No. 10-3155

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMETRIA WHEELER

Plaintiff-Appellant,

vs.

BNSF RAILWAY COMPANY AND MIKE D. HARDING

Defendants-Appellees

Appeal from the United States District Court
for the District of Kansas

The Honorable Kathryn H. Vratil
District Court No. 09-2270-KHV

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT
REQUESTED

TABLE OF CONTENTS

PRIOR APPEALS

There are no prior or related appeals to this action.

STATEMENT OF JURISDICTION

The plaintiff, Emetria Wheeler, is an African American woman, and she has been employed by the corporate defendant, BNSF Railway Company ("BNSF"), since 1977. The individual defendant, Mike D. Harding, is employed by BNSF as a general foreman. Ms. Wheeler asserts two general claims in this lawsuit: (1) the defendants discriminated against her because of her gender and/or her race in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981; and (2) the defendants retaliated against her for protesting gender and/or race discrimination, in violation of Title VII and § 1981. The claims against Mr. Harding are only asserted under § 1981. Jurisdiction is based on 28 U.S.C. § 1331. (Aplt. App. at 8-15)

On June 4, 2010, the district court filed a memorandum and order granting summary judgment in favor of the defendants on both of Ms. Wheeler's claims. (Aplt. App. at 203-223) On the same day, final judgment was formally entered in favor of the defendants. (Aplt. App. at 224) On July 1, 2010, Ms. Wheeler filed a notice of appeal pursuant to Fed. Rule App. Pro. 4(a)(1). (Aplt. App. at 225) The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Could a reasonable jury, faced with the evidence presented, return a verdict in favor of Ms. Wheeler on her claim of discrimination based on her gender and/or her race?

2. Could a reasonable jury, faced with the evidence presented, return a verdict in favor of Ms. Wheeler on her claim of retaliation for protesting gender and/or race discrimination?

STATEMENT OF THE CASE

The following facts are stated in the light most favorable to Ms. Wheeler, who is the party opposing summary judgment. For the sake of convenience, the general facts which are truly uncontroverted are taken from the district court's memorandum opinion. (Aplt. App. 205-213)

Emetria Wheeler is an African American woman, and she has been employed by BNSF and its predecessor since 1977. In 2002, Ms. Wheeler was employed by BNSF as a freight car painter in BNSF's facility in Topeka, Kansas. Ms. Wheeler was also a member of the Brotherhood Railway Carmen Division of the Transportation Communications International Union ("BRC"). (Aplt. App. at 23-24)

A. BNSF's Transfer Of Its Freight Car Work From Topeka to Lincoln

In April of 2002, BNSF transferred all of its freight car work from its facility in Topeka to its Havelock facility in Lincoln, Nebraska. As part of the transfer of the freight car work to the facility in Lincoln, only five active painters on the Topeka freight painter roster were retained. The remaining painters were given the option of accepting a transfer to Lincoln, or accepting a furlough in Topeka until work became available. Ms. Wheeler elected to transfer to Lincoln. (Aplt. App. at 23-24)

The transfer of the freight car work from Topeka to Lincoln was the subject of a memorandum of agreement between BNSF and BRC dated March 8, 2002 (the "March 2002 Transfer Agreement"). Pursuant to the March 2002 Transfer Agreement, all journeymen 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. Ms. Wheeler understood that, by accepting the transfer to Lincoln, she was giving up her seniority in Topeka. (Aplt. App. at 24)

Ms. Wheeler never had seniority on the Journeyman Carman Roster in Topeka. Pursuant to Side Letter No. 5 to the March 2002 Transfer Agreement, a Freight Painter Roster was created in Lincoln; in addition, the freight painters transferring from Topeka were also granted seniority on the Freight Carman Roster in Lincoln. As a result, Ms. Wheeler was afforded seniority on both the Journeyman Carman Roster and the Freight Painter Roster in Lincoln. (Aplt. App. at 24)

In addition to Ms. Wheeler, two other freight painters elected to transfer from Topeka to Lincoln: John Rangel and Rick Barnes. (Aplt. App. at 91) Ms. Wheeler had seniority over Mr. Barnes on both the Freight Painter Roster and the Journeyman Carman Roster in Lincoln. (Aplt. App. at 92, 133)

Ms. Wheeler and the other employees who transferred from Topeka considered BNSF's Havelock facility in Lincoln to be "a big step back in time," in

comparison to BNSF's facility in Topeka. As Ms. Wheeler explained in her deposition:

> They did things in Havelock that we would never be allowed to do in Topeka. They ran things at Havelock totally different from what we did in Topeka. Havelock to my personal opinion to me it was like a step back in time at least 20 years. The same booth that I ran in Havelock we got rid of in Topeka 20 years ago. So it was like a step back in time. To all of us that went there [it] was like a big step back in time.

(Aplt. App. at 97. Emphasis added.)

B. BNSF's Transfer Of Employees Back To Topeka From 2002 Through 2004

When BNSF transferred the carmen and painters to the Havelock facility in Lincoln, BNSF agreed that it would transfer them back to the Topeka facility as business needs allowed. In October of 2002, Mike Harding, general foreman at Topeka, began transferring carmen from the Havelock facility back to Topeka. Mr. Harding only transferred male employees, none of whom were African American. (Aplt. App. at 95, 206-207)

At the Havelock facility, work by the carmen and painter crafts was subject to a collective bargaining agreement("CBA") between BRC and the former Burlington Northern Railway Company. On the other hand, at the Topeka facility, work by the carmen and painter crafts was subject to a CBA between BRC and the former Santa Fe Railway Company. From the time of the transfer of the freight car work to the Havelock facility until April of 2005, the CBAs between BNSF and BRC did not govern the means by which employees who had

transferred from Topeka to the Havelock facility might return to Topeka. (Aplt. App. at 25)

Beginning in 2002, Mr. Harding initially transferred employees back to Topeka by using what he called "the pick and choose method." In his deposition, Mr. Harding described this method as follows:

> I was told by labor relations that we could pick and choose from those folks [in Lincoln]. That they would have to apply for positions just like a new hire would off the street. So you would consider their qualifications and pick who you thought was best qualified.

(Aplt. App. at 99)

The first employee who was transferred back to Topeka from Lincoln under the pick and choose method was Gary Punches, who transferred back on October 7, 2002. (Aplt. App. at 99) The last employee who was transferred back to Topeka under the pick and choose method was Rod Woodall, who transferred back on August 18, 2003. (Aplt. App. at 99)

After the pick and choose method had ended in August of 2003, Mr. Harding transferred employees from Lincoln back to Topeka by using what he called "the interview process." In his deposition, Mr. Harding described this process as follows:

> They posted the jobs to the intranet and the internet and advertised them internally within the company and then people were interviewed and the people that were brought back were selected by that interview process.

(Aplt. App. at 100)

Five employees were transferred from Lincoln back to Topeka in 2004 under the interview process. These employees were Mr. Artzer, Mr. Sack, Mr. Wessel, Mr. Davis, and Mr. Martinez. (Aplt. App. at 100)

C. BNSF's Transfer of Employees Back to Topeka After January 1, 2005

In January of 2005, BNSF posted a position in Topeka for a "Carmen Passenger Painter." BNSF awarded the position to John Rangel, the most senior person on the Passenger Painter Roster in the Havelock facility. Ms. Wheeler did not hold seniority on that roster, and she had not filled out a transfer request at that time. (Aplt. App. at 207)

Upon his transfer back to Topeka, Mr. Rangel reported to Mr. Harding, who is the general foreman over the business car shop. (Aplt. App. at 156, 158-159) Mr. Rangel performed the painting duties involved in repairing the business cars. BNSF has a fleet of 37 business cars, and any repair work on the fleet of business cars is performed at the Topeka facility. (Aplt. App. at 160)

In April of 2005, an Agreement was executed between 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 BRC and the predecessor companies merged into the present BNSF ("the April 2005 Transfer Agreement"). The April 2005 Transfer 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.

(Aplt. App. at 25)

Thus, under the April 2005 Transfer Agreement, a vacant position at a former Santa Fe location would first be assigned, in order, to a furloughed employee at another former Santa Fe location; then to an active employee at another former Santa Fe location; then to a furloughed employee from a former Burlington Northern location; and then to an active employee at a former Burlington Northern location. (Aplt. App. at 26)

After the execution of the April 2005 Transfer Agreement and through June 30, 2008, BNSF transferred eleven employees from Lincoln (a former Burlington Northern location) back to Topeka (a former Santa Fe location). These employees were J.W. Nystrom, L.M. Herman, F. Martinez, C.A. Neeland, R.O. Benavides, Jr., S.K. Johnson, W.M. Galloway, W.D. Torres, D.A. Steinlage, G.I. Chandler, and C.A. Eastman. (Aplt. App. at 93)

D. Ms. Wheeler's Requests To Transfer From Lincoln

Pursuant to the April 2005 Transfer Agreement, Ms. Wheeler filled out and submitted two requests to transfer from the Lincoln facility. The first transfer request is dated June 10, 2005, and it only requested a transfer to Topeka. (Aplt. App. at 94, 137)

Ms. Wheeler testified that she filled out the second transfer request at the same time that Mr. Barnes filled out his transfer request. (Aplt. App. at 147) Mr. Barnes' transfer request is dated June 21, 2005. (Aplt. App. at 106) Ms. Wheeler further testified that her second transfer request included a request to transfer to BNSF's facility in Kansas City, Kansas, either as a carman or as a painter. (Aplt. App. at 137A, 154)

Ms. Wheeler testified that she wanted to transfer to BNSF's facility in Kansas City for two reasons. First, "everyone knew that if you went to Kansas City you were on the Santa Fe side and you could get back to Topeka quicker." (Aplt. App. at 148) This was so because the Kansas City facility was a former Santa Fe facility, and under the April 2005 Transfer Agreement, if a position opened up in the Topeka facility (also a former Santa Fe facility), then Ms. Wheeler would have priority for that position over any employee in the Lincoln facility (a former Burlington Northern facility). (Aplt. App. at 25-26)

The second reason why Ms. Wheeler wanted to transfer to the Kansas City facility was because "[i]t was closer to home." (Aplt. App. at 148) Ms. Wheeler had purchased a home in Topeka, and she explained that her son-in-law in

Topeka had been diagnosed with a serious medical problem. (Aplt. App. at 90, 148)

E. The Failure To Transfer Ms. Wheeler Back To Topeka After Mr. Rangel's Retirement In 2005

On July 1, 2005, Mr. Rangel retired from BNSF. (Aplt. App. at 167) On July 14, 2005, the list of "Transfer Requests for Topeka Painter" was updated. Ms. Wheeler was first on this list. (Aplt. App. at 195)

Shortly after Mr. Rangel had retired, Ms. Wheeler called Mr. Harding to talk about filing the painter position in the business car shop. During this conversation, Mr. Harding said that he was not going to fill the position because of lack of work, and because he might get someone who could not handle the job. Ms. Wheeler then suggested that he post the position as a painter/carman position, and further stated that she had seniority on both the Painter Roster and the Carman Roster in Havelock. Mr. Harding replied that he was not going to fill the painter's position. However, Mr. Harding went on to say that he would bring a painter back when a locomotive painter retires, or when painting becomes available in the locomotive side. (Aplt. App. at 133-134, 145-146)

Mr. Harding testified in his deposition that he was the person who made the decision to fill the position vacated by Mr. Rangel's retirement with a carman rather than a painter. (Aplt. App. at 164) Mr. Harding further testified that he based this decision on his opinion that by the time Mr. Rangel retired, he was

only being utilized as a painter about 20% of the time; the other 80% of the time Mr. Rangel was "just milling around." (Aplt. App. at 161)

Mr. Harding conceded in his deposition that his opinion that Mr. Rangel was only being utilized as a painter about 20% of the time was a subjective opinion, since there were no documents or other objective data to support his opinion. (Aplt. App. at 163-164) Mr. Harding further conceded that he never discussed with Mr. Rangel himself whether Mr. Rangel was only being utilized as a painter about 20% of the time. (Aplt. App. at 168)

Mr. Harding cannot recall specifically which carman he hired to fill the position vacated by Mr. Rangel's retirement. However, Mr. Harding agreed that he did not hire a woman or an African American to fill that position. (Aplt. App. at 165)

Following Mr. Rangel's retirement, Terry Gooden was usually assigned to perform the painting duties involved in repairing the business cars. (Aplt. App. at 162) Mr. Gooden is on the Painting Roster in Topeka, and Ms. Wheeler was on that same Roster prior to her transfer to the Havelock facility. (Aplt. App. at 102)

F. The Failure To Transfer Ms. Wheeler To Kansas City In 2006

Sometime in the fall of 2006 but prior to November, Mr. Barnes was offered a transfer to Kansas City as a carman. (Aplt. App. at 104-105) Ms. Wheeler was above Mr. Barnes on the Carman Roster in the Lincoln facility. (Aplt. App. at 133) However, in contrast to Mr. Barnes, Ms. Wheeler was never

offered a transfer to Kansas City as a carman. If Ms. Wheeler had been offered such a transfer, she would have accepted the transfer. (Aplt. App. at 148)

G. The Failure To Transfer Ms. Wheeler To Topeka In April of 2007

As of January 1, 2007, the Painter Roster in Topeka consisted of the following active employees:

Employee	Seniority Date
L.M. Cox	1974-01-28
T.L. Gooden	1976-01-06
S.E. Gomez	1977-04-26
J.A. Adame	1977-06-20
J.M. Avila	1980-10-06

(Aplt. App. at 194)

At the end of March of 2007, one of the employees on the Painter Roster in Topeka, Jesse Avila, died. Mr. Avila's last day of work at the Topeka facility was March 30, 2007. The specific title of the position held by Mr. Avila was "car loco painter" (carman locomotive painter). (Aplt. App. at 149, 199)

Mr. Harding testified in his deposition that after Mr. Avila had died, the general foreman over the locomotive shop, in consultation with the superintendent, decided not to fill the position vacated by Mr. Avila with another painter, but to leave the position open. Mr. Harding further testified that he then requested, and was granted, permission to fill the vacant position by calling back another carman to work in the business car shop. (Aplt. App. at 169-170)

Ms. Wheeler testified that on April 5, 2007, she saw a job posting on BNSF's intranet for a position in Topeka described as either a carman or a

painter position. In any event, the duties of this position expressly included painting. According to the job posting, the hiring manager of this position was Mr. Harding. (Aplt. App. at 134, 150-151)

On or about April 9, 2007, William Galloway called Mr. Harding on the telephone to inquire about a job posting for a position in Topeka which was either a carman or a painter position. At that point in time, Mr. Galloway was working in BNSF's facility in Kansas City, and he had started to fill out the application for the position online. (Aplt. App. at 175, 177, 179)

During this telephone conversation, Mr. Harding told Mr. Galloway that if he was serious about the position in Topeka, he should request a transfer, rather than apply for the position online. Mr. Harding further advised Mr. Galloway that if he filled out the paperwork for a transfer and submitted it, then he would get consideration before the employees in Havelock. Mr. Galloway was not aware that because Kansas City was a former Santa Fe facility, he would have priority in transfers over the employees in Havelock. (Aplt. App. at 176-179)

Mr. Galloway followed Mr. Harding's advice and filled out the paperwork for a transfer to Topeka, and then faxed the paperwork to Mr. Harding. Shortly thereafter, Mr. Harding told Mr. Galloway that he had received the transfer. (Aplt. App. at 179-181)

On April 16, 2007, Mr. Galloway started to work in the Topeka facility, and he performed cab carpenter duties for only three days. On April 19, 2007, Mr. Galloway was assigned to perform locomotive painting duties. (Aplt. App. at 181)

As of June 11, 2007, Mr. Galloway continued to perform locomotive painting duties. The other employees who also were performing locomotive painting duties were L.M. Cox, T.L. Gooden, S.E. Gomez, and J.A. Adame. (Aplt. App. at 183, 202) Except for Mr. Galloway, all of these other employees were on the Painter Roster in Topeka. (Aplt. App. at 194)

H. The Failure To Transfer Ms. Wheeler To Topeka After June of 2007

Mr. Galloway continued to perform locomotive painting duties from June of 2007 until after Ms. Wheeler transferred back to Topeka in August of 2008. Mr. Galloway finally transferred to the business car shop on September 5, 2008. (Aplt. App. at 184-186)

Steve Gomez has been on the Painter Roster in Topeka since April 26, 1977. (Aplt. App. at 194) Since 2001, Mr. Gomez has held a position as a carman locomotive painter. Mr. Gomez testified in his deposition that between 2006 and 2008, there was a lot of overtime work performing locomotive painting duties. For some months during this period of time, Mr. Gomez worked eight hours of overtime every other day. (Aplt. App. at 188-190)

Mr. Gomez further testified that about one month before the death of Mr. Avila (who died at the end of March of 2007), Mr. Gomez and a coworker approached the superintendent of the Topeka facility, Mr. Galvan, about the idea of bringing Ms. Wheeler and Mr. Barnes back to Topeka, since they had experience in performing locomotive painting duties. Mr. Galvan replied that he would look into the idea. When Mr. Avila died, Mr. Gomez and his coworker

again approached Mr. Galvan about the idea of bringing Ms. Wheeler and Mr. Barnes back to Topeka. About two and one-half months later (in June of 2007), Mr. Galvan told Mr. Gomez: "It's a done deal, they are coming." (Aplt. App. at 191-192)

On June 15, 2007, Ms. Wheeler filed a charge of race and gender discrimination against BNSF with the Topeka Human Relations Commission. On the same day, the Topeka Human Relations Commission sent a letter to BNSF, enclosing a copy of Ms. Wheeler's charge of discrimination and a request for records from BNSF. (Aplt. App. at 211)

On December 29, 2007, Ms. Wheeler filed a second charge of race and gender discrimination against BNSF with the Equal Employment Opportunity Commission. This charge was cross-filed with the Kansas Human Rights Commission on the same day. (Aplt. App. at 95)

On July 10, 2008, Courtney Carpenter, who was then the Human Resources Manager in Topeka, sent a letter to Ms. Wheeler about a painter position in Topeka. This letter stated in relevant part:

> I have been attempting to contact you by telephone in regards to the Carman Painter position in Topeka, KS that was advertised on our website several weeks ago. I am going through the transfer request list for Carmen Painters to Topeka and you are on the top of the seniority roster.

(Aplt. App. at 196)

Ms. Carpenter's letter of July 10 falsely stated that a "Carman Painter position in Topeka, KS . . . was advertised on our website several weeks ago." During May, June, and July of 2008, Ms. Wheeler looked at BNSF's website for new job postings in Topeka almost every day. There was no job posting for a Carman Painter position. (Aplt. App. at 134)

On July 11, 2008, Mr. Galvan, who was then the superintendent of the Topeka facility, called Ms. Wheeler and told her that there was a painter position in Topeka available. Mr. Galvan then asked Ms. Wheeler if she would accept this position. Ms. Wheeler in turn asked Mr. Galvan to fax her a copy of the position information, which he did. This information indicated that the title of the position was "Car Loco Painter" (Carman Locomotive Painter), and that the duties were "Paint Locomotives/Parts." (Aplt. App. at 138-140, 152-153, 197)

On August 24, 2008, Ms. Wheeler returned to work in the Topeka facility as a "carman locomotive painter", and her duties consisted of painting locomotive parts. Ms. Wheeler's rate of pay in the Topeka facility was equivalent to her rate of pay in the Lincoln facility. (Aplt. App. at 134, 152)

I. The Less Favorable Treatment Of Ms. Wheeler After Her Return To Topeka In 2008

After returning to work in the Topeka facility in August of 2008, Ms. Wheeler was treated less favorably than Mr. Barnes. Specifically, in contrast to Mr. Barnes, Ms. Wheeler was not spoken to by her supervisors; instead, her

work assignments were relayed to her through Mr. Barnes, or written on a piece of paper. (Aplt. App. at 142) Ms. Wheeler explained in her deposition:

> I go into a meeting where we have a line-up. There's at least 19 people there. There's only one black. There's only one female. I happen to fit both categories there. The only black and the only female. When Rick [Barnes] is not there, which he is not there on Monday nights, do you think I get talked to. I get handed a piece of paper; there's your assignments.

(Aplt. App. at 142)

Ms. Wheeler was also treated less favorably than Mr. Barnes in that she was given work assignments - - such as painting battery boxes or pan engines, or painting inside a cab - - with unusually short time requirements. (Aplt. App. at 142-143) Ms. Wheeler testified:

> I've always been expected since I've come back to do X amount above any other employee that I am working with . . . if it takes six man hours I'm supposed to do it in three, plus other duties also within the realm. . . . I work right through breaks. I work right through lunch. Work right through anything I have to.

(Aplt. App. at 143. Emphasis added.)

Ms. Wheeler was further treated less favorably than Mr. Barnes in that she was not given keys to the facility or keys to her personal locker, nor was she assigned a vehicle to use. (Aplt. App. at 143-144) Ms. Wheeler testified:

> When I first came back to Topeka the other painter that came with me was given keys to everything, given a vehicle to drive, given locker, locks. So therefore . . . I walked from blank to blank or either [rode] on the back of his vehicle. . . . I was not given any keys to the facility. I would have to wait until he

> came to unlock the facility if it was locked. Any equipment that was locked, I would have to wait or ask him to unlock it. . . .

(Aplt. App. at 143. Emphasis added.)

J. Proceedings In The District Court

The district court granted summary judgment in favor of the defendants on Ms. Wheeler's claim of discrimination based on her gender and/or her race, and also on her claim of retaliation for protesting gender and/or race discrimination. (Aplt. App. at 203-223) As to Ms. Wheeler's claim of discrimination, the district court held, as a matter of law, that none of the actions which Ms. Wheeler suffered rose to the level of an "adverse employment action." (Aplt. App. at 215-220) As to Ms. Wheeler's claim of retaliation, the district court likewise held, as a matter of law, that none of the actions which Ms. Wheeler suffered rose to the level of an "adverse employment action." (Aplt. App. at 220-222)

ARGUMENTS AND AUTHORITIES

This court reviews a district court's grant of summary judgment de novo to determine whether there is a genuine issue as to any material fact, and whether the moving party is entitled to judgment as a matter of law. Garrett v. Hewlett-Packard Company, 305 F.3d 1210, 1216 (10th Cir. 2002). In considering whether there are any genuine issues of material fact, "the court does not weigh the evidence but instead inquires whether a reasonable jury, faced with the evidence presented, could return a verdict for the nonmoving party." Gullickson v. Southwest Airlines Pilots' Ass'n., 87 F.3d 1176, 1183 (10th Cir. 1996), citing

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). See also Munguia v. Unified School Dist. No. 328, 125 F.3d 1353, 1356 (10th Cir. 1997).

In analyzing a summary judgment motion, the court "may not make credibility determinations or weigh the evidence," and "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133, 150 (2000). The nonmoving party must be given "wide berth to prove a factual controversy exists." Jeffries v. State of Kan., 147 F.3d 1220, 1228 (10th Cir. 1998).

In the present case, the district court erroneously weighed the evidence, and failed to view the record in the light most favorable to Ms. Wheeler. As discussed in detail below, a reasonable jury, when faced with the evidence presented here, could return a verdict for Ms. Wheeler on her claim of discrimination as well as on her claim of retaliation.

I. A REASONABLE JURY, FACED WITH THE EVIDENCE PRESENTED, COULD RETURN A VERDICT IN FAVOR OF MS. WHEELER ON HER CLAIM OF DISCRIMINATION BASED ON HER GENDER AND/OR HER RACE

A. Ms. Wheeler's Mixed-Motive Theory of Recovery

Ms. Wheeler's first claim is that the defendants discriminated against her because of her gender and/or race, in violation of both Title VII and § 1981. (Aplt. App. at 36-37) An employment discrimination claim may proceed initially on two alternative theories of recovery: a "mixed-motive" theory, or a "pretext" theory. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n. 12 (1989) [plurality opin.]. See also Fye v. Oklahoma Corp. Com'n, 516 F.3d 1217, 1225-1227 (10th

Cir. 2008) [explaining the differences between a mixed-motive theory and a pretext theory]; Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 552 (10th Cir. 1999) [Price Waterhouse continues to control a mixed-motive theory of recovery].

Under a mixed-motive theory of recovery, the plaintiff must show that an employment decision "was the product of a mixture of legitimate and illegitimate motives." Price Waterhouse, 490 U.S. at 247. Where such a theory of recovery is asserted, "it simply makes no sense to ask whether the legitimate reason was the 'true reason' . . . for the decision." Price Waterhouse, 490 U.S. at 247. Emphasis in original. Rather, the essential inquiry is whether "an impermissible motive played a motivating part in an adverse employment decision." Price Waterhouse, 490 U.S. at 250. Emphasis added.

Under a pretext theory of recovery, on the other hand, the plaintiff must show that the ostensible legitimate business reason for an employment decision was not the "true reason" for the decision. Where such a theory of recovery is asserted, the basic premise "is that either a legitimate or an illegitimate set of considerations led to the challenged decision." Price Waterhouse, 490 U.S. at 247. Emphasis in original. The essential inquiry is whether "the employer's stated reason for its decision is pretextual." Price Waterhouse, 490 U.S. at 247 n. 12.

Here, Ms. Wheeler is asserting a mixed-motive theory of recovery in regard to her discrimination claim under Title VII and § 1981. Where a mixed-

motive theory of recovery is asserted, the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is not applicable. Price Waterhouse, 490 U.S. at 246-247. See also Fye v. Oklahoma Corp. Com'n, 516 F.3d at 1225; Medlock v. Ortho Biotech, Inc., 164 F. 3d at 550; Greene v. Safeway Stores, Inc., 98 F.3d 554, 557-58 (10th Cir. 1996).

In order to prevail on her mixed-motive theory of recovery, Ms. Wheeler need only show that "an impermissible motive played a motivating part in an adverse employment decision," Price Waterhouse, 490 U.S. at 250, even though other factors may have also played a motivating part in the employment decision. Or in the language of 42 U.S.C. § 2000e-2(m), which codifies the mixed-motive theory of recovery:

> Except as otherwise provided in this subchapter, 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.

In order to survive a motion for summary judgment, a "plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was a motivating factor' for the defendant's adverse employment action." White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008), quoting 42 U.S.C. § 2000e-2(m). Here, the district

court held that Ms. Wheeler has failed to produce sufficient evidence to convince a jury that the defendants took any "adverse employment action" against her.

B. Evidence Of "Adverse Employment Actions" Taken Against Ms. Wheeler

As the district court correctly stated, Ms. Wheeler contends that the defendants took five adverse employment actions against her because of her gender and/or race: (1) failing to transfer her from Lincoln to Topeka after Mr. Rangel retired on July 1, 2005; (2) failing to transfer her from Lincoln to Kansas City in the fall of 2006; (3) failing to transfer her from Lincoln to Topeka in April of 2007; (4) failing to transfer her from Lincoln to Topeka after June of 2007; and (5) treating her less favorably than Mr. Barnes after they had returned to Topeka in 2008. (Aplt. App. at 214)

As to the first four employment actions - - which all involved failing to transfer Ms. Wheeler from Lincoln to Topeka, or to Kansas City as a stepping stone to Topeka (Aplt. App. at 148) - - the district court concluded that Ms. Wheeler has failed to show that a position in Topeka was objectively more desirable than her position in Lincoln. (Aplt. App. at 215-218) Citing Sanchez v. Denver Public Schools, 164 F.3d 527, 532 (10th Cir. 1998), the district court explained:

> Where a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the employee's belief that the transfer is either positive or negative does not itself render the denial or receipt of the transfer an adverse employment action.

(Aplt. App. at 216) The district court erred in reaching this conclusion for two reasons.

First, in contrast to Sanchez, Ms. Wheeler is asserting a mixed-motive theory of recovery. As codified in 42 U.S.C. § 2000e-2(m), such a theory of recovery applies to "any employment practice." This statutory language is very broad, and it is not limited to employment practices which are objectively adverse.

Second, also in contrast to Sanchez, Ms. Wheeler has presented evidence from which a reasonable jury could find that a transfer from Lincoln to Topeka was objectively desirable. One piece of evidence consists of Ms. Wheeler's testimony that she and the other employees who had transferred from Topeka considered the Lincoln facility to be "a big step back in time," in comparison to the Topeka facility. (Aplt. App. at 97) Another piece of evidence consists of the unconverted fact that from October of 2002 through June of 2008, nineteen employees chose to transfer from Lincoln to Topeka. (Aplt. App. at 93, 99, 100, 207) Based on this evidence, a reasonable jury could find that the defendants' failure to transfer Ms. Wheeler from Lincoln to Topeka, or to Kansas City as a stepping stone to Topeka, constituted an adverse employment action.

As to the fifth employment action which forms the basis of Ms. Wheeler's discrimination claim - - treating her less favorably than Mr. Barnes after they had returned her to Topeka in 2008 - - Ms. Wheeler has likewise presented evidence

from which a reasonable jury could find that such treatment was objectively adverse. For example, Ms. Wheeler testified that in order to complete her work assignments with unusually short time requirements, she worked "right through breaks" and "right through lunch." (Aplt. App. at 143) Ms. Wheeler further testified that because she was not assigned a vehicle to use, she had to walk from one work station to another work station, or ride on the back of Mr. Barnes' vehicle. (Aplt. App. at 143) Ms. Wheeler further testified that because she was not given keys to the facility, she was delayed in completing her work assignments. (Aplt. App. at 143)

In light of this evidence, a reasonable jury could find that the defendants' less favorable treatment of Ms. Wheeler after she had returned to Topeka constituted adverse employment actions. As this court explained in Sanchez:

> Such actions are not simply limited to monetary losses in the form of wages or benefits. [Citation omitted.] Instead, we take 'a case-by-case approach,' examining the unique factors relevant to the situation at hand.

164 F.3d at 5352, quoting Jeffries v. State of Kan., 147 F.3d 1220, 1232 (10th Cir. 1998).

II. A REASONABLE JURY, FACED WITH THE EVIDENCE PRESENTED, COULD RETURN A VERDICT IN FAVOR OF MS. WHEELER ON HER CLAIM OF RETALIATION FOR PROTESTING GENDER AND/OR RACE DISCRIMINATION

A. Ms. Wheeler's Mixed-Motive Theory of Recovery

Ms. Wheeler's second claim is that the defendants retaliated against her for protesting gender and/or race discrimination, in violation of both Title VII and

§ 1981. (Aplt. App. at 37-38) Ms. Wheeler is asserting a mixed-motive theory of recovery in regard to her retaliation claim. This means that she only needs to establish that retaliation "was a motivating factor for any employment practice, even though other factors also motivated the practice."

In order to establish a prima facie claim of retaliation, Ms. Wheeler must show that: (1) she engaged in protected opposition to discrimination; (2) a reasonable person would have found her employer's subsequent action to be materially adverse; and (3) a causal connection exists between her protected activity and the employer's action. Semsroth v. City of Wichita, 555 F.3d 1182, 1184 (10th Cir. 2009); McGowan v. City of Eufala, 472 F.3d 736, 741 (10th Cir. 2006). Focusing only on the second element, the district court again held that Ms. Wheeler has failed to produce sufficient evidence to convince a jury that the defendants took any "adverse employment action" against her.

B. Evidence Of "Adverse Employment Actions" Against Ms. Wheeler

As the district court correctly stated, Ms. Wheeler contends that the defendants took two adverse employment actions against her in retaliation for protesting gender and/or race discrimination: (1) failing 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. (Aplt. App. at 220) Citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006), the district court further explained:

> Plaintiff correctly asserts that although her retaliation claim implicates the same allegedly adverse actions which form the basis of her disparate treatment claim, a different and less strict standard applies for determining whether these employment actions are 'adverse.' Under this less strict standard, plaintiff must show that a reasonable employee would have found the challenged action materially adverse, i.e., that it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

(Aplt. App. at 221)

In regard to the defendants' failure to transfer Ms. Wheeler from Lincoln back to Topeka after June of 2007, the district court concluded that this did not rise to the level of an "adverse" employment action, saying:

> Plaintiff cites no objective difference between her painter position in Havelock and the painter position to which she requested transfer . . . in Topeka in 2007.

(Aplt. App. at 222) The district court erred in reaching this conclusion for two reasons.

First, in Burlington N. & Santa Fe Ry. Co. v. White, the Supreme Court emphasized that determining whether an employment action is "adverse" is a contextually sensitive inquiry, explaining:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.'

548 U.S. at 69. Emphasis added.

Here, the relevant context is that from October of 2002 through June of 2008, nineteen employees were transferred from Lincoln back to Topeka. (Aplt. App. at 93, 99, 100, 207) In light of this context, a reasonable jury could find that the defendants' refusal to transfer Ms. Wheeler from Lincoln back to Topeka after June of 2007 constituted an adverse employment action, i.e. that it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Second, contrary to the district court's conclusion, Ms. Wheeler has come forward with evidence of an objective difference between her painter position in the Lincoln facility and the painter position in Topeka to which she requested transfer. This evidence consists of Ms. Wheeler's testimony that she and the other employees who had transferred from Topeka considered the Lincoln facility to be "a big step back in time," in comparison to the Topeka facility. (Aplt. App. at 97) A reasonable jury could find Ms. Wheeler's testimony to be "objective evidence of material disadvantage," and not "merely the bald personal preferences of the plaintiff." Semsroth v. City of Wichita, 555 F.3d at 1185.

In regard to the defendants' less favorable treatment of Ms. Wheeler after she had returned to Topeka in 2008, the district court concluded that "these actions do not constitute adverse employment actions . . . [because] no one at BNSF has disciplined plaintiff or counseled her with respect to any work performance matter since she returned to Topeka," (Aplt. App. at 222) The

district court erred in reaching this conclusion because, again, "[c]ontext matters." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. at 69.

In context, the real social impact of the defendants' less favorable treatment of Ms. Wheeler was that: (1) she was ignored by her supervisors (Aplt. App. at 142); (2) she was forced to work through her breaks and her lunch (Aplt. App. at 143); and (3) she was impeded in her ability to move from one work station to another, and to complete her work assignments. (Aplt. App. at 143) In light of these circumstances, a reasonable jury could find that the less favorable treatment of Ms. Wheeler after her return to Topeka was materially adverse, i.e. it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

CONCLUSION

For the reasons discussed above, the district court erred in granting summary judgment in favor of BNSF on Ms. Wheeler's claim of discrimination and on her claim of retaliation. Accordingly, the judgment in favor of BNSF on these two claims must be reversed, and the case remanded to the district court for further proceedings.

CERTIFICATE OF COMPLIANCE WITH RULE 32

Pursuant to Fed. R. App. Pro. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 7,581 words. I relied on my word processor to obtain this count, and it is Microsoft Word 2000.

ORAL ARGUMENT

Oral argument is requested in this case because it raises at least one issue which requires further clarification by the Tenth Circuit: What evidence is sufficient to establish an "adverse employment action" in the context of claims of discrimination and retaliation under 42 U.S.C. § 2000e-2(m)?

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CERTIFICATE OF SERVICE

I herby certify that on the 29th day of September, 2010, I delivered a copy of the foregoing document via electronic mail to the following parties:

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