No. 23-20441

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FERNANDO YATES,
Plaintiff-Appellant,

v.

SPRING INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing federal laws prohibiting workplace discrimination, including the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"). This appeal raises important questions regarding the correct standards for establishing a prima facie case of ADEA discrimination and for determining what conduct is actionable under the ADEA's anti-discrimination and anti-retaliation provisions. Because EEOC has a substantial interest in ensuring the proper application of the laws it enforces, EEOC offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES

1. Did the district court err by relying on this Court's prior "ultimate employment decision" standard for discrimination claims under Title VII—which this Court abandoned in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc)—to hold that the conduct Plaintiff challenged was not actionable discrimination under the ADEA?

2. Did the district court err by holding that Plaintiff failed to establish a prima facie case of ADEA discrimination as to his replacement as seventh-grade math teacher by a substantially younger teacher?

3. Did the district court err by failing to analyze separately whether the conduct Plaintiff challenged could constitute actionable retaliation under the ADEA?

STATEMENT OF THE CASE

A. Statement of the Facts[1]

Plaintiff Fernando Yates—a math teacher in his late sixties—filed this suit alleging that the Spring Independent School District ("the District") discriminated and retaliated against him in violation of the ADEA.[2] R.1; R.22; R.98 at 3. Yates began working at the District's Spring Leadership Academy during the 2021-2022 school year as one of two eighth-grade math teachers. R.87-2 at 2. A few weeks into the school year, the District

[1] EEOC presents these facts in the light most favorable to Yates, consistent with the standard of review for an award of summary judgment. *See Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 478 (5th Cir. 2008).

[2] Yates also brought claims under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. R.1, R.22, R.98 at 3. EEOC does not take any position on these claims or on any other issue in this appeal.

placed Yates on a "support plan," allegedly based on concerns with his performance and preparation. R.87-2 at 2, 7. The plan required Yates, among other measures, to have coaching sessions with other educators at least three times a week, observe another teacher modeling the first-period lesson daily, and receive regular walkthroughs from the instructional leadership team. R.87-2 at 2-3, 7.

Shortly after, the other eighth-grade math teacher resigned, and the District combined the two eighth-grade math classes and assigned a different teacher as the lead teacher. R.87-2 at 3. Around this same time, the District placed Yates on a second support plan, which required him to observe other teachers daily, complete observation notes and practice activities, and undergo daily coaching sessions with other educators. R.87-2 at 3, 9. This plan additionally entailed "moving Mr. Yates to provide 'push-in' services for the classroom of the 6th grade math teacher." R.87-2 at 3.

In this "push-in" role, Yates was no longer a lead teacher responsible for his own classroom but was instead located inside the sixth-grade math teacher's classroom working with some of that teacher's students. R.87-2 at 3. The District describes Yates' role as "work[ing] with smaller groups of students to deliver targeted instruction designed to help those students

catch up to their peers." R.87-2 at 3. Yates describes this role as effectively a long-term substitute position, where he was frequently called out of the classroom to monitor metal detectors and restrooms or to cover for other teachers' classrooms. R.87-1 at 9.

Yates served in this role for a few weeks, until the seventh-grade math teacher resigned. R.87-2 at 3. The District initially assigned Yates to fill that teacher's position but then replaced him soon after with Melissa Lugo, "a brand new teacher straight out of teach[er] college" who was in her twenties. R.87 at 21; R.87-1 at 14; R.87-2 at 3; R.89 at 35. Yates was sixty-seven years old at the time. R.87 at 21; R.89 at 35. The District moved Yates back to the sixth-grade "push-in" position, which he occupied for about two months. R.87-2 at 3.

In March 2022, however, after a dispute between Yates and the sixth-grade math teacher, the District assigned Yates to "report to the [school's] Media Center . . . while [it] developed a new support/intervention plan for him to continue doing push-in support." R.87-2 at 4. Yates began a new role providing support for three eighth-grade math students, whom he instructed separately in the library. R.87-1 at 35-36. The District also placed Yates on a new support plan that required him to undergo 45-minute

planning and 45-minute professional development sessions each day, review a series of videos and other resources, and submit lesson plans and other materials to the District for review. R.87-2 at 4, 44-46.

Yates requested to transfer to another school and began working at Bailey Middle School, also in the District, for the 2022-2023 school year. R.87-1 at 40-41; R.87-2 at 5. In October 2022, the District received complaints that Yates was yelling at students and not letting them use the restroom or visit the nurse's office. R.87-4 at 2. The District placed Yates on paid administrative leave for roughly four months while it conducted an investigation. R.87-4 at 2. Under the terms of this administrative leave, Yates could not visit his school or any District facility; participate in any District activities; or have any contact with students, parents, or colleagues. R.87-6 at 2. The District ultimately cleared Yates to return to work following the investigation. R.87-1 at 46; R.87-7 at 5. Yates still works at Bailey Middle School. R.87-1 at 46.

B. District Court's Decision

Yates alleged that the District discriminated and retaliated against him in violation of the ADEA by reassigning him to the "push-in" position,

putting him on a support plan, and putting him on administrative leave for four months. *See, e.g.*, R.89 at 30, 32-33.

The court granted summary judgment to the District. R.98. First, the court rejected Yates' ADEA discrimination claim on the ground that none of the employment actions Yates challenged amounted to actionable discrimination. R.98 at 5-9. The district court reached this conclusion by relying on this Court's former "ultimate employment decision" standard for Title VII discrimination claims, R.98 at 6-8, even though this Court had, weeks prior, issued its en banc decision in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc), abandoning this standard. First, the district court found Yates' reassignment not actionable because it did not amount to an "ultimate employment decision[] such as hiring, granting leave, discharging, promoting, or compensating." R.98 at 6 (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007)). Second, with respect to the support plans imposed on Yates, the court concluded that an "employer's decision to place an employee on a performance improvement plan is not an adverse employment action," quoting a pre-*Hamilton* decision that applied the "ultimate employment decision" standard. R.98 at 6 (quoting *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir.

2019)). Third, with respect to Yates' four-month administrative leave period, the court held that placing a plaintiff "on paid leave—whether administrative or sick—[is] not an adverse employment action," again quoting a pre-*Hamilton* decision that applied the "ultimate employment decision" standard. R.98 at 8 (quoting *McCoy*, 492 F.3d at 559) (alteration in original).

The district court also rejected Yates' ADEA discrimination claim on the separate ground that he failed to "make out a *prima facie* case of age discrimination." R.98 at 11. But, in reaching this conclusion, the court recited the elements required for a prima facie case of ADEA *retaliation*. *See* R.98 at 11 (stating that a plaintiff must show protected activity, an adverse employment action, and a causal link). The court then found that Yates failed to satisfy the "causal connection" element of this test as concerned his reassignment from the seventh-grade math teacher position to the "push-in" position[3] because he established only that his replacement "was

[3] It is not clear whether the district court was additionally analyzing the imposition of a support plan in concluding that Yates failed to establish a prima facie case. *See* R.98 at 11 (discussing the decision to replace Plaintiff with a younger teacher but then referencing the decision to place him on a support plan).

younger in age (in her 20's)" and adduced no evidence of "age-related statements" or of "a pattern or practice of hiring younger applicants." R.98 at 11. The court thus held that Yates could not establish a prima facie case of age discrimination. R.98 at 11.

The court acknowledged that Yates brought a retaliation claim, R.98 at 3, but did not separately discuss this claim. Accordingly, the court never considered whether the actions in question—the reassignment, support plans, and administrative leave—"well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," so as to constitute actionable retaliation under the governing standard. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The district court made several errors in granting summary judgment. First, the district court erred by relying on this Court's former "ultimate employment decision" standard for Title VII discrimination claims in holding that the conduct Yates challenged was not actionable discrimination under the ADEA. This was error because this Court had, weeks prior, issued its en banc decision in *Hamilton v. Dallas County*, 79

F.4th 494 (5th Cir. 2023) (en banc), retiring this "ultimate employment decision" standard. Under this Court's current precedent, a Title VII discrimination plaintiff need instead show discrimination that adversely impacts the "terms, conditions, or privileges" of that individual's employment in a more-than-*de minimis* manner. Under this standard, which applies with equal force to the ADEA's nearly identical text, a jury could reasonably find that the discriminatory conduct Yates challenges—reassignment to a "push-in" position, imposition of support plans, and being placed on paid administrative leave—is actionable.

Second, the court applied a muddled analysis in considering Yates' ADEA discrimination claim. Although purporting to analyze his discrimination claim, the court applied the wrong standard, relying on the prima facie case elements of an ADEA *retaliation* claim to conclude that Yates failed to establish a "causal link" as to his reassignment from a seventh-grade teacher position to a "push-in" position. Adding to the confusion, the court then held that Yates failed to establish a prima facie case because he did not proffer ageist comments or statistical proof of a pattern or practice of hiring younger applicants, suggesting the court understood it was analyzing an age discrimination claim (not a retaliation

claim). Viewed under the proper standard, Yates established a prima facie case of age discrimination by adducing evidence his replacement was about forty years younger than him.

Finally, despite seeming to recognize that Yates also brought an ADEA retaliation claim, the court failed to analyze that claim separately. The Supreme Court has instructed that the standards for actionable discrimination and retaliation are not coterminous. The court therefore should have considered whether the retaliatory conduct at issue was actionable under the distinct might-well-dissuade-a-reasonable-worker standard articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

ARGUMENT

I. A jury could find that Yates established an adverse action sufficient to sustain his ADEA discrimination claim.

A. The district court erred by relying on the pre-*Hamilton* "ultimate employment decision" standard to reject Yates' ADEA discrimination claim.

The ADEA makes it unlawful for an employer "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." 29 U.S.C.

§ 623(a)(1). This language is effectively identical to Title VII's language making it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of a protected characteristic. 42 U.S.C. § 2000e-2(a)(1). Courts interpret section 623(a)(1) of the ADEA and section 2000e-2(a)(1) of Title VII interchangeably. *Lorillard v. Pons*, 434 U.S. 575, 584 & n.12 (1978) (stating in reference to these provisions that "the prohibitions of the ADEA were derived *in haec verba* from Title VII"); *see also Elliott v. Grp. Med. & Surgical Serv.*, 714 F.2d 556, 557 n.1 (5th Cir. 1983) (noting that "Congress lifted the substantive provisions of Title VII almost verbatim in drafting the ADEA" and that courts thus "construe[] the two sets of legislation consistently").

In rejecting Yates' ADEA discrimination claim, the district court relied on this Court's former "ultimate employment decision" standard for Title VII discrimination claims, R.98 at 6-8, under which discrimination is actionable only if it amounts to an "ultimate employment decision[] such as hiring, granting leave, discharging, promoting, or compensating," *McCoy*, 492 F.3d at 559 (internal quotation marks omitted). But the district court did not acknowledge that this Court, weeks prior, had issued its en

banc decision in *Hamilton* abandoning the "ultimate employment decision" standard. 79 F.4th at 497 (concluding that the phrase "ultimate employment decision" "appears nowhere in the statute and . . . thwarts legitimate claims of workplace bias"). In *Hamilton*, this Court held that a plaintiff need not show "discrimination with respect to an 'ultimate employment decision'" but instead only "that [he] was discriminated against, because of a protected characteristic, with respect to . . . the 'terms, conditions, or privileges of employment'—just as the statute says." *Id.* at 506 (quoting 42 U.S.C. § 2000e-2(a)(1)). Under the plain language of the statute, this Court concluded, the plaintiffs' allegations of sex-based shift assignments easily stated a plausible claim of discrimination. *Id.* at 505.

Hamilton recognized that Title VII "does not permit liability for de minimis workplace trifles" but declined to address "the precise level of minimum workplace harm" necessary to sustain a discrimination claim. *Id.* Subsequently, in *Harrison v. Brookhaven School District*, 82 F.4th 427 (5th Cir. 2023), this Court recognized that a plaintiff must show "an adverse action" and "something more than a *de minimis* harm borne of that action" to establish unlawful discrimination, *id.* at 431. In discussing this *de minimis* threshold, *Harrison* adopted the Sixth Circuit's approach in *Threat v. City of*

Cleveland, 6 F.4th 672 (6th Cir. 2021), which explained that a discrimination claim must "involve[] a meaningful difference in the terms of employment and one that injures the affected employee," rather than "differential treatment that helps the employee or perhaps even was requested by the employee," *Harrison*, 82 F.4th at 431 (quoting *Threat*, 6 F.4th at 678).

This Court's analysis of Title VII in *Hamilton* and *Harrison* applies with equal force to the ADEA's nearly identical text, *supra* p. 11 (explaining that courts construe the two statutes consistently), and thus governs the analysis of Yates' ADEA discrimination claim.

B. Under the correct standard, a jury could reasonably find that each of the employment actions Yates challenged amounts to actionable age discrimination.

Under the standard articulated in *Hamilton* and *Harrison*, a jury could reasonably find that each of the discriminatory actions at issue—reassigning Yates from a lead-teacher position to a "push-in" position, placing him on support plans, and putting him on administrative leave for roughly four months[4]—constitutes actionable discrimination.

[4] The district court also concluded that being assigned to teach "at risk" or "special needs" students and receiving feedback from other teachers did not constitute actionable discrimination. R.98 at 7-9. Yates' submissions do not appear to complain that he was assigned to work with "at-risk" or

1. Reassignment to "push-in" position

First, a jury could find that reassigning Yates from a lead-teacher position to a "push-in" position adversely impacted the "terms" or "conditions" of his employment in a more-than-*de minimis* manner. *See Harrison*, 82 F.4th at 431. The reassignment changed the position Yates held and the nature of his work responsibilities in a manner that neither "help[ed]" him nor "was requested by" him. *Id.* (quoting *Threat*, 6 F.4th at 678). As a result of the reassignment, Yates no longer served as a lead teacher responsible for his own classroom of students but instead provided instructional support for a small subset of students in other teachers' classrooms. R.87-2 at 3. As Yates explained, he had been "teaching the eighth graders, the whole room," but after the reassignment he was just "ask[ed] . . . to pull out" a few students. R.87-1 at 36. And, according to Yates, his "main job" was not even "giving support to the[se] students."

"special needs" students or to assert any adverse action stemming from teacher feedback (as distinct from the support plans imposed on him). *See, e.g.*, R.89 at 30 (complaining not about the type of students he was assigned to teach but instead that he was assigned "to metal [detector] and bathroom monitoring" and was not "the teacher of record anymore"); R.89 at 31-32 (complaining about support plans but not associated teacher feedback). EEOC therefore does not address either of these issues.

R.87-1 at 10. Instead, Yates testified that "I became a long-term substitute. . . . I was demoted. [My job] became to check the restroom, . . . to check the backpacks of the students. . . . [T]hey didn't even care about what I was doing there or not doing there in the classroom." R.87-1 at 9.

The reassignment changed not only Yates' duties but also the setting where he performed them. Yates moved first from his own classroom to another teacher's classroom and then to the school's Media Center. R.87-2 at 3-4. With this arrangement, Yates explained, he "didn't have a place to stay" or a place to "put . . . [his] things." R.87-1 at 9.

Such changes, a jury could reasonably conclude, adversely impacted the "terms" and "conditions" of Yates' employment in a more-than-*de minimis* way. As the United States recently expressed to the Supreme Court in an amicus curiae brief about transfer decisions, "[f]ormally transferring an employee from one job to another plainly alters the attendant circumstances of employment" and thus falls within the ambit of the statute. Br. of the United States as Amicus Curiae at 11, *Muldrow v. City of St. Louis*, No. 22-193, 2023 WL 5806264 (S. Ct. Sept. 5, 2023).[5] Indeed, "it is

[5] On December 6, 2023, the Supreme Court will hear argument in *Muldrow* to consider whether "Title VII prohibit[s] discrimination in transfer

difficult to imagine a more fundamental term or condition of employment than the position itself." *Chambers v. District of Columbia*, 35 F.4th 870, 874 (D.C. Cir. 2022) (en banc) (citation omitted).

Just as the shift assignments in *Hamilton* were actionable because they impacted "[t]he days and hours" the plaintiffs worked, which "are quintessential 'terms or conditions' of one's employment," 79 F.4th at 503, so too is a job reassignment actionable where it impacts the duties one performs and the setting where they are carried out. The "where" and "what" of a job—the location where the employee works, the position he holds, and the particular work he is required to do—all fall squarely within the "terms" and "conditions" of employment. *See Threat*, 6 F.4th at 677 ("How could the *when* of employment not be a *term* of employment?"). A typical employee asked to describe his "terms" or "conditions" of employment would almost surely mention where he works and what he does. *See* EEOC Compliance Manual § 15-VII(B)(1), 2006 WL 4673430 (2006) ("Work assignments are part-and-parcel of employees' everyday terms and

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decisions absent a separate court determination that the transfer decision caused a significant disadvantage[.]" *See Muldrow v. City of St. Louis*, 143 S. Ct. 2686 (2023) (mem.).

conditions of employment . . . ."). A jury could thus reasonably find that Yates' reassignment amounted to actionable discrimination.

2. Support plans

A jury could also conclude that subjecting Yates to multiple support plans adversely impacted the "terms" or "conditions" of his employment in a more-than-*de minimis* manner.

The support plans altered the expectations and requirements of Yates' employment by mandating that he undertake a series of time-consuming corrective actions. For example, one support plan required him to engage in 45-minute planning and 45-minute professional development sessions each day and to submit lesson plans and other materials to the District for review. R.87-2 at 44-46. The other support plans required him to undergo coaching and observation sessions either daily or multiple times per week and to complete observation notes and practice activities. R.87-2 at 2-3, 7, 9. Yates explained that he found it "humiliating" that the District was requiring him to practice tasks that he had already "been doing . . . . I have been doing lesson plan[s], you know, when I have been teaching there and [the District] is asking me to do it" again pursuant to the support plans. R.87-1 at 36.

A jury could reasonably conclude on this record that these support plans altered the "terms" and "conditions" of Yates' employment by requiring him to undertake a number of burdensome corrective measures as a term of his continued employment with the District.

3. Administrative leave

A jury could also find that placing Yates on administrative leave for approximately four months had an adverse and more-than-*de minimis* impact on the "terms" and "conditions" of his employment.[6]

A work suspension upends the most fundamental condition of employment: that an employee report to the workplace to complete job-related tasks. *See Webster's New International Dictionary of the English Language* 556 (2d ed. 1957) (defining "conditions" to include "[a]ttendant circumstances . . . as [in] living *conditions*; playing *conditions*"); *see also* EEOC Compliance Manual § 15-VII(B)(7), 2006 WL 4673430 (2006) (advising that "rules and policies regarding discipline . . . must be enforced

[6] It is not clear from Yates' pro se appellate brief whether he continues to pursue a discrimination claim based on the mandatory administrative leave. Because this Court construes the filings of pro se litigants liberally, *see, e.g.*, *Collins v. Dall. Leadership Found.*, 77 F.4th 327, 330 (5th Cir. 2023), and because the district court ruled on this issue, R.98 at 8, EEOC addresses it here.

in an evenhanded manner, without regard to" protected characteristics). Yates' roughly four-month administrative-leave period had precisely this effect. Under the terms of his leave, Yates could not return to his school or any other District facility; participate in any District activities; or have any contact with students, parents, or colleagues. R.87-6 at 2. In short, Yates could not carry out the duties central to his role as a teacher. And Yates testified that the effect was detrimental and unwelcome for him: he became depressed, sought medical treatment, and began taking medication during his administrative leave. R.87-1 at 46-47; *see Harrison*, 82 F.4th at 431 (looking to whether differential treatment "was requested by the employee") (quoting *Threat*, 6 F.4th at 678).

That Yates received pay during his leave does not alter this analysis. The phrase "terms, conditions, or privileges of employment" "is not limited to economic or tangible discrimination." *Hamilton*, 79 F.4th at 504 (internal quotation marks omitted). It "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment . . . in employment.'" *Id.* at 501 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*,

523 U.S. 75, 78 (1998)). This language, a jury could find, easily encompasses Yates' work suspension.

II. Yates established a prima facie case of age discrimination as to his reassignment from the seventh-grade teacher position to the "push-in" position.

The district court applied the wrong legal standard in concluding that Yates failed to establish a prima facie case of age discrimination. Rather than applying the elements of a prima facie case of ADEA *discrimination*, the court erroneously recited the elements of an ADEA *retaliation* claim. Specifically, the court cited *Holtzclaw v. DSC Communications Corp.*, 255 F.3d 254, 259 (5th Cir. 2001), an ADEA retaliation case, for the proposition that "a *prima facie* case under the ADEA" requires a plaintiff to "show: (1) that he engaged in a protected activity, (2) that there was an adverse employment action, and (3) that a causal link existed between the protected activity and the adverse employment action," R.98 at 11. But a prima facie case of ADEA *discrimination* instead requires a plaintiff to show that he was: (1) discharged (or here demoted); (2) qualified for the position he occupied; (3) within the protected class at the time of the demotion; and (4) either i) replaced by someone outside the protected class, ii) replaced by

someone younger, or iii) otherwise demoted because of his age. *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 378 (5th Cir. 2010).

There does not appear to be any meaningful dispute that Yates satisfied these elements as concerns his reassignment from the seventh-grade math teacher position to the "push-in" position. The District did not argue that Yates was unqualified for the position he initially occupied. R.87 at 20-22. And there is no dispute that Yates (at sixty-seven years old) was within the protected class at the time of his reassignment and was replaced by someone outside the protected class: a "brand new teacher straight out of teach[er] college" in her twenties. R.87 at 21; R.87-1 at 14; R.87-2 at 3; R.89 at 35.

The district court reached a contrary conclusion based on its incorrect understanding of the governing standard. The court stated that the fact that Yates' replacement "was younger in age (in her 20's)" was "[in]sufficient to establish [the] causal connection" element, R.98 at 11, but the "causal connection" element derives from an ADEA *retaliation* rather than *discrimination* claim. *Supra* p. 20. To the extent the court meant to say that this age difference could not give rise to an inference of age *discrimination*, this too is incorrect because the fact that a plaintiff was "replaced by

someone outside the protected class" (or someone substantially younger) *is* sufficient to establish the fourth element of a prima facie case of age discrimination. *Jackson*, 602 F.3d at 378; *see also O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996). Such a showing satisfies this element without any need for evidence of "age-related statements" or "statistical proof" of "a pattern or practice of hiring younger applicants," contrary to the district court's conclusion otherwise. R.98 at 11. The district court thus erred by concluding that Plaintiff failed to establish a prima facie case of age discrimination as concerns his replacement as seventh-grade math teacher.[7]

[7] To be sure, establishing the prima facie case is not the end of the inquiry. It simply "places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (internal quotation marks omitted). If the defendant meets this burden, "the presumption raised by the prima facie case is rebutted, and drops from the case," *id.* at 507 (internal quotation marks omitted), and the burden reverts to the plaintiff to show that the employer's articulated reasons are a pretext for discrimination, *see Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-07 (1973).

III. The district court erred by failing to consider whether the actions Yates challenged could sustain his ADEA retaliation claim.

The district court acknowledged that Yates brought a retaliation claim, R.98 at 3, but it did not analyze this claim or consider whether the conduct Yates challenged amounted to actionable retaliation.[8] This was error because the adverse-action standard for an ADEA retaliation claim differs from that for an ADEA discrimination claim.

In the context of a Title VII retaliation claim, the Supreme Court held in *Burlington Northern* that a plaintiff can establish an adverse action by showing "that a reasonable employee would have found the challenged action materially adverse," that is, that "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (internal quotation marks omitted). And, the Supreme Court explained, the scope of actionable retaliation is "not coterminous" with the scope of actionable discrimination. *Id.* at 67. This Court has applied *Burlington Northern*'s analysis to ADEA retaliation claims. *See Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498-99 & n.5 (5th Cir. 2015).

[8] It is not clear whether Yates is pursuing his retaliation claim on appeal. In light of the liberal standard applicable to pro se filings, *Collins*, 77 F.4th at 330, and in an effort to be helpful to the Court, EEOC addresses this issue.

The district court, however, did not separately analyze Yates' ADEA retaliation claim or consider whether the conduct Yates challenged met the standard articulated in *Burlington Northern*. This Court should thus remand Yates' retaliation claim for application of the proper standard.

CONCLUSION

For the foregoing reasons, the grant of summary judgment as to the claims addressed above should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4,885 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) and Fifth Circuit Rule 32.1 because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 ProPlus with Book Antiqua 14 point.

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