No. 24-1901

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEBRA PRATT,
Plaintiff-Appellant,
v.

WISCONSIN ALUMINUM FOUNDRY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Wisconsin

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

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

JAMES DRISCOLL-MACEACHRON
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(602) 661-0014
james.driscoll-maceachron@eeoc.gov

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Title VII, meanwhile, prohibits retaliation against individuals who oppose what they reasonably believe to be unlawful discrimination in the workplace. 42 U.S.C. § 2000e-3(a); *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008).

The plaintiff here alleged that her employer retaliated against her for complaining about discrimination. The district court granted summary judgment to the employer, holding, among other things, that no jury could find that the plaintiff had engaged in protected activity. In its decision, the court articulated an incorrect standard for protected activity and for the hostile work environment the plaintiff opposed.

The EEOC has a strong interest in the proper interpretation and application of Title VII. The EEOC therefore offers its views to the Court. *See* Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUES[1]

1. Did the district court err in articulating a retaliation standard that requires a human resources manager or employee to do more than other employees to oppose discrimination in the workplace?

2. Did the district court err in articulating the standards for assessing whether a plaintiff reasonably believed that she opposed a hostile work environment?

3. Did the district court err in holding that no jury could find that the plaintiff engaged in protected activity, when the plaintiff complained multiple times about harassing or discriminatory conduct in the workplace?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Debra Pratt began working for the Foundry as a human resources (HR) and benefits administrator in 2016. R.33-1 at 7 (Dep. 19:15-23); *id.* at 147. When the Foundry fired her supervisor in February 2017, it

[1] The EEOC does not take a position on any other issue in this appeal.
[2] Because this appeal is from summary judgment, we recount the facts in the light most favorable to the nonmoving party. *See generally Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

promoted Pratt to HR manager. *Id.* at 8 (Dep. 22:11-16); R.36-1 at 1. The Foundry increased her salary in 2018 and gave her a performance bonus. R.34 at 1. Her duties as HR manager included responding to complaints of harassment, discrimination, and retaliation. R. 33-1 at 12-13 (Dep. 39:18-40:4, 42:1-43:1).

Beginning in 2017, Pratt began reporting to her supervisor, Ben Jacobs, what she believed to be inappropriate conduct by Vice President of Operations Eugene Boyd directed at her and other employees. R.36-1 at 1-2, 7-8; R.33-1 at 8, 16-17 (Dep. 25:19-23, 56:7-58:6). Pratt reported that Boyd referred to a female employee, Jodi Rabitz, as a "bitch" and that Boyd told her that he "intentionally antagonized [Rabitz] to 'piss her off.'" R.36-1 at 7. And Pratt received a complaint from another female employee that Boyd "flipp[ed] her off" when the employee asked him "to move his vehicle from visitor parking." R.33-1 at 115 (Dep. 240:8-15); *id.* at 226. Pratt also reported that Boyd "undercut [her] and other women professionally" and that he "treated women significantly worse than men." R.36-1 at 7.

In February 2018, Pratt learned that Boyd had asked Lilly Goehring, a female Material Manager, to stand up on a table in a meeting and pull down her pants to show him where she had "injured her 'ass.'" R. 33-1

at 26 (Dep. 96:18-21); *id.* at 187. That made at least one employee who witnessed the incident uncomfortable. *Id.* at 167, 187. Pratt reported that an employee told her that Boyd had, on another occasion, "put his thumb on the table, sticking up, and told [Goehring] to 'sit on it and he would spin her.'" *Id.* at 187.

Pratt also reported offensive conduct she personally experienced. R.36-1 at 9. As she told Jacobs, Tom Behnke, another supervisor "called [Pratt] a 'cunt' and a 'bitch' when she asked him to sign a payroll change form." *Id.*

Pratt's reports included other conduct that she believed constituted discrimination. She told Boyd that Cedric Yang alleged that he had not received a promotion because of his race. R.33-1 at 14 (Dep. 46:1-8); R.36-1 at 8. Yang complained to Pratt that Tom Culp, the relevant manager, had said Yang had not received the promotion "because he was Asian." R.33-1 at 14 (Dep. 46:1-8); R.36-1 at 8. The Foundry resolved the issue by giving Yang the promotion he had been seeking, and Culp later said that he and Yang had been joking around when Culp made the comment. R.36-1 at 8. Pratt also reported to Jacobs and Boyd that she believed Culp engaged in racial discrimination against other employees, including asking her to

write up a Black employee without cause and firing a Hispanic employee. *Id.* at 8-9. And Pratt told Jacobs that a female HR employee received an email sent from a male supervisor's computer that said, "U Smoken Hot." R.33-1 at 229; R.36-1 at 9. Pratt "told [Jacobs that] it was unacceptable sexual harassment." R.36-1 at 9.

In February 2018, a maintenance manager gave Jacobs a document that the manager said he had found on the printer in the HR work area. R.33-1 at 166. The document included confidential information about allegations of discrimination. *See id.* at 166-67. The Foundry hired an outside attorney to investigate who wrote the document, who left it on the printer, and the accuracy of the allegations in the document. *Id.* at 166. The investigating attorney reported that Pratt confirmed the document was hers but disputed that she had left it on the printer. *Id.* at 169. As for the allegations in the document, the attorney concluded, among other things, that it was more likely than not that Boyd had told Goehring to show him where she "bruised her ass" but that Boyd likely did not tell Goehring to sit on his thumb. *Id.* at 181-82.

Meanwhile, shortly after the maintenance manager found the document (and before she knew about the third-party investigation), Pratt

emailed a version of it to Jacobs. R.33-1 at 28 (Dep. 102:2-103:3); R.36-2 at 8. The emailed version included a "Findings" section. *Id.* at 188. In it, Pratt said that "the biggest concern of all is that of sexual harassment." *Id.* Based on her interviews, she said, "at this point in time, it appears to be of a joking nature between participants," but it was "still unprofessional and against the law" and "any witnesses . . . [would] have the ability to file a sexual harassment complaint with the company as well as the EEOC." *Id.* She concluded that it "would be a difficult case to defend." *Id.*

The Foundry hired a consulting group called the Utech Group in 2018 to help align and develop its leaders. *Id.* at 193-194. Utech interviewed 51 Foundry employees and then provided a report in September 2018 assessing Utech leaders, including Pratt. *Id.* at 195, 205. Utech said that interviewees saw Pratt "work[ing] hard to make things better" but that she "[i]nvestigates people instead of focusing on what's best for the company." *Id.* at 205.

At the end of 2018, Jacobs provided Pratt her annual evaluation. *Id.* at 36 (Dep. 136:12-137:21); *id.* at 208-09. Jacobs gave her consistently low marks, with an overall rating of 10 out of 32. *Id.* at 208-09. Pratt asked Jacobs for feedback during the evaluation, but Jacobs did not provide any.

Id. at 38 (Dep. 142:12-17). Pratt also told Jacobs that she "felt that [she] had a target on [her] back and that since the event regarding the [found] document, [she] felt like [she] had been retaliated against." *Id.* (Dep. 142:24-143:2). She testified that she meant she "was retaliated against for not just starting the investigation but bringing my concerns forward." *Id.* (Dep. 143:3-9).

On March 7, 2019, Pratt emailed Jacobs asking for more information on her evaluation. *Id.* at 215-18. She explained that she believed she "was participating in a protected activity in February of 2018 and fe[lt she has] suffered retaliation on a repeated basis as a result." *Id.* at 218. The Foundry terminated Pratt a week later. *See* R.36-1 at 9.

B. District Court's Decisions

Pratt filed this lawsuit, and the Foundry moved to dismiss Pratt's complaint. It argued, among other things, that the court should dismiss Pratt's retaliation claim based on the "manager rule." R.8 at 9-10. That rule, as the Foundry described it, limits the ability of employees whose job duties involve investigating or reporting discrimination to engage in protected activity to only those times when the employee "step[s] outside

of her role" to make a personal complaint. *Id.* The district court, however, "decline[d] to adopt the manager rule here." R.18 at 10.

The district court later granted the Foundry's summary judgment motion. R.45. On retaliation, the court said that Pratt's claim "poses significant difficulties" because she was "the employer's human relations manager" and, as part of their jobs, HR employees "investigate and report discrimination within the company." *Id.* at 15. Relying on a case from the Second Circuit, the court reasoned that HR employees must do more than "merely . . . convey others' complaints of discrimination." *Id.* at 16 (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 318 (2d Cir. 2015)). Instead, plaintiffs like Pratt must show that they "actively support[] other employees in asserting their Title VII rights or personally complain[] or [are] critical about the discriminatory employment practices." *Id.* (quoting *Littlejohn*, 795 F.3d at 318).

After considering an elevated standard for protected activity by human resources managers, the court turned to other aspects of Pratt's retaliation claim. The court held that Pratt did not engage in protected activity "because the conduct she was investigating did not involve prohibited discrimination under Title VII." *Id.* Focusing only on Pratt's

report of potential sexual harassment arising from Boyd's conduct toward Goehring, the court said that "the gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome." *Id.* (cleaned up) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986)). It also reasoned that "sexual harassment must be severe *and* pervasive." *Id.* at 17 (emphasis added). The court then held that Boyd's conduct "was an isolated instance and there is no evidence that it was intended to harass Ms. Goehring." *Id.* The court also concluded that Pratt also could not show a causal link between any protected activity and her termination. *Id.* at 17-18.

ARGUMENT

The district court erred in both its articulation of a standard for opposition that depends on the employee's job duties and in its analysis of the alleged discrimination that Pratt opposed. Title VII does not set a higher bar for HR managers or other employees to clear in order to engage in protected activity. Meanwhile, in assessing Pratt's opposition, the court used an incorrect hostile work environment standard. Under the appropriate standard, harassment need only be severe or pervasive (not both), does not require an intent to harass, and must be viewed

cumulatively. And, when an employee opposes a hostile work environment, protected activity may include opposition to acts that are not yet unlawful. Finally, using the appropriate standards, a jury could reasonably find that Pratt opposed unlawful discrimination in the workplace.

I. Managers and human resources employees are subject to the same standard for assessing protected activity as other employees.

Title VII prohibits retaliation against employees for engaging in protected activity, which includes opposing discrimination. 42 U.S.C. § 2000e-3(a); *see also* EEOC, Enforcement Guidance on Retaliation and Related Issues § II.A (Aug. 25, 2016) ("Retaliation Guidance"), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues. As explained below, Title VII casts a wide net in protecting individuals who engage in protected activity. Thus, in evaluating whether an employee opposed discrimination, it makes no difference whether the employee is a line employee, manager, or human resources official.

Holding HR managers and officials to a different standard for protected activity ignores Title VII's plain language. The anti-retaliation

provision makes it unlawful "to discriminate against *any* . . . employee[]" for engaging in protected activity. 42 U.S.C. § 2000e-3(a) (emphasis added). And Title VII defines employee broadly as "an individual employed by an employer." 42 U.S.C. § 2000e(f). Congress then exempted only a small subset of employees, specifically listing state elected officials, their staffs, and various appointed officials. *Id.*

Pairing that inclusive definition of employee with the anti-retaliation provision's emphasis that it reaches "any . . . employee," 42 U.S.C. § 2000e-3(a), confirms the provision's broad scope. "Any," after all, is a word that "has an expansive meaning." *Babb v. Wilkie*, 589 U.S. 399, 405 n.2 (2020) (cleaned up). Courts have thus held that the use of "any . . . employee[]" in Title VII's antiretaliation provision encompasses "all employees." *Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1347 (11th Cir. 2022); *Jackson v. Genesee Cnty. Rd. Comm'n*, 999 F.3d 333, 345 (6th Cir. 2021). "HR managers fall into the category of 'all employees,' and the statutory definition of 'employee' does not have any carveout or exclusion of HR managers that would remove them from the protection of the opposition clause." *Patterson*, 38 F.4th at 1347 (citing 42 U.S.C. § 2000e(f)); *see also* Retaliation Guidance § II.A.2.d ("[A]ll employees who engage in

opposition activity are protected from retaliation, even if they are managers, human resources personnel, or other EEO advisors.").

The expansive definition of "opposition" also counsels against an elevated standard for HR officials and managers. Title VII does not define "oppose[]," *see* 42 U.S.C. § 2000e-3(a), so it "carries its ordinary meaning . . . '[t]o resist or antagonize . . . ; to contend against; to confront; resist; withstand.'" *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009) (quoting Webster's New Int'l Dictionary 1710 (2d ed. 1957)). As the Fourth Circuit observed, "[t]his broad definition led the Court [in Crawford] to conclude that the threshold for oppositional conduct is not onerous." *DeMasters v. Carilion Clinic*, 796 F.3d 409, 417 (4th Cir. 2015); *see also* Retaliation Guidance § II.A.2 ("Protected 'opposition' activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination.").

Based on that definition, opposition "goes beyond 'active, consistent' behavior." *Crawford*, 555 U.S at 277. As a result, the Supreme Court refused to distinguish between those who start the complaint process and those who participate in that process. *Id.* at 277-78 (rejecting "a freakish rule

protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question"). Nothing in that expansive definition requires that HR officials and managers take more or different action to oppose discrimination than other employees.

The Foundry nonetheless argued below that Pratt had to satisfy a more stringent "manager rule" because she was an HR manager. In its motion to dismiss, it argued for the application of that judicially-created doctrine, derived from case law under the Fair Labor Standards Act (FLSA), which requires an HR manager to go beyond her job duties to engage in protected activity. R.8 at 9-10; *see McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996) (articulating manager rule). And, at summary judgment, the Foundry argued that Pratt could not show protected activity based on "activity that fell squarely within her role as Human Resources Manager." R.31 at 24-25.

Whatever the merits of the manager rule for claims under the FLSA, it has no place in Title VII. As described above, Title VII's text does not separate managers or HR employees from other employees, and the Supreme Court's interpretation of opposition encompasses opposition by

all workers. Moreover, every circuit to consider the manager rule in a published decision has rejected its application to claims under Title VII.[3] *Patterson*, 38 F.4th at 1346-1348; *Jackson*, 999 F.3d at 346; *DeMasters*, 796 F.3d at 422-24; *Littlejohn*, 795 F.3d at 317 n.16; *see also Poff v. Okla.*, 683 F. App'x 691, 701 n.5 (10th Cir. 2017).

The district court rejected the Foundry's argument at the motion-to-dismiss stage but articulated a rule much like the manager rule at summary judgment. Quoting the Second Circuit, the court said that HR managers must prove more than "reporting or investigating" complaints of discrimination; they must "actively support other employees in asserting their Title VII rights or personally complain or [be] critical about the discriminatory employment practices." R.45 at 16 (quoting *Littlejohn*, 795 F.3d at 318). But Title VII does not require active opposition. *Crawford*, 555 U.S. at 276-79. And that "active support" rule still treats managers differently than other employees, without any textual basis in Title VII. *See*

[3] This Court has not addressed the "manager rule," but employers periodically ask courts within the Circuit to adopt it, as the Foundry did here. R.8 at 9-10; *see also, e.g.*, *Carpenter v. Olin Corp.*, No. 3:23-CV-00759, 2024 WL 1285421, at *8 (S.D. Ill. Mar. 26, 2024); *Armour v. Homer Tree Servs., Inc.*, 15-cv-10305, 2017 WL 4785800, at *10 (N.D. Ill. Oct. 24, 2017).

Muldrow v. City of St. Louis, 601 U.S. 346, 355 (2024) (holding that courts interpreting Title VII should not "add words . . . to the statute Congress enacted" in a way that "demands something more of [the plaintiff] than the law as written"); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015) (rejecting argument because "[i]t asks us to add words to the law to produce what is thought to be a desirable result").

In setting a higher standard, the court relied on the employer's concern in *Littlejohn* that applying *Crawford* to HR officials would lead to "gratuitous litigation." R.45 at 15 (quoting *Littlejohn*, 795 F.3d at 318). But policy objections do not justify departing from the text of Title VII. *Muldrow*, 601 U.S. at 358 ("[T]he City's policy objections cannot override Title VII's text."). And that asserted policy concern also ignores the many other existing limits on Title VII retaliation claims. Even without a higher standard, HR officials and managers must still engage in protected activity, and any protected opposition must be based on a good-faith, reasonable belief that the employment practice they oppose violates Title VII. *See Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002). And, to prevail on a retaliation claim, HR officials and managers must also show they suffered a materially adverse action, that their protected activity caused that adverse

action, and that any reasons the employer offers for the adverse action are pretextual. *See O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir. 2011).

Thus, under Title VII, the same test for opposition applies to all employees, including HR officials and managers. "'When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'" *Crawford*, 555 U.S. at 276 (quoting U.S. Amicus Br. at 9). To the extent that the district court intended to separate out purely clerical duties in the receipt and logging of complaints, that would be the same for all employees: opposition requires a person to "explicitly or implicitly communicate[] his or her belief that the matter complained of is, or could become, harassment or other discrimination." *See* Retaliation Guidance § II.A.2.a; *id.* § II.A.2.d ("A managerial employee with a duty to report or investigate discrimination still must satisfy the same requirements as any other employee alleging retaliation under the opposition clause."). Merely recording the receipt of a complaint likely does not meet that standard. But HR officials and managers, like all other individuals protected by Title VII,

may register their opposition through any form of explicit or implicit communication in opposition to discriminatory employment practices. *See Crawford*, 555 U.S at 277; Retaliation Guidance § II.A.2.a. And that can include reporting discrimination in the workplace, regardless of the role or position of the employee doing the reporting.

II. The district court erred in describing what Title VII requires for an employee to oppose a hostile work environment.

As with its articulation of an artificially elevated opposition standard for HR managers, the court set too high a standard for assessing the alleged discrimination Pratt complained about. Opposition need only "be based on a good-faith and reasonable belief that [the employee] is opposing unlawful conduct." *O'Leary*, 657 F.3d at 631. An employee "need not show that the practice he opposed was in fact a violation of the statute; he may be mistaken in that regard and still claim the protection of the statute." *Id.* But the court held that Pratt did not engage in protected activity when she reported harassment because "it did not involve prohibited discrimination under Title VII." R.45 at 16. In doing so, the court erred in articulating the standard for a hostile work environment claim and incorrectly held that the challenged conduct must already be fully actionable.

A. The district court used unduly strict tests for assessing a hostile work environment in the context of a retaliation claim.

Title VII prohibits discrimination in the terms and conditions of employment, 42 U.S.C. § 2000e-2(a), which "includes requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). When a plaintiff brings a hostile work environment claim, this Court looks to whether the harassment was (1) unwelcome, (2) based on a protected characteristic, (3) sufficiently severe or pervasive to create a hostile or abusive environment, and, if so, (4) whether the employer should be held liable for the harassment. *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018). The court here, however, misstated the "severe or pervasive" standard, added an intent element, and did not consider the often ongoing nature of a hostile work environment.

The district court first departed from the governing standard by requiring harassment to be "severe *and* pervasive." R.45 at 17 (emphasis added). This Court, however, has "repeatedly stressed that the phrase 'severe or pervasive' is disjunctive." *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008). Thus, "[h]arassment need not be severe *and* pervasive to

impose liability; one or the other will do." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000); *see also Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe *or* pervasive . . . ." (emphasis added)). The more severe the harassment is, the less frequent it needs to be, and vice versa. *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) ("[A] sufficiently severe episode may occur as rarely as once . . . while a relentless pattern of lesser harassment that extends over a long period of time also violates the statute." (citation omitted)).

Next, the court erroneously looked for an intent to harass. But harassment includes "conduct [that] has the purpose *or effect* of . . . creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (emphasis added); *see also Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 979-80 (9th Cir. 2023) (relying on 29 C.F.R. § 1604.11(a)). As the Tenth Circuit observed, "whether the alleged harasser's purpose or intent was to do harm . . . is legally immaterial. The important question is whether the [conduct] had *the effect* of contributing to the creation of a . . . hostile work environment." *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1230 (10th Cir. 2015). Thus, plaintiffs need not show "discriminatory intent" for

a Title VII hostile work environment claim.[4] *Huff v. Sheahan*, 493 F.3d 893, 902 (7th Cir. 2007); *see also Yuknis v. First Student, Inc.*, 481 F.3d 552, 554 (7th Cir. 2007) (stating that a hostile work environment does not require "an intention of causing distress or offense").

Finally, the court's approach incorrectly cabined its analysis to a single incident of potential harassment. "Hostile work environment claims," however, "are different in kind from discrete acts." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). "Their very nature involves repeated conduct," and harassment can "occur[] over a series of days or perhaps years." *Id.* As a result, "a single act of harassment may not be actionable on its own," but it may still be part of an actionable hostile work environment. *Id.* Thus, when assessing whether harassment violates Title VII, this Court "emphasize[s that] . . . courts should not carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive." *EEOC v.*

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[4] Sex-based harassment similarly "need not be motivated by sexual desire." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788-89 (7th Cir. 2007) (rejecting argument that proving "sexual harassment" created a hostile work environment requires "sexual advances" or other "conduct of a sexual nature" in a case involving primarily sexist comments) (cleaned up).

Costco Wholesale Corp., 903 F.3d 618, 626 (7th Cir. 2018) (cleaned up). Instead, "all instances of harassment by all parties are relevant to proving that an environment is sufficiently severe or pervasive." *Scaife v. U.S. Dep't of Veterans Affs.*, 49 F.4th 1109, 1118 (7th Cir. 2022).

B. An employee may oppose a hostile work environment before it is fully actionable.

The district court held that Pratt had not engaged in protected activity "because the conduct she was investigating did not involve prohibited discrimination under Title VII." R.45 at 16. But that is more than Title VII demands. Assessing whether a plaintiff had a reasonable belief she was opposing discrimination does not require "that the underlying conduct she perceived as sexual harassment actually was serious enough to constitute a Title VII violation." *Magyar v. Saint Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008); *Castro v. DeVry Univ., Inc.*, 786 F.3d 559, 564 (7th Cir. 2015) ("Whether [the alleged harasser's] comments went so far as to violate Title VII does not matter" because the plaintiffs "sincerely and reasonably believed they were complaining about conduct prohibited by Title VII[.]").

As this Court has held, "[t]he objective reasonableness of the belief is not assessed by examining whether the conduct was persistent or severe enough to be unlawful." *Magyar*, 544 F.3d at 771. Instead, the question is "merely whether it falls into the category of conduct prohibited by the statute." *Id.*; *Logan v. City of Chicago*, 4 F.4th 529, 538 (7th Cir. 2021) (same). Put differently, "there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII." *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 242 (5th Cir. 2016). That zone may include when someone "reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015) (en banc); Retaliation Guidance § II.A.2.c. It may also include complaints "about offensive conduct that, if repeated often enough, would result in an actionable hostile work environment." Retaliation Guidance § II.A.2.c.

Protecting opposition to some acts of harassment that are not yet actionable aligns with Title VII's goal of preventing discrimination. The "primary objective" of Title VII "is not to provide redress but to avoid

harm." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (cleaned up); *Crawford*, 555 U.S. at 279 (same). Early reporting of harassment directly serves that purpose by allowing employers to stop harassment before it becomes actionable.

A contrary rule, meanwhile, would place employees witnessing harassment in a catch-22. To prevail on a coworker harassment claim, a plaintiff must show the employer knew or should have known about the harassment. *Burlington Indus., Inc. v. Ellerth*, 524 US. 742, 759 (1998). And an employer may escape liability for harassment by a supervisor if the plaintiff unreasonably failed to report the harassment. *Id.* at 765. If Title VII's protections for opposing unlawful employment practices did not attach until harassment is severe or pervasive enough to be actionable, those limitations on employer liability would force employees to choose: report harassment that may not yet be actionable with no protection against retaliation, or remain silent and risk losing a remedy for the harassment. *See Crawford*, 555 U.S. at 279 (rejecting definition of opposition that put employees in a similar "catch-22"). Thus, encouraging employees to "report harassing conduct before it becomes severe or pervasive" directly serves "Title VII's deterrent purpose." *Ellerth*, 524 U.S. at 764.

III. A jury could reasonably find that Pratt engaged in protected activity.

The court's incorrect articulation of the standard for opposing harassment and for establishing a hostile work environment also led it to err in assessing Pratt's opposition to discrimination. Viewed under the appropriate standards, a jury could easily find that Pratt's reports meet the *Crawford* standard for opposition and that she had an objectively reasonable belief that the pattern of conduct she opposed could violate Title VII.

To begin, a jury could find that Pratt communicated her belief that there was unlawful employment discrimination in the workplace. *See Crawford*, 555 U.S. at 276 (communicating belief that employer engaged in employment discrimination "virtually always constitutes" opposition). She repeatedly reported conduct she reasonably believed to be discriminatory, including offensive comments a supervisor made to her. *See, e.g.*, R.33-1 at 16, 26 (Dep. 56:7-58:3, 97:18—98:17); *id.* at 187-88; R.36-1 at 7-10. And she described Boyd's conduct toward Goehring as "sexual harassment," stated that she believed it was "against the law," and warned that employees who observed it could "file a sexual harassment complaint with . . . the EEOC." R.33-1 at 188. She also told the Foundry that she believed Boyd treated her

and other women "worse than men" and that he had called another female employee a "bitch." R.36-1 at 7-9. On top of that, she informed the Foundry that she believed another supervisor engaged in racial discrimination. R.33-1 at 14 (Dep. 46:1-8); R.36-1 at 8-9.

A jury could thus find Pratt satisfied the *Crawford* standard. She did more than merely clerical duties like receiving and passively processing others' complaints that may be insufficient to establish protected activity for any employee, regardless of their job description. Instead, she repeatedly and explicitly communicated to the Foundry that she believed that Foundry supervisors discriminated against others because of characteristics protected by Title VII, and she complained to Jacobs that Behnke called her a "bitch" and a "cunt." R. 36-1 at 7-10.

A jury could also find that Pratt reasonably believed that the conduct she opposed could ultimately constitute unlawful discrimination. She reported actions that fell "within the category of conduct prohibited by" Title VII because she believed supervisors at the Foundry were engaged in sex-based harassment and racial discrimination. *See Magyar*, 544 F.3d at 771. And Pratt detailed multiple acts of potentially sex-based harassment: not just Boyd's sex-based comments to Goehring in the

presence of others, but also Boyd's calling another female employee a "bitch," flipping off a female employee, an apparently ongoing pattern of Boyd's mistreatment of other female employees, a female HR employee receiving an email from a male supervisor's computer that said, "U Smoken Hot," and another supervisor calling Pratt "a cunt and a bitch." R.33-1 at 16, 26 (Dep. 56:7-58:3, 96:18-98:17); R.36-1 at 7-10. In reporting all these acts, she reported "offensive conduct that, if repeated often enough, would result in an actionable hostile work environment." Retaliation Guidance § II.A.2.c; *see also Boyer-Liberto*, 786 F.3d at 284.

Meanwhile, the court disregarded Pratt's reports of what she believed to be racial discrimination. Pratt reported that another supervisor told a subordinate he did not receive a promotion because he was Asian—and that the same supervisor discriminated against a Hispanic employee and a Black employee. R.33-1 at 14 (Dep. 46:1-8); R.36-1 at 8-9. Although the supervisor later said he was joking, R.36-1 at 8, a reasonable jury could find Pratt's communication about what she believed to be several acts of racial discrimination also constituted opposition because it was based on a reasonable, good-faith belief that an unlawful employment practice had occurred. *See O'Leary*, 657 F.3d at 633-34.

CONCLUSION

For these reasons, the Court should vacate the judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

s/ James Driscoll-MacEachron
JAMES DRISCOLL-MACEACHRON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(602) 661-0014
james.driscoll-maceachron@eeoc.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,388 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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s/James Driscoll-MacEachron
JAMES DRISCOLL-MACEACHRON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(602) 661-0014
james.driscoll-maceachron@eeoc.gov

October 18, 2024

CERTIFICATE OF SERVICE

I certify that on this 18th day of October, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users and will be served through the appellate CM/ECF system.

s/James Driscoll-MacEachron
JAMES DRISCOLL-MACEACHRON
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(602) 661-0014
james.driscoll-maceachron@eeoc.gov