No. 23-11936

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JESSICA IVEY,
Plaintiff-Appellant,

v.

CRESTWOOD MEDICAL CENTER,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

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

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CERTIFICATE OF INTERESTED PERSONS 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 plaintiff-appellant and defendant-appellee, the following persons and entities may have an interest in the outcome of this case:

1. Equal Employment Opportunity Commission (Amicus Curiae)
2. Goldstein, Jennifer S. (Associate General Counsel, EEOC)
3. Occhialino, Anne Noel (Assistant General Counsel, EEOC)
4. Reams, Gwendolyn Young (Acting General Counsel, EEOC)
5. Yeomans, Georgina C. (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. The EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

/s/ *Georgina C. Yeomans*
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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This appeal presents important questions about the scope and application of Title VII's retaliation provision. Because the EEOC has a substantial interest in the proper interpretation of Title VII, it files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

1. Whether a reasonable jury could find that the plaintiff's July 3 email, in which she elaborated on her prior complaint of race-based harassment, and also complained of physical assault, constitutes protected activity under Title VII's retaliation provision.

2. Whether being required to undergo a drug screening and being suspended pending the results of that test could dissuade a reasonable employee from complaining of discrimination.

3. Whether a reasonable jury could find a causal link between the plaintiff's protected activity and the defendant's requirement that she undergo a drug screening, given the events' close temporal proximity.

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff Jessica Ivey, a Korean American woman, began working for Defendant Crestwood Medical Center as an Emergency Room nurse in March 2020. R.29-1 at 5 (13:20-21); R.29-5 at 28; R.29-7 at 2.[1] She worked three shifts per week, on Friday, Saturday, and Sunday, initially from 1 p.m. to 1 a.m., and later from 3 p.m. to 3 a.m. R.29-8 at 19 (67:4-7). Because her shift fell partially during the day shift (7 a.m.-7 p.m.) and partially during the night shift (7 p.m.-7 a.m.), Ivey worked the beginning of her shift under the daytime charge nurse's supervision and the remainder of her shift under the supervision of Tina Simon, the nighttime charge nurse. R.29-1 at 17 (60:2-22).

Ivey felt that Simon singled her out for close supervision and harsh treatment. In Ivey's view, Simon "talked down" to her, "berated" her "in front of staff," "talked to [her] within earshot of patients," and generally made her "feel inadequate and not intelligent." R.29-1 at 145. Simon called

[1] References to the record take the form R.__ at __, identifying the district court docket number and the page number from the electronic filing system.

Ivey on the overhead intercom "for things no one else" was called for. *Id*. Simon's scrutiny made Ivey feel she could not "go to the bathroom without letting 5 people know" where she was. R.29-4 at 1.

On June 12, 2020, Ivey complained about Simon's behavior in an email to Bob Phillips, director of the Crestwood Emergency Department, and John Crow, clinical manager of the Emergency Department. R.29-1 at 145. She wrote that she thought Simon might be bullying her because she is Korean. *Id*. Shortly thereafter, Phillips and Crow met with Ivey to discuss her complaint. R.29-1 at 33 (125:10-21). Phillips told Ivey that he would investigate her allegations, but also assured her that Simon "wasn't a racist." R.29-1 at 35 (133:14-23).

Phillips met with Simon on June 15 and asked her about Ivey's account of their relationship. R.29-9 at 23 (83:19-23). Simon admitted she "indeed paged [Ivey] overhead, but she had paged other people." *Id*. (84:4-5). She also admitted that she is "very direct in her conversations." *Id*. (84:13-14). Simon said she did not want Ivey to feel she was being singled out. *Id*. (84:15-22). She asked for "the opportunity to talk to her and see if they could make it work." *Id*. Phillips agreed and decided to pause any further investigation to see if Simon could resolve the issue informally. *Id*.

(84:23-85:4). He did not forward Ivey's discrimination complaint to human resources at that time. R.29-9 at 22 (80:17-23).

On June 26, Crestwood completed Ivey's 90-day evaluation. Crestwood ranked her "high-satisfactory" and noted no performance issues. R.29-9 at 21-22 (77:23-79:8), 80.

On June 29, Simon reported to Phillips that, although she and Ivey had gotten along well on the weekend shift that spanned June 19-21, she and Ivey had struggled to work together the weekend of June 26-28. R.29-9 at 24 (86:6-13, 87:16-21). Phillips contacted Ivey and the two agreed to meet, along with Crow, on July 3 before the start of Ivey's 3 p.m. shift to discuss the status of her discrimination complaint. R.29-9 at 30 (110:18-22).

At 11:34 a.m. on July 3, before her afternoon meeting with Phillips and Crow, Ivey sent them another email detailing interactions with Simon that made her feel she was "being targeted or bullied along with [her] other complaints." R.29-3 at 5. In that email, Ivey described several interactions with Simon, including an incident in which Simon "smacked [Ivey] on the butt" while Ivey was at the nurse's station on May 24. *Id*.

After receiving that email, Phillips decided to investigate and immediately contacted the witnesses that Ivey identified as being able to

corroborate her claim that Simon was mistreating her. R.29-9 at 29 (106:6-108:20). According to Phillips, the witnesses did not corroborate Ivey's complaints, but two or three of the witnesses he talked to that day "were concerned about [Ivey's] behavior."[2] *Id*. Two witnesses reported that Ivey had discrepancies in Omnicell, the machine used to manage certain drugs that nurses dispense to patients. *Id*. One witness speculated that she was acting like a drug abuser. *Id*. Phillips then checked Ivey's pharmacy report and found "a few discrepancies" with her Omnicell counts, though none indicated missing medication. *Id*. at 29-30 (107:9-17, 111:5-16). Based on this information, Phillips contacted Susan Bryce, the chief nursing officer, and David Brown, director of human resources, and recommended a diversion investigation, including a full audit of Ivey's charts and a drug screen. *Id*. at 29 (108:1-20). Bryce and Brown agreed. *Id*.

When Ivey came in to meet with Phillips and Crow to discuss her complaint later that day, Phillips told her she would have to undergo a urinalysis to screen for drugs and that she would be suspended pending the results of her test. R.29-1 at 39 (146:2-9); 29-14 at 8-9; R.29-8 at 21 (74:22-

[2] One coworker confirmed in a later interview that Ivey was treated "differently." R.29-14 at 50.

75:5); R.29-9 at 36-37 (137:20-138:2). Ivey agreed to be tested but insisted on first calling Crestwood's corporate complaint hotline to further document her harassment complaint and to state her concern that the drug test was retaliatory. R.29-1 at 39-40 (146:4-9, 150:6-151:8, 152:1-4); 29-14 at 8-9. As a result of her suspension, Ivey missed her three shifts the weekend of July 3. R.29-9 at 37 (138:6-7). Her coworkers noticed her absence and Simon informed them that Ivey had been placed on leave. R.29-1 at 28 (102:21-103:1); R.29-3 at 7.

In the middle of the following week, Phillips called Ivey to tell her that her drug test results were negative, to say that she would be retroactively paid for the time she was suspended pending her results, and to invite her to return to work the following Friday. R.29-9 at 36-37 (137:20-138:2), 40 (150:12-17); R.29-1 at 46 (176:1-5). Ivey returned to the ER for one shift, but reported that Simon resumed her harassment. R.29-1 at 47-48 (180:11-184:13). After that shift, Crow told Ivey that she could not continue to work her usual shift. R.29-1 at 51 (195:6-12, 196:10-14). Crestwood did not put Ivey back on the schedule, but instead placed her on unpaid administrative leave. R.29-1 at 59 (228:1-229:11). After Ivey declined an offer to transfer to a non-ER shift, Crestwood offered her a severance

agreement that she did not sign. *Id*. at 48 (184:4-22), 55 (211:12-19), 57 (219:16-20). Ivey's opportunity to sign the severance agreement expired on September 1, at which time Crestwood terminated her. R.29-14 at 12.

B. District Court's Decision

Ivey sued Crestwood alleging race-based disparate treatment, hostile work environment, and retaliation under Title VII and 42 U.S.C. § 1981.

The district court granted summary judgment to Crestwood on all claims. On Ivey's retaliation claim, Crestwood conceded that Ivey engaged in protected activity under Title VII's opposition clause on multiple occasions, including when she complained about race discrimination to Phillips (and Crow) on June 12. R.42 at 44 & n.115. The court therefore found it unnecessary to separately analyze the question of whether Ivey engaged in protected activity.

The court then identified two potential materially adverse actions Ivey suffered: termination and drug screening. The court held that a jury could not reasonably conclude that Ivey's protected activity was a but-for cause of her termination because the evidence showed "she did not cooperate with Crestwood's efforts to assist her return to work following the negative drug screen." *Id*. at 48.

The court also seemingly held that subjecting Ivey to a drug screen was not a materially adverse action, *id*. at 48-50, and that, in any event, Ivey could not establish a causal connection between her protected activity and the drug screen because Crestwood "provided the basis for its decision, which the court cannot second-guess," *id*. at 51. In other words, because Crestwood submitted evidence that Phillips believed a drug screen was necessary based on the July 3 investigation, no reasonable jury could find a causal link between Ivey's discrimination complaint and Crestwood's decision to drug screen her.[3]

ARGUMENT

I. A reasonable jury could conclude that Crestwood retaliated against Ivey when it forced her to undergo drug screening and suspended her after she complained of race-based harassment.

Title VII prohibits employers from discriminating against any employee "because he has opposed any practice made an unlawful employment practice" under the statute. 42 U.S.C. § 2000e-3(a). Plaintiffs relying on circumstantial evidence to prove a retaliation claim may invoke

[3] The district court also granted summary judgment to Crestwood on Ivey's disparate treatment and hostile work environment claims. The EEOC takes no position on those claims and therefore does not address them.

the *McDonnell-Douglas Corporation v. Green*, 411 U.S. 792 (1973), burden-shifting framework, under which "[t]he plaintiff must first make out a prima facie case of retaliation, showing (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action was causally related to the protected activity." *Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1344-45 (11th Cir. 2022) (quotation marks omitted).[4] The employer may then proffer a legitimate, non-discriminatory reason for its adverse action. If it does, the plaintiff must then show the reason was "merely a pretext and that the real reason was retaliation." *Id.* at 1345.

The district court erred in holding that Ivey did not make out a prima facie case that Crestwood retaliated against her when it forced her to

[4] The district court described the plaintiff's burden as proffering "evidence that the 'desire to retaliate' against the protected activity was *the* 'but-for cause' of the adverse action." R.42 at 46 (emphasis added) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013)). But a retaliation plaintiff must show only that the desire to retaliate was *a* but-for cause, of which there could be many. *Nassar*, 570 U.S. at 362 ("The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) ("Often, events have multiple but-for causes.").

undergo drug screening after she complained about Simon's alleged race-based harassment.

A. A reasonable jury could find that Ivey engaged in multiple instances of protected opposition to discrimination, including when she sent her July 3 email.

Title VII's opposition clause is expansive and applies to a range of activity, including informal complaints to one's supervisor. *See Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1311 (11th Cir. 2016); *Rollins v. Fla. Dep't of L. Enf't*, 868 F.2d 397, 400 (11th Cir. 1989); EEOC Enforcement Guidance on Retaliation and Related Issues § II.A.2.a (Aug. 25, 2016), 2016 WL 4688886, at *7. An employee who complains to her supervisor about perceived discrimination engages in protected activity so long as she holds a subjective and objectively reasonable belief that an illegal employment practice occurred. *Furcron*, 843 F.3d at 1311. "[T]he plaintiff is not required to prove that the discriminatory conduct complained of was actually unlawful," so long as the conduct opposed was "'close enough to support an objectively reasonable belief that it is.'" *Id*. (citing *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) and quoting *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)).

As the district court explained, R.42 at 44 n.115, Crestwood conceded, R.35 at 16 n.2, that Ivey engaged in protected activity "when she complained that she believed she was subject to race discrimination" on four instances: (1) her June 12 email to Phillips and Crow, in which she asked whether Simon was mistreating her because she is Korean, R.29-1 at 145; (2) a call she made to Crestwood's corporate hotline on July 3 after meeting with Phillips and Crow but before being drug tested, R.29-14 at 8; (3) one text message she sent to a Crestwood human resources officer on July 21, R.29-14 at 33-34; and (4) an email she sent to Crestwood's Chief Operating Officer on July 30, R.29-6 at 3.

But Ivey also engaged in protected activity on the morning of July 3, mere hours before her drug screening, when she emailed Phillips and Crow to elaborate on her June 12 harassment complaint. In that email, she wrote that she was providing more information to support her June 12 complaint that Simon "targeted or bullied" her. R.29-3 at 5. Among other allegations, Ivey wrote on July 3 that Simon had slapped Ivey "on the butt." *Id*. She sent the email to Phillips and Crow, the same individuals whom she contacted on June 12, when she explicitly tied her complaint that she was being "bullied, and singled out and targeted" to her race. R.29-1 at

145. And she sent the email a few hours before she was scheduled to meet with Phillips and Crow to discuss the status of her race discrimination complaint. R.29-9 at 22 (81:11-21), 28-29 (105:16-108:12). A jury could therefore find that Ivey's July 3, 11:34 a.m., email was a follow-up to her June 12 harassment complaint and was protected activity.

B. A reasonable jury could find that drug testing and suspending Ivey was a materially adverse action.

Title VII's antiretaliation provision protects employees from materially adverse actions that "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, 67-68 (2006) (citation omitted).

The district court seems to have concluded that Crestwood's decision to drug test Ivey and to suspend her pending the results of that testing cannot, as a matter of law, amount to a materially adverse action under *White*. R.42 at 48-50. That holding was error.

As a matter of common sense, a reasonable employee might be dissuaded from complaining of discrimination if, each time she did, her employer forced her to undergo a drug test, suspended her, and withheld pay for several days pending the results of that test. *Cf. Adams v. City of*

Montgomery, 569 F. App'x 769, 774 (11th Cir. 2014) (affirming district court, which held that drug test was adverse action but that plaintiff failed to establish causation); *Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 776 (6th Cir. 2018) (reasonable jury could conclude employee suffered materially adverse action when she was "referred to a fitness-for-duty exam, placed on leave, escorted out of the office, had her badge removed, and her email set to send out an automated reply that she was no longer" employed).

Being subjected to a drug test is embarrassing and intrusive. *Cf. Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 617 (1989) (noting the act of collecting a urine sample implicates privacy interests); *see also Nat'l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *vacated in part on other grounds by* 489 U.S. 656 (1989) ("There are few activities in our society more personal or private than the passing of urine."). The fact that Ivey's coworkers knew she had been placed on leave amplified her embarrassment. *See supra* p.6. And unpaid suspension, even with retroactive pay, is disruptive. *See Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 920 (11th Cir. 1993) (describing 30-day paid suspension as materially adverse); *see also White*, 548 U.S. at 72-73 (holding 37-day suspension, for which employee was later compensated, was materially

adverse). The drug test and suspension, taken together, could certainly dissuade a reasonable employee from complaining about discrimination. *Cf. NLRB v. Almet Inc.*, 987 F.2d 445, 450-51 (7th Cir. 1993) (drug testing and suspending union organizer for three days pending drug test results was pretextual harassment meant to dissuade employee from engaging in National Labor Relations Act protected activity).

In its summary judgment motion, Crestwood cited *McQueen v. Alabama Department of Transportation*, 769 F. App'x 816 (11th Cir. 2019), for the proposition that a drug test is not a materially adverse action. *McQueen* held the plaintiff's "drug test did not constitute an adverse employment action because he passed the test and did not suffer any tangible harm as a result" and therefore could not support a retaliation claim. *Id*. at 824. But *McQueen* is not controlling, *see Patterson*, 38 F.4th at 1346, nor did it analyze the issue in depth. The unpublished *McQueen* decision did not explain its conclusion that the plaintiff's drug test was not materially adverse, citing only *Crawford v. Carroll*, 529 F.3d 961, 971-74 (11th Cir. 2008). But nothing in *Crawford* establishes that drug tests categorically are not materially adverse. The *Crawford* decision instead held that the temporary denial of the

plaintiff's merit pay increase was adverse under both the retaliation standard and Title VII's disparate treatment standard. *Id*.

Even if *McQueen* were controlling, Ivey suffered the added adversity of a suspension accompanying her drug test, compounding the events' deterrent effect.

C. A reasonable jury could find a causal link between Ivey's discrimination complaints and Crestwood's decision to drug test and suspend her, given the events' temporal proximity.

The causation prong of the prima facie case "is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001) (quotation marks omitted). Close temporal proximity between protected activity and a materially adverse action can create a genuine issue of material fact regarding whether a causal relationship exists between the two. *Patterson*, 38 F.4th at 1352. A gap of one month is sufficiently proximate to create a genuine issue as to causation. *See Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600-01 (11th Cir. 1986); *see also Patterson*, 38 F.4th at 1352 (proximity of one week sufficient to create genuine issue regarding causal link). By contrast, a three-month lapse is too long, standing alone, to create a genuine dispute

as to causation. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

Ivey engaged in protected activity a few hours before Crestwood required her to undergo drug screening and suspended her without pay pending the results of that screening. Such an unusually close temporal proximity suffices at summary judgment to establish causation. Indeed, even Ivey's June 12 complaint, which Crestwood concedes was protected activity, is sufficiently proximate to create a genuine issue regarding whether there is a causal link between her protected activity and the adverse action she faced three weeks later on July 3. *See Donnellon*, 794 F.2d at 601; *see also Tebo v. City of DeBary*, 784 F. App'x 727, 731 (11th Cir. 2019) (holding temporal proximity of thirty-two days between informal complaint and termination satisfies prima facie causation element).

CONCLUSION

For the foregoing 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 3,326 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on September 8, 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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