# 23-7961

## United States Court of Appeals for the Second Circuit

Ryan Whitney, M.D.,
*Plaintiff-Appellant*,

v.

Montefiore Medical Center, Albert Einstein College of Medicine,
*Defendants-Appellees*.

**On Appeal from the United States District Court**
**for the Southern District of New York, No. 1:21-cv-9623**
**Hon. Paul A. Engelmayer**

---

**OPENING BRIEF FOR APPELLANT RYAN WHITNEY, M.D.**
**AND SPECIAL APPENDIX (SPA1-SPA57)**

---

JASON L. SOLOTAROFF
GISKAN SOLOTAROFF & ANDERSON LLP
90 Broad St., 2nd Floor
New York, NY 10004
(212) 847-8315
solotaroff@gslawny.com

HYLAND HUNT
RUTHANNE M. DEUTSCH
ALEXANDRA MANSBACH
DEUTSCH HUNT PLLC
300 New Jersey Avenue, NW
Suite 900
Washington, DC 20001
Tel.: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

*Attorneys for Appellant Ryan Whitney, M.D.*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Statutes and Rules**

## JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. Final judgment was entered on November 8, 2023, SPA57, and this Court has jurisdiction under 28 U.S.C. § 1291. The notice of appeal was timely filed on December 6, 2023. Fed. R. App. P. 4(a)(1)(A); JA2254.

## ISSUES FOR REVIEW

1. Whether a rational juror could find that Montefiore discriminated against a medical resident on the basis of his ADHD when the residency program director lied to conceal her knowledge of his ADHD, urged the resident to consider another specialty upon learning of his ADHD, and generated an exaggerated negative paper trail to justify his termination, violating several policies and procedures along the way.

2. Whether a rational juror could find that Montefiore failed to accommodate a resident with ADHD when it failed to implement several agreed-upon reasonable accommodations, despite repeatedly being alerted to its failures.

## STATEMENT OF THE CASE

Plaintiff, Dr. Ryan Whitney, was terminated a few months before completing his three-year anesthesiology residency at Montefiore, ostensibly for insufficient clinical skills. Yet Whitney had passed his first two residency years, and successfully completed third-year clinical rotations before being notified of termination. What went wrong? A reasonable jury could find things started to go awry when, in his first

residency year, he disclosed his Attention-Deficit/Hyperactivity Disorder (ADHD) to the residency program director.

From that point on, Whitney's evaluations were fraught with irregularities: special forms focused on organizational skills; post hoc negative evaluations replaced contemporaneous positive ones; and above all else, the program director's imperative to collect feedback to prove her case that Whitney should be terminated. Though she falsely claimed not to know about Whitney's ADHD until near the end of his residency, a jury could find otherwise—and that her lie conceals discriminatory intent. Not animus, necessarily, but a stereotype-based prejudgment (apparently shared by the district court) that ADHD is incompatible with practicing anesthesiology. And once Whitney requested accommodations, Montefiore suspended his termination, and the program director found herself "stuck" with him, her campaign to set him up for failure—including by not providing agreed accommodations—kicked into overdrive.

Whitney's record was not perfect. He faced—and overcame—some struggles with clinical skills, initially failed (but later passed, with accommodations) a certification exam, and had some missteps (as did other residents). A jury might credit Montefiore's version of events. But it could as easily find, instead, that Whitney's record did not come close to justifying his termination. And it is not impossible for a rational juror to conclude that Whitney was terminated because of

his ADHD. The district court's holding otherwise reflects that court's trespass into the jury's domain of weighing competing evidence and deciding whose story is right.

A reasonable jury could also find that Montefiore's proffered reasons for the termination were pretextual, and that an exaggerated record of deficiencies was constructed because residency program leadership—who manipulated every step of the process—concluded Whitney dismissal-worthy upon learning about his ADHD, mounting a campaign to "prove its case" that Whitney had to go, flouting standard procedures along the way.

The district court (Engelmayer, J.) granted summary judgment for defendant.[1] Accordingly, the factual background describes the record as the Court must consider it: construing the evidence in the light most favorable to Whitney. *See, e.g.*, *Costello v. City of Burlington*, 632 F.3d 41, 45 (2d Cir. 2011).

### A. Montefiore's Residency Program

As part of training in medical specialties, doctors complete a teaching hospital "residency." For the anesthesiology program at Montefiore, residency is typically an internship year plus three years of clinical training referred to as CA-1, CA-2, and CA-3, during which residents learn from supervisory "attending" doctors and are rotated through various sub-specialties. JA18-19 (Joint Stipulated Facts ¶¶4, 7, 13

[1] Plaintiff consented to the dismissal of Albert Einstein College of Medicine. SPA14 n.4.

("JSF")). Dr. Sujatha Ramachandran is the residency program director for anesthesiology. Montefiore's Clinical Competency Committee (CCC) reviews resident performance and decides whether residents progress through the program. JA19-20 (JSF ¶21). Ramachandran is part of the CCC, and provides information on residents during the CCC meetings. JA43 (Ramachandran Declaration ¶22). Associate program directors, including Dr. Gregory Kim, are also members of the CCC. JA20 (JSF ¶22).

All new residents first complete a one-on-one rotation. JA1855-57 (Ramachandran Deposition). If successful, they are placed on double coverage, which allows one attending doctor to supervise two residents at once by going back and forth between two ORs. JA2200 (Rule 56.1 Statement of Plaintiff ¶¶150-151 ("PSF")). Successful residents are also placed "on call," usually overnight or on a weekend. JA2201 (PSF ¶152). During these times, there are fewer doctors available and therefore residents must be able to safely practice anesthesia with more limited supervision. *Id.* Montefiore's residency program does not permit residents to be double covered or work on call unless they can provide safe anesthesia care. JA19 (JSF ¶15); JA2201 (PSF ¶155).

### B. Whitney Successfully Completed CA-1 Year, Despite Ramachandran Initiating Disability-Focused Evaluations.

**1.** Dr. Ryan Whitney began his anesthesiology residency at Montefiore in July 2018 after finishing his internship elsewhere. JA21 (JSF ¶35). He performed well

during his initial rotation (in his case, pediatrics), was placed on "double coverage," and was allowed to take calls. JA1857-59 (Ramachandran).

Whitney has ADHD, a neurological medical condition that qualifies as a disability under the ADA. JA108 (Whitney Declaration ¶2); SPA18. ADHD is associated with inattention, difficulties in organization and vulnerability to distraction. JA2005-09 ("Attention Deficit/Hyperactivity Disorder and Successful Completion of Anesthesia Residency: A Case Report"). Whitney's ADHD manifested as some issues with organization, prioritization, anxiety, and an inability to answer questions concisely. JA1934-35 (Whitney Deposition). Over years of medical training and practice, Whitney has developed systems that allow him to achieve desired results despite his differing cognitive style. At Montefiore he often wore noise-canceling headphones to minimize distraction while completing patient notes and brought a bag into the operating room that included checklists, emergency medications, pre-made IV kits, and a timer (to avoid distractions from using the clock on his cell phone). JA2204-05 (PSF ¶181); JA1918-20 (Whitney). Whitney was transparent about his needs, often discussing his ADHD with colleagues, including several attendings. JA2204-05 (PSF ¶¶179, 182).

Ramachandran learned about Whitney's ADHD by October 2018—at the latest—during a meeting where they discussed feedback that he got flustered easily.[2]

[2] Ramachandran denied in her deposition and grievance hearing testimony that she

JA21-22 (JSF ¶¶36-37); JA1853-55 (Ramachandran); JA1935-37 (Whitney). In that same meeting, she strongly urged Whitney to give up on anesthesiology. JA2207 (PSF ¶194). When Whitney explained that he wanted to "fix" any deficiencies and continue in the program, she asked him to reconsider "over and over again." JA21-22 (JSF ¶37); JA942 (contemporaneous email). Ramachandran also knew by December 2018 that Whitney had hired a lawyer, texting her team that this was "[a]ll the more reason to be on top of these evals." JA23 (JSF ¶43). (She later claimed that she had given no thought to why he might have hired a lawyer; she claimed to be unaware of Whitney's ADHD at that time. JA1852, JA1870-71.)

**2.** Shortly after Ramachandran learned of Whitney's ADHD, the CCC recommended remediation for Whitney, stating he "distracts easily." JA22 (JSF ¶38). Remediation typically involves one-on-one training or other support for a resident to get up to peer level. JA1868-69 (Ramachandran). Ramachandran designed special evaluation forms during Whitney's remediation that focused evaluators on characteristics where negative stereotypes exist for people with ADHD (e.g., organizational skills). JA22 (JSF ¶40); JA1989 (example evaluation). Other residents were not evaluated using special evaluation forms and several anesthesia

---

knew about Whitney's ADHD in 2018. JA1852-53; JA1881-82; JA1980. But their October 2018 conversation, which discussed Whitney's ADHD, was summarized by Whitney in a contemporaneous email, and forwarded to Ramachandran, JA21 (JSF ¶¶36-37).

attendings testified that they had never been asked to evaluate any other resident using this type of special form. JA33 (JSF ¶¶121-22); JA2208 (PSF ¶204).

Ramachandran emphasized ADHD-specific areas when distributing the targeted forms to attendings. JA22 (JSF ¶41); JA2208 (PSF ¶¶203, 205-206). When emailing the form to one attending for use in evaluating Whitney, for instance, Ramachandran alerted the evaluating doctor that Whitney had "some organizational issues/concerns." JA22 (JSF ¶41).

Because of his neurodivergence, an OR set-up that worked for Whitney may not have looked organized to an attending, especially one without knowledge of ADHD. JA1941-42 (Whitney). Even though, in October 2018, Whitney had asked Kim (Ramachandran's deputy) to tell other attendings about his ADHD, and provide needed context, Kim never did. JA1945-46 (Whitney).

**3.** During remediation, Whitney was supervised one-on-one rather than being double-covered, and was initially denied academic credit for the first half of his CA-1 year. JA22-23 (JSF ¶¶40, 44). Whitney successfully completed remediation, however, and was again double-covered and placed on calls. JA23 (JSF ¶45). He received positive feedback, and the consensus among attendings was that he was improving. JA2209-10 (PSF ¶¶211, 215).

In the second half of his CA-1 year, Whitney successfully completed multiple rotations, including neuroanesthesia, pediatrics, general, and ICU. JA1938

(Whitney). At the end the year, the CCC evaluated Whitney at peer level, retroactively awarding him full credit for his CA-1 year. JA23 (JSF ¶47); JA2210 (PSF ¶216). The CCC minutes state that Whitney had "[i]mproved. He has positive evaluations. He did a good job on the Neuro rotation and was well-prepared." JA1127.

### C. Whitney Successfully Completed CA-2 Year, While Ramachandran and Her Deputy Sought "Something Concrete Against Him."

**1.** After being promoted to CA-2, JA23 (JSF ¶47), Whitney successfully completed rotations in fall 2019 that included ICU, general, and cardiac. JA1939 (Whitney). In December 2019, Ramachandran and her deputy (Kim) learned that Whitney had failed the "BASIC exam," which residents must pass to be certified by the American Board of Anesthesiology. JA23-24 (JSF ¶¶48, 51). Whitney took the exam without any accommodations. JA2210 (PSF ¶217). Kim texted Ramachandran "[a]t least [] Whitney failed his boards so we have something concrete against him." JA2004 (PSF ¶218). Two days later, on December 13, Whitney was informed that he had failed his obstetrics rotation from September. JA24 (JSF ¶¶53-54). The CCC did not give him credit for the first half of his CA-2 academic year. JA24-25 (JSF ¶¶56, 62).

Shortly thereafter, in January 2020, Whitney received a "conditional pass" on a repeat of the obstetrics rotation, meaning that he passed but would not take OB

calls until he passed his second OB rotation (which he did in September 2020). JA25 (JSF ¶¶63-64). Whitney then successfully completed another cardiac rotation, JA1940 (Whitney), before being transferred to COVID care with all other residents in March 2020. In July 2020, Whitney received full credit for his CA-2 year and was moved up to CA-3. JA26 (JSF ¶70); JA2212 (PSF ¶229).

**2.** Although the CCC determined Whitney had passed his CA-2 year, residency program leaders later tried to generate post hoc evaluations to make it appear otherwise. Whitney's final rotation at the end of CA-2 was neuroanesthesia, on the heels of a three-month-long elective-surgery moratorium (due to the pandemic). JA26 (JSF ¶¶65-68). Whitney was only in the OR for seven days during this rotation. JA1925 (Whitney). Whitney received positive feedback and was not informed of significant performance issues. JA109 (Whitney Declaration ¶11). His end-of-rotation evaluation, completed by Dr. Pisklakov shortly after the rotation ended, rated him between 3 and 4 (out of 5). JA27 (JSF ¶74); JA2073 (evaluation). (To the extent there are CA-year-specific standards, 3-4 equates to CA-2 or CA-3 performance. JA1897 (Ramachandran); JA1832-33 (Osborn Deposition); JA1811-12 (Chyfetz Deposition).) This is the only contemporaneous end-of-rotation evaluation for this rotation.

Nearly two months after the rotation ended, an anesthesiologist emailed Kim stating that Whitney had failed the rotation. JA26 (JSF ¶71). Two end-of-rotation

evaluations were later input into the system with lower ratings. JA27 (JSF ¶74); JA2053-2115 (evaluations). Montefiore procedures provide for only one end-of-rotation evaluation, and Ramachandran cannot explain why Whitney received three of them. JA26 (JSF ¶73); JA2211 (PSF ¶225). The head of the neuroanesthesia division could not recall another time when a resident received more than one end-of-rotation evaluation for neuroanesthesia. JA1836. The doctors who wrote these extra (more negative) evaluations did not work with Whitney during the neuroanesthesia evaluation. JA1925 (Whitney). Around the same time that these post hoc evaluations were generated, Whitney was belatedly told that he had failed the neuroanesthesia rotation from several months before. JA27 (JSF ¶¶74-75).

### D. Despite Passing Every Rotation at the Start of His CA-3 Year, Ramachandran Initiated an Attempt to Terminate Whitney's Residency.

**1.** At the outset of his CA-3 year, Whitney received more positive evaluations, including in acute pain, ambulatory surgery, and pre-admissions testing (PAT) rotations. JA2213 (PSF ¶239); JA1944 (Whitney). In September of 2020, he successfully passed his second required obstetrics rotation, JA25 (JSF ¶64), receiving a positive end-of-rotation evaluation and positive individual evaluations, JA2214 (PSF ¶243). Attendings described how Whitney's "technical skills have improved tremendously," that "he seems more confident and relaxed," that his "knowledge base has also improved," and that they were "very happy with the

progression of Dr. Whitney's performance." *Id.*; JA2136 (evaluation); JA2137-40 (evaluations); JA1876-79 (Ramachandran); *see also* JA1878 (Whitney had "performed well" and was "making appropriate preemptive clinical decision-making").

**2.** In August 2020, after his successful acute pain rotation and just a few days into his ambulatory surgery rotation, Whitney, when withdrawing drugs for a procedure, realized the clinical pharmacy system was generating the wrong patient's name and reported the issue. JA2212 (PSF ¶230); JA858 (Whitney). As part of its response, the pharmacy department initiated an audit to assess Whitney's drug-related recordkeeping. JA27 (JSF ¶77); JA260 (Kim Deposition). Ramachandran then requested an emergency "fitness for duty" drug test for Whitney, JA2010 (drug test log), falsely claiming that he was on remediation, JA2011-12 (request form). Whitney was pulled off the surgical floor and escorted to provide a urine sample. JA1932 (Whitney).

Whitney was quickly cleared of any potential wrongdoing (e.g., drug diversion). JA2213 (PSF ¶238); JA28 (JSF ¶82). The audit examined 32 procedures over 9 days in June, finding a 44% discrepancy rate. JA1933 (Whitney), JA948 (audit). Controlled substance charting discrepancies were common among anesthesiology residents, JA109 (Whitney Declaration ¶8), and the audit wrongly included cases Whitney had transferred to other residents mid-procedure, where the

transferees handled some drug recordkeeping, JA1933 (Whitney). Whitney's audit was in the middle of the pack for short-time-period audits, which have discrepancy rates varying from 11% to 29% to 100%. JA2203 (PSF ¶171); JA174 (Defendant's Rule 56.1 Reply ¶171). A later audit, after his termination, showed Whitney's discrepancy rate over a longer period was 8%, JA22025, near the purported department average of 5%, SPA4-5.

Whitney then failed his BASIC exam re-take (taken the morning after his drug test and again without accommodations). JA28 (JSF ¶87); JA2212 (PSF ¶233). Anesthesiology board guidelines specify that training time should be extended when a resident fails the exam. JA1929 (Whitney); *see also* JA984 (CCC policy allowing extension of training time). Nonetheless, when Whitney failed the exam, Ramachandran seized on the opportunity, emailing her deputies and others that they had "to decide how we are handling [Whitney]," JA29 (JSF ¶88).

Ultimately, the minor pharmacy issue had disproportionate consequences for Whitney. Not only did his performance on the board exam suffer due to his stress about the drug testing, JA2028 (Whitney testimony); JA1229-30 (ad hoc transcript); JA2212 (PSF ¶233), he was also unable to work in the OR for almost a month while the process of clearing him for duty dragged on, losing valuable hands-on training time. JA28 (JSF ¶¶80, 82, 84).

**3.** Ramachandran initiated a special CCC meeting in September 2020 that

recommended Whitney's termination. JA1815 (Delphin Deposition). The CCC also considered Whitney's moonlighting, which Ramachandran learned about after emailing her team that they needed to "handle" Whitney. JA29 (JSF ¶¶88, 93). No minutes exist for this special Whitney-specific CCC meeting, even though minutes are required by department procedure and were kept for other CCC meetings. JA20 (JSF ¶¶26-27).

**4.** Under standard procedures, an ad hoc committee independently reviews the proposed termination. JA30 (JSF ¶98); JA929. To ensure fairness, Montefiore's policy specifies that the committee "shall not include anyone who was directly involved in the underlying matters giving rise to the adverse action or who actively participated in the determination to propose or impose the adverse action." JA30 (JSF ¶99). Ramachandran helped to pick the members of the ad hoc committee, JA2215 (PSF ¶252); JA1874 (Ramachandran), including the chair, Dr. Shaparin, JA30 (JSF ¶98). Contrary to policy, Shaparin had not only participated in the CCC decision, but had voted to recommend Whitney's termination. JA30 (JSF ¶100).

Additionally, Ramachandran provided the ad hoc committee with a cherry-picked performance record. Most significantly, while the file she shared with the ad hoc committee had an extensive section concerning Whitney's previous 2019 failure of the obstetrics rotation, it omitted his positive evaluations from his successful obstetrics pass that had just occurred in September 2020. JA2215-16 (PSF ¶¶256-

257); JA1845-46 (Ramachandran).

When Whitney met with the committee, he requested accommodations for ADHD. JA30 (JSF ¶102). At one point, a committee member told him that he could not "blame everything on the ADHD." JA1227. The ad hoc committee meeting also allowed Whitney to address moonlighting. Given his uncertainty about the time period at issue and the partly remote and supervisory nature of his outside work, he was unsure whether the policy even applied. JA1926-27. Whitney now acknowledges that he violated the moonlighting policy. JA29 (JSF ¶93).

In preparing the ad hoc committee's report, Shaparin worked with Ramachandran. JA31 (JSF ¶106); JA2217 (PSF ¶¶263-264). The ad hoc committee upheld the CCC's termination recommendation. JA31 (JSF ¶104).

### E. Montefiore Agreed to Reasonable Accommodations, but Never Provided Them.

**1.** After Montefiore's lawyers got involved, the anesthesiology department suspended Whitney's termination pending provision of accommodations for his ADHD. JA2219 (PSF ¶276). (Ramachandran had predicted as much; the day after the CCC meeting recommended Whitney's termination, Ramachandran emailed a colleague: "I haven't heard back from [Montefiore attorneys] and I am sure they will bring up loopholes that will prevent us from following through with the CCC recommendation." JA2052.)

Montefiore thus acknowledged that Whitney could continue and that

remediation was possible despite failure of the basic exam, any drug discrepancy issue, and moonlighting. JA1872-73 (Ramachandran). With satisfactory clinical performance in spring 2021, along with exam passage, Whitney would have graduated on time in June 2021. JA36 (JSF ¶148). Whitney passed the BASIC exam in June 2021, the first time he took it with accommodations. JA36 (JSF ¶¶147-48).[3]

Montefiore agreed to provide the following reasonable accommodations to Whitney:

- sharing all feedback or communications about Whitney and providing him daily and specific feedback;
- "distributing information that accurately describes and represents the resident's learning style and approved accommodations";
- providing "[p]rotected breaks";
- and designating a "mutually agreed" mentor and contact person. JA2221-22 (PSF ¶¶292-293, 296); JA979-82 (failure to accommodate letter).

Ramachandran, however, was focused on building a paper trail for termination. She emailed another physician who sent negative feedback about Whitney that "he cannot graduate but we need to prove our case." JA2018. Kim told

[3] After failing the BASIC exam during his first attempt in 2019, Whitney was unable to apply for accommodations the next two tries (both in 2020) because the required in-person neurocognitive testing was not possible due to the pandemic. JA1928 (Whitney).

another resident that both "Ramachandran and me [Kim] talk sh*t about [Whitney]." JA2039 (text message). Ramachandran texted other doctors "I just want him out," JA2220 (PSF ¶286), and that she was worried that she would be "doomed to keep [Whitney]," JA2227 (PSF ¶337). Kim texted Ramachandran that their "arguments get worse if he passes" his exams. JA2219 (PSF ¶280). Consistent with her focus on "building [a] case," Ramachandran did not provide the accommodations that Montefiore had agreed to.

**2.** Whitney's accommodations period included three rotations: pediatrics, general anesthesia, and neuroanesthesia. JA33, JA35-36 (JSF ¶¶118, 133, 139, 141).

The accommodations period began on November 16, 2020, immediately after Whitney was ordered to stay home for over six weeks after the September CCC termination recommendation. JA33 (JSF ¶118); JA1930 (Whitney). (The department later claimed that this was a "reading rotation" to help him prepare for the BASIC exam, but Whitney was never informed of this and thought he was suspended. JA2175 (PSF ¶73); JA1930-31.) Whitney had already completed two pediatric rotations, JA1947 (Whitney), and did not need another pediatric rotation to graduate. According to Whitney's anesthesiology education expert witness, pediatric anesthesiology is notoriously difficult because of the especially small margin for error. JA1974. According to the expert, given Whitney's six-week absence from the OR, it was an unreasonable medical education choice to "assign[]

a resident, in the process of remediation and returning to the operating room after time away from training, to begin in pediatric anesthesia." JA1974. Whitney was deemed not to have passed this third (unnecessary) pediatrics rotation, JA33 (JSF ¶124), despite passing two prior pediatrics rotations.

**3.** Besides unreasonably starting Whitney in pediatrics, the anesthesiology department failed to deliver the agreed-upon accommodations.

**a.** Significant feedback was shared with Ramachandran directly yet never given to Whitney. For example, Whitney was assigned to a cleft palate surgery with a surgeon (Dr. Tepper) on December 16, 2020. JA35 (JSF ¶136). The surgeon inadvertently dislodged the patient's breathing tube, which was eventually re-inserted, and the procedure was safely completed without complications. JA2231-34 (PSF ¶¶355-371). Whitney performed another similar uneventful surgery with Tepper later the same day, JA2234 (PSF ¶371), received a positive daily evaluation from the attending anesthesiologist, including that Whitney had functioned at a CA-3 level and had appropriately called for help in an emergency, JA2013, and heard nothing else about the cleft-palate procedure. An anesthesiology safety expert concluded that Whitney responded appropriately. JA1966. The surgery was not reported to Montefiore's Quality Improvement team as a safety incident. Whitney remained on double coverage, indicative of a clinical judgment that he could provide care safely and appropriately as the sole anesthesiologist in the OR. JA19 (JSF ¶15);

JA2233 (PSF ¶368).

Almost two months after the surgery, at Ramachandran's request, the cleft-palate surgeon (Tepper) sent her an email stating that Whitney had failed to respond adequately to the situation. JA2232 (PSF ¶364); JA35 (JSF ¶136); JA1904 (Ramachandran); JA2020-21 (email). Although Ramachandran promised Tepper that she "w[ould] speak to the resident involved," JA2020, Ramachandran never spoke to Whitney about this surgery and never directed anyone else to speak to him. JA35 (JSF ¶138); JA1906 (Ramachandran). Despite the agreed accommodation to share feedback with Whitney, Ramachandran did not forward Tepper's email to Whitney. JA35 (JSF ¶137). The first time Whitney learned of any concern about his performance in that cleft palate procedure was when he received his termination letter. JA111 (Whitney Declaration ¶24); JA934 (termination letter April 13, 2021). Ramachandran's failure to share feedback with Whitney happened repeatedly, despite the explicit agreement otherwise. JA1954 (Whitney).

Even when feedback was timely provided, it was "begrudging and extremely cursory." JA980 (failure to accommodate letter); *see also* JA110 (Whitney Declaration ¶17). Whitney complained during the accommodations period that the feedback was inadequate. JA980 (failure to accommodate letter); JA1961 (Straker Deposition).

**b.** Such begrudging feedback is perhaps unsurprising given . Ramachandran's

failure to ever explain Whitney's learning style to attendings or provide ADHD context surrounding the feedback requirement. JA982 (failure to accommodate letter). While Ramachandran claims to have spoken to attendings, there are no contemporaneous records, minutes, or documents indicating this, and many attendings stated that during this period they did not know Whitney had ADHD or how that affected his performance. JA32 (JSF ¶114); JA2222, JA2227 (PSF ¶¶295, 332); JA110 (Whitney Declaration ¶16).

The specialized feedback accommodation was supposed to provide Whitney with more support, and attendings needed context to be able to effectively and fairly train (and evaluate) Whitney. JA2005 (case study of successful accommodations). Without the agreed explanation, it caused the opposite: attendings resented Whitney for the additional paperwork burden, JA2222 (PSF ¶299). Whitney described the attendings as "angry" because they saw the accommodations period "as something some lawyers were making them [d]o." JA1954. The mentor assigned to Whitney as part of the accommodations process claimed it was "not [her] role" to foster "more understanding from the faculty as to this accommodations process." JA1963 (Straker).

Ultimately, contrary to the supposed goal of fostering learning, the feedback was "punitive" for Whitney. JA1954. Attendings purposefully made Whitney wait for hours after his shift had otherwise ended to receive feedback. JA1948-49

(Whitney). Despite Whitney asking for privacy, attendings would provide negative feedback in front of others. JA1949 (Whitney). One doctor, irate at Whitney, told him that she was "double board certified" and did not "need somebody…making her do something because [Whitney] got [his] feelings hurt and had to get lawyers involved." JA1948 (Whitney). The upshot was a negative feedback loop that made it even harder for Whitney to focus or perform. JA1242-43, JA1252-54.

**c.** The department also paid lip service to other accommodations, undermining their purpose. Montefiore agreed to provide Whitney with a 30-minute lunch break and two 15-minute breaks to allow him to clear his mind and re-focus. JA981 (failure to accommodate letter); JA1955 (Whitney). But breaks were scheduled such that the allotted time had to be used to prepare for the next case, forcing Whitney to skip true breaks to have adequate preparation time. JA1954-57 (Whitney).

Similarly, Whitney was supposed to be assigned a mutually agreeable mentor to help provide feedback in a way more suited to Whitney's neurodivergence. JA980 (failure to accommodate letter). Instead, Ramachandran selected a mentor who had previously told Whitney that anesthesiology was not an "appropriate" field for him, JA2224 (PSF ¶¶314-315), who had accused Whitney of being "unprofessional" and "unethical," and who stated that she did not want to work with him, JA2224 (PSF ¶316).

Even when Whitney, through counsel, raised these concerns with Montefiore

during the accommodations period, his concerns were not addressed. JA979-82; JA1898-1901 (Ramachandran).

**4.** Early in the accommodations period, Ramachandran switched to (another) Whitney-specific new form, asking whether Whitney was performing at a CA-3 level. JA1894-95 (Ramachandran). Whitney was the only resident ever evaluated using this yay-or-nay metric. JA33 (JSF ¶¶121-122); JA2239 (PSF ¶409).

Asking some, but not all, attendings[4] whether Whitney was operating at a CA-3 level, the department interpreted any negative responses as a "fail." JA1951-52 (Whitney); JA2235 (PSF ¶381). Whitney's positive evaluations were also discounted by assuming they involved easier cases that did not speak to Whitney's CA-3 level. JA2236 (PSF ¶¶382-385). Any neutral was also counted as a negative: even when one attending expressed no opinion about Whitney's level, the department counted him as a "fail." JA2236 (PSF ¶386). The department even counted a positive evaluation as a "fail" because the evaluator said he would defer to other faculty members who worked more frequently with Whitney. JA1951 (Whitney). As a result of this heads-I-win-tails-you-lose method, the department determined that Whitney failed his general anesthesia rotation; had the department not discounted positive and neutral votes, the outcome would have been a tie at

[4] Whitney testified that some attendings with no performance concerns about him were not asked to provide evaluations. JA1952.

worst. JA2235-36 (PSF ¶¶381-387); JA1951-52 (Whitney).

Typically, Montefiore addressed failure to meet peer level by extending training time, not termination. Another resident, referred to as Doe, struggled with clinical performance and professionalism issues throughout his first three years of residency. JA2030 (2019 email); JA2032-33 (2018 letter); JA2034 (2017 email); JA2036-37 (2018 text messages). In his third year at Montefiore, Doe made a mistake in inserting a catheter which required the patient to be resuscitated and then changed the medical record to cover up his mistake. JA2036-37. Doe, who did not have ADHD or any other disability, was granted extensions of training time and ultimately graduated (even after his mistake nearly caused a patient's death). JA2034 (email extending CA-1), JA2032-33 (2018 remediation), JA2030-31 (2019 email). The department did not extend Whitney's training time.

**5.** Given the department's failure to provide agreed accommodations, and the *sui generis* evaluation process, Whitney failed his pediatrics and general rotations. JA33, JA35 (JSF ¶¶124, 135). This happened even though, against a stacked deck, several doctors evaluated Whitney as functioning on a CA-3 level. JA2236 (PSF ¶¶384, 387). Others found that he had shown "marked improvement." JA2239 (PSF ¶¶405, 408). Whitney's final rotation (neuroanesthesia) went well. JA2237, JA2239 (PSF ¶¶393, 407); JA1953 (Whitney). Throughout the accommodations period, the department continued to assign Whitney to double coverage. JA112 (Whitney

Declaration ¶28). As late as March 17, 2021, Ramachandran informed the chief residents that they could schedule Whitney for obstetrics call, JA2051 (text message), reflecting the hospital's judgment that he could practice safely. JA1860-61 (Ramachandran).

Nonetheless, at the end of March 2021, Ramachandran asked to schedule another special CCC meeting to discuss Whitney. JA2240 (PSF ¶414). The CCC again recommended that Whitney be terminated, again with no minutes. JA20 (JSF ¶27). The CCC determination appears to be a rubber stamp; Ramachandran asked Montefiore's lawyers for advice on a template termination letter beforehand. JA2240 (PSF ¶417). Even though Whitney had received positive evaluations noting improvement, and was on double coverage and obstetrics call, the primary reason given for termination was patient safety. JA934 (termination letter).

After the CCC's termination recommendation, Shaparin, now the interim department chair, sent a letter to Whitney terminating his residency. JA36 (JSF ¶145). Shaparin did not make an independent determination at that time as to whether Whitney should be terminated, relying instead on his pre-accommodation ad hoc committee decision. JA2148-49 (Shaparin Deposition). The April 2021 CCC termination letter was Whitney's first notice of alleged patient safety concerns from the cleft palate surgery with Tepper nearly five months prior. JA934 (termination letter).

### F. Procedural History

**1.** Whitney requested a grievance hearing under Montefiore's Hearing and Appeal Policy and Procedures. JA37 (JSF ¶150). The grievance panel was obliged to uphold the termination unless arbitrary, capricious, or without factual basis. JA37 (JSF ¶152). Ramachandran falsely stated at the grievance hearing that there had been no subsequent audit of Whitney's drug recordkeeping. JA2241 (PSF ¶423). But she had requested an audit around the time of Whitney's termination, which showed an 8% disparity rate (not the 44% reported to the grievance panel). JA2241 (PSF ¶422). Ramachandran also minimized the deficiencies of similarly situated resident Doe. JA2242-43 (PSF ¶¶431-434). The grievance panel declined to overturn Whitney's termination. JA2191 (PSF ¶115).

**2.** Whitney brought claims for disparate treatment, retaliation, and failure to accommodate under the Rehabilitation Act, the ADA, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 *et seq*. SPA1.

Montefiore moved for summary judgment on Whitney's federal claims. Because Montefiore did not contest that Whitney was otherwise qualified to perform the essential functions of his role,[5] the court's sole inquiry on Whitney's disparate treatment claim was whether discrimination was the reason Whitney was terminated.

[5] The court nonetheless opined that someone with ADHD may not be able to be an anesthesiologist. SPA18 n.5.

SPA19-20.

The district court viewed the relevant decisionmakers to be the interim head of the department and the grievance hearing panel. SPA21. Having first eliminated from its analysis the main players in Whitney's residency experience, the court then found a jury could not infer anti-ADHD animus. SPA25; SPA27. Next, applying a "cat's paw" theory, the district court reviewed some of the evidence of Ramchandran's and Kim's animus in isolation, explaining each piece away—including their lies about knowledge of Whitney's ADHD since 2018. SPA32-41.

The court also rejected Whitney's failure to accommodate claim, holding that Montefiore was not required to follow through on its promised accommodations, and that it had done enough. SPA49-51. Granting Montefiore's motion, the district court declined to exercise supplemental jurisdiction over Whitney's state law claims. SPA56.

## SUMMARY OF ARGUMENT

The question is this: If a jury returned a verdict for Whitney on this record, would the Court be compelled to set it aside? The answer is no. Here's what a rational juror could find: Residency program leadership (Ramachandran and Kim) knew about Whitney's ADHD within his first few months in the program—when he had barely had a chance to learn the field—and their immediate response was to urge him to exit anesthesiology. From that point forward, Whitney had a target on his

back. He was evaluated on an unlevel playing field and in irregular ways: unique forms focused on organizational skills; negative post hoc evaluations replacing more positive contemporaneous ones; *sui generis* up/down votes on performing at CA-3 level; and disregard for standard decisionmaking processes. Throughout it all, Ramachandran and Kim celebrated when they got "something concrete against Whitney," JA2004 (text message), worried their "argument gets worse if he passes," JA2040 (text message), fretted about legal "loopholes" that might impede his termination, JA2052 (email), and solicited documentation from attendings with concerns to "prove [their] case" (often concealing it from Whitney), JA2018 (email). And as they did and said all of this, they knew about his ADHD—but lied and said they didn't.

The district court called the lie "minor," but a reasonable factfinder could conclude that Ramachandran's snap judgment that Whitney's ADHD precluded his success was the real reason she threw out the usual procedures for evaluating clinical performance when it came to Whitney—and set him up to fail from the get-go. That ADHD lens, clouded by stereotype, became the aperture through which she viewed his performance from then on—as did other attendings, whom she primed from the first few months to scrutinize Whitney's organizational skills, while never providing needed context.

The drumbeat of the district court's decision is that clinical performance

cannot possibly be a pretextual reason for termination because there is evidence that Whitney's performance was poor. But a rational juror could find Whitney's true performance, evaluated fairly, was good enough, and did not justify termination. One expects that medical residents will receive a mix of positive and negative feedback, as Whitney did. Residency is not just a job, but an educational program. As the example of another (non-disabled) Montefiore resident (Doe) indicates, failures do not mean termination. They mean more training.

And as issues were identified, and Whitney got that training, he was meeting milestones. More milestones than Doe, in fact. Whitney passed his CA-1 year on time. (Doe did not, and was allowed to repeat his entire first year.) Whitney also passed his CA-2 year on time. He then passed every CA-3 rotation before Ramachandran initiated the termination process—setting aside one rotation where the "failing" evaluations were generated only after his termination was recommended. Montefiore kept him on double coverage and on call, reflecting his ability to practice safely. Against this backdrop, the extra negatives engineered by Ramachadran tip the balance in a way that a rational juror could find highly probative. It doesn't require a conspiracy theorist to infer that something else besides fair evaluation of performance—discrimination by stereotype—is going on here.

Far from evidencing Montefiore's fairness toward Whitney's ADHD, as the district court supposed, the department's actions after the purported grant of

accommodations only confirms Ramachandran's disability-based prejudgment. Yes, Montefiore suspended the termination and paid lip service to accommodations. But in practice, the residency program's implementation—or failure to implement—rendered the accommodations ineffective. Instead of mitigating Whitney's disability-related limitations, the sham accommodations period set him up to fail, subjecting him to a punitive evaluative environment that exacerbated ADHD symptoms rather than facilitating learning. Separate and apart from the discriminatory termination, a rational juror could find that Montefiore failed to accommodate Whitney's ADHD, an independent basis for relief.

## ARGUMENT

### I. The Standard Of Review Is De Novo.

This Court "review[s] *de novo* the award of summary judgment, construing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences and resolving all ambiguities in its favor." *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 71 (2d Cir. 2019). The record "may not properly [be] consider[ed] in piecemeal fashion," but must be reviewed "as a whole." *Porter v. Dartmouth-Hitchcock Med. Ctr.*, 92 F.4th 129, 147 (2d Cir. 2024) (emphasis and citation omitted). "[A]ll evidence favorable to the moving party that the jury is not required to believe" "must [be] disregard[ed]." *Id.* (emphasis and citation omitted). In "discrimination cases where state of mind is at issue," like this one, affirmance of

summary judgment for the employer should be "sparing[]" because "careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination." *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003) (citation omitted).

## II. A Reasonable Jury Could Find That Montefiore Terminated Whitney Because Of His Disability.

### A. Montefiore Agrees that a Reasonable Jury Could Find Every Element of a Disparate Treatment Claim but Causation.

**1.** It is undisputed, in this appeal, that (1) Montefiore is a covered employer; (2) Whitney "was disabled within the meaning of the ADA"; and (3) Whitney "was otherwise qualified to perform the essential functions of his job, with or without reasonable accommodation." *Fox*, 918 F.3d at 71; *see* SPA18. The only issue is whether a rational jury could conclude that "discrimination was the but-for cause of" Whitney's termination. *Natofsky v. City of New York*, 921 F.3d 337, 348 (2d Cir. 2019). Because Montefiore never disputed that Whitney was otherwise qualified to perform the essential functions of an anesthesiology resident, the district court's apparent belief that this element presented a "substantial question," SPA18 n.5, is legally irrelevant.[6]

[6] The district court's description of Whitney's job as "practicing anesthesia," *id.*, also blinks away the difference between Whitney's actual job—treating patients while receiving training as an anesthesiology resident—and that of an experienced anesthesiologist. As a resident still learning the field, it is unsurprising that Whitney (like other residents) received a mix of positive and negative feedback. SPA4.

**2.** On causation, the ADA and Rehabilitation Act "impose[] a 'but-for' standard." *Porter*, 92 F.4th at 148. Accordingly, summary judgment is proper only if "no rational juror could infer that [an employee] was terminated … based on [his] disability or [his] reporting activities." *Id.* at 133. Because employers "are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law," discrimination claims often "depend on proof by circumstantial evidence." *Id.* at 149 (emphasis and citation omitted). The Court applies the *McDonnell Douglas* burden-shifting approach when "direct evidence" is unavailable. *Id.* at 149 (emphasis and citations omitted).

Under that approach, once a plaintiff establishes a *prima facie* case of discrimination (assumed here, SPA19), the defendant must "'articulate some legitimate nondiscriminatory reason'" for the termination. *Fox*, 918 F.3d at 71 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). After that, the question becomes whether the asserted reason "was a pretext or discriminatory in its application." *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 807). Proffered reasons are not pretextual unless "it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Still, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation," combined with the employee's *prima facie* case. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.

133, 147 (2000).

Here, the record supports a finding of pretext and that Ramachandran and Kim, the prime movers for Whitney's termination, harbored discriminatory intent.

### B. Whitney's Clinical Performance Record Was Negatively Skewed through Procedural Irregularities.

To show pretext, an employer's assertions about an employee's performance need not be false, but only "not [the] true reasons" for the adverse action, *Reeves*, 530 U.S. at 143, including because they were exaggerated or insufficient to justify the action. *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218-19 (10th Cir. 2002). Montefiore gave three contemporaneous reasons for Whitney's termination: clinical performance, medical knowledge (*i.e.*, exam failures), and moonlighting. JA934-35 (termination letter). The district court granted summary judgment based on a slightly different list that added "mismanagement of patient records" while omitting moonlighting. SPA42. A reasonable juror could find either list pretextual.

Procedural irregularities are strong evidence of pretext. *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 313 (2d Cir. 1997). At every stage, Whitney's clinical performance record was shaped by irregular procedures to create the impression of widespread clinical failures, exaggerating intermittent performance difficulties that were in the process of improvement and did not justify termination. Procedural irregularities included belated negative feedback inconsistent with contemporaneous positive evaluations; unique evaluation forms and methods; a host

of deviations from the normal decisionmaking process; and an accommodations period designed for failure. The district court gave them short shrift, discounting nearly all of them as "banal" in a single footnote, SPA38-39 n.10, but a jury could view them differently.

***1. Whitney often received procedurally irregular, post hoc feedback.***

"[I]f an employer has a policy or procedure that governs a specific situation but fails to adhere to the same in taking an adverse employment action," then "it might be inferred that the reason articulated for taking the adverse employment action against the employee was not true." *Taite v. Bridgewater State Univ., Bd. of Trs.*, 999 F.3d 86, 97 (1st Cir. 2021).

This principle applies if the irregular procedures exaggerate negative feedback, even if there is some basis for it. For example, the Tenth Circuit held that an employee sufficiently established pretext at summary judgment, notwithstanding past "concerns about efficiency and productivity," because his supervisors had "inflat[ed] and exaggerat[ed] long-standing critiques of his performance." *Garrett*, 305 F.3d at 1218-19. The same inference can be drawn here.

Despite prior feedback on areas for clinical improvement—to be expected for a medical resident—the CCC still determined that Whitney successfully completed his CA-1 and his CA-2 years. He had also received passing grades on all the rotations he completed at the beginning of his CA-3 year, before the initial termination

decision. *See* pp. 8-11 *supra*. Given this backdrop of meeting standards, a rational jury could find that the termination process rested on negative feedback that was "inflated" and "exaggerated" to justify termination.

Procedural departures that produce a post hoc paper trail are particularly probative. *See Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 477 (5th Cir. 2015) (holding factfinder could infer age discrimination where, *inter alia*, employee was not given four written warnings for prior incidents until the day he was fired, permitting inference that "employer manufactured steps in the disciplinary policy … to paper his file after it had decided to fire him"). A reasonable jury could find that when contemporaneous feedback did not fit Ramachandran's and Kim's goal of obtaining something "concrete against" Whitney, JA2004 (text message), and "prov[ing] [the] case," JA2018 (email), Ramachandran's modus operandi was to keep soliciting feedback until she obtained the negative paper trail she was looking for, and to hold it close until deployed in support of an adverse action. Post-hoc negative feedback demonstrates pretext because it gives the employee "neither notice nor the opportunity to attend to the factors that allegedly caused" the negative evaluation. *See Garrett*, 305 F.3d at 1220.

Two examples of Whitney's treatment illustrate this irregularly skewed approach to evaluations. Imagine an administrator focused on terminating someone. Facing a problem where timely end-of-rotation evaluation for neuroanesthesia are

too positive, JA2053-73, what might she do? Try again (twice) until desired negative feedback is secured, using evaluators who did not even work with Whitney during the rotation. JA2074-2115; JA1925 (Whitney). Better yet, complete the latter two (negative) evaluations only after the decision to terminate Whitney (and don't tell him until then, either). JA27 (JSF ¶¶74-75). Such actions are highly irregular. Policy dictates only one end-of-rotation evaluation, JA26 (JSF ¶73), there is no explanation for why Whitney received three, JA2211 (PSF ¶225), and the head of neuroanesthesia cannot recall this ever occurring for anyone else, JA1836. The district court acknowledges part of this evidence, SPA9, then ignores it. But a jury could find it significant. Other than obstetrics, which Whitney failed once but successfully completed twice before Ramachandran initiated the termination process, this neuroanesthesia rotation is the only "failed" rotation before the initial termination—if evaluations post-dating the termination could even count.

Feeling "doomed" to keep Whitney, JA2050 (text message), and want to turn the cleft-palate incident that was contemporaneously documented as a safely completed molehill into a mountain? Set aside the contemporaneous feedback deeming Whitney's performance a success. JA2013. Solicit an email that exaggerates or distorts what occurred, two months later, JA2232 (PSF ¶364); JA2020-21—but make sure not to share it with Whitney, JA35 (JSF ¶137), despite an explicit promise to share such feedback as a reasonable accommodation to his

ADHD, JA981 (failure to accommodate letter). The district court insisted that seeking "feedback about this disquieting incident" was wholly innocent. SPA35. But calling it "disquieting" yet again construes the record in favor of Montefiore. Contemporaneous feedback indicated it was a minor incident that Whitney handled well. A reasonable jury could infer that Ramachandran was soliciting, and concealing, a different, belated report as part of her self-described request for emails to "prove [her] case," JA2018 (also soliciting an email documenting concerns about Whitney).

It might be reasonable to infer, as the district court did, that Ramachandran's interest in "prov[ing] [the] case" is completely aboveboard, SPA34-35. But it would be equally, if not more, reasonable to infer that Ramachandran was specifically requesting follow-up emails to buttress Whitney's termination as part of a "sudden and unprecedented campaign to document [Whitney's] deficiencies and thus justify a decision that had already been made," which can "raise an inference of pretext." *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 236 (5th Cir. 2015).

### 2. *Whitney was often evaluated using sui generis evaluation forms and methods.*

For significant evaluations, "having a fair across-the-board process matter[s]." *Taite*, 999 F.3d at 96. When a member of a protected class is subject to one procedure, and others are subject to a different procedure, such "irregularities in the … process" can support a finding of pretext. *Id.* Ramachandran routinely singled

Whitney out for special procedures. First, special evaluation forms focused on ADHD-related traits, *see* pp. 6-7, *supra*. Then, Whitney-only evaluation forms requiring a "yes/no" vote on whether he performed at a CA-3 level. JA33 (JSF ¶117); *e.g.*, JA1985 (example evaluation). Other residents were not evaluated with forms like these. JA33 (JSF ¶¶121-22). The promised accommodations in no way justified this unique thumbs up/thumbs down evaluation metric. *See* JA979-82 (failure to accommodate letter).

The district court rejected Whitney's arguments about the CA-3 evaluation because Whitney stipulated that residents are evaluated on how well they've achieved milestones based on their level of training. SPA38. But the issue isn't *whether* residents are evaluated by level, but *how*. There is a qualitative difference in evaluating a resident from 1 to 5 across a host of different milestones (on which a resident might do better in some areas, and worse in others, and then average to a CA-3 level), versus a flat "yes/no" on whether the resident is performing at a CA-3 level. *Compare* JA1832-33 (describing standard process), *with* JA1985 (special form). Ramachandran's Whitney-specific thumbs up/thumbs down approach fed directly into procedural debacles like the general anesthesia voting tally, where positive evaluations could be discounted on the blackbox theory that the cases weren't sophisticated enough, and neutral evaluations could be coded as fails, *see* pp. 21-22, *supra*—all with the goal of Whitney's failing the accommodations period.

***3. Whitney's termination process violated Montefiore's procedures.***

Whitney's termination process also flouted Montefiore's procedures. Despite CCC minutes being required, there are no minutes of either CCC decision recommending termination. JA20 (JSF ¶¶26-27). The Ad Hoc committee that reviewed the CCC's initial termination decision was not independent, as Montefiore's policy required, because Shaparin—its chair, selected by Ramachandran—had already voted to recommend Whitney's termination. JA30 (JSF ¶¶98-100); JA2215 (PSF ¶252); JA1874 (Ramachandran). And the committee considered a gerrymandered performance record (compiled by Ramachandran) that emphasized his failure of his first OB rotation while excluding positive evaluations from the second OB rotation he passed just the month before. JA2215-16 (PSF ¶¶256-257); JA1845-46 (Ramachandran). The district court shrugged all of this off. SPA38-39 n.10. But viewed in context of the many other corners cut to secure Whitney's termination, a jury could reasonably infer that these deviations were designed to ensure (and conceal, given the missing minutes), a manipulated decisionmaking process.

***4. Whitney's accommodations period set him up to fail.***

Finally, a factfinder could reasonably infer that Montefiore set Whitney up to fail during the accommodations period. Even though Whitney didn't need to complete an additional pediatrics rotation to graduate, JA1947 (Whitney), and even

though starting with pediatrics was an unreasonable medical education decision, JA1974 (expert report), Montefiore began Whitney's accommodations with pediatrics. The district court dismissed the relevance of an expert opinion on this pedagogical choice. SPA26 n.7. But such evidence is probative of whether Montefiore "made it impossible for [Whitney] to succeed upon [his] reinstatement." *Allen v. U.S. Postal Serv.*, 63 F.4th 292, 303 (5th Cir. 2023) (finding evidence of performance "sabotage" where supervisors assigned employee "different routes, making it difficult for her to learn and deliver one route"). A reasonable juror could (again) infer that Whitney was set up to fail.

### C. Other Asserted Reasons for Termination Were Also Pretextual.

**1.** Montefiore's termination letter mentioned Whitney's exam failures, but also specified that the consequence of a three-time exam failure would be a six-month extension of Whitney's training time, not termination. JA935. In response to Kim's question whether Whitney had to "pass or get kicked out," Ramachandran said she thought not, but was "doomed to keep him." JA1882 (Ramachandran), JA2049-50 (text messages); *see also* JA2029 (Ramachandran's text that she was "stuck with him for another 6 months" due to exam failure). And because Whitney passed the exam in June 2021—the first time he took it with accommodations—the exam would not even have stopped him from graduating on time. JA36 (JSF ¶¶ 147-48). No giant leap is required to find Whitney's earlier exam failures were make-

weights.

**2.** As for moonlighting, the district court did not mention it as a legitimate reason justifying the termination, with good reason. *See* SPA42. Although it was noted in the initial termination recommendation, JA30 (JSF ¶103), Whitney's termination was then suspended to allow him to demonstrate clinical performance with accommodations, JA32 (JSF ¶¶108, 112). A reasonable jury could therefore infer that moonlighting did not itself justify termination, and did not actually motivate the decision. *See Burton*, 798 F.3d at 234, 237 (an employee's "substantiated shortcoming" does not defeat pretext when the employee "worked an additional six months after the incident" and the incident was included as part of the termination rationale, but not "proffered as an independent basis for termination").

**3.** The final reason given by the district court justifying the termination—Whitney's purported patient record discrepancies—was not even mentioned in the termination letter. Here again, Montefiore's decision to suspend Whitney's termination notwithstanding any recordkeeping issues permits discounting recordkeeping discrepancies as a true reason for termination.

The district court relied mainly on one incident—a pharmacy audit in August 2020. JA28 (JSF ¶81). But a reasonable juror could find the audit discrepancy rate (44%) was not outside the norm. Other similar audits found discrepancy rates of 11%, 29%, and 100%. JA2203 (PSF ¶171). The district court wrongly discarded

them as "particular audits," SPA5 n.2, because Whitney's was a "particular audit," too. In focusing on the purported 5% departmental average, *see* SPA4, SPA29, the district court compared a long-term-average apple to a short-term-audit orange. The jury need not do so (plus it could decline to credit Ramachandran's 5% average estimate altogether, given her testimony that she does not see the department's drug audits, JA1911-12). When apples are compared, Whitney's post-termination audit showed an 8% discrepancy rate, far closer to the purported department average of 5% (which covers residents and attendings with decades of experience alike). By doing its own (wrong) weighing of the evidence on discrepancy rates, the court, again, stepped into the jury's shoes.

### D. A Rational Juror Could Find that Discrimination Was the Real Reason for Whitney's Termination Given Residency Program Leadership's Immediate Negative Reaction to Whitney's ADHD Disclosure and Subsequent Cover-up.

Although pretext is alone enough to support a finding of discrimination, *Reeves*, 530 U.S. at 147, there is more evidence of discriminatory intent here.

#### *1. The district court appropriately focused on Ramachandran and her deputies under a "cat's paw" theory.*

Under a "cat's paw" theory, "an employer may be held liable for the animus of a supervisor who was not charged with making the ultimate adverse employment decision but who was relied on by the decisionmaker." *Porter*, 92 F.4th at 159. The district court properly postulated that such liability is applicable under the ADA and

Rehabilitation Act. SPA29-32.

"Cat's paw" doctrine emerged in discrimination cases subject to a "mixed motive" standard of causation, and the Court has yet to hold that it applies to claims under the ADA and Rehabilitation Act, *Natofsky*, 921 F.3d at 351. Still, the Court has applied it to Title VII retaliation claims, which similarly require but-for causation. *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272-73 & n.4 (2d Cir. 2016). Other courts of appeals have applied it to ADA claims and other claims requiring but-for causation. *See, e.g.*, *Sandefur v. Dart*, 979 F.3d 1145, 1154 (7th Cir. 2020) (ADA); *Bledsoe v. Tenn. Valley Auth. Bd. of Dirs.*, 42 F.4th 568, 582 (6th Cir. 2022) (age discrimination). Correctly. Cat's paw liability avoids an otherwise unwarranted huge gap in disability discrimination law, SPA32, because an employer's authority "to reward, punish, or dismiss is often allocated among multiple agents." *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011).

If Ramachandran and her deputies, despite not being the final decisionmakers, "desired [their] actions to cause, or knew that [their] actions were substantially certain to result in, adverse employment action for [Whitney]," and took those actions because of Whitney's disability, that establishes discriminatory intent. *See Vasquez*, 835 F.3d at 272 n.4. A reasonable jury could find Ramachandran and Kim harbored such intent.

### 2. *Ramachandran and Kim's lies about their longstanding knowledge of Whitney's ADHD are strong evidence of discriminatory intent.*

A factfinder could conclude that Ramachandran and Kim knew about Whitney's ADHD by October 2018, in his first residency year, and they lied when they claimed ignorance of it until the ad hoc committee met two years later. JA1852 (Ramachandran); JA1821-22 (Kim). A contemporaneous recap email, forwarded to Ramachandran and Kim, documents that Whitney discussed his ADHD with Ramachandran in October 2018 when they met to discuss his performance. JA1999-2001. He also asked Kim for accommodations for his ADHD around the same time. JA1946 (Whitney).

What's more, the content of the ADHD-related conversation that Ramachandran lied about is probative. As Whitney told the ad hoc committee, after he told Ramachandran about his ADHD, he was told "some people aren't cut out for anesthesia," JA1252-53. Whitney was not even four months into a three-year residency when Ramachandran, in the same meeting where she learned about his ADHD, urged him to "reconsider [his specialty] over and over again." JA2001 (contemporaneous email).[7]

---

[7] The district court uses "animus" or "hostility" as shorthand, *e.g.* SPA43, but discriminatory intent need not reflect antipathy toward the protected group. Rather, a supervisor who prejudges an employee incapable by reason of disability—*i.e.*, who holds the belief that ADHD is incompatible with being an anesthesiologist—and then takes an action against an employee based on that prejudgment, has

There is also persuasive evidence that Ramachandran and Kim took actions intended to result in Whitney's termination because of his ADHD. As soon as they learned of Whitney's ADHD, Ramachandran and Kim:

- Developed Whitney-specific forms that focused evaluators on ADHD-associated traits and primed evaluators to watch out for his "organizational issues" in CA-1 (which Whitney passed), JA22 (JSF ¶¶40-41);
- celebrated obtaining something "concrete against him" in CA-2 (passed, again), JA2004 (text message);
- manipulated the record before the CCC and ad hoc committee in September 2020 (after he passed all his CA-3 rotations to that point), *see* Section II.B, *supra*, including picking a committee member who told Whitney he shouldn't "blame everything on the ADHD," JA1227;
- were hoping in October 2020 he would fail the BASIC exam because their "arguments get worse if he passes," JA2040 (text message);
- failed to provide Montefiore's granted accommodations, and did not follow up on Whitney's concerns that the accommodations were not being implemented, while being concerned about "need[ing] to prove [their] case," *see* Section IV,

---

discriminated "on the basis of" disability. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001) (ADA "protect[s] disabled individuals from discrimination 'based on prejudice, stereotypes, or unfounded fear.'" (citation omitted)).

*infra*;

- and repeatedly reiterated their frustration in late 2020 that they were "doomed" to keep "freaking RW" and "stuck" with him, JA2050; JA2048; JA2029.

Concluding that Ramachandran and Kim deliberately lied about their knowledge of Whitney's ADHD, the next question is why? It's reasonable to infer that they lied to conceal how Whitney's ADHD motivated them to build their case for termination. Just as a finding of pretext can permit a discrimination finding, because "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose," inferring discriminatory intent from dishonesty about knowledge of disability "is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves*, 530 U.S. at 147.

Deeming Ramachandran and Kim's lie Whitney's "strongest evidence," the district court then discounted it as a mere "litigation falsehood" about a "minor discrepanc[y]." SPA39-40. But that usurps the weighing function of the jury, who could find that the falsehood covers up the intent behind the procedural irregularities and goes to the heart of the case.

The district court's other reasons for discounting the lie fail to pass muster, yet again overriding a jury call. Principally, the district court relies on purportedly

objective negative feedback from others. SPA40-41. But even though Whitney received some objective negative feedback (as any resident in training would), it's reasonable to infer that Ramachandran and Kim judged Whitney more harshly, and manipulated procedures and his performance record to make his performance appear worse than it was, because of his ADHD. *See* Section II.B, *supra*.

As for Ramachandran giving Whitney "positive comments" and removing him from remediation, the evidence supports that she did so because his good performance forced her to (despite her attempt to sink him with ADHD-focused evaluations), especially given Kim's later celebratory text to her when they were able to obtain something "concrete against him," JA2004 (the first exam failure).

Finally, Ramachandran's hostility to legal "loopholes," JA2052, and willingness to subvert the granted accommodations, Section IV, *infra*, speak volumes. Although the district court ascribed benign motives—or mere "personal hostility" toward Whitney—to Ramachandran's solicitation of negative feedback and focus on "prov[ing] our case" during the accommodations period, SPA34-36, a reasonable juror need not do so. *See Kelley v. Corr. Med. Servs.*, 707 F.3d 108, 116-117 (1st Cir. 2013) ("[D]iscriminatory animus is a reasonable inference" from evidence that supervisor "was repeatedly hostile to any accommodation of [an employee's] disability.").

### *3. Montefiore extended training for a non-disabled resident with worse performance, rather than terminating his residency.*

Evidence that Ramachandran treated Whitney more harshly than a similarly situated but non-disabled resident is also strong probative evidence of discrimination. *See Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000). "Whether two employees are similarly situated ordinarily presents a question of fact for the jury." *Id.* The record does not support the district court's view that there was no "'objectively identifiable basis for comparability.'" SPA29 (quoting *Graham*, 230 F.3d at 40).

A jury could reasonably find that Doe struggled with clinical performance throughout all three (plus) years of his clinical residency. Doe was denied credit for his entire first CA-1 year (2016-2017) because he was lagging in clinical skills and medical knowledge, and had his training extended by a year so he could repeat CA-1 year. JA2034 (2017 email). In Doe's second CA-1 year (2017-2018) (which the district court errantly deems his "first year of … residency," SPA12), he was put on two months of remediation for failures related to patient care, technical skills ("unable to perform basic tasks"), and professionalism ("[s]erious questions … about [his] honesty and credibility"). JA2032-33. Then, in his third year of residency (officially, his CA-2 year, 2018-2019), Doe made a mistake with a catheter that caused a patient to "code" (requiring resuscitation), changed a patient chart to try

and cover it up, then lied about it. JA2036-37.[8] After three OB rotations, Doe was assessed as "[s]till not at the level that he can safely and reasonably practice OB anesthesia even on a mediocre level." JA2030-31 (2019 email). Despite some discussion of terminating his residency, JA2037 (Kim and Ramachandran text messages), Doe was allowed to graduate in 2020, JA38 (JSF ¶161).

A reasonable jury could conclude from this evidence that Doe was a similarly situated resident whom Montefiore treated more favorably, because Doe and Whitney were "subject to the same workplace standards" and Doe's conduct was of "comparable seriousness," *Graham*, 230 F.3d at 40, if not graver. The district court's reasons for rejecting the comparator fall flat.

First, it is legally immaterial that Shaparin (who signed Whitney's termination letter) and the grievance hearing panel were not involved in Doe's case. SPA27-28. Under a cat's paw theory, the relevant actors are the subordinates who harbor discriminatory intent (here, Ramachandran and Kim). *See Morris v. BNSF Ry. Co.*, 969 F.3d 753, 763 (7th Cir. 2020). Both were the prime movers in determining Doe and Whitney's fate, *see, e.g.*, JA2032-33 (letter from Ramachandran); JA2034 (email from Ramachandran); JA2036-37 (text messages).

---

[8] Ramachandran testified someone else changed the chart, but a jury need not credit that testimony. JA2243 (PSF ¶¶ 433-434). Especially because this was not the only incident where Doe improperly altered a patient's chart. JA2035. Yet the district court credited Montefiore's evidence that chart alteration would be a "fireable offense" in Whitney's case. SPA29.

What's left of the district court's reasoning improperly weighs the evidence and draws improper inferences against Whitney. The district court concluded the two residents' paths did not bear "a reasonably close resemblance" because Doe received critical feedback "at the start of his residency" whereas "Whitney's flunks" persisted. SPA28. But Doe, unlike Whitney, failed his entire first year (which he was then allowed to repeat), and his significant failures extended well into his third year at Montefiore. JA2030-31 (2019 email). Montefiore provided him multiple chances to stay and complete the program.

As for the district court's reasoning that Whitney's deficiencies were "arguably materially more serious," SPA29, an "arguable" conclusion is reason to deny, not grant summary judgment. The district court simply missed record evidence of Doe's professionalism deficiencies similar to (or worse than) those lodged against Whitney. JA2032-33 (letter documenting Doe's professionalism issues); JA2036-37 (text messages about Doe's attempted cover-up). And on patient safety, an objective basis for comparability, a patient almost died and had to be resuscitated from Doe's mistake in his third year at Montefiore. Nothing remotely similar happened to Whitney, in his third year or otherwise.

### E. "Neutral" Decisionmakers Did Not Rehabilitate an Unfounded Termination Decision.

The district court focused substantial attention on the final decisionmakers in the long process, shepherded by Ramachandran, to terminate Whitney. SPA22-27.

But a reasonable juror could easily find those final steps to be mere formalities in a chain of events started by Ramachandran in Whitney's first year, when she learned of his ADHD and decided it was disqualifying.

**1.** Shaparin, the interim department chair, was the formal decisionmaker for Whitney's termination. JA36 (JSF ¶145). The district court held Shaparin himself harbored no discriminatory animus. SPA22-25. But Whitney also based his claim on Ramachandran's and Kim's discriminatory intent, under a cat's paw theory. SPA29-30. What matters is whether Ramachandran and Kim's actions proximately caused Whitney's termination, *see Staub*, 562 U.S. at 422; *Vasquez*, 835 F.3d at 582, a question the district court did not assess.

A jury may infer proximate cause "[w]hen a decisionmaker relies on a biased employee's knowledge about the employee." *Bledsoe*, 42 F.4th at 582. That inference is strong here. Ramachandran called for the CCC meeting that recommended Whitney's termination, obtained a termination template before the CCC met, and filled out the Whitney-specific information in the letter that Shaparin signed. JA36 (JSF ¶143); JA2240 (PSF ¶¶417-418). Going backwards in the causal chain, Ramachandran (along with Kim) violated procedure after procedure to build a skewed record of overly negative evaluations and speed Whitney's case to termination. *See* Section II.B, *supra*. A rational factfinder could find Ramachandran's animus-based "act[s] w[ere] allowed to influence the employer's

decision to fire [Whitney]." *Porter*, 92 F.4th at 160.

**2.** The district court wrongly viewed Montefiore's hearing panel's affirmance of the termination as "highly probative" of the absence of discriminatory intent, SPA27, failing to grapple with the hearing panel's narrow standard of review, the biased paper performance record, and how Ramachandran continued to manipulate the record against Whitney even during her hearing testimony.

First, though the district court relied on *Collins v. New York City Transit Authority*, 305 F.3d 113 (2d Cir. 2002), Montefiore's hearing panel's remit was much narrower than the arbitration process there, which was established to "deprive the Transit Authority of the power to terminate an employee unilaterally." *Collins*, 305 F.3d at 119. By contrast, Montefiore's hearing panel exercised arbitrary and capricious review, JA37 (JSF ¶152), a critical fact the district court ignored. What's more, the hearing panel necessarily considered, in addition to testimony, a paper performance record shaped by Ramachandran's animus and procedural violations. *See, e.g.*, JA1977 (hearing panel has been given "all of the evaluations").

Finally, though the district court asserted there were no "irregularities" in the panel process, SPA25, a reasonable jury could find that Ramachandran manipulated the record before the hearing panel, for example by falsely denying that Whitney's drug recordkeeping had been audited a second time (with much better results), JA1913-14 (Ramachandran); falsely testifying that the comparator, Doe, was not

involved in an incident that almost caused a patient's death and that his issues were solely related to clinical performance, JA1839-43 (Ramachandran); and disclaiming that Whitney told her he had ADHD in their 2018 meeting, JA1980. Yet again minimizing the import of Ramachandran's false statements, the district court ignored the reasonable inferences—that the hearing panel decision was tainted by, rather than cleansing, Ramachandran's actions that engineered Whitney's termination because of his ADHD.

## III. A Rational Juror Could Find That Montefiore Retaliated Against Whitney For His Protected Activity.

As the parties agreed, Whitney's retaliation claim rises and falls with his disparate treatment claim. SPA44.

Whitney engaged in two forms of protected activity in October 2020, requesting an accommodation and filing a charge with the EEOC. SPA45. Montefiore generally, and Ramachandran specifically, knew about that protected activity before or around the time that the accommodations period started. JA30, JA33 (JSF ¶¶102, 119). The district court wrongly held no retaliation because Montefiore provided accommodations rather than terminate Whitney. SPA46. But the court's reliance on the accommodations period fails because a reasonable jury could infer intentional retaliation from the sham accommodations period, especially given Ramachandran's hostility to legal "loopholes" that would prevent Whitney's termination, JA2052, while she was "doomed" to keep Whitney, JA2050. The

judgment on Whitney's retaliation claim should also be reversed.

## IV. A Rational Juror Could Find That Montefiore Failed To Accommodate Whitney's ADHD.

### A. The District Court Applied the Wrong Legal Standard to Whitney's Failure-to-Accommodate Claim.

**1.** The ADA "require[s] an employer to provide a reasonable accommodation for an employee's disability unless the accommodation would impose an undue hardship on the employer." *Tafolla v. Heilig* , 80 F.4th 111, 118 (2d Cir. 2023); 42 U.S.C. § 12112(b)(5)(A). A *prima facie* failure-to-accommodate claim requires showing (1) the employee "is a person with a disability under the meaning of the ADA"; (2) a covered employer "had notice of his disability"; (3) with "reasonable accommodation, [the employee] could perform the essential functions of the job"; and (4) the "employer has refused to make such accommodations." *Tafolla*, 80 F. 4th at 118 (citation omitted). No "proof of discriminatory intent" is required. *Brooklyn Ctr. for Psychotherapy, Inc. v. Philadelphia Indem. Ins. Co.*, 955 F.3d 305, 312 (2d Cir. 2020). When failure to accommodate "leads to discharge for performance inadequacies resulting from the disabilities, [it] amounts to a discharge solely because of the disabilities." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995).

Montefiore disputed only the fourth element: that it had refused to make reasonable accommodations, SPA48, arguing that Whitney's claim failed because

he received requested accommodations and any variances were immaterial. *See* Defs. Mot for Summ. J., Dkt. 64, at 27-28.

**2.** Setting aside the issue as framed by the parties, the district court miscast Whitney's claim as "whether Montefiore provided Whitney with *all* of his proposed accommodations." SPA49. Observing that the ADA does not require granting every request, the court analyzed only whether the accommodations Montefiore did provide were "plainly reasonable." SPA49 (quoting *Noll v. Int'l Bus. Machines*, 787 F.3d 89, 94 (2d Cir. 2015)).

That is the wrong test (on which the court's answer was wrong, too). What matters is how Montefiore's accommodations compare to what Montefiore *agreed* to provide. In *Noll*, the employer did not even purport to grant a deaf employee's requested accommodation (immediate closed captioning on work videos) but granted an alternative (sign language interpreters). *Id.* at 93. In that context, the Court held the only issue was whether the alternative accommodation was "plainly reasonable." *Id.* at 94.

Whitney's claim is not about substitution of alternatives, but rather about Montefiore's failure to provide accommodations that it already agreed to as both reasonable and effective (if implemented). When an employer has already granted an accommodation, the question is whether a jury could find the employer's deficient implementation "ma[de] the accommodations ineffective." *Porter*, 92

F.4th at 155. The district court backhanded this inquiry, insisting that it was legally irrelevant whether Montefiore "ke[pt] its promises." SPA51. This misunderstands the law.

Montefiore's contemporaneous agreement that the promised accommodations were reasonable and effective has legal import. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400-01 (2002) (A "reasonable accommodation" must be effective, meaning it will "*accommodate* a disabled individual's limitations."). A rational juror can infer from that agreement (as well as other evidence justifying the accommodations, *e.g.*, JA2005-08 (case study)), that it would be ineffective to provide accommodations substantially less than what the employer itself initially agreed to. *See Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 189 (2d Cir. 2015) (medical leave that left only two weeks for study was not an effective accommodation where medical school typically offered six- to eight-week study leaves). The question is thus not whether an employer was "perfect," but whether failure to deliver granted accommodations—*i.e.*, to keep its promises—rendered the accommodations "ineffective," *Porter*, 92 F.4th at 155. Montefiore's sham approach not only rendered the accommodations ineffective, but worse, made them counterproductive.[9]

[9] The district court gave Montefiore high marks because it purportedly "surpassed its legal obligations" by suspending Whitney's termination. SPA50. The district court's sunny view that Montefiore suspended termination as an act of grace rather

### B. A Reasonable Jury Could Find Montefiore's Failure to Deliver Agreed Accommodations Rendered Them Ineffective.

**1.** Beyond denying the legal relevance of Montefiore falling far short of its granted accommodations that it acknowledged as reasonable and effective, the court also held, in the alternative, that Montefiore did not breach its promises. SPA51-54. A rational jury could find otherwise—and that the failures rendered the accommodations ineffective, again making summary judgment improper. *See Porter*, 92 F.4th at 155. An ineffective accommodation is one that does not, in fact, remove the disability-related barrier to an individual performing essential job functions. *See Barnett*, 535 U.S. at 400; *Noll*, 787 F.3d at 95. For example, providing written notes rather than a sign language interpreter is not effective where a deaf employee has difficulty understanding written communication. *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1111-13 (9th Cir. 2010). Montefiore's "accommodations," as implemented, flunk the effectiveness test.

**a.** For starters, a reasonable juror could find that Montefiore did not, as it had agreed, distribute information to other attendings about Whitney's learning style related to the approved accommodations. JA982. The district court wrongly held there was not agreement to do so. SPA52-53. But evidence cited by the district court

---

than a legal calculus is disputable. *See* SPA23. Nor does an exercise of some favorable discretion excuse an employer's failure to provide reasonable accommodations.

included specifics listed under the heading "Distributing information that accurately describes and represents the resident's learning style and approved accommodations," and Montefiore did not state that it was denying this accommodation, as it did for others. *Compare* JA975, *with* JA974.

In *Tafolla*, the Court considered a similar kind of ambiguity. 80 F.4th at 120-22. There, the employer argued it granted an employee's accommodation, but the Court held that a reasonable jury could read an ambiguous request as seeking two distinct accommodations (only one of which was granted), precluding summary judgment. *Id.* at 121. So, if there is any ambiguity in the scope of agreed accommodations, it must be resolved in Whitney's favor at summary judgment. Whether ambiguous or clear, even Ramachandran appeared to believe that Montefiore had agreed to distribute this information, testifying that, to meet this accommodation, she told attendings "not to interrupt [Whitney], to ask him when ... directives had to be done," described the accommodations, and explained that they were for his ADHD. JA1887. The problem is that a jury could find Montefiore did not, in fact, distribute the explanatory information Ramachandran claimed. No emails or calendar items document the purported calls that Ramachandran asserted she had with attendings on these topics. JA2221-22 (PSF ¶294). Several anesthesiology attendings were not aware that Whitney had ADHD until after his termination or recalled no conversation with Ramachandran about ADHD in relation

to the accommodations. JA32 (JSF ¶114); JA2227 (PSF ¶332); JA1827-28 (Osborn). Ramachandran admits, moreover, that she did not distribute information on Whitney's learning style. JA1888.

Ramachandran blames Whitney for not providing the requisite information, JA1888, yet acknowledges Whitney provided a case study about successful accommodations for an anesthesiology resident with ADHD. JA1979 (Ramachandran hearing testimony). Ramachandran also obtained the names of Montefiore experts, but never followed up. JA2219 (PSF ¶278). That was her job, not Whitney's. *Cf. Tafolla*, 80 F.4th at 123 (holding that a jury could find employer terminated the interactive process by, *inter alia*, not "seek[ing] clarification from [the employee] or her doctor").

Most probative, how attendings reacted to the feedback accommodation suggests they never were told why more feedback was needed—and also illuminate how lack of context rendered the feedback accommodations ineffective. Whitney testified that attendings were angry about extra work; they used feedback punitively, for example forcing him to extend his workday; and none indicated that they understood the purpose of the feedback. JA110 (Whitney Declaration ¶16).[10] A

[10] Because Whitney testified he got feedback "most days" and it was "fine," the district court unreasonably inferred that Montefiore must have explained the accommodations. SPA53. But Whitney also testified that attendings had no "level of understanding" and viewed feedback requirements as "some punitive experience" and "something some lawyers were making them [do]." JA1954.

senior attending described feedback as a task imposed simply because Whitney "got [his] feelings hurt." JA1948 (Whitney). In response to Whitney's contemporaneous concerns on this point, Ramachandran explained nothing more to the attendings, but simply doubled down on "stress[ing] to them that these accommodations were required." JA1900-01 (Ramachandran).

Accordingly, the extra feedback, rather than removing barriers for Whitney, made things worse. As Whitney explained to the ad hoc committee, "increased scrutiny" and a "high stakes" "evaluative process" exacerbated his stress and ADHD symptoms and negatively affected his performance. JA1241, 1251-52, 1807-1808. What was supposed to be a supportive exercise in helping Whitney to address any ADHD-related challenges was transformed into to a targeted and punitive daily scolding about whether he met CA-3 criteria. *See* JA1985 (evaluation).

**b.** Montefiore also failed to provide all types of feedback it had agreed to as reasonable accommodations. The district court treated feedback as a monolith, SPA53, but Montefiore agreed to provide three distinct forms: daily feedback on time management and prioritization, daily case debriefing, and copies of written/emailed feedback about Whitney. JA980-81. As Montefiore acknowledged, Defs. Mot for Summ. J., Dkt. 64, at 28, Whitney testified that Montefiore failed to provide copies of feedback about him sent to Ramachandran, JA1924; JA1954, a concern that he also raised contemporaneously, JA981 (failure to accommodate

letter). He expressly exempted that feedback from his comment about "fine" daily feedback that the district court seized on, SPA53, explaining "I mean, I didn't get any email … nonconfidential email communication … regarding me," JA1954. In relying on scattered evidence of daily feedback and case debriefing or mentor meetings to grant summary judgment, SPA53, the district court mixed apples and oranges.

The "off the books" feedback Ramachandran failed to provide was crucial because Ramachandran testified that some attendings would email her rather than putting negative feedback into New Innovations, the evaluation system of record. JA1862-63. The unshared email about the December 2020 cleft palate surgery is again illustrative. Whitney was told that he performed at a CA-3 level and appropriately responded to the emergency. JA2013 (contemporaneous evaluation). Ramachandran did not share the surgeon's (much later) email stating that Whitney did not respond appropriately. JA35 (JSF ¶¶136-38); JA2232 (PSF ¶364). Yet this incident was relied on to justify Whitney's termination, JA934 (termination letter), without Whitney previously having been given any negative feedback or opportunity to learn from it. This failure to share off-book feedback occurred repeatedly, JA35 (JSF ¶137); JA1923-24 (Whitney); JA1954 (Whitney), and Whitney was criticized for even asking for copies, JA981 (failure to accommodate letter). By not sharing this feedback, Montefiore deprived Whitney of both the opportunity to address areas

where improvement was needed—the very purpose of the accommodation—and to provide his perspective on what occurred.

**c.** As for protected breaks, Montefiore acknowledged evidence of missed breaks (while arguing, wrongly, that it was immaterial). Defs. Mot. for Summ. J., Dkt. 64, at 28. That was a jury call. It is no stretch to find that Montefiore did not provide protected breaks, given scheduling that forced Whitney to spend the purported "break" setting up for the next case. JA1954-55; JA1956-57 (Whitney). Far from giving Whitney time "to collect his thoughts and prepare for his afternoon 'flow of cases,'" as the district court wrongly concluded, SPA50, the breaks were scheduled for the "convenien[ce]" of *the attending's* "flow of cases," with Whitney forced to "skip the break" so "the patient wasn't delayed." JA1954-55 (Whitney).

The failure to protect breaks vitiated the effectiveness of the accommodation, the very purpose of which was to provide Whitney "a moment to clear [his] brain" in the middle of the day. JA1955 (Whitney). But with "breaks" scheduled to overlap with time needed to set up for the next patient, there was no respite. JA1954-55 (Whitney). Unlike in *Porter*, where the Court held that two isolated incidents of encroachment on protected time and space over nine months did not render the accommodations ineffective, 92 F.4th at 155, Whitney testified that he "frequently" worked with attendings who usurped his protected break time in this way, JA1955.

**d.** Finally, Montefiore failed to provide a reasonable, mutually agreed mentor.

The district court rejected this claim mainly because Montefiore did not agree to give Whitney a "veto" over the mentor choice, SPA51, again improperly resolving ambiguity against Whitney. Montefiore's accommodations referred to a "mutually agreed" mentor, nowhere objecting to seeking Whitney's input, JA970-711. Ramachandran claimed only that Whitney did not provide input, JA1886, not that his viewpoint was immaterial. In another he-said/she-said conflict that was the jury's to resolve, Whitney testified that he was given no advance notice or opportunity to object to Straker's selection as his mentor. JA110 (Whitney Declaration ¶15). When he did object, JA980 (failure to accommodate letter), nothing changed.

Compounding its error, the district court held that a mutually agreed mentor is a *per se* unreasonable accommodation. SPA52. Not only did Montefiore agree to this request as reasonable, mooting the point, but circuit law requires the reasonableness of a request for "replacement of a supervisor" to be evaluated "on a case-by-case basis," albeit with a presumption of unreasonableness. *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122-23 (2d Cir. 1999). Unlike in *Kennedy*, moreover, Whitney did not seek to avoid "*any* interaction with" Straker, nor make a request that would require "excessive organizational costs." *Id.* at 123.[11] All he

[11] A reasonable jury could also reject purported organizational reasons for not assigning Whitney's suggested mentors. For example, Ramachandran testified that Whitney was not assigned his preferred neuroanesthesia mentor, Pisklakov, because Pisklakov "was coming out of neuro" and leaving Montefiore. JA1902. But Whitney testified that Piskalokov was still in neuroanesthesia during his rotation. JA1953.

sought was an unbiased mentor, JA980 (failure to accommodate letter), given that an attending had described Straker as Whitney's "enemy," JA1922 (Whitney).

Mentor selection mattered to the effectiveness of the accommodation. Contrary to the district court's limited conception of the mentor's role (answering questions and giving feedback), SPA52, the overall mentor would "coordinate everything for him," and the rotation mentors would be resources for Whitney if he had trouble getting feedback. JA401 (grievance hearing transcript). Whitney understood that he should bring his "concerns" about being evaluated fairly to his mentor. JA1921. Yet Straker did not view her role as helping to make the feedback process helpful to Whitney, declining to take steps to help attendings understand the process when Whitney requested it. JA1963 (Straker). A reasonable jury could find that by selecting a mentor who had already judged Whitney incapable of being an anesthesiologist, Montefiore again provided a purported "accommodation" that hurt more than it helped—exacerbating his stress and transforming a purported avenue to report concerns into a dead end.

**e.** A rational jury could find that the overarching purpose of the accommodations was to support Whitney's learning process and clinical skill development through structured, timely feedback in a way that lessened, not heightened, his anxiety. But as actually implemented—especially without any guidance to attendings on how to help Whitney learn—structured feedback became

daily punitive evaluations, open communication became hidden negative feedback, protected breaks became stressful opportunities to fall behind, and mentorship became an opportunity to repeat concerns to an unyielding "enemy." Summary judgment is improper where, as here, "there is a disputed issue of fact regarding whether the modifications the employer selected were effective, and where the trier of fact could reasonably conclude that the employer was aware or should have been aware that those modifications were not effective." *UPS Supply Chain Solutions*, 620 F.3d at 1113.

**2.** Finally, even if, contrary to law, a reasonable jury was required to disregard Montefiore's agreements, and limited to considering the accommodations provided in a vacuum, the provided accommodations were not plainly reasonable because they were ineffective. *Noll*, 787 F.3d at 95 (effectiveness is an element of a "plainly reasonable" accommodation). The district court, which neglected effectiveness altogether, was flatly wrong in concluding otherwise. Far from giving Whitney "a second chance," SPA50, the accommodations—as implemented—only heightened the target on Whitney's back. A reasonable jury could find that Montefiore implemented sham accommodations which only heightened Whitney's anxiety and made it harder for him to perform, rather than mitigate his limitations. That is not plainly reasonable.

## CONCLUSION

The district court's judgment should be reversed.

March 27, 2024

Respectfully submitted,

s/Hyland Hunt

Hyland Hunt
Ruthanne M. Deutsch
Alexandra Mansbach
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
Tel.: (202) 868-6915
Fax: (202) 609-8410
hhunt@deutschhunt.com

Jason L. Solotaroff
GISKAN SOLOTAROFF & ANDERSON LLP
90 Broad St., 2nd Floor
New York, NY 10004
Tel.: (212) 847-8315
solotaroff@gslawny.com

*Attorneys for Appellant Ryan Whitney, M.D.*

## CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 13,964 words, and thus complies with the type-volume limitation set forth in Local Rule 32.1(a)(4).

s/Hyland Hunt
Hyland Hunt

March 27, 2024

**CERTIFICATE OF SERVICE**

I hereby certify that, on March 27, 2024, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt
Hyland Hunt