No. 24-1055

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BETHANY SCHEER,
Plaintiff-Appellant,

v.

SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Colorado
Hon. Daniel D. Domenico, U.S. District Judge
No. 1:20-cv-03793-DDD-MEH

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

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

GAIL S. COLEMAN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rule

Other Authority

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission ("EEOC") with administering, interpreting, and enforcing Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq*. Appellant Bethany Scheer alleges that her employer, Appellee Sisters of Charity of Leavenworth Health System, Inc. ("SCL"), perceived her as having a mental-health impairment, mandated that she participate in employer-provided mental health counseling to address the perceived impairment, and then terminated her for refusing to sign a release authorizing disclosure of certain information about the mandatory counseling to her employer. The district court held that the mandatory referral was not a discriminatory adverse action because it did not constitute a "significant change in employment status," and that terminating her based on her failure to comply with a non-discriminatory requirement did not violate the ADA. The EEOC has a substantial interest in the proper interpretation of the laws it enforces and wishes to explain why it believes the district court erred. Accordingly, the EEOC files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES[1]

1. Could a reasonable jury find that SCL regarded Scheer as disabled because it took prohibited actions against her based on its perception that she was suicidal?

2. Could a reasonable jury find that Scheer was qualified to perform the essential functions of her job based on evidence that SCL would not have terminated her for performance reasons?

3. Would a reasonable jury be compelled to accept SCL's affirmative defense that its actions were justified as "job-related and consistent with business necessity" where the parties dispute key facts?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Bethany Scheer began working in SCL's Physician Billing Department in 2014. Jt. App. Vol. 2 at 267. In mid-August 2019, she confided in a coworker (Angela Diaz), a supervisor (Lani Rasmussen), and

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

[2] Consistent with the standard of review for awards of summary judgment, the EEOC views the facts in the light most favorable to Scheer and makes all reasonable inferences in her favor. *See Lazy S Ranch Props., LLC v. Valero Terminaling & Distrib. Co.*, 92 F.4th 1189, 1198 (10th Cir. 2024).

department manager Danielle Stowell that she was struggling with personal issues. Jt. App. Vol. 1 at 96, 101-02; Jt. App. Vol. 3 at 450. Although Scheer testified that she was not suicidal and had not said anything to suggest that she was, Jt. App. Vol. 1 at 83, Stowell, Diaz, and Rasmussen interpreted her comments otherwise, Jt. App. Vol. 2 at 265. Rasmussen expressed her concerns directly to Stowell, and supervisor Bethany Krech relayed Diaz's concerns. *Id.* Stowell emailed Human Resources Director Karen Oxenford with a "summary of the talks of suicide." *Id.*

Prior to learning about Scheer's emotional distress, Stowell and Scheer's supervisor, Kathleen Orsborn, had been in the process of drafting a performance improvement plan ("PIP") regarding Scheer's productivity. Jt. App. Vol. 1 at 72. Now believing that Scheer was suicidal, Oxenford added a second component to the PIP addressing "Behavioral Concerns." Jt. App. Vol. 1 at 172. The PIP described the behavioral concerns as being that Scheer "[t]alked of suicide to multiple members of the team," and stated that this "rais[ed] concerns for her safety." Jt. App. Vol. 2 at 210. In response to the stated concern, the PIP imposed an "action plan" consisting of "[m]andatory referral to the EAP." *Id.* The EAP (short for "Employee Assistance Program") is a free program offering "telephonic counseling

and referrals for everyday challenges, in-person counseling with behavioral health professionals, [and] financial and legal support services." Jt. App. Vol. 2 at 231. The PIP instructed, "You will contact [the EAP] within seven days (by Wednesday, September 4, 2019) for evaluation and treatment." Jt. App. Vol. 2 at 210.

On August 28th, Stowell, Orsborn, and Oxenford met with Scheer to discuss the PIP. Jt. App. Vol. 1 at 65. Initially, they addressed concerns with Scheer's productivity, which they said tended to be poor at the beginning of every month due to over-socializing with colleagues, and then rushed at the end of the month to achieve monthly goals. *Id.* Scheer protested that there was no need to place her on a PIP because she had met her monthly goals for the past five months. Jt. App. Vol. 1 at 175; Jt. App. Vol. 3 at 425. She became upset and left the room for ten or fifteen minutes. Jt. App. Vol. 1 at 176. When she returned, the conversation turned to Scheer's emotional wellbeing. Jt. App. Vol. 1 at 65-66.

Oxenford testified, "I explained that another reason we were all together is that there was a good deal of concern for her safety after she had spoken with multiple members of the team of suicidal ideations." Jt. App. Vol. 1 at 66. Accordingly, Oxenford explained, the PIP required her to

attend EAP counseling. *Id.* "I asked her to try and understand that we were doing this out of care and concern for her and her safety," Oxenford stated in her notes memorializing the meeting. Jt. App. Vol. 6 at 967. Oxenford later testified that, in addition to concern for Scheer's safety, the PIP mandated EAP counseling because Scheer's behavior was disruptive to coworkers, including to Diaz, who hesitated before applying for a mentorship position because she feared Scheer's emotional reaction to competing against her. Jt. App. Vol. 1 at 73. The PIP itself said nothing about disruptive behavior, however, Jt. App. Vol. 2 at 210-11, and no one said anything about disruption to Scheer, Jt. App. Vol. 3 at 401. Scheer agreed that she should see a mental health professional but stated that she would do so on her own, not because SCL was telling her to do so. Jt. App. Vol. 1 at 66. "I explained that was no longer an option," Oxenford said, "and that visiting with the EAP was a condition of her continued employment, as it was part of her PIP." *Id.*

Later that day, Oxenford presented Scheer with a form seeking her "Authorization for Release and Exchange of Confidential Employee Information." Jt. App. Vol. 1 at 81. Scheer's signature would authorize the EAP to disclose to SCL "[i]nformation regarding contact with [the EAP

provider]" and "[i]nformation regarding attendance at scheduled appointments, compliance with recommendations, [and] participation in the [formal referral] process." *Id.* The authorization would expire after one year. *Id.* Oxenford told Scheer that, as part of the PIP, she would have to sign this form by the end of the day. Jt. App. Vol. 1 at 112, 182.

Scheer was uncomfortable with the scope of the release and did not trust Oxenford's representation that SCL would not have access to her medical information. Jt. App. Vol. 1 at 113-14. She asked Oxenford for more time to research the form, and Oxenford responded, "Bethany, this is not up for debate." Jt. App. Vol. 6 at 937-38. Scheer did not sign the form, and Oxenford suspended her without pay on August 29. Jt. App. Vol. 1 at 181. Later that day, Scheer reached out to the EAP program on her own and left a voicemail stating, "I'm wondering if the EAP is a good fit." Jt. App. Vol. 5 at 777. On September 4, Scheer came to work and told Oxenford that she had consulted an attorney. Jt. App. Vol. 6 at 969. Requiring her to sign the release, she said, violated the ADA. Jt. App. Vol. 6 at 972. Oxenford disagreed and fired her on the spot. *Id.*

The EAP counselor returned Scheer's call that afternoon. Jt. App. Vol. 5 at 789. Although she was unclear whether she would have to pay for EAP

sessions herself because she had already been terminated, Scheer met voluntarily with the EAP counselor five times from September through January. Jt. App. Vol. 5 at 790.

Scheer filed suit under the ADA and the Rehabilitation Act[3] alleging that SCL had fired her "based upon its erroneous perception that she suffers from a disability of mental illness," and in retaliation for complaining that the mandatory release violated the ADA. Jt. App. Vol. 1 at 6. SCL moved for summary judgment. Jt. App. Vol. 1 at 36.

B. District Court's Decision

The district court granted SCL's motion, stating that "Ms. Scheer's claims for discrimination and retaliation hinge on a showing that SCL took adverse employment action against her because of a disability or a perceived disability [and] [s]he has not made this showing[.]" Jt. App. Vol. 6 at 985. "Adverse employment actions," the court said, "are those that cause a *significant* change in employment status, such as 'hiring, firing, failing to promote, reassignment with *significantly* different responsibilities, or a decision that causes a *significant* change in benefits.'" Jt. App. Vol. 6 at

[3] 29 U.S.C. §§ 791 *et seq.*

982 (quoting *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 761 (1998)) (emphases added).

First, it said, neither the PIP nor the mandatory EAP referral qualifies as an adverse employment action. Jt. App. Vol. 6 at 983. The court observed that Scheer challenged her PIP only in regard to the mandatory EAP referral, "[b]ut a mandatory referral to an employee assistance program has never been upheld as an adverse employment action." *Id.* (citing cases holding that EAP referrals are not adverse actions). Acknowledging that the mandatory nature of the referral "pushes the needle closer to an adverse employment action," the court nonetheless stated that Scheer failed to adequately distinguish cases holding that such referrals were permissible. Jt. App. Vol. 6 at 984. Moreover, the court said, the required release would only have informed SCL of whether Scheer was attending her EAP sessions and complying with treatment and would not have revealed anything about the treatment itself. *Id.* "[C]onditioning Ms. Scheer's employment on a referral she also independently sought out," the court stated, "was not a significant change in employment status." *Id.* (citing *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998)).

Based on its holding that the mandatory referral was not an adverse employment action, the court concluded, "it follows that Ms. Scheer's termination for refusing to sign the release was predicated on her refusal to comply with that condition, and not 'because of' a perceived disability." Jt. App. Vol. 6 at 985.

ARGUMENT

A reasonable jury could find that SCL discriminated against Scheer in violation of the ADA. The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to … terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To prove her disability discrimination claim, Scheer must establish that she is disabled within the meaning of the statute, that she was qualified to perform the essential functions of her job, and that she "suffered an adverse employment action because of her disability." *See Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 989-90 (10th Cir. 2021).

I. A reasonable jury could find that SCL regarded Scheer as disabled because it took prohibited actions against her based on its perception that she was suicidal.

An individual is disabled for purposes of the ADA if they "(A) [have] a physical or mental impairment that substantially limits one or more

major life activities of such individual; (B) [have] a record of such an impairment; or (C) [are] regarded as having such an impairment." 42 U.S.C. § 12102(1). The statute provides that an employer regards an employee as disabled if it takes "an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id*. § 12102(3)(A). This Court interprets "an action prohibited under this chapter" to mean "adverse employment action." *See Edmonds-Radford*, 17 F.4th at 989-90. Here, SCL regarded Scheer as disabled because it took "adverse employment actions" against her "because of" a perceived mental impairment.

SCL acknowledges that it perceived Scheer as having a mental-health impairment. Jt. App. Vol. 1 at 50-51. It asserts, however, that Scheer "cannot show SCL was mistaken about her disability." Jt. App. Vol. 1 at 50. Whether SCL was mistaken is irrelevant. Although the Supreme Court previously interpreted the ADA's "regarded as" provision to mean that an employer had to be "mistaken[]" about an impairment, *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999), Congress "abrogated" that standard in 2008. *Adair v. City of Muskogee*, 823 F.3d 1297, 1305-06 (10th Cir. 2016).

Pursuant to the 2008 amendments to the ADA, "the employer need only regard the employee as being impaired, whether or not the employer also believed that the impairment prevented the employee from being able to perform a major life activity." *Id.*

Because SCL admits that it perceived Scheer as having a mental-health impairment, the only remaining issues for purposes of the regarded-as analysis are whether SCL took an "adverse employment action" against Scheer, and whether it did so because of her perceived impairment.

A. A reasonable jury could find that SCL took prohibited actions against Scheer.

SCL required Scheer to choose between mandatory EAP counseling and losing her job. When she refused to comply with the conditions of the mandatory EAP referral, SCL terminated her. A reasonable jury could find that both actions—the mandatory EAP referral and the termination—constituted actionable discrimination.

1. The reasoning of *Muldrow v. City of St. Louis* abrogates the legal standard upon which the district court relied.

The Supreme Court's decision in *Muldrow v. City of St. Louis*, __ U.S. __, 144 S. Ct. 967 (2024), has clarified that the adverse-action test the district court applied was incorrect. The district court indicated that actionable

discrimination is limited to actions that caused "a *significant* change in employment status." Jt. App. Vol. 6 at 982 (emphasis added). It then held that the challenged actions failed to meet that "significant change in employment status" test. *See, e.g.*, Jt. App. Vol. 6 at 984 (citing *Sanchez,* 164 F.3d at 532).

Significance is the very test the Supreme Court rejected in *Muldrow*. "Title VII's text nowhere establishes that high bar." *Muldrow*, 144 S. Ct. at 972; *see also id*. at 974 (no need to show "the harm incurred was 'significant'"); *id*. ("To demand 'significance' is to add words—and significant words, as it were—to the statute Congress enacted."). The anti-discrimination provision, the Court explained, prohibits injury to individuals based on a protected trait, "without distinguishing between significant and less significant harms." *Id*. at 976.

In illustrating how courts had gone astray by adding a significant-harm test, the Supreme Court discussed—and criticized—three circuit court decisions, one a ruling from this Court. *See id*. at 975 (critiquing *Daniels v. United Parcel Serv., Inc*., 701 F.3d 620, 635 (10th Cir. 2012), for "rewr[iting] Title VII, compelling workers to make a showing that the statutory text does not require"). And the *Muldrow* Court elsewhere

pointed to another Tenth Circuit case as an example of one applying the now-rejected significant-harm test. *Id*. at 973 n.1 (citing *Sanchez*, 164 F.3d at 532). *Sanchez*—which the district court here invoked—thus no longer is good law.

Although this case differs from *Muldrow* in that it arises under the ADA rather than Title VII, and does not involve a discriminatory transfer, neither difference renders *Muldrow* inapplicable. First, the same key words that *Muldrow* was construing—making it unlawful for an employer to "discriminate" with regard to "terms," "conditions," or "privileges" of employment—also appear in the ADA. *Compare* 42 U.S.C. § 2000e-2(a)(1) (Title VII) with 42 U.S.C. § 12112(a) (ADA); *see Muldrow*, 144 S. Ct. at 974 (analyzing language of § 2000e-2(a)(1)). This Court, in a recent en banc decision under the ADA, discussed those same words and prior Supreme Court case law interpreting them in the context of Title VII. *See Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 817 (10th Cir. 2020) (en banc). That Title VII case law, *Exby-Stolley* explained, "provide[s] us with a broad conception of the scope of the language 'terms, conditions, [and] privileges of employment.'" *Id*. Although the case law interpreted Title VII, the Court said, "we discern nothing in the text of those decisions or otherwise that

suggests their reasoning does not readily apply to nearly identical language in the ADA." *Id*. (citation omitted); *see also id*. ("[W]e can presume that Congress was aware of the [Supreme] Court's interpretation of 'terms, conditions, [and] privileges of employment' when it chose to use parallel language in the ADA." (citation omitted)).

As to the second distinction, the reasoning in the Supreme Court's *Muldrow* decision extends beyond transfers because the Court focused on the statute's terms-or-conditions language and rejected adding "any … adjective suggesting that the disadvantage to the employee must exceed a heightened bar." *Muldrow*, 144 S. Ct. at 974. Indeed, the Court elsewhere "underscore[d]" the breadth of its ruling, without limiting it to transfers: "this decision changes the legal standard used in any circuit that has previously required 'significant,' 'material,' or 'serious' injury. It lowers the bar Title VII plaintiffs must meet." *Id*. at 975 n.2. "[M]any cases" now "will come out differently," the Court added. *Id*.

To be sure, the Court explained, the challenged action must "respect[] an identifiable term or condition of employment." *Id*. at 974. But if it does so, plaintiffs must show merely that their employers treated them "worse" based on a protected characteristic. *Id.* In other words, they must

demonstrate that they experienced "some harm," a "simple injury standard" that need not turn on a court's subjective views of that harm's gravity. *Id*. at 974-75 & n.2; *see also id*. at 980 (Kavanaugh, J., concurring in judgment) (describing the majority's "some additional harm" standard as "a relatively low bar" that could include "money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like").

Accordingly, cases holding that mandatory EAP referrals are not serious or significant enough to be "adverse employment actions" cannot survive *Muldrow*. *See, e.g., Johnson v. Fla. Dep't of Corr.*, 829 F. App'x 889, 893-94 (11th Cir. 2020) (mandatory EAP referral not adverse action because plaintiff did not lose pay or benefits and was not disciplined; no "tangible" effect on employment); *Ndzerre v. Wash. Metro. Area Transit Auth.*, 275 F. Supp. 3d 159, 164-65 (D.D.C. 2017) (same; no "significant" change in employment status); *Jenkins v. Med. Labs. of E. Iowa, Inc.*, 880 F. Supp. 2d 946, 961 (N.D. Iowa 2012) (same and noting that EAP counseling was "only a temporary requirement" and not one causing "material" and "tangible" change), *aff'd on other grounds*, 505 F. App'x 610 (8th Cir. 2013).

2. The mandatory EAP referral and subsequent termination were both actionable discrimination under *Muldrow v. City of St. Louis.*

The *Muldrow* Court reiterated that the phrase "terms, conditions, or privileges of employment" "is not used in the narrow contractual sense; it covers more than the economic or tangible." 144 S. Ct. at 974 (cleaned up). Here, the district court correctly acknowledged that "Scheer was told explicitly that agreeing to the referral was a *condition of her employment*." Jt. App. Vol. 6 at 984 (emphasis added). Consequently, *Muldrow*'s standard applies to that referral.

The change to Scheer's employment status and the forced nature of the counseling requirement easily fulfill *Muldrow*'s "some harm" requirement. The district court acknowledged that the mandatory nature of the counseling "pushes the needle closer to an adverse employment action," but emphasized that "Ms. Scheer never disputed that she needed, or would benefit from, counseling." Jt. App. Vol. 6 at 984. Indeed, the court said, Scheer voluntarily reached out to the EAP program during her suspension and then voluntarily attended five counseling sessions. *Id.* Those facts, however, have no bearing on whether SCL's actions—

mandating counseling and requiring Scheer to sign a release—caused Scheer harm.

As Scheer explained, she had privacy concerns about the mandatory, non-negotiable release SCL insisted she sign—a release that would authorize the EAP to disclose to SCL whether she was attending her appointments and whether she was complying with the recommended treatment. Jt. App. Vol. 1 at 113-14. Moreover, Scheer testified, there is a difference between self-initiated counseling and counseling mandated by an employer. Jt. App. Vol. 1 at 109. An employer that is concerned about an employee's mental health may offer the employee resources, including voluntary counseling through its EAP (without requesting or requiring a release of medical information). But the loss of autonomy inherent in a *mandatory* EAP referral is a type of harm that Congress sought to prevent in enacting the ADA. *See* 42 U.S.C. § 12101(a)(5) (citing "overprotective rules and policies"); *see also Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 85 (2002) ("Congress had paternalism in its sights when it passed the ADA"). The court's subjective perception that treatment may have benefitted Scheer is

irrelevant because the choice should have been Scheer's, not SCL's. Depriving her of that choice was "worse" treatment under *Muldrow*.[4]

In any event, regardless of whether the mandatory EAP referral was actionable by itself, SCL also terminated Scheer. Jt. App. Vol. 6 at 972. "[T]ermination from employment is the quintessential example of an adverse employment action." *Ehrlich v. Kovack*, 710 F. App'x 646, 650 (6th Cir. 2017). SCL has not disputed that Scheer's termination was an adverse action; rather, it argued below only about the reason why it terminated her. *See, e.g.*, Jt. App. Vol. 1 at 54.

B. SCL took these actions because of Scheer's perceived impairment.

SCL concedes that it would not have referred Scheer for mandatory EAP counseling if it had not believed that she was having suicidal ideations. Jt. App. Vol. 1 at 57. Ipso facto, the referral was "because of" Scheer's perceived mental-health impairment, whether or not SCL had

[4] The fact that a mandatory EAP referral for counseling, coupled with a required release of medical information, is "worse" treatment does not end the ADA inquiry. The ADA provides certain defenses to otherwise impermissible actions. *See infra* pp. 22-23, 25.

additional reasons for the referral. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) ("Often, events have multiple but-for causes.").

The termination was also "because of" Scheer's perceived impairment. SCL states that it would not have terminated Scheer if she had complied with the terms of the mandatory referral. Jt. App. Vol. 1 at 56. That explanation short-circuits the causation chain. As SCL admits, the perceived impairment led to the mandatory referral. Then the mandatory referral, coupled with the mandatory signed release, led to Scheer's failure to comply, which led, in turn, to her termination. The fact that the mandatory referral and Scheer's refusal to comply with all its terms intervened between SCL's perception of the impairment and Scheer's termination does not break the causal connection.

As the Supreme Court has explained, "[I]t is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter." *Burrage v. United States*, 571 U.S. 204, 211-12 (2014). Looking backwards from the termination to Scheer's failure to comply with a mandatory referral, including signing a medical release, that SCL implemented expressly because of her perceived impairment, it is evident that Scheer's termination "would not have occurred but for" SCL's

perception that her suicidal ideations amounted to a mental-health impairment. *See United States v. Cone*, 868 F.3d 1150, 1155 (10th Cir. 2017) (where police asked defendant to step out of car during background check, defendant complied and pistol was in plain view, pistol was seized because defendant could not legally possess it, and security of pistol led to discovery of drugs, "the causal chain flows naturally from the request the Defendant exit his vehicle to the detection of the drugs").

The district court erroneously cited *Jenkins v. Medical Laboratories of Eastern Iowa, Inc.*, for the proposition that "where mandatory referral for conflict resolution counseling was not an adverse employment action, termination for failure to comply with the referral was not discrimination because of a disability." Jt. App. Vol. 6 at 985 (citing *Jenkins*, 880 F. Supp. 2d at 960). That citation was inapt. First, as described above, the *Jenkins* court's "adverse action" analysis—requiring a showing of "material" and "tangible" harm—cannot survive *Muldrow*. *See supra* pp. 11-15. Second, unlike in the instant case, the mandatory referral in *Jenkins* was not disability-related. *See Jenkins*, 880 F. Supp. 2d at 954 (employer referred Jenkins and two coworkers for mandatory EAP counseling because of interpersonal conflict among all three). *Jenkins* was correct that termination

for failure to comply with a referral that had nothing to do with disability cannot be an ADA violation, but that logic has no bearing on this case.

II. A jury could find that Scheer was qualified to perform the essential functions of her position.

A. A jury could find that SCL would not have fired Scheer based on her performance.

SCL argued below that Scheer was not qualified for her job because it had placed her on a PIP for performance problems. Jt. App. Vol. 1 at 52. Should SCL renew its argument on this issue, the EEOC urges this Court to hold that a reasonable jury could reject that contention.

Individuals are "qualified" under the ADA if they can perform the essential functions of their jobs with or without reasonable accommodation. 42 U.S.C. § 12111(8). SCL has certainly submitted evidence that it had concerns about Scheer's performance. *See, e.g.*, Jt. App. Vol. 2 at 210. Nonetheless, SCL's concerns focused on Scheer's purported pattern of low productivity numbers at the beginning of the month and then her "cramming and stressing at the end of the month" to meet her monthly goals. Jt. App. Vol. 1 at 79.

There is no dispute that for the five months prior to her termination, Scheer satisfied SCL's productivity metrics. Jt. App. Vol. 1 at 86. Orsborn

and Stowell issued the PIP to "performance manage" Scheer, not to discipline her. Jt. App. Vol. 1 at 67. Senior Director of Patient Billing Jeff Niesen confirmed that "[a] PIP is not disciplinary in nature, and is instead a tool to try to help underperforming associates to improve their performance." Jt. App. Vol. 6 at 960. Oxenford stated that because the PIP was not disciplinary, the portion of it that did not relate to "Behavioral Concerns" would not have led to Scheer's termination. Jt. App. Vol. 1 at 67. The "Action Plan" connected to the performance component stated, "SCL Health values you as an employee and desires to see you fulfill your full potential." Jt. App. Vol. 2 at 210. Accordingly, a jury could deem Scheer "qualified" for her job. *See Sasser v. Salt Lake City Corp.*, 772 F. App'x 651, 658 (10th Cir. 2019) (employee who was "at the very least [] minimally qualified" for the job established prima facie case of discrimination).

B. The "direct threat" affirmative defense is unavailable in this case.

Below, SCL argued that Scheer was not qualified for her job because she posed a direct threat to herself. Jt. App. Vol. 1 at 52. The ADA allows employers to require that employees not pose a direct threat to themselves or others. 42 U.S.C. § 12113(b) (expressly covering threat to others);

29 C.F.R. § 1630.2(r) (EEOC regulation extending statutory prohibition to threat to self); *see also* 42 U.S.C. § 12116 (authorizing EEOC to promulgate ADA Title I regulations). Establishing "direct threat" is an affirmative defense, with the burden of proof on the employer. *EEOC v. Beverage Distrib. Co., LLC*, 780 F.3d 1018, 1021 (10th Cir. 2015). The district court did not address this affirmative defense, but should SCL raise it on appeal, the EEOC urges this Court to hold that the direct-threat defense is unavailable here as a matter of law.

Essential to the direct-threat defense is that the threat be "in the workplace." 42 U.S.C. § 12113(b) ("The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals *in the workplace*." (emphasis added)); *see also* 29 C.F.R. § 1630.2(r) (extending direct-threat defense to safety "of the individual or others"); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1090 (10th Cir. 1997) ("[T]he pertinent EEOC regulations and interpretive guidance discuss the 'direct threat' defense in terms of a threat to individuals in the workplace[.]").

Certainly, when an individual poses a direct threat to safety in the workplace, an employer may take steps to address the risk. But in making

such a direct-threat determination, the employer must make an individualized assessment based on objective evidence and/or a reasonable medical judgment. 29 C.F.R. § 1630.2(r); EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act ("Enforcement Guidance"), 2000 WL 33407181, at *7, question 5, Ex. C (July 27, 2000) (An employer "may not make any disability-related inquiries or require the employee to submit to a medical examination" without first having "a reasonable belief, based on objective evidence, that…[an employee] will pose a direct threat due to a medical condition"); *see also id.* at *6 (discussing ways in which an employer may acquire objective evidence). Generalized fears are not a substitute for objective evidence regarding any given individual. *See id.* at *8, question 6, Ex. B (unsupported rumors regarding employee with depression did not constitute objective evidence warranting a disability-related inquiry or medical exam).

Here, SCL has not said it was concerned that Scheer might harm herself on the job or that the job might harm her. *See Echazabal*, 536 U.S. at 76 (discussing concern that working at refinery might aggravate plaintiff's Hepatitis C by exposure to toxins). There is no evidence, in any event, to

support such speculation. Accordingly, there is no evidentiary basis for arguing that the mandatory EAP referral and associated termination were justified because Scheer posed a direct threat.

III. A jury would not be compelled to accept SCL's affirmative defense that its actions were justified as "job-related and consistent with business necessity."

The ADA allows employers to establish an affirmative defense to certain types of otherwise-impermissible conduct where the conduct is "job-related and consistent with business necessity." *See, e.g.*, 42 U.S.C. §§ 12112(d)(4)(A) (mandatory medical examinations and inquiries); 12113(a) (qualification standards, tests, or selection criteria); 12113(b) (direct threat). A defendant has the burden of proof to show that the challenged conduct is job-related and consistent with business necessity. *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 759 (10th Cir. 2020). As the party moving for summary judgment and bearing the burden of proof on its affirmative defense, "*[SCL's] showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for [SCL].*" *Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015) (citation omitted; emphasis in original).

SCL argued below that its EAP referral was not a medical exam or disability-related inquiry under 42 U.S.C. § 12112(d)(4)(A),[5] but stated that even if it were, it was justified in requiring Scheer to attend EAP counseling because of its "legitimate belief that Scheer had productivity and behavioral issues that needed to be addressed." Jt. App. Vol. 1 at 55 n.3, 57. Specifically, SCL pointed to "the impact Scheer's behavioral issues [were] having on her own productivity and on other associates." Jt. App. Vol. 1 at 50.

SCL is correct that an employer may justify an otherwise impermissible mandatory medical exam if disability-related symptoms affect job performance. *See Hannah P. v. Coats*, 916 F.3d 327, 339 (4th Cir. 2019) (depression caused "repeated issues with attendance and timely reporting"); *Conrad v. Bd. of Johnson Cnty. Comm'rs*, 237 F. Supp. 2d 1204, 1218, 1222 (D. Kan. 2002) (possible bipolar-affective disorder caused erratic

[5] A "disability-related inquiry" is "a question (or series of questions) that is likely to elicit information about a disability." Enforcement Guidance, 2002 WL 33407181, at *3, question 1 (providing examples of inquiries that are and are not disability-related). A "medical examination" is "a procedure or test that seeks information about an individual's physical or mental impairments or health." *Id.* at *3, question 2 (listing factors to consider in determining whether test or procedure constitutes a medical examination).

and declining work performance); *Walker v. Children's Hosp. of Wisc.*, No. 17-C-0583, 2019 WL 5863930, at *1 (W.D. Wis. Nov. 8, 2019) (perceived disability caused plaintiff to make "increasingly bizarre accusations against her coworkers and supervisors," interfering with her ability to collaborate with colleagues and requiring employer to spend time and resources investigating baseless claims), *aff'd on other grounds*, 799 F. App'x 939 (7th Cir. 2020); *see also Harris v. LMI Finishing, Inc.*, No. 05-cv-570-TCK-FHM, 2007 WL 129002, at *8 (N.D. Okla. Jan. 12, 2007) ("[C]onflict with coworkers is a legitimate, non-discriminatory reason for mandatory participation in the EAP.").

However, a jury would not be compelled to accept SCL's contention that addressing its belief that Scheer was experiencing suicidal ideation was job-related and consistent with business necessity. Specifically, a jury need not accept SCL's assertion that the mandatory referral was based on productivity or behavioral issues. The PIP cited "concerns for safety" and was silent as to other reasons for the mandatory referral. Jt. App. Vol. 2 at 210. Stowell testified, "I thought it was necessary to recommend her for counseling based on how much she was struggling with life overall." Jt. App. Vol. 3 at 370. Scheer confirmed that the only reason offered at the

meeting for the mandatory referral was SCL's concern that she was going to harm herself. Jt. App. Vol. 3 at 401. Although Oxenford and Orsborn later testified that they were also concerned that Scheer's statements were disruptive to coworkers, Jt. App. Vol. 1 at 73 (Orsborn); Jt. App. Vol. 1 at 183 (Oxenford), a jury would not be compelled to accept this post hoc justification, especially because SCL did not previously refer Scheer for disruptive behavior based on her "rampant socializing with other associates," Jt. App. Vol. 1 at 72.

If a jury concludes that SCL's sole reason for the mandatory EAP referral was unrelated to the workplace, then SCL could not show that the referral was "job-related and consistent with business necessity." *See* 42 U.S.C. § 12112(d)(4)(A). SCL could have (and perhaps should have) encouraged Scheer to reach out to the EAP program voluntarily but could not require it as a condition of her continued employment. Likewise, SCL could not rely on Scheer's refusal to comply with the terms of the unlawful referral as a justification for her termination.

CONCLUSION

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

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

s/*Gail S. Coleman*
GAIL S. COLEMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

April 29, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(f) because it contains 5,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

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

s/*Gail S. Coleman*
GAIL S. COLEMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

April 29, 2024

CERTIFICATE OF SERVICE

I certify that on this April 29, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

s/*Gail S. Coleman*
GAIL S. COLEMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov