[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-11378

Non-Argument Calendar

CHARITY MOORE,
LASHAWN SMITH,

Plaintiffs-Appellants,

versus

CITY OF HOMEWOOD,
STEVE SPARKS,

Defendants-Appellees.

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

D.C. Docket No. 2:19-cv-00879-SGC

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Charity Moore and LaShawn Smith, both police dispatchers, sued the City of Homewood and Sergeant Steve Sparks, alleging violations of Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and the Family and Medical Leave Act. The district court granted the defendants' motion to dismiss in full. We reverse as to Officer Moore's Family and Medical Leave Act retaliation claim. We affirm as to the remaining claims.

FACTUAL BACKGROUND[1]

The Parties

Charity Moore and LaShawn Smith worked as police dispatchers for the Homewood Police Department. Officer Smith began working for the department in 2014. Officer Moore joined the department in 2015. Officer Moore and Officer Smith are African American. Through this action, the officers sued their employer,

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[1] "We accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Luke v. Gulley*, 975 F.3d 1140, 1143 (11th Cir. 2020) (quoting *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019)).

the City of Homewood, and their supervisor, Sergeant Steve Sparks.[2]

Officer Moore

Officer Moore's problems started when she returned from maternity leave in April 2017. When Officer Moore returned from leave, she asked her white supervisor, Sergeant Steve Sparks, for a private place to express breast milk. About a year earlier, a white police department employee asked for a private place to pump breast milk and the department made one available. But when Officer Moore made the same request, Sergeant Sparks told her to pump at her desk and to "place a sign on the doorway as needed."

Officer Moore's desk—in the dispatch room—offered little privacy. Although employees needed an access code to enter the dispatch room, anyone with the code could freely enter the room. In practice, that meant that all dispatchers and several police officers had access to the room. And those people would often enter the dispatch room, even when Officer Moore placed a sign on the doorway that read "Private: Pumping in Progress." Over the spring and summer of 2017, the department also increased the number of police patrols but kept the number of dispatchers the same. This meant longer hours for dispatchers and fewer opportunities for Officer Moore to take a break to seek "a private refuge to pump." These new officers were also given the access code,

[2] We refer to the City of Homewood and to Sergeant Sparks collectively as the "city."

increasing the number of people who would "walk[] in and out of the dispatch room, ignoring [Officer] Moore's sign requesting privacy."

During this period, several officers in the department made offensive comments to Officer Moore. One employee asked her, for example, "[a]re you hooked up like a cow?" Another told her, "[I] would love to purchase some of that milk." In May 2017, about a month into her return from maternity leave, Officer Moore asked Lieutenant Andrew Didcoct for a private place to pump and, despite saying that he would "[l]ook into it," Lieutenant Didcoct never did.

In July 2017, two months after she reached out to Lieutenant Didcoct, Officer Moore again asked Sergeant Sparks for a private place to pump. Sergeant Sparks falsely replied that Officer Moore's request was "the first time anyone ha[d] notified" him that she needed a private place to pump. Sergeant Sparks told Officer Moore that "options for privacy were limited" and offered her the opportunity to use the "bathroom / locker room." The department also made Lieutenant Didcoct's windowed office available to her.

A few months later, the jail bathroom leaked sewage onto Officer Moore's desk, contaminating milk and her breast pump. The department bought Officer Moore a new breast pump. Going forward, the department required her to sit at the desk closest to the dispatch room's entry door. This new desk was in front of a window that "anyone" could see into.

Beyond these breast-pump problems, Officer Moore also faced push-back from the department about two years later when she discovered she had a tumor and needed to adjust her work schedule. In February 2019, Officer Moore felt excruciating back pain, went to the emergency room, and was diagnosed with a tumor in her lower back. When she provided her doctor's note to Sergeant Sparks, he told her that, unless she further explained the note, he wouldn't accept it and would instead discipline her. In response, Officer Moore told Sergeant Sparks's supervisor, Lieutenant Keith Peterson, that Sergeant Sparks scrutinized black officers' medical notes more closely than white officers' notes. Lieutenant Peterson didn't deny that allegation. He told Officer Moore that he would "look into it" but he never followed up with her.

On top of requiring additional information, Sergeant Sparks "subjected [Officer Moore] to heightened, onerous scrutiny compared to her white co-workers" when she requested time off because of her tumor. So, for example, before allowing her to return to work, Sergeant Sparks required Officer Moore to take a "Fit for Duty" assessment, even though he didn't make white co-workers with similar health issues do the same. Later, in April 2019, Sergeant Sparks told Officer Moore that she would need to work more days than her doctor-prescribed limit. Officer Moore said she could not do this without first checking with her doctor. Within days, Officer Moore was "subjected to her first drug test" since she started with the department five years earlier. Officer Moore emailed Sergeant Sparks, saying she thought there was a "race-

based double standard" within the department. Sergeant Sparks never acknowledged Officer Moore's complaint.

The department, according to Officer Moore, continued to "interfere[]" with her right to take leave in a way that white officers never experienced. For example, Sergeant Sparks "impl[ied] and/or threaten[ed]" Officer Moore with disciplinary action for taking leave. He also called her and demanded that she work longer hours to accommodate two white dispatchers who were taking time off for a baby and for elective surgery. Sergeant Sparks further told Officer Moore that he "did not like or appreciate her having longer, [Family and Medical Leave Act] agreed-upon weekends," and he altered Officer Moore's work schedule to prevent her from having consecutive days off. For his part, Lieutenant Peterson told Officer Moore to have her doctor amend her medical papers so that she could work more hours.

In September 2019, Sergeant Sparks stepped down as Officers Moore and Smith's supervisor but remained with the department. That same day, an anonymous complaint was filed against Officer Moore for having—two years earlier—posted a video to social media as part of her ongoing advocacy for breastfeeding mothers in Alabama. Officer Moore's new white supervisors "gave her a write up" for posting the video. Four years earlier, a white officer had "made a pornographic video" and sent "invitations around the [department] to join him in a 'viewing party'" but was not disciplined. That same officer was allowed to resign after failing a drug test. Both Sergeant Sparks and Internal Affairs Sergeant Doug

Finch (who is also white) had posted "bigoted and/or violence-steeped 'memes'" on social media but had never been disciplined.

Officer Smith

Officer Smith's claims are based on a single incident. In February 2019, Officer Smith asked Sergeant Sparks to go home early because she was feeling sick. Sergeant Sparks denied that request—despite granting similar ones from white employees. This was "beyond frustrating to Smith" and she "began experiencing what to her felt like a panic attack." Officer Smith called Homewood's Employee Assistance Program for help, and a representative advised her to go to the emergency room. When Officer Smith told Sergeant Sparks that she was going to the emergency room, Sergeant Sparks sent an "armed guard" to escort her off of the city's property.[3]

PROCEDURAL HISTORY

In their second amended complaint, Officers Moore and Smith asserted twelve counts against Homewood and Sergeant Sparks. Their claims can be broken down into four categories: (1) race discrimination under section 1983 and Title VII (counts one, three, five, ten, eleven, and twelve); (2) race retaliation under section 1983 (counts two and four); (3) Officer Moore's claims for violations of nursing mother accommodations under the Fair Labor

[3] In their complaint, Officer Moore and Officer Smith also describe a series of racist incidents—not involving them—that occurred within the department throughout their time working there.

Standards Act and section 1983 (counts six and seven); and (4) Officer Moore's claims for interference and retaliation under the Family and Medical Leave Act and section 1983 (counts eight and nine).[4]

The district court granted the city's motion to dismiss in full. First, as to Officer Moore and Smith's race discrimination claims, the district court held that neither of them suffered any adverse employment action. Second, as to Officer Moore and Smith's race retaliation claims, the district court reached the same conclusion, holding that they failed to allege any adverse employment action. The district court held that Officer Smith's retaliation claim also failed because she did not allege that she engaged in any protected activity. Third, as to Officer Moore's nursing claim—that the city failed to provide a private place to nurse—the district court held that Officer Moore failed to plausibly allege damages. Fourth, as to Officer Moore's Family and Medical Leave Act interference and retaliation claims, the district court concluded that these claims must be dismissed because Officer Moore was never denied any benefit and because she suffered no adverse employment action. This appeal followed.

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[4] In their opening brief, Officers Moore and Smith make a few passing references to the Americans with Disabilities Act. But that is not enough to preserve an ADA claim for appeal. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

STANDARD OF REVIEW

We review de novo the district court's dismissal of a complaint for failure to state a claim. *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010). A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Our review has two steps: (1) we "eliminate any allegations in the complaint that are merely legal conclusions"; and (2) for any "well-pleaded factual allegations, [we] assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Am. Dental Ass'n*, 605 F.3d at 1290 (cleaned up).

DISCUSSION

Race Discrimination

The district court properly dismissed the officers' claims for race discrimination under Title VII and section 1983. "When section 1983 is used as a parallel remedy for [a] violation of . . . Title VII . . . , the elements of the two causes of action are the same." *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1508 (11th Cir. 1995) (quoting *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n.16 (11th Cir. 1982)); *see also Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009) (same). Like the parties, we'll analyze the claims together.

"Claims of race discrimination . . . require a showing that the employer subjected the employee to an 'adverse employment action.'" *Davis v. Legal Servs. Ala., Inc.*, 19 F.4th 1261, 1265 (11th Cir. 2021). Where a plaintiff brings a disparate treatment claim, adverse employment actions "consist of things that affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone." *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020).

We've held, in other words, that an employee bringing a discrimination claim "must show a *serious and material* change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001). It follows that "not all conduct by an employer negatively affecting an employee constitutes adverse employment action." *Webb-Edwards v. Orange Cnty. Sheriff's Off.*, 525 F.3d 1013, 1031 (11th Cir. 2008) (cleaned up); *see also Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1453 (11th Cir. 1998) ("[I]t is not enough that [the challenged action] imposes some *de minimis* inconvenience or alteration of responsibilities."). "Title VII is neither a general civility code nor a statute making actionable the ordinary tribulations of the working place." *Cotton v. Cracker Barrel Old Country Store, Inc.*, 434 F.3d 1227, 1234 (11th Cir. 2006) (cleaned up).[5]

[5] This is consistent with the text of Title VII, which limits discrimination claims to changes in an employee's "compensation, terms, conditions, or privileges

The officers have failed to plausibly allege that they suffered any adverse employment action. Officer Moore rests her claim to an adverse employment action on three events. First, Officer Moore points to the fact that the city previously provided a white employee with a small room to pump in but offered her only (1) her desk in the dispatch room, (2) the women's bathroom or locker room, and (3) Lieutenant Didcoct's windowed office. Even assuming these accommodations fall short of the Fair Labor Standards Act's requirements, we can't say that they amount to an adverse employment action because they simply don't resemble a "termination[], demotion[], suspension[] without pay, [or] pay raise[] or cut[]"—the things we've previously identified as paradigmatic adverse actions. *Monaghan*, 955 F.3d at 860. The department offered Officer Moore at least three places to pump—some of which appear to have offered at least some privacy. The city's failure to offer her some other (more-private) location doesn't rise to the level of an adverse employment action.

Second, Officer Moore claims that the department's response to her back injury also constitutes an adverse action. The department, Officer Moore says, (1) required her to provide more information about her doctor's note, (2) subjected her to a "Fit for Duty" assessment, (3) had her take a drug test, (4) "impl[ied]

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of employment." 42 U.S.C. § 2000e-2(a)(1). "Courts have uniformly read this language to require a plaintiff suing under [section] 2000e–2(a) to establish, as part of his prima facie case, that he suffered so-called 'adverse employment action.'" *Davis*, 245 F.3d at 1238.

and/or threaten[ed]" her with disciplinary action for taking leave, (5) "demanded" that she work more than her doctor recommended, and (6) altered her work schedule to "prevent her from having consecutive days off." The problem, though, is that none of these things had a "material" and "tangible" adverse effect on Officer Moore's terms of employment. *Davis*, 245 F.3d at 1239. Officer Moore never alleges, for example, that the city *ultimately* rejected her doctor's note, that it *actually* required her to work more hours, or that it *ever* took any disciplinary action against her. Nor does she explain how the "Fit for Duty" assessment or the drug test imposed anything more than a "*de minimis* inconvenience." *Doe*, 145 F.3d at 1453. Because none of these actions materially affected Officer Moore's terms of employment, they are not adverse employment actions.

Third, Officer Moore points to the "write-up" she received for an Instagram video she posted. But we've routinely held that negative reviews—standing alone—rarely establish an adverse action. As we explained in *Davis*:

> Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. Expanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance. Federal courts ought not be put in the

> position of monitoring and second-guessing the feedback that an employer gives, and should be encouraged to give, an employee. Simply put, the loss of prestige or self-esteem felt by an employee who receives what he believes to be unwarranted job criticism or performance review will rarely—without more—establish the adverse action necessary to pursue a claim under Title VII's anti-discrimination clause.

Davis, 245 F.3d at 1242; *see also, e.g.*, *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1216 (11th Cir. 2008) (holding that several "warnings and [a] reprimand did not lead to any change in the terms, conditions, or privileges of employment"). In short, none of the actions Officer Moore points to—considered individually or collectively—rise to an adverse employment action.

Officer Smith's claim fails for similar reasons. Officer Smith, for her part, says she suffered an adverse employment action when Sergeant Sparks denied her request to leave work early and when he sent officers to escort her off the property. But neither of these things amount to "a serious and material change in the terms, conditions, or privileges of [her] employment." *Crawford v. Carroll*, 529 F.3d 961, 970–71 (11th Cir. 2008) (cleaned up). In fact, Sergeant Sparks ultimately allowed Officer Smith to leave work early. The allegations show that Sergeant Sparks sent help to an employee suffering from a panic attack. Even viewed in the light most favorable to the officers, Sergeant Sparks's actions amount at most to "[t]rivial slights" that "are not actionable." *Monaghan*, 955 F.3d at 860.

When faced with similar facts, we've found no adverse employment action. Take our decision in *Davis v. Legal Services Alabama Inc.*, 19 F.4th 1261, 1264 (11th Cir. 2021), for example. In that case, Legal Services Alabama, a legal nonprofit, suspended with pay its executive director. *Id.* at 1264. Affirming the district court's order granting summary judgment for the employer, we held that a "paid suspension is not an adverse employment action." *Id.* at 1267. Indeed, the *Davis* court reached this conclusion, even where the employer (1) disclosed the suspension to the executive director's former political opponent, (2) suspended him days before a high-profile reception with the state bar, (3) compiled a narrative of reasons for his suspension in a suspension letter, and (4) placed a security guard in front of the nonprofit's building in the wake of the suspension. *Id.* Here, neither Officer Moore nor Officer Smith faced anything approaching a suspension. As in *Legal Services Alabama*, then, the officers in our case have alleged no adverse employment action.

* * *

Because Officers Moore and Smith failed to plausibly allege an adverse employment action, the district court properly dismissed their race discrimination claims.

Race Retaliation

The district court properly dismissed the officers' claims for race-based retaliation.[6] To establish a prima facie case of retaliation, a "plaintiff must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was causally related to the plaintiff's protected activities." *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997); *see also Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1317 (11th Cir. 2002) (same). Only the first and second elements are at issue here.

As to the first element, an employee has engaged in a protected activity, under Title VII, if she (1) "has opposed any practice made an unlawful employment practice by" Title VII or (2) "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). "The first part of the anti-retaliation provision is known as the 'opposition clause' and the second part as the

[6] The officers bring their race-based retaliation claims under section 1983. Section 1983 claims require an underlying constitutional or statutory violation. *See Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979) (noting that section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes"). But the officers never identify the underlying constitutional or statutory violation that they base their section 1983 retaliation claims on. In any event, the parties—and the district court—analyzed the officers' section 1983 retaliation claims under Title VII standards. We'll do the same.

'participation clause.'" *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1134 (11th Cir. 2020) (setting out the standard for retaliation).

As to the second element, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in [the retaliation] context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (cleaned up). "We speak of *material* adversity because we believe it is important to separate significant from trivial harms." *Id.* "An employee's decision to report discriminatory behavior," the Supreme Court has cautioned, "cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.*

We'll take the officers' claims in turn.

Officer Moore has abandoned her race-based retaliation claim. In her initial brief, Officer Moore argued that the district court erred in dismissing her race discrimination claim but made no arguments for her race-based retaliation claim. And "[w]e have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority." *Sapuppo*, 739 F.3d at 681. To the extent that she sufficiently raised the issue in her reply, by then it was too late. *In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial

brief or raised for the first time in the reply brief are deemed [abandoned]."").

Officer Smith's race-based retaliation claim fails for two reasons. First, Officer Smith never alleged that she opposed any practice that is unlawful under Title VII or that she participated in any Title VII proceedings. Although Officer Smith speculated that Sergeant Sparks denied her request to leave early due to her race, she never says that she reported that belief to anyone or that she suffered any consequences because of that complaint. Indeed, Officer Smith never claims that she ever reported *any* instances of race discrimination to *anyone*. As a result, Officer Smith failed to allege that "she engaged in statutorily protected activity." *Little*, 103 F.3d at 959.

Second, even if she had alleged that she engaged in protected activity, Officer Smith's claim would still fail because she didn't plead an adverse employment action. As we've said, Officer Smith's entire claim rests on Sergeant Sparks's initial refusal to allow her to leave work early and on his decision to send guards to help her out of the building. But at no point does Officer Smith "allege why a reasonable worker in [her] shoes would have been dissuaded from reporting allegedly retaliatory conduct because of these [actions]." *Johnson v. Miami-Dade Cnty.*, 948 F.3d 1318, 1327 (11th Cir. 2020). Nor could she. As we've said, Sergeant Sparks ultimately allowed Officer Moore to leave. And an employee suffering from a panic attack cannot reasonably expect her employer to send no one to help her out of the building. In all, while Sergeant

Sparks might've been rude—maybe even harsh—we can't say that he took any adverse employment action. *See, e.g.*, *Higdon v. Jackson*, 393 F.3d 1211, 1219–20 (11th Cir. 2004) ("[The plaintiff] alleges that [a supervisor] was rude, but this Court has repeatedly stated that the civil rights laws were not intended to be a 'civility code.'").

* * *

In short, Officer Moore abandoned her race-based retaliation claim. And Officer Smith failed to plausibly allege that she engaged in any protected activity or that she suffered an adverse employment action.

Officer Moore's Nursing Claim

Officer Moore's nursing claim—that the city is liable for failing to provide a private place to pump—fares no better. Under the Fair Labor Standards Act:

> (1) An employer shall provide--
>
> > (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
> >
> > (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

29 U.S.C. § 207(r).

Both sides agree that Officer Moore adequately alleged that the city violated the Fair Labor Standards Act by failing to give Officer Moore "a place . . . that is shielded from view and free from intrusion . . . to express breast milk." *Id.*[7] But they disagree as to whether Officer Moore plausibly alleged that she suffered the sorts of damages required by the Fair Labor Standards Act. As we explain below, we agree with the district court that Officer Moore's nursing claim must be dismissed because she failed to adequately plead damages.

In setting out the damages an employee can recover under the nursing provisions, the Fair Labor Standards Act says this: "Any employer who violates the provisions of . . . section 207 . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Here, Officer Moore did not allege that she is owed any "unpaid minimum wages" or "unpaid overtime compensation." Instead, she said that she

[7] It's not entirely clear to us that Officer Moore *has* plausibly stated a violation of section 207(r). That's because she alleged, in her complaint, that Sergeant Sparks "offered the women's bathroom / locker room as a place to pump." And while the Fair Labor Standards Act says that a "bathroom" (for obvious sanitary reasons) won't suffice for a private place to nurse, it says nothing about locker rooms. Nor does Officer Moore explain why the locker room provided by her employer was deficient. In any event, because the parties (and the district court) assumed that Officer Moore stated a violation of section 207(r), we'll do the same and continue to damages.

incurred only "privations, physical and emotional damages." Because Officer Moore's damages aren't recoverable under the Act, she's failed to state a plausible claim for relief.

Federal district courts across the country have reached this same plain-text conclusion. *See, e.g.*, *Poague v. Huntsville Wholesale Furniture*, 369 F. Supp. 3d 1180, 1199 (N.D. Ala. 2019) ("[C]ourts have found in their interpretation of [section] 207(r) that employees may only recover for unpaid minimum wage or overtime wages due as a result of a violation of [section] 207(r)."); *Lampkins v. Mitra QSR, LLC*, 2018 WL 6188779, at *5 (D. Del. Nov. 28, 2018) ("By its express terms, [section] 216(b) limits the remedies available for violations of [section] 207(r) to 'unpaid minimum wages' and 'unpaid overtime compensation.'"); *Barbosa v. Boiler House LLC*, 2018 WL 8545855, at *6 (W.D. Tex. Feb. 23, 2018) (observing that "unpaid minimum wages" and "unpaid overtime compensation" are "the only forms of compensation provided under the statute for violations of 29 U.S.C. [section] 207"); *Mayer v. Prof'l Ambulance, LLC*, 211 F. Supp. 3d 408, 413 (D.R.I. 2016) ("Courts examining this issue have likewise held that there is no cause of action under [s]ection 207(r) absent a claim for unpaid minimum wages or overtime.").

Against this, Officer Moore advances two arguments—both unpersuasive.

First, Officer Moore points to *Moore v. Freeman*, 355 F.3d 558 (6th Cir. 2004), in which the Sixth Circuit held that the "anti-retaliation provisions of the [Fair Labor Standards Act] . . . allow[]

for damages for mental and emotional distress." *Id.* at 563. Relying on this decision, Officer Moore contends that she too is entitled to these sorts of damages. But the Sixth Circuit's ruling—interpreting the Fair Labor Standards Act's retaliation provisions—does nothing to help Officer Moore's case. That's because Officer Moore brought an *accommodations* claim (contending that her employer "refus[ed] to provide her the safety and privacy accorded to her under the Act"), not a *retaliation* claim (contending that her employer punished her for invoking her rights under the Act).

The Sixth Circuit's holding in *Freeman* only supports our ruling here. The damages provision at issue in our case—for violating section 207(r)'s nursing requirements—says that an employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The damages provision at play in *Freeman*—for violating section 215(a)(3)'s retaliation prohibition—is significantly broader, providing that the employer "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the retaliation provision], including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Congress, in short, knows how to expand damages beyond unpaid minimum wages, unpaid overtime, and liquidated damages when it wants to. But it chose *not* to do so here. *See generally Savage Servs. Corp.*

v. United States, 25 F.4th 925, 935 (11th Cir. 2022) ("Where Congress knows how to say something but chooses not to, its silence is controlling." (quoting *Pinares v. United Techs. Corp.*, 973 F.3d 1254, 1262 (11th Cir. 2020))).

Second, Officer Moore argues that she did, in fact, raise a Fair Labor Standards Act retaliation claim and that she plausibly stated that claim. We disagree. For starters, Officer Moore, in her complaint, never referenced section 215(a)(3) or any Fair Labor Standards Act retaliation claim. Nor did she ever argue that she plausibly stated such a claim before the district court. "[A]nd on appeal this Court 'cannot allow [a plaintiff] to argue a different case from the case she presented to the district court.'" *Matamoros v. Broward Sheriff's Off.*, 2 F.4th 1329, 1337 n.6 (11th Cir. 2021) (quoting *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004)).

Even if Officer Moore's newly discovered retaliation claim *had* been preserved, it would still fail on the merits. To make out a prima facie case of retaliation under the Fair Labor Standards Act, a plaintiff must allege: "(1) she engaged in activity protected under the act; (2) she subsequently suffered adverse action by the employer; and (3) a causal connection existed between the employee's activity and the adverse action." *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1342–43 (11th Cir. 2000) (cleaned up). As the district court noted, Officer Moore hasn't met the third element: causation. While Officer Moore complains, for example, that the city "refused to provide her with . . . federally-mandated nursing

accommodations" and "failed to address widespread harassment, taunts and jeers she experienced with respect to her nursing practices," she never suggested in her complaint that the city took these actions *because* she invoked the Fair Labor Standards Act. *See* 29 U.S.C. § 215(a)(3) (providing that it is unlawful to "discriminate against any employee because such employee has filed any complaint"); *see also Wolf*, 200 F.3d at 1343 (explaining that a plaintiff "must show she would not have been [subjected to the adverse action] but for her assertion of [Fair Labor Standards Act] rights").[8]

* * *

Because Officer Moore alleged no damages under the Fair Labor Standards Act, she did not state a plausible claim for relief. We affirm the district court's dismissal of Officer Moore's nursing claim.

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[8] Officer Moore brought two counts based on these alleged nursing violations: one under the Fair Labor Standards Act and the other under section 1983. In her section 1983 count, Officer Moore says that the city "deprived and violated Plaintiff Moore's 29 U.S.C. § 207(r) rights under color of law." Officer Moore treats the two counts as rising and falling together. She never argues (for instance) that, even if she failed to allege damages under the Fair Labor Standards Act, her section 1983 count may still somehow survive. In failing to do so, she forfeited any such contention. *See United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (explaining that the "failure to raise an issue in an initial brief on direct appeal should be treated as a forfeiture of the issue, and therefore the issue may be raised by the court *sua sponte* [only] in extraordinary circumstances").

Officer Moore's Family and Medical Leave Act Claims

The Family and Medical Leave Act "creates two types of claims: interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, and retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act." *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1206 (11th Cir. 2001) (cleaned up). Officer Moore has advanced both types of claims here. We address them in turn.

The Interference Claim

The Family and Medical Leave Act's interference provision makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the Act]." 29 U.S.C. § 2615(a)(1). The benefits afforded by the Family and Medical Leave Act include (1) "12 workweeks of leave during any 12-month period" for certain family and medical events, 29 U.S.C. § 2612(a)(1); and (2) the right "to be restored by the employer to the position of employment held by the employee when the leave commenced," 29 U.S.C. § 2614(a)(1). "To establish that an employer interfered with her [Family and Medical Leave Act] rights, an employee need only show by a preponderance of the evidence that she was entitled to the benefit that her employer denied." *Matamoros*, 2 F.4th at 1338.

We've held that "a technical [Family and Medical Leave Act] violation alone is not enough" to secure relief under the Act. *Ramji*

v. Hosp. Housekeeping Sys., LLC, 992 F.3d 1233, 1241 (11th Cir. 2021). Instead, "to prevail on a [Family and Medical Leave Act] interference claim, a plaintiff must show harm from the alleged interference with her rights." *Munoz v. Selig Enters., Inc.*, 981 F.3d 1265, 1274–75 (11th Cir. 2020) (cleaned up). As the Supreme Court has explained, the Family and Medical Leave Act "provides no relief unless the employee has been *prejudiced* by the violation." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (emphasis added). To show prejudice, the plaintiff must "demonstrate some harm remediable by either 'damages' or 'equitable relief.'" *Evans v. Books-A-Million*, 762 F.3d 1288, 1296 (11th Cir. 2014) (quoting *Ragsdale*, 535 U.S. at 89).[9]

In this case, Officer Moore's interference claim fails because Officer Moore has identified no "harm from the alleged interference with her rights." *Munoz*, 981 F.3d at 1274–75. Officer Moore alleged that the department (1) required her to provide more information about her doctor's note, (2) subjected her to a "Fit for Duty" assessment, (3) had her take a drug test, (4) "impl[ied]

[9] This "harm" requirement is consistent with the Family and Medical Leave Act's enforcement provision, which (roughly speaking) permits damages only for (1) "any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation"; (2) "in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation"; and (3) "such equitable relief as may be appropriate, including employment, reinstatement, and promotion." 29 U.S.C. § 2617(a)(1).

and/or threaten[ed]" her with disciplinary action for taking leave, (5) "demanded" that she work more than her doctor recommended, and (6) altered her work schedule to "prevent her from having consecutive days off." These things may show that the department discouraged Officer Moore from taking leave, but Officer Moore never explains how she was *prejudiced* by any of these actions. Officer Moore doesn't claim, for example, that the department ever denied her leave, that she would have taken more leave absent the department's reaction, or that she lost out on any compensation or suffered any monetary loss because of the department's actions. Officer Moore, in sum, doesn't tell us how she was prejudiced by anything the department did.

Faced with similar facts, we've held that an employee has no interference claim. In *Graham v. State Farm Mutual Insurance Co.*, 193 F.3d 1274 (11th Cir. 1999), for example, we adopted "the holding and rationale" of the district court, which held:

> Besides failing to show that she was subject to an adverse employment action, plaintiff has not demonstrated that she suffered any damages as a result of State Farm's actions. Even if the defendants have committed certain technical infractions under the [Family and Medical Leave Act], plaintiff may not recover in the absence of damages. Plaintiff was never denied leave time by State Farm. In fact, she was provided with more than 170 hours of leave in the 12 months between her automobile accident and her resignation, most of which was paid. As this court has

> noted, the [Family and Medical Leave Act] does not allow recovery for mental distress or the loss of job security.

Graham, 193 F.3d at 1284 (cleaned up); *see also Munoz*, 981 F.3d at 1275 ("[The plaintiff] testified that [the employer] did not deny her leave time. As a result, [the plaintiff] has not shown damages to support her [Family and Medical Leave Act] interference claim."). We reach the same result here.

Pushing back on this point, Officer Moore—relying on our decision in *Diamond v. Hospice of Florida Keys, Inc.*, 677 F. App'x 586 (11th Cir. 2017)—contends that "interference" includes discouraging employees from taking leave. It's true, as we observed in *Diamond*, that "unlawful employer interference includes not only refusing to authorize [Family and Medical Leave Act] leave, but also 'discouraging an employee from using such leave.'" 677 F. App'x at 592 (quoting 29 C.F.R. § 825.220(b)). But our conclusion here *isn't* that Officer Moore alleged no interference. It's that Officer Moore alleged no prejudice. In fact, our holding in *Diamond* is perfectly consistent with what we've said here. In *Diamond*, we reversed the district court's order granting summary judgment for the employer because the plaintiff *had* created an genuine issue as to whether she was prejudiced by the discouragement—by testifying both that "she would have taken more days off . . . had [the employer] not discouraged her from doing so" and that she incurred "the cost of traveling 300 miles each way to her

parents' home" rather than taking leave and staying at her parents' home. *Id.* at 594. Officer Moore has alleged nothing like that here.

The Retaliation Claim

The Family and Medical Leave Act also prohibits retaliation. *See* 29 U.S.C. § 2615(a)(1), (2). In order to state a claim of retaliation under the Family and Medical Leave Act, an employee must plausibly allege that: "(1) [s]he engaged in a statutorily protected activity; (2) [s]he suffered an adverse employment decision; and (3) the decision was causally related to the protected activity." *Strickland*, 239 F.3d at 1207. No one disputes the first or third elements. Rather, the city argues—and the district court concluded—that Officer Moore's claim fails because she didn't plausibly allege an adverse employment action. We disagree.

Our circuit has yet to resolve whether *Burlington Northern*'s "dissuade a reasonable worker" standard from the Title VII context applies to retaliation claims under the Family and Medical Leave Act. But both sides appear to assume that *Burlington*'s standard for an "adverse employment action" applies to the Family and Medical Leave Act claim, and so we'll do the same.

Under the *Burlington* standard, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 68 (cleaned up). This standard won't reach "trivial harms" like "petty slights or minor annoyances that often take place at work and that all employees

experience." *Id.* At the same time, "*Burlington* suggests that it is for a jury to decide whether anything more than the most petty and trivial actions against an employee should be considered 'materially adverse' to him and thus constitute adverse employment actions." *Crawford*, 529 F.3d at 974 n.13.

Officer Moore alleged more than that here. She alleged (for example) that the department "threaten[ed] [her] with disciplinary action for her attempting to avail herself of her FMLA rights." She said that the department, on more than one occasion, "demand[ed]" that she work more hours, including more than what her doctor recommended. She claimed that the department "alter[ed] her work schedule to prevent her from having consecutive days off." She alleged that the department subjected her to a "Fit for Duty" assessment and a drug test. Viewing the facts in the light most favorable to the plaintiff, we think it's at least plausible that a reasonable employee may be dissuaded from invoking her Family and Medical Leave Act rights if she knew that, in the immediate aftermath, her employer would threaten disciplinary action, impose a burdensome schedule, demand longer hours, and subject her to various physical examinations.

The employer's actions here are quite a stretch from the "petty slights, minor annoyances, and simple lack of good manners" the Supreme Court identified in *Burlington* as falling outside the Family and Medical Leave Act's scope of protection. 548 U.S. at 68 (pointing to the "sporadic use of abusive language, gender-related jokes, and occasional teasing" (quoting *Faragher v. City of*

Boca Raton, 524 U.S. 775, 788 (1998))). Not surprisingly, the facts of our case are much closer to those in which courts have found sufficient adverse action to support a retaliation claim. *See, e.g.*, *id.* (holding that a jury could reasonably find that reassignment to a less prestigious and more arduous position was an adverse action); *Monaghan*, 955 F.3d at 863 (holding that "statements from a supervisor . . . which threatened both termination and possible physical harm" were adverse actions); *Crawford*, 529 F.3d at 974 ("[W]e have no doubt but that Crawford suffered a materially adverse action in the form of the unfavorable performance review she received (that affected her eligibility for a merit pay increase) after she complained of racial discrimination[.]").

In response, the city makes two arguments—neither convincing.

First, the city cites various district court and unpublished circuit court decisions for the proposition that fit-for-duty tests, drug tests, and denials of time off are not adverse employment actions. But the city doesn't address the fact that the department also threatened Officer Moore with disciplinary action and demanded that she work longer hours. And crucially, while the "actions of which [Officer Moore] complains might not have individually risen to the level of adverse employment action . . . , when those actions are considered collectively, the total weight of them does constitute an adverse employment action." *Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002). It is not enough, in other words, to view the employer's actions in isolation. We must view

them together, and—in that light—decide whether they might dissuade a reasonable employee from engaging in protected activity. Having done so, we believe Officer Moore has stated a plausible claim here.

Second, the city argues that the complaint "makes no allegations about retaliation under the [Family and Medical Leave Act]" and that "[t]he word retaliation is found nowhere in the" operative complaint. This is wrong. The complaint says that "Defendant Homewood deprived and violated Plaintiff Moore's [Family and Medical Leave Act] rights by . . . retaliating against her for exercising and/or attempting to exercise her rights under the Family and Medical Leave." It's clear, in other words, that Officer Moore pleaded a retaliation claim under the Family and Medical Leave Act.[10]

* * *

To sum up: Officer Moore has not stated an interference claim under the Family and Medical Leave Act. But we believe the district court erred in dismissing Officer Moore's Family and Medical Leave Act retaliation claim.[11]

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[10] The city never contends that Officer Moore's retaliation claim fails for the same reason her interference claim fails (i.e., a lack of prejudice). We decline to address that argument with no briefing and in the first instance.

[11] In their complaint, Officer Moore brought a section 1983 claim alleging that "Homewood deprived and violated Plaintiff Moore's 29 U.S.C. § 2601, *et seq.* [Family and Medical Leave Act] rights under color of law." We affirm the

CONCLUSION

We reverse the part of the district court's order dismissing count eight's retaliation claim. We affirm the rest of the district court's order.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings.

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district court's dismissal of this count for two reasons. First, Officer Moore's passing reference to the claim in her initial brief is insufficient to preserve her claim. *Sapuppo*, 739 F.3d at 681. Second, "a municipality cannot be held liable under [section] 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's *policy or custom*, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [section] 1983." *Id.* at 694 (emphasis added). Officer Moore has alleged no such policy or custom here.