Oral argument requested

No. 18-1096

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Sue Cirocco,
Plaintiff-Appellant,

v.

Linda McMahon,
in her official capacity as Administrator of the
United States Small Business Administration,

Defendant-Appellee.

On appeal from a final judgment of the United States District Court
for the District of Colorado, Hon. Magistrate Judge Nina Y. Wang
No. 1:17-cv-01588-NYW

REPLY BRIEF OF APPELLANT SUE CIROCCO

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Introduction

Appellant Sue Cirocco exhausted her administrative remedies before filing this suit. She cooperated in good faith during both stages of the administrative process. SBA's brief—which cites only two purported instances of non-cooperation—fails to show otherwise. Ms. Cirocco did not sit for a formal deposition during the investigative phase because she was recovering from a mental breakdown caused by the discriminatory conduct at issue in this suit. And she did not respond to discovery requests during the administrative hearing phase because she and SBA agreed to postpone discovery while in settlement negotiations. Ms. Cirocco then sued once the administrative process proved stagnant, which federal law and EEOC guidance expressly authorize whether that process has been completed or not.

SBA's other arguments also lack merit. SBA still maintains that exhaustion is a jurisdictional prerequisite to suit under Title VII, though this Court recently held the exact opposite and overruled the authority on which the district court relied. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018). SBA says that *Lincoln* applies only to private-sector cases. But that gambit fails because *Lincoln* itself expressly overruled a federal-sector precedent of this Court.

SBA also contends that Ms. Cirocco forfeited her exhaustion arguments. We first explain why SBA's forfeiture argument is wrong. We then rebut SBA's other contentions.

Argument

I. Ms. Cirocco did not forfeit her exhaustion arguments.

SBA asserts (at 6) that Ms. Cirocco forfeited her exhaustion arguments by not raising them below—in effect, making the extraordinary assertion that Ms. Cirocco cannot appeal the adverse ruling that SBA sought and obtained in the district court. That argument fails on multiple fronts.[1]

A. First of all, SBA misunderstands the forfeiture doctrine. Forfeiture does not apply here because the district court ruled on the merits of the exhaustion issue. Forfeiture's foundational principle—that appellate courts do not consider issues "not passed upon below," *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)—reflects the "significant but limited job of [the] appellate system to correct errors *made by the district court*," *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (emphasis added). Thus, as this Court has repeatedly indicated, the forfeiture doctrine does not apply when the lower court has ruled on the relevant issue. *See, e.g.*, *Margheim v. Buljko*, 855 F.3d 1077, 1089 (10th Cir. 2017); *Leo Sheep Co. v. United States*, 570 F.2d 881, 891 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979). The arguments that SBA now claims are forfeited are the same arguments that SBA briefed below and the district court accepted. There was no forfeiture.

[1] Waiver and forfeiture are different doctrines but the terms are sometimes used interchangeably. *Hamer v. Neighborhood Hous. Serv. of Chi.,* 138 S. Ct. 13, 17 n.1 (2017). SBA uses both terms, but the issue here is one of forfeiture. *See id.*

B. Even assuming (incorrectly) that the doctrine could apply here, SBA's forfeiture argument is itself forfeited because SBA did not raise it below. *See Engle v. Isaac*, 456 U.S. 107, 124 n.26 (1982); *Cook v. Rockwell Intern. Corp.*, 618 F.3d 1127, 1138-39 (10th Cir. 2010). After SBA moved to dismiss on exhaustion grounds and received Ms. Cirocco's response, it had two opportunities to argue that she forfeited—in its reply brief, App. 80, where it would be expected to argue forfeiture, and during the November 28, 2017 status conference, App. 104. SBA took neither opportunity and thus "waived the waiver argument it now presents." *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1259 n.14 (10th Cir. 2010).

C. In any event, SBA is wrong on its own terms because Ms. Cirocco's pro se response to SBA's motion to dismiss did in fact address exhaustion. Ms. Cirocco mentioned SBA's jurisdiction-based argument, which alleged failure to exhaust, and then responded: "I followed all the procedures and processes available to open up the discussion about the discrimination" at SBA. App. 57. In other words, Ms. Cirocco told the court that she had exhausted all routes before filing suit. Ms. Cirocco also countered SBA's exhaustion argument, regarding discovery before the administrative judge, by attaching her former lawyer's draft Rule 11 letter to her response. App. 56. That letter showed that Ms. Cirocco did not participate in discovery because the parties agreed to postpone it while in settlement negotiations. *See* Opening Br. 35.

Ms. Cirocco thus responded sufficiently to SBA's motion to dismiss. Although Ms. Cirocco did not use the word "exhaustion" or structure her response as would a lawyer, given the liberal construction to which her pro se filings were entitled, *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013), lawyerly precision was not required.

II. Ms. Cirocco exhausted her Title VII claims.

We now turn to the merits of the exhaustion issue. This Court should reverse on the independent ground that SBA did not itself seek to dismiss on exhaustion grounds in the administrative process. But if the Court instead chooses to evaluate Ms. Cirocco's conduct against the good-faith cooperation standard, then it should hold that Ms. Cirocco met that standard in both the investigative and hearing phases. And by exiting the hearing process after two-and-a-half years to pursue a federal suit, she did not, as SBA asserts, impermissibly "abandon" her claims. To the contrary, she followed the statutory and regulatory framework to a tee.

A. This Court should reverse because SBA never sought to dismiss Ms. Cirocco's complaint for failure to cooperate during the administrative process.

A district court may not dismiss a Title VII suit for failure to cooperate where, as here, the agency itself did not seek to dismiss on those grounds in the administrative process but instead completed its EEO investigation on the merits. That is so because, under the regulations, an agency must dismiss an EEO complaint for failure to cooperate if it lacks sufficient information to process it and the employee refuses to

respond to written requests for additional information. 29 C.F.R. § 1614.107(a)(7). Our opening brief explains (at 25-29) that an agency's choice not to dismiss for failure to cooperate has sensibly been treated by courts as proof that the agency had sufficient information to evaluate the claim, *see, e.g.*, *Jasch v. Potter*, 302 F.3d 1092, 1095-96 (9th Cir. 2002), and thus that the complainant cooperated. Likewise, EEOC treats an agency's decision to complete its investigation as proof that the agency had sufficient information to evaluate the claim, *see, e.g.*, *Gutierrez v. Roche*, EEOC Doc. 01A23422, 2003 WL 1203781, at *1 (Office of Fed. Ops. Mar. 10, 2003), and thus that the complainant cooperated. It is also telling that here the administrative judge did not dismiss for failure to cooperate either, *see* App. 54-55, even though EEOC regulations authorized her do so in appropriate circumstances, 29 C.F.R. §§ 1614.107(a)(7), 1614.109(b).

Without citing any authority, SBA counters that Ms. Cirocco's choice to pursue an administrative hearing deprived SBA of its "opportunity to make a final decision," thus preventing it from "seeking dismissal for failure to cooperate." SBA Br. 22. This argument lacks any support in the statute or regulations. SBA could have dismissed for failure to cooperate at any point during the lengthy investigative phase and without having issued a final decision. *See* 29 C.F.R. § 1614.108(c)(3). But as soon as 180 days of the investigative period passed, Ms. Cirocco was authorized to pursue her own rights—for example, to receive an administrative hearing, 29 C.F.R.

§ 1614.108(h), (f), or "quit the process and file a lawsuit in court" even if her "complaint [was pending] before an EEOC Administrative Judge."[2]

In sum, SBA could have dismissed for failure to cooperate at any time during the investigation, but its failure to do so means that the district court lacked authority to dismiss on that basis. This Court should reverse on this ground alone.

B. Ms. Cirocco cooperated in good faith throughout the administrative process.

In any case, Ms. Cirocco cooperated in good faith during both the investigative and hearing phases of the administrative process. The applicable standard requires good-faith, not "[p]erfect," cooperation. *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1311 (10th Cir. 2005), *abrogated on other issue by Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166 (10th Cir. 2018). Good-faith cooperation "must be judged by commonsense standards." *Id.* And "it will be rare for a charging party's non-cooperation to be a basis for the defendant to challenge the court's" review. *Id.* at 1311-12.

1. SBA says that because Ms. Cirocco did not "answer questions under oath over a three-month period" and did not respond to discovery requests, she did not cooperate. SBA Br. 13, 16. The agency then says that there is no "material difference between

[2] EEOC, *Filing a Lawsuit in Federal Court: Points in the Administrative Complaint Process for Filing a Lawsuit*, https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (permalink at https://perma.cc/XXG3-NR6A); EEOC, *Federal Complaint Process: Hearings*, https://www.eeoc.gov/federal/fed_employees/hearing.cfm (permalink at https://perma.cc/X56K-F6L8); *see* 42 U.S.C. § 2000e-16(c).

Cirocco's failure to cooperate and that of the complainants in *Khader* … and *Shikles*." SBA Br. 14.

Ms. Cirocco's situation is nothing like *Khader* or *Shikles*. *See* Opening Br. 32-33, 35. *Shikles* held that the plaintiff did not cooperate based on "the combination" of six instances of non-cooperation. *See* 426 F.3d at 1307 n.1, 1317. Here, there are only two supposed offenses. And, critically, in *Khader v. Aspin*, the agency formally notified the complainant that her complaint would be dismissed absent the requested information, 1 F.3d 968, 970 (10th Cir. 1993), a regulatory prerequisite for dismissal that did not occur here, *see* 29 C.F.R. § 1614.107(a)(7). To the contrary, SBA concluded its investigation on the merits without even suggesting to Ms. Cirocco that it might seek dismissal if it did not receive the requested information. *See* Opening Br. 27-28.

And, in both *Shikles* and *Khader*, unlike here, the plaintiffs provided no explanation for why they did not fully comply with all of the agency's demands. Indeed, in *Khader*, far from explaining her conduct, the plaintiff refused to re-send information already submitted to the agency. 1 F.3d at 970. SBA notes this fact (at 14) but fails to recognize its significance. The plaintiff in *Khader* lacked a good-faith reason for refusing to re-submit this information. *Id.* at 971. She instead made a point not to cooperate because she perceived the agency's loss of her information as "calculated malice" rather than what it really was—inadvertence. *Id.*; *see also Shikles*, 426 F.3d at 1307 n.1 (complainant provided no explanation for non-cooperation); *Jones v. McHugh*, 2014 WL 3107996, at

*11 (D. Kan. July 8, 2014) (in finding plaintiff failed to cooperate, court noted that plaintiff did not provide an explanation for missing a scheduled conference), *aff'd in part on other grounds*, 604 F. App'x 669 (10th Cir. 2015).

2. Even further afield is SBA's reliance on *Vinieratos v. Department of Air Force*, 939 F.2d 762 (9th Cir. 1991). There, the complainant was held to have abandoned the EEOC process because, after filing a formal EEO complaint, he filed an appeal with the Merit Systems Protection Board (MSPB), a duplicate filing that the relevant regulations prohibited. *Id.* at 769-70 & n.9. And he obstructed the EEOC process by filing multiple complaints on the same topics in three separate administrative systems, seeking "to stay proceedings in one forum when the prospects for relief appeared brighter in another," twice requesting that EEOC defer to MSPB, and repeatedly failing to appear for interviews or return the EEOC counselor's messages. *Id.* at 764, 769-70. It should go without saying that Ms. Cirocco did not engage in that kind of bad-faith gamesmanship.

3. By contrast, Ms. Cirocco's efforts to cooperate with SBA, coupled with her explanations for her actions, easily meet the good-faith standard.

a. As our opening brief describes (at 33-34), Ms. Cirocco took a range of affirmative steps to cooperate with SBA, such as writing a lengthy narrative with nine appendices—

including an in-depth chronology—and promptly responding to SBA's investigator, Mr. Gay, even while on medical leave.[3]

It is important to recall that "[p]erfect cooperation" is not required. *Shikles*, 426 F.3d at 1311. *Jones v. United Parcel Service* is illustrative. 411 F. Supp. 2d 1236 (D. Kan. 2006), *aff'd in part, rev'd in part on other grounds*, 502 F.3d 1176 (10th Cir. 2007). There, Jones partially responded to EEOC's first request for additional information, did not respond to the second at all, and spoke with the investigator by telephone. *Id.* at 1252. And EEOC did not dismiss his claim for failure to cooperate in the administrative process. *Id.* The district court found that although Jones did not exhibit "perfect cooperation," his actions did not manifest a "total lack of cooperation" as in *Shikles* and, therefore, he exhausted his claim. *Id.* Given Ms. Cirocco's genuine and substantial efforts to cooperate, including agreeing to be interviewed by Mr. Gay without a court reporter, *see* App. 49-50, this case is *Jones* squared.

b. Ms. Cirocco's case also meets the good-faith standard because she provided credible explanations for the two instances of purported non-cooperation. First, Ms.

[3] SBA seeks to question the breadth and detail of Ms. Cirocco's EEO submission by stating that "no appendices appear on the record." SBA Br. 12. But the appendices and the chronology are cross-referenced extensively in the EEO complaint, *see, e.g.*, App. 37-38, and the entire EEO complaint is not in the record because SBA selectively excluded most of it when moving to dismiss on the ground of Ms. Cirocco's non-cooperation. *See* Opening Br. 9 n.5. As officers of the Court, we cannot allow to pass SBA's suggestion that Ms. Cirocco's EEO complaint was bare bones. With its chronology and attachments, it covers more than 150 pages in SBA's Report of Investigation.

Cirocco did not refuse a formal deposition to undermine or slow the investigation. She refused it because she was ill. *See* App. 48-50. SBA asserts (at 11) that Mr. Gay tried to schedule her interview "nine times in three months," but the number of the agency's requests is irrelevant because Ms. Cirocco simply was not medically cleared for a formal deposition during those three months. *See* App. 48-50. After explaining that to Mr. Gay, Ms. Cirocco immediately asked him whether there was anything else she could provide to aid his investigation. *Id.* Mr. Gay, in turn, said he understood Ms. Cirocco's predicament and then completed the investigation on the merits of her claims. *Id.*; *see* Opening Br. 33-34.

SBA says that Ms. Cirocco maintained below that her "deteriorated mental state necessitated [only] leave from work, not that it prevented her from being interviewed" and that she did not acknowledge Mr. Gay's suggestions that "the interview would be non-confrontational." SBA Br. 11, 15 n.3. In fact, Ms. Cirocco's doctor prohibited her from being deposed, not just from attending work, which she relayed to Mr. Gay: "It is too stressful to be deposed. My physician did not clear me for this or to return to work." App. 48. Indeed, Mr. Gay himself equated Ms. Cirocco's readiness to sit for the deposition with her readiness to return to work, acknowledging what SBA now denies: "In light of your medical condition, we should wait to have the interview when you are cleared by your doctor to return to work." App. 49. Despite SBA's suggestions to the contrary (at 11), a formal deposition taken under oath before a court reporter, as

opposed to a written questionnaire or an interview with the investigator (*see* App. 49-50), is confrontational in nature. SBA's insistence that a court reporter be present compounded Ms. Cirocco's concern that a formal deposition would be intimidating. *See* App. 49.

Second, SBA itself acknowledged the parties' agreement to delay discovery in light of pending settlement negotiations. Opening Br. 35-36 (citing acknowledgment in SBA's EEOC motion); *see also Ramsey v. Moniz*, 75 F. Supp. 3d 29, 45-46 (D.D.C. 2014) (not responding to agency's discovery requests while negotiating a settlement does not constitute bad faith or non-cooperation in the EEO process). Indeed, SBA even told Ms. Cirocco that she need not respond to its discovery requests if she wished to file suit in federal court. App. 77.

Furthermore, when SBA reinstated its discovery requests, Ms. Cirocco had been in the administrative process for over two years. *See* Opening Br. 8-9, 12. She did not have to respond to discovery because she had a statutory and regulatory right to pursue her claim in federal court: "If the agency does not issue a final decision within 180 days of the administrative complaint, the individual may sue anytime after that date." *Laughter v. Gallup Indian Med. Ctr.*, 425 F. App'x 683, 685 (10th Cir. 2011) (citing 29 C.F.R.

§ 1614.407(b)). And, again, EEOC itself tells complainants exactly that. *See* Opening Br. 4, 6.[4]

3. SBA asserts that Ms. Cirocco's decision not to undergo a formal deposition constitutes a failure to cooperate because the information sought by SBA was necessary to resolve her case. SBA Br. 14. But if the information were truly necessary—and SBA could not assess the merits of her case without it—then, under the regulations, SBA should have dismissed her claim for failure to cooperate. *See* Opening Br. 25-27. But it did not. Instead, Mr. Gay indicated to Ms. Cirocco that he had sufficient information to evaluate her claim: "if you believe that this would be stressful, I respect your judgment and will conclude the investigation without your input." App. 48.

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[4] In finding that Ms. Cirocco failed to cooperate, the district court relied in part on Ms. Cirocco's purported failure to respond to SBA's agency-level motion for summary judgment. *See* App. 97. In doing so, the court cited the declaration of an agency lawyer, William Gery, which misleadingly suggested that Ms. Cirocco was under a duty to respond to that motion. As our opening brief shows (at 37)—and SBA's answering brief does not contest—Ms. Cirocco was under no duty to respond to that motion because the case was dismissed before her response was due.

In part to rebut Mr. Gery's misleading declaration, Ms. Cirocco attached to her opening brief administrative filings *in this case*, the authenticity of which SBA does not (and could not) dispute. SBA now argues that those filings may not be cited. Not so. This Court can take judicial notice of materials filed in the administrative proceedings because they are "proceedings in other courts" "within and without the federal judicial system" that have "direct relation to [the] matters at issue." *Anderson v. Herbert*, 2018 WL 3689232, at *4 (10th Cir. Aug. 2, 2018) (quoting *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979)). It is more than a little ironic that SBA's brief (at 18-19) relies repeatedly on one of the very documents that it claims this Court may not look at.

C. Ms. Cirocco's suit did not constitute impermissible "abandonment" of her claims.

SBA denigrates the statutory framework authorizing a complainant to elect a hearing in lieu of a final agency decision, because it supposedly allows the complainant to "run[] out the clock" on the administrative process and "deprive an agency of its opportunity for administrative adjudication." SBA Br. 18-19. The upshot, according to SBA, is that a complainant who chooses this path—the path that Congress created and EEOC has repeatedly endorsed—impermissibly abandons her administrative claims. That it not correct.

1. SBA's argument runs headlong into Title VII's text. As noted earlier (at 5-6, 11), a plaintiff is entitled to go to federal court once 180 days has passed from the filing of her administrative complaint. 42 U.S.C. § 2000e-16(c). This is so even if the agency has yet to issue a decision on the merits and even if the complaint is pending before an administrative judge. *See* Opening Br. 23-24 (citing EEOC guidance and circuit precedent authorizing complainant to withdraw from the administrative hearing process after 180 days to file suit). Once a complainant "cooperates with the agency or EEOC for 180 days, [s]he is not required to take any further action to exhaust [her] administrative remedies," *Wilson v. Peña*, 79 F.3d 154, 166 (D.C. Cir. 1996), and she may

then "quit the process."[5] Nowhere is SBA's failure to rebut Ms. Cirocco's recitation of the statutory framework more apparent than in its failure even to acknowledge the cited EEOC guidance documents, which authorize complainants to do exactly what Ms. Cirocco did.

Ms. Cirocco did not, as SBA asserts, seek an administrative hearing to "run[] out the clock." SBA Br. 19. When Ms. Cirocco sued, the 180 days had *already* run out. She was thus entitled to sue well before submitting her hearing request. *See* Opening Br. 21-22. She invoked a hearing to give the administrative process a full and fair opportunity to resolve her claims. When the administrative judge did nothing for more than a year after Ms. Cirocco's hearing request, *see id.*, and settlement negotiations broke down, App. 77, Ms. Cirocco decided to go to court, as the statute and regulations expressly allow. *See* App. 57.

Invoking the "policy aims of the administrative process," SBA insists (at 17) that it must be given the opportunity to resolve every administrative claim on the merits. But the best evidence of the "policy aims" of a statutory scheme is the text itself, which authorizes complainants to file suit when Ms. Cirocco did. *See* 42 U.S.C. § 2000e-16(c). In any event, SBA ignores the overriding policy aim of the 180-day provision:

[5] EEOC, *Filing a Lawsuit in Federal Court: Points in the Administrative Complaint Process for Filing a Lawsuit*, https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm (permalink at https://perma.cc/XXG3-NR6A).

"providing *prompt* access to the courts in discrimination disputes." *Wilson*, 79 F.3d at 167 (emphasis added) (quoting *Grubbs v. Butz*, 514 F.2d 1323, 1328 (D.C. Cir. 1975). Because that access "is so important[,] the administrative process [is] given only a finite time to deal alone with a given dispute." *Id.*

2. This Court has never found impermissible abandonment on the ground that a complainant, after requesting an optional hearing more than 180 days after filing her EEO complaint, sued before the hearing process had been completed. The district court below cited this Court's decision in *Laughter*, 425 F. App'x 683, to explain the law on abandonment. App. 92. But *Laughter* is poles apart from the situation here. *Laughter* held that a complainant abandoned his EEO *class* complaint when he voluntarily withdrew it after 180 days, specifically requesting that he instead be allowed to file an EEO *individual* complaint. *Laughter*, 425 F. App'x at 686. After the agency informed the complainant that it was processing his claim only as an individual, the court ruled that the start date for the 180 days was when his individual complaint was filed, not when the class complaint had been filed. *Id.* The court then held—referring to the *individual* complaint—that a complainant abandons his claim if he files suit *before* the 180-day clock expires. *Id.* Ms. Cirocco did not withdraw her EEO complaint only to refile it before the agency. And, as noted, she waited well more than the requisite 180 days.

Citing *Khader v. Aspin*, 1 F.3d 968 (10th Cir. 1993), SBA says that a "complainant who abandons his or her claim before the agency has reached a determination has also

failed to exhaust." SBA Br. 10. But the Court there was referring to a plaintiff who effectively abandoned her claims by preventing the agency from finishing its investigation *during* the 180-day investigation period. *Khader*, 1 F.3d. at 970-71. *Khader*'s reasoning does not apply to the hearing process, which occurs when, as here, the agency has already completed its investigation.

III. Ms. Cirocco exhausted her Title VII retaliation claim.

Ms. Cirocco's opening brief explained, first (at 38-41), that she exhausted the retaliation allegations in her EEO complaint and, second (at 41-43), that she exhausted her post-complaint retaliation allegations because they were based on an ongoing hostile work environment, initially described in her EEO complaint and continuing thereafter. SBA misapprehends both points.

A. SBA argues that Ms. Cirocco's EEO complaint did not make out a retaliation claim because it "*did not* allege prior EEO activity" and so the claim was raised "for the first time in the district court." SBA Br. 20. This assertion is simply not true. Ms. Cirocco's EEO complaint described retaliation at length, App. 36-40, and specifically alleged prior EEO activity: "*[S]ince I contacted EEO* regarding the discriminatory and retaliatory treatment I had been experiencing … [my supervisors] have stepped up their efforts ... to create a hostile work environment for me." App. 39-40 (emphasis added).

B. Although Ms. Cirocco, a lay person, did not use the magic words "retaliatory hostile work environment," her EEO complaint makes clear that was her situation.[6] She then further described, in her district-court filings, the hostile work environment that her supervisors had continued to perpetuate after the EEO complaint was filed.[7]

SBA acknowledges that a hostile-work-environment claim "may include acts taken after the plaintiff files an EEOC charge if those acts contribute to the same hostile work environment." SBA Br. 22. But it nonetheless insists that "retaliation" and "hostile work environment" are legally distinct claims that must be separately exhausted, SBA Br. 20-21, and so Ms. Cirocco cannot have exhausted a claim that is denominated a retaliatory hostile work environment. That is not correct. This Court has held just the opposite, expressly recognizing that a hostile work environment "if sufficiently severe, may constitute 'adverse employment action' for purposes *of a retaliation claim*." *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) (emphasis added); *see also*

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[6] *See* App. 32 (Ms. Cirocco checking the box for "working conditions" as an "issue being complained of" in her EEO complaint and listing "various" dates); App 35-36 (explaining that her supervisors "fostered a hostile work environment" with cross-references to her attached chronology of events); App. 39-40 ("[S]ince I contacted the EEO regarding the discrimination and retaliatory treatment I had been experiencing … [my supervisors] have stepped up their efforts … to create a hostile work environment for me") (listing seven relevant dates detailed in attached chronology).

[7] *See* App. 11 ("The environment became even more hostile and intimidating … while an extensive investigation of Ms. Cirocco was conducted"); App. 12 ("Eventually, the stress and anxiety surrounding the hostile work environment reached a point…."); App. 57 ("I followed all the procedures … available to open up the discussion about the … *high risk environment* at the SBA Finance Center.") (emphasis added).

Noviello v. City of Boston, 398 F.3d 76, 89-90 (1st Cir. 2005) (noting that "the weight of authority supports th[is] view" and that "the verb 'discriminate' in the anti-retaliation clause [of Title VII] includes subjecting a person to a hostile work environment.").

SBA also asserts (at 21) that "the sole basis" for Ms. Cirocco's hostile work environment claim is allegations made "*to the district court* years after she submitted her formal EEO complaint." This assertion is flatly wrong. Ms. Cirocco detailed three retaliatory-hostile-work-environment allegations in her EEO complaint. *See* Opening Br. 38-39.

Though not entirely clear, SBA also appears to assert that Ms. Cirocco did not allege a hostile-work-environment claim but only a single instance of sex discrimination. *See* SBA Br. 21 ("Her EEO complaint alleges sex discrimination during 'evaluation/appraisal,' not a harassment claim."). That mischaracterizes Ms. Cirocco's EEO complaint. Where the EEO complaint form asks the complainant to check boxes for the "issues being complained of," Ms. Cirocco checked not only the box for "evaluation/appraisal," but also for "*working conditions*" and "training," listing "*various*" dates. App. 32 (emphases added). She also checked the box for "other" and noted in the adjacent space: "various–see attachments 1-4." *Id.* In those attachments, as noted above (at 17 n.6), Ms. Cirocco explained that she was subjected to a retaliatory hostile work environment.

IV. Exhaustion of administrative remedies is not a jurisdictional prerequisite to suit.

As discussed above in parts II and III, Ms. Cirocco exhausted her Title VII claims. This Court should reverse for those reasons alone and, therefore, need not reach the question whether exhaustion is a jurisdictional prerequisite to suit.[8]

But if the Court does address this issue, the lower court's ruling that exhaustion is a jurisdictional prerequisite must be reversed because this Court recently held the exact opposite. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018). In doing so, this Court expressly overruled precedent on which the district court relied. *Id.* (overruling *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1317 (10th Cir. 2005)); *see* App. 92-95.

SBA tries to rid itself of *Lincoln* by distinguishing it as "a private sector case" that "does not necessarily extend to the federal employment context," where, SBA asserts, the government is protected by sovereign immunity. SBA Br. 25. That assertion cannot be right because *Lincoln* itself expressly abrogated a federal-sector precedent of this Court. *See Lincoln*, 900 F.3d at 1185 (abrogating *Sampson v. Civiletti*, 632 F.2d 860, 862 (10th Cir. 1980)). *Lincoln* also explained that it was following "the overwhelming

[8] If this Court decides exhaustion is not jurisdictional, then it need not reach the forfeiture question addressed in part I. Exhaustion would then be SBA's affirmative defense. In that case, Ms. Cirocco would not have been required to argue exhaustion in response to a motion to dismiss and so could not have forfeited an argument that she was not required to make in the first place.

majority of our sibling circuits," which do not consider exhaustion a jurisdictional prerequisite, including in federal-sector cases. *See Lincoln*, 900 F.3d at 1185 n.10 (citing federal-sector cases *Douglas v. Donovan*, 559 F.3d 549, 556 n.4 (D.C. Cir. 2009), and *Gibson v. West*, 201 F.3d 990, 993 (7th Cir. 2000)).

SBA's puzzling reliance on *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94 (1990), underscores the agency's misunderstanding of sovereign immunity. SBA quotes (at 24) *Irwin*'s language—that waivers of sovereign immunity must be "strictly construed"—but does not mention *Irwin*'s holding: Title VII's federal-sector filing deadline is *not* jurisdictional. *Id.* at 94-95. Indeed, *Irwin* rejected the premise of SBA's argument, holding that tolling of the statutory deadline is available in suits against the federal government precisely because it is "customarily" available "in lawsuits between private litigants." *Id.* at 95. Put another way, the strict-construction rule exists, but it does not apply here. Congress indisputably waived SBA's sovereign immunity for Title VII violations. And, once the government "waives its immunity and does business with its citizens, it does so much as a [private] party never cloaked with immunity." *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002).[9]

[9] Ms. Cirocco's opening brief explains (at 47-50) that she was prejudiced by the district court's erroneous holding that exhaustion is a jurisdictional precondition to suit. SBA does not deny that the district court's ruling, if erroneous, was prejudicial, and so we rest on our opening brief in that regard.

Conclusion

This Court should reverse the district court's decision and remand for proceedings on the merits of Ms. Cirocco's claims.

Respectfully submitted,[*]

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I certify that on November 13, 2018 I electronically filed this Reply Brief of Appellant Sue Cirocco using the Court's CM/ECF system, which will send notification of its filing to the following person:

Katherine Ann Ross (katherine.ross@usdoj.gov).

November 13, 2018 /s/Brian Wolfman
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