No. 18-2196

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ERIKA BAZEMORE

Plaintiff-Appellant,

v.

BEST BUY

Defendant-Appellee.

On Appeal from the United States District Court
For the District of Maryland, Southern Division (18-cv-00264-PJM)

PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING EN BANC

A. *Introduction*

In *Boyer-Liberto v. Fontainebleau Corp.*, the full Court held "that an isolated incident of harassment, if extremely serious, can create a hostile work environment." 786 F.3d 264, 268 (4th Cir. 2015) (en banc).

This case presents an important question about *Boyer-Liberto*'s reach: What is an employer's role in remedying a hostile work environment that results from a single severe incident of harassment? Is it enough for an employer to admonish the harasser but keep the victim in the dark? Or must the employer take steps reasonably calculated to abate the hostile work environment for the employee who suffered the harassment?

The panel[1] holds that if an employer takes some action, no matter how small, and similarly severe harassment does not recur, an employee cannot state a hostile work environment claim. The panel says this is true even if the employee still finds herself in the throes of a hostile work environment and the employer knows of the employee's suffering yet does nothing. Under the panel's view, an employee will rarely (if ever) be able to state a claim against her employer based on a single severe incident of coworker harassment. Rehearing en banc is warranted.

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[1] Circuit Judges Agee, Richardson, and Quattlebaum.

The Supreme Court has held that "an employer will *always* be liable when its negligence leads to the creation or *continuation of a hostile work environment*." *Vance v. Ball State Univ.*, 570 U.S. 421, 446 (2013) (emphasis added). Consistently, courts of appeals have recognized that "an employer who has notice of a hostile work environment has a duty to take reasonable steps to eliminate it." *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 62 (2d Cir. 1998). And circuits have held that an employer can be held liable if they do not take actions reasonably calculated to end the hostility that flowed from harassment. *See Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320, 327 (5th Cir. 2019) (employer is liable for coworker harassment when "the employer knew or should have known of the hostile work environment but failed to take reasonable measures to try and stop it"); *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 68 (1st Cir. 2019) ("Liability for a discriminatory environment . . . depends on whether the employer knew or should have known of the hostile work environment and took reasonable measures to try to abate it." (quotation marks omitted)).

When confronted with a single instance of severe harassment, therefore, the inquiry should not be just whether the employer took any action to stop the harassment (which makes little sense when the issue is a single instance of severe harassment), but whether the employer took steps reasonably calculated to abate the hostile work environment created by the harassment. In the panel's view, however,

an employer must only take steps to prevent the harasser from using the same slur against the same victim. A hostile work environment is not so narrowly conceived. As the First Circuit explained, "[c]ourts should avoid disaggregating a hostile work environment claim" because this "approach defies the [Supreme] Court's directive to consider the totality of circumstances in each case and robs the incidents of their cumulative effect." *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001). The panel's narrow understanding of a hostile work environment allows an employer to "escape liability, even if it knew about certain conduct, if that conduct is isolated from a larger pattern of acts that, as a whole, would constitute an actionable hostile work environment." *Id*.

Indeed, the Seventh Circuit has rejected the panel's approach, holding that courts should "not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed." *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004); *see Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991) ("[M]eting out punishments that do not take into account the need to maintain a harassment-free working environment may subject the employer to suit by the EEOC."). This Court should be "concerned with the 'environment' of workplace hostility, and whatever the contours of one's environment, they surely

may exceed the individual dynamic between the complainant and [her harasser]." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001).

The panel, which holds as a matter of law that the only relevant inquiry into the reasonableness of an employer's response to harassment is whether the precise type of harassment continued, fails to consider whether the response was reasonably intended to remedy the hostile work environment *as a whole*, including the effect of the harassment on the victim. In fact, the panel holds that the continuation of a hostile work environment is *irrelevant* to the question of imputability. The panel decision weakens Title VII's protections and is inconsistent with *Vance* and precedent from other circuits. This Court should rehear this case en banc. Fed. R. App. P. 35(a)(2).

Moreover, as far as Appellant is aware, this is the first time that this Court has held that dismissal of a Title VII hostile work environment claim was appropriate at the 12(b)(6) stage because the employer's response to the harassment was adequate as a *matter of law*. The unprecedented step taken by the panel contradicts this Court's admonition that "the adequacy of [an employer's] response . . . is a factual issue," *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995), and the bedrock principle that courts do not "resolve contests surrounding the facts" on a motion to dismiss. *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016) (quotation marks omitted). This is another reason to grant rehearing en banc. Fed. R. App. P. 35(a)(1).

The panel effectively forecloses Title VII claims premised on an incident of severe harassment by a coworker. As such, its decision frustrates Title VII's core purpose of ending workplace discrimination.

B. *The factual allegations in Ms. Bazemore's complaint*

In her *pro se* complaint, which must be taken as true and construed liberally, *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014), Erika Bazemore alleged that her coworker, Anne Creel, targeted her with the slur "Nigger Tits" in the middle of the Best Buy sales floor in front of colleagues and a supervisor. J.A. 49. Ms. Bazemore "could feel all the eyes of the coworkers present in the group looking straight at [her] breast[s]." J.A. 50. The experience took Ms. Bazemore "back to the days of Slavery, where black women stood naked on the auction block to be sold; and while waiting, jokes [were] made about . . . their bodies." *Id*.

Ms. Bazemore was afraid to report the harassment to the store's General Manager, April Brewster, because Brewster and Creel were best friends and she was worried that Brewster would not take her complaint seriously. J.A. 49, 119. Ms. Bazemore therefore called HR to report the harassment, expressly informing HR that she did not go to her boss, Brewster, because her boss was close with the harasser. J.A. 49.

Despite notice of Creel and Brewster's close relationship, Best Buy appointed Brewster to remedy the situation. The "corrective action" taken by Best Buy was

limited to Brewster and Creel having a private meeting, after which Brewster filled out a scant report claiming Creel "made a comment . . . that was offensive" and that she gave Creel a "final warning." J.A. 16. This action fell short of Best Buy's policies both in theory and in practice. Best Buy has a zero-tolerance policy for racial slurs, and consistent with this policy, Best Buy terminated employees in the past for saying "nigger." J.A. 30, 118. That Best Buy appointed Creel's best friend to remedy the complaint and did not follow its own policies confirmed Ms. Bazemore's fear that her complaint would be mishandled. Moreover, Ms. Bazemore did not learn of this "corrective" action until *after* she filed a complaint with the EEOC. *See* J.A. 50–51.

Ms. Bazemore alleged that her workplace was "drastically altered" as a result of the harassment—Creel and Brewster started to treat her with hostility. J.A. 51. Ms. Bazemore was constantly "walk[ing] on eggshells." *Id.* She even had to plan "simple task[s] like a trip to the bathroom" to make sure she was "never caught alone with" Brewster or Creel. *Id*. Ms. Bazemore's well-being deteriorated as a result—she lost fifteen pounds and needed therapy and medication. J.A. 52. By contrast, Creel continued to use racial slurs, referring to customers of color pejoratively as "gypsies." J.A. 119.

Therefore, when Ms. Bazemore received a voicemail from HR claiming the matter had been "resolved," Ms. Bazemore called back and left a voicemail stating

she did not see how, when "nothing ha[d] happened" and "[t]hings in the store were still tense." J.A. 50, 139. HR did not return her call. J.A. 50.

The "unreturned phone calls" and the way Brewster treated her "showed [Ms. Bazemore] that being referred to as nigger tits in front of a group of her coworkers was nothing." *Id.* After waiting a month for Best Buy to respond, and realizing "nothing was going to be done about [her] traumatic experience," Ms. Bazemore filed a complaint with the EEOC. *Id.* After the EEOC complaint was dismissed, Ms. Bazemore filed the instant suit.

The district court dismissed the suit, holding Ms. Bazemore "fail[ed] to allege sufficient facts to show that Creel's conduct [was] imputable to Best Buy." J.A. 132.

C. *The panel decision*

The panel held that dismissal was appropriate because Ms. Bazemore did not allege a basis to impute liability onto Best Buy.[2] What doomed Ms. Bazemore's complaint, held the panel, was that she "ha[d] not pled that Best Buy failed to act to stop Creel's harassment." Slip op. at 8–9. The panel relied on *EEOC v. Xerxes Corp.*, 639 F.3d 658, 670 (4th Cir. 2011), a summary judgment case where this Court found an employer's response to harassment effective as a matter of law, to support its

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[2] To state a hostile work environment claim, Ms. Bazemore had to allege: "(1) unwelcome conduct, (2) because of her race or sex, that was (3) severe or pervasive enough to make her workplace environment hostile or abusive and (4) imputable to Best Buy, her employer." Slip op. at 7.

holding. To the panel, that Ms. Bazemore still suffered hostility *after* Best Buy took action was irrelevant to imputability; the fact "Creel's racist and sexist joke changed the environment at work and caused [Ms. Bazemore] to suffer physically and psychologically," "only go[es] to the third element of her hostile work environment claim—that Creel's harassment was so severe or pervasive that it made the environment at work hostile or abusive." Slip op. at 11. The panel did not address Ms. Bazemore's allegations that Best Buy did involve her in the remedial process or take any steps to rectify her work environment after it had drastically changed due to the harassment. And the decision ignores the fact that Best Buy did not respond when Ms. Bazemore called to report that her workplace was still hostile as a result of the harassment.

REASONS TO GRANT THE PETITION

A. *The panel decision is inconsistent with* Vance *and other circuits' precedent which hold that an employer can be liable for allowing a hostile work environment to persist.*

The panel decision draws a bright line. It holds that the plausibility of a hostile work environment claim based on a severe incident of harassment turns on whether the harasser engaged in the exact same conduct after an employer took some action. To the panel, an employer does not have to take steps to ameliorate the hostile work environment that the victim of harassment faces. And the panel finds it unnecessary to even inquire whether it was in fact the employer's response that stopped the same harassment from recurring.

The Seventh Circuit has rejected the panel's myopic focus on the efficacy of an employer's response, explaining that a court is "not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed." *Wyninger*, 361 F.3d at 976. As the Ninth Circuit said, "[i]n evaluating the adequacy" of the employer's response to harassment, a court can look beyond whether the harasser stopped his or her behavior, and "also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct." *Ellison*, 924 F.2d at 882.

When considering the adequacy of the employer's response, it is especially important to consider factors beyond whether the precise harassment continued when faced with an isolated instance of severe harassment followed by ongoing hostility. In *Boyer-Liberto*, this Court recognized that some types of harassment are so severe that they will render the workplace hostile, specifically positing that a racial epithet such as the slur "nigger" can be "severe enough to engender a hostile work environment." 786 F.3d at 280. If a single severe instance of harassment engenders a hostile work environment, it does not make sense that the adequacy of the employer's response should be judged by whether the precise form of harassment continued. Rather, the more sensible question when faced with severe harassment is whether the employer took reasonable steps to abate the hostile work environment that resulted from the harassment.

This framing of the inquiry aligns with the Supreme Court's understanding that an employer "will always be liable" under Title VII "when its negligence leads to the creation or *continuation of a hostile work environment*." *Vance*, 570 U.S. at 446 (emphasis added). And it fits with numerous circuits' holdings that the adequacy of an employer's response must be measured by whether it was reasonably calculated to alleviate *the hostile work environment*, not just the harassment. *See Distasio*, 157 F.3d at 62 ("An employer who has notice of a hostile work environment has a duty to take reasonable steps to eliminate it."); *Gardner*, 915 F.3d

at 327 (an employer is liable when it "knew or should have known of the hostile work environment but failed to take reasonable measures to try and stop it"); *Roy*, 914 F.3d at 68 ("Liability for a discriminatory environment . . . depends on whether the employer knew or should have known of the hostile work environment and took reasonable measures to try to abate it." (quotation marks omitted)). As the Second Circuit declared: "once an employer has knowledge of a racially combative atmosphere in the workplace, he has a duty to take reasonable steps to eliminate it." *Snell v. Suffolk Cty.*, 782 F.2d 1094, 1104 (2d Cir. 1986).

Ms. Bazemore alleged facts that show Best Buy did not take steps reasonably calculated to alleviate the hostile environment she suffered. First, Best Buy did not engage her in its "corrective action," therefore it could not have intended to alleviate the hostility she suffered. Second, Best Buy did not respond to Ms. Bazemore when she alerted the company that she still was experiencing hostility as a result of the harassment. Third, Best Buy did not publicly acknowledge the inappropriateness of Creel openly using a slur on the sales floor, so there is no reason to think that Best Buy's action would "persuade potential harassers to refrain from unlawful conduct." *Ellison*, 924 F.2d at 882. Indeed, we know Best Buy's action did not dissuade Creel, as she continued to use racially charged insults.

Ms. Bazemore plausibly alleged that Best Buy's response was not "reasonable under the circumstances as then existed." *Wyninger*, 361 F.3d at 976. Best Buy had

"knowledge of a racially combative atmosphere in the workplace" and failed "to take reasonable steps to eliminate it." *Snell*, 782 F.2d at 1104.

Ms. Bazemore's complaint should have survived a motion to dismiss. But the panel has now raised the bar for Title VII plaintiffs. Now, an employer can avoid liability so long as it can show that it took some action and the exact type of harassment "stopped" occurring. This true even if: (1) the claim involves an isolated instance of severe harassment that does not have to recur to create Title VII liability; (2) the employer did not involve the victim in the remedial action or seek to remedy the subjectively hostile work environment she suffered; and (3) the employer knows that the victim is still suffering and does nothing. In light of the panel decision, an employer has no incentive to engage with a victim of severe harassment or to take steps to remedy hostility created by harassment. This is inconsistent with "the broad remedial purpose of Title VII: to root out the cancer of discrimination in the workplace." *DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015) (cleaned up).

B. *The panel decision is inconsistent with precedent establishing that the adequacy of an employer's response is a factual issue that is inappropriate to resolve at the motion to dismiss stage*.

The panel decision also enters unchartered territory by holding that Ms. Bazemore's complaint should be dismissed at 12(b)(6) because Best Buy's response to the harassment was adequate as a matter of law. The decision is irreconcilable

with the pronouncement that "[t]he adequacy of [an employer's] response once it was aware of the harassment is a factual issue." *Amirmokri*, 60 F.3d at 1131. Factual issues cannot be resolved at the motion-to-dismiss stage because motions to dismiss do not "resolve contests surrounding the facts." *King*, 825 F.3d at 214 (quotation marks omitted). The panel breaks with these well-established principles.

The panel assumes that Best Buy's corrective action "stopped" the harassment because Creel never again called Ms. Bazemore "nigger tits" after her meeting with Brewster. However, construing Ms. Bazemore's complaint liberally and drawing all inferences in her favor, it is reasonable to conclude that Best Buy's corrective action was nothing more than a sham that was not actually calculated to prevent or correct the harassing behavior. Thus, there is no reason to believe at this juncture that it was Best Buy's response that "stopped" the harassment. Several allegations support this inference.

One, Best Buy appointed Creel's best friend to discipline Creel despite notice of their relationship. Two, the "discipline" occurred in a private meeting between the two friends and a supervisor who witnessed the harassment and did nothing. Three, the corrective action form memorializing the meeting euphemizes Creel's derogatory slur as an "offensive comment." Four, Best Buy had previously fired employees for saying "nigger," but did not fire Creel. Five, Best Buy's policies suggest that termination is the appropriate action for using a racial slur, and Best

Buy failed to follow that policy.[3] Six, Creel was not chastened because she continued to use racial epithets after meeting with Brewster.[4] Seven, Creel *and* Brewster treated Ms. Bazemore with hostility after their meeting. Eight, when Ms. Bazemore made Best Buy aware of the hostility, Best Buy refused to return her call.

These allegations raise the plausible inference that Best Buy's response was intended "as nothing more than a slap on the wrist or perhaps even an outright sham." *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc). In light of these allegations, the panel could not conclude that it was Best Buy's response that put an end to Creel's harassing behavior; there could be any number of reasons aside from Best Buy's response that explain why Creel did not call Ms. Bazemore "nigger tits" again; it could be that Ms. Bazemore went out of her way to avoid Creel. As the Seventh

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[3] The panel asserts "it is not our role to micro-manage Best Buy's disciplinary procedures." Slip op. at 12. While true, as the Second Circuit explained, a company's failure to follow its own procedures is "evidence tending to show that the company's response was inadequate." *Distasio*, 157 F.3d at 65. Best Buy's failure to follow its own policies bolsters the plausibility of Ms. Bazemore's claim.

[4] The panel criticizes Ms. Bazemore's allegations that other employees have been fired for saying "nigger" and that Creel continued to use the slur "gypsy" by saying "these allegations lack dates, detail or context." Slip op. at 12. But such details are (a) unnecessary to understand the import of the allegations, and (b) unnecessary at the complaint stage. *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 452 (4th Cir. 2017) ("[T]o satisfy the plausibility standard, a plaintiff is not required to plead factual allegations in great detail.").

Circuit held, "the question as to whether an employer's response was reasonably likely to end the harassment is fact specific and must be analyzed according to a totality of the circumstances review." *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 908 (7th Cir. 2018). The panel improperly resolves this "fact specific" question at the 12(b)(6) stage.

The case the panel decision primarily relies on in support, *Xerxes*, reveals the shaky ground on which it rests. First, *Xerxes* is a summary judgment case, which further underscores the notion that it is more appropriate to resolve the fact-intensive question regarding the adequacy of an employer's response after discovery. Second, *Xerxes* dealt with a situation of pervasive harassment, and it therefore makes sense that *Xerxes* focused on whether the harassment stopped. Third, the response *Xerxes* found "adequate as a matter of law" involved "increasingly progressive measures to address the harassment," including a meeting with employees to review the anti-harassment policy, "employee counseling and disciplinary action, suspensions of two employees, and warnings that future misconduct could result in progressive discipline, up to and including termination." 639 F.3d at 671–72 (quotation marks omitted). The comprehensive action taken in *Xerxes* is a far cry from the minimal action Best Buy took here.

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When opposing dismissal, Ms. Bazemore argued that "discovery will show that Best Buy failed to adequately respond, and will show that my fear from the very beginning, that nothing would be done because of who Anne Creel is to April Brewster, has come true." J.A. 119. For all we know, discovery may have proved her right, that during their meeting, Brewster may have told Creel 'I'm only having this meeting to avoid liability, and so you know, I have to write you up, but you're not really in trouble. From now on, don't call Ms. Bazemore nigger tits because she'll complain, but feel free to be as nasty to her as you wish. In fact, I'll be nasty too and hopefully we can get her to quit.' And to be sure, based on Ms. Bazemore's well-pled allegations, this casting is reasonable. According to the panel, even if the meeting occurred exactly as above, and despite Best Buy doing nothing to abate the hostile environment that the company knew Ms. Bazemore was suffering, Best Buy's response was adequate as a matter of law simply because Creel did not repeat the slur "nigger tits."

Now, when an employee calls a coworker "nigger," the employer only has to go to the offender and say 'stop,' without considering how the victim's workplace may have changed after being called "the most offensive word in English." *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring). This should not be the law.

CONCLUSION

This Court should grant rehearing en banc.

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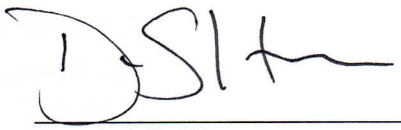
CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a) and 35(b) of the Federal Rules of Appellate Procedure, undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes and images, contains no more than 3,900 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 3,890 words.



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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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