

10-409-cv (L)  
Millea v. Metro-North R.R. Co.

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Argued: February 7, 2011 Decided: August 8, 2011)

5 Docket Nos. 10-409-cv (L); 10-564-cv (XAP)

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7 - - - - -x

8  
9 CHRISTOPHER MILLEA,

10  
11 Plaintiff-Appellant-Cross-  
12 Appellee,

13  
14 -v.-

10-409-cv (L)  
10-564-cv (XAP)

15  
16 METRO-NORTH RAILROAD COMPANY,

17  
18 Defendant-Appellee-Cross-  
19 Appellant.

20  
21 - - - - -x

22  
23 Before: DENNIS JACOBS, Chief Judge,  
24 PETER W. HALL, Circuit Judge,  
25 SHIRA A. SCHEINDLIN, District Judge.\*  
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27  
28 Following a jury trial in the United States District  
29 Court for the District of Connecticut (Bryant, J.),

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\* The Honorable Shira A. Scheindlin, of the United States District Court for the Southern District of New York, sitting by designation.

1 plaintiff Christopher Millea won partial victory on his  
2 claims under the Family Medical Leave Act ("FMLA"). He and  
3 the defendant, Metro-North Railroad Co. ("Metro-North"),  
4 cross-appeal. Millea argues that, on his retaliation claim,  
5 the jury charge should have adopted the standard set forth  
6 for Title VII retaliation in Burlington Northern & Sante Fe  
7 Railway Co. v. White, 548 U.S. 53 (2006). Millea also  
8 appeals the award of only \$204 in attorneys' fees on his one  
9 successful claim, that Metro-North interfered in his  
10 exercise of FMLA rights. Metro-North cross-appeals the  
11 denial of its Rule 50 motion for judgment as a matter of law  
12 on the interference claim. We affirm the district court's  
13 denial of Metro-North's motion. Because the district court  
14 erred in rejecting the Burlington Northern jury charge, and  
15 this error prejudiced the plaintiff, we vacate and remand  
16 for a new trial on the retaliation claim. We also vacate  
17 the award of attorneys' fees and remand for recalculation in  
18 conformity with the lodestar method.

19  
20 FOR APPELLANT: Joseph D. Garrison, Jr.  
21 Garrison, Levin-Epstein, Chimes,  
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6  
7

8 DENNIS JACOBS, Chief Judge:  
9

10 Following a jury trial in the United States District  
11 Court for the District of Connecticut (Bryant, J.),  
12 plaintiff Christopher Millea won partial victory on his  
13 claims under the Family Medical Leave Act ("FMLA"). He and  
14 the defendant, Metro-North Railroad Co. ("Metro-North"),  
15 cross-appeal. Millea argues that, on his unsuccessful  
16 retaliation claim, the jury charge should have adopted the  
17 standard set forth for Title VII retaliation in Burlington  
18 Northern & Sante Fe Railway Co. v. White, 548 U.S. 53  
19 (2006). Millea also appeals the award of only \$204 in  
20 attorneys' fees on his one successful claim, that Metro-  
21 North interfered in his exercise of FMLA rights. Metro-  
22 North cross-appeals the denial of its Rule 50 motion for  
23 judgment as a matter of law on the interference claim. We  
24 affirm the district court's denial of Metro-North's motion.  
25 Because the district court erred in rejecting the  
26 Burlington Northern jury charge, and this error prejudiced  
27 the plaintiff, we vacate and remand for a new trial on the

1 retaliation claim. We also vacate the award of attorneys'  
2 fees and remand for recalculation in conformity with the  
3 lodestar method.

4  
5 **BACKGROUND**

6 Christopher Millea suffers from severe post-traumatic  
7 stress disorder as a result of combat as a Marine during  
8 the First Gulf War. Notwithstanding psychotherapy and  
9 medication, he suffers unpredictable panic attacks and  
10 exhaustion that can require time off work on short notice.  
11 In 2001, Millea began working for Metro-North, a tri-state  
12 area commuter railroad. In 2005, he applied for special  
13 leave under the FMLA; Metro-North approved his application  
14 and granted him 60 days of intermittent FMLA leave for  
15 2006.

16 The Incident. In the summer of 2006, Millea was  
17 working in a Stamford storeroom under supervisor Earl  
18 Vaughn, with whom Millea had developed a contentious  
19 relationship. A phone conversation with Vaughn on  
20 September 18, 2006, developed into a heated disagreement  
21 that triggered one of Millea's panic attacks. Millea  
22 immediately left work to see his doctor. Because the  
23 encounter with Vaughn led to the attack, Millea did not

1 inform Vaughn about his unforeseen FMLA leave; instead, he  
2 advised Garrett Sullivan, the Lead Clerk, and asked  
3 Sullivan to advise Vaughn, which Sullivan did. The next  
4 day, Millea called Sullivan at 5:45am to report that he was  
5 taking another FMLA day; Sullivan again relayed the  
6 information to Vaughn. In both instances, Vaughn received  
7 timely, although indirect, notice of Millea's use of FMLA  
8 leave.

9 Metro-North's internal leave policy provides, in  
10 relevant part, "[i]f the need for FMLA leave is not  
11 foreseeable, employees must give notice to their supervisor  
12 as soon as possible." Because Millea did not notify Vaughn  
13 of his two absences *directly*, Vaughn told Metro-North's  
14 payroll department to log Millea's absences as non-FMLA  
15 leave. Metro-North then opened an official investigation  
16 of Millea, which resulted in a formal Notice of Discipline  
17 being placed in his employment file for one year. The  
18 Notice was expunged after a year, Millea having had no  
19 further disciplinary incidents. After the investigation,  
20 Millea voluntarily transferred to a custodian janitorial  
21 job, which paid slightly less but was not supervised by  
22 Vaughn.

1           The Complaint. Millea's complaint against Metro-North  
2 alleges that he never violated Metro-North's internal leave  
3 policy because he notified Vaughn (indirectly) of his  
4 absences, or, in the alternative, that the aspect of Metro-  
5 North's policy he violated was void because it conflicted  
6 with the regulations implementing the FMLA. Millea alleges  
7 three claims:

- 8           1. Interference with Millea's ability to take FMLA  
9 leave. See 29 U.S.C. § 2615(a)(1) ("It shall be  
10 unlawful for any employer to interfere with,  
11 restrain, or deny the exercise of or the attempt  
12 to exercise, any right provided under this  
13 subchapter.").
- 14  
15           2. Retaliation against Millea for taking FMLA leave  
16 by: (i) placing a notice of discipline in his  
17 employment file for a year; (ii) requiring him to  
18 update his FMLA certification; (iii) creating a  
19 work environment that motivated him to transfer to  
20 a lower paying job; (iv) delaying approval of his  
21 bid for the lead custodian position in 2009; and  
22 (v) subjecting him to heightened managerial  
23 surveillance. See 29 U.S.C. § 2615(a)(2) ("It  
24 shall be unlawful for any employer to discharge or  
25 in any other manner discriminate against any  
26 individual for opposing any practice made unlawful  
27 by this subchapter.").
- 28  
29           3. Intentional infliction of emotional distress  
30 ("IIED").

31  
32           The Answer. On the interference claim, Metro-North  
33 answered that it was entitled to log Millea's absences as  
34 non-FMLA leave because he violated Metro-North's legally  
35 valid internal leave policy. On the retaliation claim,

1 Metro-North answered that none of the claimed acts of  
2 retaliation was the result of Millea's use of FMLA leave,  
3 and none was materially adverse. On the IIED claim, Metro-  
4 North answered that any violation of the FMLA was not done  
5 intentionally or outrageously and so could not amount to  
6 IIED.

7 The Trial. Millea's suit against Metro-North was  
8 tried in May 2009. Millea requested that the court charge  
9 the jury on the definition of "materially adverse  
10 employment action" using the standard articulated by the  
11 Supreme Court in Burlington Northern & Santa Fe Railway Co.  
12 v. White, 548 U.S. 53 (2006) ("Burlington Northern"), a  
13 Title VII retaliation claim case. The court rejected the  
14 proposed charge on the ground that this case involved the  
15 FMLA, not Title VII, and instead issued an instruction with  
16 a narrower definition of "materially adverse."

17 The jury returned a verdict in favor of Millea on his  
18 interference claim, awarding him \$612.50 in lost wages and  
19 other damages. The jury found in favor of Metro-North on  
20 both the retaliation and IIED claims. Millea moved for  
21 costs and attorneys' fees, and the court awarded \$204 in  
22 attorneys' fees and \$18,643 in costs. Metro-North moved  
23 for judgment as a matter of law on the interference claim

1 and for its costs associated with the retaliation and EEID  
2 claims. The court denied these motions.

3 Both parties now appeal.  
4

5 **DISCUSSION**

6 This appeal and cross-appeal together present three  
7 questions. First, did the district court err in denying  
8 Metro-North's request for judgment as a matter of law on  
9 Millea's interference claim? Second, did the district  
10 court commit nonharmless error when it rejected Millea's  
11 proposed retaliation instruction based on the Burlington  
12 Northern standard? Third, did the district court abuse its  
13 discretion in awarding Millea only \$204 in attorneys' fees  
14 for his successful interference claim?  
15

16 **I**

17 "We review a district court's ruling on a Rule 50  
18 motion de novo, and apply the same standard used by the  
19 district court below." Cobb v. Pozzi, 363 F.3d 89, 101 (2d  
20 Cir. 2004). Judgment as a matter of law is available only  
21 if there is no "legally sufficient evidentiary basis" for a  
22 reasonable jury to find for the prevailing party on that  
23 claim. Fed. R. Civ. P. 50(a)(1). Judgment as a matter of

1 law is only granted when "(1) there is such a complete  
2 absence of evidence supporting the verdict that the jury's  
3 findings could only have been the result of sheer surmise  
4 and conjecture, or (2) there is such an overwhelming amount  
5 of evidence in favor of the movant that reasonable and fair  
6 minded persons could not arrive at a verdict against it."

7 Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec.

8 Workers, 34 F.3d 1148, 1154 (2d Cir. 1994) (brackets and  
9 internal quotation marks omitted).

10  
11 **A**

12 Metro-North argues there is no legal basis on which  
13 the jury could have concluded that Metro-North interfered  
14 with Millea's exercise of his FMLA rights. Metro-North  
15 concedes that Millea was entitled to take FMLA leave and  
16 that it disciplined Millea for his use of such leave, but  
17 argues that such discipline was justified as a matter of  
18 law by Millea's failure to comply with Metro-North's  
19 internal leave policy requiring an employee to notify his  
20 supervisor *directly* when FMLA leave is taken. There is no  
21 dispute that a company may discipline an employee for  
22 violating its internal leave policy as long as that policy  
23 is consistent with the law; however, we conclude that, on

1 these facts, Metro-North's internal leave policy is  
2 inconsistent with the FMLA.

3 The FMLA generally requires employees to "comply with  
4 the employer's usual and customary notice and procedural  
5 requirements for requesting leave." 29 C.F.R. §  
6 825.303(c). However, this requirement is relaxed in  
7 "unusual circumstances" or where the company policy  
8 conflicts with the law. Id.

9 The regulations implementing the FMLA provide that  
10 when an employee's need for FMLA leave is unforeseeable (as  
11 Millea's was), "[n]otice may be given by the employee's  
12 spokesperson (e.g., spouse, adult family member, or other  
13 responsible party) if the employee is unable to do so  
14 personally." Id. § 825.303(a). Because this regulation  
15 expressly condones indirect notification when the employee  
16 is unable to notify directly, Metro-North's policy  
17 conflicts with the FMLA and is therefore invalid to the  
18 extent it requires direct notification even when the FMLA  
19 leave is unforeseen and direct notification is not an  
20 option.

21 Whether Millea's situation on September 2006  
22 constituted an "unusual circumstance" in which he was  
23 "unable" to personally notify Vaughn is a question of fact,

1 not of law. The jury found that Millea gave proper notice,  
2 meaning his notice complied with the FMLA and all legally  
3 valid aspects of Metro-North's internal leave policy.  
4 Neither the district court nor this Court may second-guess  
5 this finding.

6  
7 **B**

8 Metro-North also argues that the jury verdict on the  
9 interference claim must be vacated because the district  
10 court committed legal error by charging the jury that an  
11 employer's internal leave policy may not be more strict  
12 than the requirements of the FMLA. Metro-North argues this  
13 instruction was impermissibly broad and vague. We  
14 disagree.

15 The district court charged the jury:

16 In determining whether [Millea's] notice occurred  
17 as soon as practicable, you must consider all of  
18 the facts and circumstances of the situation. You  
19 should note that under the FMLA, notice may be  
20 given by the employee, by a family member, or  
21 other responsible adult, such as a treating  
22 physician or other medical professional. You  
23 should also note that an employer may impose  
24 customary rules and procedures for notification,  
25 provided that they are not more stringent than the  
26 requirements under the Family Medical Leave Act.

27  
28 This instruction is not misleading: It correctly explains  
29 that the FMLA authorizes indirect notification and that an

1 employer is free to implement internal notification rules  
2 only to the extent those rules are not more strict than the  
3 law allows.

4 Metro-North argues that the "not more stringent"  
5 language is overly broad because companies may implement  
6 internal leave policies more strict than the FMLA as long  
7 as the "timing requirement" is not more strict than the  
8 FMLA permits. This is incorrect: The FMLA limits  
9 stringency, requiring certain latitude in terms of timing,  
10 method of notification, etc. If the law expressly states  
11 that an employee may do a thing, a company's internal leave  
12 policy may not prohibit it. In this case, the FMLA's  
13 implementing regulations state that an employee in Millea's  
14 position may notify his employer indirectly of his need for  
15 unforeseen medical leave; a company's internal leave policy  
16 may not require otherwise. The jury instruction correctly  
17 captured this idea.

18  
19 **C**

20 Even if Millea prevails on his interference claim, he  
21 would be entitled to no damages unless he suffered a  
22 compensable loss as a result of the alleged interference.  
23 The FMLA provides that an employer interfering with its

1 employee's legitimate use of FMLA-protected leave "shall be  
2 liable to [the] employee affected...for damages equal  
3 to...the amount of...any wages, salary, employment  
4 benefits, or other compensation denied or lost to such  
5 employee by reason of the violation." 29 U.S.C. §  
6 2617(a)(1)(A)(i)(I). Metro-North argues that when it  
7 logged Millea's medical leave as "sick leave" instead of  
8 "FMLA leave," Millea suffered no compensable loss because  
9 both types of leave were unpaid, and that it is therefore  
10 entitled to judgment as a matter of law that it owes Millea  
11 nothing.

12 It appears from the record that Metro-North never made  
13 this argument before the district court. Its opposition to  
14 Millea's motion for attorneys' fees implicitly conceded the  
15 validity of the \$612.50 damages award: It used this award  
16 as the basis for its calculation of attorneys' fees.  
17 Arguments raised for the first time on appeal are deemed  
18 waived. Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215, 221  
19 (2d Cir. 2006) ("[T]his court ordinarily will not hear  
20 arguments not made to the district court."). Having  
21 tacitly accepted the validity of the damage award before

1 the district court, Metro-North waived this argument even  
2 if it had merit, which is doubtful.<sup>2</sup>

3  
4 **II**

5 Millea challenges the judgment dismissing his  
6 retaliation claim on the ground that the jury instruction  
7 defining "materially adverse action" constituted reversible  
8 error. We review de novo a claim of an erroneous jury  
9 instruction. Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111,  
10 115 (2d Cir. 2000). To justify a new trial, a jury  
11 instruction must be both erroneous and prejudicial. Id. at  
12 116. "A jury instruction is erroneous if it misleads the  
13 jury as to the correct legal standard or does not  
14 adequately inform the jury on the law." Id. An erroneous

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<sup>2</sup> Section 2617(a)(1)(A) allows recovery for lost "benefits" and "other compensation" in addition to lost wages. Logging Millea's FMLA leave as "sick leave" presumably reduced the number of remaining sick leave days to which Millea was entitled--"presumably," because it is assumed that Metro-North does not grant limitless unpaid sick leave (the record was never developed on this point precisely because Metro-North failed to raise the issue before the district court). Furthermore, the controversy created by Vaughn's decision to change Millea's leave from "FMLA leave" to "sick leave" forced Millea to spend considerable time on the internal investigations and disciplinary proceeding, which may have resulted in missed work hours and lost wages.

1 jury instruction is prejudicial unless "the court is  
2 convinced that the error did not influence the jury's  
3 verdict." Id.

4  
5 **A**

6 Millea sought a charge using the definition of  
7 "materially adverse employment action" articulated by the  
8 Supreme Court in the Title VII lawsuit, Burlington Northern  
9 & Santa Fe Railroad Co. v. White, 548 U.S. 53 (2006). In  
10 particular, Millea proposed that an adverse employment  
11 action occurs when "a reasonable employee in the  
12 plaintiff's position would have found the alleged  
13 retaliatory action materially adverse," and that a  
14 retaliatory action is "materially adverse" when the action  
15 "would have been likely to dissuade or deter a reasonable  
16 worker in the plaintiff's position from exercising his  
17 legal rights."

18 The district court rejected Millea's proposed  
19 instruction, instead charging the jury:

20 An "adverse employment action" is a materially  
21 adverse change in the terms and conditions of  
22 employment. Examples of material adverse change  
23 in the terms and conditions of employment are  
24 termination, demotion, loss of benefits, or  
25 significantly diminished responsibilities. An  
26 alteration of job responsibilities and a mere

1 inconvenience are not examples of materially  
2 adverse changes in the terms and conditions of  
3 employment.

4 Millea argues that in light of the reasoning in Burlington  
5 Northern, the district court's definition of "materially  
6 adverse" was impermissibly narrow and therefore erroneous.  
7 We agree.

8 Burlington Northern expanded the definition of  
9 "materially adverse employment action" for purposes of  
10 Title VII retaliation claims. Now, a Title VII plaintiff  
11 "must show that a reasonable employee would have found the  
12 challenged action materially adverse, which in this context  
13 means it well might have dissuaded a reasonable worker from  
14 making or supporting a charge of discrimination." 548 U.S.  
15 at 68 (internal quotation marks omitted). The Court  
16 rejected the proposition that an actionable act of  
17 retaliation must relate to the specific terms and  
18 conditions of the employee's employment, id. at 61, and  
19 construed "materially adverse action" broadly to include  
20 changes in employment life outside of the terms and  
21 conditions of employment. Id. The Court concluded that  
22 only this broader definition fulfilled the purpose of Title  
23 VII's anti-retaliation provision: preventing employers

1 from deterring their employees from exercising their  
2 legitimate legal rights. Id. at 68.

3 This rationale applies with comparable force to the  
4 anti-retaliation provision of the FMLA. The FMLA's anti-  
5 retaliation provision has the same underlying purpose as  
6 Title VII--and almost identical wording. Compare 29 U.S.C.  
7 § 2615(a)(2) ("It shall be unlawful for any employer  
8 to...discriminate against any individual for opposing any  
9 practice made unlawful by this subchapter."), with 42  
10 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment  
11 practice for an employer to discriminate against any of his  
12 employees...because he has opposed any practice made an  
13 unlawful employment practice by this subchapter.").

14 We therefore join our sister circuits that have  
15 considered this issue and apply the Burlington Northern  
16 standard for materially adverse action to the FMLA context.  
17 See Breneisen v. Motorola, Inc., 512 F.3d 972, 979 (7th  
18 Cir. 2008) (applying Burlington Northern anti-retaliation  
19 standard to FMLA retaliation claims); Metzler v. Fed. Home  
20 Loan Bank of Topeka, 464 F.3d 1164, 1171 n.2 (10th Cir.  
21 2006) (same); McArdle v. Dell Prods., L.P., 293 F. App'x  
22 331, 337 (5th Cir. 2008) (unpublished opinion) (per curiam)  
23 (same); DiCampli v. Korman Cmty., 257 F. App'x 497, 500-01

1 (3d Cir. 2007) (unpublished opinion) (same); Csicsmann v.  
2 Sallada, 211 F. App'x 163, 167-68 (4th Cir. 2006)  
3 (unpublished opinion) (per curiam) (same). For purposes of  
4 the FMLA's anti-retaliation provision, a materially adverse  
5 action is any action by the employer that is likely to  
6 dissuade a reasonable worker in the plaintiff's position  
7 from exercising his legal rights.

8 By instructing the jury that a "material adverse  
9 action" is restricted solely to changes in the employee's  
10 terms and conditions of employment, the district court  
11 committed legal error.

12  
13 **B**

14 Millea further argues that the erroneous jury  
15 instruction prejudiced him, and that retrial is required on  
16 his retaliation claim. We agree.

17 Of the five retaliatory acts alleged by Millea, the  
18 jury found only one causally related to Millea's use of  
19 FMLA leave: the placement of a formal letter of reprimand  
20 in Millea's employment file. The error in the district  
21 court's jury instruction is harmless as to the four other  
22 actions due to lack of causation, and we affirm the  
23 judgment in favor of Metro-North as to those four actions.

1 As for the letter of reprimand, Metro-North argues  
2 that any error by the district court was harmless because  
3 the adverse effect of the letter was not "material" even  
4 under the Burlington Northern standard. We disagree.

5 The Burlington Northern materiality standard is  
6 intended to "separate significant from trivial harms" so  
7 that employee protection statutes such as Title VII and the  
8 FMLA do not come to create "a general civility code for the  
9 American workplace." Burlington Northern, 548 U.S. at 68  
10 (internal quotation marks omitted). To separate the  
11 significant from the trivial, the Burlington Northern  
12 standard employs an "objective" test, which considers  
13 whether the action would deter a "reasonable employee" from  
14 exercising his rights. Id. "[P]etty slights, minor  
15 annoyances, and simple lack of good manners will not" give  
16 rise to actionable retaliation claims. Id. In this  
17 objective light, we think (and conclude that a reasonable  
18 jury could decide) that a letter of reprimand would deter a  
19 reasonable employee from exercising his FMLA rights. A  
20 formal reprimand issued by an employer is not a "petty  
21 slight," "minor annoyance," or "trivial" punishment; it can  
22 reduce an employee's likelihood of receiving future  
23 bonuses, raises, and promotions, and it may lead the

1 employee to believe (correctly or not) that his job is in  
2 jeopardy. A reasonable jury could conclude as much even  
3 when, as here, the letter does not directly or immediately  
4 result in any loss of wages or benefits, and does not  
5 remain in the employment file permanently.

6 Because the erroneous jury instruction differs  
7 materially from the proper jury instruction that Millea  
8 proposed, and because a reasonable jury could conclude that  
9 the letter of reprimand constitutes retaliation under the  
10 proper jury instruction, we conclude that the error was  
11 prejudicial.

12 Metro-North argues that any error was harmless in any  
13 event because Millea suffered no lost wages, salary, or  
14 employment benefits as a result of the alleged retaliation,  
15 and that no retrial is needed because Millea would receive  
16 no relief even if he prevailed. We disagree.

17 First, because Millea did not prevail on his  
18 retaliation claim, the jury made no factual findings as to  
19 whether Millea suffered any lost wages or benefits as a  
20 result of Metro-North's alleged retaliation. Under  
21 § 2617(a)(1)(A), Millea is entitled to recover not just  
22 lost wages and benefits but also any "actual monetary  
23 losses sustained" as a direct result of Metro-North's

1 retaliation. Millea has asserted that he sustained such  
2 losses: As a result of Metro-North's actions, he felt  
3 compelled to transfer to a lower paying job, thereby losing  
4 income. Millea should have an opportunity before the trial  
5 court to show that the letter of reprimand--if the jury  
6 determines that it constituted retaliation--caused this  
7 loss (and others).

8 Second, even if Millea cannot show specific monetary  
9 losses caused by the letter of reprimand, he may be  
10 entitled to equitable relief under § 2617(a)(1)(B),  
11 including any promotions or job transfers he may have been  
12 denied. Again, if Millea convinces a jury that the letter  
13 of reprimand constituted illegal retaliation, he deserves  
14 an opportunity to pursue such equitable relief.

15 Finally, the success of Millea's retaliation claim  
16 affects the attorneys' fees to which Millea is entitled  
17 under the FMLA's fee-shifting provision. After the trial,  
18 the district court reduced the attorneys' fees  
19 significantly because Millea prevailed only on the least  
20 significant of his three claims. Millea v. Metro-North  
21 R.R. Co., No. 3:06-cv-1929, 2010 WL 126186, at \*4-8 (D.  
22 Conn. Jan. 8, 2010). This would change if Millea succeeded  
23 on his retaliation claim at retrial.

1 In sum, we hold that the definition of "materially  
2 adverse employment action" articulated by the Supreme Court  
3 in Burlington Northern applies to FMLA retaliation claims.  
4 The district court's failure to instruct the jury using  
5 this standard was an error that may have influenced the  
6 verdict, so it is not harmless and necessitates a new  
7 trial. We therefore vacate the judgment in favor of Metro-  
8 North on Millea's FMLA retaliation claim and remand for a  
9 new trial on this claim alone. We affirm the judgment in  
10 favor of Millea on his FMLA interference claim and the  
11 judgment in favor of Metro-North on Millea's IIED claim.  
12

### 13 III

14 The FMLA directs that the district court "shall, in  
15 addition to any judgment awarded to the plaintiff, allow a  
16 reasonable attorney's fee, reasonable expert witness fees,  
17 and other costs of the action to be paid by the defendant."  
18 29 U.S.C. § 2617(a)(3).

19 We review attorneys' fee awards for abuse of  
20 discretion. McDaniel v. Cnty. of Schenectady, 595 F.3d  
21 411, 416 (2d Cir. 2010). A district court abuses its  
22 discretion if it (1) bases its decision on an error of law  
23 or uses the wrong legal standard; (2) bases its decision on

1 a clearly erroneous factual finding; or (3) reaches a  
2 conclusion that, though not necessarily the product of a  
3 legal error or a clearly erroneous factual finding, "cannot  
4 be located within the range of permissible decisions." Id.  
5 (internal quotation marks omitted).

6 Millea argues the district court abused its discretion  
7 by calculating the fee award as a proportion of his  
8 monetary recovery. We agree, and we therefore vacate the  
9 fee award and remand for recalculation in accordance with  
10 the lodestar method and this opinion.<sup>3</sup>

11  
12 **A**

13 "The district court retains discretion to  
14 determine...what constitutes a reasonable fee." LeBlanc-  
15 Sternberg v. Fletcher, 143 F.3d 748, 758 (2d Cir. 1998)  
16 (internal quotation marks omitted). However, this  
17 discretion is not unfettered, and when a prevailing party

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<sup>3</sup> Because we vacated the judgment in favor of Metro-North on Millea's retaliation claim, Millea could succeed on this claim at retrial, necessitating a recalculation of his attorneys' fees. Such a recalculation would render the errors made by the district court in its original calculation moot. However, we still must reach the fee award issue here because the legal error in the district court's original calculation necessitates a recalculation even if Millea's retaliation claim fails when retried.

1 is entitled to attorneys' fees, the district court must  
2 abide by the procedural requirements for calculating those  
3 fees articulated by this Court and the Supreme Court.

4 Both this Court and the Supreme Court have held that  
5 the lodestar--the product of a reasonable hourly rate and  
6 the reasonable number of hours required by the case--  
7 creates a "presumptively reasonable fee." Arbor Hill  
8 Concerned Citizens Neighborhood Assoc. v. Cnty. of Albany,  
9 522 F.3d 182, 183 (2d Cir. 2008); see also Perdue v. Kenny  
10 A. ex rel. Winn, 130 S. Ct. 1662, 1673 (2010). While the  
11 lodestar is not always conclusive, its presumptive  
12 reasonability means that, absent extraordinary  
13 circumstances, failing to calculate it as a starting point  
14 is legal error. A detailed explanation of the lodestar  
15 calculation is unnecessary, but compliance with the Supreme  
16 Court's directive that fee award calculations be "objective  
17 and reviewable," implies the district court should at least  
18 provide the number of hours and hourly rate it used to  
19 produce the lodestar figure. Perdue, 130 S. Ct. at 1674.

20 It is unclear whether the district court calculated  
21 the lodestar. The opinion references Millea's request for  
22 \$144,792 in attorneys' fees, but does not explain how this  
23 figure was calculated. Millea, 2010 WL 126186, at \*6.

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**B**

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While a district court must calculate the lodestar, it is not "conclusive in all circumstances." Perdue, 130 S. Ct. at 1673. A district court may adjust the lodestar when it "does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Id. However, such adjustments are appropriate only in "rare circumstances," because the "lodestar figure [already] includes most, if not all, of the relevant factors constituting a reasonable attorney's fee." Id. (internal quotation marks omitted). For example, a court may not adjust the lodestar based on factors already included in the lodestar calculation itself because doing so effectively double-counts those factors. Instead, the lodestar can be adjusted only by factors relevant to the determination of reasonable attorneys' fees that were not already considered in the initial lodestar calculation. The district court erred by adjusting the initial \$144,792 figure--which is presumably the lodestar--by several factors.

First, the district court reduced its initial figure because it concluded Millea's case was not particularly

1 complicated and "did not involve any novel legal issues  
2 significant to the legal community." Millea, 2010 WL  
3 126186, at \*5. "[T]he novelty and complexity of a case  
4 generally may not be used as a ground for [adjusting the  
5 lodestar]" because they are already included in the  
6 lodestar calculation itself, being "fully reflected in the  
7 number of billable hours recorded by counsel." Perdue, 130  
8 S. Ct. at 1673 (internal quotation marks and bracket  
9 omitted). Thus, while a district court may not adjust the  
10 lodestar based on these factors, it may use them to  
11 determine the reasonable number of hours the case requires.  
12 That is a permissible consideration and one that a trial  
13 judge is particularly well-situated to evaluate.

14 Second, the district court impermissibly reduced its  
15 initial figure because it concluded that the interference  
16 claim--the only claim on which Millea prevailed--had no  
17 public policy significance. Millea, 2010 WL 126186, at \*6.  
18 By enacting a fee-shifting provision for FMLA claims,  
19 Congress has already made the policy determination that  
20 FMLA claims serve an important public purpose

1 disproportionate to their cash value. We cannot second-  
2 guess this legislative policy decision.<sup>4</sup>

3 Third, the district court impermissibly reduced its  
4 initial award because Millea was unsuccessful on his  
5 retaliation and IIED claims. Millea, 2010 WL 126186, at  
6 \*5-6. Millea's lack of success on the IIED claim provides  
7 no reason to adjust the lodestar because the lodestar  
8 should have already excluded this claim. When calculating  
9 a lodestar, the number of hours spent on a case should  
10 include only those hours spent on claims eligible for fee-  
11 shifting. Hours spent solely on common law claims and  
12 statutory claims not subject to fee-shifting must be  
13 excluded to reflect the default rule that "each party must  
14 pay its own attorney's fees and expenses."<sup>5</sup> Perdue, 130 S.

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<sup>4</sup> To the extent we have held otherwise in the past, see Carroll v. Blinken, 105 F.3d 79, 81 (2d Cir. 1997) ("[W]here the damage award is nominal or modest, the injunctive relief has no systemic effect of importance, and no substantial public interest is served, a substantial fee award cannot be justified."), such holdings were (at least) impaired by the declaration in Perdue that the lodestar is the "guiding light of our fee-shifting jurisprudence," that it is "presumptively reasonable," that it includes "most, if not all, of the relevant factors" in determining a reasonable fee award, and that it should only be deviated from in "rare" and "exceptional" circumstances. Perdue, 130 S. Ct. at 1672-73 (internal quotation marks omitted).

<sup>5</sup> Hours spent on legal work that furthers both fee-shifting and non-fee-shifting claims may be included in the

1 Ct. at 1671. Excluding these ineligible claims prevents  
2 abuse: Plaintiffs should not be able to inject frivolous  
3 or borderline frivolous fee-shifting claims into a  
4 litigation in order to collect attorneys' fees on claims  
5 for which fee-shifting is not available. For similar  
6 reasons, Millea's lack of success on his retaliation claim  
7 also provided no basis for adjusting the lodestar. The  
8 FMLA's fee-shifting provision only applies to claims on  
9 which the plaintiff prevails. See 29 U.S.C. § 2617(a)(3).  
10 Hours spent on unsuccessful fee-shifting claims, like those  
11 spent on claims wholly ineligible for fee-shifting, must be  
12 excluded from the reasonable hours spent on the case when  
13 calculating the lodestar.

14 Finally, the district court impermissibly reduced its  
15 initial fee award based on an incorrect conclusion that  
16 Millea's victory was "de minimis." Millea, 2010 WL 126186,  
17 at \*6. The \$612.50 award was not de minimis; to the  
18 contrary, the award was more than 100% of the damages  
19 Millea sought on that claim. It was not a derisory or  
20 contemptuous rejection by the jury. The district court

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lodestar calculation because they would have been expended even if the plaintiff had not included non-fee-shifting claims in his complaint.

1 conflated a small damages award with a de minimis victory.  
2 True, where the plaintiff manages to prevail on a  
3 technicality in a mostly frivolous lawsuit, a court should  
4 award no attorneys' fees to discourage such lawsuits.  
5 Farrar v. Hobby, 506 U.S. 103, 114-15 (1992). However,  
6 "[t]hat is not to say that all nominal damages awards are  
7 *de minimis*. Nominal relief does not necessarily a nominal  
8 victory make." Farrar, 506 U.S. at 120-21 (O'Connor, J.,  
9 concurring). FMLA claims are often small-ticket items, and  
10 small damages awards should be expected without raising the  
11 inference that the victory was technical or de minimis. If  
12 an expense of time is required to obtain an award that is  
13 not available by voluntary compliance or offer of  
14 settlement, the expense advances the purposes of the  
15 statute. Absent a purely technical victory in an otherwise  
16 frivolous suit, litigation outcomes are only relevant to  
17 fee award calculations when they are a direct result of the  
18 quality of the attorney's performance. Perdue, 130 S. Ct.  
19 at 1673-74. And "the quality of an attorney's performance  
20 generally should not be used to adjust the lodestar because  
21 considerations concerning the quality of a prevailing  
22 party's counsel's representation normally are reflected in  
23 the reasonable hourly rate" used to calculate the lodestar

1 initially. Id. at 1673 (brackets and internal quotation  
2 markets omitted). Even in those "rare" and "exceptional"  
3 instances where an adjustment is warranted by the  
4 characteristics of the attorney, "the trial judge should  
5 adjust the attorney's hourly rate in accordance with  
6 specific proof linking the attorney's ability to a  
7 prevailing market rate." Id. at 1674. In other words,  
8 such adjustments should be made when calculating the  
9 original lodestar figure. The court must also link such  
10 adjustments to specific actions of the attorney that  
11 indicate a level of performance not accounted for in the  
12 prevailing market rate. Id. The district court erred by  
13 adjusting the attorneys' fee award based on the outcome of  
14 the litigation without tying that outcome to the quality of  
15 Millea's attorneys and without making the adjustment within  
16 the lodestar calculation.

17  
18 **C**

19 The district court calculated its final fee award as a  
20 proportion of the damages Millea was awarded. Millea, 2010  
21 WL 126186, at \*6. This was legal error. While a court  
22 may, in exceptional circumstances, adjust the lodestar,  
23 Perdue, 130 S. Ct. at 1673, it may not disregard it

1 entirely. Especially for claims where the financial  
2 recovery is likely to be small, calculating attorneys' fees  
3 as a proportion of damages runs directly contrary to the  
4 purpose of fee-shifting statutes: assuring that civil  
5 rights claims of modest cash value can attract competent  
6 counsel. The whole purpose of fee-shifting statutes is to  
7 generate attorneys' fees that are *disproportionate* to the  
8 plaintiff's recovery. Thus, the district court abused its  
9 discretion when it ignored the lodestar and calculated the  
10 attorneys' fees as a proportion of the damages awarded.

11  
12 **CONCLUSION**

13 For the reasons discussed above, the district court's  
14 judgment is affirmed in part and vacated in part, and the  
15 case is remanded for a retrial solely on Millea's FMLA  
16 retaliation claim and for recalculation of attorneys' fees  
17 in accordance with this opinion and the results of that  
18 retrial.