No. 20-12886

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Artur Davis,

Plaintiff-Appellant,

v.

Legal Services Alabama, Inc., et al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Middle District of Georgia
Case 2:18-cv-00026, Hon. R. Austin Huffaker, Jr.

PETITION FOR REHEARING EN BANC

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January 6, 2022

No. 20-12886

Artur Davis, Plaintiff-Appellant

v.

Legal Services Alabama, Inc., et al., Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 26.1-1, Plaintiff-Appellant Artur Davis states that the following people and entities have an interest in the outcome of this appeal:

Adams, Jerusha, U.S. Magistrate Judge

Georgetown Law Appellate Courts Immersion Clinic

Brasher, Andrew L., U.S. Circuit Judge

Brown, Whitney R.

Buckley Beal

Buckley, Edward Daniel

Davis, Artur

Huffaker, Jr., Austin, U.S. District Judge

Legal Services Alabama, Inc.

Lehr Middlebrooks Vreeland & Thompson, P.C.

Mendelsohn, Kenneth J.

Meth, Madeline

Walker, Susan Russ, U.S. Magistrate Judge

Watkins, William Keith, U.S. District Judge

Vreeland, II, Albert L.

Wolfman, Brian

January 6, 2022

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RULE 35-4(C) CERTIFICATE

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Does the phrase "terms, conditions, or privileges of employment" in Title VII and Section 1981, 42 U.S.C. § 2000e-2(a)(1); *see* 42 U.S.C. § 1981(a), (b), reach paid suspensions motivated by an employer's discrimination or do Title VII and Section 1981 cover only discriminatory suspensions that cause pocketbook harms?

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INTRODUCTION AND RULE 35(B)(1) STATEMENT

Federal anti-discrimination law forbids discrimination as to "compensation, terms, conditions, or privileges of employment." *E.g.*, 42 U.S.C. § 2000e-2(a)(1). On its face, this standard reaches economic and non-economic harms. But rather than applying Title VII and Section 1981's statutory text, the panel here held that, even when motivated by discrimination, a workplace suspension is actionable only if it results in a diminution in pay or if the plaintiff suffers some additional harm. Panel Op. 10.

The panel decision flouts Title VII's text, undermines Congress's purposes, creates intra-circuit confusion, and conflicts with other circuits' authoritative decisions. *See* Fed. R. App. P. 35(b)(1)(B) (noting that circuit conflict is a basis for en banc review). The United States agrees with Plaintiff-Appellant Artur Davis that limiting federal anti-discrimination statutes to covering economic harms is wrong. *See, e.g.*, Br. for United States as Amicus Curiae, *Peterson v. Linear Controls, Inc.*, No. 18-1401, 2020 WL 1433451, at *6 (Mar. 20, 2020), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.) (U.S. *Peterson* Br.).

Because only the en banc Court can reconsider binding circuit precedent, the panel could not properly resolve the exceptionally important issue presented by this appeal: whether "terms, conditions, or privileges of employment" encompass only adverse employment decisions that cause pocketbook injuries or other similarly significant harms, or whether, as

Plaintiff-Appellant maintains, Title VII and Section 1981 prohibit all workplace suspensions motivated by discriminatory intent.

ISSUE PRESENTED

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual" with respect to "compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. § 2000e-2(a)(1). Section 1981 of the Civil Rights Act of 1866 provides "[a]ll persons" in the United States "the same right" "to make and enforce contracts" as is "enjoyed by white citizens," including "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a), (b).

The issue presented is whether "terms, conditions, or privileges of employment" encompass a paid suspension arising from an employer's discriminatory application of disciplinary policies.

COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff-Appellant Artur Davis sued Defendants for violations of Title VII, 42 U.S.C. § 1981, and Alabama law. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. § 1367(a). That court's July 16, 2020 order granted summary judgment to Defendants as to all claims. Doc. 50. Plaintiff filed a timely notice of appeal on July 31, 2020. Doc. 51. With jurisdiction under 28 U.S.C. § 1291, a panel of this Court affirmed. Panel Op. 19.

STATEMENT OF THE CASE

This appeal arises from a grant of summary judgment, and this Court must "view the evidence and draw all reasonable inferences" in Davis's favor. Panel Op. 3 n.1. Because Davis does not seek rehearing of his constructive-discharge or defamation claims, we focus here solely on his suspension-related discrimination claims.

I. Factual background

In 2016, Plaintiff-Appellant Artur Davis, a former United States Congressman, was hired by Defendant-Appellee Legal Services Alabama, a non-profit providing civil legal services for low-income Alabamians, as the organization's first Black Executive Director. Doc. 45-10 at 1; Doc. 45-2 at 6, 67.[1]

During the hiring process, Karen Jones, a Black board member on the search committee warned Davis that LSA had a history of "racial issues." Doc. 45-2 at 7. Black employees had often been frustrated in their efforts to be promoted, and LSA had a pattern of firing Black staff. *Id.* According to Jones, the search committee was divided: Black search-committee members favored Davis, but white members mostly backed a white corporate attorney whom Jones described as less qualified. *Id*. at 6. Jones listed Defendant-Appellee Alex Smith as among the white Board members who did "not like" Davis and did not support hiring him. *Id.*

[1] Pin cites are to the page numbers generated by the CM/ECF system.

Once hired as Executive Director, Davis experienced race-related issues with several LSA staff, including complaints that he failed to hire more senior-level Black staff and that he favored white employees in internal disputes between Black and white staff. *See* Doc. 45-10 at 2, 5, 6-7. LSA's then-Chief Financial Officer, Gary Gilmore, described a climate that included some subordinates acting "openly hostile to Davis, in a way [that Gilmore] had rarely seen in … [his] career." Doc. 45-12 at 2. Gilmore recalled two LSA employees who would cut Davis off, act "disrespectful," and "even refus[e] to look at him while he was talking." *Id.* Despite these challenges, Gilmore observed that Davis "was always a professional, always polite," and respectful when handling disagreements. *Id.* Eventually, in August 2017, three LSA employees complained to the Board's Executive Committee about Davis.

On August 18, 2017, as Davis left work, Defendant-Appellees LaVeeda Morgan Battle and Alex Smith, then the Board's chair and vice chair, informed Davis that the Board's Executive Committee had voted to suspend him with pay pending an internal investigation. Doc. 45-10 at 8. They purported to base the suspension on complaints that Davis had created a hostile environment for certain employees. Doc. 41-1 at 3.

LSA protocol called for the Board's Personnel Committee to gather facts and evaluate complaints against executive leadership before the Board's Executive Committee considered discipline. *See* Doc. 45-4 at 77. But this protocol was bypassed when LSA suspended Davis. *See* Doc. 45-10 at 8.

In contrast, months earlier, when the white Director of Operations was the subject of written complaints alleging that her management style created a hostile environment for three employees, Doc. 45-11 at 1; Doc. 45-10 at 2, LSA followed its protocol, forwarding the complaints to the Board's Personnel Committee for preliminary review prior to recommending action by the full Board, Doc. 45-4 at 48. Ultimately, LSA took no disciplinary action against the white Operations Director. Doc. 45-10 at 2.

When Davis was suspended, LSA posted a guard in front of its building, physically preventing Davis from entering the office and causing reputational harm by implying that he posed a security threat. Doc. 45-2 at 35-36. Davis's suspension occurred just days before LSA held a reception for the organization's primary funder, the federal Legal Services Corporation, to which local judges, lawyers, and journalists were invited. Doc. 45-12 at 3. The Board President instructed staff to respond to inquiries by attendees about Davis's absence by stating that it involved an "internal matter" that they "could not discuss." *Id.* Consequently, Davis learned about rumors in the press and within the organization that his dismissal must have been connected to sexual or financial misconduct. Doc. 45-2 at 37.

On August 22, 2017, Davis resigned. Doc. 45-10 at 8.

II. Procedural background

Davis sued LSA, Battle, and Smith, alleging, as relevant here, race discrimination under Section 1981 and Title VII, and defamation claims. The

district court granted Defendants' motion for summary judgment. The court held that Davis had not been subjected to actionable discrimination because he had suffered no "adverse employment action" under this Court's precedent. Doc. 49 at 11-16. According to the court, being placed on paid leave is not an objectively harmful employment decision like discriminatory "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *See id.* at 13-14. Although "Davis may have been offended" by the suspension, the court held that "an employee's subjective view" is irrelevant. *Id.* at 13.

The panel affirmed, acknowledging that whether a discriminatory paid suspension is actionable under Title VII and Section 1981 was a question of first impression. Panel Op. 8-9. The panel held that Davis's suspension-related discrimination claims could not proceed because LSA had not subjected Davis to an adverse employment action, which are employer decisions "that affect continued employment or pay—things like terminations, demotions, suspensions without pay and pay raises or cuts—as well as other things that are similarly significant standing alone." Panel Op. 8 (citing *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020)). This holding, according to the panel, aligned with sister circuits' precedent that "a simple paid suspension is not an adverse employment action." Panel Op. 10. The panel maintained that none of the additional circumstances surrounding Davis's suspension "escalated" the paid suspension to "an adverse employment action." Panel Op. 10.

REASONS FOR GRANTING EN BANC REVIEW

I. The panel decision is wrong.

A. The panel decision disregards the statutory text and authorizes discrimination prohibited by Title VII and Section 1981.

Although the phrase "adverse employment action" appears nowhere in Title VII or Section 1981's text, this Court requires plaintiffs alleging disparate treatment to prove that they suffered one. *See, e.g.*, *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238-39 (11th Cir. 2001).[2]

Under the adverse-employment-action doctrine, only "[t]angible employment actions" that "affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone" are actionable. *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020).

This interpretation—which led the panel to conclude that, even when motivated by discrimination, "a simple paid suspension" is not actionable, Panel Op. 10—is at war with Title VII's text and the Supreme Court's interpretation of the statute. Under Title VII, an employer may not

[2] This petition seeks rehearing for both Davis's Title VII and Section 1981 claims. The Title VII and Section 1981 liability standards are the same. *See, e.g.*, *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1256-57 (11th Cir. 2012). Therefore, to avoid redundancy, we refer below to Title VII alone, as did the panel in analyzing Davis's discrimination claims. *See* Panel Op. 7-8.

"discriminate" with respect to an individual's "compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. § 2000e-2(a)(1).

"It's not even clear that we need dictionaries to confirm what fluent speakers of English know" about the meaning of the ordinary English words contained in Section 703(a)(1), *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (Sutton, J.), and the definitions of the words "discriminate" "compensation," "terms," "conditions," and "privileges" are not ambiguous.

"Discriminate" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third New International Dictionary 647-48 (1961) (Webster's Third). "As used in Title VII, the term 'discriminate against'" thus "refers to 'distinctions or differences in treatment that injure protected individuals.'" *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59 (2006)).

"Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third 2358. A "condition," is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third 473. "Privilege" means to enjoy "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third 1805. These words, taken together, refer to "the entire

spectrum of disparate treatment"—the gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted). Title VII is thus not limited to employment practices that impose pocketbook injuries or those that employers or courts view as particularly harmful.

Quite the contrary, the statute establishes no minimum level of actionable harm. In using the phrase "terms, conditions, or privileges," "Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (emphasis added). Title VII thus "tolerates no racial discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

In sum, the statutory phrase "terms, conditions, or privileges" is a catchall for all incidents of an employment relationship, and the panel's contrary decision impermissibly "rewrite[s] the statute that Congress has enacted." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018).

Here, by handling complaints against Davis in a manner less favorable than how it addressed complaints against a white senior official, LSA treated Davis differently based on race, thus discriminating against him. Although the panel is correct that a "paid suspension can be a useful tool for an

employer to hit 'pause' and investigate when an employee has been accused of wrongdoing," Panel Op. 10, an employer, may not, consistent with Title VII, apply one disciplinary rule to a Black employee and another to a white one.

Employers thus retain the right to suspend employees accused of wrongdoing but not when the plaintiff can prove that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin—that is, the employer's actions must have been taken "because of" one of these protected characteristics, 42 U.S.C. § 2000e-2(a)(1); *see Tex. Dep't Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). That requirement, should not, however, be conflated with the distinct requirement that the employment practice must be "with respect" to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1); *see* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action was Materially Adverse or Ultimate*, 47 U. Kan. L. Rev. 333, 368 (1999).

Because proving that an employer acted with discriminatory intent can be a substantial burden, *see Burdine*, 450 U.S. at 257-59; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993), revisiting the panel's decision would not impose any unreasonable obligations on employers legitimately seeking to address employee misconduct, but, rather, would apply federal anti-discrimination law as it was written and intended.

Disciplinary actions including "reprimands, warnings, [and] suspensions" are terms or conditions of employment that cannot be discriminatorily imposed. EEOC Compl. Man., § 612.1, 2006 WL 4672691 (2006). As the Sixth Circuit recently explained, "the *when* of employment" must be a "*term* of employment." *Threat v. City of Cleveland*, 6 F.4th at 677; *see also* EEOC Compl. Man., § 613.3, 2006 WL 4672703 (2009).

By suspending Davis with pay, Defendants disciplined Davis and decided *when* Davis could (or in this case, could not) work, thus imposing new "terms" and "conditions" of employment. After Defendants suspended Davis, he could not have shown up the next day and performed his job, precisely because contrary terms and conditions were imposed by his employer. That LSA posted a security guard to enforce Davis's suspension, Doc. 45-2 at 35, underscores this point.

A benefit may be a privilege of employment even if it is not expressed in an agreement, but simply accorded by custom. *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). And an employment benefit "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.*

Here, LSA's disciplinary protocol called for complaints against executive leadership to be sent to the Board's Personnel Committee before the Executive Committee considered imposing discipline. *See* Doc. 45-4 at 77. LSA followed this disciplinary protocol when a white senior LSA official was the subject of complaints but denied Davis, who is Black, this privilege of

employment when similar complaints were lodged against him. Doc. 45-11 at 1; Doc. 45-4 at 48; Doc. 45-10 at 2, 8-9.

B. The panel decision creates intra-circuit confusion and conflicts with out-of-circuit precedent even under an impermissibly narrow understanding of Title VII and Section 1981.

As shown, the conduct at issue here altered the "terms, conditions, or privileges" of Davis's employment on a discriminatory basis, which is all that Title VII's text demands. But even if this Court is disinclined to revisit the conflict between Title VII's text and the judicially-created requirement that employees prove an "adverse employment action," the Court's existing, controlling precedent demonstrates that a discriminatory paid suspension causing reputational harm qualifies. Indeed, the Court has consistently rejected a "bright-line test for what kind of effect on the plaintiff's 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable." *Davis*, 245 F.3d at 1238. The "adverse action" framework is meant simply to separate "substantial" from "trivial" harms. *Monaghan*, 955 F.3d at 860. Adverse employment decisions thus include all practices that "affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—*as well as other things that are similarly significant standing alone*," *id.* (emphasis added), including reputational harm.

In *Hinson v. Clinch County*, 231 F.3d 821, 829 (11th Cir. 2000), for example, a principal alleged that her employer discriminatorily transferred her to a

position that might have been "seen by some as a promotion," but that "could be seen as" involving a "loss of prestige." *Id.* at 824, 829. In contrast to the panel's decision here, the Court concluded there, that because the employment action resulted in "a loss of prestige and responsibility," it was actionable under Section 703(a)(1). *Id.* at 830.

The panel's rule immunizing paid suspensions from Title VII coverage conflicts with *Hinson* and other controlling precedent recognizing that a plaintiff need not suffer a cut in pay or benefits to have experienced an adverse employment action. *See Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1203 (11th Cir. 2013) (acknowledging that an adverse action may be found without change in pay if a plaintiff is reassigned to role with "significantly different" duties). Rehearing en banc is thus necessary—even if this Court wishes to maintain its adverse-employment-action doctrine—to resolve the confusion within this Circuit about what kinds of discriminatory conduct violate Title VII, or, put differently, what constitutes an "adverse employment action."

In some other circuits, too, intangible harms that do not immediately affect continued employment or pay are actionable. In *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980), the Second Circuit held that an employment decision "interfere[d] with a condition or privilege of employment" where a teacher's salary, workload, and teaching subject did not change, but the teacher was professionally dissatisfied because of a job transfer. *Id.* at 364, 366. "[I]nconvenience resulting from a less favorable

schedule," *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008), a change in responsibilities that leaves an employee "unchallenged," *Spees v. James Marine, Inc.*, 617 F.3d 380, 392 (6th Cir. 2010), and giving an employee a workplace "status" that threatens future termination without ultimately resulting in termination, are covered employment harms. The Sixth Circuit's adverse-employment-action doctrine excludes only de minimis harms, narrowly understood. *See Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021) (Sutton, J.). And the D.C. Circuit recently granted rehearing en banc on its own motion to reconsider its adverse-employment-action precedent. *See Chambers v. District of Columbia*, No. 19-7098, 2021 WL 1784792, at *1 (D.C. Cir. May 5, 2021). Moreover, no other circuit has concluded, as the panel did, that a paid suspension inconsistent with an employer's internal disciplinary rules fails to meet Title VII's adversity requirement.

The panel ignored the reputational injury Davis suffered—harm that elevated the suspension to an adverse employment action under this Court's existing (incorrect) precedent. In the panel's view, because LSA did not "intentionally time[] the suspension … to embarrass Davis," it was not actionable. Panel Op. 11. But LSA's intent matters only to the question of whether the suspension was discriminatory—an issue that was not decided because LSA did not dispute below that the differential treatment Davis experienced was discriminatory. Because the suspension diminished Davis's responsibilities—he was barred from attending a significant event in which he, as Executive Director, would have been involved—and led to rumors that

harmed his reputation and future job prospects, the employment decision was not a "simple paid suspension." It thus amounted to an adverse employment action, even under this Court's anti-textual precedent.

II. The issue presented is important and recurring.

A. The panel decision has far-reaching consequences. Limiting actionable discrimination to adverse employment actions with only economic consequences effectively blesses an array of discriminatory practices beyond the paid suspension at issue in this case. Discriminatory shift assignments, *Jackson v. Hall Cnty. Gov't*, 518 F. App'x 771, 773 (11th Cir. 2013), negative performance evaluations, *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1261 (11th Cir. 2001), and denials of training are not actionable, *Johnson v. Gestamp Alabama*, LLC, 946 F. Supp. 2d 1180, 1202 (N.D. Ala. 2013). The same goes for discriminatory office-space assignments. *Griffin v. GMAC Com. Fin., L.L.C.*, 2008 WL 11322925, at *23 (N.D. Ga. Jan. 10, 2008), *report and recommendation adopted*, 2008 WL 11334068 (N.D. Ga. Mar. 5, 2008).

The potential ramifications of the adverse-employment-action doctrine—as applied to a range of federal laws aimed at eliminating workplace discrimination including the Americans with Disabilities Act and the Age Discrimination in Employment Act—are also not fully reflected in the litigated decisions. Because, according to the panel, discrimination is permissible if it does not impose pocketbook or other similarly significant harm, an employer could, without legal consequence, require all of its Black

employees to work under white supervisors, women to stand in meetings while male counterparts sit comfortably, disabled people to work in a "disabled-persons" annex, and older employees to write periodic reports about their retirement plans. Decades after Title VII, Section 1981, the ADA, and the ADEA were enacted to eliminate the workplace indignities of Jim Crow and sex-based stereotypes and the marginalization of disabled and older Americans, those results defy the plain language and intent of these federal anti-discrimination laws.

B. The United States acknowledges the importance of the issue presented—whether discrimination without economic loss is actionable under Title VII—and agrees with Davis. It has argued to the Supreme Court that the adverse-employment-action doctrine has "no foundation" in Title VII's text, Congress's purpose, or Supreme Court precedent. U.S. *Peterson* Br., 2020 WL 1433451, at *6; *accord* Br. in Opp'n at 13, *Forgus v. Shanahan*, No. 18-942, 2019 WL 2006239 (May 6, 2019), *cert. denied*, 141 S. Ct. 234 (2020) (Mem.).

The United States is a frequent defendant in employment-discrimination litigation, *see* 42 U.S.C. § 2000e-16, and the EEOC rules on thousands of employment-discrimination charges annually.[3] Since March 2020, the

[3] *See* EEOC, All Statutes (Charges filed with EEOC) FY 1997 - FY 2020, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 (last visited December 23, 2021).

Government has reiterated its disagreement with the adverse-employment-action precedent before six circuits.[4] There can be no serious dispute, then, that the issue presented here is important and ripe for this Court's reevaluation.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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Counsel for Plaintiff-Appellant Artur Davis

January 6, 2022

[4] *See* Br. for United States as Amicus Curiae at 2, *Hamilton v. Dallas Cnty.*, 21-10133, Doc. 00515871990 (5th Cir. May 21, 2021) (listing all amicus filings).

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-12886

ARTUR DAVIS,

Plaintiff-Appellant
Cross Appellee,

versus

LEGAL SERVICES ALABAMA, INC.,
LAVEEDA MORGAN BATTLE,
ALEX SMITH,

Defendants-Appellees
Cross Appellants.

Appeals from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:18-cv-00026-RAH-JTA

Before ROSENBAUM and TJOFLAT, Circuit Judges, and STEELE, * District Judge.

PER CURIAM:

Artur Davis appeals the district court's order granting summary judgment in favor of Defendants, Legal Services Alabama, Inc. ("LSA"), and two members of its Board of Directors, LaVeeda Morgan Battle and Alex Smith. Specifically, Davis contends that the district court erred in holding that, as a matter of law, the paid suspension to which LSA subjected Davis could not constitute an adverse employment action for purposes of his race-discrimination claim and that Davis had not raised a genuine dispute of material fact on whether he was constructively discharged. Davis also argues that the district court erred in holding that LSA's sharing of information with a consultant it hired could not constitute publication for purposes of a state-law defamation claim. For their part, Defendants cross-appeal the district court's failure to award them costs. For the reasons that follow, we affirm the district court's

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* Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

judgment and dismiss the cross-appeal as premature.

I.[1]

Plaintiff-Appellant-Cross-Appellee Davis is a former Congressman, candidate for mayor of Montgomery, Alabama, candidate for governor of Alabama, and federal prosecutor. He is Black. In 2016, he applied for and obtained the position of Executive Director of LSA, a non-profit law firm providing civil legal services for low-income Alabamians.

During the course of his work with LSA, Davis began experiencing problems with some of his subordinates and colleagues. Some of these employees complained about Davis to LSA's Executive Committee.

On August 18, 2017, as Davis left work, Battle and LSA Board Vice Chair Smith approached him. They informed Davis that the Executive Committee of the Board had voted to suspend him with pay pending an investigation of the complaints against him. Along with this news, they delivered to Davis a copy of the Committee's resolution suspending him (the "Resolution") and a letter outlining the reasons for the suspension (the "Suspension Letter"): (1) spending decisions outside the approved budget; (2)

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[1] Since we are reviewing an order granting summary judgment, we view the evidence and draw all reasonable inferences from it in the light most favorable to the nonmoving party—here, Davis. *Lewis v. City of Union City,* 934 F.3d 1169, 1179 (11th Cir. 2019). For that reason, the actual facts may or may not be as described in this opinion.

failure to follow LSA policies and procedures when hiring new staff; (3) creating new initiatives without Board approval; and (4) creating a hostile work environment for some LSA employees.

After that, Davis learned that LSA had taken other steps related to his suspension, including posting a security guard in front of its building and hiring David Mowery, an Alabama political consultant, to handle public relations related to Davis's suspension. Davis and Mowery did not have a good relationship because Mowery had handled one of Davis's failed political campaigns until their relationship soured. After that, Mowery had worked for the campaign of Davis's opponent in another race. According to Battle, LSA was unaware of the history between the two men when it hired Mowery. LSA gave copies of the Resolution and the Suspension Letter to Mowery.

Four days after he was advised that he was being placed on paid suspension, on August 22, 2017, Davis sent word to the Board that he intended to resign from his position as Executive Director, effective September 23, 2017.

Davis filed suit against LSA, Battle, and Smith. The amended complaint stated eight causes of action. As relevant here, they included race discrimination under § 1981 against all defendants; race discrimination under Title VII against LSA; and defamation counts against Battle, Smith, and LSA.

Among other bases for his claims of race discrimination, Davis asserted that LSA's prior Operations Director and its prior

Executive Director, both white, had been treated more favorably than he had, and that they had participated in worse alleged misconduct. The former Operations Director allegedly had engaged in abusive behavior towards subordinates, but LSA took no action against her before she left. And the prior Executive Director allegedly had made sexually harassing remarks to female employees and had abused mileage expenses before he resigned. Neither was placed on suspension before leaving.

Following discovery, Defendants moved for summary judgment on all Davis's claims.

The district court granted the motion. As relevant on appeal, it held that, as a matter of law, Davis was not subjected to an adverse employment action, and that circumstance was fatal to his discrimination claims. More specifically, the court held both that being placed on paid leave was not an adverse employment action and that Davis had not raised a fact issue on his claim that he had been constructively discharged.

The district court also granted summary judgment as to Davis's defamation claims, holding that, under Alabama law, the complained-of disclosure (LSA's provision to Mowery of the Resolution and Suspension Letter) could not constitute "publication"—an essential element of defamation.

The district court entered a final judgment on July 16, 2020. Davis timely filed a notice of appeal. Davis appeals the district

court's summary-judgment rulings with respect to his discrimination and defamation claims.

After Davis filed his notice of appeal, Defendants filed a Bill of Costs in the district court. The day after filing their Bill of Costs, Defendants filed their own notice of appeal, complaining of the district court's failure to award them costs.

II.

We review *de novo* a district court's grant of summary judgment, using the same legal standards the district court must apply. *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010). Summary judgment is appropriate when the movant shows no genuine dispute exists as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In determining whether the movant has met this burden, courts must view the evidence in the light most favorable to the non-movant. *Alvarez*, 610 F.3d at 1263–64.

When a movant shows that no genuine dispute of material fact exists, the burden shifts to the non-movant to demonstrate a genuine issue of material fact that precludes summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The non-movant must go beyond the pleadings and present competent evidence of specific facts to show that a genuine issue exists. *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004).

III.

A. LSA did not subject Davis to an adverse employment action

Title VII of the Civil Rights Act prohibits employers from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment" because of that individual's race. 42 U.S.C. § 2000e-2(a)(1). Section 1981 similarly prohibits race discrimination in employment. 42 U.S.C. § 1981. Claims of race discrimination under both Title VII and § 1981 require a showing that the employer subjected the employee to an "adverse employment action."[2] *Quigg*, 814 F.3d at 1235 (recognizing that a Title VII claim requires an adverse employment action); *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1283 n.3 (11th Cir. 2018) (recognizing that Title VII claims and § 1981 claims

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[2] Davis complains that the district court improperly applied the *McDonnell Douglas* framework when evaluating his race-discrimination claim because his claim was a "mixed-motive" claim. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). We need not decide whether, in fact, his claim was a mixed-motive one because it makes no difference to the outcome here. To be sure, the *McDonnell Douglas* framework does not apply in a mixed-motive case. *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1239 (11th Cir. 2016). But a mixed-motive plaintiff—that is, a plaintiff who claims that another factor and unlawful discrimination contributed to the employer's decision to take adverse employment action—must show "(1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was a motivating factor for the defendant's adverse employment action." *Id.* (alteration in original). Because the correct framework for a mixed-motive claim also requires the employee to establish he was subjected to an adverse employment action and because the district court granted summary judgment on solely the basis that Davis failed to show an adverse employment action, any error by the district court in applying *McDonnell Douglas* was harmless.

"have the same requirements of proof and utilize the same analytical framework") (citation omitted).

When, as here, we are not talking about a hostile-work-environment claim, adverse employment actions include "tangible employment actions," which are those actions "that affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone." *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020).

Davis appeals the district court's conclusion that suspension with pay pending an investigation categorically does not constitute an adverse employment action and its holding that Davis was not subjected to a constructive discharge.

i. Davis's paid suspension here was not an adverse employment action

Whether suspension with pay can rise to the level of an adverse employment action in discrimination cases appears to be an

issue of first impression in this Circuit.[3] Many of our sister circuits, however, have already addressed the issue.

No Circuit has held that a simple paid suspension, in and of itself, constitutes an adverse employment action. *See Joseph v. Leavitt*, 465 F.3d 87 (2d Cir. 2006) (holding that paid leave there did not constitute an adverse employment action but leaving open the possibility that a paid suspension or accompanying investigation carried out in an exceptionally unreasonable or dilatory way may constitute an adverse employment action); *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015) (same); *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001) *abrogated on other grounds by Burlington N.*, 548 U.S. at 68 (holding that, categorically, paid suspension or leave is not an adverse employment action); *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000) (same); *Peltier v. United States*, 388 F.3d 984 (6th Cir. 2004) (same); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772 (7th Cir. 2007) (same); *Pulczinski v.*

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[3] We have previously acknowledged that paid suspension may constitute an adverse employment action in the *retaliation* context. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 920 (11th Cir. 1993) ("In August of 1990, plaintiff was the subject of an adverse employment action; he was suspended with pay for thirty days."). The standard to show an adverse employment decision in a retaliation case is more relaxed, with the employee having to show only that the mistreatment "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). But we have held that a five-day suspension with pay pending an investigation, without more, is not an adverse action for purposes of a First Amendment retaliation claim. *Bell v. Sheriff of Broward Cnty.*, 6 F.4th 1374, 1379 (11th Cir. 2021).

Trinity Structural Towers, Inc., 691 F.3d 996 (8th Cir. 2012) (same); *Haddon v. Exec. Residence at White House*, 313 F.3d 1352 (Fed. Cir. 2002) (same).

We agree with our sister Circuits that a simple paid suspension is not an adverse employment action. A paid suspension can be a useful tool for an employer to hit "pause" and investigate when an employee has been accused of wrongdoing. And that is particularly so in a case like this one—where the employee under investigation is in charge of all the employees who are the witnesses. As a practical matter, employers cannot expect employees to speak freely to investigators when the person under investigation is looking over their shoulders. Employers should be able to utilize the paid-suspension tool in good faith, when necessary, without fear of Title VII liability.

Davis does not disagree that a simple paid suspension does not rise to the level of an adverse employment action. Rather, he asserts that the manner in which his suspension was handled, and the circumstances that accompanied it, combined to amount to an adverse employment action. We therefore must consider whether the circumstances here escalated Davis's paid suspension to an adverse employment action. We conclude they did not.

Davis maintains that the following circumstances made his paid suspension atypical and caused it to constitute an adverse employment action: (1) LSA disclosed the suspension to Mowery; (2) the suspension occurred days before a high-profile LSA reception with the state bar; (3) LSA compiled a narrative of reasons for the

suspension in the Suspension Letter; and (4) LSA placed a guard in the building in the aftermath of the suspension. Davis also argues that because he was the Executive Director, he served as the public face of LSA. And as a result, Davis asserts, the paid suspension was more adverse to him than it would be to a low-level employee.

We disagree. Davis has offered no evidence that LSA purposely hired Mowery because of the bad blood between Mowery and Davis or intentionally timed the suspension with the state bar event to embarrass Davis. And as we explain in Section III.B, on this record, we cannot conclude that LSA's disclosure of the suspension to Mowery was improper or otherwise punitive. The record likewise contains no evidence that placing a guard at the building after a suspension was out of the ordinary for LSA. And it is perfectly reasonable that LSA would compile its reasons for the suspension in a document to give to Davis to avoid any accusations of arbitrariness. Last, Davis has offered no authority, and we have found none, to support the notion that whether an action constitutes an adverse employment action should depend on whether the employee is high-ranking in the organization. Put simply, the circumstances of Davis's paid suspension do not rise to the level of an adverse employment action.

ii. Davis was not constructively discharged

Davis next argues that, even if his paid suspension does not amount to an adverse employment action, his alleged constructive discharge does. Under Title VII, a constructive discharge is tantamount to an actual discharge, so it constitutes an adverse

employment action. *Green v. Brennan*, 578 U.S. 547, 555 (2016); *see also id.* at 560 ("The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him."); *Akins v. Fulton Cnty.*, 420 F.3d 1293, 1300–01 (11th Cir. 2005) ("Constructive discharge negatively affects an employee's job status, and therefore constitutes an adverse employment action."). Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job. *Bryant v. Jones*, 575 F.3d 1281, 1298 (11th Cir. 2009).

The district court held that Davis abandoned his constructive-discharge claim when he failed to address the Defendants' argument that Davis's voluntary resignation meant there could be no constructive discharge as a matter of law. Nevertheless, the district court went on to hold that, even if Davis had not abandoned the claim, LSA was still entitled to summary judgment on Davis's theory of constructive discharge. We do not address the district court's holding on abandonment because its ultimate conclusion that Davis was not constructively discharged was correct, in any case.

The district court held that "a Title VII constructive discharge claim generally cannot be based upon an employee's resignation under the subjective belief that an investigation would be

unfair or unjust." To support this conclusion, the district court relied on *Hargray v. City of Hallandale*, 57 F.3d 1560 (11th Cir. 1995).

We do not agree that *Hargray* is instructive in this regard. Rather, *Hargray* is about whether a resignation from public employment that had been requested by the employer was sufficiently involuntary to trigger the protections of the Due Process Clause. *Id.* at 1567–68.

Davis correctly points out in his brief that "whether a government entity's conduct violates a litigant's constitutional rights . . . is a more demanding standard than whether a litigant advances to the post prima facie stage, or its equivalent, in an employment lawsuit." Appellant's Brief at 20–21. The district court did apply too exacting a standard to determine whether Davis had raised an issue of fact on whether he was constructively discharged. Instead, the correct standard is the one articulated in *Green*: whether the employee can demonstrate that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign. 578 U.S. at 555.

Nevertheless, the district court arrived at the correct ultimate conclusion. And we may affirm on any basis in the record, even if the district court did not actually rely on that basis. *Henley v. Payne*, 945 F.3d 1320, 1333 (11th Cir. 2019).

Even under the proper, more relaxed standard, no reasonable factfinder would conclude that a reasonable person would have felt compelled to resign under Davis's circumstances. Instead,

Davis offered evidence of unpleasant disputes and disagreements with coworkers who then filed complaints against Davis. The evidence does not paint a picture of intense, intolerable harassment usually seen in cases of constructive discharge. And because paid suspension alone is not an adverse employment action, an employee's resignation in response to it cannot be an adverse employment action, either. Nor did Davis give LSA the chance to remedy any allegedly intolerable working conditions because he notified LSA of his intention to resign so soon after the suspension—within four days. *See Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation.").

For these reasons, Davis failed to establish that he had suffered any adverse employment action. As a result, his substantive discrimination claims necessarily failed, and the district court's grant of summary judgment on them was appropriate.[4]

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[4] Davis also complains that the district court ruled that race was not a motivating factor in any adverse employment action taken against Davis. But while the district court did acknowledge that Davis's response to the motion for summary judgment "maintain[ed] that there [was] ample evidence that race was a motivating factor in [Davis's] suspension," it nonetheless decided to "confine its inquiry . . . strictly to whether there was an actionable adverse employment action." ECF No. 49 at 19–20. For that reason, no holding on motivation is before this Court, and we offer no opinion on it.

B. The LSA's disclosure of the Resolution and Suspension Letter to Mowery did not amount to publication under Alabama law

Next, Davis appeals the district court's conclusion that he failed, as a matter of law, to meet the publication element of his defamation claim. Davis contends that Defendants defamed him when they gave the Resolution and Suspension Letter to Mowery. For its part, LSA asserts that it provided Mowery with the documents so Mowery could provide public-relations guidance concerning Davis's suspension.

Under Alabama law, a defamation plaintiff must establish all the following to set forth a defamation claim: (1) the defendant was at least negligent (2) in publishing (3) a false and defamatory statement to another; (4) that statement concerned the plaintiff; and (5) the claim is actionable either without having to prove special harm or upon allegations and proof of special harm. *Gary v. Crouch*, 867 So. 2d 310, 315 (Ala. 2003).

The district court held that LSA's provision of the documents to Mowery did not constitute publication because Mowery was acting as LSA's agent at the time of the disclosure. In so holding, the court relied on *Brackin v. Trimmier L. Firm*, 897 So. 2d 207 (Ala. 2004). There, the Family Security Credit Union ("FSCU") identified various improprieties related to a former employee. *Brackin*, 897 So. 2d at 209. In response, the Alabama Credit Union Administration ordered FSCU to conduct an investigation of the improprieties. *Id.* FSCU retained a law firm to conduct the

investigation, which in turn retained Jo Lynn Rutledge, a certified public accountant. *Id.* As part of the investigation, various employees told Rutledge that Karen Brackin, an FSCU employee at the time, had instructed employees to change due dates on loans and make other changes to loan documents. *Id.* at 210. Eventually, Brackin sued FSCU on various theories, one of them being defamation based on FSCU employees' disclosures of information about Brackin to Rutledge. *Id.* at 215.

The Supreme Court of Alabama held that no publication of the statements occurred when the employees gave the information to Rutledge. *Id.* at 221. This was so, the court reasoned, because Rutledge was retained by FSCU and the law firm to conduct the investigation. So the information that the employees gave Rutledge fell within the scope of the agency relationship between FSCU and Rutledge. "[T]he employees' communications to Rutledge did not amount to 'publications' to a third party for purposes of establishing a defamation claim." *Id.* at 222.

In his brief, Davis attempts to distinguish *Brackin* by pointing out that the investigation there was ordered by the state regulatory agency. True, but that is legally irrelevant to the fact that an agency relationship between Rutledge and FSCU existed. And that relationship, as we have explained, served as the basis for the Court's decision.

Davis also argues that the district court erred by conflating a "consultant" relationship with an agency relationship, and he contends that the district court should have applied traditional

agency principles to determine whether Mowery was truly acting as LSA's agent or rather, as an independent contractor. In Davis's view, LSA can claim that giving Mowery the documents was not publication only if Mowery was LSA's employee.

We are not persuaded. Being an "agent" and being an "independent contractor" are not necessarily mutually exclusive. One can be in an agency relationship with another without being that person's employee. *See Brown By & Through Brown v. Com. Dispatch Publ'g Co.*, 504 So. 2d 245, 246 (Ala. 1987) (emphasizing that "test of agency is the right of control," not simply employer-employee relationship); *see also 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1251 (10th Cir. 2013) ("[A]n independent contractor can be an agent. An agent need not be an employee."). Indeed, the Alabama Supreme Court held that Rutledge was an "agent" of FSCU for publication purposes, even though Rutledge was not FSCU's employee. *See Brackin*, 897 So. 2d at 222. If Davis were correct, employers could not hire consultants and experts to assist them in human-resources matters. Otherwise, they would risk defamation liability every time they hired outside consultants, investigators, and advisors and provided them with the information they needed to do their jobs.

For these reasons, the district court correctly held that LSA's provision of the Resolution and Suspension Letter to Mowery did not constitute publication for purposes of a defamation claim under Alabama law.

C. We lack jurisdiction over Defendants' cross-appeal

In their cross-appeal, Defendants point out that the district court was silent as to the award of costs under Federal Rule of Civil Procedure 54(d). Based on this circumstance, Defendants argue that the district court erred by denying them costs without stating a basis for doing so. In Defendants' view, they are entitled under Rule 54(d)(1) to their costs because the district court made no findings of misconduct by Defendants that would justify any sanction. But Defendants do not mention in their brief the bill of costs they filed after the district court entered the final judgment and Davis filed his notice of appeal.

In the absence of circumstances not present here, an appellate court's jurisdiction is limited to appeals of final decisions. 28 U.S.C. § 1291; *Fort v. Roadway Exp., Inc.*, 746 F.2d 744, 747 (11th Cir. 1984). But a district court's decision regarding costs is not final until the amount is fixed. *See Mekdeci v. Merrell Nat'l Lab'ys*, 711 F.2d 1510, 1523 (11th Cir. 1983) (finding lack of jurisdiction to review a district court's order that it intended to award costs but had yet to fix the amount).

Federal Rule of Civil Procedure 54(d)(1) states that unless a federal statute, the Federal Rules, or a court order provides otherwise, costs should be allowed to the prevailing party, and the court clerk "may tax costs on 14 days' notice." The Middle District of Alabama's Local Rule 54.1 directs that requests for taxation of costs under Rule 54(d) shall be filed with the clerk within 35 days of entry of final judgment.

Here, Defendants' cross-appeal is premature because the judgment, while final as a general matter, was not a final decision on costs, and the district court has not acted on the bill of costs Defendants filed after judgment. A district court is not required to address costs in its judgment, and silence is not somehow an implicit denial of costs. To the contrary, Local Rule 54.1 contemplates that the prevailing party will not even seek costs until after the district court enters final judgment. Because the judgment from which the Defendants cross appeal is not final as to the costs issue—the sole subject of their appeal—we lack jurisdiction over the cross-appeal and therefore dismiss it.

IV.

For the foregoing reasons, the judgment of the district court is affirmed, and the cross-appeal is dismissed.

AFFIRMED; CROSS-APPEAL DISMISSED.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document uses a monospaced typeface and contains 3,845 words.

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January 6, 2022 /s/Madeline Meth

CERTIFICATE OF SERVICE

I certify that, on January 6, 2022, this petition was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/Madeline Meth