No. 23-12983

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HAYDEE VALDES,
Plaintiff-Appellant,

v.

KENDALL HEALTHCARE GROUP, LTD.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida, No. 1:22-cv-22046
Hon. K. Michael Moore, United States District Judge

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

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

STEVEN WINKELMAN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2564
steven.winkelman@eeoc.gov

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the Equal Employment Opportunity Commission (EEOC) as amicus curiae certifies that, in addition to those listed in the certificates filed by the plaintiff-appellant and the defendant-appellee, the following persons and entities may have an interest in the outcome of this case:

1. Equal Employment Opportunity Commission (EEOC) (Amicus Curiae)
2. Gilbride, Karla (General Counsel, EEOC)
3. Goldstein, Jennifer S. (Associate General Counsel, EEOC)
4. Smith, Dara S. (Assistant General Counsel, EEOC)
5. Winkelman, Steven J. (Attorney, EEOC)

Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a government agency, is not required to file a corporate disclosure statement.

According to plaintiff-appellant's certificate, defendant-appellee is affiliated with HCA Healthcare, Inc., a publicly traded company whose ticker symbol is HCA.

/s/ Steven Winkelman
STEVEN WINKELMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2564
steven.winkelman@eeoc.gov

November 29, 2023

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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 implicates the proper standards for assessing whether an employer's actions qualify as adverse employment actions for purposes of an age discrimination claim under the ADEA or as materially adverse actions for purposes of a retaliation claim under the ADEA. Because the EEOC has a substantial interest in the proper resolution of these questions, the agency offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Whether a reasonable jury could find that discontinuing an employee's participation in a paid clinical training program was an adverse employment action for purposes of an ADEA age discrimination claim.

2. Whether a reasonable jury could find that the same conduct was a materially adverse action for purposes of an ADEA retaliation claim

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

under the standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Haydee Valdes is a licensed radiology technologist. R.73 at 2 (¶ 2). In 2019, when Valdes was fifty-nine, she began working at Kendall Healthcare Group, Ltd., a hospital, as a magnetic resonance imaging technician ("MRI tech"). R.73 at 2 (¶¶ 2-3). After a few years, Valdes sought training in mammography. R.73 at 8 (¶ 55). According to Valdes, she "needed [the training] because [she] was working toward certification in mammography which would increase [her] value as a technologist and make [her] more versatile professionally." R.76 at 9 (¶ 34). Kendall Healthcare agreed to provide the training and, beginning in October 2021,[3] it allowed Valdes to perform mammography procedures in a clinical setting under the

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[2] The EEOC presents these facts in the light most favorable to Valdes, as required at summary judgment. *See Mazzeo v. Color Resols. Int'l, LLC*, 746 F.3d 1264, 1266 (11th Cir. 2014). For record citations, "R.# at #" refers to the district court docket entry and CM/ECF-assigned page numbers. Where appropriate, original paragraph numbers are provided parenthetically.

[3] Valdes testified that she received some mammography training at Kendall Healthcare before October 2021, but she did not specify when. R.83-1 at 149:11-15.

supervision of the hospital's lead mammography technician. R.73 at 8 (¶¶ 55-56). The hospital also "paid [Valdes] to train." R.73 at 8 (¶ 55).

In July 2021, several months before the training began, Valdes had filed a charge of discrimination with the EEOC in which she alleged that a director at Kendall Healthcare was trying to get her fired because of her age. R.73 at 9 (¶ 59); R.73-18 at 1-2. In February 2022, around the same time the hospital was responding to the EEOC charge, it suddenly discontinued Valdes's participation in the mammography clinic. R.76 at 9 (¶ 34); R.83-1 at 147:23-148:4, 151:17-23. The hospital offered varying reasons for doing so. One person told Valdes that it was because of an issue relating to a "joint commission." R.83-1 at 151:24-152:11. Another told her that it was because of an accreditation issue. R.83-1 at 148:10-20; 151:24-152:11. The hospital would also claim that it discontinued Valdes's work in the mammography clinic "due to low patient volume." R.73 at 8 (¶ 56); *see also* R.71-4 at 107:10-23.

In April 2022, Valdes filed a second EEOC charge, alleging that Kendall Healthcare had discontinued her participation in the mammography clinic in retaliation for her first EEOC charge. R.73 at 9 (¶ 60); R.98-2 at 167. Months later, in August 2022, she filed a third charge,

alleging that the hospital had constructively fired her. R.73 at 9 (¶ 61). At that time, Valdes was sixty-three. R.73 at 2 (¶ 3); R.98-2 at 174.

B. District Court's Decision

Valdes filed this lawsuit, asserting claims for age discrimination and retaliation under the ADEA (among other claims). R.18 at 14-15 (¶¶ 81-86), 16-17 (¶¶ 94-99). She cited Kendall Healthcare's discontinuation of her participation in the mammography clinic as one of several events supporting her claims. R.18 at 12 (¶ 69).

After discovery, the district court granted summary judgment to Kendall Healthcare on Valdes's ADEA claims. R.99 at 18. As relevant here, the court held that the discontinuation of training was not an "adverse employment action" for purposes of Valdes's discrimination claim. R.99 at 8. It reasoned that "the discontinuation of mammography training did not impact [Valdes's] 'compensation, terms, conditions, or privileges of employment'" because "the training was not a part of [her] occupation as an MRI technologist, but rather, was an unrelated training that [she] underwent in her attempt to receive a separate certification." R.99 at 8 (quoting *Nettles v. LSG Sky Chefs*, 211 F. App'x 837, 839 (11th Cir. 2006)). Having held that the discontinuation of training was not an adverse

employment action, the court did not consider whether Valdes's age played a role in the hospital's decision. R.99 at 10.

The court also assumed that because the discontinuation of training was not an adverse action for purposes of Valdes's discrimination claim, it likewise could not be an adverse action for purposes of her retaliation claim. R.99 at 12 & n.6 (declining to consider retaliation claim premised on discontinuation of training "[g]iven that [Valdes] asserts the same adverse actions as the basis for both [her] age discrimination and retaliation claims"). Again, the court did not consider whether there was a causal connection between Valdes's first EEOC charge and the hospital's decision to end her training. R.99 at 13-15.

After the district court entered a final judgment, this appeal followed. R.115; R.119.

SUMMARY OF ARGUMENT

The district court erred in holding that Kendall Healthcare's decision to discontinue Valdes's participation in a paid clinical training program was not sufficiently adverse as a matter of law to support her age discrimination and retaliation claims under the ADEA. In so holding, the district court did not apply the proper standards governing each claim.

First, a reasonable jury could find that the deprivation of training was an "adverse employment action" for purposes of Valdes's age discrimination claim. This Court has long recognized that "[d]iscrimination with respect to training programs is … actionable under the ADEA as long as the training is materially related to the employee's job responsibilities or possibilities for advancement." *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1436 n.16 (11th Cir. 1998) (citations omitted). Here, Valdes proffered evidence that Kendall Healthcare's decision to discontinue her participation in the mammography clinic negatively impacted her opportunities for professional growth or advancement. That evidence was enough to preclude summary judgment on the adverse action element of Valdes's discrimination claim. Furthermore, although this Court need not address the issue here, the ADEA's plain text does not require a "serious and material" adverse action to prove disparate treatment.

Second, a reasonable jury could find that the deprivation of training was a "materially adverse action" for purposes of Valdes's retaliation claim. The Supreme Court set forth the proper materiality standard for retaliation claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which held that an action is materially adverse if "it well

might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (cleaned up). Applying this standard, the Supreme Court and this Court have recognized that withholding or denying training opportunities well might dissuade a reasonable worker from complaining about discrimination under some circumstances. They have also recognized that because discrimination and retaliation claims are subject to different standards, an employer's conduct may be actionable as retaliation even when it is not actionable as discrimination. In reaching a contrary result here, the district court did not apply the *Burlington Northern* standard but instead incorrectly assumed that its ruling on the adverse action element of Valdes's *discrimination* claim extended to the adverse action element of her *retaliation* claim. This Court has squarely rejected that reasoning.

In short, under the appropriate standards, a reasonable jury could find that Kendall Healthcare's discontinuation of Valdes's training was sufficiently adverse to support her age discrimination and retaliation claims under the ADEA. Accordingly, the district court erred in granting summary judgment on this ground.

ARGUMENT

I. A reasonable jury could find that discontinuing Valdes's participation in a paid clinical training was an adverse employment action for purposes of her age discrimination claim.

A. A denial of training is sufficiently adverse where, as here, it negatively impacts an employee's opportunities for professional growth or development.

The ADEA makes it unlawful for an employer to "discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a prima facie case of age discrimination under this Court's precedents, a plaintiff must show, among other things, that she suffered an "adverse employment action." *Liebman v. Metro. Life Ins. Co.*, 808 F.3d 1294, 1298 (11th Cir. 2015). This Court's precedents further define an "adverse employment action" as one that results in "a *serious and material* change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001) (emphasis in original) (Title VII case); *see also Cobb v. City of Roswell ex rel. Wood*, 533 F. App'x 888, 894 (11th Cir. 2013) (applying *Davis* in ADEA context).[4]

[4] This Court "has adapted to issues of age discrimination the principles of law applicable to cases arising under the very similar provisions of Title VII." *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir.

Importantly, an adverse employment action need not have "direct economic consequences." *Davis*, 245 F.3d at 1239. Instead, an employment action may be sufficiently adverse when, for instance, it "impede[s] an employee's professional growth or advancement." *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1452 (11th Cir. 1998) (Americans with Disabilities Act case addressing lateral transfers); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (preventing employees "from advancing in their careers" is among the "tangible effects" of discrimination); *Barnes v. Nationwide Mut. Ins. Co.*, 598 F. App'x 86, 90 (3d Cir. 2015) ("[A]ctions that reduce opportunities for promotion or professional growth can constitute adverse employment actions."); *de la Cruz v. N.Y.C. Hum. Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 21 (2d Cir. 1996) (transferring employee to position with "little opportunity for professional growth" is adverse employment action).

Consistent with these principles, this Court has long recognized that a denial of training may qualify as an adverse employment action when it

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1993). Accordingly, this Court often turns to Title VII cases for guidance in interpreting and applying the ADEA. *E.g.*, *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1263-64 (11th Cir. 1997); *Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559, 1561 (11th Cir. 1987).

negatively impacts an employee's opportunities for professional development or career advancement. As this Court has explained: "Discrimination with respect to training programs is … actionable under the ADEA as long as the training is materially related to the employee's job responsibilities *or possibilities for advancement*." *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1436 n.16 (11th Cir. 1998) (emphasis added) (citations omitted).

The statutory text likewise dictates that discontinuing an employee's training, when motivated by the employee's age, may be actionable as discrimination. The ADEA prohibits discrimination with respect to the "terms, conditions, or *privileges* of employment," 29 U.S.C. § 623(a)(1) (emphasis added), and training opportunities are often a quintessential privilege of employment. After all, the "promise of education and experience in a specific skilled position is a material benefit." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 921 (11th Cir. 2018). And "a benefit, though not a contractual right of employment, may qualify as a 'privilege' of employment." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (brackets omitted) (Title VII case); *see also Miller v. Int'l Harvester Co.*, 811 F.2d 1150, 1151 (7th Cir. 1987) ("[T]he word 'privilege' denotes (or at least includes) a

non-contractual benefit or expectation…."); *Hamilton v. Dallas Cnty.*, 79 F.4th 494, 501-02 (5th Cir. 2023) (en banc) ("Any 'benefits that comprise the incidents of employment, or that form an aspect of the relationship between the employer and employees,' … fall within Title VII's ban on discrimination." (quoting *Hishon*, 467 U.S. at 75)); 29 U.S.C. § 630(*l*) ("The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits….").

Here, Valdes supplied evidence from which a reasonable jury could infer that Kendall Healthcare's decision to discontinue her participation in the mammography clinic negatively impacted her opportunities for "professional growth or advancement." *Doe*, 145 F.3d at 1452. In her declaration, Valdes testified that she "needed [the training] because [she] was working toward certification in mammography which would increase [her] value as a technologist and make [her] more versatile professionally." R.76 at 9 (¶ 34). Kendall Healthcare concedes that training was "for [Valdes's] benefit," that the training would enable her "to become certified in mammography," and that the hospital paid Valdes to complete this training. R.73 at 8 (¶ 55). By denying Valdes a valuable (and paid) clinical training opportunity, the hospital thus deprived her of a "material benefit."

Jefferson, 891 F.3d at 921. Under these facts, a reasonable jury could conclude that Kendall Healthcare materially altered a privilege of Valdes's employment.

The fact that the mammography training did not directly relate to Valdes's then-present job duties "as an MRI technologist" does not support a different result, as the district court incorrectly reasoned. R.99 at 8. To be sure, Valdes agreed that mammography tests were not "part of [her] job *as an MRI tech*," R.83-1 at 143:24-144:4 (emphasis added), and that the discontinuation of the clinical training did not "adversely affect[] [her] job *as an MRI tech*," R.83-1 at 155:23-156:4 (emphasis added). As explained above, however, a denial of training may be sufficiently adverse if "the training is materially related to the employee's job responsibilities *or possibilities for advancement*." *Turlington*, 135 F.3d at 1436 n.16 (emphasis added). Thus, it is not necessary to show that a denial of training impacted one's present job responsibilities.

In short, there are genuine issues of material fact as to whether discontinuing Valdes's participation in a paid clinical training impeded her "professional growth or advancement," *Doe*, 145 F.3d at 1452, and whether the training was "materially related" to her "possibilities for

advancement," *Turlington*, 135 F.3d at 1436 n.16. The district court therefore erred in granting summary judgment on this ground.

B. The ADEA's plain text does not require a "serious and material" adverse action to establish disparate treatment.

Although this Court need not reach the issue—because the discontinuation of Valdes's training was an adverse employment action under existing precedent—we note that, in the EEOC's view, the "serious and material" requirement set forth in *Davis* is inconsistent with the ADEA's plain text.

The ADEA prohibits discrimination with respect to the "terms, conditions, or privileges of employment." 29 U.S.C. § 623(a)(1). As the EEOC and the Attorney General have argued in the Title VII context (and the EEOC has argued in the ADEA context), that language does not require an additional showing of "serious," "material," or "tangible" harm.[5] And

[5] *See, e.g.*, Br. for United States as Amicus Curiae at 23-27, *Muldrow v. City of St. Louis*, No. 22-193, 2023 WL 5806264 (U.S. Sept. 5, 2023) (Title VII); En Banc Br. of the United States as Amicus Curiae at 12-15, *Hamilton v. Dallas Cnty.*, No. 21-10133, 2022 WL 17249398 (5th Cir. Nov. 21, 2022) (Title VII); En Banc Br. of United States as Amicus Curiae at 12-14, *Chambers v. District of Columbia*, No. 19-7098, 2021 WL 2853570 (D.C. Cir. July 7, 2021) (Title VII); Br. of EEOC as Amicus Curiae at 11-19, *Dennison v. Ind. Univ. of Pa.*, No. 22-2649, 2023 WL 1253638 (3d Cir. Jan. 25, 2023) (ADEA).

as they have specifically argued to this Court, *Davis* erred in reading such a requirement into the statute. *See* Br. for United States as Amicus Curiae at 13-21, *Bennett v. Butler Cnty. Bd. of Educ.*, No. 23-10186, 2023 WL 4077545 (11th Cir. June 14, 2023).

Presented with these arguments, three circuits—two sitting en banc—have recently reconsidered their materiality standards for discrimination claims. *See Hamilton*, 79 F.4th at 501-02; *Chambers v. District of Columbia*, 35 F.4th 870, 872-73 (D.C. Cir. 2022) (en banc); *Threat v. City of Cleveland*, 6 F.4th 672, 678 (6th Cir. 2021); *see also Naes v. City of St. Louis*, No. 22-2021, 2023 WL 3991638, at *2 (8th Cir. June 14, 2023) (Stras, J., concurring) ("The problem [with requiring a material adverse employment action] is that those words do not appear in Title VII's text."). The Supreme Court is also poised to consider a related question this term. *See Muldrow v. City of St. Louis*, 143 S. Ct. 2686 (2023) (mem.) (granting certiorari on the question whether "Title VII prohibit[s] discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage").

We bring these developments to this Court's attention so it can consider revisiting *Davis*'s "serious and material" requirement at the

appropriate time and in the appropriate case. But because the discontinuation of Valdes's training was an adverse employment action under existing precedent, this Court need not do so here.

II. A reasonable jury could find that discontinuing Valdes's participation in a paid clinical training was a materially adverse action for purposes of her retaliation claim under the standard set forth in *Burlington Northern*.

The ADEA makes it unlawful for an employer to retaliate against any employee because she has engaged in protected activity, including by filing a charge of discrimination. 29 U.S.C. § 623(d). To establish a prima facie case of retaliation, a plaintiff must show, among other things, that she suffered a materially adverse action. *Brown v. Northside Hosp.*, 311 F. App'x 217, 224 (11th Cir. 2009).

Importantly, what counts as a materially adverse action in the *retaliation* context differs from what counts as an adverse employment action in the *discrimination* context. The Supreme Court set forth the appropriate material adversity standard for retaliation claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). There, the Court held that an action is materially adverse for purposes of a Title VII

retaliation claim if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (cleaned up).

In *Burlington Northern*, the Supreme Court also clarified that, unlike Title VII's anti-discrimination provision, the anti-retaliation provision "is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64. After all, while the anti-discrimination provision prohibits discrimination "with respect to … compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), the anti-retaliation provision contains no such qualification, *id.* § 2000e-3(a). The Court found "strong reason to believe" that Congress intentionally drew this "important" textual distinction to further Title VII's aims. *Burlington N.*, 548 U.S. at 61, 63. The Court reasoned that because "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses, … [i]nterpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of [Title VII's] primary objective depends." *Id.* at 67; *see id.* at 66 (Title VII's protections for

"victims of retaliation" are different than protections for "victims of … discrimination").[6]

Here, the district court did not conduct the analysis required by *Burlington Northern*. Indeed, the court did not cite *Burlington Northern* or mention its "well might have dissuaded" standard. *See* R.99 at 12-16. Instead, it incorrectly assumed that the discontinuation of training could not be materially adverse for purposes of Valdes's *retaliation* claim solely because it was not sufficiently adverse for purposes of her *discrimination* claim. R.99 at 12 & n.6.

This Court has rejected that reasoning. It has explained that "*Burlington Northern* set out a different standard for retaliation claims" that is distinct from "the standard applicable to claims of discrimination." *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 861 (11th Cir. 2020); *see also Crawford v. Carroll*, 529 F.3d 961, 974 n.14 (11th Cir. 2008) ("[W]hile the new

[6] Although *Burlington Northern* addressed Title VII retaliation claims, courts apply it in the ADEA context as well. *E.g.*, *Brown*, 311 F. App'x at 224 (applying *Burlington Northern* to ADEA retaliation claim); *see also Gomez-Perez v. Potter*, 553 U.S. 474, 495 (2008) (Roberts, C.J., dissenting) ("[T]he antiretaliation provision in the Title VII private-sector provision … is materially indistinguishable from that in the ADEA….").

standard enunciated in *Burlington* applies to Title VII retaliation claims, it has no application to substantive Title VII discrimination claims; the prior standard remains applicable to such claims.").

Critically, because retaliation and discrimination claims are subject to different standards, "the same action could satisfy the adverse action element of a retaliation claim but not a discrimination claim." *Laster v. Ga. Dep't of Corr.*, No. 22-13390, 2023 WL 5927140, at *2 (11th Cir. Sept. 12, 2023) (Title VII case); *see also Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1266 & n.3 (11th Cir. 2021) (even if paid suspension does not "rise to the level of an adverse employment action in discrimination cases," it nonetheless "may constitute an adverse employment action in the *retaliation* context" because "[t]he standard to show an adverse employment decision in a retaliation case" is different), *petition for cert. filed* (U.S. Sept. 8, 2022) (No. 22-231).

In effectively applying the adversity standard for discrimination claims to Valdes's retaliation claim, the district court thus erred. *See Monaghan*, 955 F.3d at 862 (holding, in Title VII context, that district court erred by applying adversity standard "inconsistent with *Burlington Northern*"); *see also Davis-Garett v. Urb. Outfitters, Inc.*, 921 F.3d 30, 44 (2d Cir. 2019) ("In applying that pre-[*Burlington Northern*] substantive

discrimination standard to the retaliation claims in the present case, the district court erred."); *Morse v. Ill. Dep't of Corr.*, 191 F. Supp. 3d 848, 861 (N.D. Ill. 2015) (faulting party for "erroneously assum[ing] that an 'adverse action' means the same thing for purposes of discrimination and retaliation claims").

Under the correct standard—the *Burlington Northern* standard—a reasonable jury could find that the discontinuation of a paid clinical training well might dissuade a reasonable worker from complaining about discrimination. Indeed, *Burlington Northern* itself contemplated that depriving an employee of training opportunities could constitute a materially adverse action under some circumstances. In providing examples of materially adverse actions, for instance, the Supreme Court noted that "to retaliate by 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." *Burlington N.*, 548 U.S. at 69; *see also* EEOC, *Enforcement Guidance on Retaliation and Related Issues*, No. 915.004, 2016 WL 4688886, at *17 & n.117 (Aug. 25, 2016). In the Title VII context, this Court has likewise recognized that a "failure to train could be considered [a]

materially adverse employment action[]" for purposes of a retaliation claim. *DaCosta v. Birmingham Water Works & Sewer Bd.*, 256 F. App'x 283, 287 (11th Cir. 2007).

At a minimum, whether this particular denial of training could have dissuaded a reasonable worker from complaining about discrimination presents a fact question for the jury. As this Court has explained, *Burlington Northern* "strongly suggests that it is for a jury to decide whether anything more than the most petty and trivial actions against an employee should be considered 'materially adverse' to him and thus constitute adverse employment actions." *Crawford*, 529 F.3d at 974 n.13.[7]

[7] Even if the hospital's discontinuation of Valdes's training did not successfully dissuade her from complaining about discrimination, that fact would not change the result. The *Burlington Northern* standard asks only whether an employer's actions "well might have dissuaded a *reasonable* worker from making or supporting a charge of discrimination." 548 U.S. at 68 (cleaned up) (emphasis added). 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.*; *see also Laster*, 2023 WL 5927140, at *3 ("[T]he reasonableness of an employee's fear of reprisal is generally a question of fact for a jury.").

CONCLUSION

For the foregoing reasons, the EEOC urges this Court to clarify that under the appropriate standards, a reasonable jury could find that Kendall Healthcare's discontinuation of Valdes's training was sufficiently adverse to support Valdes's age discrimination and retaliation claims. Accordingly, the district court erred in granting summary judgment on this ground.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

/s/ Steven Winkelman
STEVEN WINKELMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2564
steven.winkelman@eeoc.gov

November 29, 2023

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 4,144 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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.

/s/ Steven Winkelman
STEVEN WINKELMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2564
steven.winkelman@eeoc.gov

November 29, 2023

CERTIFICATE OF SERVICE

I certify that on November 29, 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.

I further certify that I caused four paper copies of the foregoing brief to be mailed to the Clerk of Court.

/s/ Steven Winkelman
STEVEN WINKELMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2564
steven.winkelman@eeoc.gov

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