Oral argument not yet scheduled

No. 20-4165

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michael Threat, Margerita Noland-Moore, Lawrence Walker, Reginald Anderson, and Pamela Beavers,
Plaintiffs-Appellants,

v.

City of Cleveland, Ohio, and Nicole Carlton, personally and in her official capacity as Commissioner,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio

No. 1:19-cv-2105 (Gwin, J.)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS MICHAEL THREAT ET AL.

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May 3, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-4165 Case Name: Threat, et al. vs. City of Cleveland, et al.

Name of counsel: Brian Wolfman

Pursuant to 6th Cir. R. 26.1, Michael Threat, et al.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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No.

CERTIFICATE OF SERVICE

I certify that on May 3, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Brian Wolfman

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Defendants adopted a race-based policy that prohibited work shifts comprised of only Black EMS captains. When Plaintiffs—Black captains whose shifts were controlled by the policy—sought relief from this discrimination, Defendants responded with a retaliation campaign, filing an unfair labor practice charge against Plaintiffs and further disciplining Plaintiff Beavers.

Rather than engage with Plaintiffs' or the United States' arguments that the City's discrimination and retaliation violated federal and state law, Defendants search for procedural escape hatches. They go so far as to ask this Court, "as a preliminary matter," to "reject" the entire appeal on nebulous procedural grounds. *See* Resp. Br. 19. Their specific forfeiture and waiver arguments, taken together, would nullify Plaintiffs' discrimination claims and leave only a stripped-down version of one of Plaintiffs' two retaliation claims before this Court. Yet the parties vigorously litigated these very claims below, including in three rounds of dispositive motion practice, leading to the district court's resolution of them on their merits. For those reasons, as explained further below, this Court should resolve all of Plaintiffs' claims on their merits as well.

The little that Defendants do say on the merits demonstrates what has been evident throughout this litigation: The City believes that its use of race-based classifications is not only lawful, but appropriate; that the captains are wrong to demand a non-discriminatory workplace; and that the City is free to discipline them for seeking equal treatment. As explained below, the City is wrong on all counts. This Court should hold Defendants' race-based policies and retaliation unlawful and ensure that Defendants provide Plaintiffs with all appropriate retrospective and prospective relief.

I. Defendants' race-based shift-assignment policy is unlawful.

A. Defendants violated Title VII and the Ohio Civil Rights Act by altering Plaintiffs' terms, conditions, or privileges of employment based on race.

Title VII of the Civil Rights Act of 1964 and the Ohio Civil Rights Act make it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. § 2000e-2(a)(1); *see* Ohio Rev. Code Ann. § 4112.02(A). Defendants struggle to defend the district court's impermissibly narrow interpretation of this catchall phrase, *see* Resp. Br. 23-29, and they don't even try to confront the statutory text, which would have made their job even more difficult, because it does not establish a minimum level of actionable harm. Opening Br. 26; U.S. Br. 5-6.

As our opening brief shows (at 23-32), Defendants' race-based shift-assignment policy violates federal and Ohio law by discriminating against Plaintiffs as to the terms, conditions, or privileges of their employment. Plaintiffs' position about the correct meaning of the phrase "terms, conditions, or privileges of employment" was presented to the district court. (*See* RE 30-1 PageID 355.) Indeed, it was the principal issue decided at summary judgment. (RE 53 PageID 1508, 1510, 1512.) So, Defendants' assertion that Plaintiffs forfeited this argument, *see* Resp. Br. 23, is frivolous and should be rejected.[1]

[1] Defendants also accuse Plaintiffs of using an addendum to their opening brief to present new evidence on appeal. *See* Resp. Br. 14. The addendum does not add evidence but summarizes undisputed record material. *See* Opening Br. Add. 1a-2a. Indeed, Defendants rely on the facts presented in these visual aids in their brief. Resp. Br. 7-9.

1. The district court's narrow interpretation of Title VII disregards the statutory text and countenances unlawful discrimination.

Instead of looking to the statute's words, Defendants ask this Court to examine *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), for clues about Section 703(a)(1)'s meaning. *See* Resp. Br. 28-29. *Burlington Northern* held that the Act's antiretaliation provision—which does not refer to "terms, conditions, or privileges of employment"—reaches conduct *outside* the workplace. *See* 548 U.S. 53, 61-64 (2006); *compare* 42 U.S.C. § 2000e-2(a)(1), *with* 42 U.S.C. § 2000e-3(a). This conclusion tells us nothing about the meaning of the phrase "terms, conditions, or privileges of employment," *see* Opening Br. 23-26, and Defendants' conduct here occurred *in* the workplace.

Because each Plaintiff suffered actionable harms, Defendants' arguments aimed at distinguishing between each Plaintiff's experiences are relevant only to potential damages, not the liability question presented here. *See* Resp. Br. 22-23, 30-31. As our opening brief explains (at 27-30), Defendants' race-based shift-assignment policy controlled when and with whom *all* Plaintiffs worked, reducing the benefits of their seniority and constructively diminishing their supervisory responsibilities. That is because all Plaintiffs were prohibited from supervising paramedics without a white captain present. Opening Br. 33. Though all Plaintiffs experienced this harm, the consequences that Defendants' race-based policy had on each Plaintiffs varied to some degree. Plaintiff Anderson was relegated to the night shift for five months because of the policy, and Plaintiff Beavers was denied an available day shift despite her seniority. *Id.* at 33-34. If this Court agrees with Plaintiffs that their discrimination claims should

proceed to trial only as to remedy, Defendants will have the opportunity to address what each Plaintiff is owed—and how that may vary depending on each Plaintiff's experience. *See id.* at 42.[2]

The differences between Plaintiffs' damages claims are irrelevant for another reason: Plaintiffs seek to hold Defendants accountable not only for the individualized harms they suffered, but also to prevent prospective injuries by obtaining declaratory and injunctive relief. (RE 1 PageID 21-22.) Even after the parties entered into a conciliation agreement providing that Defendants would not make future race-based shift adjustments, Defendants have insisted that the collective bargaining agreement permits them to design discriminatory shift-assignment policies and that Defendant Carlton's "only mistake was admitting" to the discriminatory practice. (RE 31-3 PageID 467; *see also* RE 32-9 PageID 694.) Carlton still supervises Plaintiffs, and she explained at her deposition that she would not prohibit Black captains from working together "until the matter is resolved, which is why we're here today," strongly implying that if the case is resolved in her favor, she will resume using race as a basis for assigning Plaintiffs' shifts. (RE 29 PageID 277.) Given these comments, and Defendants' unlawful conduct, all Plaintiffs have valid claims for injunctive as well as monetary relief. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

If this Court affirms the district court's flawed interpretation of Section 703(a)(1), Defendants—already comfortable with using race to make employment decisions—will

[2] Defendants' assertion that Plaintiffs forfeited their claims to punitive damages, Resp. Br. 5, makes no sense because remedy questions have yet to arise. The district court disposed of this case on cross-motions for summary judgment as to liability, not remedy. (RE 53 PageID 1513; *see also* RE 1 PageID 22.)

be further emboldened. The gist of their argument, after all, is that they are free to hang a sign in the workplace reinstating the very policy at issue here: Black captains may not work shifts without a white captain present. Decades after Title VII was enacted to eliminate the workplace indignities of Jim Crow, that cannot be right, and this Court should say so.

2. Defendants' race-based shift assignment policy is an "adverse employment action" even under the district court's impermissibly narrow understanding of Title VII.

a. Even if employees must prove they suffered an "adverse employment action" under the district court's narrow interpretation of Section 703(a)(1), Plaintiffs are entitled to judgment on liability. Shift reassignments are adverse employment actions when they result in "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities" or other changes that make the assignment worse. *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996). Because all Plaintiffs' shifts were controlled by the policy, resulting in a "less distinguished title, a material loss of benefits" and diminished responsibilities, they all suffered adverse employment actions under this Court's precedent. Opening Br. 32-33.

Defendants argue that Plaintiffs failed to direct the district court to evidence showing that each Plaintiff suffered an adverse employment action. *See* Resp. Br. 30. Not so. Plaintiffs argued as the moving party that they all suffered an adverse employment action by being subject to the race-based shift policy and that some Plaintiffs suffered additional, individualized harms. (RE 38 PageID 1228-29.) Plaintiffs demonstrated that the policy was discriminatory, that all Plaintiffs were harmed by

being forced to participate in a race-based shift-assignment process, and that Plaintiff Anderson suffered additional harm by having his shift reassigned because he is Black. (*Id.*)

Defendants also mistakenly contend that Plaintiffs have forfeited the argument that Plaintiff Beavers suffered an additional adverse employment action. Resp. Br. 33. This argument is part and parcel of Plaintiffs' argument below that some Plaintiffs suffered additional, harmful employment actions, as evidenced by Plaintiff Anderson's discriminatory shift reassignment. (*See* RE 38 PageID 1229.) Defendants' own filings identified the harm suffered by Beavers when they explained that, even though she had greater seniority than Warren James, a white captain, and had requested the available day shift, Carlton awarded that shift to James. (RE 33-1 PageID 906-08; RE 19 PageID 125-26.) In any event, the district court granted Defendants judgment because of its incorrect definition of an adverse employment action (*see* RE 53 PageID 1510-13), not because of any failure by Plaintiffs to identify particular harms. On appeal, Plaintiffs point to evidence entered into the record by Defendants to demonstrate that the district court's definition of an adverse employment action is incorrect. Nothing has been forfeited.

b. Even if this Court agrees with the district court's restrictive interpretation of Section 703(a)(1) and concludes that Plaintiffs failed to meet their burden as the moving party, at the very least, *Defendants* would not be entitled to summary judgment because disputed material facts would exist regarding the severity of the harms caused by the race-based shift-assignment policy. Despite Defendants' contrary assertion, Resp. Br. 30, Plaintiffs, as the non-moving party, pointed to sufficient evidence from which a jury

could conclude that they suffered adverse employment actions. (RE 36 PageID 1206-07.) *See Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 805 (6th Cir. 2020) (citing Fed. R. Civ. P. 56(a)).

As explained above (at 3) and in our opening brief (at 29-30), the race-based shift-assignment policy constructively reduced the supervisory responsibilities of *all* Plaintiffs and changed the meaning of seniority. That this policy did not formally alter Plaintiffs' titles misses the point. *See* Resp. Br. 30-31. It effectively diminished their titles, supervisory responsibilities, and ability to obtain desired shifts. *See* Opening Br. 29-30.

Plaintiffs Beavers and Anderson suffered *additional* adverse actions. Defendants erroneously maintain that Beavers must show that her treatment was objectively intolerable. *See* Resp. Br. 34. Our opening brief shows (at 34) that, because Beavers' request for a transfer was denied, she was subjected to unhealthy conditions and, thus, suffered an adverse employment action under this Court's precedent. And Anderson was reassigned to the night shift under the race-based policy. *See* Opening Br. 33-36.

As the United States has explained, the district court "relied on a series of unpublished decisions from this Court" to erroneously conclude shift changes are not adverse employment actions. U.S. Br. 4. (RE 53 PageID 1511-13 & n.43.) Defendants attempts to defend the district court's mistaken conclusion are fruitless. *See* Resp. Br. 25-27. Under this Court's published precedent, discriminatory shift assignments are adverse employment actions. *See* Opening Br. 32. That some captains may have preferred night shifts, *see* Resp. Br. 32, 35-36—a disputed fact—simply underscores our point: Captains value the seniority that allows them to select shifts that suit their needs

and lifestyles, and *when* someone is required to work is a term, condition, or privilege of employment.

B. Defendants are liable under Section 1983 for equal-protection violations.

1. Plaintiffs' equal-protection claims are properly before the Court.

Unable to justify their admittedly race-based assignment system under the strict scrutiny required by the Equal Protection Clause, Defendants assert that Plaintiffs' claims were not properly raised below. *See* Resp. Br. 36-42. This misdirection fails.

To start, Defendants' assertion that they were blindsided by Plaintiffs' equal-protection claims is, charitably put, misleading. *See* Resp. Br. 37-38. Early in the litigation, when Defendants moved for a more definite statement, they themselves recognized that Count III "reads like it is asserting a denial-of-equal protection claim." (RE 4 PageID 47.) Later, Defendants again noted that Count III included a "denial of equal protection … claim" and moved for summary judgment on that claim. (RE 33 PageID 880.) Defendants' argument, raised for the first time after the district court granted judgment on the pleadings, that Plaintiffs sought to "re-assert … a § 1983/Equal Protection claim," (RE 37 PageID 1214), and their argument here that Plaintiffs seek to "retroactively assert an Equal Protection claim on appeal," Resp. Br. 37, are at odds with these prior (and accurate) acknowledgements.

Defendants' position that Title VII and equal-protection-employment claims are identical, *see* Resp. Br. 42-43, underscores the weakness of their forfeiture argument. Because their defense to the Title VII and equal-protection claims is the same, *see id.*, and the Title VII claims were extensively litigated below, Defendants cannot sensibly

argue that they would have altered the substance of their arguments had the equal-protection theory been clearly labeled in the complaint. Instead, they must concede that their "essential position in the litigation is reflected in the [district court's] decision." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000); *cf. Brent v. Wayne Cnty. Dept. of Human Servs.*, 901 F.3d 656, 680 (6th Cir. 2018) (identifying the purpose of a particular waiver rule as providing the opposing party a chance to respond).

Defendants' argument is further belied by the record, which makes Plaintiffs' equal-protection claims evident. The complaint needed only to allege facts supporting the claim, not to identify its legal theory. *See Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam). The complaint undoubtedly pleaded facts that support an equal-protection claim alongside the Title VII discrimination allegations. *See Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); Opening Br. 37-38.

Contrary to Defendants' argument, Resp. Br. 37-38, Plaintiffs' response to the motion for a more definite statement did not alter their equal-protection claims. There, Plaintiffs emphasized that their factual allegations also supported a due-process claim (which Plaintiffs do not pursue on appeal). (RE 5 PageID 54-55.) But their due-process claims were in addition to, not to the exclusion of, their equal-protection claims. The complaint detailed clear allegations of racial discrimination, so Plaintiffs had no need to further identify the factual basis for their equal-protection claims. (RE 1 PageID 6-10.) *See Smith*, 378 F.3d at 577. Regardless of what Plaintiffs said in opposition to Defendants' motion for a more definite statement, Defendants' attempt to use the motion "to tie [Plaintiffs] down to a particular legal theory" at the pleadings stage is

"contrary to the philosophy of the federal rules." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1377 (3d ed. 2002).

Nor could Plaintiffs have abandoned their equal-protection claim *after* the district court granted Defendants judgment on the pleadings on Count III. *See* Resp. Br. 42. Though Defendants are correct that the district court spoke of dismissing Plaintiffs' "Due Process Claim" (RE 35 PageID 1189), Plaintiffs reasonably understood the judgment to encompass all of Count III, which Defendants themselves acknowledged contained an equal-protection claim, "despite its [due-process] caption." (RE 33 PageID 880.) That is why Plaintiffs noted in their partial-summary-judgment reply brief that their "14th amendment claims [had] already been dismissed and as such, Plaintiffs [would] not address those issues further." (RE 38 PageID 1227.) The district court knew of Plaintiffs' understanding when it had before it Defendants' motion for summary judgment on numerous claims, including the equal-protection claim. (*See id.*) Yet the district court did not mention the claim in its summary-judgment opinion, implying that the court understood the claim had already been dismissed. (*See* RE 53 PageID 1513.) Thus, Plaintiffs neither abandoned the claim nor conceded any arguments by not pursuing the dismissed claim further.

The doctrine of invited error gets Defendants no further. *See* Resp. Br. 41-42. As the cases cited by Defendants illustrate, this Court applies that doctrine only when a party actively induces an error. *See Simms v. Bayer Healthcare LLC*, 752 F.3d 1065, 1073 (6th Cir. 2014) (party agreed in open court to a later-challenged case-management plan); *Harvis v. Roadway Exp., Inc.*, 923 F.2d 59, 61-62 (6th Cir. 1991) (plaintiff requested a jury trial and then argued on appeal that the jury trial was inappropriate); *Neal v. Ford Motor*

Co., No. 09-3653, 2010 U.S. App. LEXIS 27900, *7 (6th Cir. Oct. 13, 2010) (party appealed a point that counsel conceded below). On the other hand, this Court refuses to apply the doctrine absent an affirmative act, such as when a party only "acquiesce[s]" to an "earlier ruling." *Fryman v. Fed. Crop Ins. Corp.*, 936 F.2d 244, 251 (6th Cir. 1991). Neither Plaintiffs' early drafting nor their decision to forgo further pursuit of a dismissed claim is an affirmative inducement warranting waiver by invited error. *See id.*; *cf. United States v. McReynolds*, 964 F.3d 555, 568 (6th Cir. 2020) (refusing "to turn inartful [appellate] briefing into waiver"). This Court should reach the merits of the equal-protection claim.

2. Defendants violated Plaintiffs' equal-protection rights by classifying them on the basis of race.

When Defendants finally address the merits of Plaintiffs' equal-protection claims, they fail to conduct the required strict-scrutiny analysis. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Nor do they address Plaintiffs' arguments that the City is liable under *Monell* and that Carlton is not entitled to qualified immunity. *See* Opening Br. 39-42. Instead, Defendants argue only that their actions pass constitutional muster because, in their view, they did not violate Title VII—that is, because their conduct did not result in what they view as an "adverse employment action," a requirement that, if it exists at all, is a statutory one. *See* Resp. Br. 42-43.

Defendants' effort to map their (incorrect) interpretation of Title VII onto the Constitution would allow state actors to exercise race-based decision making without any justification. But strict scrutiny requires "all" government-imposed "racial classifications" to be "narrowly tailored measures that further compelling governmental

interests." *Adarand Constructors, Inc.*, 515 U.S. at 227. As to injury, all an equal-protection plaintiff must show is an Article III injury-in-fact, which Defendants do not and could not contest Plaintiffs have suffered. *See Gratz v. Bollinger*, 539 U.S. 244, 262 (2003). Therefore, if Title VII and the Equal Protection Clause require the same degree of injury, *see Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 275 (6th Cir. 2003); Resp. Br. 42-43, Defendants' cramped interpretation of Title VII's text must be rejected, and Plaintiffs' injuries are actionable under both the statute and the Constitution. Conversely, if this Court holds that Plaintiffs had to prove a narrowly defined "adverse employment action" to succeed on their Title VII disparate-treatment claim, the equal-protection claim still succeeds because it does not require that purported statutory element. After all, "adverse employment action" is at most shorthand for "terms, conditions, or privileges of employment"—words that do not appear in the Equal Protection Clause.

As Defendants would have it, the government could constitutionally make employment decisions based on unjustified racial classifications as long as the decisions do not meet Defendants' stringent definition of an "adverse employment action." This would mean, for example, that a police chief could institute a policy that all Black officers had to work nights or a rule that no two Black officers could be partners, whereas white officers could work whenever and with whomever they like. Because these shift-assignment policies would not meet Defendants' definition of an "adverse employment action," *see* Resp. Br. 42-43, the chief would not have to offer *any* justification for the policies—let alone show that they were narrowly tailored to advance

a compelling interest. That view violates basic equal-protection principles, and this Court should reject it.

II. The district court erred in granting judgment to Defendants on Plaintiffs' retaliation claims.

A. The complaint sufficiently alleges, and a reasonable jury could decide, that Defendants retaliated against Plaintiffs by filing an unfair labor practice charge.

Defendants ask this Court to ignore the procedural posture relevant to Plaintiffs' labor-charge-retaliation claims. We therefore first explain why the district court erred in dismissing the claims on Defendants' motion for judgment on the pleadings and then turn to why, on the fully developed factual record, Defendants are not entitled to summary judgment on these claims.

1. The district court erred in granting Defendants' motion for judgment on the pleadings because Defendants directly revealed the retaliatory motive behind the labor charge.

At the pleading stage, Plaintiffs had no burden to *prove* the elements of their claims; rather, they were required only to plead facts that gave rise to an inference of liability. *See Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 605 (6th Cir. 2014). They did so by alleging facts supporting Defendants' express retaliatory motive. Our opening brief details (at 45-46) Defendants' awareness that no unfair labor practice had occurred and that Plaintiffs were not responsible for the media leak that was the purported basis for the labor charge. (*See* RE 1 PageID 11.) Plaintiffs pleaded that the City "offered to drop the unfair labor practice allegations against Plaintiffs if Plaintiffs agreed to withdraw their retaliation charges pending before the OCRC." (*Id.*) That alone was more than

sufficient to state the retaliation claims. *See Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 873-74, 879 (6th Cir. 1991).

a. Plaintiffs did not forfeit application of the direct-evidence framework to their labor-charge-retaliation claims. Resp. Br. 44-45. Defendants bore the burden to demonstrate they were "clearly entitled to judgment" when taking Plaintiffs' well-pleaded material allegations as true. *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 526 (6th Cir. 2006). Because Defendants failed to meet this initial burden based on the allegations described above, Plaintiffs could not have forfeited their opportunity to use the direct-evidence framework in their (voluntary) response through mere acknowledgment that Defendants properly recited the standard of proof applicable to indirect-evidence cases. (RE 20 PageID 169.)

As to the pleadings themselves, under Title VII, plaintiffs are not required to identify in the complaint which evidentiary standard governs. Nor do they forfeit the opportunity to prove the case using direct evidence by not invoking that standard by name. *See Serrano v. Cintas Corp.*, 699 F.3d 884, 897-98 (6th Cir. 2012) (rejecting premature selection of an evidentiary framework at the pleading stage). Indeed, courts often state that, "[a]bsent direct evidence of [discriminatory] intent, the *McDonnell Douglas* burden-shifting analysis applies," suggesting that the direct-evidence standard is the default. *See, e.g., Coburn v. Rockwell Automation, Inc.*, 238 Fed. App'x 112, 116 (6th Cir. 2007).

In any event, "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *United States v. McReynolds*, 964 F.3d 555, 568 (6th Cir.

2020) (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). That is why this Court has used its judgment to characterize what the plaintiff says is direct evidence as indirect evidence, and vice versa. *See, e.g., In re Rodriguez*, 487 F.3d 1001, 1008 (6th Cir. 2007).

b. On the merits, Defendants just repeat the district court's error. Resp. Br. 43, 47-49. They say that Plaintiffs "did not cite any authority supporting the argument that a ULP filed against a union can serve as the basis of a retaliation claim by individual members of the union." Resp. Br. 47. But Plaintiffs only had to allege facts showing that Defendants took action to dissuade them from making or supporting a charge of discrimination. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Because "the significance of any given act of retaliation will often depend on the particular circumstances," *id.* at 69, this Court has rejected the idea that certain employment decisions are, "as a categorical matter," insufficient to prove material adversity under *Burlington Northern*. *See Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed. App'x 424, 432 (6th Cir. 2007). The allegations concerning the City's quid-pro-quo offer to drop the unfair labor practice charge in exchange for Plaintiffs dropping their discrimination charges meet the *Burlington Northern* standard. Taking Defendants' admission of retaliation as true, a reasonable jury could find that Defendants filed the unfair labor practice charge with the belief that it would dissuade Plaintiffs from engaging in Title VII protected activities.

Defendants' focus on whether the relationship between Plaintiffs and their union is "close enough to support a third-party retaliation claim" is misplaced. Resp. Br. 44, 47-49 (quoting the district court's summary judgment opinion). Third-party retaliation

doctrine applies when someone closely related to the plaintiff, but *not* the plaintiff herself, engaged in protected activity. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174-75 (2011). Here, *Plaintiffs themselves* plainly engaged in protected activity. Therefore, the district court erred in treating this as a third-party retaliation claim.

The relationship between Plaintiffs and the union is relevant only because it shows Plaintiffs themselves suffered a materially adverse action under *Burlington Northern*. Even though the labor charge was formally filed against the union, Plaintiffs have maintained since filing their complaint that Defendants "filed an unfair labor practice charge *against Plaintiffs*." (RE 1 PageID 11 (emphasis added).) An employer may officially file an unfair labor practice charge only against a union representative or the union itself (*see* RE 32-4 PageID 651), but the allegations and record reveal that the labor charge was filed as leverage against Plaintiffs. Because Plaintiffs and the union are inextricably linked—after all, the basis of the charge was Plaintiffs' purported dissemination of information about Defendants' discrimination—the labor charge was in fact directed at Plaintiffs. Indeed, the union had standing to defend against the charge only because it is "the bargaining representative for Emergency Medical Technician Supervisors (Captains)" and stood in the Plaintiffs' shoes. (RE 32-4 PageID 653.)

Defendants also argue that Plaintiffs Threat and Noland-Moore were not in fact deterred from engaging in Title VII protected activity. Resp. Br. 49. But the standard for whether a reasonable employee would have been deterred is an "objective" one, rendering Plaintiffs' actions non-dispositive. *See Burlington*, 548 U.S. at 68-69. To hold otherwise would produce the perverse result of punishing individuals who persevere through employer retaliation. In any event, accepting Plaintiffs' allegations as true and

viewing all reasonable inferences in their favor, Plaintiffs *were* dissuaded from engaging in Title VII protected activity. (RE 1 PageID 11-12.) Given Defendants' warnings, multiple Plaintiffs "were initially reluctant to appear" at discrimination hearings. (RE 32-9 PageID 693-94.) In fact, Plaintiffs limited the charges they brought, knowing that "it wasn't going to do any good" to challenge every instance of discrimination because of the City's combativeness. (RE 31-5 PageID 570.)

For these reasons, this Court should reverse the district court's order granting judgment to Defendants as to the labor-charge-retaliation claims.

2. The labor-charge-retaliation claims should be remanded for trial because summary judgment is not warranted.

Beyond reversing the judgment on the pleadings and remanding Plaintiffs' retaliation claims, this Court should also instruct the district court to deny Defendants' motion for summary judgment because the factual record is fully developed, and genuine disputes of material fact remain.

a. Defendants' counsel told Plaintiff Threat, "if you drop the OCRC I will think about dropping the ULP." (RE 32-10 PageID 707-09.) This statement—which supports Plaintiffs' allegation that Defendants filed the unfair labor practice charge to dissuade them from engaging in Title VII protected activity—is admissible.

Counsel's statement is not hearsay. *See* Resp. Br. 45-46. It is not being used to prove the truth of the matter asserted; that is, Plaintiffs do not seek to demonstrate that Defendants would actually consider withdrawing the charge if Plaintiffs dropped their discrimination charges. *See* Fed. R. Evid. 801(c)(2); *United States v. Boyd*, 640 F.3d 657, 663-64 (6th Cir. 2011). Instead, the statement is proof of Defendants' retaliatory intent

underlying the labor charge and to "show its effect on the listener." *United States v. Churn*, 800 F.3d 768, 776 (6th Cir. 2015). The statement is also not hearsay because it is a statement of a party opponent; it was made by Defendants' attorney, a person whom Defendants authorized to represent their views on the unfair labor practice charge and Plaintiffs' discrimination charges. Fed. R. Evid. 801(d)(2)(A), (C); *see also United States v. Joseph*, 483 Fed. App'x 146, 150 (6th Cir. 2012).

Nor is the statement protected by mediator-testimonial privilege. *See* Resp. Br. 45. That privilege, if it ever applied, was waived when Defendants themselves disclosed the information during Plaintiff Noland-Moore's deposition and voluntarily placed it in the district-court record without asserting this privilege. Opening Br. 45. In the context of attorney-client privilege, once "the privacy for the sake of which the privilege was created [is] gone by the [client's] own consent … the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice." *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981). The same concept applies here because Defendants' own disclosure—not once, but twice—constituted a voluntary waiver of the purportedly confidential information, thus waiving any privilege. (*See* RE 31-5 PageID 552; RE 32-10 PageID 707.) *See United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997); *see also In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) (attorney-client privilege waived when documents voluntarily submitted to government agencies).

This Court has considered statements made during negotiations when those statements prove facts unrelated to the subject matter of the negotiations or where a party shows that "some wrong" was "committed in the course of the settlement

discussions; e.g., libel, assault, breach of contract, unfair labor practice, and the like." *E.g.*, *Uforma/Shelby Bus. Forms v. NLRB*, 111 F.3d 1284, 1293-94 (6th Cir. 1997) (quotation and citation omitted); *Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 798 (6th Cir. 2007). Thus, because Plaintiffs do not point to the statement to "prove or disprove the validity" of the unfair labor practice charge—the subject of the mediation at which Defendants' counsel made the statement—this Court may consider it for "another purpose," Fed. R. Evid. 408, which is to prove Defendants' retaliatory intent. Moreover, the statement shows that Defendants committed "some wrong" during the mediation, namely that Defendants sought to coerce Plaintiffs into dropping their discrimination charges.

b. With their evidentiary challenges rebuffed, Defendants cannot demonstrate that they met their "initial burden" at the summary-judgment stage by "showing that there is no material issue in dispute." *Lindsay v. Yates*, 578 F.3d 407, 414 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). As our opening brief demonstrates (at 44-50), this is true whether the Court applies the direct or indirect-evidence standard to the relevant facts.[3]

Defendants rely on only non-precedential decisions to dispute that when a plaintiff presents direct evidence of an employer's retaliatory intent, her case-in-chief is met and the defendant is not entitled to summary judgment. Resp. Br. 46. Those decisions are

[3] Defendants imply that Carlton was not involved in filing the unfair labor practice charge against Plaintiffs. Resp. Br. 13. A reasonable jury could conclude otherwise, however, because Defendant Carlton's email address was listed on the labor-practice charge. (RE 32-4 PageID 651.)

irrelevant given this Court's precedential holding that a plaintiff with direct evidence of retaliatory intent will survive summary judgment because, after admitting an unlawful motive, there is a genuine dispute of material fact as to whether the defendant "would have made the same decision absent the impermissible motive." *Yazdian v. ConMed Endoscopic Techs., Inc.,* 793 F.3d 634, 648 (6th Cir. 2015). Ultimately, Defendants do not explain why a reasonable jury would be unable to conclude from the record here that they filed the unfair labor practice charge with the unlawful retaliatory intent to pressure Plaintiffs "to drop" their discrimination charges. (RE 32-10 PageID 707-09.)

It is not clear why Defendants emphasize that, before they admitted their retaliatory motive, the Ohio State Employment Relations Board found probable cause that an unfair labor practice violation had occurred. (RE 19-1 PageID 157.) Insofar as Defendants point to the probable-cause finding to undermine Plaintiffs' evidence demonstrating that retaliation motivated the labor charge, it is no help to Defendants at the summary-judgment stage when disputed facts and plausible inferences must be viewed in Plaintiffs' favor. *See George v. Youngstown State Univ.*, 966 F.3d 446, 458 (6th Cir. 2020); *see also Maben v. Thelen*, 887 F.3d 252, 262, 268 (6th Cir. 2018) (rejecting the "checkmate doctrine" and concluding that a finding by a third party of the plaintiff's misconduct only creates a fact question for the jury on the plaintiff's retaliation claim). Summary judgment should be denied.

B. Defendants are not entitled to judgment on Beavers's discipline-based retaliation claim.

The district court dismissed Beavers's stand-alone retaliation claim without analysis, even though the complaint alleged, and the record demonstrates, that Defendants

selectively enforced tardiness policies against Beavers after she engaged in Title VII protected activity. For the reasons below and in our opening brief (at 50-53), this Court should reverse and remand for a trial on Beavers's retaliation claim.

1. Defendants make the puzzling assertion that Beavers abandoned her retaliation claim. *See* Resp. Br. 49-50. Defendants point to Beavers's statement, in opposition to summary judgment, that she would not further address the previously dismissed retaliation claims. (*See* RE 36 PageID 1204.) At that point, the district court had granted Defendants "judgment on the pleadings for Plaintiffs' retaliation claims." (RE 35 PageID 1189.) This order was clear to both parties at the time. It applied, in Defendants' words, to "all retaliation claims—including Beavers's claim [that] the City and Carlton retaliated against her by placing her on Step 1 of the attendance policy." (RE 39-1 PageID 1236.) Beavers had no obligation or reason to further press the dismissed claim until it merged with the final judgment for appeal. *See* Fed. R. Civ. P. 54(b).[4]

2. Defendants imply (but do not expressly contend) that Beavers's retaliation claim is limited to the actions detailed in her EEOC charge and thus does not include events that occurred after she filed the charge. Resp. Br. 51. (*See also* RE 33-1 PageID 903-04.) This assertion is contrary to well-established precedent that "EEOC complaint[s] should be liberally construed to encompass all claims 'reasonably expected to grow out of the charge of discrimination.'" *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 732 (6th Cir. 2006) (quoting *Haithcock v. Frank*, 958 F.2d 671, 675 (6th Cir. 1992)). After

[4] Defendants also suggest Beavers never alleged retaliation. Resp. Br. 50. But Beavers unequivocally pleaded an independent retaliation claim (RE 1 PageID 12, 14-15, 20-21), which Defendants recognized and addressed throughout the litigation. (RE 19 PageID 127-28; RE 33-1 PageID 903; RE 39-1 PageID 1236-37.)

Beavers filed the charge alleging Carlton scheduled her for a pre-disciplinary hearing, Defendants placed her on an eighteen-month disciplinary schedule. (RE 1 PageID 12; RE 29-6 PageID 340-41.) That discipline—which was the outcome of the pre-disciplinary hearing—was, to say the least, "reasonably expected to grow out of" the hearing. The discipline therefore is encompassed in Beavers's claim.

3.a. Turning to the merits, Defendants argue that the discipline was not sufficiently harmful to support Beavers's retaliation claim, but they fail to grapple with the proper standard. *See* Resp. Br. 50-51. Again, a retaliation plaintiff need only allege an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quotations omitted). Under this "relatively low bar," *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 596 (6th Cir. 2007), Beavers's pre-disciplinary hearing and eighteen-month discipline are sufficient to avoid summary judgment. *See* Opening Br. 51-52.

b. Genuine disputes exist as to the causal connection between Beavers's protected activity and her discipline. *See* Opening Br. 52-53; Resp. Br. 51-52. In addressing the causal-connection prong, Defendants point to employees other than Beavers who were disciplined. Resp. Br. 52. Even if these were fair comparisons, they would not entitle Defendants to summary judgment. The relevant question is "whether the plaintiff can identify one or more comparators who are similarly situated" and who were treated better, not whether the defendant can point to any individuals treated similarly. *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 753 (6th Cir. 2012) (abrogated on other grounds).

Plaintiffs have met that standard, identifying three similarly situated white captains who were treated more favorably than Beavers. *See* Opening Br. 51-52.

Only one of the disciplined employees Defendants identify in their failed attempt to show Carlton's actions were indisputably legitimate is a captain, and he too is Black. Rather than prove Carlton's actions were not retaliatory, Defendants' argument reinforces Plaintiffs' view that the retaliation was part of a larger campaign of discrimination. Opening Br. 52. Retaliation is, after all, a form of discrimination. *See Laster v. City of Kalamazoo*, 746 F.3d 714, 729 (6th Cir. 2014); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 452-53 (2008).

The selective enforcement is all-the-more evident when looking to genuine comparators: three white captains who were "grossly abusive of the sick abuse policy," did not engage in protected activity, and were never placed on a disciplinary schedule. (RE 31-5 PageID 566.) Defendants argue that one of those captains, Warren James, "was not similarly situated to Beavers … 'because management [Carlton] did not believe [his] actions violated company policy or warranted punitive action.'" Resp. Br. 52 (alterations in original). That begs the question of what Defendant Carlton's motive truly was. Carlton had the authority to decide what "warranted punitive action," and a genuine dispute of material fact exists as to whether she properly used that power or instead abused it to selectively enforce the tardiness policy, targeting Beavers (and other Black captains) for discipline while letting their white counterparts off. The district court erred by granting summary judgment for Defendants while these disputes of material fact linger.

CONCLUSION

This Court should reverse the district court's judgment in favor of Defendants on Plaintiffs' Title VII, Ohio Civil Rights Act, and equal-protection claims. It should also reverse the district court's denial of Plaintiffs' motion for partial summary judgment on their Title VII discrimination claims against the City and their Ohio Civil Rights Act and Equal Protection Clause claims against both Defendants and instruct the district court to grant judgment in Plaintiffs' favor as to liability on those claims. Finally, the Court should remand the retaliation claims for trial.

Respectfully submitted,*

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CERTIFICATE OF COMPLIANCE

This document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii)'s type-volume limitation because it contains 6,458 words, excluding parts of the brief exempted by Rule 32(f).

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May 3, 2021

/s/ Brian Wolfman
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CERTIFICATE OF SERVICE

I certify that on May 3, 2021, I filed this brief with the Clerk of the Court electronically via the CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

May 3, 2021

/s/ Brian Wolfman
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