

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 25-1271

COLETTE CUNNINGHAM,

Plaintiff - Appellant,

v.

LOUDOUN COUNTY SHERIFF'S OFFICE; MICHAEL L. CHAPMAN, Individually and Officially as Sheriff; MARK POLAND, Individually and Officially; ERIC PRUGH, Individually and Officially; KENNETH DONDERO, Individually and Officially; THOMAS GILLIGAN, Individually and Officially,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Michael Stefan Nachmanoff, District Judge. (1:23-cv-01626-MSN-LRV)

Submitted: April 13, 2026

Decided: September 29, 2026

Before WYNN, BENJAMIN, and BERNER, Circuit Judges.

Affirmed in part, reversed in part, vacated in part, and remanded by unpublished per curiam opinion.

ON BRIEF: Thomas Kenneth Plofchan, Jr., WESTLAKE LEGAL GROUP PLLC, Potomac Falls, Virginia, for Appellant. Alexander Francuzenko, Philip C. Krone, COOK CRAIG & FRANCUZENKO, PLLC, Fairfax, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Colette Cunningham appeals the district court’s order granting summary judgment to the Loudoun County Sheriff’s Office (“the Sheriff’s Office”) on Cunningham’s gender-discrimination and retaliation claims under Title VII. We affirm in part, reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

The Sheriff’s Office is divided into four stations, each led by a Station Commander, who is a Captain, and an Assistant Station Commander, who is a First Lieutenant. The First Lieutenant position is particularly demanding because that role must perform the Station Commander’s duties whenever necessary and serve as the “duty officer” on a rotating basis, which means it is the on-call supervisor during non-business hours. J.A. 75, 385.¹

In December 2019, Loudoun County Sheriff Michael Chapman promoted Cunningham to First Lieutenant and Assistant Station Commander of the Eastern Loudoun Station (“the Eastern Station”). Thomas Gilligan served as the Station’s Captain and Station Commander at that time.

Eventually, tensions arose between Cunningham and Gilligan. Cunningham claims that Gilligan repeatedly harassed her over a period of months, including by warning her that one of her subordinates was “keeping a thick file on her.” J.A. 494. Sheriff Chapman and Undersheriff Mark Poland met with Cunningham to address the problem. Cunningham claims that prior to that meeting, she lodged formal complaints against Gilligan. In contrast,

¹ “J.A.” refers to the joint appendix the parties filed in this appeal.

Poland testified that he thought that there was nothing “more than a personality conflict” between Cunningham and Gilligan. J.A. 157. And Chapman testified that he was unaware of any formal complaints that Cunningham filed against Gilligan. Ultimately, Chapman and Poland concluded that “the dynamic at the [Eastern Station] was off and that something needed to be done,” J.A. 157, so they removed Gilligan from the Eastern Station and relocated him to the Sheriff’s Office headquarters in June 2020.

Although Gilligan was physically absent from the Eastern Station, the Sheriff’s Office maintains that he continued to serve as the Station’s Captain and Station Commander until he was replaced by Greg Ahlemann in March 2021. It also claims that Cunningham “underfill[ed]” for Gilligan during that nine-month period. J.A. 532–33. Underfilling occurs “when a position is filled, but the person in the position is unavailable” so someone else performs that position’s duties on an interim basis. J.A. 158. Furthermore, the Sheriff’s Office explains that Cunningham was not named Acting Captain because that title can only be given when the role is vacant.

The parties do not dispute many of the material facts related to Cunningham’s employment conditions during Gilligan’s absence. Specifically, the Sheriff’s Office does not contest that during that nine-month period Cunningham ran the Eastern Station’s day-to-day operations, that she worked overtime to meet the Eastern Station’s needs, and that she continued to serve as a duty officer.

But their agreement ends there. Cunningham claims that her responsibility to run the Eastern Station’s day-to-day operations was “significantly greater than a temporary coverage usually performed by an Assistant Station Commander in the temporary absence

of a Station Commander.” J.A. 495. She further alleges that, while Gilligan was absent, the Sheriff’s Office refused to give her and the Station Commanders comparable administrative support.

On March 18, 2021, Cunningham filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”) against the Sheriff’s Office based on sex discrimination and retaliation. After receiving her Notice of Right to Sue, Cunningham filed a complaint, asserting five counts. The district court dismissed every count except for her Title VII claim, which includes three distinct theories: discrimination based on gender, pay disparity based on gender, and retaliation.

Cunningham asserted that, because of her gender, the Sheriff’s Office denied her a Monday-through-Friday schedule while she operated as the “de facto” Station Commander; forced her to serve as a duty officer while she also served as the Station Commander; refused to give her the rank or title associated with her job responsibilities; and did not pay her commensurate with male station commanders. J.A. 38. She also asserted that the Sheriff’s Office retaliated against her after she filed a complaint of sex discrimination.

After discovery, the Sheriff’s Office moved for summary judgment. The district court granted the motion. It concluded that Cunningham’s disparate-treatment theory failed because she did not identify any appropriate comparators or an adverse employment action. It found that her pay was too “similar” to the pay received by her proffered comparators to support her pay disparity theory. J.A. 586. And it determined that her retaliation claim was

deficient as a matter of law because there was no evidence that the Sheriff's Office was on notice of her EEOC complaint, which she filed *after* the allegedly adverse actions occurred.

Cunningham timely appealed. J.A. 564.

II.

We review de novo a district court's order granting summary judgment. *Deque Sys. Inc. v. Browserstack, Inc.*, 177 F.4th 585, 598 (4th Cir. 2026). "Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, . . . there's 'no genuine dispute as to any material fact and [the moving party] is entitled to judgment as a matter of law.'"² *Id.* (quoting Fed. R. Civ. P. 56(a)).

Because Cunningham does not address the district court's retaliation analysis in her opening brief, she has waived any challenge to the district court's conclusion that the claim fails as a matter of law. *See Grayson O Co. v. Agadir Int. LLC*, 856 F.3d 307, 316 (4th Cir. 2017). So we affirm summary judgment on that issue. However, we reach a different result on her disparate-treatment and pay-discrimination claims.

Under Title VII, an employer may not "discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of

² In its ruling, the district court took "into account" that Cunningham failed to abide by E.D. Va. Local Rule 56(B), which required her to specifically agree or disagree with each of the disputed facts in the case. J.A. 585. In doing so, Cunningham argues that the district court "elevate[d] form over substance," Opening Br. at 26. We disagree. "Even if a non-moving party fails to comply with Local Rule 56(B), the Court should still generally determine whether the moving party has met its burden on a motion for summary judgment, rather than deciding the motion on a technicality." *Brown v. Serenity C & C, Inc.*, 391 F. Supp. 3d 546, 551 (E.D. Va. 2019). And that is precisely what the district court did. *See* J.A. 585.

such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). And a plaintiff may prove discrimination under Title VII with direct evidence or, alternatively, with indirect evidence through "the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019) (cleaned up).

Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of discrimination. *Lettieri v. Equant*, 478 F.3d 640, 646 (4th Cir. 2007). If she does, the burden shifts to the employer to assert a nondiscriminatory explanation for its actions. *Id.* If the employer succeeds, the burden shifts back to the plaintiff to show that the employer's explanation was "actually a pretext for discrimination." *Id.* (citation omitted).

Cunningham pursued her disparate-treatment and pay-disparity claims through the *McDonnell Douglas* framework. The district court concluded at summary judgment that, even viewing the evidence in the light most favorable to Cunningham, she had failed to establish a prima facie case of discrimination under either theory. We disagree.

A.

"To establish a prima facie case of disparate treatment, a plaintiff must prove four elements: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *Cosby v. S.C. Prob., Parole & Pardon Servs.*, 93 F.4th 707, 714 (4th Cir. 2024) (cleaned up). In conducting this holistic inquiry, we must "determine whether the record as a whole gives rise to a reasonable inference of . . . discriminatory conduct by the employer." *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 512 (4th Cir. 1993). The district

court concluded that Cunningham failed to meet her burden on the third and fourth elements. We evaluate each in turn.

1.

“An adverse employment action is a discriminatory act that adversely affects the terms, conditions, or benefits of the plaintiff’s employment.” *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (cleaned up). Cunningham alleges that the Sheriff’s Office denied her a promotion along with the attendant schedule, forced her to remain a duty officer, and deprived her of additional administrative support while she performed the day-to-day duties of Station Commander. Each of these actions constitute adverse employment actions based on the facts of this case. *See Mackey v. Shalala*, 43 F. Supp. 2d 559, 568–69 (D. Md. 1999) (explaining that “Title VII does not limit an adverse employment action to a decision that only affects monetary considerations, since an employer can make an employee’s job undesirable without affecting that employee’s salary or benefits”), *aff’d*, 360 F.3d 463 (4th Cir. 2004).

As a result of those decisions, Cunningham worked a grueling schedule rife with overtime hours. And this new paradigm significantly altered the conditions of her employment. *See* J.A. 495 (Cunningham stating in an affidavit that her new “responsibility was significantly greater than a temporary coverage usually performed by an Assistant Station Commander”). Therefore, the district court erred in concluding that the defendants were entitled to summary judgment on the adverse-employment-action element of Cunningham’s disparate-treatment claim.

2.

Turning to the fourth element, the district court similarly erred in concluding that Cunningham failed to identify suitable comparators.

“[T]here is no bright-line rule for what makes two jobs ‘similar’ under Title VII.” *Spencer*, 919 F.3d at 207. Generally, “courts consider whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications—provided the employer considered these latter factors in making the personnel decision.” *Id.* (quotation omitted). This requirement “is not toothless.” *Id.* A “plaintiff must provide evidence that the proposed comparators are not just similar in *some* respects,” *id.*, but “are similar in all *relevant* respects,” *Johnson v. Baltimore City*, 163 F.4th 808, 818 (4th Cir. 2026) (quotation omitted).

Here, Cunningham identifies three male Captains who served as Station Commanders at other stations as appropriate comparators and asserts that, unlike them, she was (1) required to perform two jobs, (2) denied a promotion, (3) required to work overtime, (4) denied a Monday-through-Friday work schedule, and (5) denied administrative support.

The gravamen of the Sheriff’s Office’s argument is straightforward: these comparators are inappropriate because they are Captains and Cunningham is not. That distinction is typically significant. *See, e.g., Lightner v. Wilmington*, 545 F.3d 260, 265 (4th Cir. 2008) (explaining that “[t]he difference in [the plaintiff’s and the comparators’] positions within the [police department] makes the purported comparison in this case too

loose”). But here, it is not germane to the proper inquiry: whether the comparators were “similar [to Cunningham] in all *relevant* respects.” *Johnson*, 163 F.4th at 818.

Their difference in rank is immaterial because the Sheriff’s Office required Cunningham to perform the very same day-to-day duties typically assigned to a Captain for a nine-month period. She testified in an affidavit that she was held to the same standard as the other Captains. The Sheriff’s Office did not present evidence to the contrary.

And it is of negligible relevance that Cunningham did not report to the same supervisor as her comparators. The crux of Cunningham’s disparate-treatment argument is that the Sheriff’s Office treated her like a First Lieutenant but required her to perform the duties of a Captain and Station Commander. According to that argument, the Sheriff’s Office’s decision to make her report to Captain Gilligan while the other Captains reported to a Major is evidence of disparate treatment—not evidence that the Captains are inappropriate comparators. Therefore, because of the facts of this case, Cunningham’s reporting line is not relevant to this similarity inquiry, at least at the summary-judgment stage.

Cunningham’s experience and qualifications are also irrelevant to this similarity inquiry because there’s no evidence that the Sheriff’s Office considered her experience or qualifications when it decided to place greater demands on her than it placed on the higher-ranking Station Commanders.

Furthermore, the record, viewed in the light most favorable to Cunningham, shows that there exists a genuine issue of fact regarding whether the Sheriff’s Office

systematically deprived Cunningham of the resources that it provided other Station Commanders.³

On the one hand, the Sheriff's Office does not dispute that, as First Lieutenant, Cunningham was required to serve as a duty officer, or that the Captain Station Commanders were not required to perform that function. The Sheriff's Office also acknowledged that the Eastern Station is its busiest. Thus, it is undisputed that Cunningham was performing the duties of both a First Lieutenant and a Station Commander for nine months at the busiest station in the county. Further, Cunningham testified in her affidavit that "no other stations provided any manpower assistance to the [Eastern Station]" while she performed the Station Commander's duties. J.A. 495–96. And Kim Holway, the First Lieutenant of the Ashburn Station, testified in a deposition that she believed that the Sheriff's Office deprived Cunningham of resources so that she would fail. *See* J.A. 507. These facts support Cunningham's assertion that the Eastern Station "was short staffed." J.A. 495.

On the other hand, the Sheriff's office introduced evidence that the Eastern Station "has more staff than the other stations," that it "had a strong sergeant in Sgt. Sam Harwood" while Cunningham performed the day-to-day duties of Station Commander, and that "during operations meetings, First Lieutenants and Captains would be reminded that each

³ By contrast, the record does not create a triable issue of fact regarding Cunningham's disparate-treatment claim predicated on the failure-to-promote adverse action. The only promotion-related evidence in the record are the statements in Cunningham's affidavit regarding Rudy Landon's promotion to Captain and Acting Major, Kenneth Dondero's promotion to Captain, and Easton McDonald's promotion to Major. But Cunningham did not select any of these individuals as her comparators.

station needed to be providing assistance and support to the other stations.” J.A. 157. Major Dondero also provided affidavit testimony that he gave Cunningham “relief when she would ask to leave early or say she needed time off because [he] understood she was covering additional duties.” J.A. 174.

Therefore, there exists a genuine issue of fact about the administrative support that Cunningham received in comparison to the other Station Commanders sufficient to defeat summary judgment on the fourth element of Cunningham’s prima facie disparate-treatment claim.⁴

B.

The district court also erred in granting the Sheriff’s Office’s motion for summary judgment on Cunningham’s pay-disparity claim.

To establish a prima facie case of pay disparity using the *McDonnell Douglas* framework, a plaintiff must establish that “(1) she is a member of a protected class, (2) she was performing her job satisfactorily, (3) an adverse employment action occurred, and (4) the circumstances suggest an unlawfully discriminatory motive.” *Spencer*, 919 F.3d at 207. “Where, as here, the prima facie case of wage discrimination is based on comparators, the plaintiff must show that she is paid less than men in similar jobs.” *Id.*

⁴ Cunningham also argues that the district court overlooked a factual dispute as to whether the Station had a Station Commander from June 2020 to March 2021. But, assuming arguendo that this fact is in dispute, it is only relevant to her failure-to-promote claim, which fails for the reasons articulated above. *See Cosby*, 93 F.4th at 714.

The district court concluded that Cunningham's pay-disparity claim failed because her salary was "quite similar" to her identified comparators. J.A. 586. That analysis was erroneous.

Cunningham presented uncontroverted affidavit testimony that her base salary in 2020 was \$108,366.74. It is undisputed that her total compensation for that year was \$123,220.87. It is also undisputed that her Captain comparators earned \$118,923.60; \$123,558.45; and \$134,347.05 in 2020. So, it is certainly the case that Cunningham's total annual salary was "quite similar" to her comparators' annual salaries.

But that does not end the inquiry. Cunningham provided affidavit testimony that she was required to work overtime while the Captain Station Commanders were not. And the Sheriff's Office introduced evidence that the Captains are exempt employees who are not entitled to overtime pay. But there's one missing piece to this puzzle: whether the Captains had to work the same number of hours as Cunningham to obtain this "similar" salary. The record leaves that hole unfilled.

Thus, viewing the evidence in the light most favorable to Cunningham, there exists a triable issue of fact whether Cunningham was forced to work *more* hours to earn the *same* compensation as men in a similar job. If that question is answered in the affirmative, then the Sheriff's Office paid Cunningham an hourly rate that was *less* than it paid men performing similar duties. Consequently, Cunningham established a prima facie case of pay disparity and the district court erred in granting the Sheriff's Office's motion for summary judgment.

III.

Accordingly, we affirm the district court's order granting summary judgment on Cunningham's retaliation claim because she waived her challenge to that decision. We reverse the grant of summary judgment on her disparate-treatment claim because the Sheriff's Office argued only that Cunningham failed to establish a prima facie case of disparate treatment, and we conclude that the Sheriff's Office is not entitled to summary judgment on that issue. We vacate the order granting summary judgment on Cunningham's pay-disparity claim and remand for further summary-judgment proceedings on that issue because the Sheriff's Office argued before the district court that it had proffered a legitimate, nondiscriminatory reason for the alleged disparity, and the district court did not reach that argument. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED IN PART, REVERSED IN PART,
VACATED IN PART, AND REMANDED*