No. 22-40813

In the United States Court of Appeals for the Fifth Circuit

ROSANDRA DAYWALKER,
Plaintiff-Appellant

v.

UTMB AT GALVESTON; MD BEN RAIMER, IN HIS OFFICIAL CAPACITY,
Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division

BRIEF FOR APPELLEES

JOHN SCOTT
Provisional Attorney General

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

LANORA C. PETTIT
Principal Deputy Solicitor General

MICHAEL R. ABRAMS
Assistant Solicitor General
Michael.Abrams@oag.texas.gov

TODD DICKERSON
Assistant Attorney General

Counsel for Appellees University of Texas Medical Branch at Galveston and Ben Raimer, M.D., in his official capacity

Certificate of Interested Persons

No. 22-40813

Rosandra Daywalker,
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UTMB at Galveston; MD Ben Raimer, In His Official Capacity,
Defendants-Appellees

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees, as governmental parties, need not furnish a certificate of interested persons.

/s/ Michael R. Abrams
Michael R. Abrams
Counsel of Record for
Defendants-Appellees[1]

[1] Defendant-Appellee Ben Raimer was sued in his official capacity as President of the University of Texas Medical Branch. ROA.133, 142. He is no longer serving in that role. Dr. Charles P. Mouton, the current President ad interim for the University of Texas Medical Branch, is therefore automatically substituted as a party. *See* Fed. R. App. P. 43(c)(2).

Statement Regarding Oral Argument

The district court did not abuse its discretion in resolving the parties' discovery disputes or plaintiff's motion for sanctions, and the court's grant of summary judgment was a straightforward application of this Court's employment-law precedents. Because the issues central to the resolution of this appeal are not complex or novel, oral argument is unlikely to aid the Court in its decisional process. If the Court schedules argument, however, appellees respectfully reserve their right to participate.

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes, Regulations, Rules, and Other Authorities:

Introduction

Residency programs are the training grounds for our country's physicians. A certification that a doctor has finished her medical residency "tells the world that the resident . . . is qualified to pursue further specialized training or to practice in specified areas." *Davis v. Mann*, 882 F.2d 967, 974 (5th Cir. 1989). For that reason, residencies are rigorous, demanding endeavors. The trust between physicians and their patients depends, in large part, on the training and oversight that residents receive in these programs.

This case is about an otolaryngology resident, Dr. Rosandra Daywalker, who struggled to meet clinical and professional expectations in her time at the University of Texas Medical Branch at Galveston (UTMB). Almost from the outset, faculty observed that she was unable to prioritize tasks. This led to a notable problem: she routinely failed to submit timely medical notes after patient visits, which is essential to delivering high-quality healthcare. In her third year, after informal interventions were unsuccessful, the Department of Otolaryngology placed Daywalker on a remediation plan. She responded by questioning the integrity and professional judgment of the entire faculty. Her performance dipped. The Department unanimously decided to have her repeat selected third year rotations to improve her clinical competency. Rather than stay on and work through the remediation, Daywalker hired a lawyer, voluntarily resigned, and sued.

The district court allowed most of Daywalker's claims to proceed past UTMB's motion to dismiss, at which point this case required an unusual investment of judicial resources to handle a host of discovery issues. The district court ably handled that

assignment. Daywalker insists that the district court stacked the deck against her, but the court ruled in her favor on discovery issues as frequently, if not more, than it did for UTMB. Her objection that the district court deprived her of documents she needed lacks merit; the court simply refused to redraft her discovery requests for her after the discovery window had closed. And the court allowed her access to information about other residents—it just instructed that she needed to take some commonsense steps, routine in many cases, to protect sensitive information contained in those documents from public disclosure. Later in the proceedings, Daywalker's counsel sought sanctions, smearing UTMB's counsel as unprofessional and divisive, but the court rejected those and more nefarious accusations too, and for good reason. UTMB's counsel comported himself admirably in the face of unfounded personal attacks, and there was no basis for sanctions against him or UTMB.

On the merits, the district court correctly recognized that Daywalker could not survive summary judgment on her discrimination and retaliation claims. UTMB's decision to continue Daywalker at a third-year academic level was unanimously approved through a multi-level review process that included the Department's Clinical Competency Committee, the full faculty, and the Associate Dean of Graduate Medical Education. Daywalker asks the federal courts to intervene in, and eventually overturn, the program's careful oversight of one of its residents. But "[w]hether the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's [action] was motivated by discrimination." *Deines v. Tex. Dep't of Protective and Regul. Servs.*, 164 F.3d 277, 2814 (5th Cir. 1999). Even viewing

the evidence in the light most favorable to her, as the Court must, Daywalker lacked competent summary judgment evidence to create a fact question on whether UTMB's actions were discriminatory or retaliatory. The district court's judgment should be affirmed.

Statement of Jurisdiction

Daywalker brought claims under various federal statutes against UTMB and its then-President, invoking the federal courts' jurisdiction under 28 U.S.C. section 1331. ROA.134. On November 14, 2022, the district court granted summary judgment and entered a separate final judgment. ROA.2268-2294, 2295. Daywalker filed a timely notice of appeal. ROA.3327; *see* 28 U.S.C. § 1291.

Issues Presented

1. Whether the district court abused its discretion in construing Daywalker's discovery requests or in deciding to grant Daywalker access to documents about her fellow residents subject to the protections of the Family Educational Rights and Privacy Act of 1974 (FERPA).
2. Whether the district court correctly granted summary judgment on Daywalker's discrimination and retaliation claims.
3. Whether Daywalker has abandoned her claim that UTMB's counsel should have been personally sanctioned by failing to adequately brief that issue in this Court, or alternatively, whether the district court abused its discretion in denying Daywalker's request when she did not establish that UTMB's counsel engaged in unprofessional conduct.

STATEMENT OF THE CASE

I. Factual Background

A. UTMB's otolaryngology residency program

Otolaryngology is a medical subspecialty that concerns surgical and medical management of head and neck conditions. ROA.1620, 1626. At UTMB, the Department of Otolaryngology—Head and Neck Surgery operates a residency program with the goal of ensuring that its graduating residents leave with "a strong core training" in the field and "a proficiency level appropriate for a new and independent practitioner in General Otolaryngology." ROA.1624. It is among the top residency programs in otolaryngology training in the country. ROA.1623.

Residents are trained by a faculty of experienced doctors who practice in the field of otolaryngology. ROA.1656. The residents attend lectures, participate in weekly didactic activities, and work in various medical rotations. ROA.1666, 1670, 1675, 1678. UTMB provides the residents informal, spot feedback through interactions with faculty during clinic and rotations and more formal feedback through twice-annual evaluations. ROA.1478, 1750-51. A group of faculty members also meet regularly as part of the Department's Clinical Competency Committee, which discusses residents' progress and potential interventions to help advance residents through the program. ROA.1468-69.

UTMB's otolaryngology program requires the successful completion of five post-graduate academic years. ROA.134, 1607. As residents progress through the program, they advance through post-graduate years ("PGY") along two related tracks: employment level and academic level. ROA.1491. All residents at UTMB

receive an annual contract that reflects the number of years the resident has been employed by the University, and thus, when a resident is held back for academic purposes, her PGY years for employment and academic purposes proceed along different paths. ROA.1491.

B. Daywalker's enrollment and concerns about untimely submission of notes

In 2015, Daywalker matriculated into UTMB's otolaryngology residency program. ROA.134. During her first two years in the program, Daywalker was supervised by the Department's then-program director, Dr. Susan McCammon. ROA.134. In an early evaluation of Daywalker's performance, McCammon noted it was "important" for Daywalker to "focus on professionalism in the next 6-month block," including "being on time . . . completing duty hour logs, operative log, clinic notes and other accountable documents promptly." ROA.1591. In that same evaluation packet, a supervisor in Daywalker's pediatric surgery rotation warned about Daywalker's "lack [of] personal insight as to her own performance" and said she gave "one of the worst performances I have seen on the pediatric surgery service at UTMB." ROA.1589. This supervisor worried that "when more responsibility is given to her, the results will be disastrous." ROA.1589.

Daywalker's biggest struggle, as McCammon spotted early on, was the timely completion of medical documentation, which is a crucial component of medical practice. ROA.1752. Medical notes communicate the background of the clinical care delivered to patients. ROA.1716. The records allow other providers to understand the patient's history so that they can provide the best possible treatment for the patient.

ROA.1469. UTMB's Otolaryngology Department required residents to complete clinic, inpatient, and operative notes within 24 hours (although individual faculty could set stricter standards). ROA.1469.

Daywalker's struggles with documentation persisted as she advanced through the program. In a second-year evaluation, faculty documented more concerns in that regard:

- "Significant challenges with timely completion of clinic notes. Does not seem to appreciate the relative importance of documentation."
- "Needs to develop efficiency in clinical interviewing and documentation."
- "Reason for lower score is persistent tardiness and procrastination of documentation/task such as case logs."
- "[S]till needs to build efficiency in clinic encounters and notes. May need better time management to prevent procrastination."

ROA.1577-79.

In April 2017, Dr. Wasyl Szeremeta replaced McCammon as the Department's residency program director. ROA.134-35. As Szeremeta noted in his evaluation of Daywalker at the end of her second year, the Clinical Competency Committee was monitoring several aspects of Daywalker's performance, the most notable of which was her consistent failure to timely complete documentation of patient care. ROA.1580. In August 2017, Szeremeta and the assistant program director, Dr. Farrah Siddiqui, met with Daywalker to discuss her progress in the program and stress the importance of improving her documentation. ROA.1473.

Daywalker showed some improvements after that meeting. As one faculty member wrote in her first third-year evaluation, Daywalker's "[r]enewed energy and positive, confident attitude have improved [her] clinical efficiency/documentation." ROA.1571. Another praised her "[g]reat change in attitude with better organization/time management shown by completing documentation and research plans on time." ROA.1571. But others still noted deficiencies, including that Daywalker had "some difficulty with incorporating feedback and the timely completion of medical documentation" and "had issues with documentation and accountable deadlines at the beginning of the year." ROA.1571. Szeremeta rated her as "meets expectation" in five areas (an improvement from her last second-year evaluation) and as "requires attention" in the areas of professionalism and interpersonal and communication skills. ROA.1573.

C. UTMB's remediation plan for Daywalker

Around May 2018, UTMB conducted a routine department-wide review of medical documentation, which revealed that five of Daywalker's notes had been incomplete since June 2017. ROA.1475. When questioned about the issue, Daywalker responded that four of the five patients "[l]eft without being seen and were supposed to be removed from the schedule." ROA.1475. Further review found this to be false—the patients had *not* left without being seen—and Szeremeta was concerned that Daywalker "subsequently created notes and 'documentation'" to cover up her omission. ROA.1476. In his view, she appeared to have copied-and-pasted prior notes from two other doctors without making any significant edits. ROA.1476. As he explained to her, "[t]he care of another human being places the physician in an

incredible position of needing to demonstrate unquestionable trust and reliability," and Daywalker's conduct "create[d] a situation where it is not possible to trust the documentation that is actually written." ROA.1476.

Szeremeta was not the only faculty member who was alarmed. Serious doubts about Daywalker's progress were also reflected in her semi-annual evaluation for the period from January through June 2018. ROA.1564-68. The faculty noted:

- "Her clinical skills in terms of examination/evaluation and judgment on call especially are below her PGY level. Due to continued problems with professionalism, there is lack of trust when it comes to her judgment within the healthcare team."
- "[Daywalker's interpersonal communication skill] suffers due to documentation which impacts overall patient care and communication."
- "[She] needs to improve her efficiency in the outpatient and inpatient clinical settings as this is negatively impacting her ability to work effectively within the residency and health care team structure."
- "[She] does not seem to accept feedback in a positive way and this has made it difficult for her to progress appropriately through her residency training."
- "Has had difficulty with procrastination and timely completion of tasks especially relating to documentation. [She] has been reminded many times to improve in this area. She has demonstrated ability to perform well in this area for 2–3 weeks, but then regresses back to prior patterns."

- "[Professionalism] has continued to be an issue. Whereas she has improved in some aspects, she is still a cut slower than her age matched peers in her pace."
- "[She] continues to have serious issues with completion of medical documentation in a timely manner. This has on occasion negatively impacted patient care."
- "I am seriously concerned with the progress of this resident—she has lost the trust of not only residents but faculty as well—very difficult to see how she will succeed as an upper year resident. There are multiple serious lapses in professionalism and behavior that does not engender trust."

ROA.1565-66.

In May 2018, the members of the Clinical Competency Committee voted to place Daywalker on a remediation program. ROA.1469. The Chair of the Department, Dr. Vicente Resto, joined in that decision. ROA.1487. Remediation is a plan "to provide tailored assistance, training, and/or supervision to residents who need additional support to meet expectations"; it is not "formal discipline" nor is it "reportable … to future employers." ROA.1469. Dr. Thomas Blackwell, the Associate Dean of Graduate Medical Education, approved the decision to place Daywalker on remediation. ROA.3713.

On May 30, 2018, Szeremeta sent a letter to Daywalker notifying her of the remediation plan. ROA.1483-89. The letter explained that Daywalker's "severe lapses in professional behavior have created an environment where it is difficult for the faculty to trust you in the care of our patients here at UTMB." ROA.1483. The letter

identified numerous instances, backed by evidence, where Daywalker's performance was insufficient. For example, "despite the fact that [she] [saw] fewer patients" than her peers, her documentation "continue[d] to be late and inaccurate." ROA.1483. That failing was consequential: in one specific case, the lack of "accurate and timely documentation of an outpatient visit caused a 19-year old patient to have her surgery cancelled." ROA.1484. The letter advised Daywalker of institutional requirements, explained that she was responsible for "knowing these deadlines and complying with them," and stated that: (1) she could be on remediation for up to six months; (2) violations of the remediation plan could result in probation; and (3) any other evidence of fraudulent medical documentation would result in her immediate dismissal from the program. ROA.1488-89.

A few days later, Daywalker met with Resto. In the meeting, she complained about Szeremeta and the faculty's decision to place her on remediation. ROA.1618. She wrote him a letter on June 1, expressing regret about her "less-than-optimal experience" in the program. ROA.1756. But she was "amenable to remediation" in part because it would "be a great exercise to continually improve [her] performance and efficiency." ROA.1755. Daywalker nonetheless believed the remediation decision was unfair and submitted an internal complaint of discrimination against Szeremeta on June 1, 2018. ROA.137, 2271-72.

On Daywalker's request, Resto replaced Szeremeta with Dr. Farrah Siddiqui as Daywalker's day-to-day supervisor for the remediation. ROA.1618. When Daywalker later complained about Siddiqui, UTMB appointed yet a different point of contact, Dr. Christopher Thomas, to serve as Daywalker's supervisor with the goal

of "help[ing] her pass the remediation and graduate from the residency program." ROA.1618.

D. UTMB's decision to retain Daywalker at a PGY-3 academic level

Despite UTMB's attempts to bring up Daywalker's performance, she continued to fall short. About one month into the remediation, Siddiqui and Resto met with Daywalker. ROA.1608. They told her that she was "barely meeting the remediation requirements": "She continued to have lapses in documentation, she was late on a call note, and her efficiency in clinic and medical knowledge was behind [UTMB's] expectations for a resident of her experience." ROA.1608. Siddiqui in particular took care to warn her, in writing, that "any future delinquencies will not be allowed and will count as a violation of remediation, escalating the process to probation." ROA.1612.

A couple of months into her remediation plan, Daywalker requested four months of personal leave. ROA.1469. UTMB approved her request. ROA.1471-72. Based on "the recommendations from the [Clinical Competency Committee], the entire Faculty as well as the [Graduate Medical Education] office," Resto drafted a letter dated August 8, 2018, in which he informed her that "[w]hen you return to active duty on December 10, 2018, you will still be under the same terms of remediation as before" and will therefore "return as a PGY-3" in order to "ease back into the clinical rotation, to build confidence and to gain the skills needed to be a successful PGY 4 in July." ROA.1471-72. This update to the remediation was unanimously approved by members of the Clinical Competency Committee, the Department's faculty, and Dean Blackwell. ROA.1490, 1608, 1827. The decision to keep Daywalker at a third-

year academic level was also in accord with UTMB's leave policy, which notifies residents that "[e]xtended absences from the program may require additional time and training." ROA.1505. Daywalker herself acknowledged that her leave request "obviously will affect my training substantially" and "will likely elongate my training by another year." ROA.1598. Dr. Harold Pine, a member of the faculty, personally delivered Resto's letter. He volunteered because he "had a good relationship with Dr. Daywalker and thought [his] presence would help the situation." ROA.1470.

Although the update to the remediation kept Daywalker at a third-year academic level, it did not impact her employment level. Within a one week or so of UTMB's decision to retain Daywalker at a third-year academic level, Szeremeta approved Daywalker's promotion, which included a bump in pay, to a fourth-year employment level based on total years of service. ROA.1600, 1809.

E. Daywalker's resignation

Following the August 8th letter, Daywalker discussed her situation with her counsel and converted her personal leave to leave under the Family Medical Leave Act of 1993 (FMLA). ROA.33. In October 2018, shortly before her return, she asked to be removed from the supervision of Szeremeta and Siddiqui as an accommodation for "the anxiety and depression caused by the toxic work environment that forced me to take FMLA leave." ROA.3744. She resigned on November 6, 2018, the same day she returned from her leave. ROA.3738.

II. Procedural History

A. Daywalker's complaint and the district court's denial of UTMB's motion to dismiss

Daywalker sued UTMB and its then-President, Dr. Ben Raimer, in his official capacity.[2] ROA.27. In her operative complaint, she alleged discrimination, harassment, and retaliation in violation of Title VII of the Civil Rights Act based on race and gender, (2) retaliation in violation of the Rehabilitation Act of 1973, and (3) FMLA discrimination. ROA.141-42, 3743-44 (clarifying that she did "not allege disability discrimination but retaliation for requesting an accommodation under the ADA/Rehabilitation Act"); *accord* ROA.1713-15.[3]

UTMB filed a motion to dismiss the amended complaint in its entirety, ROA.177-207, but the district court let the bulk of Daywalker's claims proceed. The court observed that Daywalker's complaint "ignores her gender-based claim" and dismissed that claim "insofar as it takes the form of either hostile work environment or constructive discharge." ROA.339. And the court dismissed Daywalker's claim for money damages against Raimer in his official capacity.[4] ROA.341. She was allowed to move forward "with all her other claims and requested relief." ROA.341.

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[2] For ease of readership, this brief refers to both defendants collectively as UTMB.

[3] Daywalker's initial complaint included allegations that UTMB violated the Americans with Disabilities Act, ROA.27, but her amended complaint omits mention of an ADA claim.

[4] Daywalker does not challenge the district court's decisions in its order on the motion to dismiss.

B. The district court's discovery orders

1. Daywalker's request for documents about other residents and the district court's FERPA decision

Eleven months after the initial scheduling conference, Daywalker served UTMB with discovery requests. ROA.2166. In response to 13 of those requests, UTMB asserted that Daywalker sought "information directly related to a student," 20 U.S.C. § 1232g(a)(4), that FERPA expressly protects. ROA.863. After both parties briefed the issue, Magistrate Judge Edison issued a written order concluding that "[b]ecause a medical residency is undoubtedly an academic undertaking that allows doctors to further their education and training in the medical field … medical residents are students for purposes of FERPA." ROA.866. The court went on to find, however, that Daywalker's discovery requests were "directly relevant to the claims at issue in this lawsuit" and therefore overruled UTMB's FERPA objections. ROA.866-68. The court ordered UTMB to notify the residents affected by the order and afforded them the opportunity to object.[5] ROA.868 (citing 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9)(i)).

Many residents timely objected, *see* ROA.1283, fearing that the "disclosure of records, reports, and/or evaluations during . . . training at UTMB could be taken out of the constructive criticism and educational context in which they were created and used to affect substantial personal and professional reputational harm," ROA.1356;

[5] In the same order, the court overruled UTMB's objections that Daywalker's requests implicated the Health Insurance Portability and Accountability Act (HIPAA) and ordered UTMB to produce all responsive documents notwithstanding those objections. ROA.862.

accord ROA.1359. The court then signed an order requiring documents with personally identifying information to be redacted and handled consistently with the court's standing protective order. ROA.1400. The court caveated that it would "certainly entertain" an argument to revise or modify the order if Daywalker believed there was reason to do so. ROA.1400.

2. Daywalker's request for documents about "all PGY-3 Residents for 2016–17 and PGY-4 Residents for 2017–18."

In one of Daywalker's discovery requests, she asked for:

> All documents for all PGY-3 Residents for 2016-17 and PGY-4 Residents for 2017-18 in Otolaryngology relating to performance appraisals, training information, rotation notes/evaluations/appraisals and disciplinary action of any kind.

ROA.2102. UTMB produced responsive documents for three residents. ROA.2103. But UTMB interpreted the request to "cover[] only residents who were PGY-3 in 2016–17 and PGY-4 in 2017–18." ROA.2103. Daywalker disagreed and demanded information about two additional residents who she said "attended UTMB's resident program from 'July 2015 to July 2020,'" which made them PGY-3s for the 2017–18 contract year and PGY-4s for the 2018–19 contract year. ROA.2103.

After the pretrial motion deadline and discovery deadline had lapsed, *see* ROA.296, Daywalker sought to compel documents about those two residents. ROA.2102, 3522. Magistrate Judge Edison denied her motion, ROA.3522, and the district court affirmed that ruling for the same reasons that Judge Edison gave, ROA.2266. Judge Edison reasoned that the "common understanding" is that "[i]f you ask for postgraduate three residents for the year 2016 to 2017, you are talking

about those folks who went from 2016 to '17 in their postgraduate year third. And if you ask for residents for -- PGY-4 residents for 2017 to '18, that to me is clearly asking for those people who are postgraduate year four for '17 and '18. Exactly what it says." ROA.3521. Although Judge Edison agreed that the requested information might be relevant under Federal Rule of Civil Procedure 26, Judge Edison did not think "there was a document request . . . that calls for that." ROA.3522.

C. The district court's grant of summary judgment

Following substantial briefing, the district court granted UTMB's motion for summary judgment and dismissed Daywalker's claims with prejudice. The court first addressed Daywalker's Title VII claims. ROA.2276-89. Noting this Court's precedent that "[a]dverse employment actions in Title VII discrimination cases are only those 'ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating,'" ROA.2276-77 (quoting *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019)), the court found that Daywalker offered "no evidence that she was forced to leave" and concluded that a "delayed promotion" unassociated with negative salary consequences could not be considered an adverse employment action.[6] ROA.2277-78. In "an abundance of caution," the court also addressed whether Daywalker had identified a similarly situated employee

[6] The district court also addressed (and ultimately found no merit to) Daywalker's claim that UTMB's shortening of her facial-plastics rotation from 8 weeks to 3 weeks amounted to an adverse employment action. ROA.2278. Daywalker briefly mentions that issue (at 7) in her opening brief but does not expand on it in her argument. It is therefore abandoned. *See Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 831 (5th Cir. 1993).

outside of her protected class who was treated more favorably. ROA.2279-80. The lone comparator that Daywalker identified did not meet that standard because that individual did not have issues with accuracy and punctuality of medical notes, "had different performance issues and was in a different stage of the disciplinary process." ROA.2280.

The court then dismissed Daywalker's Title VII retaliation claim that UTMB held her back as a PGY-3 in retaliation for her submitting a discrimination complaint. The court found that she failed to make out a prima facie case of causation because (1) the undisputed evidence showed that the decision to hold her back was unanimous, and (2) the two-month gap between her protected complaint and the adverse act was not, by itself, enough to show causation. ROA.2283-85. Furthermore, the court found that even if Daywalker could make out a prima facie case of retaliation, she could not show that the reasons behind UTMB's decision were pretextual. ROA.2286.

Next, the court rejected Daywalker's hostile-work-environment claim, reasoning that even "if some of Szeremeta's remarks to Daywalker were insensitive, none were direct racial insults," and Fifth Circuit precedent requires more to establish a hostile work environment. ROA.2288. Daywalker's constructive-discharge claim failed for related reasons: in particular, to succeed on such a claim requires a greater degree of harassment than a hostile-work-environment claim. ROA.2289 (citing *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001)). Because Daywalker did not show the elements of a hostile-work-environment claim, she could not survive summary judgment on her constructive-discharge claim, either. ROA.2289.

Turning to Daywalker's FMLA retaliation claim, the court found no evidence of a causal link between her request for FMLA leave and being held back, citing the "uncontroverted evidence that the decision to hold Daywalker at a third-year level took place *before* her request to convert her leave into FMLA leave." ROA.2290 (emphasis added). Likewise, the court noted "no evidence that the defendants knew about any disability" before they made the decision to hold Daywalker as a third-year resident, "much less that they based their decision to hold Daywalker back on a disability," and that Daywalker's Rehabilitation Act claim therefore failed as a result. ROA.2291.

D. The district court's denial of Daywalker's motion for sanctions

In the same memorandum opinion, the district court denied Daywalker's motion for sanctions. ROA.2293-94. Her accusation was that "a UTMB investigator deleted a document containing interview notes related to Daywalker's claims, and that the staff member in charge of taking minutes at [Clinical Competency Committee] meetings deleted electronic recordings of the meetings' proceedings." ROA.2293. But the court noted that there was no prejudice from the loss of the document because the interview notes were otherwise produced, and no prejudice from the deleted recordings because the meeting minutes were produced. ROA.2293. And the court found that any delay in document production was "largely due to Daywalker's unwillingness to abide by the protective orders." ROA.2293. Finally, the court reviewed the incidents that Daywalker described of purported improper behavior by UTMB's counsel during depositions and concluded that "none of them amount to sanctionable conduct." ROA.2294.

This appeal followed.

Summary of the Argument

I. Daywalker cannot show that the district court unreasonably handled discovery or that any prejudice resulted from the court's decisions. To start, medical residents at UTMB are "students" for the purpose of FERPA because (1) a central aspect of UTMB's graduate medical education program is the education of medical residents, (2) UTMB's residency programs are rigorous courses of clinical and didactic education, and (3) the notion that Texas medical residents are students is embedded in Texas law. But even if the court's reasoning on that score was wrong, Daywalker still cannot show a basis for reversal. Daywalker was not deprived of any documents because of the court's FERPA decision and accordingly cannot show that the court's decision prejudiced her.

The district court also correctly found that Daywalker's discovery requests did not encompass two of the residents about whom she sought information to establish comparator evidence. A party bears the initial burden under Rule 34 to "describe with reasonable particularity each item or category of items to be inspected," Fed. R. Civ. P. 34(b)(1)(A), and the court was under no obligation—nor would it have been proper—to expand Daywalker's discovery requests beyond the description of the items that Daywalker specifically asked for.

II. On the merits, the district court's grant of summary judgment should be affirmed. As to the Title VII race discrimination claim, Daywalker needed to identify a similarly situated comparator who was treated more favorably, but she did not provide evidence of any other resident with similar issues timely completing medical

notes. On that basis alone, her claim was appropriately dismissed. Even apart from that, this claim fails because she did not controvert the legitimate, nondiscriminatory reasons that UTMB held her back as a resident. Daywalker's Title VII retaliation claim fell short for similar reasons: even if she established a prima facie case, there was no evidence suggesting that UTMB's decision was pretext for unlawful retaliation. Her hostile work environment and constructive discharge claims were properly dismissed for a different reason: as she all but conceded in the district court, she could not survive summary judgment on those claims with the evidence she marshalled.

Nor did Daywalker create a fact issue on her FMLA and Rehabilitation Act retaliation claims. UTMB came to its unanimous decision that Daywalker should return from personal leave as a third-year resident *before* she sought FMLA leave or requested an accommodation for anxiety and depression. Without a causal link between her protected activity and the decision she complains of, there was no basis for Daywalker's claims to proceed to a jury. And as with her Title VII discrimination and retaliation claims, she did not show that UTMB's thoroughly documented reasons for its decision were pretextual.

III. Finally, the district court did not abuse its discretion in denying Daywalker's motion for sanctions. Daywalker purports to "incorporate[] the law and facts in her sanctions motion," Appellant Br. 47, but parties may not subvert word limitations by incorporating prior briefing by reference. Thus, the Court should find that Daywalker has abandoned her claim to sanctions. Even if she did adequately brief the issue, there was no abuse of discretion in the district court's denial of her sanctions

motion. Despite the ad hominem attacks, UTMB's trial counsel comported himself appropriately under the circumstances. The district court found no merit to Daywalker's sanctions motion. This Court should not either.

STANDARD OF REVIEW

"[A] district court's discovery decisions are reviewed for abuse of discretion and are reversible only if arbitrary or clearly unreasonable and the appellant demonstrates prejudice resulting from the decision." *Grupo Mex. SAB de CV v. SAS Asset Recovery, Ltd.*, 821 F.3d 573, 575 (5th Cir. 2016). Prejudice occurs if "the proceeding would have turned out differently had the evidence been disclosed." *Bass v. City of Jackson*, 540 F. App'x 300, 302 (5th Cir. 2013)(per curiam). "The appellant bears the burden of proving abuse of discretion and prejudice," *Crosby v. Louisiana Health Serv. & Indem. Co.*, 647 F.3d 258, 261 (5th Cir. 2011), and a district court's discovery rulings should be reversed on appeal "only in an 'unusual and exceptional case.'" *O'Malley v. U.S. Fid. & Guar. Co.*, 776 F.2d 494, 499 (5th Cir. 1985) (per curiam).

By contrast, a district court's decision on summary judgment is reviewed *de novo*, applying the same standard as the district court. *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800, 804 (5th Cir. 2010). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At this stage, a court must construe "all facts and inferences in the light most favorable to the nonmoving party," *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005), but summary judgment "may not be thwarted by conclusional allegations,

unsupported assertions, or presentation of only a scintilla of evidence." *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012).

ARGUMENT

I. The District Court's Discovery Rulings Were Not an Abuse of Discretion and Did Not Prejudice Daywalker.

A. The district court correctly interpreted FERPA and appropriately balanced Daywalker's rights with those of the non-party medical residents.

FERPA protects a student's privacy interests in "education records," which are defined as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution[7], or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The Department of Education's regulations define a student as "any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records." 34 C.F.R. § 99.3.

FERPA's protections, however, are subject to an important limitation: an educational institution may disclose a student's educational records without the student's consent if the disclosure is made to comply with a court order. 20 U.S.C. § 1232g(b)(2)(B). To obtain such an order, the party seeking disclosure "is required

[7] It is undisputed that UTMB is subject to FERPA as an "educational agency or institution" that receives federal funding under programs administrated by the Secretary of the United States Department of Education. ROA.854.

to demonstrate a genuine need for the information that outweighs the privacy interests of the students." *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 292 (E.D.N.Y. 2008).

1. Dictionary definitions of "student" and "education" from around the time that FERPA was enacted support the district court's conclusion that medical residents are covered "students." *See* The Concise Oxford Dictionary of Current English (5th ed. 1964) (defining "student" as a "[p]erson studying in order to qualify himself for some occupation or devoting himself to some branch of learning or under instruction at university or some other place of higher education or technical training"); *see also id.* (defining "education" as "systematic instruction"); *e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (looking to dictionaries in use when Congress enacted the statute at issue). The court's reasoning was also an accurate reflection of how medical residencies are structured. As the court noted, "[m]edical residents are doctors in training. They have graduated from medical school, been awarded a Doctor of Medicine degree, and now are training to be a particular type of doctor." ROA.865. UTMB's otolaryngology residency offers an intense course of clinical and didactic education, ROA.1666, 1670, 1675, 1678, and under Texas law, physicians must complete a least one year of graduate medical education to be eligible for full licensure. 22 Tex. Admin. Code § 163.2(a)(5).

Daywalker does not engage with the text of the statute. She relies instead (at 45) on an informal letter by a Department of Education official, but the letter's reasoning is circular: it finds that medical residents have completed their education without considering whether a residency itself is part of a doctor's education. The letter also

ignores the history of medical residencies, the nature of which "has changed over time." *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 30 (2d Cir. 2009). As the Second Circuit explained, by the mid-1960s, "medical residents evolved from members of the hospital staff into trainees engaged in a prolonged course of study." *Id.* The letter that Daywalker relies on might be "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only if it has the "power to persuade," *see id.*, and the letter fails to meaningfully discuss or grapple with FERPA's plain language.

2. In any event, Daywalker's opposition to the district court's FERPA analysis ignores that the court *overruled* UTMB's FERPA objection, thinking it "appropriate to allow the disclosure" of the residents' information, "especially since comparator information is routinely disclosed in Title VII cases." ROA.867. That favorable finding leaves Daywalker with just one substantive objection in support of reversal on this issue: that she was prejudiced because she personally (rather than only her attorney) "should have been permitted to review these documents." Appellant's Br. 22. But her argument in that regard is unavailing for two reasons: first, the court explicitly noted that Daywalker could seek a modification of the court's order if circumstances warranted it. ROA.1400. It was incumbent on Daywalker to justify a departure from the terms of the court's order, and she never did. Second, specialized medical knowledge was unnecessary to decipher the documents that UTMB produced, which either would or would not have reflected if other residents had challenges with timely and accurate medical documentation. Daywalker does not explain

why it would take a medical doctor to ascertain whether the documents contained useful comparator information, and none is apparent from the record.

This Court's precedents require a much higher bar to show prejudice from a discovery order. "An appellate court need be involved only when a party's substantial rights have been prejudiced and the proceeding would have turned out differently had the evidence been disclosed." *Bass*, 540 F. App'x at 302 (citing *United States v. Webster*, 162 F.3d 308, 336 (5th Cir. 1998)). Daywalker cites no authority for the claim that requiring a party to abide by a standard protective order constitutes a violation of "a party's substantial rights."

B. The district court reasonably construed Daywalker's requests for production.

After the close of discovery, Daywalker sought court intervention on a different issue: whether her fourth document request, which sought "documents for all PGY-3 Residents for 2016–17 and PGY-4 Residents for 2017–18 in Otolaryngology," also covered residents who were PGY-3s for the 2017–18 contract year and PGY-4s for the 2018–19 contract year. ROA.2102-03. The court rejected that counterintuitive proposition, reasoning that the "common understanding" is that "[i]f you ask for postgraduate three residents for the year 2016 to 2017, you are talking about those folks who went from 2016 to '17 in their postgraduate year third. And if you ask for residents for -- PGY-4 residents for 2017 to '18, that to me is clearly asking for those people who are postgraduate year four for '17 and '18." ROA.3521.

Daywalker contends that the court "violated the law and liberal interpretation of discovery that this Circuit has adopted." Appellant's Br. 24. She fails to mention,

however, that the court exercised its discretion in her favor to entertain the belated motion in the first instance. ROA.3522. Moreover, the Federal Rules of Civil Procedure put parties to the burden of identifying the documents they are requesting with "reasonable particularity," Fed. R. Civ. P. 34(b)(1)(A), and the court simply held Daywalker to that standard, *see Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 575 (N.D. Tex. 2018) ("A Rule 34(a) request made with reasonable particularity does not require a reasonable attorney or party attempting to properly respond to ponder and to speculate in order to decide what is and what is not responsive." (citation omitted)).

To support her abuse-of-discretion argument, Daywalker cites (at 12, 19) *Coughlin v. Lee*, in which this Court reversed a district court for improperly limiting discovery *after* the plaintiff made an appropriately tailored request. 946 F.2d 1152, 1159 (5th Cir. 1991). But that is not what happened here. The district court agreed that the information at issue might be relevant but found that Daywalker's requests did not cover it. The district court's job was not to "expand[] [her] discovery requests." Appellant Br. 26. Instead, it was to ascertain whether the documents she wanted were within the scope of an existing one. The district court's conclusion in that regard was not an abuse of discretion. *E.g.*, *Smith v. Gen. Motors, LLC*, No. 15-2473, 2017 WL 6888568, at *5 (W.D. La. July 21, 2017) (denying motion to compel where the plaintiffs did not identify a discovery request that encompassed the information at issue and none of the plaintiffs' interrogatories or requests for production appeared to request that information).

II. The District Court Properly Granted Summary Judgment.

A. The district court correctly dismissed Daywalker's Title VII claims.

1. Daywalker did not establish a prima facie case of racial discrimination and did not show that UTMB's actions were pretextual.

Daywalker attempts to show unlawful discrimination through circumstantial evidence, which means that the *McDonnell Douglas* burden-shifting framework applies to her claim. *See* Appellant's Br. 39-40; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To meet her initial burden of showing a prima facie case, she needed to show that (1) she is a member of a protected class, (2) she was qualified for her position, (3) she was subject to an adverse employment action, and (4) she "was treated less favorably because of [her] membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances." *Paske v. Fitzgerald*, 785 F.3d 977, 985 (5th Cir. 2015).

The district court concluded that a delayed promotion unassociated with any negative salary consequences is not an "ultimate employment decision" for purposes of Title VII discrimination claims. ROA.2276-77 (citing *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998)). That conclusion was consonant with existing precedent. But this Court sitting en banc recently heard *Hamilton v. Dallas County*, No. 21-10133 (5th Cir. Aug. 3, 2022), which may result in a new standard for what constitutes an "adverse employment action." Given that the Court can affirm on any ground supported by the record, *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777,

781 (5th Cir. 2012), there are two easier ways to resolve this claim. *First*, Daywalker did not identify a similarly situated comparator. *Second*, even if she did meet her prima facie burden, she did not show UTMB's legitimate, nondiscriminatory reasons for holding her back as a PGY-3 were pretextual. *See* ROA.1455-56.

a. A similarly situated comparator is someone treated more favorably under "nearly identical" circumstances, including "essentially comparable violation histories." *Lee v. Kan. City S. Ry.*, 574 F.3d 253, 260 (5th Cir. 2009); *see Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000). Daywalker (at 40) points to Resident 3 as a comparator but offers *no* explanation of why that resident is similarly situated and has therefore abandoned the argument. *Dardar*, 985 F.2d at 831. Instead, she renews her objection (at 21) that the district court should have required UTMB to produce additional documents about the resident. As UTMB has already explained, that contention lacks merit. *Supra* Part I.B.

But even putting those problems aside, Daywalker and Resident 3 did not have "essentially comparable violation histories." *Lee*, 574 F.3d at 260. Daywalker's problems included, among others, her longstanding inability to complete her medical notes on time and an incident in which she potentially fraudulently altered medical records. *Supra* pp. 7-8. The sole concern with Resident 3 was that she "[m]ay be having depth or eye/hand issues with endoscopic cases," and there was no evidence suggesting this was a prolonged issue. ROA.3720. Daywalker's years-long and well-documented struggle with medical notes are not comparable to Resident 3's temporary difficulties with a small subset of surgical cases. Beyond that, Resident 3 "was in a different stage of the disciplinary process." ROA.2280. The district court

therefore properly held that Daywalker did not identify or produce evidence of a similarly situated employee outside of Daywalker's protected class who was treated more favorably. ROA.2280. That was sufficient basis alone for Daywalker's discrimination claim to fail.

b. Under *McDonnell Douglas*, once a plaintiff makes a prima facie showing and her employer articulates a legitimate, non-discriminatory reason for its action, the burden shifts to the plaintiff to show that the employer's reasons were pretext for discrimination. *Owens v. Circassia Pharm., Inc.*, 33 F.4th 814, 825-26 (5th Cir. 2022). To the extent the Court even reaches this part of the *McDonnell Douglas* framework, which it need not for the reasons explained above, UTMB articulated legitimate reasons for requiring Daywalker to repeat certain PGY-3 rotations: its faculty was unanimously concerned about Daywalker's "clinical competency and academic progress." *E.g.*, ROA.1469, 1608. Thus, Daywalker had the burden to show, through "substantial evidence," that each of UTMB's stated reasons were really a pretext for discrimination. *Owens*, 33 F.4th at 826; *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001). That burden is particularly stringent here because UTMB's decision were academic in nature and made with the collective wisdom and input of UTMB's faculty. *E.g.*, *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978); *Sun v. Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799, 815 (7th Cir. 2007) (courts are generally reticent to "second-guess the expert decisions of faculty committees.").

Daywalker relies on three pieces of evidence to demonstrate pretext: first, that "Resto admitted . . . that there was no validity to the remediation"; second, that she submitted a rebuttal "negating every claim" in Szeremeta's remediation memo; and

third, that "Resto and Siddiqui admitted she was 'passing' remediation." Appellant's Br. 40-41. None carry Daywalker's burden.

Resto's purported admission about the "validity" of the remediation does not establish a fact issue for three reasons. *First*, Daywalker has affirmatively disclaimed that "the remediation was an adverse act in her race discrimination claim." ROA.3574. That is because the remediation and UTMB's decision to retain her as a PGY-3 were separate acts, even if based on some of the same underlying conduct. *Supra* pp. 9-10, 11-12. Daywalker does not dispute, nor could she, that UTMB's leave policy notifies residents that "[e]xtended absences from the program may require additional time and training." ROA.1505. Daywalker knew when she requested personal leave that "obviously [this] will affect my training substantially" and "will likely elongate my training by another year." ROA.1598. Those considerations were part of the retention decision but were not a factor in the remediation.

Second, only "fundamentally different" rationales can establish pretext through inconsistency. *Musser v. Paul Quinn Coll.*, 944 F.3d 557, 564 (5th Cir. 2019). Here, there was no inconsistency, let alone a "fundamentally different" rationale. Daywalker does not provide support for her assertion that Resto said there "was no validity to the remediation." According to her own declaration, Resto reassured her that he "did not believe [she] falsified clinic notes." ROA.3588. That is not inconsistent with Szeremeta's letter informing Daywalker of the remediation plan. As the district court noted, Szeremeta "merely informed Daywalker that he had a suspicion that she had copied-and-pasted and falsified notes based on particular oddities with the notes that concerned him, but did not make a formal accusation." ROA.2286.

"Even if Szeremeta misinterpreted the oddities as falsification, there is no evidence that the misinterpretation was pretextual." ROA.2286.

Third, Resto's comments do not disprove that the faculty was concerned that "her notes were untimely and inaccurate," ROA.2286, and that Daywalker's clinical competency and professionalism needed improvement. The decision to have Daywalker repeat certain PGY-3 rotations was a collective one, and she does not introduce any evidence that the entire faculty acted as a mere "rubberstamp" for Resto's personal views. *Laxton v. Gap Inc.*, 333 F.3d 572, 584 (5th Cir. 2003).

Next, Daywalker purports to "incorporate[] as fully set forth herein her Remediation Rebuttal to negate the truthfulness of Szeremeta's remediation memo," Appellant's Br. 7, *accord* Appellant's Br. 41, but it is not the Court's role to "piece[] together the relevant assertions" in that document to develop Daywalker's argument for her, *Bank of Am. Nat'l Ass'n v. Stauffer*, 728 F. App'x 412, 413 (5th Cir. 2018). Even if UTMB were wrong in its view of Daywalker's performance, the question is whether UTMB had a reasonable belief in that assessment. *E.g.*, *Dickerson v. Metro. Dade Cnty.*, 659 F.2d 574, 581 (5th Cir. Unit B Oct. 1981) (observing that even if employer was wrong in its evaluation of employee's absenteeism, it did not violate Title VII if it acted on reasonable belief). Daywalker does not show that UTMB's views were unreasonable. Indeed, in summary judgment briefing below, Daywalker conceded that she did not complete at least "a few notes" within the required time period, ROA.3564, and acknowledged that Szeremeta sincerely believed (albeit incorrectly, in her view) other faculty members' conclusions about her deficient performance, ROA.3580.

Last, and for related reasons, Siddiqui's reassurance that Daywalker was "passing" remediation does not show pretext. ROA.3735. Siddiqui warned her that she was "barely meeting the remediation requirements" and was worried about Daywalker's continued "lapses in documentation" and "efficiency in clinic and medical knowledge." ROA.1608. Daywalker did not introduce evidence that Siddiqui's concerns were illegitimate or pretext for discrimination. As explained above, they were widely shared across the entire faculty. *See* ROA.1608.

2. Daywalker's retaliation claim fails for similar reasons.

To prove retaliation under Title VII, Daywalker had an initial burden of proving "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action." *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996). As in Title VII discrimination claims, after a plaintiff makes a prima-facie case, the defendant must show a legitimate, non-retaliatory reason for the action. *Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 400 (5th Cir. 2013). The burden then shifts back to the plaintiff to show that the reason is pretextual. *Id.* The "claims must be proved according to traditional principles of but-for causation," *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013), which the plaintiff must show at the pretext stage. *Chapple v. Tex. Health & Hum. Servs. Comm'n*, 789 F. App'x 985, 991 (5th Cir. 2019) (per curiam).

a. UTMB does not dispute that Daywalker's June 2018 internal complaint was protected activity. The district court correctly held, however, that Daywalker did not "produce[]. . . competent summary-judgment evidence" of an adverse

employment action, even under the "slightly" broader standard that applies in the retaliation context. ROA.2281-82 (quoting *Welsh*, 941 F.3d at 826). Her "job title, grade, hours, salary, and benefits" were unchanged, and there was no evidence that she suffered a diminution in standing among her co-residents. ROA.2282. Daywalker repeatedly insists that she was subjected to a "demotion." *E.g.*, Appellant's Br. 11, 14, 16, 21. But she does not argue that the district court was wrong in any of its conclusions about the fundamental nature of her work. She thus did not show how she suffered an adverse employment action under this Court's Title VII retaliation precedent.

b. That is enough to foreclose Daywalker's retaliation claim, but she also cannot meet her burden of showing that she would not have been held at the PGY-3 academic level but for her protected activity. "[T]emporal proximity alone is insufficient to prove but for causation," *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007), meaning that Daywalker must rely on the context surrounding UTMB's decision to create a fact question. That context works in UTMB's favor rather than Daywalker's. Most importantly, UTMB faculty expressed alarm about Daywalker's subpar performance well before she made her discrimination complaint. *Supra* pp. 6, 8. This Court recently observed that a plaintiff's attempt to show a causal link was "weakened by the fact that [the plaintiff] also had documented performance issues that began around the same time she made her [protected complaints]." *Hudson v. Lincare, Inc.*, 58 F.4th 222, 232 (5th Cir. 2023). "[S]ubstantial similarities between [a supervisor's] prior annual reviews and the negative review recommending against [the plaintiff's] promotion negate a

retaliatory motive for his negative assessment." *Shu-Hui Wu v. Miss. State Univ.*, 626 F. App'x 535, 538 (5th Cir. 2015) (per curiam). In that vein, "collective decision-making is less susceptible to influence by an individual with a retaliatory motive." *Id.* Thus, an employer's use of a collective decision-making process "suggests [that there was] no retaliation." *Strong,* 482 F.3d at 806 n.2.

Daywalker does not grapple with this case law. Instead, she relies (at 32) almost exclusively on Pine's statement during their August 8 meeting that "if you want to prove a point legally, you might win, but you're not going to be an [O]tolaryngologist." ROA.3589. This statement does not help her for four reasons. *First*, Pine did not reference Daywalker's internal discrimination complaint, and he provided unrebutted testimony that he "was not aware of Dr. Daywalker's June 2018 internal complaint of discrimination" when he voted for her to be placed on remediation or continue as a PGY-3. ROA.1470. *Second*, when Pine spoke with Daywalker to deliver Resto's letter, he "did not have any authority to deliver any message on behalf of UTMB to Dr. Daywalker other than what was included in the letter." ROA.1470. Daywalker provides no evidence to the contrary. *Third*, Daywalker offers no explanation for why Pine would be motivated to retaliate against her. He had a "good relationship with Dr. Daywalker," was trying to "help the situation," and had no knowledge of any complaints—let alone that any complaints had been lodged against him. ROA.1470. *Fourth*, and finally, Daywalker offers no proof that Pine had "influence or leverage over the official decisionmaker," which in this instance was the entire faculty of the Otolaryngology Department, the Clinical Competency Committee,

and the Dean of Graduate Research Education. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000); ROA.1471.

3. Daywalker did not establish a hostile work environment or that she was constructively discharged.

In the proceedings below, Daywalker claimed that this Court "has made it practically impossible to prove hostile work environment based on race" and said she was "prepared that this court may not likely find hostile work environment." ROA.3582. Putting to the side her characterization of this Court's precedent, she was right—and the district court, in turn, was right—that she did not offer sufficient evidence of a hostile work environment to survive summary judgment. Such a claim requires harassment based on a factor rendered impermissible by Title VII that affects a term, condition, or privilege of employment. *Watts v. Kroger Co.*, 170 F.3d 505, 509 & n.3 (5th Cir. 1999). The harassment must be "extreme" and sufficiently "severe or pervasive" to alter the conditions of the victim's employment and create an abusive working environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Moreover, the complained-of conduct must be both objectively and subjectively offensive. *EEOC v. WC&M Enters.*, 496 F.3d 393, 399 (5th Cir. 2007). This means that not only must a plaintiff perceive the environment to be hostile, but it must appear hostile or abusive to a reasonable person. *Id.* To determine whether conduct is objectively offensive, the totality of the circumstances is considered, including: "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance." *Id.*

Daywalker provides a bulleted list of incidents that she asserts reveal a harassing workplace environment. Appellant's Br. 4-6. Many involve performance-related feedback. *E.g.*, Appellant's Br. 5 (Szeremeta "singled her out for negative feedback in front of other residents"). But actionable harassment must involve "racially discriminatory intimidation, ridicule and insults." *Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000), *abrogated on other grounds by Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67 (2006). Receiving a poor performance evaluation, being unjustly criticized in front of peers, or being written up are insufficient to make out a prima facie case of hostile work environment. *Kang v. Bd. of Supervisors of La. State Univ.*, 75 F. App'x 974, 976-77 (5th Cir. 2003). Likewise, Daywalker's complaints about Szeremeta's Facebook posts are irrelevant. Appellant's Br. 5. Daywalker does not point to any evidence that she and Szeremeta were even friends on Facebook, let alone that she saw the posts at issue while she was a resident at UTMB.

Once those allegations are set aside, Daywalker's claims rest on the premise that Szeremeta made several racial comments in the middle of discussions about larger national policy issues. A few stray comments, even if offensive, do not constitute harassment severe or pervasive enough to establish a hostile work environment. *See Faragher*, 524 U.S. at 788 ("[O]ffhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"); *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885, 892 (8th Cir. 2017) ("Stray remarks in the workplace generally are not severe or pervasive enough to change the conditions of employment."). As this Court has explained, its "hostile work environment jurisprudence is not designed to prohibit all verbal or

physical harassment in the workplace." *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 443 (5th Cir. 2011) (internal quotation marks omitted). Indeed, a much more severe "series of racially insensitive or derogatory remarks to [the plaintiff] during the course of her employment" was not enough for the plaintiff to survive summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 342, 348 (5th Cir. 2007).

Daywalker's constructive-discharge claim fails for the same reasons as her hostile-work-environment claim. "Constructive discharge requires a greater degree of harassment than that required by a hostile work environment claim." *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001). Daywalker failed to establish a hostile-work-environment claim, and thus, also did not establish constructive discharge. ROA.2289.

B. The district court correctly dismissed Daywalker's FMLA retaliation claim.

To make a prima-facie showing of FMLA retaliation, a plaintiff must show that she was protected under the FMLA, she suffered an adverse employment decision, and either that she was treated less favorably than an employee who had not requested leave under the FMLA or the adverse decision was made because she took FMLA leave. *Wilson v. Noble Drilling Servs., Inc.*, 405 F. App'x 909, 912 (5th Cir. 2010) (per curiam). Daywalker did not establish either an adverse action or a link between her request for FMLA leave and the action she complains about.

Like a Title VII retaliation claim, only "materially adverse" employment acts can give rise to an FMLA retaliation claim. *See, e.g.*, *Lindsley v. TRT Holdings, Inc.*,

984 F.3d 460, 469-70 (5th Cir. 2021); *Besser v. Tex. Gen. Land Off.*, 834 F. App'x 876, 881-82 (5th Cir. 2020) (per curiam). As explained above, UTMB's requirement that Daywalker return from leave as a PGY-3 was not a materially adverse act. *Supra* Part II.A.2. Moreover, the uncontradicted record shows that UTMB reached that decision before she converted her personal leave request to FMLA leave. The Clinical Competency Committee met on August 6 to discuss requiring Daywalker to return from her personal leave as a PGY-3, ROA.3719, and Resto's letter was dated (and delivered on) August 8. ROA.1470-71. The letter expressly said that her leave is not considered a medically related leave under the FMLA. ROA.1471. There was good reason for that omission: it was not until the next day that Daywalker requested that her personal leave be converted to FMLA leave. ROA.33, 3726-27.

In recognition of this timing problem, Daywalker tries to show that she engaged in protected activity in early August when she shared with UTMB's Assistant Dean for Graduate Medical Education that she "thought [she] might qualify for FMLA." ROA.3737; Appellant's Br. 33-34. A plaintiff must do more, however, to establish protected activity under the FMLA: she must "provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c). Only saying that she "'might' need to take leave" was insufficient. *E.g.*, *Wilson,* 405 F. App'x at 913.

Daywalker also submits (at 34) that she was not "demoted" until she returned from FMLA leave in November 2018. But the Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980), makes clear that for timing purposes,

an adverse action occurs when the "decision [is] made and [the employee] was notified." And the record conclusively shows that occurred on August 8, 2018. ROA.1471-72. The letter left no room for doubt about Daywalker's return status, nor did it require Daywalker's agreement to become effective. It told her in no uncertain terms that "[w]hen you return to active duty on December 10, 2018, you will still be under the same terms of remediation as before," and "[y]ou will also return as a PGY-3." ROA.1472. Daywalker separately highlights (at 27 n.11) a letter showing that UTMB renewed her position, ROA.4048, but nothing in that letter is inconsistent with the faculty's unanimous decision to retain her as a PGY-3 for *academic* purposes. ROA.1491; *supra* pp. 4-5 (explaining the PGY years for employment and academic purposes diverge when a resident is held back).

Finally, FMLA retaliation claims, like their Title VII counterparts, are also subject to the *McDonnell Douglas* burden-shifting framework. *Lindsley*, 984 F.3d at 469-70. UTMB had legitimate reasons for having Daywalker return as a PGY-3, *supra* pp. 11-12, and Daywalker offered no evidence showing those reasons were pretextual.

C. The district court correctly dismissed Daywalker's Rehabilitation Act claim.

Daywalker's last claim is that UTMB retaliated against her in violation of Section 504 of the Rehabilitation Act. *See* 29 U.S.C. § 704. To succeed on this claim, Daywalker needed to show that she engaged in a protected activity, that UTMB took an adverse employment action against her, and that a causal connection existed between the adverse employment action and the protected activity. *Calderon v. Potter*, 113 F. App'x 586, 592 (5th Cir. 2004) (per curiam).

As with her FMLA retaliation claim, Daywalker cannot establish causation. She admits she only placed UTMB on notice of her need for an accommodation in October 2018. ROA.3743-44; *accord* Appellant's Br. 33 ("She also requested accommodations for her disability under the ADAAA the last week she was on FMLA leave."). UTMB decided to have Daywalker repeat her PGY-3 rotations in early August 2018. ROA.1471-72. Daywalker's claim fails as she did not, and cannot, show that UTMB's decisionmakers knew of her request for an accommodation in early August 2018.

Without reference to a specific place in the record, Daywalker asserts that "she discussed her disability with Resto in June 2018." Appellant's Br. 33. Even if that statement were supported, it is irrelevant to the claim Daywalker brought. She clarified in her interrogatory responses that she did "not allege[] disability discrimination but retaliation for requesting an accommodation under the ADA/Rehabilitation Act." ROA.3743. And she does not dispute that she made her first request for accommodations *after* UTMB made its decision to retain her as a PGY-3.

Rehabilitation Act claims are also subject to the *McDonnell Douglas* burden-shifting framework. *Houston v. Tex. Dep't of Agric.*, 17 F.4th 576, 585 (5th Cir. 2021). Thus, even if Daywalker could make out a prima facie case of retaliation under the Rehabilitation Act, which she cannot, she also needed to show that UTMB's articulated legitimate reasons for its decision were pretextual. As with her other claims, she did not do so. *Supra* Part II.A.1, 2.

III. The District Court Did Not Abuse Its Discretion in Denying Daywalker's Motion for Sanctions.

In her motion for sanctions, Daywalker presented an assortment of theories—purported spoliation, discovery abuses, and deposition misconduct—and asked the Court to use its inherent power to sanction UTMB and UTMB's counsel personally. ROA.5171-85. On appeal, she does not brief any issues pertaining to UTMB's alleged destruction of evidence or unreasonable delay in document production. *See* ROA.2293-94 (district court's order addressing those contentions). Instead, "[d]ue to word limitation[s] and the number of issues briefed in this case," she "incorporate[d] the law and facts in her sanctions motion as fully set herein." Appellant's Br. 47-48.

"It goes without saying that issues not properly briefed will not be considered." *Elliott v. Cockrell*, 46 F. App'x 227, 2002 WL 1940106, at *5 (5th Cir. July 25, 2002) (per curiam). "Along this line, a party cannot simply incorporate by reference positions taken in district court; the issues must be briefed here." *Id.*; *e.g.*, *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 398-99 (5th Cir. 2001) (finding that party abandoned issue when it only "adopt[ed] and incorporat[ed] by reference its argument below.").

Accordingly, the only argument in support of reversal that Daywalker even attempted to preserve was that UTMB's counsel's conduct in depositions "w[as] childish, unprofessional, divisive, disruptive, and totally unnecessary and should not go unpunished." Appellant's Br. 48. She does not provide any specific examples,

nor are any obvious from the record. This issue should therefore be deemed abandoned, too.

If it is not, there is no basis for reversal. Daywalker seeks sanctions from UTMB's counsel and minimizes her counsel's behavior as a "few objections and sidebars." Appellant's Br. 48. But Daywalker's counsel called a witness "very gullible," ROA.5317, mocked another witness's speech patterns, ROA.5529 ("I've had a lot of pauses and lot of *uh, uh* delays") (emphasis added), and threatened to sue Siddiqui, Daywalker's former supervisor, for defamation in the middle of Siddiqui's deposition, ROA.4569 ("Do you understand that [Daywalker] considers what you are saying today to be defamation of character and is considering filing suit against you personally? Do you understand that?"). The district court's understated finding that UTMB's counsel did not engage in sanctionable conduct, ROA.2294, is borne out by the deposition transcripts appended to the parties' filings, which reflect a conscientious lawyer diligently and professionally representing his clients amid regrettable circumstances.

Conclusion

The Court should affirm the judgment of the district court.

Respectfully submitted.

JOHN SCOTT
Provisional Attorney General

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

LANORA C. PETTIT
Principal Deputy Solicitor General

/s/ Michael R. Abrams
MICHAEL R. ABRAMS
Assistant Solicitor General
Michael.Abrams@oag.texas.gov

TODD DICKERSON
Assistant Attorney General

Counsel for Appellees University of Texas Medical Branch at Galveston and Ben Raimer, M.D., in his official capacity

Certificate of Service

On June 16, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Michael R. Abrams
Michael R. Abrams

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,814 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Michael R. Abrams
Michael R. Abrams