No. 24-1393

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHARMARKE Y. ABDI,

Plaintiff-Appellant

v.

HENNEPIN COUNTY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING VACATUR ON THE ISSUES ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

This appeal raises important questions about the scope of an employer's obligation to provide reasonable accommodations under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.*, and to refrain from retaliating against individuals who assert their rights under the ADA, *see* 42 U.S.C. 12203(a). The Department of Justice and the Equal Employment Opportunity Commission (EEOC) share enforcement responsibilities under Title I and the ADA's antiretaliation provision, *see* 42 U.S.C. 12117(a), 12203(c), and the EEOC has Title I rulemaking authority, *see* 42 U.S.C. 12116.

In addition, this appeal involves the proper standard for evaluating a Title VII discrimination claim under the Supreme Court's recent decision in *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024). The Department of Justice and the EEOC share enforcement responsibilities under Title VII, 42 U.S.C. 2000e-5(f)(1).

The United States files this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES AND APPOSITE CASES[1]

1. Whether a plaintiff must allege an "adverse employment action" separate and apart from the denial of a reasonable accommodation to state a failure-to-accommodate claim under Title I of the ADA, *see* 42 U.S.C. 12112(b)(5).

Dick v. Dickinson State Univ., 826 F.3d 1054 (8th Cir. 2016)

2. Whether the district court erred in failing to evaluate Abdi's ADA retaliation claim, *see* 42 U.S.C. 12203(a), under the standard set forth in *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006).

Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53 (2006)

Garrison v. Dolgencorp, LLC, 939 F.3d 937 (8th Cir. 2019)

3. Whether the district court erred in dismissing Abdi's race discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), based on the conclusion that neither a negative performance review nor a disciplinary investigation amounts to an "adverse employment action."

Muldrow v. City of St. Louis, 144 S. Ct. 967 (2024)

[1] The United States takes no position on any other issue in this appeal or on the ultimate merits of Abdi's claims.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. Congress enacted the ADA to create a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (footnotes omitted).

Title I's prohibitions on employment-based disability discrimination are set out at 42 U.S.C. 12112. Section 12112(a) provides a "[g]eneral rule" that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). Section 12112(b) makes clear that prohibited discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer. 42 U.S.C. 12112(b)(5)(A).

Under Title I, a "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. 12111(8). The statute defines "reasonable accommodation" to include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. 12111(9). The EEOC's implementing regulations provide three categories of reasonable accommodations:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. 1630.2(o)(1).

Title V of the ADA prohibits retaliation against any individual who "made a charge, testified, assisted, or participated in any manner in an investigation,

proceeding, or hearing under" the ADA. 42 U.S.C. 12203(a); 29 C.F.R. 1630.12(a) (applying Title V to the employment context). Individuals who have been retaliated against can seek the same type of relief provided in the underlying ADA title. *See* 42 U.S.C. 12203(c) (incorporating the remedies and procedures of Titles I, II, and III for retaliation claims brought under Title V).

2. Title VII of the Civil Rights Act of 1964 prohibits discrimination "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." 42 U.S.C. 2000e-2(a)(1) (emphasis added). The Supreme Court recently explained that "[t]o make out a Title VII discrimination claim, a [plaintiff] must show some harm respecting an identifiable term or condition of employment." *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024). In so holding, the Supreme Court rejected this Court's previously articulated standard for establishing a claim under this provision, explaining that a Title VII plaintiff need not show "significant," "serious," or "substantial" harm. *Ibid.*

B. Factual Background

According to the allegations in his complaint, plaintiff-appellant Sharmarke Abdi has been employed as a social worker by Hennepin County, Minnesota (the

County), for more than a decade. R.Doc.1-1, at 4.[2] Abdi is a Black person of Somali origin. R.Doc.1, at 4. He also has a physical disability that requires him to use a wheelchair. R.Doc.1-1, at 2.

In November 2020, Abdi requested as a reasonable accommodation a stand-up desk, which he alleges is necessary for him to "conduct his job duties" and to "keep his job and perform his work efficiently." R.Doc.1-1, at 4. The County denied the requested accommodation two months later, deeming it a "convenience." R.Doc.1-1, at 4. During the following two months, Abdi sought assistance from the County's ADA Coordinator and asked to appeal the County's denial of his requested accommodation. R.Doc.1-1, at 4. The ADA Coordinator refused to help, labeling Abdi's request as one of "convenience" and a "choice." R.Doc.1-1, at 4. In March 2021, Abdi contacted the ADA Coordinator's direct supervisor, objecting to the language that the coordinator had used to describe his request, which he felt attributed "fault" to him. R.Doc.1-1, at 4. The ADA Coordinator's supervisor filed a complaint against Abdi with the County's Human Services office. R.Doc.1-1, at 4.

[2] "R.Doc.__, at __" refers to the docket entry number and relevant pages of documents filed in the district court. Because Abdi is proceeding pro se, these citations do not include parallel citations to an appendix or addendum. *See* 8th Cir. R. 10A; 8th Cir. I.O.P. III.G.2.a.

Around the same time that Abdi initially requested a stand-up desk, one of his white coworkers accused him of conducting an onboarding training in Somali. R.Doc.1-1, at 4-5. Abdi's managers concluded that the allegation was false. R.Doc.1-1, at 4. In March 2021, the same coworker made another accusation against Abdi. R.Doc.1-1, at 5. Abdi emailed his direct supervisor, notifying her that the same coworker had made false accusations against him before. R.Doc.1-1, at 5. The supervisor did not respond to Abdi's email. R.Doc.1-1, at 5.

On March 30, 2021, Abdi received a performance review that repeatedly identified his "communication" as something that required improvement. R.Doc.1-1, at 5. Abdi asked if those comments related to his interactions with the ADA Coordinator and with the coworker who had complained about him. R.Doc.1-1, at 5. His supervisor said that she was aware of those interactions. R.Doc.1-1, at 5.

Two days later, the County opened a disciplinary investigation apparently related to both Abdi's attempts to secure a reasonable accommodation and his coworker's complaints against him. R.Doc.1-1, at 5. The investigation "resulted in an acquittal," but Human Services nevertheless recommended that Abdi receive "coaching." R.Doc.1-1, at 5. In August 2021, Abdi met with a senior official in Human Services about his ongoing fear that additional false accusations would be made against him. R.Doc.1-1, at 6. The official urged Abdi to "move on."

R.Doc.1-1, at 6. Abdi filed a charge of discrimination with the EEOC on August 2, 2021. R.Doc. 1-2.

Two months later, the County transferred Abdi to a new position in a different office. R.Doc.1-1, at 6. Although the new position was considered a "promotion," it came with a salary nearly $4000 lower than Abdi's prior position. R.Doc.1-1, at 6.

C. Procedural History

After receiving a notice of a right to sue on his charge of discrimination (R.Doc.1-3), Abdi filed a pro se complaint in the District of Minnesota (R.Docs.1, 1-1). Abdi alleged that the County violated the ADA by failing to reasonably accommodate his disability and by retaliating against him for seeking such an accommodation. R.Doc.1, at 3-4; R.Doc.1-1, at 1, 4-6, 10. The complaint further alleged that the County violated Title VII of the Civil Rights Act of 1964 by discriminating against him on the basis of race and national origin. R.Doc.1, at 3-4; R.Doc.1-1, at 1, 10. Abdi alleged that the County's discriminatory and retaliatory conduct was ongoing. R.Doc.1, at 4. Among other relief, Abdi sought compensatory and punitive damages. R.Doc.1-1, at 10.

The County moved to dismiss Abdi's complaint for failure to state a claim, which the district court granted. R.Doc.35, at 9. Regarding Abdi's failure-to-accommodate claim, the court held that it failed under this Court's case law

requiring Title I plaintiffs to show that "they suffered an adverse employment action because of their disability." R.Doc.35, at 5-6 (citing *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007), *cert. dismissed*, 552 U.S. 1136 (2008)). In the court's view, Abdi did not adequately plead an adverse employment action because "mere disciplinary investigations and poor evaluations are not adverse actions, as they do not necessarily have a tangible effect on an individual's employment, such as changing the employee's working conditions." R.Doc.35, at 6. And Abdi ultimately received a promotion, despite his negative performance review. R.Doc.35, at 6.

For largely the same reasons, the district court held that Abdi's ADA retaliation claim failed. Citing *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc), for the proposition that an "adverse employment action" is an element of such a claim, the court concluded that the disciplinary investigation and negative performance review were insufficient to satisfy that element. R.Doc.35, at 7-8.

Finally, regarding Abdi's Title VII claims, the district court held that he could not proceed on a theory of national-origin discrimination because the charge of discrimination that he filed with the EEOC did not allege such discrimination. R.Doc.35, at 5. And the court dismissed the race discrimination claim based on this Court's case law imposing a heightened "adverse employment action"

requirement on Title VII claims, which has since been invalidated by *Muldrow*. R.Doc.35, at 8-9 (quoting *Tolen v. Ashcroft*, 377 F.3d 879, 882 (8th Cir. 2004)).[3]

This timely appeal followed. R.Doc.37.

SUMMARY OF ARGUMENT

This Court should vacate the dismissal of and remand Abdi's Title I failure-to-accommodate claim, ADA retaliation claim, and Title VII race discrimination claim with instructions to the district court to reevaluate each of those claims under the proper standards. As explained below, the district court erred in dismissing those claims when it incorrectly required Abdi to plead heightened levels of adverse action.

1. Contrary to the district court's holding, Title I does not require a plaintiff asserting a failure-to-accommodate claim to show an "adverse employment action"

[3] The district court disregarded allegations that postdated the charge of discrimination that Abdi filed with the EEOC on August 2, 2021. R.Doc.35, at 4-5. Plaintiffs generally must satisfy administrative prerequisites before filing a Title I claim in federal court. *Lindeman v. Saint Luke's Hosp. of Kan. City*, 899 F.3d 603, 608 (8th Cir. 2018). This Court has "consistently held" that a plaintiff will be deemed to have satisfied those prerequisites "if the allegations of the judicial complaint are like or reasonably related to the administrative charges that were timely brought." *Wedow v. City of Kansas City*, 442 F.3d 661, 672 (8th Cir. 2006) (citation omitted). Before disregarding Abdi's allegations that postdated his charge of discrimination, the district court therefore should have analyzed whether those allegations were "like or reasonably related to" the administrative charges that he timely filed. The United States, however, takes no position on whether the district court's failure was error or independently warrants reversal, given that the court's application of an improper standard to plaintiff's ADA and Title VII claims is dispositive of this appeal.

separate and apart from the denial of a reasonable accommodation that implicates an employee's terms, conditions, or privileges of employment. To the extent that this Court's cases purport to consider an "adverse employment action" an element of a failure-to-accommodate claim, they treat denial of a reasonable accommodation as satisfying that element. The district court, therefore, should not have required Abdi to plead an "adverse employment action" separate and apart from the alleged denial of his request for a stand-up desk to perform his job.

2. The district court erred in analyzing whether the County's disciplinary investigation and negative performance evaluation of Abdi constituted sufficient "adverse employment action[s]" to state an ADA retaliation claim. R.Doc.35, at 7. In *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006), the Supreme Court rejected the notion that an adverse action in the context of a retaliation claim needed to be employment-related and held that an action was sufficiently adverse if it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 67-68 (citation and internal quotation marks omitted). But the district court dismissed Abdi's ADA retaliation claim for failure to allege a sufficiently adverse action without citing let alone applying *Burlington Northern*. This was error because a negative performance evaluation or a disciplinary investigation might well dissuade a reasonable employee from making or supporting a charge of discrimination.

3. The district court also erred when it held that neither the County's disciplinary investigation nor its negative performance evaluation of Abdi could be the basis for a Title VII violation. R.Doc.35, at 8. In *Muldrow v. City of St. Louis*, 144 S. Ct. 967 (2024), the Supreme Court recently rejected the standard that the district court applied to Abdi's Title VII claim, overturning this Court's prior precedent. *Id.* at 974. Per *Muldrow*, a Title VII discrimination claim does not require a showing of a "'significant,' 'material,' or 'serious' injury." *Id.* at 975 n.2. Rather, any "harm respecting an identifiable term or condition of employment" is actionable. *Id.* at 974. This holding reinforces the EEOC's guidance explaining that performance measures and discipline implicate "terms" and "conditions" of employment. Accordingly, this Court should vacate the district court's dismissal of Abdi's Title VII race discrimination claim and remand it for reevaluation under the standard set forth in *Muldrow*.

ARGUMENT

I. The denial of a reasonable accommodation that implicates terms, conditions, or privileges of employment is actionable under Title I of the ADA.

The district court erred in requiring Abdi to show an adverse employment action separate and apart from a denial of a reasonable accommodation to state a failure-to-accommodate claim under Title I of the ADA. *See* R.Doc.35, at 5-6.

Title I requires employers to make reasonable accommodations to ensure equal employment opportunities for qualified individuals with disabilities. The statute's text prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). To "discriminate against a qualified individual on the basis of disability" is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless doing so would impose an undue hardship. 42 U.S.C. 12112(b)(5)(A). Taken together, this means that, absent an undue hardship, an employer must reasonably accommodate the "known physical or mental limitations" of a "qualified individual" with a disability if the failure to do so would affect the "terms, conditions, and privileges of employment." *Cf. Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024) (holding that similar terms-or-conditions language in Title VII "is not used in the narrow contractual sense" and "covers more than the economic or tangible" (citations and internal quotation marks omitted)).

As the Tenth Circuit held in *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784 (10th Cir. 2020) (en banc), a failure-to-accommodate claim does not require proof of an "adverse employment action"

beyond the denial of a reasonable accommodation that relates to the terms, conditions, or privileges of employment. *Id.* at 792; *see also id.* at 811 (explaining that an employer's failure to make reasonable accommodations "necessarily—indeed, as a matter of logic and common sense—must involve (i.e., be 'in regard to') that qualified person's 'terms, conditions, and privileges of employment'" (quoting 42 U.S.C. 12112(a)). Indeed, Title I defines "reasonable accommodation" to include "acquisition or modification of equipment or devices," which can affect an employee's conditions of employment, even if the failure to provide such an accommodation would not result in some other adverse consequence. 42 U.S.C. 12111(9)(B); *see also* 29 C.F.R. 1630.2(o)(1)(ii)-(iii) (EEOC's implementing regulations requiring reasonable accommodations to enable qualified individuals with disabilities to perform their essential job functions and to enable employees with disabilities to enjoy equal benefits and privileges of employment).

In holding that Abdi did not state a failure-to-accommodate claim, the district court required Abdi to make an additional showing that he "suffered an adverse employment action because of [his] disability," such as a "change in salary, benefits, or responsibilities" that "constitutes a material employment disadvantage." R.Doc.35, at 5-6. Instead of analyzing whether Abdi's alleged denial of his request for a reasonable accommodation (a stand-up desk to perform his job) itself violated Title I, the court focused on his allegations about the

subsequent disciplinary investigation, his poor performance evaluation, and transfer to a new position—all acts that Abdi alleged independently violated the ADA and Title VII—and concluded that they did not amount to adverse employment actions because they did not "have a tangible effect on [Abdi's] employment, such as by changing [his] working conditions." R.Doc.35, at 6.[4]

The district court relied on *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007), *cert. dismissed*, 552 U.S. 1136 (2008), which, along with some of this Court's other cases, listed an "adverse employment action" among the elements of a prima facie failure-to-accommodate claim. R.Doc.35, at 5; *see also, e.g.*, *Kallail v. Alliant Energy Corp. Servs.*, 691 F.3d 925, 930 (8th Cir. 2012); *Canny v. Dr. Pepper/Seven-Up Bottling Grp.*, 439 F.3d 894, 900 (8th Cir. 2006); *Fenney v. Dakota, Minn. & E. R.R.*, 327 F.3d 707, 711 (8th Cir. 2003). That likely is because the phrase "adverse employment action" has "been used as a 'shorthand' for language that is materially similar to the terms-conditions-and-

[4] Although Abdi's transfer to a new position occurred two months after he filed his charge of discrimination with the EEOC (*see* R.Doc.1-1, at 6; R.Doc.1-2), the district court nonetheless addressed that allegation and concluded that it did not harm Abdi because it was a promotion. R.Doc.35, at 6. As mentioned above, *see* note 3, *supra*, the United States takes no position on whether the court should have considered this post-charge allegation in its analysis. But the United States notes that although the new position was characterized as a "promotion," it allegedly came with a $4000 reduction in annual pay. R.Doc.1-1, at 6. Even assuming this new position was relevant to Abdi's failure-to-accommodate claim, Title I expressly prohibits discrimination in "compensation" on the basis of disability. 42 U.S.C. 12112(a).

privileges-of-employment language of [Title I]." *Exby-Stolley*, 979 F.3d at 789. But the United States is aware of no case in which this Court has held that a failure-to-accommodate claim requires a showing of an adverse employment action beyond the denial of a reasonable accommodation.

On the contrary, this Court clarified in *Dick v. Dickinson State University*, 826 F.3d 1054 (8th Cir. 2016), that showing a "tangible change in working conditions" is only one way of satisfying any adverse-employment-action element of a Title I claim. *Id.* at 1060 (citation omitted). *Dick* squarely held that "[a]n employer is *also liable for committing an adverse employment action* if the employee in need of assistance actually requested but was denied a reasonable accommodation." *Ibid.* (emphasis added); *see also Peebles v. Potter*, 354 F.3d 761, 766 (8th Cir. 2004) (stating that "[t]he failure to make reasonable accommodations in the employment of a disabled employee is a separate form of prohibited discrimination" from disparate treatment based on disability). Thus, to the extent that this Court's cases purport to consider an "adverse employment action" an element of a failure-to-accommodate claim, they treat denial of a reasonable accommodation as satisfying that element. *Dick*, 826 F.3d at 1060; *see also Exby-Stolley*, 979 F.3d at 807. And no circuit holds a "predominant view" that a plaintiff must show an adverse employment action separate and apart from

the denial of a reasonable accommodation to bring a failure-to-accommodate claim. *Exby-Stolley*, 979 F.3d at 804-810 (collecting cases).[5]

The "tangible effect" standard that the district court used to analyze whether Abdi adequately alleged an adverse employment action appears to come from this Court's cases addressing Title I disparate treatment claims. *See, e.g.*, *Buboltz v. Residential Advantages, Inc.*, 523 F.3d 865, 868 (8th Cir. 2008) (explaining that the "adverse employment action" element of a Title I disparate treatment claim "is a tangible change in working conditions that produces a material employment disadvantage"). The Supreme Court recently rejected that standard in the context of Title VII disparate treatment claims, which implicate similar language proscribing discrimination related to the terms, conditions, and privileges of employment. *Muldrow*, 144 S. Ct. at 974; *see also* 42 U.S.C. 2000e-2(a)(1). But

[5] To be sure, Title I's reasonable-accommodation obligation is limited in other ways. For example, "[a]n employer only has to provide an accommodation that is reasonable, not an accommodation the employee prefers." *Faidley v. United Parcel Serv. of Am., Inc.*, 889 F.3d 933, 942-943 (8th Cir. 2018) (en banc) (citation and internal quotation marks omitted). Moreover, Title I does not require accommodations desired for mere employee convenience. *See* 29 C.F.R. Pt. 1630, App. at 422 (stating that Title I does not require "an employer . . . to provide as an accommodation any amenity or convenience that is not job-related . . . or . . . that is not provided to employees without disabilities"). Employers also have an affirmative defense under Title I if they can demonstrate that the requested accommodation would impose an "undue hardship." 42 U.S.C. 12112(b)(5)(A). But such fact-bound considerations typically cannot be assessed at the motion-to-dismiss phase and are not at issue in this appeal.

even if that standard were correct in the Title I disparate treatment context, it would not apply to a failure-to-accommodate claim for the reasons explained.

Accordingly, this Court should vacate the dismissal of Abdi's failure-to-accommodate claim and remand it to the district court for further proceedings.

II. The standard set forth in *Burlington Northern* governs ADA retaliation claims in the employment context.

The district court also applied the wrong standard to Abdi's ADA retaliation claim. *See* R.Doc.35, at 7-8.

Title V of the ADA specifically prohibits retaliation, providing that "[n]o person shall discriminate against any individual because such individual . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" the ADA. 42 U.S.C. 12203(a). In the employment context, "[r]etaliation claims under the ADA are analyzed identically to those brought under Title VII." *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 972 (8th Cir. 1999). To establish a prima facie case of retaliation under the ADA, an employee must show that "(1) [he] engaged in a statutorily protected activity, (2) the employer took an adverse action against [him], and (3) there was a causal connection between the adverse action and the protected activity." *Hill v. Walker*, 737 F.3d 1209, 1218 (8th Cir. 2013).

In *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006), the Supreme Court held that a different standard applies to Title VII retaliation

claims than applies to discrimination claims. The Court held that Title VII's "antiretaliation provision, unlike [that statute's] substantive provision, *is not limited to discriminatory actions that affect the terms and conditions of employment*." *Id.* at 64 (emphasis added); *see also* 42 U.S.C. 2000e-2 (Title VII's antidiscrimination provision); 42 U.S.C. 2000e-3(a) (Title VII's antiretaliation provision). In so holding, the Supreme Court expressly rejected this Court's then-governing standard for Title VII retaliation claims, which required plaintiffs to show an "ultimate employment decisio[n]," which it defined to mean acts "such as hiring, granting leave, discharging, promoting, and compensating." *Burlington N.*, 548 U.S. at 60, 67 (alteration in original; citation and internal quotation marks omitted) (citing *Manning v. Metropolitan Life Ins.*, 127 F.3d 686, 692 (8th Cir. 1997)); *see also AuBuchon v. Geithner*, 743 F.3d 638, 642 (8th Cir. 2014) (recognizing that *Burlington Northern* rejected this Court's prior, more "restrictive approach" to Title VII retaliation claims). Instead, the Supreme Court held that an adverse action, for retaliation purposes, is one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (citation and internal quotation marks omitted).

This Court has correctly recognized that the *Burlington Northern* standard governs ADA retaliation claims in the employment context. *See Garrison v.*

Dolgencorp, LLC, 939 F.3d 937, 942-943 (8th Cir. 2019).[6] The district court overlooked *Burlington Northern* and instead relied on an earlier case from this circuit, *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1999) (en banc), which listed "an adverse *employment* action" as an element of a retaliation claim. R.Doc.35, at 7 (emphasis added) (quoting *Kiel*, 169 F.3d at 1036). It then held that a disciplinary investigation and unfavorable performance evaluation "do not constitute an adverse action" for purposes of Abdi's retaliation claim (R.Doc.35, at 7), without analyzing whether either of those things "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," *Burlington N.*, 548 U.S. at 68 (citation and internal quotation marks omitted). This was error.

[6] In *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624 (8th Cir. 2016), a panel of this Court stated that "an adverse employment action in the [ADA] retaliation context is similar to an adverse action under the discrimination standard." *Id.* at 633. But *Kelleher*'s discussion of what constitutes an adverse action arguably was dicta because the panel held that even assuming the plaintiff established a prima facie retaliation claim, the plaintiff failed to establish that the employer's non-retaliatory justification for its actions was pretextual. *Ibid.* In any event, like the district court's decision in this case, *Kelleher* failed to address *Burlington Northern*'s contrary holding, undermining any precedential force the opinion might have on subsequent panels. *See Northeast Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (setting forth an exception to the prior-panel-precedent rule "in the unusual situation where binding circuit precedent overlooked earlier Supreme Court authority"); *accord Atlantic Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838 n.2 (Fed. Cir. 1992); *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. 1981).

Accordingly, this Court should vacate the dismissal of Abdi's retaliation claim and remand it for the district court to apply the *Burlington Northern* standard.

III. The Supreme Court's decision in *Muldrow* requires a remand of Abdi's Title VII race discrimination claim.

In dismissing Abdi's Title VII race discrimination claim, the district court applied a standard that the Supreme Court recently rejected in *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024). *See* R.Doc.35, at 8.

To establish a prima facie case of employment discrimination under Title VII, this Court's governing precedent at the time that the district court dismissed Abdi's claims required a plaintiff to show that: "1) the employee belonged to a protected class; 2) [he] was qualified to perform [his] job; 3) [he] suffered an adverse employment action; and 4) [he] was treated differently from similarly situated" employees outside of the protected class. *Turner v. Gonzales*, 421 F.3d 688, 694 (8th Cir. 2005). The district court dismissed Abdi's Title VII claim based on its conclusion that neither a negative performance review nor a disciplinary investigation constitutes an "adverse employment action." R.Doc.35, at 8-9 (citation omitted). Even if that was a proper application of this Court's then-

applicable precedent, the Supreme Court's decision in *Muldrow* requires a remand of Abdi's Title VII claim.[7]

Until recently, this Court defined "adverse employment action" in the Title VII context as "a tangible change in working conditions that produces a material employment disadvantage." *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022) (citation omitted), *vacated and remanded*, 144 S. Ct. 967 (2024). But in *Muldrow* the Supreme Court expressly rejected that standard. 144 S. Ct. at 974; *see also id.* at 975 n.2 ("[T]his decision changes the legal standard used in any circuit that has previously required 'significant,' 'material,' or 'serious' injury."). Instead, the Supreme Court held that any "harm respecting an identifiable term or condition of employment" gives rise to a Title VII discrimination claim. *Id.* at 974. As Justice Kavanaugh explained, this standard "appears to be a relatively low bar." *Id.* at 980 (Kavanaugh, J., concurring). And as the EEOC's Compliance Manual advises, a Title VII discrimination claim can be based on racially motivated performance evaluations or disciplinary investigations. EEOC Compl. Man. § 15-VII(B) (2006) ("Employers cannot permit race bias to affect work assignments, *performance measurements*, pay,

[7] Moreover, the district court failed to consider the $4000 reduction in Abdi's pay, *see* note 4, *supra*, as a potential adverse employment action. *See* R.Doc.35, at 7-8. Like Title I of the ADA, Title VII expressly prohibits discrimination in "compensation." 42 U.S.C. 2000e-2(a)(1).

training, mentoring or networking, *discipline*, or *any other* term condition, or privilege of employment." (emphases added)).

Accordingly, this Court should vacate the district court's dismissal of Abdi's Title VII claim and remand it for reevaluation under the standard set forth in *Muldrow*.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's dismissal of Abdi's ADA Title I failure-to-accommodate claim, ADA retaliation claim, and Title VII race discrimination claim and remand those claims for reevaluation under the proper standards.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5179 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). In addition, this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365. This brief also complies with Eighth Circuit Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Crowdstrike Endpoint Detection and Response (Version 7.5.17706.0) and is virus-free according to that program.

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Date: May 15, 2024

CERTIFICATE OF SERVICE

On May 15, 2024, I filed this brief with the Clerk of the Court by using the CM/ECF system. Appellee's counsel is a registered CM/ECF user, and service will be accomplished by the CM/ECF system. Appellant is proceeding pro se, and service will be accomplished by United States Postal Service Certified Mail:

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I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (ten copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

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