or formal duty. That result cannot be squared with a statute enacted to protect older workers from “inaccurate and stigmatizing stereotypes.” *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Justice Kavanaugh, concurring in the judgment in *Muldrow*, would have gone further than the Court, reasoning that a transfer made because of a protected characteristic is itself discrimination with respect to the terms, conditions, or privileges of employment, even when compensation is unchanged. 601 U.S. at 364 (Kavanaugh, J., concurring in the judgment) (citing *Chambers v. District of Columbia*, 35 F.4th 870, 879-880 (D.C. Cir. 2022) (en banc)). Under the Court’s standard or Justice Kavanaugh’s, a disciplinary plan imposed because of age, which subjects the employee to formal scrutiny, compulsory tasks, and threatened discharge, is actionable.

This case shows why the question matters. The PIP criticized Walsh, an employee of more than twenty-five years who had never been disciplined, for failing to “stretch beyond the status quo” and to “take the initiative to look beyond day to day responsibilities to meet the changing needs of the office and the firm.” C.A. App. 243. Her prior review had warned that she

would “struggle to maintain pace with what the business demands of us.” C.A. App. 138. The team leader charged with helping her complete the plan told her she could “be replaced with younger, cheaper people.” App.35a. Whether that record proves discrimination is a question for a jury. Under the First Circuit’s rule, no jury will ever be permitted to answer it.

II. The Courts of Appeals Are Divided Over How *Muldrow* Applies to Discipline Short of Discharge.

Since *Muldrow*, the courts of appeals have taken divergent approaches to disciplinary measures that stop short of discharge, such as PIPs, written warnings, and counseling requirements.

The First, Sixth, and Seventh Circuits screen such measures by asking whether they altered the formal, tangible features of the job. The First Circuit here asked whether the PIP changed title, pay, duties, or advancement opportunities, and treated a termination warning as irrelevant for at-will employees. The Seventh Circuit has held that a PIP was not an adverse action where any changes it caused were “within the normal scope of [the plaintiff’s] employment and thus did not adversely affect the terms and conditions of her employment.” *Arnold v. United Airlines, Inc.*, 142 F.4th 460, 471 (7th Cir. 2025). And the Sixth Circuit has described “documented counseling” as unlikely to qualify as an adverse action under *Muldrow*. *McNeal v. City of Blue Ash*, 117 F.4th 887, 903 (6th Cir. 2024). The First Circuit relied on both decisions.

Other courts have recognized forms of harm that the First Circuit’s test excludes. The Tenth Circuit vacated summary judgment for an employer that had terminated an employee for refusing a counseling requirement imposed with a PIP, directing the district court to decide under *Muldrow* whether the counseling requirement itself harmed the terms or conditions of her employment, rather than asking whether it effected a significant change in employment status. *Scheer v. Sisters of Charity of Leavenworth Health System, Inc.*, 144 F.4th 1212 (10th Cir. 2025). The Eighth Circuit has held that non-economic harm, an employer’s conduct exposing the employee to scorn and ridicule coupled with a change in her work assignment, satisfies *Muldrow*. *Cole v. Group Health Plan, Inc.*, 105 F.4th 1110 (8th Cir. 2024). And district courts applying *Muldrow* have held PIPs actionable where they “saddl[ed] [the plaintiff] with more and worse tasks, tarnish[ed] her permanent record, [and] dampen[ed] her prospects of a promotion or raise.” *Anderson v. Amazon.com, Inc.*, No. 23-cv-8347, 2024 WL 2801986, at *11-12 (S.D.N.Y. May 31, 2024).

Practitioners have recognized the divergence. Commentary following the decision below described it as a “rare win for employers” amid a string of post-*Muldrow* decisions treating written warnings and other performance-management tools as sufficient harm, and characterized the First Circuit as having taken “a more measured approach.” HR Daily Advisor, *1st Circuit Says Discrimination Claim Can’t Be Based on a PIP* (May 5, 2026). As a result, whether a discriminatory disciplinary plan is actionable now depends on the circuit in which the employee works. Only this Court can restore uniformity.

III. The Question Is Important and Recurring.

Performance improvement plans, written warnings, and similar measures are among the most common tools of workplace discipline, and they are frequently the first formal step toward discharge. For older workers in particular, they are often the vehicle through which stereotypes about adaptability, initiative, and “pace” first enter the employment record, as they did here. C.A. App. 138. If discriminatory discipline is beyond the statute’s reach unless it changes pay, title, or formal duties, the ADEA’s protection begins only when the employee is already out the door.

The question is not confined to the ADEA. Because Title VII, the ADEA, and the ADA use the same or similar operative language, courts apply *Muldrow* across all three. The First Circuit’s rule therefore governs every discrimination claim premised on discipline in that circuit, and its reasoning is readily transferable elsewhere. Management-side commentary has already treated the decision as “welcome clarity” for employers’ use of PIPs. Mintz, *First Circuit: A PIP Does Not Necessarily Constitute an Adverse Employment Action* (Apr. 17, 2026). This Court’s review is warranted before the at-will rationale takes root.

IV. This Case Is an Excellent Vehicle.

First, the question is squarely presented and outcome-determinative. Both courts rested the judgment solely on the adverse-action element of the prima facie case; neither reached HNTB’s arguments about performance, replacement, or pretext. If the PIP

is an adverse action, the judgment on the ADEA claim cannot stand.

Second, the issue was pressed and passed upon at every stage. The district court rejected the argument that the PIP was an adverse action, the panel decided the question under *Muldrow* in a published opinion, and Walsh sought rehearing en banc on it. See *United States v. Williams*, 504 U.S. 36, 41 (1992). The panel's remark that Walsh did not dispute its characterization of the PIP as documented counseling, is no obstacle. The panel itself examined "the particulars of Walsh's PIP to determine whether it affected the terms or conditions of her employment" and answered that question no. Having properly presented her claim that the PIP was an adverse action, Walsh "can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Third, the relevant facts are undisputed and documentary. The PIP is in the record, its terms are undisputed, and the panel assumed that it was motivated by age. The Court can resolve the legal question without addressing any disputed fact.

Fourth, there is no jurisdictional impediment. The First Circuit held the appeal timely by applying this Court's settled rule that a filing that is the "functional equivalent" of a notice of appeal satisfies Rule 3. App.3a. (citing *Smith*, 502 U.S. at 248-249). That holding is correct. Walsh's motion was filed within the period prescribed by 28 U.S.C. § 2107(a), named the parties, identified by docket number the only substantive judgment in the case, could be directed to only one appellate court, and stated that she was

seeking appellate counsel. see *Becker v. Montgomery*, 532 U.S. 757, 767 (2001) (imperfections in noticing an appeal are not fatal where “no genuine doubt exists about who is appealing, from what judgment, to which appellate court”). Walsh’s alternative tolling argument, which the panel did not reach, would independently support the same result.

Fifth, the case arises on summary judgment at the prima facie stage, the posture in which the adverse-action question most often determines whether discrimination claims reach a jury, and the posture in which *Muldrow* itself arose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT, FILED MARCH 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1499

JOANNE WALSH,

Plaintiff, Appellant,

v.

HNTB CORPORATION,

Defendant, Appellee.

Filed March 13, 2026

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS

[Hon. Nathaniel M. Gorton, *U.S. District Judge*]

Before

Montecalvo, Rikelman, and Aframe *Circuit Judges*.

AFRAME, *Circuit Judge*. Joanne Walsh worked for many years as an information technology (“IT”) employee

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for HNTB Corporation in its Boston, Massachusetts office. In August 2019, the company placed Walsh on a three-month performance improvement plan (“PIP”) that she successfully completed. About ten months later, Walsh resigned. She then sued HNTB alleging, inter alia, that the company committed unlawful age discrimination, primarily by placing her on the PIP and then constructively discharging her.

The district court granted HNTB summary judgment on the grounds that no reasonable factfinder could conclude that the PIP constituted an adverse employment action or that Walsh resigned in circumstances that constituted a constructive discharge. Walsh appealed. In response, HNTB challenged the timeliness of the appeal and defended the judgment on the merits. We conclude that the appeal is timely and affirm the judgment.

I.

We start with the timeliness issue. HNTB contends that we cannot hear this appeal because Walsh belatedly filed her notice of appeal. We describe the relevant procedural facts and then explain why Walsh’s appeal is timely.

On December 21, 2023, the district court granted summary judgment for HNTB. Following the judgment, Walsh’s trial counsel stopped the representation. On January 19, 2024, within the thirty-day period to file an appeal, *see* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), Walsh moved pro se to extend the notice-of-appeal deadline

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because she needed more time to find new counsel. The court granted that motion and allowed Walsh until March 29, 2024, to file her notice of appeal. Walsh subsequently asked for two more extensions, each of which the court granted. She filed her formal notice of appeal on May 15, 2024.

The crux of HNTB’s argument is that Walsh’s January 19 motion to extend the notice of appeal deadline was her only timely extension request under 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure (“Rule”) 4. *See* Fed. R. App. P. 4(a)(1)(A). According to HNTB, since Walsh did not file a notice of appeal within the additional time granted pursuant to that request, her May 15 notice of appeal was ineffective. Walsh responds that we should treat her January 19 motion as the functional equivalent of a notice of appeal and thus deem her appeal timely. We agree with Walsh.

Rule 3(c) requires a notice of appeal to contain three pieces of information, which we soon will detail. *See* Fed. R. App. P. 3(c)(1). The Rule also cautions that “[a]n appeal must not be dismissed for informality of form or title of the notice of appeal.” *Id.* at 3(c)(7).

Based in part on this latter provision, courts “liberally construe” Rule 3. *Smith v. Barry*, 502 U.S. 244, 248, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992). Thus, regardless of how a filing is styled, it will constitute the “functional equivalent” of a notice of appeal “[i]f [the] document [was] filed within the time specified by Rule 4 [and] gives the notice required by Rule 3.” *Id.* at 248-49, 112 S.Ct. 678. In

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determining whether a particular filing satisfies Rule 3, we are mindful of the “latitude” given to “pro se litigant[s].” *Campiti v. Matesanz*, 333 F.3d 317, 320 (1st Cir. 2003).

A motion to extend the notice of appeal deadline may serve as the functional equivalent of a notice of appeal if, among other things, it is filed within the time allotted to file such a notice. *Cruzado v. Alves*, 89 F.4th 64, 71-73 (1st Cir. 2023). There is no dispute that Walsh filed her January 19 motion within the initial thirty-day period allotted for filing a notice of appeal. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1). Thus, the remaining question is whether the motion evinces an intent to appeal and contains the “pertinent information” required by Rule 3(c)(1). *Cruzado*, 89 F.4th at 72 (quoting *Campiti*, 333 F.3d at 320). In making those determinations, we rely on “the filing’s content and surrounding circumstances rather than on any general rule.” *Id.* at 70 (quoting *Campiti*, 333 F.3d at 320) (citation modified).

First, Walsh’s motion demonstrates an intent to appeal. A motion to extend the notice of appeal deadline indicating only that a litigant is considering an appeal does not suffice. *Cruzado*, 89 F.4th at 71. But Walsh’s motion does more than that. She stated that she needed an extension because her “(former) attorney [told her] . . . that their firm does not handle appeals” and she was “actively searching for a firm to represent [her]” on appeal. We understand this statement to indicate Walsh’s intent to appeal once she retained counsel, thereby satisfying the first step in the functional equivalent analysis. *See Campiti*, 333 F.3d at 320 (concluding that a request for

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appointment of appellate counsel, after trial counsel withdrew, “evidences an intention to appeal”).

Walsh’s motion also contains the “pertinent information” required by Rule 3(c)(1). *Cruzado*, 89 F.4th at 72 (quoting *Campiti*, 333 F.3d at 320). Under that Rule, a proper notice of appeal must name the parties taking the appeal, the court to which the appeal is being made, and the judgment or order from which the appeal is being taken. Fed. R. App. P. 3(c)(1). Walsh’s motion meets the first Rule 3(c)(1) requirement because the caption identifies her and HNTB. *See Cruzado*, 89 F.4th at 72. In addition, Walsh’s motion satisfies Rule 3(c)(1)’s appeal-location requirement even though it does not expressly identify this Court as the appeal’s destination. Walsh sought to appeal a judgment from the District of Massachusetts in an employment case that could only be appealed to this Court. We have held that the failure to expressly mention this Court is not fatal where it is the only appropriate appellate venue. *Id.*; *Campiti*, 333 F.3d at 320.

Walsh’s motion also adequately references the judgment she sought to appeal. *See* Fed. R. App. P. 3(c)(1)(B). While Walsh’s January 19 filing does not expressly mention the order granting summary judgment, it does mention the case’s docket number. A review of the docket indicates that the summary judgment order was the only substantive ruling in the case. And it also shows that the district court issued a final judgment shortly after its summary judgment ruling, which means that any interlocutory orders merged into that judgment. *See Gonpo v. Sonam’s Stonewalls & Art, LLC*, 41 F.4th 1, 10-

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11 (1st Cir. 2022) (citing Fed. R. App. P. 3(c)(4)). We have concluded previously that a litigant met this final Rule 3 requirement in similar circumstances. *See Cruzado*, 89 F.4th at 72-73.

In sum, Walsh filed a timely motion to extend the notice of appeal deadline. It indicated her intent to appeal and contained sufficient information to meet Rule 3's requirements. Especially given the solicitude we afford Walsh as a then-pro se litigant, we are satisfied that her January 19 motion was the functional equivalent of a notice of appeal. The appeal is thus timely, and so we proceed to its merits.¹

II.

In reviewing the district court's grant of HNTB's motion for summary judgment, we describe the underlying facts in the light most favorable to Walsh, the non-moving party. *See Warner v. Dejoy*, 153 F.4th 109, 112 (1st Cir. 2025).

Walsh worked for HNTB from the end of January 1994 until September 2020. When Walsh left HNTB,

1. Walsh also argues that even if her January 19 request for an extension of time was not the functional equivalent of a notice of appeal, we should still find her formal notice of appeal timely because the district court appropriately granted equitable tolling of the filing deadline for her notice of appeal. *See Hamer v. Neighborhood Servs. of Chi.*, 583 U.S. 17, 22-24, 138 S.Ct. 13, 199 L.Ed.2d 249 (2017). We do not reach this argument because we have already found Walsh's January 19 motion to satisfy the notice-of-appeal requirement.

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she was fifty-five years old and worked as a Technology Support Representative II (“TSR II”). As a TSR II, Walsh supported the company’s IT systems, which included, among other tasks, assisting employees with their technology needs and managing HNTB equipment and leases.

Walsh supported IT for multiple HNTB offices, including the Boston office from which she worked. From 2015 to 2017, Walsh’s supervisor encouraged her to consider advancing to the TSR III position, but Walsh declined that invitation.

In 2018, Jim Clark became Walsh’s new supervisor. Clark wrote Walsh’s performance review that year and rated her as having “[m]et [e]xpectations” but noted that her rating was “at the lowest in the range.” In the review, Clark wrote that Walsh lacked “initiative to stretch beyond the day-to-day and status quo of the Boston area offices” and did not “improve upon any of the necessary HNTB characteristics” identified in the prior year’s review. Clark ended the review by noting that the present circumstances “put [Walsh] at risk of not meeting expectations and may result in a performance improvement plan.”

On August 1, 2019, Walsh was placed on a PIP at the same time as was her slightly older colleague, Lindsay Allinson, the other TSR II who worked with Walsh to support the Boston office. Clark drafted these PIPs at the direction of his supervisors. The two PIPS were almost identical.

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Walsh's PIP stated that there was "[r]ecent feedback from office staff [and] office/division leadership [stating] that [Walsh] ma[de] it difficult to get things done [and was] perceived to be an impediment to the success/performance of the office." In particular, the PIP noted that the office perceived Walsh as "contentious, pushing back on suggestions/ideas and unwilling to look for solutions before saying something can't be done." The PIP also indicated that Walsh "'hid[]' in the IT room," was "reluctant to engage with employees proactively," and "d[idn't] adequately represent the customer service focus that is critical to the success of a Technology Support Representative at HNTB." In addition to these concerns, the PIP criticized Walsh for not properly maintaining the IT office, which made it difficult for other employees to "access IT resources." The PIP concluded its critique by noting that Walsh had failed "to act on and improve the performance issues identified in [her] 201[8] Performance Review," including that she "stretch beyond the status quo to meet performance expectations."² The PIP lasted three months and provided a list of necessary performance improvements that correlated to the criticisms just described.

While on the PIP, Walsh asked Clark to provide her with the names of staff who complained about her performance. Clark declined the request, and Walsh

2. The PIP refers to the 2019 performance review. We understand that to be a typographical error because the 2019 performance review had not been completed in August 2019, and the information identified in the PIP does appear in the 2018 performance review.

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attempted to identify on her own who had complained. Walsh described Clark as “pissed” that she continued to try to identify those who had complained about her. In response to Walsh’s actions, Clark told Walsh, “Stop asking. Stop talking to people. Shut up.”

During the PIP period, Dan Vealey, another longtime HNTB IT employee, worked as Walsh’s team leader and thus was responsible for assisting Walsh with successfully completing the PIP. At some point while Walsh was on the PIP, Vealey told her that “[t]he company is not getting its return on investment for you,” and that she could “be replaced with younger, cheaper people.”

Nevertheless, Vealey ultimately concluded that Walsh successfully completed the PIP, which ended on November 1, 2019. Clark concurred, although he also told Walsh that she “had barely improved enough to get off the PIP.” Sometime in November or December 2019, after the PIP concluded, Vealey succeeded Clark as Walsh’s supervisor.

A few months after the PIP ended, Vealey completed Walsh’s 2019 performance evaluation. The evaluation stated that Walsh “[i]nconsistently [m]et [e]xpectations” and that 2019 was “a somewhat turbulent year” for Walsh with “some mixed results.” Vealey’s review also provided Walsh with some praise, including, for example, that she “performed the normal daily activities as consistently as she ha[d] in the past” and that “[h]er technical skills [were] very solid.”

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After the PIP, Walsh felt that her working conditions declined. In particular, Vealey “would take credit for things that” she and Allinson had done. Moreover, Vealey “t[ook] over things” that Walsh and Allinson had been “working on” until the project “started to go sideways, [when] all of a sudden” he would place responsibility back with them. Vealey also instructed Walsh to avoid saying “no” to employees who made technology requests that Walsh thought could not be met. Rather, he asked Walsh to say that she would check with her supervisor first and then respond to the employee following the consultation.

On one occasion after Walsh completed the PIP, Vealey yelled at her, stating that he was her “manager” and could “tell [her] anything [he] want[ed].” Vealey also pressured Walsh to respond to IT requests faster than necessary and, according to Walsh, he often “ma[d]e mountains out of molehills” by not “listen[ing] to [her] side of the story.” Further, Walsh believed that Vealey complimented younger TSR IIs working in other offices, without crediting her and Allinson for similar work.

Between the end of the PIP and her resignation, Walsh never complained to human resources or submitted a complaint to HNTB’s “hotline” system about being mistreated by Vealey or anyone else. Walsh was not demoted from her TSR II position, and her compensation was not reduced. No one at HNTB ever asked or told Walsh to leave her employment. Nevertheless, on September 11, 2020, about ten months after Walsh had successfully completed the PIP, she and Allinson simultaneously resigned from HNTB and “quietly walk[ed] out” together.

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After her resignation, Walsh sued HNTB in Massachusetts state court, asserting claims under the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 et seq., and Massachusetts’s law prohibiting age discrimination in employment, *see* Mass. Gen. Laws ch. 151B, § 4(18) (“Chapter 151B”), along with a claim for the breach of the implied covenant of good faith and fair dealing under state law. HNTB removed the case to federal court and after discovery, moved for summary judgment.

The district court granted HNTB’s summary judgment motion. It ruled that Walsh had not suffered an adverse action by being placed on a PIP because “Walsh successfully completed the PIP,” she “was neither demoted nor her pay reduced,” and “any changes in her responsibilities were de minimis.” The court also concluded that the constructive discharge allegation failed because the complained-of comments from management occurred months before Walsh resigned; the post-PIP changes under Vealey’s supervision were not substantial enough to show that Walsh was forced to resign; and there was no evidence that HNTB was contemplating dismissing Walsh when she decided to quit. Finally, the court rejected Walsh’s claim for a breach of the implied covenant of good faith and fair dealing. Walsh appeals the summary judgment ruling only insofar as it grants HNTB summary judgment on the federal and state age-discrimination claims.

*Appendix A***III.**

We review de novo the district court’s summary judgment ruling in favor of HNTB. *Johansen v. Liberty Mut. Grp.*, 118 F.4th 142, 148 (1st Cir. 2024). That ruling is warranted only if the undisputed material facts, taken “in the light most favorable to” Walsh, demonstrate that HNTB is entitled to judgment as a matter of law. *Escribano-Reyes v. Pro. Hepa Certificate Corp.*, 817 F.3d 380, 386 (1st Cir. 2016) (quoting *Del Valle-Santana v. Servicios Legales de P.R., Inc.*, 804 F.3d 127, 129 (1st Cir. 2015)).

The parties agree that Walsh’s claims under the ADEA and Chapter 151B may be considered together because the laws are “‘substantially similar’ in all relevant respects.” *Adamson v. Walgreens Co.*, 750 F.3d 73, 83 (1st Cir. 2014) (quoting *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 30 (1st Cir. 2007)). The parties also agree that Walsh’s claims should be considered by applying the burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In these circumstances, that framework requires, inter alia, the plaintiff to establish a prima facie case of discrimination by adducing some evidence that (1) she was at least forty years of age; (2) her job performance met the employer’s legitimate expectations; (3) the employer subjected her to an adverse employment action; and (4) the employer did not treat her in an age-neutral manner when taking the adverse action. *Del Valle-Santana*, 804 F.3d at 129-30.

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As mentioned above, the district court granted HNTB summary judgment on the ground that Walsh failed to present sufficient evidence that the company subjected her “to an adverse employment action,” the third aspect of the prima facie inquiry. On appeal, Walsh makes two arguments on this point. First, she asserts that under the Supreme Court’s decision in *Muldrow v. City of St. Louis*, 601 U.S. 346, 144 S.Ct. 967, 218 L.Ed.2d 322 (2024), which was issued after the district court’s summary judgment ruling, several of HNTB’s actions—the August 2019 PIP, a cessation in pay raises, and an alleged decrease in job duties—should be considered adverse actions. Second, she contends that she suffered a constructive discharge—an adverse action tantamount to termination, *see Suárez v. Pueblo Int’l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000)—because, starting with the PIP, her work environment deteriorated so much so that she had no choice but to resign in September 2020.

A.**1.**

We start with Walsh’s *Muldrow*-based contentions. The ADEA prohibits age discrimination when it negatively affects an employee’s “compensation, terms, conditions, or privileges of employment.” 29 U.S.C. § 623(a)(1). Actionable employer conduct thus “typically involves discrete changes in the terms of employment, such as ‘hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.’” *Morales-Vallellanes v. Potter*, 605 F.3d 27, 35

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(1st Cir. 2010) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)). For some time, in various discrimination contexts, we required plaintiffs to show that the adverse action was material, i.e., that the challenged conduct was “more disruptive than a mere inconvenience or an alteration of job responsibilities.” *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (citation omitted); *see also, e.g., Cherkaoui v. City of Quincy*, 877 F.3d 14, 25 (1st Cir. 2017); *Caraballo-Caraballo v. Corr. Admin.*, 892 F.3d 53, 61 (1st Cir. 2018).

Muldrow, which was decided about six months after the district court granted HNTB’s summary judgment motion, rejected this materiality requirement in a sex discrimination case under Title VII of the 1964 Civil Rights Act. 601 U.S. at 353 & n.1, 144 S.Ct. 967. *Muldrow* held that an adverse action is any employment event, regardless of its severity, in which an employer’s conduct leaves an employee (1) “worse off” (2) with respect to the “terms [or] conditions” of their employment. *Id.* at 354-55, 144 S.Ct. 967.

Though *Muldrow* arose under Title VII, its analysis hinged on the statutory phrase “‘terms or conditions’ of employment.” 601 U.S. at 354-55, 144 S.Ct. 967; *see* 42 U.S.C. § 2000e-2. Many other anti-discrimination statutes, including the ADEA, use the same (or similar) language, and thus courts have extended *Muldrow* to apply to those statutes as well. *See, e.g., Arnold v. United Airlines, Inc.*, 142 F.4th 460, 470 n.21 (7th Cir. 2025) (applying *Muldrow* to an ADEA claim); *Milczak v. Gen. Motors, LLC*, 102

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F.4th 772, 787 (6th Cir. 2024) (same); *Yates v. Spring Indep. Sch. Dist.*, 115 F.4th 414, 420 n.4 (5th Cir. 2024) (same); 29 U.S.C. § 623(a)(1) (prohibiting age discrimination when it negatively affects an employee’s “compensation, terms conditions, or privileges of employment.”); *see also Rios v. Centerra Grp., Inc.*, 106 F.4th 101, 112 n.4 (1st Cir. 2024) (applying *Muldrow* to a claim under the Americans with Disabilities Act). We will therefore apply the *Muldrow* standard in deciding whether the discrete actions identified by Walsh constitute adverse employment actions under the ADEA and Chapter 151B.³

2.

Because Walsh focuses most on her August 2019 PIP, we begin our analysis there.⁴ A PIP does not have the

3. No Massachusetts appellate court has decided whether to adopt the *Muldrow* standard under the Massachusetts anti-discrimination law, Chapter 151B. Because the *Muldrow* standard is more favorable to Walsh than present Massachusetts law, which still requires materiality, *Yee v. Mass. State Police*, 481 Mass. 290, 121 N.E.3d 155, 161-62 (2019), we will assume that *Muldrow* also applies to Walsh’s Chapter 151B claim, *O’Horo v. Bos. Med. Ctr. Corp.*, 131 F.4th 1, 18 n.7 (1st Cir. 2025). Even under this more generous standard, Walsh’s claims do not survive. *See infra* Part III.A.2-3.

4. At times on appeal, Walsh describes her *Muldrow*-based arguments as a hostile work environment claim. Indeed, at oral argument, Walsh’s attorney suggested that following *Muldrow*, courts may no longer distinguish between discrete adverse actions and continuing violations when evaluating anti-discrimination claims. These arguments are unavailing.

First, to the extent Walsh argues that *Muldrow* elided the distinction between claims based on continuing violations and

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same effect in every employment situation. Sometimes, an employer may issue a PIP to warn an employee about performance deficiencies or assist an employee in developing a plan to achieve an identified opportunity for skill development. *See, e.g., Arnold*, 142 F.4th at 467-68, 471. In those cases, a PIP is not an adverse employment action. *See id.* at 471 (stating, post-*Muldrow*, that a PIP did not constitute an adverse action where any changes caused by the PIP were “within the normal scope of [the plaintiff’s] employment and thus did not adversely affect the terms and conditions of her employment”). Other times, a PIP may impose new job responsibilities, change the present terms of employment, or deprive an employee of potential advancement opportunities. *See, e.g., Anderson v. Amazon.com, Inc.*, 23-cv-8347(AS), 2024 WL 2801986, at *11-12 (S.D.N.Y. May 31, 2024). In these situations, a

claims based on discrete acts, we disagree. In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court drew a line between these two types of claims and explained that each could give rise to separate forms of anti-discrimination claims—events like terminations, demotions, and suspensions made up the former, and circumstances like hostile work environments constituted the latter. 536 U.S. 101, 114-15, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). *Muldrow* did not purport to abrogate *Morgan*, and we have continued to distinguish between the two types of claims since *Muldrow*. *See, e.g., Rae v. Woburn Pub. Schs.*, 113 F.4th 86, 102 (1st Cir. 2024).

Second, to the extent Walsh contends that she brought a hostile work environment claim, the record belies that assertion. In the district court, Walsh did not argue that she suffered a hostile environment separate from her constructive discharge contention, which we discuss below. Thus, we do not analyze Walsh’s claim under a hostile work environment rubric.

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PIP may serve as an adverse employment action. *See id.* (concluding that, under *Muldrow*, a PIP constituted an adverse employment action where it, inter alia, “saddl[ed] [the plaintiff] with more and worse tasks, tarnish[ed] her permanent record, dampen[ed] her prospects of a promotion or raise, [and] temporarily prevent[ed] her from transferring”). Post-*Muldrow*, then, there is no one-size-fits-all answer for whether a PIP constitutes an adverse employment action. Rather, the inquiry is fact-intensive and PIP-specific. We therefore examine the particulars of Walsh’s PIP to determine whether it affected the terms or conditions of her employment.

It did not. The PIP identified its purpose as providing Walsh with “the opportunity to correct [her] unsatisfactory performance.” It then identified several problem areas and provided a corresponding list of ways to improve. The PIP stated that Walsh should “be more proactive” and act as an “advocate” for the offices she supported; it also stated that Walsh should clean her office because it was so messy that it made “it difficult for employees to access IT resources.” The PIP did not assign Walsh new duties, alter her title or compensation, or limit her ability to seek other opportunities within the company. Its only reference to a term of employment was the company’s reservation of its right to terminate Walsh’s employment before the end of the plan. But Walsh has not argued that she was anything other than an at-will employee before, during, or after the PIP. *See Murray v. Warren Pumps, LLC*, 821 F.3d 77, 89 (1st Cir. 2016) (In Massachusetts, unless a termination “conflict[s] with [a] sufficiently important and clearly defined public polic[y],” “an employer may lawfully

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terminate a relationship with an at-will employee at any time—for any reason, for no reason, and even for a reason that might be seen by some as unwise or unkind.”). Thus, that reference did not change the terms or conditions of Walsh’s employment. The PIP, on its face, appears to be nothing more than “documented counseling.” *McNeal v. City of Blue Ash*, 117 F.4th 887, 903 (6th Cir. 2024) (stating that documented counseling is unlikely to be an adverse action under *Muldrow*).

Walsh does not dispute this characterization of the PIP. Instead, she argues that its existence alone is an adverse action and assigns it a more sinister cast by alleging that her managers imposed it because of her age. But, as we have explained, a per se rule that all PIPs constitute an adverse action is inconsistent with *Muldrow*’s requirement that the employee demonstrate a change in the terms or conditions of employment. And even accepting for argument’s sake that Walsh’s PIP was motivated by age bias, and recognizing an objectively reasonable person may well experience distress from being placed on a PIP, Walsh still has not shown how it altered her employment conditions, which is the focus of our analysis post-*Muldrow*. The PIP’s imposition therefore does not qualify in these circumstances as actionable conduct under the ADEA or Chapter 151B.

3.

The other incidents that Walsh identifies as adverse actions under *Muldrow* also do not suffice. First, she argues that she stopped receiving pay raises during her

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final three years of employment. In the district court, Walsh did not contend that this harm constituted an adverse action, and thus her argument is waived. *See Geoffroy v. Town of Winchendon*, 959 F.3d 1, 7 n.5 (1st Cir. 2020). But even on the merits, this contention founders. Walsh was ineligible for a pay raise in those years because she had reached the top of the salary range for a TSR II employee. Her only responses to this fact are to say that she had not been “told” that she had reached the pay ceiling for a TSR II and that her maximum salary range could have been increased following a “market adjustment.” But she does not create a dispute of material fact on this point because she does not identify any evidence suggesting that there was in fact a market adjustment *Cf. Milczak*, 102 F.4th at 786 (“While an employer’s withholding of a discretionary raise or bonus that an employee is otherwise entitled to based on the terms and conditions of employment may constitute an adverse action, [the plaintiff] does not create a material question that he was entitled to an annual raise or annual bonus greater than what he received” when he fails to provide evidence “that he should have received more.”). Moreover, her ignorance of the maximum salary for her position does not mean that it did not exist.

Second, Walsh argues that she was stripped of various job duties. *Muldrow* makes clear that the loss of job duties can constitute an adverse action. 601 U.S. at 356, 144 S.Ct. 967. Here, however, Walsh never identifies the job duties that she lost; her conclusory statements do not establish a trial-worthy issue. *See Mancini v. City of Providence*, 909 F.3d 32, 44 (1st Cir. 2018). And the few record cites that Walsh provides lead only to allegations that Vealey

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would sometimes take over for her and Allinson. But in that same portion of the deposition, Walsh explained that this mostly happened to Allinson. And, in any event, Walsh acknowledged that Vealey would restore the responsibilities as soon as any difficulty arose. Summary judgment is thus appropriate for Walsh’s *Muldrow*-based claims.

B.

We turn now to Walsh’s claim alleging that she suffered an adverse action through a constructive discharge. An employer terminating someone’s employment is an obvious adverse employment action. 29 U.S.C. § 623(a)(1). And the law is clear that “[a]n employer cannot accomplish by indirection what the law prohibits it from doing directly.” *Suárez*, 229 F.3d at 54. So, a constructive discharge constitutes an adverse employment action. *Id.*

An employee’s resignation morphs into a constructive discharge when “the working conditions . . . become so onerous, abusive, or unpleasant that a reasonable person in the employee’s position would have felt compelled to resign.” *Suárez*, 229 F.3d at 54. The standard is based on objective reasonableness. *Cherkaoui*, 877 F.3d at 30.⁵ It is also rigorous: an employee is not guaranteed “a workplace free from the usual ebb and flow of power relations and inter-office politics,” and must endure the “ordinary slings and arrows that workers routinely encounter in

5. *Muldrow* is not relevant in evaluating the constructive discharge claim given that Walsh resigned from her position. See *Stratton v. Bentley Univ.*, 113 F.4th 25, 38 n.6 (1st Cir. 2024).

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a hard, cold world.” *Stratton v. Bentley Univ.*, 113 F.4th 25, 40 (1st Cir. 2024) (first quoting *Suárez*, 229 F.3d at 54 and then quoting *Torrech-Hernández v. Gen. Elec. Co.*, 519 F.3d 41, 51 (1st Cir. 2008)). Ultimately, the question reduces to whether a factfinder could determine that “the working conditions were so unpleasant that staying on the job while seeking redress would have been intolerable.” *Marrero*, 304 F.3d at 28 (citation modified) (quoting *Keeler v. Putnam Fiduciary Tr. Co.*, 238 F.3d 5, 10 (1st Cir. 2001)).

In the district court, Walsh emphasized comments made to her by Clark and Vealey while she was on the PIP. The court concluded that these comments occurred at least ten months before Walsh resigned and therefore reasonably could not be viewed as the impetus for her resignation.

Walsh argues on appeal that the district court erroneously isolated Clark’s and Vealey’s comments during the PIP period from HNTB’s post-PIP conduct. She contends that a factfinder could conclude that HNTB’s conduct, when considered in the aggregate, created circumstances so intolerable that she had no choice but to quit. We agree that in adjudicating a constructive discharge claim, a court must view the employer’s conduct holistically. *Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 562-63 (1st Cir. 1986); *Back v. Hapoalim*, 24-1064-cv, 2024 WL 4746263, at *3 & n.1 (2d Cir. Nov. 12, 2024). But even so, the evidence, viewed together, does not permit a reasonable conclusion that Walsh had no option but to resign.

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We begin with Clark’s and Vealey’s comments during the PIP period. Clark told Walsh to “shut up” and to “stop asking” in response to Walsh’s request that he identify the employees who had complained about her. Walsh acknowledged that Clark was “pissed” at her behavior and that his comment was made in response to her requests. While Clark’s comment may have been harsh, its context shows that it was a verbal “arrow[]” that may occur during a disagreement in a difficult situation; such a comment is not the stuff of an intolerable workplace. *Stratton*, 113 F.4th at 39-40 (stating that remarks by a supervisor that may have been “insensitive, unfair, or unreasonable” do not show an objectively intolerable workplace).

Similarly, Vealey’s comment about Walsh being replaced with “younger, cheaper people” may suggest age animus but also does not demonstrate an environment that would compel a reasonable person to resign. That conclusion is evident from Walsh’s decision to continue working long after Vealey made the comment. *See Landrau-Romero v. Banco Popular de P.R.*, 212 F.3d 607, 613 (1st Cir. 2000) (holding that conduct occurring seven months before a resignation cannot form the basis of a constructive discharge). And it also accords with our precedent that employer comments suggesting possible age bias are not themselves grounds for quitting. *See Torrech-Hernández*, 519 F.3d at 51 (concluding that there was no constructive discharge even though employer made age-related comments that plaintiff lacked the “same ‘energy’ he once had” and used the term “dinosaur”); *Suárez*, 229 F.3d at 56 (similar).

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Turning to the post-PIP conduct, many of Walsh's allegations depend more on her "subjective beliefs" than objective facts and thus cannot form the basis of her constructive discharge. *Gerald v. Univ. of P.R.*, 707 F.3d 7, 25 (1st Cir. 2013) (quoting *Roman v. Potter*, 604 F.3d 34, 42 (1st Cir. 2010)). These complaints relate in large measure to how Walsh perceived Vealey's management style. As mentioned earlier, Vealey assumed direct supervision over Walsh shortly after the PIP ended. During the post-PIP period, Walsh describes Vealey as often "mak[ing] mountains out of molehills," not "listening to [her] side of the story," "micromanag[ing]" everything she and Allinson did, "tak[ing] credit for things" that they had done, and complimenting younger employees for work she had also done. She also says that Vealey once (at an unidentified time) raised his voice toward her to assert his authority and pressured her to respond to employee requests more rapidly than was previously required. Finally, Walsh alleges that Vealey "infantiliz[ed]" her by asking that she confer with him before saying "no" to employees who made requests she did not think could be fulfilled.

Walsh's complaints about her new manager's actions do not objectively rise to the level of intolerable working conditions. Vealey sometimes may have engaged in "generally disagreeable behavior." *Stratton*, 113 F.4th at 39 (quoting *Ahern v. Shinseki*, 629 F.3d 49, 59 (1st Cir. 2010)). But the employment discrimination laws do not shield an employee from the "usual ebb and flow of power relations" that may come after the assignment of a new supervisor. *Suárez*, 229 F.3d at 56. While Walsh no doubt

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perceived some of Vealey's management to be unfair, Vealey also made multiple positive comments in her 2019 employment evaluation. Viewed through an objective lens, we simply do not think a reasonable factfinder could conclude that Vealey's conduct after the PIP, even when taken together with his and Clark's comments during the PIP, created a situation so intolerable that resignation was Walsh's only option.

Walsh also contends that she was constructively discharged because she "believed at the end of the PIP that she was going to be fired." It is true that an employer's repeated statement informing an employee that she "will be fired" may show a constructive discharge. *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 97 (1st Cir. 2018). But there is no evidence here of such a statement (let alone multiple). Walsh successfully completed the PIP, even though Clark told her that she had "barely" done so. While Walsh may have viewed the PIP as setting the stage for her termination, "apprehension of future termination is insufficient to establish constructive discharge." *Stratton*, 113 F.4th at 40 (quoting *Torrech-Hernández*, 519 F.3d at 52). Moreover, Walsh admits that after she completed the PIP, no one ever asked her to leave her position and her 2019 performance review never suggested that her employment was in jeopardy. Instead, she and Allinson decided to "quietly walk out" on a day of their choosing.

Ultimately, the record shows that Walsh was a long-tenured and generally successful HNTB employee who was dismayed that the company placed her on a PIP in 2019. Walsh views that decision as a step in HNTB's

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age-motivated scheme to push her out. But for Walsh's constructive discharge claim to proceed to trial, she must show more than "unpleasantness, hurt feelings, and wounded pride." *Suárez*, 229 F.3d at 51. For the reasons discussed, she has not done so.

Affirmed.

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**APPENDIX B — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE FIRST
CIRCUIT, FILED MARCH 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1499

JOANNE WALSH,

Plaintiff, Appellant,

v.

HNTB CORPORATION,

Defendant, Appellee.

Entered: March 13, 2026

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The appellant's notice of appeal was timely filed, and the district court's grant of summary judgment is affirmed.

By the Court:

Anastasia Dubrovsky, Clerk

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**APPENDIX C — MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS, FILED
DECEMBER 21, 2023**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 22-10453-NMG

JOANNE WALSH,

Plaintiff,

v.

HNTB CORPORATION,

Defendant.

Signed December 21, 2023

MEMORANDUM & ORDER

GORTON, J.

This case arises from allegations that defendant, HNTB Corporation (“HNTB” or “defendant”) constructively terminated plaintiff, Joanne Walsh (“Walsh” or “plaintiff”), because of her age in violation of both the Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (“ADEA”) and M.G.L. c. 151B, § 4. Walsh also claims a breach of the covenant of good faith and fair dealing.

Appendix C

Pending before the Court is defendant's motion for summary judgment (Docket No. 34). For the reasons that follow, the motion will be allowed.

I. Background

Walsh was employed at HNTB from January, 1994 until she resigned in September, 2020 at the age of 55. She maintains, and her employer vigorously denies, that her resignation resulted from a constructive discharge. Her employment as a Technology Support Representative II involved a range of IT support functions for HNTB customers. Walsh was purportedly content with her position and did not seek promotion to the next level of Technology Support Representative III.

The events leading to Walsh's resignation began when Walsh received her 2018 performance review which stated that she "met expectations" but "at the lowest in the range." Her 2019 performance review reported that she "inconsistently met expectations." In August, 2019, Walsh was placed on a Performance Improvement Plan ("PIP") purportedly to improve issues concerning "responsiveness, pushback, upkeep of the technical room, and lease returns." Walsh maintains that she was placed on a PIP to force her to resign because of her age.

The PIP term was 90 days and ended in November, 2019. While the parties dispute the precise dates, at about that time Danny Vealey ("Vealey") became Walsh's supervisor, replacing her former supervisor, James Clark ("Clark"). Vealey worked with Walsh throughout the PIP period and was satisfied that she met the goals of that program.

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After completion of the PIP, Walsh remained in her same position with the same pay but the parties dispute whether she retained the same job responsibilities. Plaintiff asserts that Clark reported that she “barely improved enough to get off the PIP.”

In September, 2020, Walsh resigned from HNTB. Defendant maintains that Walsh was not about to be terminated but she insists she was being pushed out. Her colleague with the same job title, Lindsay Allinson, also resigned on the same day. Allinson was then 62 years old.

Walsh’s departure created an immediate vacancy. According to plaintiff, an individual in his 30s was scheduled to replace her but ultimately, her job was filled by Amr Kaliouby who, at the time, was 53 years old.

Walsh contends that during the period leading up to her resignation, management made her life difficult and she felt she had no choice but to resign. One year and five months later, plaintiff filed the instant suit alleging that she was constructively terminated on the basis of her age in violation of federal and state law.

II. Motion for Summary Judgment

A. Legal Standard

The role of summary judgment is “to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (quoting *Garside v. Osco*

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Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). The burden is on the moving party to show, through the pleadings, discovery and affidavits, “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

A fact is material if it “might affect the outcome of the suit under the governing law[.]” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists where the evidence with respect to the material fact in dispute “is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

If the moving party satisfies its burden, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine, triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court must view the entire record in the light most favorable to the non-moving party and make all reasonable inferences in that party’s favor. *O’Connor v. Steeves*, 994 F.2d 905, 907 (1st Cir. 1993). Summary judgment is appropriate if, after viewing the record in the non-moving party’s favor, the Court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322-23, 106 S.Ct. 2548.

*Appendix C***B. Analysis****1. Federal and State Claims of Age Discrimination**

Discrimination based on age is impermissible under both ADEA and M.G.L. c. 151B, § 4. The standards applied for age discrimination claims under federal law and Massachusetts state law are so similar that both claims can be analyzed together. *Tombeno v. FedEx Corp. Servs., Inc.*, 284 F.Supp.3d 80, 86 (D. Mass. 2018) (citing *Adamson v. Walgreens Co.*, 750 F.3d 73, 78 (1st Cir. 2014)).

Where, as here, an employee lacks direct evidence that an employer's actions were motivated by animus, courts apply the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91, 914 N.E.2d 59, 66 (2009) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. 1817).

Under that framework, 1) plaintiff must establish a prima facie case of discrimination, 2) defendant may rebut that case by offering a legitimate, nondiscriminatory reason for its employment action, which would then require plaintiff 3) to produce evidence demonstrating that defendant's stated reason was a pretext. *Haddad*, 914 N.E.2d at 66 n.14; *Ingram v. Brink's, Inc.*, 414 F.3d 222, 230 (1st Cir. 2005).

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To establish a prima facie case of discrimination, plaintiff must demonstrate that

(1) [she is] a member of a protected class; (2) [she is] qualified for [her] job; (3) [she] suffer[ed] an adverse employment action at the hands of [her] employer; and (4) [there is] some evidence of a causal connection between [her] membership in a protected class and the adverse employment action.

Garmon v. Nat'l R.R. Passenger Corp., 844 F.3d 307, 313 (1st Cir. 2016) (quoting *Bhatti v. Trs. of Bos. Univ.*, 659 F.3d 64, 70 (1st Cir. 2011)).

Once a prima facie case has been stated, the burden shifts to defendant to rebut the presumption of discrimination by offering a legitimate, nondiscriminatory reason for its employment action. *See Blare v. Husky Injection Molding Sys. Boston*, 419 Mass. 437, 646 N.E.2d 111, 115 (1995). If defendant does so, plaintiff must then adduce evidence demonstrating that defendant's stated reason was pretextual. *Id.* at 116-17.

Defendant asserts that plaintiff cannot state a prima facie case because 1) she was performing below expectations 2) she did not suffer an adverse employment action but, rather, resigned and 3) her position was ultimately filled by someone similar in age. Because the Court agrees that plaintiff did not suffer an adverse employment action, it finds that plaintiff has not stated a prima facie case and will, for the following reasons, allow summary judgment for defendant.

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The parties do not dispute that on September 11, 2020, Walsh resigned from her position at HNTB. Plaintiff contends, however, that her resignation resulted from a constructive discharge because 1) she was relieved of certain duties 2) the workplace environment was intolerable and 3) she would have been terminated anyway.

To establish a claim of constructive discharge, plaintiff must demonstrate that

conditions were so intolerable that they rendered a seemingly voluntary resignation a termination.

Torrech-Hernandez v. Gen. Elec. Co., 519 F.3d 41, 50 (1st Cir. 2008). In its inquiry, this Court must assess whether the working conditions were

so onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign.

Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000). It is insufficient to show merely that a plaintiff "suffered the ordinary slings and arrows that workers routinely encounter in a hard, cold world." *Torrech-Hernandez*, 519 F.3d at 50.

The First Circuit Court of Appeals ("the First Circuit") has also endorsed the doctrine that constructive discharge can be proved by demonstrating that an employer has acted in a manner that signals to a reasonable employee

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that she will be terminated. *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 96-97 (1st Cir. 2018). Thus, if an employee is “told *repeatedly* that she is not wanted and has no future” with the organization, the Court can infer a constructive discharge. *Id.* (emphasis in original).

a. Demotion

Defendant maintains that plaintiff was never demoted nor were her pay or responsibilities reduced.

Plaintiff agrees that her pay was not reduced and she was not formally demoted but asserts that her team leader and later manager, Vealey, relieved her of several job duties that she had performed throughout her career.

Walsh cites her deposition in which she attested that Vealey “started taking over things that we were working on . . . [h]e made it look like he was in charge” but neglects to finish the quote which also states, “if a project started to go sideways, all of a sudden it was back in our lap.” That testimony undermines the assertion that plaintiff’s responsibilities were reduced.

Plaintiff also asserts that she was required to refer some customer issues to Vealey, but such a minor shift in oversight does not amount to constructive discharge. As the First Circuit has explained,

[a] reduction in responsibility . . . unaccompanied
by diminution of salary or some other marked
lessening of the quality of working conditions

is not a constructive discharge. *Suarez*, 229 F.3d at 55.

*Appendix C***b. Hostile Work Environment**

Walsh also contends that she was constructively discharged as a result of an abusive workplace environment. As evidence, she cites: 1) comments by Vealey that she could “be replaced by younger, cheaper people” and that the company was “not getting its return investment” on her, 2) Clark refused to provide her with information on why her performance was purportedly lackluster and later told her to “shut up” and “stop asking” and 3) Clark told her that “she barely improved enough to get off the PIP.”

HNTB responds that Walsh’s evidence amounts to stray comments and, in any event, occurred 10 months or more prior to her resignation.

To establish a claim of constructive discharge plaintiff needs to adduce evidence of conditions “so onerous, abusive, or unpleasant” that a reasonable person would have felt compelled to resign. The Court notes that there is conflicting evidence as to when Vealey and Clark actually supervised plaintiff but, even attributing the offending remarks to her supervisor at the time, she has not supported a claim for constructive discharge on the theory of a hostile workplace based on the current record.

Vealey’s purported comment that Walsh could “be replaced by younger, cheaper people” and that the company was “not getting its return investment” on her may indeed evince age-related animus. Clark’s comments, which included telling plaintiff to “shut up”, were certainly rude, intended to reflect frustration with Walsh and

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could be interpreted as contributing to establish a hostile workplace.

The fact that these comments were made 10 months or more prior to plaintiff's decision to resign, however, severely undermines plaintiff's assertion that the workplace environment was so hostile that she has "no real choice but to resign." *Suarez*, 229 F.3d at 56. The temporal distance between those comments and the date of plaintiff's resignation suggests that plaintiff had the choice to resign and chose to stay. *See Landrau-Romero v. Banco Popular de Puerto Rico*, 212 F.3d 607, 613 (1st Cir. 2000) ("If a plaintiff does not resign within a reasonable time period after the alleged harassment, he was not constructively discharged.").

c. Termination

Finally, the First Circuit has recognized that constructive discharge claims can be established by demonstrating that plaintiff would have been discharged had she not resigned. Here, there is no genuine question of material fact that Walsh's employment was not in imminent jeopardy.

The parties agree that Walsh was never expressly told or asked to leave HNTB. Furthermore, the evidence establishes that plaintiff's remedial PIP period ended more than 10 months before she resigned. The lapse of time between the bulk of the disparaging comments made to her and the date of her resignation seriously impairs her claim. That plaintiff successfully completed the remedial

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process with her job intact also suggests that her job security was not immediately threatened. She definitely was not “told *repeatedly* that she is not wanted and has no future.” *See Rivera-Rivera*, 898 F.3d at 97 (emphasis in original).

The Court concludes that there is no credible evidence that plaintiff was constructively terminated. Because she has not demonstrated that she suffered an adverse action at the hands of HNTB, Walsh cannot state a prima facie case for age-discrimination.¹ Summary judgment on the claims pursuant to ADEA and M.G.L. c. 151B, § 4 will be granted to defendant.

2. Breach of Implied Covenant of Good Faith

Finally, defendant moves for summary judgment on plaintiff’s claim for breach of the implied covenant of good faith and fair dealing. This Court’s conclusion that plaintiff was not constructively terminated vitiates any such claim. *See McCone v. New England Telephone and Telegraph Co.*, 393 Mass. 231, 471 N.E.2d 47, 49 n.7 (1984).

Furthermore, the exclusivity provision in Chapter 151B casts significant doubt as to plaintiff’s ability to bring a common law claim for a purportedly discriminatory termination. *See* M.G.L. c. 151B, § 9 (“[A]s to acts declared

1. This Court is unpersuaded by plaintiff’s argument that her placement on a PIP was an adverse employment action. Walsh successfully completed the PIP period and thereafter she was neither demoted nor her pay reduced and any changes in her responsibilities were de minimis.

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unlawful by section 4, the administrative procedure provided in this chapter, shall, while pending, be exclusive”); *see also Laureano v. Legal Sea Foods, LLC*, 2013 WL 5587949, at *3 (D. Mass. Oct. 9, 2013). Accordingly, summary judgment will be entered for defendant.

ORDER

For the foregoing reasons, the motion of defendant, HNTB Corporation, for summary judgment (Docket No. 34) is, as to all counts, **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: December 21, 2023

**APPENDIX D — JUDGMENT IN A CIVIL CASE
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS,
FILED DECEMBER 21, 2023**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 22-10453-NMG

JOANNE WALSH,

Plaintiff,

v.

HNTB CORPORATION,

Defendant.

Filed December 21, 2023

JUDGMENT IN A CIVIL CASE

GORTON, D.J.

- ☐ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by the Court.** In accordance with the Memorandum and Order dated December 21, 2023,

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D. 44, granting defendant's Motion for Summary Judgment;

IT IS ORDERED AND ADJUDGED

Judgment for the defendant HNTB Corporation.

Robert M. Farrell, Clerk

/s/ Haley Currie
(By) Deputy Clerk

Dated: December 21, 2023

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**APPENDIX E — ORDER DENYING REHEARING
OF THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT, FILED MAY 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1499

JOANNE WALSH,

Plaintiff, Appellant,

v.

HNTB CORPORATION,

Defendant, Appellee.

Entered: May 13, 2026

Before

Barron, *Chief Judge*, Gelpí, Montecalvo, Rikelman,
Aframe, and Dunlap, *Circuit Judges*.

ORDER OF COURT

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that

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the petition for rehearing and the petition for rehearing
en banc be *denied*.

By the Court:

Anastasia Dubrovsky, Clerk