No. 23-1439

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARY ELLEN YANICK,
Plaintiff-Appellant,

v.

KROGER COMPANY OF MICHIGAN,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with interpreting, administering, and enforcing Title I of the Americans with Disabilities Act, as amended, 42 U.S.C. §§ 12102 & 12111-12117. In granting summary judgment to the defendant, the district court held that the plaintiff's ADA claims failed because a jury could not find she had requested a reasonable accommodation or been constructively demoted.

Because this case raises important questions regarding the standards for assessing whether a plaintiff requested an accommodation, whether an accommodation is reasonable, and whether a constructive demotion occurred, the EEOC offers its views to the court. Fed. R. App. P. 29(a).[1]

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[1] An amicus curiae "must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed." Fed. R. App. P. 29(a)(6). Typically, the EEOC waits to file its brief until after the party being supported has already filed its principal brief. In light of the potential federal government shutdown, however, and given the significance of the issues, the EEOC files this brief now. *See* Antideficiency Act, 31 U.S.C. §§ 1341(a)(1)(B), 1342.

STATEMENT OF THE ISSUES[2]

1. Could a jury find that Yanick requested accommodation and that an accommodation modifying Yanick's work schedule was reasonable on its face?

2. Did the district court err in assessing whether Kroger constructively demoted Yanick?

STATEMENT OF THE CASE

A. Statement of the Facts

Mary Ellen Yanick worked as the bakery department manager at a Kroger grocery store. Yanick Dep., R. 18-2, PageID #259. She had been in that position for thirteen years, Yanick Decl., R. 19-3, PageID #415, and, in performance reviews from 2009 and 2016, her supervisors rated her as "very good" and as "[a] good, consistent performer." 2009 Performance Review, R.19-2, PageID #411; 2016 Performance Review, R. 19-1, PageID #404.

In January 2018, Yanick was diagnosed with breast cancer. Yanick Dep., R. 18-2, PageID #261; Certification of Health Care Provider, R. 18-9, PageID #319. She told Mark Lavine, an assistant manager, about her

[2] The EEOC takes no position on any other issue in this case.

diagnosis. *Id.,* PageID #260. Around the same time, Marli Schnepp started work as the store manager. *See* Schnepp Dep., R. 18-4, PageID #291. As store manager, she was the "top authority." *Id.* On her first day at the store, Lavine told her that an employee named Mary Ellen had cancer. *Id.*, PageID #291-292.

Shortly after her arrival, Schnepp began criticizing Yanick. According to Yanick, Schnepp "was always in [her] department . . . kind of badgering [her] about different things." Yanick Dep., R.18-2, PageID #268. Schnepp, meanwhile, testified she had "daily conversations" and "one-on-one coaching" with Yanick. Schnepp Dep., R. 18-4, PageID #295.

Within two weeks of Schnepp starting, she called Yanick into her office to tell her "the bakery department was too empty." Yanick Dep., R. 18-2, PageID #270. Yanick told Schnepp she had left earlier the day before for a doctor's appointment. *Id.* She also told Schnepp that she "had a lot on [her] plate" and had "had another biopsy." Yanick Handwritten Notes, R. 18-5, PageID #307; Yanick Dep., R. 18-2, PageID #261.

Schnepp called Yanick into the office a few days later, and then again on February 15. Yanick Dep., R. 18-2, PageID #261, 271. At the February 15 meeting, Schnepp gave Yanick a list of expectations and told Yanick she

would be disciplined if she did not improve her performance. *Id.*; Schnepp Dep., R. 18-4, PageID #299. Schnepp also said "that it might be a good time for [Yanick] to think about stepping down." Yanick Dep., R. 18-2, PageID #271; Schnepp Dep., R. 18-4, PageID #295 (Schnepp testifying she gave Yanick "an option to step down"). Yanick began her medical leave after that meeting. Yanick Dep., R. 18-2, PageID #265-66.

A week later, Yanick contacted Kroger's hotline to report Schnepp's mistreatment. *See* Hotline Report, R. 18-6, PageID #312. Yanick reported that Schnepp knew she had breast cancer but still "harassed [her] by bringing her into the office three times in eight days." *Id.*

Yanick returned to work in June after having a mastectomy and reconstruction surgery. Yanick Dep., R. 18-2, PageID #267, 273. At the end of her first week back from medical leave, Schnepp called Yanick into her office, along with the union steward and a human resources representative. *Id.*, PageID #273. Schnepp asked her how she "was doing now that [she] was back for a week," and Yanick responded that she "was struggling, it was hard for me physically." *Id.* Yanick also said "it was . . . hard since [she] worked 53 hours last week and needed to get used to all the work again after being off." *Id.*; *see also id.*, PageID #278 ("I told [Schnepp] I was

struggling and needed some time to get back to normal"). According to Yanick, Schnepp responded by asking who had approved Yanick's overtime, saying "she was going to start writing her up," and asking her to step down. *Id.*, PageID #273.

Schnepp confirmed that she knew that Yanick had just taken leave "for surgery for her breast cancer," and that Yanick "had been back for a week or so" when Schnepp "brought her into the office . . . [and] asked how she thought things were going." Schnepp Dep., R. 18-4, PageID #292, 297. She also told Yanick "things are not to standards." *Id.*, PageID #301. Schnepp admitted that Yanick said that "she's struggling physically to do the job," and that, "again, the option that was given to her before she went on leave . . . . If you feel that you can't do this job, you do have an option to step down." *Id.*, PageID #297, 301-02. Upset with Schnepp's response, Yanick told Schnepp she would step down, before later changing her mind. Yanick Dep., R. 18-2, PageID #274; *id.*, PageID #276.

Yanick reported what occurred to human resources, and the next day Yanick met with Schnepp and another representative from human resources. *Id.*, PageID #274-275. Schnepp said Yanick's employees did not want to work with her, and the human resources representative decided to

schedule another meeting with those employees as well. *Id.*, PageID #275. They had "a quick meeting" on June 22, discussing ways to improve the bakery department. *Id.*, PageID #275-276.

Four days later, Yanick stepped down as department head because she "had only been back two weeks . . . [and] didn't have the strength to fight [Schnepp] or her harassment." *Id.,* PageID #276; Handwritten Notes, R. 18-5, PageID #308; *see also* Yanick Dep., R. 18-2, PageID #277 (testifying that she stepped down because she "felt [she] was treated unfairly . . . [she got] cancer and they treated [her] horrible"). Yanick worked a short time gathering orders for online customers before transferring to another store. Yanick Dep., R. 18-2, PageID #259; Schnepp Dep., R. 18-4, PageID #302.

After filing a charge of discrimination and receiving a notice of her right to sue, Yanick filed this lawsuit under the ADA. Charge, R. 18-14, PageID #358; Complaint, R.1, PageID #1-8.

B. District Court's Decision

The district court granted summary judgment to Kroger. On Yanick's failure-to-accommodate claim, the court held that Yanick had not requested a reasonable accommodation. Order, R.22, PageID #476. The court reasoned that an employee must identify the accommodation

requested and that it must be a reasonable accommodation, which, according to the court, is one that "addresses a key obstacle preventing the employee from performing a necessary function of her job." *Id.* (citing *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 812 (6th Cir. 2020)).

Acknowledging that Yanick said that she was "struggling" after being on leave and that she needed "time to get back to normal," the court still held that Yanick did not show her accommodation "addressed a key obstacle preventing her from performing a necessary job function." *Id.*, PageID #477. Even though the court "believe[ed] that Yanick's comments were specific enough" to constitute a request for accommodation, it held that Yanick's requests did not "make clear that her accommodation requests were needed to conform with medical restrictions imposed because of her breast cancer." *Id.*, Page ID #477-78; *see also id.*, PageID #474 ("Yanick failed to request a reasonable accommodation in the first place.").

On the disparate treatment claim, the court held that Yanick had not suffered an adverse action. Yanick alleged she suffered a constructive demotion, and the court recognized that "a constructive demotion claim is analyzed under the same framework as a constructive discharge claim." *Id.*, PageID #471. According to the court, that framework requires:

> the employer . . . *deliberately* create[d] intolerable working conditions, as perceived by a reasonable person, and 2) the employer did so *with the intention of forcing the employee to quit* [or be demoted].

Id. (quoting *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir. 2005)) (emphases added). The court then stated that "the manner in which an employer supervises and/or criticizes an employee's job performance, without more, is insufficient to establish constructive demotion as a matter of law." *Id.*, PageID #473. Observing that the denial of a reasonable accommodation could "support a constructive demotion claim," the court nonetheless held that Yanick had not experienced intolerable conditions sufficient for a constructive demotion because she had not requested a reasonable accommodation. *Id.*

In assessing Yanick's retaliation claim, the court referred to the earlier discussion of constructive demotion, holding again that Yanick had not shown an adverse action. *Id.*, PageID #479.

ARGUMENT

I. A jury could find that Yanick requested an accommodation and that a reasonable accommodation was available.

The ADA requires employers, absent undue hardship, to reasonably accommodate otherwise qualified individuals with disabilities. 42 U.S.C.

§ 12112(b)(5)(A). To prevail on a failure-to-accommodate claim, plaintiffs must, among other things, have notified their employers that they needed accommodation (unless the need was obvious), and they must demonstrate that a reasonable accommodation existed that the employer failed to provide. *See King v. Steward Trumbull Mem'l Hosp., Inc.*, 30 F.4th 551, 560 (6th Cir. 2022); *see also Tchankpa*, 951 F.3d at 812 (describing "request[ing] an accommodation" as a "necessary element[]" and "proposing a *reasonable* accommodation" as another "key requirement"). A jury could find Yanick's statements to Schnepp, made just a week after returning from a medical leave due to cancer, during which she had a mastectomy and reconstructive surgery, notified Kroger of her need for an accommodation. A jury could also find that a modified work schedule was a reasonable accommodation on its face.

The district court, however, held as a matter of law that Yanick had not requested a reasonable accommodation, despite "believ[ing] that Yanick's comments were specific enough" to be a request for accommodation. Order, R. 22, PageID #477-78. In doing so, the court conflated the request for accommodation with the ultimate burden to show there was a reasonable accommodation available.

A. A jury could find that Yanick requested accommodation.

Under the ADA, a failure-to-accommodate claim generally requires the employee to notify their employer of the need for accommodation. 42 U.S.C. § 12112(b)(5)(a) (must reasonably accommodate "known" limitations). The EEOC's interpretive guidance states:

> If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general, however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.
>
> 29 C.F.R. pt. 1630, app., 29 C.F.R. § 1630.9.

"Once an employee requests an accommodation, the employer has a duty to engage in an interactive process." *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 857 (6th Cir. 2018); *see also* 29 C.F.R. § 1630.2(o)(3). The interactive process "should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). Both parties bring critical information to the process. While employees possess information about their disabilities, "[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible

accommodations which employers have." *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1113 (9th Cir. 2000) (en banc), *vacated on other grounds sub nom. U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). The interactive process triggered by the initial request thus requires the employer to help "determine whether a reasonable accommodation can be made." *Hostettler*, 895 F.3d at 857.

As the initial request for accommodation triggers the interactive process, the burden for showing an individual requested accommodation is not onerous. A request need not use the word "accommodation" or any other "magic words." *King*, 30 F.4th at 564 (citation omitted); *see also* EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, 2002 WL 31994335, at *4 (2002) (hereinafter "Accommodation Guidance") ("[A]n individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.'").

The request must merely communicate that an individual "needs an adjustment or change at work for a reason related to a medical condition." Accommodation Guidance, 2002 WL 31994335, at *4; *Barnett*, 228 F.3d at 1114 (request provides "notice of the employee's disability and the desire

for accommodation"); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (request must have "enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation"); *cf. Leeds v. Potter*, 249 F. App'x 442, 449 (6th Cir. 2007) (request must "make it clear from the context that it is being made in order to conform with existing medical restrictions").

As a result, "an employee's initial request does not need to identify the perfect accommodation from the start." *King*, 30 F.4th at 564 (citation omitted). An individual is "not required to come up with the solution . . . on her own" because "once the employee presents a request for an accommodation, the employer is required to engage in the interactive process so that *together* they can determine what reasonable accommodations might be available." *EEOC v. Chevron Phillips Chem. Co., LP*, 570 F.3d 606, 621-22 (5th Cir. 2009).

Context informs the analysis of whether an employee requested an accommodation. *Smith v. Henderson*, 376 F.3d 529, 535-36 (6th Cir. 2004). Put differently, "[w]hat information the employee's initial notice must include depends on what the employer knows." *Taylor*, 184 F.3d at 313.

Considering the information available at the time, the question is "whether 'a factfinder could infer that [the interaction] constituted a request for an accommodation.'" *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409, 419 (6th Cir. 2020) (quoting *Smith*, 376 F.3d at 535).

The context here matters. Kroger did not dispute that Yanick had a disability under the ADA, and, as the district court found, "Kroger had reason to know about Yanick's disability because another supervisor told Schnepp on her first day that 'Mary Ellen' had cancer . . . [and] Yanick also informed Schnepp directly that she had cancer." Order, R.22, PageID #475. Schnepp also knew that Yanick had to take medical leave "for surgery for her breast cancer." Schnepp Dep., R. 18-4, PageID #292. After Yanick "had been back for a week or so" from that medical leave, Schnepp told her "things are not to standards," and Yanick responded that she was "struggling physically to do the job." *Id.*, PageID #297, 301.

Yanick's notes and testimony provide yet more context, documenting that Schnepp "asked me how I thought I was doing now that I was back for a week" and that she responded, "I was struggling, it was hard for me physically, . . . [and] it was hard since I worked 53 hours last week & needed to get used to all the work again after being off." Yanick Dep., R.

18-2, PageID #273; Handwritten Notes, R. 18-5, PageID #308. Yanick "told her [she] was struggling and needed some time to get back to normal." Yanick Dep., Page ID #278. A jury could thus find, with the context of Yanick's undisputed disability and recent medical leave, along with Schnepp's knowledge of Yanick's disability, that Yanick's response informed Schnepp that she needed assistance because of her disability.

The district court, however, relied in part on this Court's unpublished decision in *Leeds*, 249 F. App'x at 449, to hold that no jury could find Yanick had requested accommodation even though it "believe[d] that Yanick's comments were specific enough" to do so. Order, R.22, PageID #477-78. But the context here is markedly different from the context this Court considered in *Leeds*. In *Leeds*, the plaintiff told his supervisors that his "position . . . was 'kicking [his] ass,'" but the plaintiff's comment came six weeks after he returned from back surgery—and after the employer reassigned the plaintiff following an accident that led to his forklift license being suspended. *Id.* at 445. In that context, this Court held that the plaintiff could not "show that his supervisors had knowledge of his disability" and nothing "indicated . . . that Plaintiff's statements meant anything more serious than that the work was hard." *Id.*

Here, Kroger knew that Yanick had been diagnosed with (and been recently treated for) breast cancer. Order, R.22, PageID #475; Schnepp Dep., R. 18-4, PageID #292. And when Schnepp asked how she was doing just a week after returning from medical leave, Yanick told Schnepp that she was "struggling, it was hard for [her] physically," she had worked 53 hours, and she "needed some time to get back to normal." Yanick Dep., R. 18-2, PageID #273, 278. Based on this context, Yanick's request was specific enough to create a factual question as to whether she requested accommodation. *See Smith*, 376 F.3d at 535; Order, R.22, PageID #477-78 ("Yanick's comments were specific enough.").

As a jury could find Yanick requested an accommodation, a jury could also find that Yanick's request should have triggered the interactive process. *Hostettler*, 895 F.3d at 857. And "[e]mployers 'who fail to engage in the interactive process in good faith[ ] face liability [under the ADA] if a reasonable accommodation would have been possible.'" *Lafata v. Church of Christ Home for the Aged*, 325 F. App'x 416, 422 (6th Cir. 2009) (quoting *Barnett*, 228 F.3d at 1114) (alterations in original); *see also Rorrer v. City of Stow*, 743 F.3d 1025, 1040, 1045-46 (6th Cir. 2014) (discussing good-faith obligation).

A jury could find that Kroger did not attempt to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *See* 29 C.F.R. § 1630.2(o)(3). Schnepp did not seek more information on the nature and extent of Yanick's restrictions when Yanick said she was struggling and had worked 53 hours the last week. Yanick Dep., R. 18-2, PageID #273; *see also* Schnepp Dep., R. 18-4, PageID #301-02. Instead, Yanick testified, Schnepp focused only on who approved Yanick's overtime, while threatening that "[s]he was going to start putting [Yanick] on paper" and saying that she "wanted [Yanick] to step down." Yanick Dep., R. 18-2, PageID #273.

Rather than examine the potential breakdown in the interactive process, the district court held as a matter of law that Yanick had not requested a *reasonable* accommodation. *See* Order, R. 22, PageID #477-78; *see also id.* at PageID #474 (stating in discrimination section that "Yanick failed to request a reasonable accommodation in the first place"). But the interactive process is part of determining whether a reasonable accommodation is available, *Tomlinson v. Krauss-Maffei Corp.*, No. 21-6245, 2023 WL 1777389, at *6 (6th Cir. Feb. 6, 2023), and, as discussed below, a

reasonable accommodation can include a part-time or modified work schedule. 42 U.S.C. § 12111(9)(B).

In any event, the availability of a reasonable accommodation is a separate element of a failure-to-accommodate claim. Along with showing that she made the employer aware of the need for accommodation (to start the interactive process), a plaintiff must show a reasonable accommodation was available in order "to defeat a defendant/employer's motion for summary judgment." *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002). These are distinct burdens. *See Fisher*, 951 F.3d at 419-20 (holding that a jury could find that the plaintiff's "interactions constituted a request for accommodation," and then considering whether requested accommodation was reasonable); *see also Taylor*, 184 F.3d at 313-17 (considering whether there was a sufficient request and then whether the interactive process could have identified a reasonable accommodation).

The district court skipped ahead to the ultimate test for reasonableness, rather than first determining whether there was a request sufficient to trigger the interactive process. The court stated that "it is the employee's burden to propose reasonable accommodations," and relied on the *Tchankpa* standard for assessing the reasonableness of a proposed

accommodation. Order, R.22, PageID #475-76. But that standard is not intended to test whether there was an initial request for accommodation. The plaintiff in *Tchankpa* had engaged in a lengthy interactive process with his employer, and this Court repeatedly referenced the *Tchankpa* plaintiff's accommodation request before holding that the plaintiff had not shown "his work-from-home request was reasonable." 951 F.3d at 810-11, 813. Thus, while *Tchankpa* refers to the obligation to propose a reasonable accommodation, it turns on the plaintiff's ultimate burden to demonstrate a reasonable accommodation was available. *Id.* at 811-12; *see also Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 869 (6th Cir. 2007) (discussing need to propose reasonable accommodation to defeat summary judgment).

B. A jury could find that Yanick's proposed accommodation was reasonable on its face.

The district court acknowledged Yanick's argument that she had requested "an accommodation in her work schedule," but held it was not reasonable. Order, R. 22, at #476. "The reasonableness of a proposed accommodation," however, "is a question of fact." *Fisher*, 951 F.3d at 419. That factual quest turns on whether "an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535

U.S. at 401; *Fisher*, 951 F.3d at 419 (applying *Barnett* standard). And Yanick provided enough evidence for a jury to find she met that standard.

Requests for modified work schedules, like the one a jury could find Yanick sought in order to work less than fifty-three hours a week, are explicitly referenced in the ADA, which provides that reasonable accommodation "may include . . . part-time or modified work schedules." 42 U.S.C. § 12111(9)(B). "Indeed, a modified work schedule is a classic reasonable accommodation, considered by the ADA." *Benson v. Wal-Mart Stores E., L.P.*, 14 F.4th 13, 28 (1st Cir. 2021); *EEOC v. Charter Commc'ns, LLC*, 75 F.4th 729, 734-35, 739 (7th Cir. 2023) (recognizing the same). Thus, modified and part-time work schedules are usually facially reasonable.

There is an exception, however; a modified work schedule will not be reasonable if it removes an essential function of the job.[3] *EEOC v. Ford Motor Co.*, 782 F.3d 753, 761 (6th Cir. 2015) (en banc). But Kroger did not argue that Yanick's requested accommodation would remove an essential job function, and the district court held it was "not in dispute" that Yanick

[3] The ADA also provides employers an "undue hardship" affirmative defense, 42 U.S.C. § 12112(b)(5)(A), but Kroger did not argue that defense at summary judgment and the district court did not consider it.

was "otherwise qualified for the position, with or without reasonable accommodation." Order, R.22, PageID #475; *see also Fisher*, 951 F.3d at 419 (employer "must show . . . that the proposed accommodation eliminates an essential job requirement"). A jury therefore could find Yanick met her initial burden of showing her requested accommodation was reasonable.

The district court instead held that Yanick's request was not reasonable because Yanick did not "identify how her request addressed a key obstacle preventing her from performing a necessary job function," relying on this Court's decision in *Tchankpa*. Order, R.22, PageID #476 (invoking *Tchankpa*, 951 F.3d at 812). The cases in which the "key obstacle" language arose, however, addressed a different context: they involved (1) requests from individuals who were not performing the essential functions of their jobs where (2) the requested accommodations did not address that shortcoming.[4]

[4] We note that the obligation to provide a reasonable accommodation is not limited to those accommodations that allow an individual to perform the essential functions of a job. *See Gleed v. AT & T Mobility Servs., LLC*, 613 F. App'x 535, 538 (6th Cir. 2015) (holding that a jury could find the employer failed to provide a reasonable accommodation when the plaintiff requested the use of a chair that "would have allowed him to work his shift without unnecessary pain"); *Charter Comm'ns*, 75 F.4th at 739 (accommodation

This Court first used the "key obstacle" language in *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010), where the plaintiff was a medical resident with Asperger's Syndrome who proposed "'knowledge and understanding' of the hospital physicians and staff . . . [so] they knew of his condition and its symptoms and triggers." That request was insufficient because it did not address "his communication and interaction with patients," an essential function in which he was rated "as deficient." *Id. Tchankpa*, this Circuit's only other published decision using the "key obstacle" language, also involved a mismatch between the plaintiff's proposed accommodation and his difficulty performing essential functions. There, the plaintiff requested to work from home as an accommodation, and this Court "presume[d] on-site attendance is an essential job requirement." 951 F.3d at 813. The plaintiff's doctor, meanwhile, "*confirmed* that Tchankpa could do his job without working from home" and the

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"may be needed for an employee with a disability to perform essential job functions more safely or less painfully"); 29 C.F.R. § 1630.2(o)(1)(iii) (accommodations may be necessary to "enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities"). But this Court need not address the breadth of the accommodation obligation here because a jury could find Yanick's request was consistent with the "key obstacle" language the district court relied on.

plaintiff "never explained why working from home . . . would help him perform his job while injured." *Id.*

The relationship between Yanick's requested accommodation and her ability to perform her job is far more straightforward. A week after Yanick returned from a medical leave during which she had a mastectomy, Schnepp asked Yanick, "How do you think things are going" and told her "things are not to standards." Schnepp Dep., R. 18-4, PageID #301. Yanick responded that she "was struggling," "it was hard for [her] physically," and she "needed some time to get back to normal." Yanick Dep., R. 18-2, PageID #273, 278. She also told Schnepp "it was . . . hard since I worked 53 hours last week and need to get used to all the work again after being off." *Id.* at 273. Unlike in *Tchankpa* and *Jakubowski*, a jury here could directly connect Yanick's disability-related physical struggles, her schedule, and the performance of her duties in the bakery department.

II. The district court erred in assessing whether Kroger constructively demoted Yanick.

As the district court observed, this Court recognizes constructive demotion as an adverse action and applies the same standard to constructive demotion as it applies to constructive discharge. Order, R.22,

PageID #471; *see also Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873, 876 (7th Cir. 1999); *Fenney v. Dakota, Minn. & E. R.R. Co.*, 327 F.3d 707, 717 (8th Cir. 2003). The court, however, did not evaluate whether a jury could find Kroger's denial of accommodation so intolerable that a reasonable person would step down, and it articulated an unnecessarily restrictive standard for constructive demotion.

As summary judgment was inappropriate on Yanick's failure-to-accommodate claim, remand is also appropriate on her constructive demotion claims. The district court acknowledged that a failure to accommodate could "precipitate[] an involuntary resignation," but held that Yanick had not requested a reasonable accommodation. Order, R.22, PageID #474 (citing *Smith*, 376 F.3d at 534). Because a jury could find Kroger failed to accommodate Kroger, the district court should now determine in the first instance whether that failure was so intolerable that a jury could find there was a constructive demotion. *See Smith*, 376 F.3d at 534; *see also Castagna v. Luceno*, 558 F. App'x 19, 22 (2d Cir. 2014) (summary order) (remanding constructive discharge claim because the district court had erred in assessing the underlying harassment claim).

When assessing if there was a constructive demotion, the district court should not look for evidence of additional intent. In articulating the standard below, the court relied on a superseded legal standard that required evidence the employer created intolerable conditions "with the intention of forcing the employee to quit [or be demoted]," quoting from this Court's earlier decision in *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir. 2005). Order, R. 22, PageID #471. But, eleven years after *Saroli*, the Supreme Court clarified that constructive discharge claims do not require proof the employer intended to force the plaintiff to resign. *Green v. Brennan*, 578 U.S. 547, 560 (2016).

"The whole point" of constructive discharge claims, the Court said, "is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him." *Id.* A constructive discharge claim thus has "two basic elements." *Id.* at 555. It requires an objective showing of "discriminat[ion] . . . to the point where a reasonable person in his position would have felt compelled to resign." *Id.* And the plaintiff "must also show that he actually resigned." *Id.*

The Supreme Court then expressly rejected an additional intent element. It did "not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along." *Id.* at 560. As the Fourth Circuit held, applying *Green*, a plaintiff need not show "deliberateness, or a subjective intent to force a resignation." *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 143 (4th Cir. 2017) (internal quotation marks omitted); *Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 235 (4th Cir. 2022) (same).

This Court, however, has continued to articulate an additional intent requirement even after *Green*. *See, e.g.*, *Erwin v. Honda N. Am., Inc.*, No. 22-3823, 2023 WL 3035355, at *4 (6th Cir. Apr. 21, 2023); *Burns v. Berry Glob., Inc.*, No. 21-5359, 2022 WL 351769, at *7 (6th Cir. Feb. 7, 2022). In *Tchankpa,* this Court acknowledged that *Green* "arguably conflicts with the subjective intent requirement still used by this Circuit" but questioned whether the rejection of an additional intent requirement was dicta. 951 F.3d at 816; *see also Tomlinson*, 2023 WL 1777389, at *10 (stating, without resolving issue, that "the Supreme Court raised a question as to whether intent was properly considered as an element in constructive discharge"); *Garcia v.*

Beaumont Health Royal Oak Hosp., No. 22-1186, 2022 WL 5434558, at *7 n.3 (6th Cir. Oct. 7, 2022) (questioning whether intent remains an element but declining to address the issue).

The rejection of an additional intent requirement, however, was central to *Green*'s holding. *Green* resolved when the 45-day period in which a federal employee must contact an EEO counselor begins. 578 U.S. at 549-50. Justice Alito, in a concurrence, suggested that there were two types of constructive discharge—one that required additional intent, and one that did not—and that the 45 days should only start at resignation for constructive discharge claims with additional intent. *Id.* at 569-74 (Alito, J., concurring). The majority disagreed. It held that there is only one type of constructive discharge, which does not require any additional intent and for which the 45 days begin when the employee resigns. *Id.* at 559-60; *see also Consol Energy*, 860 F.3d at 144 (explaining that the Supreme Court "revisited the standard for constructive discharge" in *Green* "and expressly rejected a 'deliberateness' or intent requirement").

Because that reasoning was central to the case's outcome, it was not dicta. *Freed v. Thomas*, 976 F.3d 729, 738 (6th Cir. 2020) ("A 'holding' is a court's determination of a matter of law pivotal to its decision.") (cleaned

up and citation omitted). And, even if it were dicta, this Court is "'obligated to follow Supreme Court dicta, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *Tchankpa*, 951 F.3d at 816 n.2 (quoting *United States v. Khami*, 362 F. App'x 501, 508 (6th Cir. 2010)).

We also note that the district court believed that "the manner in which an employer supervises and/or criticizes an employee's job performance, without more, cannot establish constructive demotion as a matter of law." Order, R.22, Page ID #473. The court cited *Smith*, 376 F.3d at 534, but this Court observed in *Smith* only that criticism, supervision, and job assignments "*normally* are insufficient." *Id.* (emphasis added). And the governing standard is simply whether there are "working conditions so intolerable that a reasonable person would have felt compelled to" step down. *Penn. St. Police v. Suders*, 542 U.S. 129, 147 (2004). While it may well be the rare case where criticism, badgering, and other forms of harsh supervision rise to the level of intolerability, courts can and should apply the governing standard from *Suders* and *Green* to determine whether, on the facts of each case, a reasonable person would feel compelled to step down or resign.

CONCLUSION

For all these reasons, the judgment of the district court should be vacated, and the case remanded for further proceedings.

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 5,610 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on this 29th day of September 2023, 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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