No. 14-____

In The Supreme Court of the United States

COURTNEY SATTERWHITE,

Petitioner,

v.

CITY OF HOUSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII forbids harassment on the basis of race, national origin, gender or religion that results in the creation of a hostile work environment. Usually a number of incidents must occur before the harassment creates such an environment and thus results in a violation of Title VII. Section 704(a) of Title VII forbids retaliation against an employee because he or she opposed a practice made unlawful by Title VII. The courts of appeals are divided regarding whether an employee is protected if he or she complains about discriminatory harassment when it first begins, or is only protected if he or she postpones complaining until the harassment has continued long enough that it has created, or almost created, a hostile work environment.

The question presented is:

> Is an employee who objects to harassment on grounds forbidden by Title VII protected from retaliation:
>
> (a) only if there has been sufficient harassment to actually violate, or to come "close" to meeting the legal standard for a violation of Title VII by creating a hostile work environment (the rule in the Fifth, Tenth and Eleventh Circuits),
>
> (b) if the employee could reasonably believe there was a violation of Title VII, with "due allowance" for the employee's lack of familiarity

QUESTION PRESENTED – Continued

with the legal standard governing what constitutes a hostile work environment (the rule in the Second and Ninth Circuits),

(c) if the employee objects to an incident that is serious, such as a "humiliating" remark (the rule in the Fourth Circuit), or

(d) if the employee objects to a type of incident which, "if it happened often enough," would create an unlawful hostile environment (the rule in the Seventh Circuit and endorsed by the EEOC)?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Courtney Satterwhite respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 3, 2015.

OPINIONS BELOW

The March 3, 2015 opinion of the court of appeals, which is unofficially reported at 2015 WL 877655 (5th Cir. March 3, 2015), is set out at pp. 1a-10a of the Appendix. The February 28, 2014, order of the district court, which is not officially reported, is set out at pp. 11a-25a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on March 3, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer –

> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides in pertinent part: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice, made an unlawful employment practice by this title...."

STATEMENT OF THE CASE

Legal Background

Section 704(a) of Title VII, like similarly worded anti-retaliation provisions in other federal anti-discrimination statutes, forbids reprisals against an employee "because he has opposed any practice, made an unlawful employment practice by this title...." 42 U.S.C. § 2000e-3(a). This case presents a recurring dispute about how to apply section 704(a) to complaints about discriminatory harassment.

In some cases arising under section 704(a), the employee is opposing a completed action, such as the denial of a promotion or an undesirable transfer. In such circumstances "practice [] made an unlawful employment practice" usually refers to a possible *past* violation of Title VII. (The lower courts generally agree that section 704(a) can apply even where an employee is mistaken in believing, for example, that a

past adverse action was motivated by some unlawful purpose).

A very different problem is presented in applying section 704(a) to employees who oppose discriminatory harassment. An individual incident of harassment on the basis of race, gender, national origin or religion is ordinarily not unlawful as such. Rather, Title VII is violated only when a series of incidents combine to create a hostile work environment. "A hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 117 (2002). "A hostile work environment is unique among the employment practices that contravene Title VII, in that such an environment normally develops through a series of separate acts, which might not, standing alone, violate Title VII. Indeed, such an environment is usually the sum of several parts." *Jordan v. Alternative Resources Corp.,* 458 F.3d 332, 351 (4th Cir. 2006) (King, J., dissenting), *on petition for rehearing en banc*, 467 F.3d 378 (4th Cir. 2006), *cert. den.*, 549 U.S. 1362 (2007). Whether particular acts of harassment create an unlawful hostile work environment depends on a number of factors, including the number and seriousness of those incidents. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986).

Aggrieved employees typically complain about particular incidents (such as a remark, or an unwanted touching), not about the "environment." And because the point of illegality is normally reached only after a series of incidents, a worker's complaint

could easily be voiced before that point in time, at a juncture when – if acted on effectively by the employer – the complaint would result in preventing, rather than redressing, a violation of Title VII. The courts of appeals are divided regarding when an employee is protected by section 704(a) if he or she objects to discriminatory harassment *before* the harassment has created an unlawful hostile work environment.

The interpretation of section 704(a) in this respect has serious consequences for the enforcement scheme envisioned by this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). If an employee is harassed by his or her supervisor, those decisions impose strict liability on the employer, but recognize an affirmative defense if the employer can show: (1) that it took reasonable care "to prevent and promptly correct any [unlawfully motivated] harassing behavior," and (2) that the plaintiff "unreasonably failed to take advantage of any preventative or corrective opportunities." *Ellerth*, 524 U.S. at 765. The purpose and effect of this liability standard is to provide an incentive for employers to establish an internal complaint process to prevent (not merely correct) harassment, and for employees to utilize that mechanism. The viability of this scheme is obviously affected by whether section 704(a) protects an employee who complains to his or her employer *before* the harassment has created an unlawful hostile work environment, and seeks employer action that would prevent a violation from occurring.

Employees typically are not familiar with either the legal standards defining a hostile work environment or the liability rules established by *Ellerth* and *Faragher*. What employees do understand is the difference between serious harassment and minor annoyances, and the difference between harassment motivated by a discriminatory purpose and abusive conduct that occurs simply because a supervisor or co-worker is mean or vindictive.

In *Clark County School District v. Breeden,* 532 U.S. 268 (2001) (per curiam), this Court held that the plaintiff's complaint about a report of a sex-related comment was not protected by section 704(a). The lower courts have been uncertain whether that summary decision was based on the fact that the plaintiff's job required her to review reports of such comments, on the fact that she "conceded it did not bother or upset her" to read the statement in the file, or on the fact that the male worker who offered to explain the comment to another male worker had insisted on doing so out of the plaintiff's presence. See 532 U.S. at 271.

These complexities have led the circuit courts to adopt widely divergent interpretations of how section 704(a) applies to complaints about discriminatory harassment.

Factual Background[1]

Courtney Satterwhite is a male African-American employee of the City of Houston, working in the office of the City Controller. In March 2010 Satterwhite attended a meeting that included Harry Singh, a higher ranking city official but not, at that point in time, Satterwhite's superior. Singh was the highest ranking official at the meeting.

Toward the end of that meeting, Singh "stood completely up"[2] and "repeated[ly]" stated "Heil Hitler."[3] App. 2a, 12a. Satterwhite recounted that "[another African-American city employee] was beside me and we kept saying he needed to cut that out."[4] Satterwhite's own efforts to persuade Singh to stop saying "Heil Hitler" were unavailing. "It continued until [Daniel] Schein stood up and asked Mr. Singh to stop."[5] Schein, who is Jewish and was one of Satterwhite's subordinates, "stood up [and] indicated

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[1] Because this case is on appeal following the award of summary judgment, we set forth the evidence adduced by the plaintiff; that evidence, in certain respects, was disputed by the defendant.

[2] Doc. 25-35, p. 2.

[3] Doc. 25-1, p. 5 ("Q.... [W]as it said once or was it repeated? A. It was repeated."; "It continued until Mr. Schein stood up and asked Mr. Singh to stop.")

[4] Doc. 25-35, p. 2.

[5] Doc. 25-1, p. 5. The spelling of Schein's name varies in the deposition transcripts; we use the correct spelling.

he was upset about that."[6] Immediately after the meeting, Satterwhite approached Singh and asked him to apologize to Mr. Schein; Singh was "very dismissive"[7] and did not then do so.

Several days later Satterwhite met with Schein, who was still "upset because he felt he was owed an apology [by Singh]."[8] Satterwhite encouraged Schein to meet with Singh and try to obtain an apology. Satterwhite then reported the incident to a city Human Resources official and asked whether he or that official should go to the meeting between Schein and Singh. The official in turn contacted the City's Chief Deputy Controller, Chris Brown, who advised that they should let Schein meet with Singh alone. When the two met, Singh apologized, and Satterwhite reported that apology to the Human Resources official.[9] Subsequently Brown verbally reprimanded Singh for his "Heil Hitler" remarks. App. 3a. Singh asked Schein why he had reported the incident to Brown, and Schein informed Singh that Satterwhite was the source of the report. App. 3a, 13a.

In July 2010 the city received letters complaining about Singh's remarks from two individuals claiming to be affiliated with the Anti-Defamation League. The letters led to an investigation by the City Office of

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[6] Doc. 25-35, p. 2.

[7] Doc. 25-1, p. 5.

[8] Doc. 25-45.

[9] Doc. 25-35; Doc. 25-1, p. 6.

Inspector General (OIG). App. 3a, 13a-14a. In the course of that investigation, Satterwhite answered questions from OIG and provided OIG with a four-page sworn written statement.[10] The OIG concluded that Singh's remarks had violated an executive order of the mayor of Houston prohibiting city employees from using "inappropriate or offensive racial, ethnic, or gender slurs, connotations, words, objects, or symbols." App. 3a, 14a.

In June 2010, Singh became Satterwhite's supervisor. A few months later, Singh recommended that Satterwhite be demoted; the City agreed and demoted Satterwhite. Satterwhite claims that Singh's recommendation and the resulting demotion were in retaliation for Satterwhite's objections to the "Heil Hitler" remarks. The city contends that Satterwhite was demoted for legitimate reasons. App. 1a-2a.

Proceedings Below

Satterwhite filed a charge with EEOC, and subsequently filed suit against the City. He alleged that he had been demoted in retaliation for his objections to the "Heil Hitler" remarks, and that the retaliation violated section 704(a) of Title VII of the Civil Rights Act of 1964. App. 2a, 17a.

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[10] Doc. 25-35.

During discovery, counsel for the City repeatedly pressed Satterwhite to explain why he "believe[d] that stating Heil Hitler is a ... discriminatory statement."[11] Satterwhite explained that the remark was discriminatory because of

> what Hitler stands for, Mr. Schein is Jewish, I'm African American.... That term means to me is basically upholding the belief, hailing Hitler and for what he stood for is very – I find it discriminatory ... [b]ecause of what Hitler stands for.... Hitler stands for hatred, and Hitler stands for people that believe that other people are inferior to them, to the point where they should be exterminated. And that – that's – and racism.... Hitler was discriminatory against many races, many individuals, people with disabilities, very discriminatory.... I know Hitler was discriminatory against Jews.... I know Hitler was very discriminatory against many national origins, including blacks, minorities, Jews.

Doc. 25-1, pp. 5-8.[12]

The City moved for summary judgment, asserting that Satterwhite's objections to the "Heil Hitler" remarks was not activity protected by section 704(a), and that Satterwhite had failed to adduce sufficient

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[11] Doc. 25-1, p. 5.

[12] See *id.* at 5 ("I felt that the things he said was discriminatory. It was offensive to me. It was offensive to my coworkers.").

evidence that his demotion was the result of retaliation for those objections. The district court assumed that Satterwhite's opposition to the statements was protected activity under section 704(a). App. 22a. It concluded, however, that Satterwhite had not offered sufficient evidence that this protected activity was the cause of his demotion. App. 23a.

The court of appeals addressed only the question of whether Satterwhite's objections to the "Heil Hitler" remarks, and his participation in the OIG investigation, were protected activity. The appellate court noted that under controlling Fifth Circuit precedent Satterwhite was required to prove either that the "Heil Hitler" remarks actually violated Title VII, or that those remarks were so close to a violation of Title VII that Satterwhite could have "had a reasonable belief" that Singh had violated Title VII. App. 7a-9a. The 2007 Fifth Circuit decision in *Turner v. Baylor Richardson Med. Ctr.,* 476 F.3d 337 (5th Cir. 2007), applied by the court of appeals below, requires plaintiffs to make such a showing in a section 704(a) case. Under *Turner* it was insufficient that the harassing remarks were the type of discriminatory statement that, if continued, would bring about an unlawful hostile environment; rather, the legally controlling question was whether those remarks had *already* done so. "[F]or his actions to be protected activities Satterwhite must ... have had a reasonable belief that Singh's comment *created* a hostile work environment under Title VII." App. 7a (emphasis added; footnote omitted).

As mandated by *Turner*, the court of appeals compared the "Heil Hitler" remarks with the controlling legal standard regarding what harassment is sufficient to create a hostile work environment that violates Title VII. App. 7a-9a and nn.3-15. The Fifth Circuit concluded that there had not yet been enough remarks to create an unlawful hostile work environment, and that the remarks that had been made had not come sufficiently close to creating an unlawful hostile environment to permit Satterwhite (if he had understood the governing Title VII case law) to reasonably believe a violation of Title VII had occurred. It thus dismissed Satterwhite's claim on the ground that his opposition to the remarks was not protected activity under section 704(a). App. 9a.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves a complex and multi-faceted circuit conflict regarding the standard governing whether an employee will be protected from retaliation if he or she complains about invidious harassment *before* the harassment has continued long enough to create a hostile work environment and thus violate the law. There are now four quite different legal standards being applied by the various courts of appeals. In May 2015, the Fourth Circuit, which until recently utilized essentially the same standard as that applied by the Fifth Circuit in this

case, decisively repudiated that standard in a divided 10-3 en banc opinion.

These divergent legal standards yield sharply inconsistent results. In the Fifth, Tenth and Eleventh Circuits, an employee is not protected from retaliation if he or she objects to a single incident of harassment (or even several incidents if "isolated"); that was the legal rule applied by the court of appeals in this case. Other circuits, including the Fourth, emphatically hold that an objection to a single incident of harassment can be protected. The difference in standards is illustrated by a truly bizarre circuit conflict regarding a particularly reprehensible racial epithet. The Tenth and Eleventh Circuits have held that section 704(a) permits an employer to retaliate against a worker who objects to the use of the slur "nigger"; the Seventh Circuit, on the other hand, has held that an African-American who objects to that language is protected by section 704(a).

This issue is of exceptional consequence to a very large number of employees. Because unlawful harassment usually is the result of a series of remarks or incidents, which over time combine to create a hostile work environment, it is virtually always the case that workers are subject to discriminatory harassment before the point at which a Title VII violation arises. The practical question is thus whether those victims are protected from retaliation if they attempt to stop the harassment as soon as it starts, or must endure the harassment in silence until it has continued long enough that it actually violates, or has come close to

violating, Title VII. Employees and employers alike have a compelling interest in an interpretation of section 704(a) which – unlike the interpretation of section 704(a) in the court below – protects and thus encourages such early complaints.

I. THERE IS A COMPLEX, DEEPLY ENTRENCHED CIRCUIT CONFLICT REGARDING WHEN SECTION 704(a) PROTECTS EMPLOYEES WHO OPPOSE HARASSMENT THAT HAS NOT YET CREATED AN UNLAWFUL HOSTILE WORK ENVIRONMENT

A. The "Close Enough" Standard In The Fifth, Tenth and Eleventh Circuits

Three circuits hold that a complaint about harassment is protected by section 704(a) only if the employee had a "reasonable belief" that the harassment had created a hostile work environment. In these circuits such a belief can only be reasonable if either (1) the harassment actually resulted in an unlawful hostile work environment, or (2) the harassment came sufficiently "close" to doing so that a reasonable person could believe that the line of illegality had been crossed.

The circuits applying this standard carefully analyze the specific harassment complained of in light of the prevailing case law used to determine when harassment has become sufficiently severe and pervasive to be unlawful. A worker's objection to harassment is protected only if an employee familiar

with the intricacies of Title VII case law regarding what constitutes a hostile work environment could reasonably have concluded under those standards that the law had been broken. This interpretation generally denies protection to complaints made to *prevent* harassment from continuing to the point of illegality.

This line of decisions appears to originate in the Eleventh Circuit decision in *Clover v. Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (11th Cir. 1999). The court of appeals in that case compared what Clover had told her employer about a claim of sexual harassment (in that case, a claim by another worker) with the legal standards governing what types and frequency of harassment would create a hostile work environment. 176 F.3d at 1351. It concluded that the information known to Clover was insufficient by itself to constitute (or come close to) a violation of the law, and that she therefore had not engaged in protected activity when she provided that information to the employer. "None of the conduct that Clover described comes anywhere near constituting sexual harassment.... [T]he conduct opposed [need not] actually be sexual harassment, but it must be *close enough* to support an objectively reasonable belief that it is." 176 F.3d at 1351 (emphasis added).

The Eleventh Circuit applied the "close enough" standard to an harassment victim in *Butler v. Alabama Dep't of Transp.,* 536 F.3d 1209 (11th Cir. 2008). In that case an African-American worker complained about a co-worker's use of the epithet "nigger," and a jury found that the plaintiff was retaliated against for

having done so. The court of appeals held that the complaint was not protected activity under section 704(a) because the harassment had not reached a level "close" to illegality. "[I]f Butler did believe that [these] words ... amounted to an unlawful employment practice ... , her belief is not objectively reasonable. It is not even close.... What [the co-worker] said was ... 'uncalled for' and 'ugly.' But not every uncalled for, ugly, racist statement by a co-worker is an unlawful employment practice..... [T]he incident that gave rise to this case is nowhere near enough to create a racially hostile environment." 536 F.3d at 1213-14. The Eleventh Circuit instructed district courts, in applying section 704(a), to carefully compare the harassment complained of with Eleventh Circuit precedents regarding what pattern of harassment is and is not sufficient to create an unlawful hostile work environment. *Id.*; see *Amos v. Tyson Foods, Inc.,* 153 Fed.Appx. 637, 646 (11th Cir. 2005) (applying "close enough" standard); *Henderson v. Waffle House, Inc.,* 238 Fed.Appx. 499, 501 (11th Cir. 2007) (same); *Tatt v. Atlanta Gas Light Co.,* 138 Fed.Appx. 145 (11th Cir. 2005) (same).

The Fifth Circuit adopted this standard in *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337 (5th Cir. 2007). The plaintiff in that case had complained about a number of racial remarks made by her supervisor. The Fifth Circuit compared those remarks with the harassment that appellate courts had held sufficiently severe and pervasive to create a hostile work environment, and concluded that the

comments "pale in comparison." 476 F.3d at 348 (citing racial harassment decisions in the Fourth, Fifth and Seventh Circuits). Measured against that legal standard, one remark was rated merely "racially inappropriate" and the other remarks were "isolated." Because the actions complained of were not close to the level of illegality, the Fifth Circuit concluded that Turner's complaint was not protected by section 704(a). "Because Turner could not have reasonably believed that ... 'ghetto children' statements constituted an unlawful employment practice in and of themselves, Turner's response to this incident cannot be considered protected activity." 476 F.3d at 349.

The decision in the instant case is a classic application of this standard. The controlling question in the court below was whether the "Heil Hitler" remarks had already "created" a hostile work environment (App. 7a), not whether their continuation could do so. The linchpin of the Fifth Circuit's analysis was a comparison of Singh's remarks with the legal standards governing when harassment is sufficiently severe or pervasive to violate Title VII. See App. 7a-8a and nn.13-15. In light of governing Supreme Court and Fifth Circuit hostile environment decisions, the panel reasoned, Satterwhite could not reasonably have believed that the "Heil Hitler" remarks had created an unlawful hostile work environment. App. 9a.

The Tenth Circuit applied the same standard in *Robinson v. Cavalry Portfolio Services, LLC,* 365 Fed.Appx. 104 (10th Cir. 2010). In that case, as in

Butler, the plaintiff had complained about the use of the epithet "nigger." The Tenth Circuit held that the complaint was not protected by section 704(a) because under the legal standards governing hostile environment claims the use of that term is not sufficient to create an unlawful hostile work environment. "A complaint of a single racist remark by a colleague, without more, is not opposition protected by Title VII. Title VII does not [protect] every employee who complains ... about other employees' isolated racial slurs.... No reasonable person could have believed that the single ... incident [of repeated use of the term 'nigger'] violated Title VII's standards." 365 Fed.Appx. at 113-14 (internal quotation marks omitted).

Until recently the Fourth Circuit applied the same standard. *Jordan v. Alternative Resources Corp.,* 458 F.3d 332 (4th Cir. 2006), *petition for rehearing en banc*, 752 F.3d 350 (4th Cir. 2006). Although the plaintiff in that case had objected to a particularly vile racial epithet, the Fourth Circuit in *Jordan* held that he could not reasonably have believed that the remark was unlawful, and thus would not enjoy the protection of section 704(a), unless the remark complained of had already created (or was at least close to) a violation of Title VII. See 458 F.3d at 341 ("a violation is actually occurring"), 343 ("a Title VII violation has occurred.")[13] Under *Jordan* (as in the Eleventh

[13] *Jordan* suggested that a complaint might also be protected if the employee had evidence that the harasser had a specific "plan" to engage in future harassment. 458 F.3d at 340. That

(Continued on following page)

Circuit) the protections of section 704(a) were limited to harassment that has reached the point of illegality and to "close cases." *Keplin v. Maryland Stadium Authority,* 2008 WL 5428082 at *6 (D.Md. Dec. 31, 2008). The Tenth Circuit decision in *Robinson* expressly applied the holding and reasoning of *Jordan.* 365 Fed.Appx. at 112-13.

B. The Fourth Circuit "Humiliating" Incident Or "In Progress" Standard

In May of 2014 the Fourth Circuit in a 10-3 en banc decision overruled *Jordan* and repudiated its legal standard. *Boyer-Liberto v. Fontainebleau Corp.,* 2015 WL 2116845 (4th Cir. May 7, 2015). Judge King, who dissented in *Jordan*, wrote the majority opinion in *Boyer-Liberto*. Judge Niemeyer, who wrote the majority opinion in *Jordan*, authored the dissenting opinion in *Boyer-Liberto.*

The majority reasoned that the *Jordan* standard, requiring harassment victims to wait until harassment is at or close to the point of illegality (the standard still applied in the Fifth, Tenth and Eleventh Circuits),

> is at odds with the hope and expectation that employees will report harassment early, before it rises to the level of a hostile environment.... [Such] reporting ... is essential to accomplishing Title VII's "primary objective,"

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caveat appears to have been of no practical significance in the application of *Jordan*, because harassers do not reveal such plans.

> which is "not to provide redress but to avoid harm."].... [T]he *Jordan* standard deters harassment victims from speaking up by depriving them of their statutory entitlement to protection from retaliation.... Jordan ... did exactly what Title VII hopes and expects: He reported the comment to his employers in an effort to avert further racial harassment.

2015 WL 2116845 at *14-*16 (quoting *Faragher v. City of Boca Raton,* 524 U.S. 775, 806 (1998)).

The Fourth Circuit in *Boyer-Liberto* specifically held section 704(a) protects an employee who objects to "an isolated harassment ... even if a hostile work environment is *not* engendered by that incident alone." 2015 WL 2116845 at *1 (emphasis added). The court of appeals identified several circumstances in which a complaint about harassment would be protected even though it did not meet (or come close to) the standard of illegality. First, the Fourth Circuit held that an employee is protected if he or she objects to even an isolated incident of harassment if it is "physically threatening or humiliating." *Id.* *16-*17. More generally, the *en banc* court reasoned that regardless of whether there was only one incident of harassment, "the focus should be on the severity of the harassment." *Id.* *16; see *id.* *16 n.6 (*Boyer-Liberto* involves "more serious conduct"). An incident which an employee reasonably believed to be humiliating would be an example of harassment sufficiently serious that section 704(a) would protect a complainant. "[E]mployees who reasonably perceive an incident to be ... humiliating do not have to wait for further

harassment before they can seek help from their employers without exposing themselves to retaliation." *Id.* 19. Second, when complaining about an isolated incident that does not create a hostile work environment, a worker is also protected under *Boyer-Liberto* if he or she reasonably believes he or she is opposing "a hostile work environment that, although *not* fully formed, is in progress." *Id.* *14 (emphasis added).

Judge Niemeyer, in a dissenting opinion, objected that the new standard in *Boyer-Liberto* was "far beyond what any court of appeals has recognized." *Id.* 35.

The Fourth Circuit's focus on whether the harassment complained of (even if an isolated incident) is "serious" is consistent with decisions in the First, Third, Sixth and Eighth Circuits. *Collazo v. Bristol-Myers Squibb Mfg., Inc.,* 617 F.3d 39, 48 (1st Cir. 2010) (section 704(a) does not protect complaint about "a single mild incident or offhand comment."); *Theriault v. Dollar General,* 336 Fed.Appx. 172, 174-75 (3d Cir. 2009) ("[N]o reasonable person could ... believe[ ] that a single, non-serious incident violated Title VII's standard" (internal quotation marks omitted); "the comments were neither physically threatening nor humiliating"); *Trujillo v. Henniges Automotive Sealing Systems North America, Inc.,* 495 Fed.Appx. 65, 653-54 (6th Cir. 2012) ("This conduct is far more serious than the similar allegation in [*Clark County School Dist. v.*] *Breeden*."); *Brannum v. Missouri Dep't*

of Corrections, 518 F.3d 542, 548-49 (8th Cir. 2008) ("the single, relatively tame comment at issue here is insufficient as a matter of law to support an objectively reasonable belief it amounted to unlawful sexual harassment.").

C. The "Due Allowance" Standard In The Ninth and Second Circuits

The Ninth and Second Circuits emphatically reject the insistence of the Fifth and Eleventh Circuits that, in determining whether an employee "reasonably" believed that he or she was opposing unlawful harassment, the courts must evaluate the harassment complained of under the specific legal standards regarding hostile work environment claims. In the Ninth and Second Circuits, an employee need only have a reasonable belief that he is opposing what laymen would regard as racial, gender-based, or other discriminatory harassment.

In *Moyo v. Gomez,* 40 F.3d 982, 985 (9th Cir. 1994), *cert. den. sub nom. California Dep't of Corrections v. Moyo,* 513 U.S. 1081 (1995), the Ninth Circuit explained that

> [t]he reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an objective standard – one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual

> and legal bases of their claims. We note again that a *reasonable* mistake may be one of fact or law.

(Emphasis in original).

> [T]he reasonable belief standard used for Title VII retaliation claims in the Ninth Circuit is very low. Most non-lawyers will be ignorant of the nuances of the law governing employment discrimination. Because courts must make due allowance of the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims, almost all retaliation claims under Title VII premised on a mistake of law will certainly survive a motion to dismiss.

Riegel ex rel. New York State Dep't of Transp., 2008 WL 150488 at *7 (N.D.N.Y. Jan. 14, 2008) (internal quotation marks omitted) (quoting *Moyo* and *Figueroa v. Paychex, Inc.,* 1999 WL 717349 at *12 (D.Or. Sept. 7, 1999)).

The Second Circuit similarly insists that the reasonableness of a complainant's belief is not governed by the details of the substantive law governing hostile environment claims. *Kelly v. Howard I. Shapiro & Associates Consulting Engineers, P.C.,* 716 F.3d 10, 17 (2d Cir. 2013) ("we do not require a sophisticated understanding on the part of a plaintiff of this relatively nuanced area of law"); see *Trujillo v. Henniges Automotive Sealing Systems North America, Inc.,* 495 Fed.Appx. 651, 656 (6th Cir. 2012) ("A reasonable person in [the plaintiff's position], particularly

one without legal training, could conclude that Rollins's comments constituted hostile environment discrimination in violation of Title VII.").

The Eleventh Circuit, on the other hand, has expressly rejected this approach.

> The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law ... [F]ailure to charge the employee who opposes an employment practice with substantive knowledge of the law "would eviscerate the objective component of [the] reasonableness inquiry."

Clover v. Total Sys. Servs., Inc., 176 F.3d at 1351 (quoting *Harper v. Blockbuster Entm't Corp.,* 139 F.3d 1385, 1388 n.2 (11th Cir. 1998)).

D. The Seventh Circuit "If It Happened Enough" Standard

The Seventh Circuit has adopted yet a different standard. In that circuit, section 704(a) protects opposition to an incident of harassment if it is "the type of occurrence that, if it happened often enough, could constitute sexual harassment." *Magyar v. Saint Joseph Regional Medical Center,* 544 F.3d 766, 772 (7th Cir. 2008). Where the statement or action complained of meets that standard, the complaint is "objectively reasonable." *Id.*

This is the interpretation of section 704(a) urged by the EEOC. EEOC Brief as Amicus Curiae Supporting

Appellant's Petition for Rehearing *en banc*, *Boyer-Liberto v. Fontainebleau Corp.*, pp. 5 ("employees engage in protected opposition for retaliation purposes if they complain about racially offensive conduct that would create a hostile work environment if repeated often enough."), 11-12 ("Employees would ... be protected ... when complaining about conduct that if repeated often enough would result in a hostile work environment."); EEOC's Brief as Amicus Curiae Supporting Appellant, *Boyer-Liberto v. Fontainebleau Corp.*, 1 ("Title VII protect[s] an employee from retaliation for informing her employer of racially offensive conduct that if repeated often enough ... would create a hostile work environment...."), 7 ("employees engage in protected opposition for retaliation purposes if they complain about racially offensive conduct that would create a hostile work environment if repeated often enough.").

E. The Circuit Conflict Is Outcome Determinative

The differences among these four standards necessarily entails a conflict regarding whether an employee is protected by section 704(a) if he or she complains about a single racist or otherwise discriminatory remark.

> [S]ome courts have held that ... a single remark cannot support a reasonable belief that the law has been violated.... Other courts have taken the opposite view, holding that a single offensive remark may support a reasonable, if mistaken, belief that the law has been violated.... To date, the Supreme Court

> has declined to resolve this conflict in the circuits, despite the frequency with which the issue arises in the lower courts.

Riscili v. Gibson Guitar Corp., 605 F.Supp.2d 558, 566 (S.D.N.Y. 2009); see *Benussi v. UBS Financial Services, Inc.,* 2014 WL 558984 at *8 (S.D.N.Y. Feb. 13, 2014) (noting that the "circuits have apparently split on whether 'a single offensive remark may support a reasonable, if mistaken, belief that the law has been violated,'") (quoting *Riscili*).

The Fourth Circuit standard in *Boyer-Liberto* is avowedly a rule defining the circumstances in which "an employee who reports an isolated incident of harassment" is indeed protected by section 704(a). 2015 WL 2116849 at *16. The Ninth Circuit "due allowance" standard in *Moyo* has been repeatedly applied to hold that employees are protected when they complain about a single incident of harassment.[14] The Seventh Circuit "if it happened often enough" standard on its face requires only a single incident of the required type; a leading Seventh Circuit section 704(a) decision held that a complaint about a "single racist slur" was protected. *Alexander v. Gerhardt*

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[14] *Onodera v. Kuhio Motors, Inc.,* 2014 WL 1031039 at *6 (D.Hawai'i March 13, 2014) (complaint about single incident protected); *EEOC v. Evergreen Alliance Golf Ltd.,* 2013 WL 1249127 at *12 (D.Ariz. March 26, 2013) (complaint about single incident protected); *Whitley v. City of Portland,* 654 F.Supp.2d 1194, 1215 (D.Or. 2009) (complaint about single incident protected); *Eakerns v. Kingman Regional Medical Center,* 2009 WL 735148 at *12 (D.Ariz. March 19, 2009) (complaint about single incident protected).

Enterprises, Inc., 40 F.3d 187, 195 (7th Cir. 1997). Conversely, under the standard in the Fifth, Tenth and Eleventh Circuits, section 704(a) does not protect an employee who complains about a single racist slur, or even a few. The linchpin of the decision in the instant case was that the "Heil Hitler" incident, however offensive, "was a single and isolated incident." App. 9a. Under *Turner*, even objections to repeated discriminatory statements are unprotected if those statements were "isolated comments [plural]." 476 F.3d at 349. In the Tenth Circuit, "complaining about an isolated racial slur is not opposition protected by Title VII." *Robinson v. Cavalry Portfolio Services, LLC,* 365 Fed.Appx. at 114 (quoting *Jordan,* 467 F.3d at 380). In the Eleventh Circuit, *Henderson v. Waffle House, Inc.,* 238 Fed.Appx. 499, 503 (11th Cir. 2007) held that an employee is not protected when she complained about only "occasional" jokes about the size of her breasts.

This difference in the interpretation of section 704(a) has led to an extraordinary circuit conflict about whether a worker is protected if he or she complains about the use of the infamous slur "nigger." The Eleventh Circuit has twice held that under section 704(a) a worker can be fired for objecting to that most vile of epithets. *Butler v. Alabama Dep't of Transp*., 536 F.3d at 1210 ("Did you see that stupid mother fucking nigger hit me?"; "Now that stupid ass nigger down there is trying to direct traffic. I hope something come[sic] over the hill and run over his ass and kill him."); *Little v. United Technologies, Carrier Transicold Div.,* 103 F.3d 956, 958 (11th Cir. 1997) ("Nobody runs this team but a bunch of niggers and

I'm going to get rid of them."). The Tenth Circuit held that an employee could be dismissed for objecting to the fact that her supervisor used the term "nigger" on several occasions. *Robinson v. Cavalry Portfolio Services, LLC,* 365 Fed.Appx.at 107, 113. On the other hand, the Seventh Circuit holds that an African-American worker cannot be retaliated against for objecting to the use of that same epithet. *Alexander v. Gerhardt Enterprises, Inc.,* 40 F.3d 187, 190 (7th Cir. 1994) ("if a nigger can do it, anybody can do it."). And the Sixth Circuit has held that employees are protected if they object to references to African-Americans as "brothers" or to Hispanics as "wetback[s]." *Trujillo v. Henniges Automotive Sealing Systems North America, Inc.,* 495 Fed.Appx. 651, 653-54 (6th Cir. 2012).

District court decisions applying *Jordan* repeatedly hold that section 704(a) does not protect an employee who objects to the use of the epithet "nigger."[15] Conversely, district courts outside the Fifth, Tenth and Eleventh Circuits generally hold that such objections are protected activity under section 704(a).[16] District court decisions in the Tenth and

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[15] *Parker v. Smithfield Packing Co.,* 2007 WL 983845 at *2, *7-*8 (E.D.Va. March 26, 2007) ("nigger rigging"); *Pollard v. George Coyne Chemical Co.,* 2008 WL 2120710 at *1, *7 (E.D.Pa. May 19, 2008) (plaintiff was called a "nigger" on "several occasions").

[16] *Adams v. Commonwealth of Pennsylvania,* 2005 WL 851339 at *3, *6 (E.D.Pa. April 8, 2005) ("nigger"); *Gist v. Burlington Coat Factory Warehouse Corp.,* 2014 WL 4105015 (D.N.J. Aug. 19, 2014) ("get back to work Nigger"); *Greene v.*

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Eleventh Circuits hold that section 704(a) does not protect African-American men who object to being addressed as "boy"[17] or "Buckwheat."[18] In the Ninth Circuit, on the other hand, a district court held that a Native American is protected if she objects to being called a "damned Indian."[19] Another trial court in that circuit held that an African-American is covered by section 704(a) if he complains about the statement "You people don't know how to do your job," because it "could reasonably be interpreted as a racial slur."[20]

There is a similar discrepancy in the protection accorded to women who object to incidents of sexual harassment. In *Henderson v. Waffle House, Inc.,* 238 Fed.Appx. 499 (11th Cir. 2007), the Eleventh Circuit held that a woman was not protected when she objected to the fact that her supervisor

> made remarks about the size of her breasts on more than one occasion and refused to give her an apron because of his opinion

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MPW Industrial Services, Inc., 2006 WL 3308577 (W.D.Pa. Oct. 4, 2006) ("nigger rigging"); *McDowell v. North Shore-Long Island Jewish Health System, Inc.,* 788 F.Supp.2d 78, 79, 82 (E.D.N.Y. 2011) ("nigger").

[17] *King v. Piggly Wiggly Alabama Distribution Co., Inc.,* 929 F.Supp.2d 1215, 1219, 1225-31 (N.D.Ala. 2013).

[18] *Sampson v. Integra Telecom Holdings, Inc.,* 2010 WL 5069851 at *1, *13-*14 (D.Utah Dec. 6, 2010).

[19] *Eakerns v. Kingman Regional Medical Center,* 2009 WL 735148 at *13 (D.Ariz. March 19, 2009).

[20] *Orme v. Burlington Coat Factory of Oregon,* 2008 WL 5234408 at *1, *8-*11 (D.Or. Dec. 12, 2008).

> about the size of her breasts.... [I]n a conversation about a new shirt, [he] told her, 'you just look like you're going to burst' and started laughing ... [W]hen she asked ... for an apron, [he] said that they did not make aprons 'big enough for people with boobs like mine' ... made a comment about her large breasts in front of a customer.

238 Fed.Appx. at 502. In *Tatt v. Atlanta Gas Light Co.,* 138 Fed.Appx. 145, 147 (11th Cir. 2005), "approximately once per week, when [the plaintiff] presented [her supervisor] with paperwork to sign, '[her boss] would pretend to unzip his pants ... and urinate all over the paperwork.'" The Eleventh Circuit held that section 704(a) did not protect the victim from retaliation for complaining about that behavior. Conversely, the Second Circuit held that a woman was protected when she complained about two incidents, 4 years apart, in which she was once criticized as acting like "a bitch in heat" and once had to hang up on her supervisor when he began a sentence with "if you think my pecker is getting in the way." *Reed v. A.W. Lawrence & Co., Inc.,* 95 F.3d 1170, 1175 (2d Cir. 1996). The First Circuit held that a supervisor was protected when he assisted a subordinate in pursuing an objection that an harasser "'stare[d] at [the victim] all the time,' 'undress[ed] her with his eyes,' and looked at her with 'elevator eyes.'" *Collazo v. Bristol-Myers Squibb Mfg., Inc.,* 617 F.3d 39, 43 (1st Cir. 2010).

District courts applying *Jordan* deny protection to women who complain about remarks about their breasts;[21] elsewhere in the country district courts generally hold such complaints are protected activity.[22] One decision applying *Jordan* held that section 704(a) does not protect a complaint about a supervisor's direction to move something "not as much as a black thick cunt hair, but less than a blonde pussy hair." *Crews v. Ennis, Inc.,* 2012 WL 5929032 at *1, *8-*9 (W.D.Va. Nov. 27, 2012). A district court decision in the Eleventh Circuit held that an employer could retaliate against a woman who complained that the company president "insinuated that [she] obtained new business by wearing short skirts and low-cut blouses when calling on customers

[21] *Boone v. Larson Mfg. Co., Inc.,* 299 F.Supp.2d 1008, 2014 (D.S.D. 2003) (regarding what to wear during the holiday shift, supervisor answered "'Well, I hope at least you'd wear a bra, because with those you'd need a bra.' ... Everyone in the office laughed"; supervisor "remarked that Boone had big cleavage.... and continued to draw attention to the size of Boone's breasts.").

[22] *Bombalski v. Lanxess Corp.,* 2014 WL 950355 at *2, *5 (W.D.Pa. March 11, 2014) (supervisor told plaintiff that "her breasts were too large for her attire"); *Brown v. LKL Associates, Inc.,* 403 F.Supp.2d 1044, 1047-48 (D.Utah 2005) (manager twice asked plaintiff for a photograph of her breasts); *Seybert v. International Group, Inc.,* 2009 WL 722291 at *3-*5, *21 (E.D.Pa. March 18, 2009) (two incidents in which plaintiff's supervisor stared at her breasts); *Whitley v. City of Portland,* 654 F.Supp.2d 1194, 1200, 1214-15 (D.Or. 2009) (single incident in which supervisor commented that plaintiff's nipples were showing through her shirt and asked if she was wearing a jogging bra).

and by engaging in illicit behavior after hours ... observed ... that she probably looked hot in leather ... [and asked] 'personal questions ... concerning [her] divorce, where [she was] living, etc.'" *Brewer v. Amsouth Bank,* 2006 WL 1522946 at *1 (N.D.Miss. May 25, 2006). Conversely, decisions in the Second and Seventh Circuits hold that a woman is protected if she complains about a single remark that, because unmarried, she must be "either a dyke or a slut,"[23] about the use of the term "bitch" at a single meeting,[24] or about a married supervisor's repeated but polite efforts to develop a personal relationship.[25] There is a bizarre disparity in decisions involving bathrooms.[26]

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[23] *Benussi v. UBS Financial Services, Inc.,* 2014 WL 558984 at *5, *8 (S.D.N.Y. Feb. 13, 2014).

[24] *Carlson v. Illinois Community College District,* 2006 WL 2853890 at *1,*6 (N.D.Ill. Sept. 27, 2006).

[25] *Pappas v. Watson Wyatt & Co.,* 2008 WL 793597 at *1, *5-*6 (D.Ct. March 20, 2008) (plaintiff's supervisor bought her gifts, spent excessive amounts of time in her office for no business purpose and invited her to his weekend ski house).

[26] In *Amos v. Tyson Foods, Inc.,* 153 Fed.Appx. 637, 646 (11th Cir. 2005), a male employee "walked through the [women's] restroom, 'in no hurry,' was 'gawking' at the two women, and stopped briefly inside. [One plaintiff] testified that [the man] taunted her with hand motions.... [H]e saw them undressed." 153 Fed.Appx. at 646. The Eleventh Circuit held that section 704(a) did not protect the women who objected to this, explaining that "this single instance would not entitle [the women] to an objectively reasonable belief that they had been sexually harassed." *Id.* at 646. In *Onodera v. Kuhio Motors, Inc.,* 2014 WL 1031039 (D.Hawai'i March 13, 2014), a district court applying the Ninth Circuit standard in *Moyo* held that section

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Similar disparities exist regarding other forms of discriminatory comments. *Compare Keplin v. Maryland Stadium Authority*, 2008 WL 5428082 at *1-*4 (D.Md. Dec. 31, 2008) (Roman Catholic worker could be fired for complaining about "several offensive comments ... about the Roman Catholic Church and its members") (applying *Jordan*), *with EEOC v. Evergreen Alliance Golf Ltd.,* 2013 WL 1249127 at *1 (D.Ariz. March 26, 2013) ("it was objectively reasonable ... for Rasnake to believe, even if his belief was wrong, that under the ADA his supervisor could not derogatorily use the word 'retarded' in a professional environment") (applying *Moyo*); *compare Garcia v. Teledyne Energy Systems, Inc.,* 2012 WL 4127878 at *1 (D.Md. Sept. 19, 2012) (Title VII permits firing Hispanic worker for complaining that co-worker referred to him as a "spic.") (applying *Jordan*), *with Hexemer v. General Electric Co.,* 2013 WL 4854350 (N.D.N.Y. Sept. 11, 2013) (complaint protected because "call[ing] [Iranian-born] Plaintiff 'uncivilized' in the context of berating ... her about the difference between acceptable behavior in the United States and Iran [were] comments Plaintiff might reasonably have viewed as particularly racist and offensive given that Plaintiff . . . had been in the United States for more than forty years....") (applying *Moyo*).

704(a) protects a man who complains that a female employee entered the men's restroom and stared at the partially exposed plaintiff.

II. THE DECISION OF THE COURT OF APPEALS, AND THE "CLOSE ENOUGH" STANDARD, ARE INCONSISTENT WITH THE DECISIONS OF THIS COURT AND THE PURPOSES OF TITLE VII

The decision of the court below, and the "close enough" standard in the Fifth, Tenth and Eleventh Circuits, are palpably inconsistent with the remedial scheme established by Title VII and with the decisions of this Court.

As the EEOC correctly emphasized in its brief in *Boyer-Liberto,* enforcement of the Title VII prohibition against the creation of an unlawful hostile work environment requires that section 704(a) be construed to protect employees who complain when discriminatory harassment first begins and before a violation has yet occurred.

> [E]mployers often cannot prevent hostile work environments from taking place unless employees alert them to the harassing conduct that, if not corrected, will create the hostile work environment. Employee complaints about racially offensive conduct that is not yet actionable are therefore essential to enable employers to avoid violations.... An employer trying to forestall actionable hostile work environments would want to know that several employees independently find the harasser's conduct racially offensive. For this reason ... , employees should be encouraged to report racially offensive conduct

> before it becomes actionable, and they should be protected from retaliation if they do so.

EEOC Brief as Amicus Curiae Supporting Appellant's Petition for Rehearing *en banc*, *Boyer-Liberto v. Fontainebleau Corp.*, pp. 8-9. "Title VII's deterrent purposes [would be best served if employees] report harassing conduct before it becomes severe or pervasive." *Ellerth*, 524 U.S. at 764.

The standard applied by the court below strikes at the heart of the remedial mechanisms prescribed by this Court's decisions in *Ellerth* and *Faragher*. In the case of harassment by an employee's supervisor, the affirmative defense recognized by *Ellerth* and *Faragher* requires the employer to prove that the employee "unreasonably failed to take advantage of any preventative ... opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765. The enforcement scheme envisioned by this Court's decisions could be eviscerated if section 704(a) did not protect employees who sought to invoke those very "preventative ... opportunities," internal mechanisms provided to enable workers to prevent harassment from reaching the point of illegality. When the harasser is not the victim's supervisor, the employer is liable if it was negligent in failing to prevent the continuation of the harassment; an internal complaint prior to the point of illegality may operate to enable the employee to establish the "negligence necessary to impute liability," *Boyer-Liberto*, 2015 WL 2116845 at *14, and thus creates a powerful incentive for preventative action by the employer.

Although the standard in the Fifth, Tenth and Eleventh Circuits purports to protect employees who "reasonably" believe there is an unlawful hostile environment, it is often impossible for an employee (or counsel) to say with confidence that there has been enough harassment to violate (or almost violate) Title VII. The narrow interpretation of section 704(a) utilized by the Fifth, Tenth and Eleventh Circuits thus "puts too heavy a burden on harassment victims because even courts sometimes have a difficult time drawing the line between lawful and merely unpleasant conduct in harassment cases." EEOC's Brief as Amicus Curiae Supporting Appellant, *Boyer-Liberto v. Fontainebleau Corp*., p. 16. "[W]hether a hostile work environment exists in fact can be a bit of a moving target; there is no 'mathematically precise test.' *See Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22 (1993)." *Jordan,* 458 F.3d at 352 (King, J., dissenting). In *Boyer-Liberto* ten judges concluded that a reasonable jury could find that the harassment was already serious enough to be illegal, while three judges insisted that no reasonable person (including Ms. Boyer-Liberto) could have believed that there was yet a Title VII violation. Had the Fourth Circuit in that case applied the Fifth, Tenth and Eleventh Circuit standard, whether Boyer-Liberto's complaint was legally protected would have depended on which three judges she happened to draw on her appeal. One district court attempting to explain the "close enough" reasonable belief standard commented that "[o]n the scale of 1-10 where 5 crosses the line into harassment, ... a 4 *might* be perceived as a reasonable belief,

if ultimately not harassing...." *Davidson v. Korman,* 2011 WL 1253743 at *5 (E.D.Cal. March 29, 2011) (emphasis added). But once the harassment reaches the point of illegality (a "5"), a worker who has not complained will likely forfeit his or her claim under *Ellerth* and *Faragher*. It would require an impossible degree of precision on the part of employees to insist that they complain just when the harassment becomes a "4," not when it is only a "3" (for which they could lawfully be fired) or already a "5" (too late to preserve their legal claims).

Harassment victims are laymen, not lawyers expert in the complex and evolving judicial standards governing when a jury could conclude that harassment is sufficiently severe or pervasive to create an unlawful hostile work environment. For the men and women in the nation's factories and offices, sexual, racial or religious "harassment" refers to the subject and seriousness of a particular incident, such as an insult or unwanted touching, not to some legal construct regarding what alters the "terms and conditions of employment." "Few employees ... could correctly identify the particular factors that a court examines in assessing a hostile work environment claim." *Rodriguez v. Wet Ink, LLC,* 2014 WL 287339 at *3 (D.Colo. Jan. 27, 2014). It is cruelly unrealistic to penalize harassment victims by denying the protections of section 704(a) to those who could not "reasonably believe" that the harassment satisfied some legal standard, regarding of frequency or gravity, of which those victims could not possibly be aware.

Nothing in the text of section 704(a) requires such a result. The statute protects employees who "oppose any practice, made an unlawful employment practice by this title." 42 U.S.C. § 2000e-3(a). In ordinary English one can oppose something by seeking to prevent its occurrence, not just by seeking to end it. The term "oppose" is used in that sense when we speak of people who oppose attacking Iran or who oppose amending the Federal Rules of Civil Procedure.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case is an excellent vehicle for resolving the multi-faceted circuit conflict. The decision in the court of appeals below rested solely on its narrow interpretation of section 704(a), which required Satterwhite to show that the comments to which he objected were either unlawful or so close to illegality that he could have reasonably believed that the governing legal standard had already been violated. The court of appeals' analysis of whether the comments in question satisfy the specific legal criteria for an unlawful hostile work environment is a classic application of the "close enough" standard utilized in the Fifth, Tenth and Eleventh Circuits. Although the decision below is unreported, it applies the controlling Fifth Circuit standard in the reported 2007 decision in *Turner*, which is the same standard adopted in reported decisions in the Tenth and Eleventh Circuits.

Satterwhite's objection to the "Heil Hitler" remarks would constitute protected activity under the interpretation of section 704(a) in the Second, Fourth, Seventh and Ninth Circuits.

The underlying question – when section 704(a) protects an employee who complains about discriminatory harassment before it has reached the point of illegality – has been thoroughly vetted in the lower courts. The various circuit courts have now devised four different legal standards regarding the meaning and protections of section 704(a). The arguments in favor of those divergent standards have been well aired, particularly in the lengthy dueling opinions of Judges King, Traxler and Niemeyer in *Jordan* and *Boyer-Liberto*. In addition, the large number of district court decisions regarding this recurring question presents a valuable body of experience on which the Court can draw in fashioning a sound and workable legal standard.

The instant case presents several of the different types of circumstances in which the question arises. In March 2010 Satterwhite himself took the initiative to report and complain about the discriminatory remarks; in July of 2010 Satterwhite answered questions from his employer in response to an investigation being conducted by that employer. See *Crawford v. Metropolitan Gov't of Nashville and Davidson County, Tenn.,* 555 U.S. 271 (2009). Satterwhite objected to the "Heil Hitler" remarks both because the remarks (and Hitler) discriminated against non-whites like himself, and because they discriminated against one of Satterwhite's subordinates, who was

Jewish. This case would thus permit the Court to consider whether such differences should be relevant under the proper interpretation of section 704(a).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-20240

COURTNEY SATTERWHITE,

Plaintiff-Appellant,

v.

CITY OF HOUSTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:12-CV-1929

(Filed Mar. 3, 2015)

Before SMITH, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

Courtney Satterwhite, an employee of the City of Houston, reported his coworker, Harry Singh, for making an offensive comment. When Singh later became Satterwhite's supervisor, he recommended

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Satterwhite be demoted for various non-retaliatory reasons. The City agreed and demoted Satterwhite. Satterwhite filed suit, alleging unlawful retaliation under Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act (TCHRA). The district court granted summary judgment to the City because Satterwhite failed to provide sufficient evidence of a causal link between his allegedly protected activity and his demotion. We now affirm because Satterwhite did not engage in a protected activity.

I

The City hired Satterwhite in 1993 as an Assistant City Controller I. By March 2010, Satterwhite had been promoted to Assistant City Controller V, and Singh was the Deputy Director of the Controller's Office; Singh did not directly supervise Satterwhite at this time.

During a March 22 meeting attended by Satterwhite, Singh, and others, Singh made a comment that referenced Hitler. Satterwhite asserts that Singh used the phrase "Heil Hitler," while Singh maintains he said, "you know, we're not in Hitler court." After the meeting, Satterwhite informed Singh that another city employee, Daniel Schein, was offended by Singh's remarks. Although Singh apologized to Schein and Schein declined to file a formal complaint, Satterwhite reported the incident to the Deputy Director of Human Resources, who reported it to the

City's Chief Deputy Controller, Chris Brown. Brown verbally reprimanded Singh. After his verbal reprimand, Singh approached Schein to inquire why he had reported the incident to Brown. Schein informed Singh that Satterwhite had reported the comment.

In June, Singh was promoted to Acting Deputy City Controller, and Satterwhite began reporting directly to Singh.

The next month, the City Controller's Office and the City Office of Inspector General (OIG) received identical letters from two individuals claiming to be members of the Anti-Defamation League. The letter complained of the "Heil Hitler" incident involving Singh and Singh's later promotion. The OIG investigated the incident and determined that "Singh made a comment to Ms. Martina Lee that they were not running a Hitler court." The OIG also concluded Singh's statement violated an executive order of the mayor of Houston prohibiting city employees from using "inappropriate or offensive racial, ethnic or gender slurs, connotations, words, objects, or symbols."

Over the course of the next few months, Singh disciplined Satterwhite on multiple occasions. One incident involved Satterwhite being unavailable at his desk for a prolonged length of time without informing others of his whereabouts, contrary to office policy. Singh later met with Satterwhite to discuss this absence and verbally reprimand him. Satterwhite purportedly became upset and yelled at Singh. In September, Singh formally disciplined Satterwhite for

changing the policy regarding how the office handled incoming government mail without properly communicating information about the change. On September 21, Satterwhite sent Singh an email expressing his belief that Singh's reprimands were retaliation for having reported the "Heil Hitler" incident. Shortly thereafter, Singh, pointing to Satterwhite's verbal and formal reprimands, recommended to City Controller Ronald Green that Satterwhite be demoted. Satterwhite was given an opportunity to respond to the stated reasons for demotion at a hearing.

After the hearing, in which Satterwhite argued that Singh was retaliating against him for reporting the "Heil Hitler" incident, Green demoted Satterwhite to Assistant City Controller IV, lowering his salary by two pay grades. Satterwhite subsequently filed a complaint with the EEOC, and after receiving notice of his right to sue, brought suit in the district court alleging unlawful retaliation under Title VII and the TCHRA. The district court granted summary judgment to the City because Satterwhite could not establish that his reports of the "Heil Hitler" incident were a but-for cause of the demotion. Satterwhite now appeals.

II

We review a district court's grant of summary judgment de novo.[1] Summary judgment is appropriate if, viewing the evidence in the light most favorable to Satterwhite, the City shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.[2] A genuine issue of material fact exists if a reasonable jury could return a verdict for Satterwhite.[3]

III

Title VII prohibits employers from engaging in retaliatory action against employees for opposing unlawful employment practices.[4] To set out a prima facie case of retaliation under Title VII, an aggrieved employee must show: "(1) he engaged in an activity protected by Title VII; (2) he was subjected to an

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[1] *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 377 (5th Cir. 2010).

[2] *See* FED. R. CIV. P. 56(a); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 308 (5th Cir. 2004).

[3] *See Jackson*, 602 F.3d at 377 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[4] 42 U.S.C. § 2000e-3(a) provides in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action."[5]

The *McDonnell Douglas*[6] burden-shifting test applies to Title VII unlawful retaliation cases.[7] If Satterwhite is able to establish a prima facie case of unlawful retaliation, the burden then shifts to the City to articulate a legitimate, non-retaliatory reason for the demotion.[8] If the City carries this burden, Satterwhite must show that the City's explanation is a pretext for unlawful retaliation.[9]

While the district court granted summary judgment to the City because it held Satterwhite failed to establish a causal link between Satterwhite's activities and his demotion, we affirm because Satterwhite's activities were not protected under Title VII.[10]

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[5] *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014) (quoting *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309, 319 (5th Cir. 2004)).

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[7] *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000).

[8] *See id.*

[9] *See id.*

[10] *See CQ, Inc. v. TXU Mining Co.*, 565 F.3d 268, 274 (5th Cir. 2009) ("[W]e may affirm a grant of summary judgment on any ground presented to the district court for consideration, even though it may not have formed the basis for the district

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Satterwhite asserts that he engaged in two distinct protected activities: (1) making an oral report to human resources that Singh used the phrase "Heil Hitler" in a meeting, and (2) answering questions in connection with the OIG's investigation of the "Heil Hitler" incident. While Satterwhite's actions could qualify as *opposing* under 42 U.S.C. § 2000e-3(a),[11] for his actions to be protected activities Satterwhite must also have had a reasonable belief that Singh's comment created a hostile work environment under Title VII.[12]

No reasonable person would believe that the single "Heil Hitler" incident is actionable under Title VII. The Supreme Court has made clear that a court determines whether a work environment is hostile "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and

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court's decision." (citation omitted) (internal quotation marks omitted)).

[11] *See Crawford v. Metro. Gov't of Nashville and Davidson Cnty., Tenn.*, 555 U.S. 271, 276-77 (2009).

[12] *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 349 (5th Cir. 2007) ("Because Turner could not have reasonably believed that Colston's conduct . . . constituted an unlawful employment practice under Title VII, this incident cannot give rise to protected activity."); *see also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (per curiam) (dismissing a retaliation claim because "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard.").

whether it unreasonably interferes with an employee's work performance.'"[13] Furthermore, "isolated incidents (unless extremely serious)" do not amount to actionable conduct under Title VII.[14] We have accordingly rejected numerous Title VII claims based on isolated incidents of non-extreme conduct as insufficient as a matter of law.[15]

In *Turner v. Baylor Richardson Medical Center*, a black employee complained of her supervisor's racially insensitive remarks, including an incident when the supervisor referred to inner-city children as "ghetto children."[16] After being terminated, the

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[13] *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment.").

[14] *Faragher*, 524 U.S. at 788.

[15] *See, e.g., Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 405-06 (5th Cir. 1999) (rejecting a race-based termination claim because evidence of discrimination only revealed isolated incidents); *Weller v. Citation Oil & Gas Corp*., 84 F.3d 191, 194-95 & n.5 (5th Cir. 1996) (reversing a jury award based on a hostile-work-environment claim stemming from single incident in which a supervisor provided an employee with offensive religious materials); *see also Mendoza v. Helicopter*, 548 F. App'x 127, 129 (5th Cir. 2013) (per curiam) (rejecting a hostile work environment claim because "the complained of conduct occurred sporadically over a several year period and c[ould not] accurately be described as pervasive. Additionally, no single incident was severe enough to independently support a hostile work environment claim.").

[16] *Turner*, 476 F. 3d at 342.

employee filed suit alleging, among other claims, unlawful retaliation.[17] We held that the employee had not established a prima facie case of retaliation because the employee "could not have reasonably believed" that the isolated comments constituted an unlawful employment practice.[18] Similarly here, Satterwhite acknowledges that Singh's comment was a single and isolated incident. He could not have reasonably believed that this incident was actionable under Title VII, and therefore, it "cannot give rise to protected activity."[19]

Satterwhite argues that the "Heil Hitler" incident must be an unlawful employment practice because the OIG found that it violated an executive order of the mayor of Houston prohibiting the use of racial, ethnic, and gender slurs. But the definition of "unlawful employment practice" in Title VII is defined by Congress not state or local laws,[20] and as previously discussed, no reasonable person could find the "Heil Hitler" incident alone satisfied Congress's definition. Accordingly, Satterwhite has failed to establish a prima facie case of retaliation.

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[17] *Id.* at 345.

[18] *Id.* at 349.

[19] *Id.*

[20] 42 U.S.C. § 2000e-2 to -3.

IV

Satterwhite also appealed the district court's judgment with respect to his claim under the TCHRA. One purpose of the TCHRA is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments."[21] Accordingly, the Supreme Court of Texas has "consistently held that th[e] analogous federal statutes and the cases interpreting [Title VII] guide [its] reading of the TCHRA."[22] Satterwhite agrees that his TCHRA claim is "analyzed under the same standard"[23] as his Title VII claim. Therefore, for the same reasons Satterwhite's Title VII claim fails, his TCHRA claim fails.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[21] TEX. LAB. CODE ANN. § 21.001.

[22] *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W. .3d 629, 633-34 (Tex. 2012).

[23] *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 650 (5th Cir. 2012).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

COURTNEY SATTERWHITE, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-12-1929
CITY OF HOUSTON, Defendant.	§	

MEMORANDUM AND ORDER

(Filed Feb. 28, 2014)

Courtney Satterwhite sued his employer, the City of Houston, alleging retaliation under Title VII and the Texas Commission on Human Rights Act ("TCHRA"). Satterwhite, who has worked for the City since 1993, currently holds the position of Assistant City Controller IV. The City demoted him in October 2010 from the position of Assistant City Controller V. (Docket Entry No. 24-8). This lawsuit stems from that demotion. Satterwhite alleges that he was demoted in retaliation for reporting remarks made in a meeting by another employee. (Docket Entry No. 13 at 2-5). In March 2010, Satterwhite reported the remarks to the City, which investigated and reprimanded the other employee. Satterwhite alleged that this employee later became his supervisor and recommended him for demotion in retaliation for reporting the remarks. (*Id.* at 5-7).

The City has moved for summary judgment on both the Title VII and TCHRA claims. (Docket Entry No. 24). Based on a careful consideration of the record, the motion and responses, and the applicable law, summary judgment is granted as to both claims. The reasons are explained in detail below. It appears, but is unclear, that the holding on the basis for this summary judgment ruling on the demotion claim requires dismissing any claims for retaliation based on other employment actions. No later than **March 14, 2014**, each party must file a brief statement identifying any remaining issues and proposing a schedule for resolving them, or submitting a proposed final judgment.

I. Background

Satterwhite began his employment with the City in 1993 as an Assistant City Controller I. He was eventually promoted to Assistant City Controller V. (Docket Entry Nos. 24-8, 25-1 at 6). Harry Singh was the Deputy Director of the Controller's Office. In March 2010, Singh did not directly supervise Satterwhite. (*See* Docket Entry No. 24-1).

On March 22, 2010, Satterwhite attended a meeting with Singh and others. (Docket Entry No. 24-2). During the meeting, Singh made a statement that referred to Hitler. (*See id*). The parties dispute what Singh said, but all agree that he made some reference to Hitler. Satterwhite contends that Singh said "Heil Hitler." (Docket Entry No. 24-14 at 14).

Singh contends that he said "you know, we are not in Hitler court." (Docket Entry No. 25-2 at 93).

Satterwhite spoke to Singh immediately after the meeting and said that Daniel Schein, an employee who reported to Satterwhite, had heard Singh's comment and was upset. (Docket Entry No. 24-2). Satterwhite asked Singh to apologize to Schein, which Singh eventually did. (*Id.*). (Docket Entry No. 24-17). That same day, Satterwhite reported Singh's remarks to Shannan Nobles, the Deputy Director of Human Resources. (Docket Entry No. 24-2). Nobles reported the remarks to Chris Brown, the City's Chief Deputy Controller. (*Id.*). Brown verbally reprimanded Singh shortly thereafter. (Docket Entry No. 25-12 at 2). Schein told Singh that Satterwhite had discussed the Hitler comment with Nobles. (*Id.*). Schein declined to file a formal complaint. (Docket Entry No. 24-17).

Singh was promoted to Acting Deputy City Controller of the Operations and Technical Services Division on June 3, 2010. (Docket Entry No. 24-3). As a result, Satterwhite began reporting to Singh. (Docket Entry No. 24-4).

In July 2010, the City Controller's Office and the City Office of Inspector General ("OIG") received two identical letters stating that they were from two members of the Anti-Defamation League. (*See* Docket Entry Nos. 24-5, 24-6). The letters described Singh's remark about Hitler, noted that the City had promoted Singh, and asked for an investigation. (*Id.*). The

letters had no contact information or return address and were unsigned. (*See id.*). The OIG was unable to locate either person identified in the letters. The Anti-Defamation League denied that the writers had "any affiliation with their organization." (Docket Entry No. 24-2, at 3). OIG nonetheless opened an investigation into Singh's remarks about Hitler. (*See* Docket Entry No. 25-22). Satterwhite provided a sworn statement to OIG on July 28, 2010. (Docket Entry No. 25-35). Satterwhite stated that Singh said "Heil Hitler" multiple times and that Schein had been offended. (*See id.* At 2). OIG's investigation concluded that Singh had violated the Mayor's Executive Order 1-20, forbidding "Racial, Ethnic and Gender Slurs."[1] (Docket Entry No. 25-22).

On July 1, 2010, Singh tried to contact Satterwhite at work, but could not locate him. (*See* Docket Entry No. 25-11). Satterwhite was away from his desk and no one knew his whereabouts. (*See id.*). Singh claims that Satterwhite's absence lasted for over four hours, which violated office policy. (Docket Entry No. 25-21 at 2). Satterwhite contends that he

[1] Order 1-20 states in relevant part: "It is the policy of the City of Houston that employees shall not verbally, non-verbally or illustratively: . . . [u]tilize, display, or distribute inappropriate or offensive racial, ethnic or gender slurs, connotations, words, objects or symbols. An inappropriate or offensive racial, ethnic or gender slur, connotation, word object or symbol is defined as a remark, language . . . which degrades an individual's race, gender or national origin." (Docket Entry No. 25-22) (second ellipsis in original).

was away from the office no more than fifty minutes and that an absence of less than an hour was not improper. (*See* Docket Entry No. 25 at 28-29). Singh met Satterwhite later that same day to discuss the absence. Singh testified that Satterwhite "became very unstable." (*Id.*). Notes written by another employee, Johnnie Campbell, shortly after the conversation state that Satterwhite was "upset" and was "shouting." (*See* Docket Entry No. 25-9). Satterwhite disputes that he yelled at Singh. (Docket Entry No. 25-19 at 34). During the meeting, Singh verbally reprimanded Satterwhite.[2] (Docket Entry No. 25-8). That same day, Singh memorialized the reprimand in an email. (Docket Entry No. 25-10).

Singh formally disciplined Satterwhite again on September 1,2010 with a written "Reminder I" reprimand. (***See*** Docket Entry No. 25-13). The Reminder I reprimand was based on two mail-handling violations: Satterwhite had changed how the office

[2] The meeting notes are ambiguous as to whether Satterwhite was reprimanded on July 1 for shouting, for his unexplained absence, or for both. (*See* Docket Entry No. 25-9). Singh's emails indicate that the reprimand occurred on July 1 and was for Satterwhite's unexplained absence, not for his conduct during the meeting. (*See* Docket Entry No. 25-10). The letter that involuntarily demoted Satterwhite indicates that Satterwhite was reprimanded on July 1 for his conduct during the meeting and on July 9 for his unexplained absence. (Docket Entry No. 24-8). Singh's statement to the OIG indicates that July 1 is the correct date for both reprimands. (*See* Docket Entry No. 25-21). Neither party argues that the discrepancy make a difference.

handled incoming government mail, which resulted in workplace confusion; and he failed properly to communicate or respond to requests for information about the change. (***See*** Docket Entry No. 25-13). The Reprimand stated: "The effect of this continued problem and you not communicating resulted in an inefficiency of the government mail process by not knowing who was receiving this mail in our division, how it was handled, or if it was being handled at all." (*Id.*). Satterwhite contends that this reprimand was improper. He argues that the changes he made to the mail-handling procedures did not violate official City "policy," but rather changed a "practice." He also argues that the City's written disciplinary policies permit only oral, not written, Reminder I reprimands. (Docket Entry No. 25 at 23, 29).

On September 21, 2010, Satterwhite sent an e-mail to Singh, complaining that the reprimands were retaliation for Satterwhite having reported the remark about Hitler made the previous March. (*See id.*).

Singh recommended Satterwhite for demotion to City Controller Ronald Green sometime in late September or early October 2010. Singh based his recommendation on the verbal reprimand and the Reminder I reprimand. (*See* Docket Entry No. 24-8). Singh also noted that in September, a coworker had requested year-end deadlines from Satterwhite for projects he was working on. (*See* Docket Entry No. 25-13). Satterwhite failed to respond, even after Singh prompted him to do so. (*See id.*; *see also* Docket

Entry No. 24-8). The demotion letter also noted that during a September 17, 2010 meeting on a project, "it became apparent that Mr. Satterwhite did not understand or realize that he was the project leader and had served in that capacity for more than a year." (*See* Docket Entry No. 25-3 at 143-44).

Satterwhite learned that Singh had recommended him for demotion on October 7, 2010. (*See* Docket Entry No. 25-3 at 143-44). Green demoted Satterwhite on October 26, 2010. (Docket Entry No. 24-8). Before the demotion, Satterwhite was given an opportunity to explain his conduct. (*See id.*). According to Green, "Mr. Satterwhite's explanations were neither satisfactory nor exculpatory." (*Id.*). Satterwhite was demoted, lowering his salary by two pay grades. (*See id.*).

Satterwhite filed a complaint with the EEOC on December 27, 2010, received notice of his right to sue on March 29, 2012, and sued the City on June 27, 2012, alleging retaliation under Title VII and the TCHRA. The City moved for summary judgment on both claims on April 5, 2013, alleging that Satterwhite could not show that he had engaged in protected activity or a sufficient causal link between any alleged protected activity and the challenged employment action; both elements of the prima facie

case. (Docket Entry No. 24).[3] The parties supplemented the briefing to address the Supreme Court's decision in *University of Texas Southwest Medical Center v. Nassar,* 133 S. Ct. 2517 (2013). (Docket Entry Nos. 38, 40).

The arguments for summary judgment and the responses are analyzed below.

II. The Applicable Legal Standards

A. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law." FED. R. CIV. PROC. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record. . . ." FED. R. CIV. PROC. 56(c)(1)(A). "[T]he plain language of Rule 56[ ] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

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[3] Satterwhite responded, (Docket Entry No. 25); the City replied, (Docket Entry No. 29); and Satterwhite filed a supplemental response, (Docket Entry No. 31).

"Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact." *Cannata v. Catholic Diocese of Austin,* 700 F.3d 169, 172 (5th Cir. 2012) (citing *Celotex,* 477 U.S. at 323). If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine dispute of material fact, it does not need to negate the elements of the nonmovant's case. *Duffie v. United States,* 600 F.3d 362, 371 (5th Cir. 2010).

"A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.,* 560 F.3d 316, 326 (5th Cir. 2009) (quotation omitted). "If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response." *Duffie,* 600 F.3d at 371 (internal quotation marks omitted).

"When the moving party has met its Rule 56[ ] burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Id.* The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Id.* (internal quotation marks omitted). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by

unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux v. Swift Transp. Co.,* 402 F.3d 536, 540 (5th Cir. 2005) (quoting *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)). "In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party." *Duffie,* 600 F.3d at 371.

B. Title VII Retaliation claims

"To establish a prima facie case of retaliation, an employee must demonstrate that (1) he engaged in an activity that Title VII protects; (2) he was subjected to an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action." *LeMaire v. La. Dep't of Transp. & Dev.,* 480 F.3d 383, 388-89 (5th Cir. 2007). "If the employee establishes a prima facie case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision." *Id.* "After the employer states its reason, the burden shifts back to the employee to demonstrate that the employer's reason is actually a pretext for retaliation." *Id.*

Title VII retaliation claims protect an employee who "has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3. The first clause is called the "opposition clause";

the second is called the "participation clause." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.,* 555 U.S. 271, 274 (2009). The plaintiff makes the necessary showing for the first element of the prima facie case by showing that he engaged in either of these protected activities.

The second element requires materially adverse employment action, that is, an action that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *McCoy v. City of Shreveport,* 492 F.3d 551, 559 (5th Cir. 2007) (quotations and citations omitted). The requirement of material adversity is imposed "to separate significant from trivial harms." *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006).

The third element requires a causal link between the protected activity and the adverse action. The Supreme Court clarified in *Nassar* that the plaintiff must show "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Nassar,* 133 S. Ct. at 2533. In Title VII terms, motivating factor analysis does not apply; the more stringent "but-for" standard must be met.

If the plaintiff makes a prima facie showing of retaliation, the burden then shifts to the defendant to proffer a legitimate retaliatory reason for the action. *Jones v. Overnite Transp. Co.,* 212 F. App'x 268, 275 (5th Cir. 2006). The plaintiff must point to evidence in the summary-judgment record supporting

an inference of pretext. *See id.* Under the burden-shifting analysis, a plaintiff may need to address the causal link both in making a prima facie showing; and, again in showing a fact dispute as to pretext. *Nassar* clarified that "but for" causation, not motivating factor, applies to both. *See Nassar,* 133 S. Ct. at 2533; *see also Finnie v. Lee Cnty., Miss.,* No. 12-60623, 2013 WL 4852244, at *2 (5th Cir. Sept. 12, 2013) (requiring plaintiff to show "that her filing of an EEOC complaint was the 'but-for' cause of her termination, that, had she not filed the claim, she would have remained in her position.").

III. Analysis

A. Protected Activity and Adverse Action

The City concedes that Satterwhite's demotion was an adverse action. (Docket Entry No. 24 at 6). The City disputes that Satterwhite engaged in protected activity. Satterwhite contends that he engaged in protected activity when he "reported and complained to management about Singh's discriminatory and unlawful conduct and subsequently participated in a formal Title VII investigation." (Docket Entry No. 13 at 6). The latter apparently refers to Satterwhite's talk with Nobles about Singh's reference to Hitler in the March 2010 meeting. (Docket Entry No. 25 at 18). He also asserts that he participated in the OIG investigation into Singh's comment. The court assumes that these were protected activities.

B. Causation

"In order to avoid summary judgment, the plaintiff must show 'a conflict in substantial evidence' on the question of whether the employer would not have taken the action 'but for' the protected activity." *Coleman v. Jason Pharm.,* No. 12-11107, 2013 WL 5203559, at *1 (5th Cir. Sept. 17, 2013) (quoting *Long,* 88 F.3d at 308). Satterwhite must point to summary-judgment evidence sufficient to support an inference that his report to Nobles or his OIG statement was the "but-for" cause of his demotion. *Finnie,* No. 12-60623, 2013 WL 4852244, at *2 (5th Cir. Sept. 12, 2013). Satterwhite has not met this burden.

The summary-judgment record shows that Satterwhite's demotion was based at least in part on conduct unrelated to his complaints about Singh's remarks. The demotion letter identifies the basis of Satterwhite's demotion. (Docket Entry No. 24-8). The letter states that Satterwhite "violat[ed] an established practice by redirecting government mail without communicating that his immediate supervisor or the government mail point person." (*Id.*). The related written Reminder I reprimand states that it issued because of (1) Satterwhite's "deviation from our long standing practice [which] compromised the safe, efficient and orderly operation of the division's mail accountability," and (2) his "insubordinate behavior of refusing to communicate immediately [with Singh] or others." (Docket Entry No. 25-13). Satterwhite does not dispute that his actions negatively affected the office's mail operations, or that he was insubordinate

in failing to communicate regarding the difficulties he caused. (*See* Docket Entry No. 25 at 9-10, 23). The evidence also shows that Satterwhite had other performance issues, including failure to respond to requests for project information and concerns about his lack of understanding and execution of his project responsibilities. The undisputed evidence shows legitimate nonretaliatory bases for the decision to recommend demoting Singh. Even if Singh was resentful toward Satterwhite for the reprimand and this was a motivating factor in the demotion recommendation, the evidence falls far short of what is needed to support an inference of "but-for" causation. Satterwhite has not shown a reasonable basis for a fact finder to conclude that he would not have been demoted in October 2010 had he not reported Singh's comments in March. *See Nassar,* 133 S. Ct. at 2533; *see also Coleman,* 2013 WL 5203559, at *1.

IV. The TCHRA claim

Satterwhite also seeks relief under the TCHRA. (*See, e.g.,* Docket Entry No. 1 at 5). "One of [the] TCHRA's purposes is to 'provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.'" *Quantum Chem. Corp. v. Toennies,* 47 S.W.3d 473, 476 (Tex. 2001) (quoting Tex. Labor Code § 21.001(1)). "The relevant claims under each of these statutes are analyzed under the same standard." *Hernandez v. Yellow Transp., Inc.,* 670 F.3d 644, 650 (5th Cir. 2012) cert. denied, 133 S. Ct. 136 (2012).

Before *Nassar,* the Texas Supreme Court stated that "motivating factor" causation applies to TCHRA retaliation claims. *Quantum Chem. Corp.,* 47 S.W.3d at 480 ("The plain meaning of this statute establishes 'a motivating factor' as the plaintiff's standard of causation in a TCHRA unlawful employment practice claim, regardless of how many factors influenced the employment decision."). But the court reached this conclusion "[i]n the absence of meaningful Supreme Court authority." *Id.* After *Nassar,* there is no longer such an absence. *Nassar* fills the void. Satterwhite's TCHRA claim fails for the same reason as the Title VII claim.

V. Conclusion

The City of Houston's motion for summary judgment is granted. It appears, but is unclear, that the holding on the basis for this summary judgment ruling on the demotion claim requires dismissing any claims for retaliation based on other employment actions. No later than **March 14, 2014**, each party must file a brief statement identifying any remaining issues and proposing a schedule for resolving them, or submitting a proposed final judgment.

SIGNED on February 28, 2014, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge