Case No. 10-3155

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMETRIA WHEELER,

Plaintiff/Appellant,

v.

BNSF RAILWAY COMPANY AND MIKE D. HARDING,

Defendants/Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Kansas
The Honorable Kathryn A. Vratil
District Court No. 09-2270-KHV

David R. Cooper, Supreme Court No. 16690
Fisher, Patterson, Sayler & Smith, L.L.P.
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NO ORAL ARGUMENT REQUESTED

THERE ARE NO SCANNED PDF DOCUMENTS ATTACHED.

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CORPORATE DISCLOSURE STATEMENT

BNSF Railway Company was a wholly owned subsidiary of Burlington Northern Santa Fe, LLC, (formerly known as Burlington Northern Santa Fe Corporation). On February 10, 2010, both Burlington Northern Santa Fe, LLC, and BNSF Railway Company became subsidiaries of Berkshire Hathaway, Inc.

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Appellees concur with the appellant's statement of jurisdiction.

STATEMENT OF ISSUES

The overriding issue is whether the district court correctly granted judgment as a matter of law to defendants/appellees.

With respect to the issues ruled upon by the district court, the issues are:

1. Whether the employment actions complained of by Wheeler are adverse employment actions sufficient to state a prima facie claim of disparate treatment on the basis of race and/or gender, and
2. Whether the employment actions complained of by Wheeler are adverse employment actions sufficient to state a prima facie claim of retaliation.

Other dispositive issues were briefed to the district court but were not reached by the district court. The issues not reached by the district court can also serve as a basis for affirming the grant of judgment to defendants and include:

3. Whether the disparate treatment claims fail because Wheeler was not treated differently than any similarly situated employee;

4. Whether the disparate treatment claims fail because the employment actions at issue do not raise an inference of discrimination; and

5. Whether the retaliation claims fail for lack of a causal connection between protected conduct and the claimed employment actions.

STATEMENT OF FACTS

Emetria Wheeler brought suit against BNSF Railway and Michael D. Harding for employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981.

Wheeler was first employed by BNSF's predecessor in 1977. Aplee. App. 59. Wheeler is an African-American, and is a painter and member of the Brotherhood Railway Carmen Division of the Transportation Communications International Union ("BRC/TCU" or "BRC"). *Id.*

In April 2002, BNSF transferred all of the freight car work from its facility in Topeka, Kansas, to BNSF's Havelock facility in Lincoln, Nebraska. *Id.* As part of the transfer of the freight car work to the Havelock facility, only five active painters on the Topeka freight painter roster were retained. The remaining painters were given the option of accepting a transfer to Havelock or accepting a furlough in Topeka until work became available. *Id.*, 60. Wheeler elected to transfer to

Havelock. *Id.* Wheeler understood the transfer to Lincoln was a permanent transfer and bought a house in Lincoln. *Id.*, 132-133.

The transfer of the work of the freight car work from Topeka to Havelock was the subject of a memorandum of agreement between the BNSF and the BRC/TCU dated March 8, 2002 (the "March 2002 Transfer Agreement"). *Id.*, 60. Pursuant to that agreement, all journeyman carmen who followed the transfer of work from Topeka had their seniority dates dovetailed to the Lincoln Seniority District and were removed from the Topeka Seniority District. *Id.*, 60.

Wheeler has never had seniority on the Topeka Journeyman Carman roster. *Id.* Pursuant to Side Letter No. 5 to the March 2002 Transfer Agreement a Freight Painter Roster was created in the Lincoln Seniority District and the freight painters transferring from Topeka were granted Freight Carman Seniority in Havelock effective in April 2002. *Id.* Thus, Wheeler was afforded seniority on both the Journeyman Carman and Freight Painter Rosters in Havelock. *Id.*

Rick Barnes and John Rangel were also afforded seniority as journeyman carmen in Havelock. *Id.*, 137. The carmen and painters following the work to Havelock had new seniority dates established at Havelock and no longer had seniority at Topeka. *Id.*, 60. Wheeler understood that, by accepting the transfer, she was giving up her seniority in Topeka. *Id.* Wheeler, John Rangel, and Rick

Barnes were the only BNSF employees afforded journeyman carman status as a result of the move to Havelock. *Id.*, 137.

Work by the carmen and painter crafts at Havelock was subject to a collective bargaining agreement ("CBA") between the BRC/TCU and the former Burlington Northern ("BN"), while work by the carmen and painter crafts at the Topeka shops were subject to a CBA between the BRC/TCU and the former Santa Fe ("SF"). *Id.*, 61. From the time of the transfer of the freight car work to Havelock in 2002 until April 2005, the CBAs between BNSF and the BRC did not govern the means by which employees who transferred from Topeka to Havelock might return to Topeka. *Id.*

In April 2005, an Agreement was executed between the BNSF and BRC which provides for the transfer of BNSF employees from one location to another location covered by any of the three separate CBAs between the BRC and the predecessor companies merged into the present BNSF. *Id.*, 61. The April 2005 Agreement permitted a voluntary transfer between locations governed by the separate CBAs to fill positions vacant for which there are no employees with seniority at that location or district available for assignment or recall. Assignments to such vacant positions are, pursuant to the Agreement, made in the following order:

(a) Senior furloughed employees covered by the same CBA holding seniority at another location;

(b) Senior active employees covered by the same CBA holding seniority at another location;

(c) Senior furloughed employees covered by a different CBA; and

(d) Senior active employees covered by a different CBA.

Id. Thus, a vacant position at a SF location would first be assigned, in order, to a furloughed employee at another SF location, then to an active employee at another SF location, then to a furloughed employee from a BN location, and then to an active employee at a BN location. *Id.*, 62.

Work load determines what craft (carman, electrician, etc.) will be used to fill an open position. *Id.*, 227, 229, 230-31, 238.

2004 "Transfers"

Prior to the April 2005 Transfer Agreement, discussed *supra*, persons at Havelock selected to fill positions in Topeka were treated like applicants "off the street," meaning they had to apply and have their qualifications considered and the best qualified could be selected. *Id.*, 228 In 2004, positions were filled by posting the positions, accepting applications, interviewing an applicant pool and filling the positions. *Id.*, 229

Rangel's Recall as a Passenger Painter

The Topeka SMT Seniority Rosters as they existed in February 2002, prior to the transfer of the freight car work to Havelock, are shown in the 2002 Seniority Roster. *Id.*, 133, 248-75. Wheeler did not have seniority on the passenger painter roster. *Id.*, 258 John Rangel was the last painter on the Topeka Passenger Painter roster. *Id.*, 230, 232.

The March 2002 Transfer Agreement provided that the positions of Passenger Carmen and Passenger Painters were not affected by the transfer of the freight car work to Havelock. *Id.*, 150 Side Letter No. 5, dated March 1, 2002, provided that Painters such as Wheeler and Rangel were granted Freight Carmen Seniority dates of April 29, 2002, but were listed on the Freight Carman Roster in Havelock, according to their then-current painters' seniority. *Id.*, 161.

In January 2005, a position for a passenger painter was, according to the applicable union agreement bulletined. *Id.*, 276. The position was awarded to Rangel, the most senior person on the Passenger Painter roster. *Id.*, 230, 277. Wheeler did not hold seniority on the passenger painter roster. *Id.*, 188.

Rangel retired in July 2005 and, in the months preceding Rangel's retirement, it was Harding's judgment that there was insufficient paint work on business car maintenance to keep a full-time painter. *Id.*, 234. Harding elected to

replace the position vacated by Rangel's retirement with a carman, who was able to perform work on both rebuild and repair work. *Id.*, 235. Upon Rangel's retirement the Passenger Painter roster became "extinct," *id.*, 227-28, 235-36 and non-incidental paint work on repairs in the business car shop after Rangel's retirement was performed by painters from the Freight Painter roster. *Id.*, 234-36.

Transfers between May 2005 and May 2007

Following the April 2005 Transfer Agreement, Wheeler filled out and submitted a "Request to Transfer Between Separate Agreements" dated June 10, 2005, indicating a desire to transfer *only* to Topeka. *Id.*, 207. Neither BNSF nor Wheeler have located or identified a similar request by Wheeler to transfer to Kansas City.

William "Bill" Galloway was a journeyman carman on the Topeka roster at the time of the 2002 transfer to Havelock. *Id.*, 185, 279, 281. Galloway elected to follow the work to Havelock. *Id.*, 279.

On or about May 9, 2005, Galloway transferred from Havelock to Kansas City as a carman. *Id.*, 280. Thus, under the April 2005 Transfer Agreement, Galloway had preference for a position in Topeka over anyone in Havelock who might have desired a transfer to Topeka. *See*, discussion of April 2005 Transfer

Agreement, and Aplee. App. 61-62. On or about April 16, 2007, Galloway transferred from Kansas City to Topeka. *Id.*

Galloway, when working in Topeka was always on either the apprentice carman roster or the journeyman carman roster. *Id.*, 281. Harding did not assign Galloway any non-incidental paint work in the business car shop. *Id.*, 237.

Wheeler was offered a position in Topeka in 2006 which she declined.

Wheeler was offered a position as a laborer in Topeka in November 2006 which she declined. *Id.*, 136-37, 211. The BNSF did nothing to keep Wheeler from accepting the laborer position in Topeka. *Id.*, 140.

"Offer" of position in Kansas City to Barnes

Barnes' transfer request listed a preference for a transfer to either Kansas City or Topeka. *Id.*, 283-85, 288. Wheeler's transfer request listed only Topeka. *Id.*, 135, 138, 207. Though Wheeler claims she filled out a transfer request for Kansas City, *id.*, 136, but no such request was located by BNSF nor was one produced by Wheeler.

Wheeler's request for transfer, lists only Topeka as the locations to which a transfer was desired. *Id.*, 207. Barnes, however listed both Topeka and Kansas City. *Id.*, 283-85, 288.

Barnes received a call in either late 2006 or early 2007 and was offered a transfer to Kansas City as a carman. *Id.*, 28-85. When Barnes took the call and made clear his request for transfer was as a painter rather than a carman, the discussion ended and Barnes did not transfer. *Id.*

Wheeler never worked for Harding

Wheeler never worked in the business car department under since Harding became General Foreman over the business car department and has never been supervised directly by Harding. *Id.*, 138.

Overtime Assignment

Part of Wheeler's complaint relating to overtime is that, while she and Barnes were on the Freight Painter roster in Havelock, the painters in Topeka as well as carmen and apprentice carmen were working overtime doing paint work in Topeka. *Id.*, 68-69, 135-36.

Rule 98 of the CBA between the BRC and the former Santa Fe/AT&SF provides the types of tasks comprised in a carman's work and includes “painting, varnishing, surfacing, decorating, lettering, cutting the stencils and removing paint and all other work generally recognized as painters work under the supervision of the locomotive and car departments.” *Id.*, 220-21.

Wheeler claims that, while she was in Havelock, she should have been offered paint work in Topeka in preference to carmen or apprentice carmen on the Topeka rosters. *Id.*, 135-36.(Wheeler 110-11.)

Wheeler agrees that painting is included within the carmen's definition of job duties, provided there is no painter available. *Id.*, 135, 139.

To the extent that any rule requires that painting be assigned to an available painter before being assigned to a carman, Harding understands that "available painter" refers to painters on staff at Topeka. *Id.*, 237, 239. The painters on the Topeka freight painter roster were fully occupied with paint work. *Id.*, 135-36. *Transfers from Havelock to Topeka and from Topeka to Havelock are "new and distinct relationships."*

Transferring from Havelock to Topeka results in a loss of the seniority attained at the Havelock facility. *Id.,* 135, 138, 283. Wheeler's transfer from Topeka to Havelock resulted in a loss of all seniority in Topeka and the establishment of new seniority in Havelock. *Id.*, 223-24.

Wheeler originally had seniority on the Topeka Freight Painter roster as of June 24, 1980. *Id.,* 232. In accordance with the 2002 Transfer Agreement and Side Letter No. 5 thereto, Wheeler was permitted to carry her seniority date on the

Topeka Freight Painter roster to the Havelock Freight Painter Roster. *Id.,* 151, 161.

Wheeler now has a seniority date on the Topeka Freight Painter roster of August 18, 2008. Aplee. App., 176.

Closed Freight Painter and Passenger Painter Roster-- Creation of New Freight Painter Positions on the Topeka Roster

In 1988, an agreement between the BRC and former Santa Fe closed the Freight Painter Roster in Topeka, providing that no additional employees would thereafter establish seniority on the Freight Painter roster. Aplee. App., 146-48. In an agreement between the BRC and BNSF dated May 22, 2008, two Freight Painter Carman positions were to be posted in Topeka and provided that the successful applicants for those positions would be added to the "Closed Freight Painter Roster" in Topeka, establishing seniority on the date they were placed on the roster. Aplee. App., 241.

As a result of the May 2008 Agreement, Wheeler and Barnes were returned to the Topeka shops as painters. (Harding, 271-72;

Wheeler started again in Topeka as a locomotive painter, painting locomotive parts in August 2008. (Wheeler, 68, 505.)

Disparate Treatment Since 2008 Transfer to Topeka

Though Wheeler complains of not being given keys, her own cart, or of high performance expectations, Wheeler has never been disciplined for work performance or failure to accomplish assigned tasks. Aplee. App. 140, 142. Indeed, the only discipline ever issued to Wheeler related to attendance during a period of her mother's illness before the transfer to Havelock and a verbal reprimand at Havelock in 2002. Aplee. App. 141-42.

Facts Related to Exhaustion - Title VII

Wheeler filed a charge of discrimination with the Kansas Human Rights Commission (KHRC) and the Equal Employment Opportunity Commission (EEOC) on or about December 29, 2007, Charge No. 846-2008-09853. Aplee. App. 213. In this charge, (hereafter referred to as the 12/29/07 Charge) Wheeler alleged in the charge, inter alia, "positions in Topeka for which [Wheeler held] seniority on have been given to Mexican-American white male employees" and claimed that she was discriminated against by being denied seniority rights to transfer to the job assignment/work location of her choice because of her race and sex. Aplee. App. 213. The 12/29/07 Charge specifies a date of discriminatory action as having occurred on 04-02-2007, and that the discriminatory action was continuing. Aplee. App. 213. The 12/29/07 Charge further specified the alleged

discrimination was on the basis of race and/or sex, but not retaliation. Aplee. App. 213.

Wheeler filed a charge of discrimination with the Nebraska Equal Opportunity Commission (NEOC) Charge No. 32E-2OO8-00656 on or about June 30, 2008, Charge No. 32E-2008-00656 (hereafter referred to as the 06/30/08 Charge). Aplee. App. 215. The 12/29/07 Charge encompassed alleged discrimination occurring from 09/1/07 to 6/16/08, on the basis of race, color, sex and retaliation. Aplee. App. 215

The EEOC issued a Dismissal and Notice of Rights as to the 12/29/07 Charge on or about February 25, 2009, Aplee. App., 217, and as to the 06/30/08 Charge on or about March 2, 2009. Aplee. App., 36.

300 days preceding December 29, 2007, was Sunday, March 4, 2007. 300 days preceding June 30, 2008 was Tuesday, September 4, 2007. This action was filed on May 21, 2009. Aplee. App., 1.

Proceedings in the District Court

On defendants' motion to dismiss, the district court dismissed:

1) any claim under Title VII against defendant Harding;

2) any Title VII claims which are based on conduct which occurred before March 4, 2007 and after June 30, 2008 (*i.e.,* any conduct not encompassed by her EEOC charges); and

3) any Section 1981 claims which are based on conduct which occurred before May 21, 2005 (*i.e.*, any claims based on conduct more than four years prior to the filing of the instant lawsuit).

Aplee. App., 298-99.

On defendants' motion for summary judgment, the district court concluded:

1) the "failure to transfer" Wheeler from to Topeka after the retirement of John Rangel in 2005 did not constitute adverse employment action necessary to sustain a disparate treatment claim, *id.*, 509;

2) the "failure to transfer" Wheeler to Kansas City in 2006 did not constitute an adverse employment action necessary to sustain a disparate treatment claim, *id.*;

3) the "failure to transfer" Wheeler to Topeka in April of 2007 (when Galloway transferred from Kansas City to Topeka) did not constitute an adverse employment action necessary to sustain a disparate treatment claim, *id.*, 510;

4) the "failure to transfer" Wheeler to Topeka after June of 2007 (when, according to Wheeler, the Topeka Shop Superintendent decided to bring painters back to Topeka) did not constitute adverse employment action necessary to sustain a disparate treatment claim, *id.*, 510;

5) the claimed disparate treatment of Wheeler relative to painter Barnes did not constitute adverse employment action necessary to sustain a disparate treatment claim, *id.*, 511;

6) the "failure to transfer" Wheeler to Topeka in April of 2007 did not constitute an adverse employment action necessary to sustain a retaliation claim, *id.*, 514; and

7) the claimed disparate treatment of Wheeler relative to painter Barnes did not constitute adverse employment action necessary sustain a retaliation claim, *id.*, 514.

Thus, finding that an adverse employment action was necessary to sustain any of Wheeler's claims and that none of the complained of actions were an adverse employment action, the district court sustained defendants' motion for summary judgment, *id.*, 514, and entered judgment against Wheeler, *id.*, 516.

ARGUMENT AND AUTHORITIES

As framed in the pretrial order, Wheeler alleged claims of disparate treatment on the basis of race and/or gender in violation of Title VII and 42 U.S.C. § 1981 and retaliation in violation of Title VII and 42 U.S.C. § 1981. Aplee. App., 72. As to her disparate treatment claims, Wheeler, claimed defendants treated her differently than similarly situated non-minority employees. *Id.* As to her retaliation claims, Wheeler claimed she was subjected to adverse employment actions because of her complaints of discrimination. *Id.*

This court reviews de novo the district court's decision to grant summary judgment, viewing the record in the light most favorable to the non-moving party. *See Kerber v. Qwest Pension Plan*, 572 F.3d 1135, 1144 (10th Cir. 2009). In addition, "we may affirm on any grounds supported by the record." *Bixler v. Foster*, 596 F.3d 751, 760 (10th Cir. 2010). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2).

Wheeler claimed that both BNSF and defendant Harding defendants discriminated against her because of her gender and/or race, in violation of both Title VII and 42 U.S.C. § 1981.

On the defendants' motion to dismiss, the district court dismissed all claims under Title VII against defendant Harding (Aplee. App., 298) and Wheeler does not appeal that decision. The district court also dismissed all claims under Title VII which were based on conduct which occurred before March 4, 2007 and after June 30, 2008 (*i.e.*, outside the time periods covered by Wheeler's two EEOC charges); and any Section 1981 claims which are based on conduct which occurred before May 21, 2005 (more than four years prior to the filing of Wheeler's complaint herein). Aplee. App., 298-99. Wheeler does not appeal the dismissal of those claims.

I. The district court correctly dismissed Wheeler's claim of claim of discrimination based on her gender and/or her race.

Of the claims remaining after the district court's order on the motion to dismiss, Wheeler based her Title VII and § 1981 of race and/or gender discrimination on the following five so-called employment "actions" pertaining to her:

(1) failing to transfer her to Topeka after Passenger Painter John Rangel retired in July, 2005;

(2) failing to transfer her to Kansas City in the fall of 2006;

(3) failing to transfer her to Topeka in April of 2007;

(4) failing to transfer her to Topeka after June of 2007; and

(5) treating her less favorably than Barnes when they returned to Topeka in 2008.

Aplee. App., 506 (listing by district court), Aplt. Brief, 21 (concurring with list).

The district court set forth the elements necessary to state a claim of disparate treatment under Title VII or § 1981, Aplee. App., 507, then examined each of Wheeler's five claims of discrimination. *Id.*, 507-512. The district court correctly concluded that each of the actions complained of were not adverse employment actions necessary to sustain a prima facie claim of disparate treatment under Title VII or § 1981. *Id.*

A. An adverse employment action is required to state a claim of disparate treatment under a mixed-motive theory.

In the instant case, there is no direct evidence of discrimination on the basis of race or gender. Ordinarily, in the absence of direct evidence of discrimination, claims of discrimination such as those advanced by Wheeler are analyzed under the familiar *McDonnell Douglas* burden-shifting approach. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); and *see Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991) ("[I]n racial discrimination suits, the elements of a plaintiff's case are the same . . . whether that case is brought under §§ 1981 or

1983 or Title VII."); *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir.2005) (gender discrimination claim under Title VII). Under the *McDonnell Douglas* approach, a plaintiff must first make out a prima facie case which raises an inference of discrimination by showing that "the employer treated similarly situated employees more favorably." *E.E.O.C. v. PVNF, Inc.*, 487 F.3d 790, 800-01 (10th Cir. 2007). Where a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to articulate some legitimate nondiscriminatory reason for its decision and, once the defendant does so, the burden then shifts back to the plaintiff to demonstrate the defendant's proffered justification is pretextual. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1226 (10th Cir. 2000).

Title VII prohibits intentional discrimination in employment on the basis of and individual's race or sex. 42 U.S.C. § 2000e-2(a)(1). 42 U.S.C. § 1981 guarantees the rights of "All persons . . . to make and enforce contracts." Where, as here, a plaintiff claims an employer has treated her less favorably than others because of a protected trait such as race or sex, the court applies a disparate treatment analysis. *See Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224-25 (10th Cir. 2008). To prevail on her disparate treatment claim under Title VII, plaintiff must show that the alleged discrimination was intentional. *Id.* Claims under Title VII and § 1981 are analyzed the same way. *Thomas v. Denny's, Inc.*, 111 F.3d

1506, 1513 (10th Cir. 1997). The precise articulation of a prima facie case depends on the context of the claim and the nature of the adverse employment action alleged. *Plotke v. White*, 405 F.3d at 1099.

Here, Wheeler eschews the *McDonnell Douglas* approach in favor of a mixed-motive theory. Aplt. Brief, 18-21. A mixed-motive analysis applies only in cases where the decision "was the product of a mixture of legitimate and illegitimate motives." *See Fye v. Okla. Corp. Comm'n*, 516 F.3d at 1224-25 (addressing the mixed-motive theory in the context of a Title VII retaliation claim); *and see Drake v. City of Fort Collins*, 927 F.2d at 1162 (elements for race discrimination are the same whether under§§ 1981 or 1983 or Title VII). When pursuing a mixed-motive theory, a plaintiff may directly show that discriminatory "animus played a 'motivating part' in the employment decision." *Fye*, 526 F.3d at 1225 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989)). If the plaintiff proves that discriminatory animus was a motivating factor in an adverse employment action, the burden of persuasion shifts to the defendant to prove that it would have taken the same action absent the [discriminatory] motive." *Id.*

Wheeler contends, erroneously, that the employment "actions" upon which she premises her disparate treatment claims need not be an "adverse" employment decision. Aplt. Brief, 22, *citing* 42 U.S.C. § 2000e-2(m). Section 2000e-2(m)

provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Contrary to Wheeler's argument, "Both the *McDonnell Douglas* and the mixed motive approaches require a demonstration that a discriminatory motive played some role in the employment decision at issue." *Semsroth v. City of Wichita*, 304 Fed.Appx. 707, 718 n.11, 2008 WL 5328466, 7 (10th Cir. 2008). This circuit explained in *Medlock v. Ortho Biotech, Inc.,* 164 F.3d 545 (10th Cir. 1999), that § 2000e-2(m) codified the "motivating factor standard" and superseded the Supreme Court's holding in *Price Waterhouse* that "an employer can avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive." *Medlock*, 164 F.3d at 552. The *Medlock* decision noted, however, that *Price Waterhouse* continues to govern the "respective burdens of plaintiff and defendant in a mixed motive case," and the statutory amendments only alter the remedies available to parties when they meet their burdens. *Id.* at 551 n.3. Thus, the plaintiff's prima facie claim under even a mixed-motives theory requires an adverse employment action.

In *Semsroth*, this Court stated the following regarding the elements necessary to state a disparate treatment claim:

> To establish a prima facie case of disparate treatment, a plaintiff must demonstrate: (i) that she belongs to a protected class; (ii) ***that she suffered from an adverse employment action***; and (iii) that her employer treated similarly situated employees differently. *Orr v. City of Albuquerque*, 417 F.3d 1144, 1149 (10th Cir. 2005). Adverse employment action includes "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) (quotation marks omitted) (quoting *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032-33 (10th Cir. 2004)). In other words, "a mere inconvenience or an alteration of job responsibilities" will not constitute an adverse employment action. *Id.* (quotation marks omitted) To be similarly situated, employees must "deal with the same supervisor and [be] subject to the same standards governing performance evaluation and discipline." *McGowan v. City of Eufala*, 472 F.3d 736, 745 (10th Cir.2006) (quotation marks omitted).

Semsroth, 304 Fed.Appx. at 718-19 (footnote omitted) (emphasis added). *Semsroth* makes clear that disparate treatment claims must be premised on adverse employment action. *Id.*, at 719 (disparate treatment claims fail for lack of an adverse employment action).

B. Plaintiff was not subjected to an adverse employment action.

None of the matters raised by Wheeler constitute an adverse employment action. The Supreme Court has explained that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing

to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). This court has liberally defined the phrase "adverse employment action." *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir.1998). "Such actions are not simply limited to monetary losses in the form of wages or benefits. Instead, we take a 'case-by-case approach.'" *Id.* Nevertheless, we will not consider "a mere inconvenience or alteration of job responsibilities" to be adverse employment action. *Id.* (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

Only "acts that constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" rise to the level of an adverse employment action. *Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1222 (10th Cir. 2006). *Accord Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1268 (10th Cir. 2005); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1217 (10th Cir. 2003) (quotations and citations omitted). Courts employ a "case-by-case approach, examining the unique factors relevant to the situation at hand." *Stinnett*, 337 F.3d at 1217 (quotations and citations omitted). An adverse employment action "must be materially adverse to the employee's job status."

Duncan v. Manager, Dep't of Safety, Denver, 397 F.3d 1300, 1314 (10th Cir. 2005). A written warning, or reprimand, is an adverse employment action "*only* if it effects a significant change in the plaintiff's employment status," *E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d at 800 (emphasis in original) (quoting *Haynes,* 456 F.3d 1224), such as "if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities." *Medina v. Income Support Div.*, 413 F.3d 1131, 1137 (10th Cir. 2005).

The employment actions Wheeler complains of are:

(1) failing to transfer her to Topeka after Passenger Painter John Rangel retired in July, 2005;

(2) failing to transfer her to Kansas City in the fall of 2006 when Painter Barnes was offered a carman position in Kansas City;

(3) failing to transfer her to Topeka in April of 2007 when Carman Galloway was transferred from Kansas City to Topeka;

(4) failing to transfer her to Topeka after June of 2007; and

(5) treating her less favorably than Barnes when they returned to Topeka in 2008.

None of the matters of which Wheeler complains constitute an adverse employment action. Prior to her August 2008 transfer to Topeka, Wheeler was (1) employed at the Havelock facility, (2) held seniority on both the Journeyman

Carman and Freight Painter rosters in Havelock, and (3) worked only as a Freight Painter or as a or lead person. Wheeler was not:

- subjected to any significant change in employment status, such as hiring, firing, failing to promote, or reassignment with significantly different responsibilities, nor was she
- subjected to any decision causing a significant change in benefits.

Though an adverse employment action may extend "beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions ... would form the basis of a discrimination suit." *MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1279 (10th Cir. 2005) (quotation omitted). *See also Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir.2000) (explaining that Title VII only proscribes discriminatory conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, or adversely affects his or her status as an employee" (quotations omitted)). The "denial" of a transfer, where that transfer bore no difference in responsibilities, pay or benefits, does not constitute an "adverse action" to support a claim under Title VII. *See, e.g., Semsroth v. City of Wichita*, 548 F.Supp.2d 1203, 1213 (D.Kan. 2008), *aff'd* 555 F.3d 1182 (10th Cir. 2009). "If a transfer is truly lateral and involves no

significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer adverse employment action." *Sanchez v. Denver Public Schools,* 164 F.3d at 532 (citing *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1449-50 (11th Cir.1998) (collecting cases)).

In short, Wheeler was not subjected to any adverse employment action. The district court correctly held as much and granted judgment to defendants on her disparate treatment claims. Aplee. App., 509-12.

II. The district court correctly dismissed Wheeler's retaliation claim.

On appeal, Wheeler bases her retaliation claims on (1) the "failure" to transfer her from Lincoln back to Topeka after June of 2007; and (2) treating her less favorably than Mr. Barnes after they had returned to Topeka in 2008. Applt. Brief, 24. Wheeler again purports to rely only on a mixed-motive theory of retaliation and, again erroneously, argues that she need not show an adverse employment action to pursue her retaliation claim.

"Title VII's antiretaliation provision forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids or has 'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing.'" *Burlington N.*

& Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006) (quoting 42 U.S.C. § 2000e-3(a)). To establish a prima facie case of retaliation, plaintiff must show "(1) that she engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse-that is, that the action might 'dissuade[ ] a reasonable worker from making or supporting a charge of discrimination,' and (3) that a causal connection exists between the protected activity and the materially adverse action." *E.E.O.C v. PVNF*, 487 F.3d at 803 (quoting *White*, 548 U .S. at 68).

Wheeler's retaliation claims fail as the latter elements-(2) a materially adverse employment action which is (3) causally connected to Wheeler's protected conduct-are wholly lacking. The district court addressed, however, only the element of an adverse employment action. Aplee. App., 512-14.

A. None of the actions relied upon by Wheeler are materially adverse employment actions.

Though the standard for assessing whether a given action is an "adverse employment action" sufficient to support a retaliation claim is sensitive to the particular circumstances of each case, it prescribes an objective inquiry that does not turn on a plaintiff's personal feelings about those circumstances. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. at 68-69. Each case is "judged from the

perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Id.* at 71 (quotations omitted).

1. The "denial" of a transfer was not an adverse employment action.

Wheeler was not "denied" any transfer. Transfers between BNSF locations were governed by the April 2005 Transfer Agreement and, under that agreement, transfers were required to be in order of seniority. Nobody transferring from Havelock to Topeka had less seniority on the Carman roster than did Wheeler. Further, the Freight Painter roster in Topeka was a closed roster to which no one had been added since the time of the merger creating the BNSF. Indeed, a special agreement was entered between the BRC and BNSF in May 2008 to create new roster positions which were filled by Wheeler and Barnes. Thereafter, Wheeler was contacted and offered a transfer. Adhering to a bona fide seniority system is not an adverse employment action and states no claim against either BNSF or Harding. 42 U.S.C. § 2000e-2(h).[1]

Regardless, the so-called "denial" of a transfer from Havelock to Topeka was not an adverse action. On appeal, Wheeler argues the "denial" of a transfer

[1]42 U.S.C. § 2000e-2(h) provides: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ."

could be construed as an adverse action because she subjectively viewed the Lincoln facility to be "a big step back in time." Aplt. Brief, 26. A prima facie claim for retaliation requires objective evidence of material disadvantage, Wheeler's bald personal preference is insufficient. *Semsroth v. City of Wichita*, 555 F.3d 1182, 1184-85 (10th Cir. 2009) (citing *McGowan v. City of Eufala*, 472 F.3d at 742-43). As set forth above, the "denial" of a transfer to a position which bears no difference in responsibilities, pay or benefits does not constitute an "adverse action" to support a retaliation claim under Title VII. *Semsroth v. City of Wichita*, 548 F.Supp.2d at 1213.

2. Wheeler's claims of disparate treatment after transfer does not constitute an adverse action.

Wheeler claims the "unfavorable" work duties consist of there having been consistently higher expectations for her performance throughout her career with the BNSF and its predecessor Santa Fe. Wheeler complains she has been ignored by her supervisors, worked through her breaks and her lunch to meet performance expectations, and had difficulty moving from one work station to another so as to complete her work assignments. Wheeler has, however, never been disciplined for work performance or failure to accomplish assigned tasks. Aplee. App. 140, 142. Indeed, the only discipline ever issued to Wheeler related to attendance during a

period of her mother's illness before the transfer to Havelock and a verbal reprimand at Havelock in 2002. Aplee. App. 141-42.

Wheeler argues the "social impact of the defendants'" treatment of her following her 2008 transfer to Topeka suffice as adverse action to support a retaliation claim. It is undisputed that Wheeler has not been disciplined or reprimanded since her transfer and that she has equivalent duties, pay and benefits as existed prior to her transfer. Wheeler simply fails to show any materially adverse that could dissuade a reasonable employee from making or supporting a charge of discrimination. There is no objective evidence of any material disadvantage and Wheeler's bald personal preference of is insufficient to state a claim of retaliation. *Semsroth*, 555 F.3d at 1184-85; and *McGowan v. City of Eufala*, 472 F.3d at 742-43.

III. Summary judgment for defendants was warranted for reasons not reached by the district court.

The district court rested its decision on its conclusions that Wheeler's claims failed for the lack of the essential element of an adverse employment decision. Defendants also briefed to the district court that plaintiff was not treated differently than any similarly situated employee and that none of the employment decisions at issue give rise to an inference of discrimination. This court, however, can affirm

the district court's decision "for any reason supported by the record," *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000), even if that reason was "not relied on by the district court." *Brady v. UBS Financial Services, Inc.,* 538 F.3d 1319, 1327 (10th Cir. 2008) (district court dismissed on statute of limitations, dismissal affirmed on basis of res judicata).

A. Wheeler's disparate treatment claims fail as Wheeler cannot demonstrate differing treatment among similarly situated employees.

This issue was presented to the district court, Aplee. App., 116-17, but not reached in the court's summary judgment decision.

"Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." *McGowan v. City of Eufala*, 472 F.3d 736, 745 (10th Cir.2006). In determining whether two employees are similarly situated, a "court should also compare the relevant employment circumstances, such as work history and company policies, applicable to the plaintiff and the intended comparable employees." *Id.*, 472 F.3d at 745.

There was only one BNSF employee situated similarly to Wheeler. Wheeler's "situation" was that of a BRC represented union employee holding

seniority solely on the Freight Painter roster in the Topeka shops prior to the April 2002 transfer to Havelock. Wheeler and Barnes were similarly situated in that:

- both were Freight Painters who elected to transfer from Topeka to Havelock, both were afforded Journeyman Carman seniority at Havelock while also being afforded seniority on the newly created Freight Painter roster at Havelock;
- both had the same seniority date on the Carman roster at Havelock (though Wheeler was senior to Barnes);
- neither Wheeler nor Barnes applied for the Carman positions posted and filled in April and August 2004;
- both Wheeler and Barnes lacked the seniority to even be asked about a transfer to Topeka after the April 2005 Agreement;
- both Wheeler and Barnes were enabled to transfer to Topeka only after their union negotiated a special agreement to open to positions on the closed Freight Painter roster in Topeka.

John Rangel, although on the Topeka Freight Painter roster prior to the transfer to Havelock, was dissimilar to Wheeler and Richard Barnes in that Rangel had been furloughed from the Passenger Painter roster in Topeka and retained his seniority on that roster despite the transfer to Havelock.

It is undisputed that all of the persons who transferred directly back from Havelock to Topeka onto the Journeyman Carman roster were senior to Wheeler (and, likewise, senior to Barnes). The only person junior to Wheeler on the Havelock roster, John Rangel, was recalled to a Passenger Painter position. Neither Wheeler nor Barnes held seniority on the Topeka Passenger Painter roster (indeed, Rangel was the last person on that roster).

B. Wheeler's disparate treatment claims fail as none of the employment actions complained of by Wheeler give rise to an inference of discrimination.

This issue was presented to the district court, Aplee. App., 119-22, but not reached in the court's summary judgment decision.

A plaintiff may pursue a mix-motive theory with direct evidence or circumstantial evidence of discrimination. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 98-102 (2003). There is no direct evidence of discriminatory motive and Wheeler relies instead on what he characterizes as circumstantial evidence. For circumstantial evidence to be sufficient to demonstrate that the employer was motivated by a discriminatory animus, it must relate directly to the discriminatory motive. *Fye*, 516 F.3d at 1226 (citing *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997)). The various actions complained of by Wheeler are

examined sequentially below. None, however, relate to any discriminatory animus nor do they give rise to any inference of discrimination.

i. from 2002 to 2008, the Carmen transferred from the Havelock facility back to the Topeka facility as Carmen were all male, and none of them were African-American.

The carman positions filled in 2004 are irrelevant to any claim asserted by Wheeler herein. After the April 2005 Transfer Agreement, transfers were granted strictly in seniority order and it is undisputed that none of the Carmen transferring directly from Havelock to Topeka held less seniority than did Wheeler on the Journeyman Carman roster. Adhering to a bona fide seniority system is not an unlawful employment practice under Title VII. 42 U.S.C. § 2000e-2(h). Likewise, a disparate impact resulting from a bona fide seniority system is not actionable under § 1981. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583

(1984).[2] Thus, no inference of discrimination arises from either the race or gender of those who transferred pursuant to the April 2005 Agreement.

ii. Passenger Painter John Rangel was recalled to Topeka in January 2005 and retired in June 2005, Harding elected to replace Rangel with a Carman;

Rangel was the last passenger painter on the Passenger Painter roster in Topeka. Wheeler did not hold seniority on the passenger painter roster. In the months preceding Rangel's retirement, it became Harding's judgment that there was insufficient paint work in business car maintenance to keep a full-time painter. Upon Rangel's retirement, he was replaced in business cars by a Carman and the Passenger Painter roster became "extinct." Thereafter, non-incidental paint work in the business car shop after Rangel's retirement was performed by painters from the Freight Painter roster. No inference of discrimination arises from the so-called

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[2]*See also*; *NAACP v. Detroit Police Officers Association*, 900 F.2d 903 (6th Cir. 1990); and *see, e.g.*, *Chance v. Board of Examiners & Bd. of Educ.*, 534 F.2d 993, 998 (2d Cir. 1976) (claims under 42 U.S.C. §§ 1981 and 1983 attacking bona fide seniority system not actionable), *cert. denied*, 431 U.S. 965 (1977); *Watkins v. United Steel Workers of America*, 516 F.2d 41, 49-50 (5th Cir. 1975) (provisions of collective bargaining agreement are valid and do not violate § 1981); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191-92 n. 37 (5th Cir. 1978) (bona fide seniority systems not subject to suit under section 1981), *cert. denied*, 439 U.S. 1115 (1979); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n. 3 (5th Cir. 1980); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1320 n. 4 (7th Cir. 1974) (seniority system is not violative of 42 U.S.C. § 1981), *cert. denied*, 425 U.S. 997 (1976); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1348-49 (11th Cir. 1983); *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1575 n. 41 (11th Cir. 1988).

"failure" to replace Rangel (the last and under-utilized Passenger Painter) with Wheeler or any other painter.

iii. Richard Barnes, a Caucasian male carman and painter in the Havelock facility, was offered a transfer to Kansas City, Kansas in 2006, and Wheeler was not offered a similar transfer.

Barnes' transfer request listed a preference for a transfer to *either* Kansas City *or* Topeka. When Barnes took the call and made clear his request for transfer was as a Painter rather than a Carman, the discussion ended and Barnes did not transfer. There is no evidence that anyone at BNSF knew of Wheeler's stated desire to transfer to Kansas City as a carman. The only transfer request on record for Wheeler shows only a request to transfer to Topeka (and not to Kansas City). Thus, her desire to transfer to Topeka as a Painter was known, but her stated desire for a transfer to Kansas City was unknown. Thus, Wheeler was not similarly situated to Barnes. No inference of discrimination arises from the "offer" of a carman position to Barnes which he did not accept and for which there is no evidence in BNSF files that Wheeler put in for a transfer to Kansas City as a carman.

iv. Assignment of painting work, both straight and overtime, to Carmen (including Galloway) and Apprentice Carmen.

The Passenger Painter and Freight Painter rosters in Topeka were closed in the late 1980s. No one was added to the Freight Painter rosters in Topeka following the merger of the BN and SF to form the BNSF. Painting is included within the CBA definition of a Carman's work. Non-incidental paint work in Topeka was assigned to a painter when a painter on the Topeka Freight Painter roster was available and thereafter to a Carman or Apprentice Carman. There is no rule that requires that paint work in the Topeka shops be offered to a Painter at another facility before offering that work to a carman or apprentice carman on the Topeka rosters (let alone a rule requiring that such paint work be offered to a painter at a facility governed by a different CBA such a Wheeler at the Havelock shops).

The assignment of painting tasks within the Topeka shops is not an adverse employment action as to Wheeler. The period during which overtime painting was being performed in Topeka, Wheeler was not on the Painter roster in Topeka. The Topeka painters were fully occupied and uncompleted paint work assigned to carmen and apprentice carmen in Topeka. Harding considered only those painters on the Topeka Painter roster as "available" painters.

No inference of discrimination arises from the use of Carmen and Apprentice Carmen already in Topeka to perform painting.

C. Plaintiff's retaliation claims also fail for lack of a causal connection between her protected conduct and the claimed employment actions.

To establish a prima facie case of retaliation, plaintiff must show, (1) that she engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection exists between the protected activity and the materially adverse action. *E.E.O.C. v. PVNF*, 487 F.3d at 803 (10th Cir.2007) (quoting *White*, 548 U.S. at 68).

As set forth above, the district court based its judgment solely on the lack of an adverse employment action. Defendants presented the additional argument, not reached by the district court, that Wheeler's retaliation claims fail for lack of a causal connection between her protected conduct and the claimed employment actions. Aplee. App. 124, 428. There is no evidence that anyone responsible for the complained of employment actions knew of her discrimination charges. To establish a prima facie case of retaliation, a plaintiff must show that the individual who took the adverse action knew of the protected activity. *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1176 (10th Cir. 2007). Thus, judgment for defendants was also proper for lack of the necessary causal connection.

CONCLUSION

The district court correctly concluded that plaintiff failed to establish an adverse employment action necessary to sustain a claim of disparate treatment or retaliation. Plaintiff fails to establish a claim of disparate treatment for reasons not addressed by the district court which also warrant judgment for the defendants. Thus, the district court correctly entered judgment for the defendants.

For these reasons, defendant asks this Court to affirm the district court's grant of summary judgment in favor of BNSF and Harding against all claims by plaintiff.

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CERTIFICATE OF DIGITAL SUBMISSION

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The words in the foregoing brief, exclusive of the cover, table of contents, table of authorities, signature block, and the certificates of service and compliance, have been counted via use of WordPerfect X4. The portions of the brief not specifically excluded above contain 8,126 words.

NOTICE OF ATTACHMENT

There are no attachments.

STATEMENT OF ORAL ARGUMENT

Defendant/Appellee does not request oral argument. The issues in this case are straightforward and the law is clear. Oral argument would not materially assist the court.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2010, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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