No. 05-683

In the Supreme Court of the United States

THOMAS MCADAMS, PETITIONER

v.

FRANCIS J. HARVEY

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the elimination of petitioner's position and his resulting transfer constituted an adverse employment action sufficient to provide a basis for a claim of retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*.

2. Whether petitioner failed to establish a causal connection between his protected activity and the challenged performance evaluation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is *reprinted in* 141 F. App'x 802. The opinion of the district court (Pet. App. 4-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2005. A petition for rehearing was denied on August 29, 2005 (Pet. App. 27). The petition for a writ of certiorari was filed on November 25, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Thomas McAdams filed the present action against the Secretary of the Army alleging, *inter alia*, that the agency retaliated against him for engaging in protected activity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 16-26.

During the times relevant to the present action, petitioner was employed at the Army's Technical Management Directorate (TMD). Pet. App. 5. TMD provides support to other agency organizations by assigning its personnel to offices that need technical support. *Ibid.* When such an office no longer requires the support of the TMD employee, it returns the employee to TMD so that the employee can be considered for other assignments. *Ibid.* TMD employees are not guaranteed that they will be assigned to any particular organization or task. *Id.* at 5-6.

In April 1997, petitioner was detailed to the Targets Management Office (TMO). Pet. App. 5. While at TMO, petitioner became Assistant Project Manager. *Ibid.* Petitioner alleges that one of his supervisors, Lieutenant Colonel Michelle Yarborough, subjected him to foul and offensive language at work. *Id.* at 6. Petitioner stated that in July 1999, he complained about the foul language to Yarborough's subordinate. *Id.* at 6-7. Petitioner did not otherwise report Yarborough's language at that time. *Id.* at 7.

On February 22, 2000, petitioner received a Mid-Point Review from Yarborough that he believed included unfavorable comments. Pet. App. 7. On March 7, 2000, petitioner filed a first step union grievance. *Ibid.* In response to the grievance, the Army told Yarborough to stop using foul language. *Ibid.* The agency's

response to the grievance also noted that, during the investigation of petitioner's complaint, comments from other employees suggested "a serious problem" with petitioner's conduct. *Id.* at 8 (citation omitted).

On April 13, 2000, the Army informed petitioner that he would be transferred from TMO back to TMD on April 23, 2000. Pet. App. 8. On May 4 or 5, 2000, petitioner filed a second-level grievance regarding his mid-year report, Yarborough's use of offensive language, and the abolishment of his position at TMO. *Ibid.* On July 11, 2000, however, petitioner withdrew that grievance. *Ibid.* On that day, Yarborough gave petitioner a performance appraisal that gave him a "B" rating. *Ibid.* The prior year, Yarborough had given petitioner an "A" rating. *Id.* at 6. Petitioner claimed that the lower performance rating potentially caused him monetary losses, because an "A" rating could have resulted in a salary increase and separate cash award. *Id.* at 8.

On July 27, 2000, petitioner contacted an Equal Employment Opportunity (EEO) counselor. Pet. App. 8. Petitioner filed informal and formal EEO complaints of discrimination with the agency. *Id.* at 9. After failing to obtain relief at the agency level, petitioner filed the present lawsuit in federal district court. *Ibid.* Petitioner contended, *inter alia*, that the Army retaliated against him when it abolished his position at TMO and transferred him back to TMD, and when he received a "B" performance rating. *Id.* at 9-10.

2. The district court granted summary judgment to the Army. Pet. App. 4-26. The court held that petitioner's "B" performance rating was not an adverse employment action sufficient to constitute actionable retaliation, and that petitioner failed to present a genuine issue of material fact with respect to whether there was

a causal link between his protected activity and the performance appraisal. *Id.* at 21-22. In addition, the court ruled that the elimination of petitioner's TMO position and his transfer back to TMD did not constitute an adverse employment action because his salary did not change, and, as a TMD employee, he was "subject to a transfer or return" to his base organization, whenever TMO determined it no longer needed his services. *Id.* at 23. In the alternative, the court held that accepting petitioner's testimony that Yarborough began the process of eliminating his position in July 1999, "there cannot be a causal connection between [his] complaint of discrimination and the decision to eliminate his position." *Ibid.*

Finally, the court ruled that even assuming *arguendo* that petitioner had demonstrated a prima facie case of retaliation, the Army had established legitimate, nondiscriminatory reasons for his "B" performance rating and his transfer back to TMD. Pet. App. 24. The court further held that petitioner failed to submit sufficient evidence upon which a reasonable juror could find that such reasons were a pretext, and thus, the Army was entitled to judgment as a matter of law. *Id.* at 25-26.

3. In an unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1-3. The court held that petitioner failed to demonstrate a causal link between his protected activity and the challenged performance rating, and that petitioner failed to establish that the elimination of his position and the resulting transfer to a new position constituted an adverse employment action. *Id.* at 3.

DISCUSSION

1. Petitioner contends (Pet. 5-11) that review is warranted to resolve a conflict in the circuits on the showing

that an employee must make to demonstrate an adverse employment action for purposes of a Title VII retaliation claim. In *Burlington Northern & Santa Fe Railway* v. *White*, cert. granted, No. 05-259 (Dec. 5, 2005) (oral argument scheduled for April 17, 2006), the Court granted a petition for a writ of certiorari to resolve that conflict.

This case involves Title VII's application to a federal employer, rather than a private employer, as in *Burlington*. Because of differences in the language between Title VII's federal employer and private employer provisions, the decision in *Burlington* would not necessarily affect the proper disposition of the petition in this case. See U.S. Amicus Br. at 19 n.5, *Burlington Northern*, *supra* (No. 05-259). Nonetheless, because of the overlap in the basic issue presented, it would be appropriate to hold the present petition pending the Court's decision in *Burlington*.

2. Petitioner further contends (Pet. 11-12) that a writ of certiorari is warranted to review the court of appeals' determination that he failed to establish a causal connection between his protected activity and the challenged performance rating. In particular, petitioner argues (Pet. 11) that his showing of a causal connection was sufficient because the Army's challenged action—the "B" performance rating—occurred 67 days after he first engaged in protected activity. See *ibid.* For several reasons, that contention does not warrant review.

First, petitioner does not assert that the court of appeals' holding that he failed to introduce sufficient evidence of causality conflicts with the holding of any other court of appeals or any decision of this Court. Second, the causality question is fact-bound and does not raise

any issue of recurring legal importance. As this Court has observed, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close." *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001) (internal quotation marks and citation omitted). The question whether a 67-day period between the protected activity and the adverse employment action is sufficient to raise an inference of causality simply involves the application of settled legal standards to the particular facts of this case.

Third, the decisions below do not present the question whether, as a categorical matter, a 67-day period between the protected activity and the adverse action can ever raise an inference of causality. The court of appeals did not address the issue of causality in those terms. Instead, it held that "[t]he district court properly determined that [petitioner] did not make out a *prima facie* case for retaliation because he failed to establish * * * a causal connection between his protected activity and his performance evaluation." Pet. App. 3. Nor did the district court reject petitioner's proof of causality on the ground that a 67-day period between the protected activity and the adverse action is always insufficient to create an inference of causality. Instead, the court held that no reasonable inference of causality could be drawn based on the particular circumstances in this case because the Army first noted problems with petitioner's performance in his mid-point review, before petitioner filed his first grievance. *Id.* at 22-23. Because the court of appeals did not squarely address the question petitioner seeks to present, and the district court

expressly based its decision on other grounds, the question petitioner seeks to raise is not presented.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Burlington Northern & Santa Fe Railway* v. *White*, No. 05-259, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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