No. 24-3498

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jeff Smith,
Plaintiff-Appellant,

v.

City of Union, OH Police Department,
Defendant-Appellee.

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

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

Congress tasked the Equal Employment Opportunity Commission (EEOC) with administering and enforcing the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq*. This appeal concerns the appropriate standard for assessing whether an employer's conduct constitutes a materially adverse action for purposes of a retaliation claim under the ADEA. Because the EEOC has a substantial interest in the proper resolution of this question, the agency offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Whether a reasonable jury could find that, under the circumstances of this case, forcing an employee to undergo a psychological fitness-for-duty examination constitutes a materially adverse action for purposes of an ADEA retaliation claim because it well might dissuade a reasonable worker from complaining about discrimination.

[1] The EEOC takes no position on any other issue in this appeal.

2. Whether the district court stated and applied the wrong standard for assessing whether an employer's conduct was materially adverse for purposes of a retaliation claim.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Jeff Smith, who was born in 1969, began working for the City of Union Police Department as a police officer in 2003. Smith Depo., R.64, Pg.ID#1405. In August 2020, the City fired Smith for alleged misconduct. Smith Depo., R.64, Pg.ID#1411, 1422. Smith immediately filed a union grievance, alleging that the City fired him without just cause. Grievance, R.64-11, Pg.ID#1822-25. He also later filed a charge of discrimination with the EEOC and the Ohio Civil Rights Commission (OCRC), alleging that the City fired him because of his age. Charge, R.64-13, Pg.ID#1881. In June 2021, while Smith's charge was still under investigation, a labor arbitrator sustained Smith's grievance and ordered the City to reinstate him with full backpay and seniority. Arbitration Award, R.67-1, Pg.ID#2447.

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[2] Because this appeal arises from a grant of summary judgment, we present these facts in the light most favorable to Smith. *See Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 805-06 (6th Cir. 2020).

Despite the arbitrator's decision, the City did not allow Smith to return to work—at least not right away. Instead, in July 2021, more than a month after the arbitrator issued the award, the City sent a letter to Smith, ordering him to undergo a psychological fitness-for-duty exam. Letter, R.57-15, Pg.ID#530-31. The exam was necessary, the City claimed, because Smith had "not performed police work" for more than a year and because Smith previously stated that he was "stressed when [he] engaged in [the] on-duty conduct" for which the City had fired him. Letter, R.57-15, Pg.ID#530. The City made clear that Smith could not return to work until he successfully completed the exam, and that if he was deemed unfit for duty, he would "not be permitted to return to work at this time." Letter, R.57-15, Pg.ID#531.

Although Smith successfully completed the fitness-for-duty exam, the City still delayed reinstating him. On July 24, for instance, the physician who conducted the exam, Dr. Mark Quarry, cleared Smith to return to work. Smith Depo., R.64, Pg.ID#1435. Unsatisfied with that result, the City demanded that Dr. Quarry review some of Smith's prior bodycam footage, presumably so Dr. Quarry could reconsider his opinion. Smith Depo., R.64, Pg.ID#1435. On August 3, after reviewing the bodycam footage,

Dr. Quarry stood by his original determination and again cleared Smith to return to work. Smith Depo., R.64, Pg.ID#1435. Apparently assuming that was the end of the matter, Dr. Quarry called Smith on August 11 to ask "how [he] like[d] being back to work." Smith Depo., R.64, Pg.ID#1435. When Smith responded that he was "not back to work" and had not "heard from the City," Dr. Quarry was "surprised" because he had "released [Smith] twice" by that point. Smith Depo., R.64, Pg.ID#1435.

Ultimately, the City did not allow Smith to return to work until August 16—more than two months after the arbitrator ordered the City to reinstate him and nearly a month after Dr. Quarry first cleared him. Smith Depo., R.64, Pg.ID#1435-36. In the meantime, the City promoted or rehired to lieutenant positions officers who were younger than Smith. *See* Blackwell Depo., R.62, Pg.ID#1364-65; Applegate Depo., R.61, Pg.ID#1339-40; Allen Depo., R.60, Pg.ID#1307-10. Before Smith returned, the City also finalized a new three-year labor contract, which provided Smith with a "zero percent increase" in salary in the first year, despite giving salary increases to other officers, and a "lesser percentage increase than everybody else" in the second and third years. Blackwell Depo., R.62,

Pg.ID#1366-67; *see also* Applegate Depo., R.61, Pg.ID#1341; Allen Depo., R.60, Pg.ID#1311.

After receiving right-to-sue letters on his initial administrative charge of discrimination, Smith filed this lawsuit, asserting claims for age discrimination under the ADEA and state law. Compl., R.1, Pg.ID#5-7. Smith then filed a second charge with the EEOC and OCRC, alleging that the City had retaliated against him by, among other things, requiring him to undergo the fitness-for-duty exam and delaying his return to work. Charge R.64-14, Pg.ID#1952-59. After receiving a notice of right to sue on his second charge, Smith amended his complaint to add a retaliation claim. Sec. Am. Compl., R.50, Pg.ID#189-91.

B. District Court's Decision

The district court granted summary judgment to the City on all of Smith's claims. Order, R.70, Pg.ID#2499. As relevant here, the court held that Smith's ADEA retaliation claim failed because he could not "show that requiring him to undergo a fitness for duty examination was a materially adverse action." Order, R.70, Pg.ID#2496. The exam was not materially adverse, the court said, for three reasons.

First, the court determined, the City ordered the exam for "legitimate reasons," and "requiring an employee to undergo a mental or physical examination for legitimate reasons before returning to work does not constitute a materially adverse action." Order, R.70, Pg.ID#2495-96 (citing *Pena v. City of Flushing*, 651 F. App'x 415, 422 (6th Cir. 2016)). Next, the exam did not affect Smith's pay or advancement opportunities because he "received full backpay for the time he spent waiting for the examination to occur" and he had "not appl[ied] for—or even express[ed] an interest in—a promotion to a supervisor position." Order, R.70, Pg.ID#2496. Finally, Smith did "not provide evidence of a similarly situated, non-protected employee who was not required to undergo a fitness for duty evaluation." Order, R.70, Pg.ID#2496.

The court concluded that the lack of a materially adverse action provided an "independent basis" for summary judgment on Smith's retaliation claim. Order, R.70, Pg.ID#2496. As alternative grounds for its decision, the court also found that Smith could not establish a causal link between his protected activity and the exam, nor could he show that the City's stated reasons for ordering the exam were pretextual. Order, R.70, Pg.ID#2497-99. Smith timely appealed. Notice of Appeal, R.73, Pg.ID#2503.

ARGUMENT

I. A reasonable jury could find on this record that forcing an employee to undergo a psychological fitness-for-duty examination constitutes a materially adverse action for purposes of an ADEA retaliation claim.

The ADEA prohibits employers from retaliating against employees for making charges of discrimination. 29 U.S.C. § 623(d). To establish a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in protected activity; (2) his employer knew of the protected conduct; (3) his employer took a materially adverse action against him; and (4) there was a causal connection between the protected activity and the employer's action. *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 288-90 (6th Cir. 2012).

The Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), governs whether an action is materially adverse for purposes of a retaliation claim. There, the Court held that an employer's conduct is materially adverse and thus actionable as retaliation if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (cleaned up). Although *Burlington Northern* arose in the Title VII context, its holding applies with equal force to retaliation claims under the ADEA. *See Blizzard*,

698 F.3d at 290 (applying *Burlington Northern* material-adversity standard to ADEA retaliation claim); *Spengler v. Worthington Cylinders*, 615 F.3d 481, 491 (6th Cir. 2010) (same); *see also Niswander v. Cincinnati Ins. Co.*, 529 F.3d 714, 723 (6th Cir. 2008) (noting that ADEA's "antiretaliation provision … is identical to the one found in Title VII").

The *Burlington Northern* standard calls for a circumstance-sensitive inquiry—simply put, "[c]ontext matters." 548 U.S. at 69. As the Court explained, "the significance of any given act of retaliation will often depend upon the particular circumstances," *id.*, and "[t]he 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," *id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)). While a "change in an employee's work schedule may make little difference to many workers," for example, it "may matter enormously to a young mother with school-age children." *Id.* Similarly, while "[a] supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight," "excluding an employee from a weekly training lunch that contributes significantly to the employee's

professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.*

Under many, perhaps even most, circumstances, requiring an employee to submit to a fitness-for-duty exam—and barring him from returning to work unless and until he successfully completes the exam—could well dissuade a reasonable worker from complaining about discrimination. Indeed, this Court and others have recognized the potential deterrent effect of a compelled fitness-for-duty exam, especially when combined with administrative leave or other consequences. *See Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 776 (6th Cir. 2018) (reasonable jury could find that plaintiff suffered materially adverse action where she "was referred to a fitness-for-duty exam, placed on leave, escorted out of the office, had her badge removed," and was later forced to choose between severance and transfer to inferior position); *Brown v. Lexington-Fayette Urb. Cnty. Gov't*, 549 F. App'x 366, 370 (6th Cir. 2013) (plaintiff suffered materially adverse action when employer "refer[ed her] for a fitness-for-duty exam which resulted in her being placed on leave"); *Spellman v. Ohio Dep't of Transp.*, 244 F. Supp. 3d 686, 703 (S.D. Ohio 2017) (reasonable jury could find that "two administrative leaves and forced psychological

evaluation" were materially adverse); *McDonald v. Potter*, No. 1:06-cv-00001, 2007 WL 2300332, at *51 (E.D. Tenn. Aug. 7, 2007) ("In light of the relatively low threshold for adverse employment actions in a retaliation context, … Plaintiff may establish a prima facie case of retaliation based upon the fitness for duty examination."), *aff'd*, 285 F. App'x 260 (6th Cir. 2008); *Moore v. Brennan*, No. 2:18-cv-02881, 2020 WL 4516911, at *15 (W.D. Tenn. Apr. 16, 2020) (multiple requests for fitness-for-duty evaluations "may have reasonably dissuaded an employee from continuing to complain"), *report and recommendation adopted*, 2020 WL 4506800 (W.D. Tenn. Aug. 5, 2020).[3]

[3] *See also Murry v. Gonzales*, No. 5:04-cv-00498, 2006 WL 2506963, at *10 (M.D. Fla. Aug. 28, 2006) ("[G]enuine issues of material fact exist as to whether a reasonable employee would find that being forced to undergo a physical and psychological fitness for duty examination constitutes a 'materially adverse' action, such that it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (citation omitted)), *aff'd sub nom. Murry v. Att'y Gen.*, 233 F. App'x 911 (11th Cir. 2007); *Morsovillo v. Clark Cnty.*, No. 2:07-cv-01011, 2009 WL 3785266, at *7 (D. Nev. Nov. 12, 2009) ("A reasonable employee would likely be dissuaded from bringing a sexual harassment lawsuit if she knew that, as a result of the suit, she would be placed on administrative leave and required to undergo a fitness for duty examination.").

It is not difficult to see why. Conditioning a worker's continued employment on a psychological exam that has—or is at least perceived to have—"the potential to destroy the career of any law enforcement officer" is inherently intimidating. *Flynn v. N.Y. State Div. of Parole*, 620 F. Supp. 2d 463, 495-96 (S.D.N.Y. 2009) (quotation marks omitted). All the more so because such exams typically compel the subject to disclose "sensitive medical information." *Psak v. Bernhardt*, No. 1:14-cv-00116, 2020 WL 2849985, at *19 (D.D.C. June 1, 2020). Simultaneously forcing an employee to take leave, whether paid or unpaid, only enhances the exam's dissuasive effect. Indeed, this Court has held that placing an employee on two days of paid administrative leave, followed by a performance plan, could meet *Burlington Northern*'s "relatively low bar." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 596 (6th Cir. 2007); *see also Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1266 n.3 (11th Cir. 2021) (observing that a "paid suspension may constitute an adverse employment action in the retaliation context" (emphasis omitted)); *cf. Burlington N.*, 548 U.S. at 73 ("[A]n indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay."). Naturally, placing an employee on paid leave—or, as here, indefinitely prolonging an

employee's paid leave—for the purpose of completing a fitness-for-duty exam clears that low bar as well.

Under the correct standard—the *Burlington Northern* standard—a reasonable jury could readily conclude that, in the circumstances Smith faced, requiring a fitness-for-duty exam was materially adverse. In ordering the exam, the City made clear that Smith's career was in jeopardy, informing him that he would "not be permitted to return to work at this time" if he failed the exam. Letter, R.57-15, Pg.ID#531. Even when Smith completed the exam, the City prolonged his leave by insisting that Dr. Quarry review additional information and then inexplicably delaying Smith's reinstatement after Dr. Quarry cleared him a second time. Smith Depo., R.64, Pg.ID#1435-36. On top of that, Smith's absence prevented him from being considered for promotions, which instead went to younger officers, and the City simultaneously finalized a collective bargaining agreement that meted out raises to everyone except Smith. *See* Blackwell Depo., R.62, Pg.ID#1364-67; Applegate Depo., R.61, Pg.ID#1339-41; Allen Depo., R.60, Pg.ID#1307-11.

Considering these surrounding circumstances and viewing the facts in the light most favorable to Smith, the fitness-for-duty exam could well

dissuade a reasonable worker from making or supporting a claim of discrimination. The district court therefore erred in granting summary judgment on this ground.

II. The district court stated and applied the wrong standard for assessing whether an employer's conduct was materially adverse for purposes of a retaliation claim.

In reaching a contrary result, the district court did not properly apply *Burlington Northern*. As an initial matter, the court misarticulated the relevant standard. While *Burlington Northern* asks whether an adverse action "*could* well" or "well *might*" dissuade a reasonable worker, 548 U.S. at 57, 68 (emphases added), the district court imposed a more demanding standard, asking whether the action "*would* dissuade a reasonable worker," Order, R.70, Pg.ID#2495 (emphasis added) (cleaned up) (quoting *Lahar v. Oakland Cnty.*, 304 F. App'x 354, 357 (6th Cir. 2008)).

That is a distinction with a difference. *See Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 365 (4th Cir. 2014) ("[T]he distinction between 'would' and 'could' is both real and legally significant.").[4] By using "could" rather

[4] To be sure, this Court has occasionally used the same "would dissuade" language. *E.g.*, *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 345, 347 (6th Cir. 2008). But that usage appears largely, if not entirely, inadvertent. In any event, to the extent prior decisions stated the relevant standard in a

than "would" in defining materially adverse actions, the Supreme Court meant to capture actions that have even the *potential* to dissuade a reasonable worker, not only those actions that are likely or certain to do so.[5] *See Callbeck v. Fallon Cmty. Health Plan, Inc.*, 480 F. Supp. 3d 308, 315 (D. Mass. 2020) (employer's action is materially adverse "where it has the *potential* to 'dissuade a reasonable worker from making or supporting a charge of discrimination'" (emphasis added) (citation omitted)); *Massaquoi v. District of Columbia*, 81 F. Supp. 3d 44, 51 (D.D.C. 2015) (similar). This

manner inconsistent with *Burlington Northern*, they do not bind future panels. *See Rose v. PSA Airlines, Inc.*, 80 F.4th 488, 504 (4th Cir. 2023) ("Where prior decisions in our Circuit use reasoning inconsistent with Supreme Court authority, we are not bound to follow them. That is true even where some of the prior panel decisions were decided after the Supreme Court case rendered them untenable." (cleaned up)), *cert. denied*, 144 S. Ct. 1346 (2024).

[5] Similarly, a plaintiff need not show that his employer's conduct actually dissuaded him from complaining about discrimination. The *Burlington Northern* standard asks only whether the employer's action could well have dissuaded a *reasonable* worker. 548 U.S. at 68. This objective standard "does not require consideration either of the severity of the underlying act of discrimination to which the employee objected, or … of the courage that particular employee demonstrated by reporting it (and hence of her asserted imperviousness to acts of retaliation)." *Steele v. Schafer*, 535 F.3d 689, 696 (D.C. Cir. 2008). To the contrary, it "expressly forecloses such considerations." *Id.*

Court should take this opportunity to clarify that "could" or "might," rather than "would," is the correct standard.

The district court's focus on whether the City had "legitimate reasons" for ordering the exam, Order, R.70, Pg.ID#2495-96, also conflates two analytically distinct inquiries: material adversity and causation. To prevail on a retaliation claim, a plaintiff must show both that his employer took a materially adverse action against him *and* that there was a causal connection between his protected activity and the adverse action. *Blizzard*, 698 F.3d at 288-90. An employer's reasons for taking an action are relevant in establishing causation, but they have no bearing on whether that action might dissuade a reasonable worker from complaining about discrimination. *See Brannon v. Finkelstein*, 754 F.3d 1269, 1275 (11th Cir. 2014) (in First Amendment retaliation context, defendant's argument concerning rationale for action against plaintiff "conflates the issue of adverse conduct with its cause"); *Hening v. Adair*, 644 F. Supp. 3d 203, 209 (W.D. Va. 2022) (similar).

This Court's decision in *Pena v. City of Flushing*, 651 F. App'x 415 (6th Cir. 2016), on which the district court relied, does not support a different result. Quoting an older decision, *Pena* stated that "an examination ordered

for valid reasons can neither count as an adverse job action nor prove discrimination." *Id.* at 422 (quoting *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 813 (6th Cir. 1999)). But both *Pena* and *Sullivan* made that statement in the context of assessing *discrimination* claims, not *retaliation* claims; as explained below, the adversity standard that governs substantive discrimination claims differs from the material adversity standard that governs retaliation claims. Additionally, although both cases also involved retaliation claims, neither decision applied *Burlington Northern* or assessed whether the exams at issue could have dissuaded a reasonable worker from complaining about discrimination. Indeed, *Sullivan* predated *Burlington Northern* altogether and *Pena* held only that the plaintiff failed to establish causation or pretext. *See Pena*, 651 F. App'x at 422-23 & n.2.[6] In the end, neither decision supports the district court's holding.

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[6] There is another reason *Pena* and *Sullivan* do not govern here: both assessed whether the fitness-for-duty exams at issue were lawful under the ADA, which expressly permits such exams in certain circumstances. *See Pena*, 651 F. App'x at 420-21; *Sullivan*, 197 F.3d at 811-12; 42 U.S.C. § 12112(d)(4). Against that backdrop, their conclusion that an employer's use of a fitness-for-duty exam expressly permitted by the ADA could not support a disability-based disparate-treatment claim under the ADA is unremarkable.

The district court's discussion of similarly situated comparators suffers from a similar defect. Order, R.70, Pg.ID#2495-96. Comparator evidence—evidence that an employer treated similarly situated employees differently—is relevant in showing causation or pretext. *See Hopkins Cnty. Coal, LLC v. Acosta*, 875 F.3d 279, 291 (6th Cir. 2017) (comparator evidence provides "indirect evidence of causation to support a discrimination claim"); *Mitchell v. Per-Se Techs., Inc.*, 64 F. App'x 926, 927 (6th Cir. 2003) ("Causation may be inferred from … differential treatment of similarly situated comparators.").[7] But whether comparators experienced the same adverse action is wholly separate from whether that action could dissuade a reasonable worker.[8]

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[7] The district court cited *Hodges v. City of Milford*, 918 F. Supp. 2d 721 (S.D. Ohio 2013), for the proposition that "requiring an examination can be considered materially adverse if a similarly situated, non-protected employee was not required to go through the same procedures." Order, R.70, Pg.ID#2495. But *Hodges* considered comparator evidence in assessing whether the employer's articulated reasons for its actions were pretext for retaliation, not whether those actions were materially adverse. 918 F. Supp. 2d at 743-46.

[8] Of course, if an employer were to uniformly and consistently require all employees returning from extended leave to undergo fitness-for-duty exams, that fact may well diminish the likelihood that the exam might dissuade a reasonable worker. In that hypothetical scenario, however, it would be difficult for the employee to establish causation.

Finally, the district court appeared to assume that an employer's conduct could be materially adverse only—or at least "[t]ypically"—if it affects the terms or conditions of employment, such as "pay, benefits, seniority, rank, or job status." Order, R.70, Pg.ID#2495 (quoting *Blackburn v. Shelby Cnty.*, 770 F. Supp. 2d 896, 925 (W.D. Tenn. 2011)). But *Burlington Northern* expressly held otherwise. There, the Court clarified that, unlike Title VII's substantive anti-discrimination provision, the anti-retaliation provision "is not limited to discriminatory actions that affect the terms and conditions of employment." 548 U.S. at 64; *see also Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 419 (6th Cir. 2021) ("In the retaliation context, the term 'adverse employment action' encompasses more than just actions that affect 'the terms, conditions or status of employment.'" (citation omitted)). After all, the Court explained, while Title VII's anti-discrimination provision prohibits discrimination "with respect to … compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), "no such limiting words appear in the antiretaliation provision," *Burlington N.*, 548 U.S. at 62. Nor do they appear in the ADEA's anti-retaliation provision. 29 U.S.C. § 623(d). Accordingly, an action may be materially adverse for purposes of a retaliation claim even when it does not affect

one's pay or advancement opportunities. In holding otherwise, the district court implicitly applied the adversity standard that governed substantive discrimination claims.[9]

The lower court decisions on which the district court relied provide scant support for its reasoning. *Blackburn*, for example, largely—and improperly—rested on caselaw that predated *Burlington Northern*. 770 F. Supp. 2d at 924-25 (citing *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 462 (6th Cir. 2000); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885-87 (6th Cir. 1996); *Virostek v. Liberty Twp. Police Dep't/Trs.*, 14 F. App'x 493, 503-04 (6th Cir. 2001); *Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir. 1999)). And

[9] Even putting aside the fact that the adversity standard for substantive discrimination claims does not apply to retaliation claims, the district court also relied on outdated caselaw governing adversity in the discrimination context. In *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), the Supreme Court clarified that while a plaintiff asserting discrimination "must show some harm respecting an identifiable term or condition of employment," she need not show that "the harm incurred was 'significant' … [o]r serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar." *Id.* at 354-55. The Court also made clear that its "decision change[d] the legal standard used in any circuit that has previously required 'significant,' 'material,' or 'serious' injury." *Id.* at 356 n.2. Here, the district court relied entirely on caselaw that predated *Muldrow* and thus no longer governs even in the discrimination context.

although *Blackburn* later cited more recent decisions of this Court, *id.* at 926, one did not mention or apply *Burlington Northern* (because the defendant challenged only causation with respect to the retaliation claim), *Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 320 (6th Cir. 2007), and two did not involve retaliation claims at all, *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008); *Freeman v. Potter*, 200 F. App'x 439, 442 (6th Cir. 2006). Similarly, *Broach v. City of Cincinnati*, No. 1:12-cv-00066, 2013 WL 3712338, at *8 (S.D. Ohio July 12, 2013), held that forcing an employee to take "significant unpaid leave" to complete a fitness-for-duty exam was "sufficient" to qualify as a materially adverse action. It did not hold that significant unpaid leave was the minimum threshold to establish material adversity.

CONCLUSION

For the foregoing reasons, the EEOC urges this Court to clarify that under the appropriate standard—the *Burlington Northern* standard—a reasonable jury could find that the compelled psychological fitness-for-duty examination Smith underwent was a materially adverse action for purposes of his ADEA retaliation claim. Accordingly, the district court erred in granting summary judgment on this ground.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,173 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1).

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CERTIFICATE OF SERVICE

I certify that on October 23, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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60	Deposition of Chris Allen	1295-1332
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62	Deposition of Michael Blackwell	1350-1387
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64-11	Grievance	1822-1825
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70	Order Granting Summary Judgment	2479-2499
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