No. 18-___

IN THE

Supreme Court of the United States

REEMA CONSULTING SERVICES, INC.,

Petitioner,

v.

EVANGELINE J. PARKER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII provides that, "It is an unlawful employment practice to discharge or otherwise to discriminate against an employee with respect to conditions of employment, because of such individual's sex or to limit, segregate, or classify an employee in any way which would deprive or tend to deprive the employee of employment opportunities or otherwise adversely affect the employee's status as an employee, because of such employee's sex." 42 U.S.C. § 2000e-2(a). An employee claiming a severe or pervasive hostile work environment because of her sex can obtain relief under Title VII. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To state a claim under Title VII for a hostile work environment because of sex, the plaintiff must allege workplace harassment that (1) was "unwelcome"; (2) was based on the employee's sex; (3) was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere"; and (4) was, on some basis, imputable to the employer. *See, e.g Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Bass v. E.I. du Pont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003); *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313–14 (4th Cir. 2008).

This case concerns an employee who was the subject of a false rumor that she received a promotion because she slept with a supervisor. Her Complaint alleges that the rumor originated due to a coworker's jealousy. Other than the sexual content of the rumor,

there is no allegation that the rumor arose due to gender or sex-based animus beyond The Fourth Circuit Court of Appeals belief that such rumors had a historical negative impact on women in the workplace.

The central question presented in this case is whether a false rumor, alleged to have originated out of jealousy, that a female employee received a promotion because she slept with a higher-ranking employee is "based on sex", such that it can give rise to liability under Title VII.

PARTIES TO THE PROCEEDING

The Petitioner is Reema Consulting Services, Inc.

The Respondent is Evangeline Parker.

CORPORATE DISCLOSURE STATEMENT

The petitioner has no parent corporation or publicly held company that owns 10% or more of its stock.

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Reema Consulting Services, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (App 1a to 22a) is reported at 915 F.3d 297. The order of the district court is unreported. A transcript of the motions hearing is at App 26a-54a.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on February 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Reema Consulting Services, Inc. ("RCSI") seeks review of the Fourth Circuit's reversal of the dismissal of two counts of a complaint filed by Evangeline Parker ("Parker") alleging sexual harassment. This case presents a recurring question of significant importance that has divided the Federal Courts of Appeals -- whether rumors about an employee's sexual conduct are *per se* actionable under Title VII.

As Parker alleged in her Complaint and EEOC Charge, this suit arose because she was "[f]aced with the hostile work environment caused by unfounded and sexually-explicit rumors targeting her." App 55a. Parker was hired by RCSI in December, 2014 and worked until her termination on May 18, 2016. App 57a, ¶7. According to the allegations in the Complaint, Parker was promoted six times. Approximately two weeks after she accepted a managerial role at RCSI, Parker was made aware of a rumor about her which portrayed her as having a sexual relationship with Damarcus Pickett, RCSI's Deputy Program Manager, in order to obtain her managerial position. App 58a ¶12. Parker directly traces the origination of the rumor to a jealous subordinate coworker. App 60a ¶25.

Although Parker claimed the rumor spread, she did not identify anyone else who told her of it, heard it from other employees or made inquiry about it. According to her Complaint, it was Parker who

continued to bring up the rumor at work confronting coworkers "in an effort to set the record straight." App 59a ¶18. Parker made no allegation that anyone placed any credence in the rumor and, although she identified that there were other female managers, she offered no allegations or reasonable inferences to intimate those other female managers were subjected to similar rumors or disrespect. App 55a *et seq.*. In fact, Parker specifically identified three separate female managers in her Complaint and conspicuously did not allege that any of these female managers were subjected to the same type of rumors, were otherwise harassed because of their gender or even that they found any truth to the rumors. App 60a ¶23, App 61a ¶28, App 62a ¶35.

Parker did admit, however, that during the less than two-month period from when she learned of the rumor to her termination, the HR manager investigated the situation. App 61a ¶28. According to Parker, the HR manager then met with all managers, including Parker, who agreed to apologize and which Parker was willing to accept to end the situation. App 61a ¶29. In addition to this meeting and acceptance of the apologies, RCSI directed all employees to go through sexual harassment retraining, starting with the managers and supervisors.

Parker also conceded that after this meeting and instruction on sexual harassment training, the RCSI manager, Larry Moppins, did not want to

further discuss the rumor and dismissed its efficacy or impact in his management of her when he told her to stop "huffing and puffing about this BS rumor." App 60a ¶27 (emphasis supplied).

In less than two months after the rumor started, and less than two weeks since Parker accepted the apology and RCSI began sexual harassment training, Parker was terminated. App 62a ¶36. Parker filed a charge with the EEOC that she had been the victim of a hostile work environment. App 63a ¶42.

Upon hearing the Motion to Dismiss, the Honorable Roger W. Titus dismissed the Complaint. As to the nature of the rumor and its impact, Judge Titus was very specific in why it did not meet the test necessary for inferring illegal conduct by RCSI.

> Now I will second what both sides have said is that it would be truly offensive to me or anybody else to have someone spread a rumor that I or any other person received a promotion because of sexual favors or having sexual relations with the person who made the decision. That goes right to the core of somebody's merit as a human being to suggest that they were promoted and the promotion was not based upon merit, but rather was based upon the giving of sexual

favors. And so I would condemn as I think any reasonable person would in the strongest possible terms that making a rumor like that and spreading it is vile, vulgar behavior, which is alleging that somebody's conduct has been totally unacceptable and inappropriate.

The problem for Ms. Parker is that her complaint as to the establishment and circulation of this rumor is not based upon her gender, but rather based upon her alleged conduct, which was defamed by, you know, statements of this nature. Clearly, this woman is entitled to the dignity of her merit-based promotion and not to have it sullied by somebody suggesting that it was because she had sexual relations with a supervisor who promoted her. But that is not a harassment based upon gender. It's based upon false allegations of conduct by her. And this same type of a rumor could be made in a variety of other context involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to a promotion. But the rumor and the spreading of that kind of a rumor is based upon conduct, not gender. And therefore, with regard to the count

alleging harassment based upon gender, I find that there's simply not based upon gender, but based upon improper allegations of her conduct.

As the courts have repeatedly said, the civil rights laws are not a workplace civility code. They are not designed to assure that every employee have a tranquil employment environment. They are not intended to deal with the slights and insults that are unfortunately the part of daily life in a variety of different context. But here, I conclude that the harassment claim fails because it is not alleging harassment based upon gender.

Even if she were to satisfy the element of harassment being based upon gender, I conclude that she's also failed to allege that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. She alleges that it was frequent, but the temporal element here is very short in terms of how long this rumor was in circulation. Just a matter of a few weeks. And a few slights that she's referenced here do not rise up to the level that would suffice for it being

> severe and persuasive. Accordingly, I find that Count One of the complaint fails to state a claim and I will dismiss that count.

App 51a - 52a. He later added "[h]ere, the legal question is whether spreading a rumor or circulating a rumor that somebody's promotion was based upon the providing of sexual favors is not gender-based discrimination. It is conduct based rumor mongering, for the sake of a better word, and it could apply without regard to gender as has happened in other cases that I have had before me." App 53a.

Judge Titus also relied upon the absence of finding such conduct as being able to form the basis for the retaliation claim pursued by Parker in Count II of her Complaint because her belief in discrimination were simply not objectively reasonable. App 53a. He also dismissed Count III of Parker's Complaint which was further premised on the alleged "three strike policy" because it was not presented to the EEOC prior to Parker's coming to Court. App 50a.

The Fourth Circuit Court of Appeals reversed, in part. In its decision, the Fourth Circuit transformed the requirement set forth in *Oncale* that the discrimination be, "because of" sex and created a standard where any conduct, regardless of the expressed motivation for the conduct, can form a legal

basis for a Title VII action if it is related to sex or can be alleged to perpetuate a stereotype related to gender, is actionable. The Fourth Circuit, in reversing the District Court, held that,

> Because "traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society," and "these stereotypes may cause superiors and coworkers to treat women in the workplace differently from men," it is plausibly alleged that Parker suffered harassment because she was a woman.

Parker at 303, (citing *Spain*, 26 F.3d at 448; *Price Waterhouse*, 490 U.S. at 250–51, 258, 272–73 (plurality and concurring opinions); *McDonnell*, 84 F.3d at 259–60; *cf. Passananti v. Cook Cty.*, 689 F.3d 655, 665–66 (7th Cir. 2012) (noting that use of the word "bitch" to demean a female can support a sexual discrimination claim even though the word may sometimes be directed at men); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 (11th Cir. 2010) (en banc) (same); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 47 (1st Cir. 2009) (finding actionable the denial of a promotion because the employee was a working mother with young children); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119–21 (2d Cir. 2004) (same).

In so doing, the Fourth Circuit Court of Appeals ignored the explicit statement in the Complaint that the rumor began due to a co-worker's jealousy, not animus based on gender. Harassment that is inflicted without regard to gender is not actionable because the harassment is not based on gender. Title VII makes it unlawful for an "employer ... to discriminate against any individual with respect to his ... conditions ... of employment, because of such individual's ... sex...." 42 U.S.C. § 2000e–2(a)(1). Although Parker asserts that the rumors were "sexually-explicit," they were not "gender-explicit" which is a required element of a Title VII claim.

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] ... because of ... sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, (1998).

ARGUMENT

This Court has made clear that not every slight, insult or indignity provides a basis for liability under Title VII.

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view.

Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citations omitted).

At the heart of Parker's Complaint is her belief that the rumor started by her jealous co-worker that she was having an affair with a supervisor created a hostile work environment. By her own admission the rumor was "an unfounded, sexually-explicit rumor" which "falsely and maliciously portrayed her as having a sexual relationship with a co-worker." App 58a ¶12. Not only did this rumor not exist upon each

of her five previous promotions, nothing in the rumor mentioned Parker's gender which also did not impact her promotions at RCSI.

In addition to the rumor not being gender specific, Parker also specifically identified three other female managers in her Complaint who were witnesses to different events. Much like the lack of impediments to each of Parker's previous five promotions, Parker did not allege, explicitly or implicitly, that any of these women had been similarly subjected to such rumors upon being promoted or that they suffered any hostile feelings as a female manager. Given Parker's admission of the jealous motivation for the rumor and this absence of any allegation or reasonable inference that other women had similar experiences, there is no doubt that this rumor was solely about her conduct and insufficient to support claims of an illegal hostile work environment for women.

The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed due to general hostility based upon sex. *Id.* Title VII filters out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" and ensure that the conduct must be extreme to amount to a change in the terms and conditions of employment. *Faragher*, 524 U.S. at 788. "Mere utterance of an epithet which

engenders offensive feelings in a female employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." *Munday v. Waste Management of North America, Inc.*, 858 F. Supp. 1364, 1374 (D. Md. 1994)(*citing Meritor Sav. Bank, FSB* at 67)

As even Judge Titus acknowledged, while the gossip was unfortunate, offensive and had the effect of causing Parker some discomfort, it was insufficient to support a hostile work environment claim.

> The problem for Ms. Parker is that her complaint as to the establishment and circulation of this rumor is not based upon her gender, but rather based upon her alleged conduct, which was defamed by, you know, statements of this nature. Clearly, this woman is entitled to the dignity of her merit-based promotion and not to have it sullied by somebody suggesting that it was because she had sexual relations with a supervisor who promoted her. But that is not a harassment based upon gender. It's based upon false allegations of conduct by her. And this same type of a rumor could be made in a variety of other context involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to a promotion. But the rumor

> and the spreading of that kind of a rumor
> is based upon conduct, not gender.

App 51a - 52a.

The rumor which Parker claims to have been battling and which fueled her Complaint is based on her conduct and not her gender. There is no dispute that Parker believes that the rumor was started "by a co-worker who was jealous of her success at the company" and not because she was a woman. Her alleged misdeed which found its place into workplace gossip was an affair with a supervisor, not any activity premised on her being female.

Her gender had no context in the rumor which was premised only on an alleged affair. In fact, according to Parker, this same rumor was maligning Mr. Pickett and caused him to be questioned by Mr. Moppins. JA-9 ¶16. Mr. Pickett had to endure the same embarrassing effect and offense at the accusation of such conduct as did Parker undermining the notion that the rumor is gender specific. If the rumor was gender based as argued by Parker, Mr. Pickett's conduct would not have been questioned or fallen into an ill light.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons. First, the circuits are split as to whether "sex" in Title VII includes rumors related to sexual

conduct regardless of the motivation for the rumors. Resolving the present issue would provide much needed clarification to the Courts and employers as to whether context is relevant in determining whether or not a rumor related to sexual conduct violates Title VII.

Second, the Fourth Circuit's opinion conflicts with this Court's decision in *Oncale v. Sundowner* 523 U.S. 75, 80, (1998). The Fourth Circuit's decision eliminates the distinction between rumors based on conduct and those which reflect historical stereotypes and discrimination because of sex. Even accepting the most liberal conclusions in the Complaint, by Parker's own admission, the rumors related to her conduct originated from a jealous co-worker who had not achieved a comparable level of success despite starting at the company at the same time as Plaintiff and were not "because of" her sex. There is no allegation that her co-worker's commencement of the rumor was attributable to discriminatory animus or had started because she was a woman. Instead, her co-worker fabricated a rumor, which Plaintiff acknowledges management viewed as a "BS rumor," to try to undermine her success at work by attributing it to conduct unrelated to work. The Fourth Circuit's decision would eliminate the distinction between general co-worker animus and sexual harassment, that is, harassment because of sex, and create liability under Title VII for employers for actions taken without discriminatory animus.

Third, the Fourth Circuit's decision has widespread consequences for employers. It threatens to create a general code of civility whereby employers are charged with policing and controlling their employees' speech to ensure that employees are not inadvertently perpetuating outdated stereotypes related to gender roles, regardless of intent. The significance of RCSI's petition for writ of certiorari is further reflected in the EEOC's decision to participate in Plaintiff's appeal as amicus curiae despite electing to dismiss Plaintiff's charge along with the involvement of the National Women's Law Center and 43 other organizations as amici at the Fourth Circuit. *Parker v. Reema Consulting Services*, No. 18-1206, docket entries 23-1, 25-1 (4th Cir. 2018). These entities all recognized that the legal question presented in the appeal and Defendant's Petition is a significant issue affecting the public interest and participated as amici as a result. *Id.*

I. THE CIRCUITS ARE IRRECONCILABLY SPLIT ON WHETHER RUMORS RELATED TO SEXUAL CONDUCT ARE BASED ON SEX OR CONDUCT.

The Fourth Circuit's departure from the "because of" element necessary for a legal claim of discrimination was contrary to precedents from the Second, Seventh, and Tenth Circuit Courts of Appeals, along with a number of District Courts, holding that rumors that an employee was having an affair are conduct-based and not prohibited by Title

VII. *Brown v. Henderson*, 257 F.3d 246, 255–56 (2d Cir. 2001); *Pasqua v. Metro Life Insurance*, 101 F.3d 514 (7th Cir. 1996); *Duncan v. Manager, Dep't of Safety, Denver*, 397 F.3d 1300, 1312 (10th Cir. 2005); *Bystry v. Verizon Services Corp.*, 2005 WL 8147293 (D. Md. 2005); *Rose-Stanley v. Virginia*, 2015 WL 6756910 (W.D. Va. 2015). These cases are discussed in Section A below.

In reversing this Court's grant of RCSI's motion to dismiss, the Fourth Circuit held that rumors about affairs are per se based on sex, not conduct alone, and recognized case law from the Third and Seventh Circuit as the decisive authority on the issue. *Parker v. Reema Consulting Services, Inc.*, 915 F.3d 29 (4th Cir. 2019); *McDonnell v. Cisneros*, 84 F.3d 256, 259–60 (7th Cir. 1996); *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994). The decisions relied upon by RCSI stand for the opposite proposition as those relied upon by Plaintiff and the Fourth Circuit, such that there is a significant split amongst the circuits as to whether rumors related to sexual conduct may form the basis for a Title VII sexual harassment claim. The cases relied on by the Fourth Circuit are discussed in Section B, below.

A. Courts Holding That Bare Rumors of Affairs Are Conduct Based.

A number of courts have rightly held, pursuant to *Oncale,* that bare rumors of extramarital affairs in the workplace or other sexual conduct are conduct

based and not gender based. In *Brown v. Henderson*, 257 F.3d 246, 255–56 (2d Cir. 2001), the Second Circuit Court of Appeals found that the rumors of an affair were conduct based and insufficient to support a claim under Title VII.

> Nonetheless, we conclude that in the case before us Brown has not carried her burden of showing-even for purposes of avoiding summary judgment-that the harassment she faced was rooted in her sex. The bulk of the behavior she cites, though often highly cruel and vulgar, related either to her union-related conflict with Nelson or to her purported affair with Parrett. Most importantly, both in the statements she made in support of her EEO complaint and in her deposition, plaintiff repeatedly explained that Nelson and the others were harassing her as an outgrowth of their dispute over the union election. And she never suggested that their antagonism toward her was related to her being a woman. Instead, until her affidavit in opposition to summary judgment, Brown gave every indication that, in her view, what made her tormentors' conduct "sexual harassment" was the fact that the behavior touched on matters of

sexuality, i.e. her purported sexual relationship with Parrett, and not that it was a form of sex discrimination. . . .

Here, however, there is overwhelming evidence that the hostility toward Brown was grounded in workplace dynamics unrelated to her sex and that even these pictures did not reflect an attack on Brown as a woman. Moreover, and crucially, this overwhelming evidence derives substantially from Brown herself, and her own view, clearly expressed, that the harassment was fundamentally the product of a workplace dispute stemming from the union election, and not from her being a woman. Given her repeated statements to that effect, we are reluctant to allow her to rescue her claim with a last-minute conversion to the position that, instead of what she had consistently said before, she faced adverse conditions because she is a woman. Accordingly, we agree with the district court's conclusion that, as a matter of law, Brown cannot show that she suffered the harassment in question because of her sex.

Brown, 257 F.3d at 255–56 (citations omitted).

A similar result is found in the Seventh Circuit decision *Pasqua v. Metro Life Insurance*, 101 F.3d 514 (7th Cir. 1996). Donald Pasqua sued his employer based on his employees' rumors that he was "engaged in an intimate relationship" with a female subordinate and that he was showing her favoritism. Both Mr. Pasqua and his female subordinate were upset about the rumors. Mr. Pasqua complained to his employer several times about the rumors and reported that the female subordinate was threatening to file a sexual harassment lawsuit. The Seventh Circuit Court of Appeals held that his claim could not meet the "because of" sex requirement for a hostile work environment claim. "Harassment that is inflicted without regard to gender, that is, where males and females in the same setting do not receive disparate treatment, is not actionable because the harassment is not based on sex." *Id.*, 101 F.3d at 517. The court found that there was no hostile work environment when the subject matter of the rumors were about a man and a woman, and "both men and women alike were talebearers." *Id.*

This is consistent with the legions of other decisions which have found that the "mere existence of uncomfortable rumors in the workplace is not the type of hostile environment" which Title VII was meant to redress. *McDonnell v. Cisneros*, 1995 WL 110131, *8 (N.D.Ill.1995) (stating that evidence of false rumors circulating the plaintiffs' work place

regarding sexual misconduct on their part was insufficient to survive defendant's motion for summary judgment on plaintiffs' hostile work environment claim). *Bystry v. Verizon Services Corp.,* 2005 WL 8147293 (D. Md. 2005), cited by Amici to the Fourth Circuit, also supports the insufficiency of Parker's case and the District Court held true to the belief that the offensive comments needed to be "because of" gender or gender stereotypes.

> While sexual activity is often related to gender, liability under Title VII must be based on gender discrimination: discrimination based solely on sexual activity or rumors of sexual activity is insufficient. Though Bystry has produced evidence that the sexual rumors may have played a motivating role in Verizon's decision to fire her, she has failed to offer evidence indicating that the decision-makers at Verizon were motivated by gender or gender stereotypes.

Bystry, 2005 WL 8147293 at 8.

Similarly, in *Rose-Stanley v. Virginia*, 2015 WL 6756910 (W.D. Va. 2015), the court confronted allegations like those presented by Parker and also rejected the possibility of them forming the foundation for a sexual harassment claim.

Stanley bases her hostile environment claim on rumors about an alleged sexual relationship she had with Mathena, along with questions posed by Washington about that relationship. All of these events occurred over a period of about three weeks. These allegations do not rise to the level of objective hostility or abuse. The Supreme Court has repeatedly stated that "'simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (*quoting Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998)). Rumors are commonplace in the work environment, and Washington had the right to investigate those rumors to determine whether Mathena was improperly favoring Stanley. While the rumors and resulting conversation might have made Stanley uncomfortable, they did not create an objectively hostile and abusive work environment. The facts pled simply do not state a plausible claim for hostile environment sexual harassment. . . .

> I also question whether the rumors about the alleged inappropriate relationship were based on the plaintiff's gender. According to the Complaint, the rumors concerned both Stanley, a female, and Mathena, a male. In that sense, the rumors can be construed as gender-neutral. Likewise, the Complaint alleges that Washington questioned both Stanley and Mathena about the alleged affair.

Rose-Stanley, 2015 WL 6756910 at 6, n. 4.

Other cases have followed the same analysis and determined that sexual rumors about an individual are generally insufficient on their own to satisfy the requirements of demonstrating hostile work claims. *See, e.g., Duncan v. Manager, Dep't of Safety, Denver*, 397 F.3d 1300, 1312 (10th Cir. 2005)(City was not liable for hostile work environment for failing to respond to letter alleging that female officer had relationships with male officers since letter made series of salacious allegations about both male and female officers and did not single female officer out for disparate treatment because of gender); *Ptasnik v. City of Peoria, Dep't of Police*, 93 F. App'x 904, 909 (7th Cir. 2004)("[b]ecause both male and female officers were the subject of sexual rumors, these rumors were likely spread for reasons having 'nothing to do with gender discrimination'"); *Lawrence v. Christian Mission*

Center Inc. of Enterprise, 780 F.Supp.2d 1209 (M.D. Ala. 2011) ("[w]hile 'it is not inconceivable that someone might spread slanderous rumors in the workplace for the simple motivation that someone else was of a particular gender,' Lawrence has not pled any facts that demonstrate that the rumors about her sexual relationship with a resident of Christian Mission were spread because of or were based on her gender"); *Lewis v. Bay Indus., Inc.,* 51 F. Supp. 3d 846, 854-55 (E.D. Wis. 2014)(Employee did not engage in protected activity when he reported that there were rumors that female co-worker's promotion was due to her alleged sexual affair with male owner, absent any indication that any hostility directed at the co-worker was because of her sex; rumors were based on belief, whether true or not, that co-worker had been unfairly given a position she was not qualified to perform); *Reiter v. Oshkosh Corp.*, 2010 WL 2925916 (E.D. Wis. 2010)("Even if a rumor was circulating, there is no indication that any other employees attempted to make fun of her or taunt her about it. In fact, much of the evidence of the rumor seems to have resulted from her own questioning of other employees"); *Snoke v. Staff Leasing, Inc.*, 43 F. Supp. 2d 1317, 1327 (M.D. Fla. 1998) ("defendant points to evidence in the record that both plaintiff and Ayala, a male, were the subject of the rumors, and that both men and women were discussing them. Accordingly, the rumors do not show harassment 'because of' sex"); *Fletcher v. Illinois*, 2006 WL 3196795 (S.D. Illinois 2006)(plaintiff alleged that male officers talked about her as if she were "a piece

of trash" and that she was referred to as the "company whore" but co-workers' conduct do not appear to be sufficiently severe, or linked to her actions in filing a complaint and record was void of any evidence of favorable treatment given to "similarly situated individuals who did not engage in protected ... activity"); *Campbell v. Masten*, 955 F. Supp. 526, 530 (D. Md. 1997)(plaintiff's hostile work environment fails because alleged harassing conduct was based on supervisor's "fears that his wife would learn of their past affair" not verbal or physical conduct of sexual nature).

B. Courts Holding That Bare Rumors of Affairs Are Gender Based.

The Fourth Circuit relied on only two primary cases to suggest that rumors similar to those presented in this case are actionable. Both cases were based on events occurring more than 20 years ago and commentary about the nature of society recognized by courts in those decisions are outdated, as recognized by this Court.

The central case relied upon by the Fourth Circuit is *Spain v. Gallegos*, 26 F.3d 439, 443 (3d Cir.1994). In *Spain*, the plaintiff's supervisor was the alleged paramour, the supervisor refused to take any action to quell the rumors, and even encouraged them, over a four-year period. These rumors allegedly "caused her co-workers to ostracize her, thereby

straining her relationship with them and with her supervisors and making her miserable." *Id.* A co-worker testified that he was told, "Be careful, you don't want to rub Ellen Spain [the plaintiff] the wrong way, because if you do, then you're going to have problems with the Director" because there was a relationship between the two of them. *Id.*, n 4. The Third Circuit found that "the rumors developed over a period of several years ... and manifested themselves through her continuous interaction with her colleagues and supervisors .... continuing in particular after Spain had asked [her supervisor] to put an end to the rumors." *Id.*

In *Spain,* the Third Circuit relied upon views of sexuality which are clearly now outdated. This obsolescence is recognized by the tremendous progress and growth in society, social networks, the courts[1] and as even recognized by the Supreme Court's subsequent recognition of same sex harassment under Title VII, *Oncale*, and its denouncement of bans on same-sex marriage in *Obergefell v. Hodges*, ___ US__, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), and *United States v. Windsor*, 570 U.S. 744 (2013). *Spain* made

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[1] At least two of the Federal Court of Appeals have now recognized protection under Title VII based on an individual's sexual orientation as well. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).

clear that its view of the rumored comments were based on the court's belief that sex between two consensual males would not have the subject of the same types of rumors.

> Our discussion above leads us to believe that even if a male had a relationship bringing him into repeated close contact with Nelson, it would have been less likely for co-workers to have believed that the relationship had a sexual basis. Thus, the resulting poor interpersonal relationships, negative evaluations, and denial of advancement might not have occurred for a male as they allegedly did for Spain, inasmuch as the situation which caused them simply would not have been created.

Spain, 26 F.3d at 448.

In *McDonnell v. Cisneros*, 84 F.3d 256, 259–60 (7th Cir. 1996), also relied upon by the Fourth Circuit in its decision, the Seventh Circuit stated that, "Unfounded accusations that a woman worker is a "whore," a siren, carrying on with her coworkers, a Circe, "sleeping her way to the top," and so forth are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they could constitute a form of sexual harassment." However, in so doing, the Seventh Circuit did not

adopt an express rule that such an allegation was sufficient, standing alone, to state a claim for relief and under the circumstances present in that case, held that the allegations related to accusations of sexual conduct did not give rise to a viable claim for sexual harassment. *Id.* at 260.

As recognized by the progressive decisions of other Federal Circuit Courts of Appeal and the Supreme Court, the legal assumption upon which *Spain* was decided is no longer acceptable for courts or in society. The Fourth Circuit's decision in this case creates a legal presumption that the phrase "sleeping their way to the top" is solely derogatory of women. This presumption does not exist in Title VII nor in any of the cases which have confronted similar rumors in the past. Regardless, Circuits continue to rely on the Court's reasoning in *Spain*. The Fourth Circuit's opinion in the present case further exacerbates the split between the circuits that have addressed rumors such that this issue is ripe for adjudication by this Court.

II. THE FOURTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S DECISION IN *ONCALE*.

Equating the phrase "sleeping to the top" with an egregious gender based slight against only women is inconsistent with this Court's decision in *Oncale v. Sundowner* and Title VII generally. In *Oncale*, this Court held that harassment that is inflicted without

regard to gender is not actionable because the harassment is not based on gender. Title VII makes it unlawful for an "employer ... to discriminate against any individual with respect to his ... conditions ... of employment, because of such individual's ... sex...." 42 U.S.C. § 2000e–2(a)(1). Although Parker asserts that the rumors were "sexually-explicit," they were not "gender-explicit" which is a required element of a Title VII claim.

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] ... because of ... sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.

Oncale, 523 U.S. at 80.

The Fourth Circuit's Title VII analysis is backward and unsupported in the law. The Fourth Circuit relies on Parker's gender as the reason for the rumor rather than demonstrating that the rumor itself was gender based. Although nothing in the rumor suggests it only applies to women or that it is not equally insulting to the other participant, Mr. Pickett, the Fourth Circuit's position is that the rumor is gender based *per se* because Parker is a woman.

This argument is insufficient to find the necessary elements of Title VII injury as explained by this Court in *Oncale*.

It is undeniable that the rumor was premised upon and ascribing only immoral conduct to both Plaintiff and to Mr. Pickett and was not gender based. Among the more noteworthy admissions which make this conclusion inescapable are Parker's statement that she worked for RCSI for well over a year during which she "earned six promotions based on her performance and professionalism while at the company," that she was not the only female manager and there were several others and she met with each of them during the events she described in her Complaint. The explanation of her previous promotional success with no indication that it was impeded or otherwise influenced by any gender bias and the identification of numerous high level female managers who were not subjected to the same type of conduct and who were eyewitnesses to the events which Parker claimed belies any plausible suggestion that the rumors were gender based.

More importantly, given this Court's recognition of the rights of those with different sexual preferences and identities, adopting the position taken by the Fourth Circuit only reinforces illegal negative stereotypes about sexual identities and choices. This Court should not countenance this effort by The Fourth Circuit. By accepting the Fourth

Circuit's argument that "sleeping their way to the top" reinforced a gender stereotype solely about women, this Court is trampling on the recognized rights of individuals who may have different sexual orientations. It also creates a situation where the phrase has a different meaning and import when used in the context of a heterosexual couple as opposed to a homosexual or bisexual plaintiff. It is improper and unfounded to grant plaintiffs a legal presumption that "sleeping their way to the top" is gender specific to women given that such a presumption treads on the rights of these other individuals.

As the Tenth Circuit Court of Appeals correctly recognized in *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996 (10th Cir. 1996), rumors like those relied upon by Parker are about conduct and favoritism and are not gender based.

> Although there was a sexual content to the rumors of a relationship between plaintiff and the sales manager, and the statements attributing her success to such a relationship, the district court's finding that the rumors and comments were gender neutral is not clearly erroneous. Based on observed behavior, there was strong evidence that plaintiff and her manager had a special relationship, and that plaintiff's success was due, in some part, to this

> relationship. It appears that such rumors and inferences would have occurred even if the roles were reversed and plaintiff were male. This is different than the situation in *Jew v. University of Iowa,* 749 F. Supp. 946, 950, 958 (S.D. Iowa 1990), where there was no basis for the rumors other than Dr. Jew's gender, and *Spain v. Gallegos,* 26 F.3d 439, 443 (3d Cir.1994), where the rumors were not true but were created and perpetuated by improper conduct by plaintiff's supervisor.

Winsor, 79 F.3d at 1001. Rumors related to an affair are about an employee's conduct and when a plaintiff explicitly ascribes the motivation for the rumor to be something other than discriminatory animus, *Oncale* should control the determination that Title VII has not been violated by such a rumor. Granting certiorari in the present matter would clarify the scope and application of *Oncale* and provide much-needed clarification to its that a claim under Title VII requires discriminatory animus, not just gender-based content.

III. THE FOURTH CIRCUIT'S OPINION CREATES A GENERAL CODE OF CIVILITY.

Public policy considerations support this Court granting certiorari in the present action. The Fourth Circuit's decision creates an environment whereby

employers may be charged with liability for use of words and phrases with no context and regardless of intent. In its opinion, the Fourth Circuit relied not on the motivations explicitly proscribed to the individual who started the false rumor, namely jealousy, but instead relied on notions of traditional stereotypes faced by women and found that the rumor stated a *per se* claim for a violation of Title VII. In so doing, the Fourth Circuit has created a standard where the motivation for conduct is irrelevant and employers must police every rumor and statement made by an employee to ensure that it has no historical foundation based on a gender bias even if the current motivation for the rumor is divorced from any such historical context. As a practical matter, this general code of civility presents a substantial hardship on even proactive employers and goes well beyond the intent of Title VII.

The Fourth Circuit's decision creates a framework where employers must ignore the content of their employee's words and their ascribed motivations but also assess whether some historical stereotype may be implicated, regardless of whether there is any intention to invoke that stereotype. Under this rubric, employers must not only act without discriminatory animus but must also be historically and politically enlightened. This is not what Title VII requires.

Moreover, the standard created by the Fourth Circuit fails to provide an appreciation for the fact that language is constantly evolving and new words and phrases are regularly becoming part of the lexicon of society, shedding former negative definitions. Not only are new words and phrases created, old words and phrases take on new meaning as society evolves and changes. Rather than cling to the vestiges of demeaning connotations, society has appropriated many words and phrases requiring that the meanings be appreciated only in their current context. What once may have been a racially-loaded phrase may now be seen as completely innocuous as slang and historical context changes. The same situation exists with language regarding sax and sex stereotypes.

Because language is understood only within the bounds of its contextual clues, the courts cannot ignore a plaintiff's concession of the motivation of the speaker. Is the speaker's intent to invoke historical, discriminatory stereotypes or is the speaker motivated by some other factor which carries no intent to violate the law? When the motivation is explicitly acknowledged by the plaintiff (as was the case here), courts must consider it in determining whether there was a discriminatory intent.

This Court has recognized that not all objectionable conduct or language amounts to discrimination under Title VII. Although gender-specific language that imposes a change in the terms

or conditions of employment based on sex will violate Title VII, general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII is not a "general civility code." *Faragher*, 524 U.S. at 788 (quoting *Oncale*, 523 U.S. at 80. Title VII does not prohibit profanity alone, however profane. It does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits discrimination, including harassment that discriminates based on a protect category. Indeed, as the Supreme Court observed in *Oncale*, Title VII

> Does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.

Id., 523 U.S. at 81.[2]

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[2] In *Oncale*, this Court stated that a determination of whether harassment has occurred required consideration of "[c]ommon sense, and an appropriate sensitivity to social context," to distinguish between general office vulgarity and the "conduct which a reasonable person in the plaintiff's

Sexual language and discussions that truly are indiscriminate do not themselves establish sexual harassment under Title VII. The Supreme Court has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id*. at 80.

The Fourth Circuit's holding in the present case ignores this distinction and the contextual analysis required of the courts. Parker conceded in her Complaint that the rumor was started and undertaken by a jealous coworker not premised on any animus toward women. Under the Fourth Circuit's ruling here, every slight, slur or insult is fodder for a

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position would find severely hostile or abusive." *Id*, 523 U.S. at 82. Implicitly recognizing that there are few instances where words or actions are considered to create a *per se* hostile work environment, this Court acknowledged that certain behavior, such as slapping someone on the buttocks, depending on the context, may not be considered abusive but may be abusive under other circumstances. *Id.*, 523 U.S. at 81. As such, when determining whether words or conduct violates Title VII, a court must look at, "a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id*.

harassment claim if the phrase or term has a foundation in some historical prejudice even where it arose in a context devoid of discriminatory animus related to gender. This creates a substantial new burden on employers, creates a general code of civility and does little to eradicate unlawful workplace harassment. Ignoring context and discriminatory animus and construing the use of statements tied to all historical vestiges goes well beyond eradicating harassment and turns Title VII into a general code of civility. This objective has been steadfastly resisted by the courts.

This Court should grant certiorari in the present case to prevent the expansion of Title VII beyond its original intent and to provide employers with the necessary guidance to avoid running afoul of Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1206

EVANGELINE J. PARKER,

Plaintiff-Appellant,

v.

REEMA CONSULTING SERVICES, INC.,

Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NATIONAL WOMEN'S LAW CENTER; A BETTER BALANCE; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN SEXUAL HEALTH ASSOCIATION; BLACK WOMEN'S ROUNDTABLE; NATIONAL COALITION ON BLACK CIVIC PARTICIPATION; CALIFORNIA WOMEN LAWYERS; CHAMPION WOMEN; DISTRICT OF COLUMBIA COALITION AGAINST DOMESTIC VIOLENCE; END RAPE ON CAMPUS; EQUAL RIGHTS ADVOCATES; FAMILY VALUES @ WORK; FEMINIST MAJORITY FOUNDATION; GENDER JUSTICE; GIRLS FOR GENDER EQUITY; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HARVARD LAW SCHOOL GENDER VIOLENCE PROGRAM; LAWYERS CLUB OF SAN DIEGO; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; LEGAL AID AT WORK; LEGAL MOMENTUM, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND; LEGAL VOICE; MAINE WOMEN'S

LOBBY; MEDICAL STUDENTS FOR CHOICE; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ALLIANCE TO END SEXUAL VIOLENCE; THE NATIONAL CRITTENTON FOUNDATION; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN'S POLITICAL CAUCUS; OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE; PEOPLE FOR AMERICAN WAY FOUNDATION; SERVICE EMPLOYEES INTERNATIONAL UNION; SISTERREACH; SOUTHWEST WOMEN'S LAW CENTER; STOP SEXUAL ASSAULT IN SCHOOLS; THE NATIONAL URBAN LEAGUE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK; WOMEN'S LAW PROJECT,

Amici Supporting Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, Senior District Judge. (8:17-cv-01648-RWT)

Argued: October 31, 2018

Decided: February 8, 2019

Before NIEMEYER, AGEE, and DIAZ, Circuit Judges.

Affirmed in part, reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Agee joined in full and Judge Diaz joined except as to Part IV. Judge Diaz wrote a separate opinion concurring in part and dissenting in part.

ARGUED: Dennis A. Corkery, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, D.C., for Appellant. Donald James Walsh, WRIGHT, CONSTABLE & SKEEN, LLP, Baltimore, Maryland, for Appellee. Julie Loraine Gantz, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus United States Equal Employment Opportunity Commission. ON BRIEF: Andrew R. Kopsidas, Daniel Tishman, Min Suk Huh, FISH & RICHARDSON, P.C., Washington, D.C.; Tiffany Yang, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN

AFFAIRS, Washington, D.C., for Appellant. Gregory P. Currey, WRIGHT, CONSTABLE & SKEEN, LLP, Baltimore, Maryland, for Appellee. James L. Lee, Deputy General Counsel, Jennifer S. Goldstein, Associate General Counsel, Anne Noel Occhialino, Acting Assistant General Counsel, Office of General Counsel, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus United States Equal Opportunity Commission. Kathleen R. Hartnett, Ann O'Leary, Palo Alto, California, Melissa Shube, Brent Nakamura, BOIES, SCHILLER, FLEXNER, LLP, Washington, D.C.; Fatima Goss Graves, Emily Martin, Sunu Chandy, Sarah David Heydemann, NATIONAL WOMEN'S LAW CENTER, Washington, D.C., for Amici National Women's Law Center, et al.

NIEMEYER, Circuit Judge:

In this appeal, the central question presented is whether a false rumor that a female employee slept with her male boss to obtain promotion can ever give rise to her employer's liability under Title VII for discrimination "because of sex." We conclude that the allegations of the employee's complaint in this case, where the employer is charged with participating in the circulation of the rumor and acting on it by sanctioning the employee, do implicate such liability. Therefore, we reverse the district court's order dismissing Count I of the complaint, which makes a claim on that basis, as well as Count II, which alleges retaliation for complaining about such a workplace condition. We affirm, however, the court's dismissal of Count III because the employee failed to exhaust that claim before the Equal Employment Opportunity Commission.

I

The facts before us are those alleged in the complaint. And, in the present procedural posture where the district court granted the defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept those facts as true. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011). They show the following.

From December 2014 until May 2016, Evangeline Parker worked for Reema Consulting Services, Inc., ("RCSI") at its warehouse facility in Sterling, Virginia. While she began as a low-level clerk, she was promoted six times, ultimately rising to Assistant Operations Manager of the Sterling facility in March 2016.

About two weeks after Parker assumed that position, she learned that "certain male employees were circulating within RCSI" "an unfounded, sexually-explicit rumor about her" that "falsely and maliciously portrayed her as having [had] a sexual relationship" with a higher-ranking manager, Demarcus Pickett, in order to obtain her management position. The rumor originated with Donte Jennings, another RCSI employee, who began working at RCSI at the same time as Parker and in the same position. Because of her promotions, however, Parker soon became Jennings' superior, making him jealous of and ultimately hostile to her achievement.

The highest-ranking manager at the warehouse facility, Larry Moppins, participated in spreading the rumor. In a conversation with Pickett, Moppins asked, "hey, you sure your wife ain't divorcing you because you're f–king [Parker]?" As the rumor spread, Parker "was treated with open resentment and disrespect" from many coworkers, including employees she was responsible for supervising. As she alleged, her "work environment became increasingly hostile."

In late April 2016, Moppins called a mandatory all-staff meeting. When Parker and Pickett arrived a few minutes late, Moppins let Pickett enter the room but "slammed the door in Ms. Parker's face and locked her out." This humiliated Parker in front of all her coworkers. Parker learned the next day that the false rumor was discussed at the meeting.

The following day, Parker arranged a meeting with Moppins to discuss the rumor, and at that meeting Moppins blamed Parker for "bringing the situation to the workplace." He stated that he had "great things" planned for Parker at RCSI but that "he could no longer recommend her for promotions or higher-level

tasks because of the rumor." He added that he "would not allow her to advance any further within the company."

Several days later, Parker and Moppins met again to discuss the rumor. Moppins again blamed Parker and said that he should have terminated her when she began "huffing and puffing about this BS rumor." During the meeting, Moppins "lost his temper and began screaming" at Parker.

Later that same day, Parker filed a sexual harassment complaint against Moppins and Jennings with RCSI's Human Resources Manager.

Several weeks later, in mid-May, Jennings submitted a complaint to the Human Resources Manager, alleging that Parker "was creating a hostile work environment against him through inappropriate conduct," and Parker was then instructed, based on Jennings' complaint, to have no contact with Jennings. While she asserts that Jennings' complaint was false, she followed the instruction. Supervisors, however, permitted Jennings to spend time in Parker's work area talking to and distracting employees she managed. On these occasions, Jennings stared at Parker at length and smirked and laughed at her. Parker raised this situation with her supervisor and the Human Resources Manager, but neither addressed it, allegedly exacerbating Parker's experience of a hostile work environment.

On May 18, 2016, Parker was called to a meeting with Moppins, the Human Resources Manager, and RCSI's in-house counsel, and at that meeting, Moppins simultaneously issued Parker two written warnings and then fired her. One warning was based on Jennings' complaint against Parker, and the other asserted that Parker had poor management ability

and was insubordinate to Moppins. In her complaint, Parker alleges that both warnings were unfounded. She also alleges that RCSI failed to follow its "three strikes" rule under which employees are subject to termination only "after receiving three written warnings." She had received no prior warnings. She alleges further that the rule "was disparately enforced such that male employees were generally not fired even after three or more warnings, while some female employees were terminated without three warnings or with all three warnings being issued at once."

Based on these facts, Parker alleges, in Count I, a hostile work environment claim for discrimination because of sex, in violation of 42 U.S.C. § 2000e-2; in Count II, a retaliatory termination claim under § 2000e-3; and in Count III, a discriminatory termination claim alleging that RCSI terminated her employment contrary to its three-warnings rule, in violation of § 2000e-2.

By order dated January 19, 2018, the district court granted RCSI's motion to dismiss Parker's complaint for failure to state a claim. The court explained its reasoning from the bench, stating with respect to Count I:

> [I]t would be truly offensive to me or anybody else to have someone spread a rumor that I or any other person received a promotion because of sexual favors or having sexual relations with the person who made the decision. That goes right to the core of somebody's merit as a human being to suggest that they were promoted and the promotion was not based upon merit, but rather was based upon the giving of sexual favors.

* * *

> The problem for Ms. Parker is that her complaint as to the establishment and circulation of this rumor is not based upon her gender, but rather based upon her alleged conduct, which was defamed by, you know, statements of this nature. Clearly, this woman is entitled to the dignity of her merit-based promotion and not to have it sullied by somebody suggesting that it was because she had sexual relations with a supervisor who promoted her. But that is not a harassment based upon gender. It's based upon false allegations of conduct by her. And this same type of a rumor could be made in a variety of other context[s] involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to a promotion. But the rumor and the spreading of that kind of a rumor is based upon conduct, not gender.

The court also concluded that the alleged harassment was not severe or pervasive. In dismissing Count II, the retaliatory termination claim, the court stated that "because the complaint fail[ed] to establish that the matters alleged in Count [I] were discriminatory, [Parker] has failed to establish, therefore, that her belief was objectively reasonable and, therefore, she cannot establish a prima facie case of retaliation." Finally, in dismissing Count III, the discriminatory termination claim, the court gave as its reason that Parker had not exhausted the claim with the EEOC.

From the district court's order of dismissal, Parker filed this appeal.

II

The core reason given by the district court to dismiss Count I was that the harassment Parker suffered was "not . . . harassment based upon *gender*. It [was] based upon false allegations of *conduct* by her." (Emphasis added). In addition, the court concluded that the harassment was not sufficiently severe or pervasive to have altered the conditions of Parker's employment because "the temporal element here [was] very short in terms of how long this rumor was in circulation. Just a matter of a few weeks. And a few slights that she [has] referenced here do not rise up to the level that would suffice for it being severe and pervasive." For these reasons, the court concluded that Count I failed to state a claim under Title VII for a hostile work environment based on sex.

Title VII provides that it is an unlawful employment practice "to discharge . . . or otherwise to discriminate" against an employee "with respect to . . . conditions . . . of employment, because of such individual's . . . sex . . .; or to limit, segregate, or classify [such] employee[] . . . in any way which would deprive or tend to deprive [the employee] of employment opportunities or otherwise adversely affect [the employee's] status as an employee, because of such [employee's] . . . sex." 42 U.S.C. § 2000e-2(a). An employee claiming a severe or pervasive hostile work environment because of her sex can obtain relief under Title VII. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To state a claim under Title VII for a hostile work environment because of sex, the plaintiff must allege workplace harassment that (1) was "unwelcome"; (2) was based on the employee's sex; (3) was "sufficiently severe or pervasive to alter

the conditions of employment and create an abusive atmosphere"; and (4) was, on some basis, imputable to the employer. *Bass v. E.I. du Pont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003); *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313–14 (4th Cir. 2008).

In this appeal, only the requirements that the harassment be based on sex and that it be sufficiently severe or pervasive are at issue. We address each in order.

A

RCSI contends first, as the district court concluded, that its actions toward Parker were taken not because she was a female but rather because of her rumored conduct in sleeping with her boss to obtain promotion. It argues that this rumor was not "gender specific" but rather was "solely about [Parker's] conduct and insufficient to support claims of an illegal hostile work environment for women." Because "[t]here is no dispute that Parker believes that the rumor was started 'by a co-worker who was jealous of her success at the company' and not because she was a woman," it thus contends that because "there is no doubt that his rumor was solely about her conduct" and could have been levelled against a man, it is insufficient to support a claim of discrimination based on sex.

We conclude, however, that RCSI's argument fails to take into account all of the allegations of the complaint, particularly those alleging the sex-based nature of the rumor and its effects, as well as the inferences reasonably taken from those allegations, which must be taken in Parker's favor, as required at this stage of the proceedings. *See Nemet Chevrolet,*

Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009).

As alleged, the rumor was that Parker, a female subordinate, had sex with her male superior to obtain promotion, implying that Parker used her womanhood, rather than her merit, to obtain from a man, so seduced, a promotion. She plausibly invokes a deeply rooted perception—one that unfortunately still persists—that generally women, not men, use sex to achieve success. And with this double standard, women, but not men, are susceptible to being labelled as "sluts" or worse, prostitutes selling their bodies for gain. *See McDonnell v. Cisneros*, 84 F.3d 256, 259–60 (7th Cir. 1996) (concluding that rumors of a woman's "sleeping her way to the top" "could constitute a form of sexual harassment"); *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994) (concluding that a rumor that a woman gained influence over the head of the office because she was engaged in a sexual relationship with him was sufficient to allow a reasonable jury to conclude the a woman suffered the harassment alleged because she was a woman); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 258, 272–73 (1989) (plurality and concurring opinions) (noting that gender stereotypes can give rise to sex discrimination in violation of Title VII).

The complaint not only invokes by inference this sex stereotype, it also explicitly alleges that males in the RCSI workplace started and circulated the false rumor about Parker; that, despite Parker and Pickett's shared tardiness, Parker as a female, not Pickett as a male, was excluded from the all-staff meeting discussing the rumor; that Parker was instructed to have no contact with Jennings, her male antagonist, while Jennings was not removed from

Parker's workplace, allowing him to jeer and mock her; that only Parker, who complained about the rumor, but not Jennings, who also complained of harassment, was sanctioned; and that Parker as the female member of the rumored sexual relationship was sanctioned, but Pickett as the male member was not.

In short, because "traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society," and "these stereotypes may cause superiors and coworkers to treat women in the workplace differently from men," it is plausibly alleged that Parker suffered harassment because she was a woman. *Spain*, 26 F.3d at 448; *see also Price Waterhouse*, 490 U.S. at 250–51, 258, 272–73 (plurality and concurring opinions); *McDonnell*, 84 F.3d at 259–60; *cf. Passananti v. Cook Cty.*, 689 F.3d 655, 665–66 (7th Cir. 2012) (noting that use of the word "bitch" to demean a female can support a sexual discrimination claim even though the word may sometimes be directed at men); *Reeves v. C.H. Robinson Worldwide, Inc.,* 594 F.3d 798, 810 (11th Cir. 2010) (en bane) (same); *Chadwick v. WellPoint, Inc.,* 561 F.3d 38, 47 (1st Cir. 2009) (finding actionable the denial of a promotion because the employee was a working *mother* with young children); *Back v. Hastings on Hudson Union Free Sch. Dist.,* 365 F.3d 107, 119-21 (2d Cir. 2004) (same).

Thus, the dichotomy that RCSI, as well as the district court, purports to create between harassment "based on gender" and harassment based on "conduct" is not meaningful in this case because the *conduct* is also alleged to be gender-based. We conclude that, in overlooking this, the district court erred.

B

RCSI also contends that the harassment Parker alleged in the complaint was not sufficiently severe or pervasive to create a hostile work environment. And the district court adopted this view, noting that the rumor circulated for only "a few weeks" and involved only "a few slights." Parker argues, on the other hand, that her complaint alleges harassment that was severe or pervasive, as it was 'frequent," maliciously designed," 'humiliating," 'permeated throughout her workplace," and caused 'open resentment and disrespect" from her coworkers. Indeed, she maintains that her harassment even had a physical component.

In determining whether the harassment alleged was sufficiently severe or pervasive, we must "look[] at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with [the] employee's work performance." *Harris*, 510 U.S. at 23.

We conclude that the complaint's allegations and the inferences that may reasonably be drawn from them support Parker's claim that the harassment she experienced was severe or pervasive such that it altered the conditions of her employment and created an abusive atmosphere.

The complaint alleges that, over the period from Parker's promotion to Assistant Operations Manager in March 2016 until she was fired on May 18, 2016, the rumor and its adverse effects harmed Parker. The frequency alleged in the complaint was greater than what the district court characterized as "a few slights." Indeed, the harassment was continuous,

preoccupying not only Parker, but also management and the employees at the Sterling facility for the entire time of Parker's employment after her final promotion.

The harassment began with the fabrication of the rumor by a jealous male workplace competitor and was then circulated by male employees. Management too contributed to the continuing circulation of the rumor. The highest-ranking manager asked another manager, who was rumored to be having the relationship with Parker, whether his wife was divorcing him because he was "f–king" Parker. The same manager called an all-staff meeting, at which the rumor was discussed, and excluded Parker. In another meeting, the manager blamed Parker for bringing the rumor into the workplace. And in yet another meeting, the manager harangued Parker about the rumor, stating he should have fired her when she began "huffing and puffing" about it. During this period, Parker was also told that because of the rumor, she could receive no further promotions in the company. She then faced a false harassment complaint launched by the male employee who started the rumor and was sanctioned based on that complaint—first, with the instruction to stay away from the rumormonger and second, with the termination of her employment. If we are to take the allegations from the complaint and the reasonable inferences therefrom as true, as we must, the harassment related to the rumor was all-consuming from the time the rumor was initiated until the time Parker was fired.

The harassment emanating from the rumor also had physically threatening aspects, even though harassment need not be physically threatening to be actionable. At an all-staff meeting at which the

rumor was discussed, the warehouse manager slammed the door in Parker's face, and at another meeting, he screamed at Parker as he lost his temper while blaming Parker for the rumor. That this harassment came from Parker's supervisor made it all the more threatening. *See Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) ("[A] supervisor's power and authority invests his or her harassing conduct with a particularly threatening character").

In addition, the harassment related to the rumor was humiliating. As the district court rightly noted, it "goes right to the core of somebody's merit as a human being" to suggest they were promoted not on worth but for sexual favors. The rumor and its consequences thus entailed "open resentment and disrespect from her coworkers," including those she was responsible for supervising.

Finally, the harassment interfered with Parker's work. She was blamed for bringing the controversy to the workplace; she was excluded from an all-staff meeting; she was humiliated in front of coworkers; she was adversely affected in her ability to carry out management responsibility over her subordinates; she was restrained in where she could work, being told to stay away from the rumormonger; and she was told she had no future at RCSI because of the rumor. In addition, she alleges that her employment was terminated because of the rumor and, as stated by management, because of the rumormonger's complaint. In short, RCSI's management's entire relationship with Parker, as well as Parker's employment status, was changed substantially for the worse.

Thus, based on the allegations of Parker's complaint and the reasonable inferences flowing there-

from, we conclude that Parker adequately alleges the severe or pervasive element of illegal harassment. *See Harris*, 510 U.S. at 22.

Accordingly, because Parker's complaint plausibly alleges a hostile work environment claim under Title VII for discrimination because of sex, we reverse the district court's ruling dismissing Count I.

III

The district court also dismissed Parker's retaliatory termination claim alleged in Count II, holding that "because the complaint fails to establish that the matters alleged in [Count I] were discriminatory, [Parker] has failed to establish . . . that her belief [that she was subject to gender discrimination] was objectively reasonable and, therefore, she cannot establish a prima facie case of retaliation." Because we conclude that the complaint does indeed allege a plausible claim of a hostile work environment based on sex, in violation of Title VII, we reverse the dismissal of Count II alleging a retaliatory termination claim. *See Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 285 (4th Cir. 2015) (en banc) (holding that because alleged harassment met elements of hostile work environment claim, complaining about such harassment was necessarily protected activity for purpose of retaliation claim).

IV

Finally, the district court dismissed the discriminatory termination claim alleged in Count III, concluding that Parker had not exhausted this claim with the EEOC. Specifically, the district court held that the allegations of RCSI's disparate enforcement of its three-strikes policy, as described in Parker's complaint, were absent in her EEOC charging document. We agree with the court.

Parker must exhaust her claims with the EEOC by including them in charges filed with the agency. In determining whether she exhausted her claims, we give her credit for charges stated in her administrative charging document, as well as "charges that would naturally have arisen from an investigation thereof." *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995). But when the claims in her court complaint are broader than "the allegation of a discrete act or acts in [the] administrative charge," they are procedurally barred. *Chacko v. Patuxent Inst.*, 429 F.3d 505, 508–10 (4th Cir. 2005).

In this case, Parker's EEOC charge made no reference to the need to receive warnings or a violation of RCSI's three-strikes policy. She did not refer to the policy or the allegation that RCSI treated men and women differently in applying the policy. She merely asserted sex-based termination based on the facts relating to the rumor and the conduct that followed from it. Accordingly, RCSI was not "afforded ample notice of the allegations against it" with respect to Count III. *Sydnor v. Fairfax County*, 681 F.3d 591, 595 (4th Cir. 2012). We thus affirm the dismissal of the discriminatory termination claim alleged in Count III, as it alleges a broader pattern of misconduct than is stated in the administrative charging document.

* * *

In sum, we reverse the district court's order dismissing Counts I and II and affirm its order dismissing Count III.

AFFIRMED IN PART, REVERSED IN PART

DIAZ, Circuit Judge, concurring in part and dissenting in part:

After Evangeline Parker gained six promotions in just over a year, reaching a post few women at her company had ever occupied, a false rumor started that she owed her rise not to hard work and skill, but to a sexual affair. Adding injury to this insult, Parker's supervisor then disciplined her more harshly than the male coworker who spread the rumor and treated her less respectfully than the male manager she supposedly slept with. These facts in combination—the spreading of a rumor rooted in base stereotypes about female professionals, plus Parker's disparate treatment compared with members of the opposite sex—fairly permit the inference that Parker was treated with less dignity because she is a woman. I am therefore pleased to join the portions of Judge Niemeyer's opinion holding that Parker has alleged harassment based on her sex and reversing the dismissal of Parker's hostile work environment and retaliation claims.

I write separately, however, because I would also reverse the district court's dismissal of Parker's wrongful termination claim. Respectfully, I cannot agree that Parker's failure to mention a "three-strikes" policy in her EEOC paperwork bars her from asserting this claim. The majority's approach to exhaustion, in my view, demands more specificity and foresight from an EEOC claimant than our precedents or good sense require.

In enforcing the requirement that a Title VII plaintiff first file charges with the EEOC, our cases strike a careful balance between Title VII's administrative framework and judicial remedies. *See Stewart v. Iancu*, 912 F.3d 693, 707 (4th Cir. 2019). On the

one hand, we want employers and the EEOC to know about alleged discrimination so that they may, if possible, resolve matters before a slow and expensive lawsuit becomes necessary. *Sydnor v. Fairfax County*, 681 F.3d 591, 593 (4th Cir. 2012); *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005).* Allowing plaintiffs to conjure new claims and allegations in federal court would undermine this congressionally designed system.

Yet we've also been mindful that "laypersons, rather than lawyers," are expected to begin this remedial process. *Sydnor*, 681 F.3d at 594 (quoting *Fed. Express Corp. v. Holowecki*, 522 U.S. 389, 402–03 (2008)). Administrative charges typically aren't completed by lawyers. (Parker, for instance, filled hers out herself.) Courts thus "construe them liberally," *Chacko*, 429 F.3d at 509, lest exhaustion become a "tripwire for hapless plaintiffs" or erect "insurmountable barriers to litigation out of overly technical concerns." *Sydnor*, 681 F.3d at 594.

Accordingly, an EEOC charge outlines—but does not rigidly fix—the shape of litigation. As long as a plaintiff's claims in her judicial complaint "are reasonably related to her EEOC charge and can be expected to follow from a reasonable administrative investigation," she may advance them in court. *Id.* (quoting *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir. 2000)). This permissive approach reconciles competing concerns about employer notice, agency administration, and fairness to (often pro se) EEOC claimants. It also, not unimportantly, reflects

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* *Sydnor* was an Americans with Disabilities Act case, but that statute incorporates Title VII's enforcement scheme. *See Sydnor*, 681 F.3d at 593.

the EEOC's considered policy that an adequate charge is one precise enough to "identify the parties" and "describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Our cases thus tolerate some discrepancy between the EEOC charge and the formal lawsuit. For instance, in *Smith*, we held that a Title VII complaint was reasonably related to the plaintiff's EEOC charge where the legal claim (retaliatory termination) didn't change though the form of alleged retaliation (threatened termination versus reassignment and withheld job opportunities) varied. 202 F.3d at 248; *accord Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (11th Cir. 2004) ("[J]udicial claims are allowed if they amplify, clarify, or more clearly focus the allegations in the EEOC complaint." (quotation omitted)). Likewise, in *Chisholm v. U.S. Postal Service*, we said that an EEOC charge generally alleging discrimination in promotions notified the employer that "the entire promotional system was being challenged," not just aspects specifically noted in the charge. 665 F.2d 482, 491 (4th Cir. 1981). And in *Sydnor*, we again excused discrepancies between the EEOC document and lawsuit because both "involved the same place of work and the same actor" and "focused on the same type of discrimination." 681 F.3d at 594–96; *accord Kersting v. Wal-Mart Stores, Inc.*, 250 F.3d 1109, 1118 (7th Cir. 2001) ("[T]he EEOC charge and the complaint must, at minimum, describe the *same conduct* and implicate the *same individuals*." (citation omitted)).

We should be similarly accommodating in this case. Although Parker's lawsuit differs from her EEOC charge in mentioning the three-strikes policy, our precedents suggest the two are similar enough to be

reasonably related. As in *Sydnor*, Parker's charge and complaint involve the same place and actors (RCSI, Parker, Moppins, and the rest) and the same type of discrimination (Moppins firing Parker allegedly because of her sex). And as in *Smith*, Parker's complaint alleges the same type of discrimination as her charge but adds greater detail: the charge alleges a firing based on the rumor and its aftermath, and the complaint says it also involved a disparately enforced three-strikes policy. Both involve the same parties, the same event, and the same type of discrimination.

In contrast, when we have previously dismissed Title VII claims, the plaintiff's EEOC papers "reference[d] different time frames, actors, and discriminatory conduct" than the judicial complaint. *Chacko*, 429 F.3d at 506. Parker, however, did not allege discrimination based on a different protected trait or assert a different category of unlawful conduct. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132–33 (4th Cir. 2002) (no exhaustion where charge mentioned only race discrimination, but lawsuit also alleged discrimination based on sex and skin tone); *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 301 (4th Cir. 2009) (same when complaint alleged unlawful discrimination, but charge mentioned only retaliation). She didn't recast a single gripe about uneven discipline into a full-scale assault on her professional history with her employer. *Dennis v. County of Fairfax*, 55 F.3d 151, 153, 156 (4th Cir. 1995). Nor did her lawsuit allege a decades-long saga of discriminatory harassment when her EEOC charge described only three specific incidents. *Chacko*, 429 F.3d at 511.

Instead, Parker's EEOC charge described her termination by RCSI based on sex, and her formal complaint just provides a fuller factual story of how and why it came about. In my view, the charge gave RCSI ample notice that the circumstances of Parker's termination were under scrutiny. Reasonable investigation of that firing would have uncovered the facts alleged in her complaint—including the fact that her firing allegedly involved two written warnings instead of three.

I would therefore let Parker seek judicial relief for her allegedly discriminatory termination. Accordingly, I join all but Part IV of Judge Niemeyer's opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: February 8, 2019]

No. 18-1206
(8:17-cv-01648-RWT)

EVANGELINE J. PARKER

Plaintiff-Appellant

v.

REEMA CONSULTING SERVICES, INC.

Defendant-Appellee

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NATIONAL WOMEN'S LAW CENTER; A BETTER BALANCE; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN SEXUAL HEALTH ASSOCIATION; BLACK WOMEN'S ROUNDTABLE; NATIONAL COALITION ON BLACK CIVIC PARTICIPATION; CALIFORNIA WOMEN LAWYERS; CHAMPION WOMEN; DISTRICT OF COLUMBIA COALITION AGAINST DOMESTIC VIOLENCE; END RAPE ON CAMPUS; EQUAL RIGHTS ADVOCATES; FAMILY VALUES @ WORK; FEMINIST MAJORITY FOUNDATION; GENDER JUSTICE; GIRLS FOR GENDER EQUITY; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HARVARD LAW SCHOOL GENDER VIOLENCE PROGRAM; LAWYERS CLUB OF SAN DIEGO; LEAGUE OF WOMEN VOTERS OF THE UNITED STATES; LEGAL AID AT WORK; LEGAL

MOMENTUM, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND; LEGAL VOICE; MAINE WOMEN'S LOBBY; MEDICAL STUDENTS FOR CHOICE; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ALLIANCE TO END SEXUAL VIOLENCE; THE NATIONAL CRITTENTON FOUNDATION; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN'S POLITICAL CAUCUS; OKLAHOMA COALITION FOR REPRODUCTIVE JUSTICE; PEOPLE FOR AMERICAN WAY FOUNDATION; SERVICE EMPLOYEES INTERNATIONAL UNION; SISTERREACH; SOUTHWEST WOMEN'S LAW CENTER; STOP SEXUAL ASSAULT IN SCHOOLS; THE NATIONAL URBAN LEAGUE; WOMEN'S LAW CENTER OF MARYLAND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK; WOMEN'S LAW PROJECT

Amici Supporting Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed in part and reversed in part.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. RWT-17-1648

EVANGELINE J. PARKER,

Plaintiff,

v.

REEMA CONSULTING SERVICES, INC.,

Defendant.

ORDER

Upon consideration of the Defendant's Motion to Dismiss [ECF No. 31], the Response [ECF No. 34], the Reply [ECF No. 35], and the arguments of counsel, it is, for the reasons stated on the record during the hearing held on December 7, 2017, this 7th day of December, 2017, by the United States District Court for the District of Maryland,

ORDERED, that Defendant's Motion to Dismiss [ECF No. 31] is hereby GRANTED; and it is further

ORDERED, that Plaintiff's Complaint [ECF No. 1] is hereby DISMISSED; and it is further

ORDERED, that the Clerk of this Court is hereby directed to CLOSE this case.

/s/
ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

APPENDIX D

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[1] Civil No. RWT-17-01648

EVANGELNE J. PARKER,

Plaintiff,

v.

REEMA CONSULTING SERVICES, INC.,

Defendant.

Greenbelt, Maryland
December 7, 2017
1:30 p.m.

TRANSCRIPT OF MOTIONS HEARING BEFORE
THE HONORABLE ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter	Lisa K. Bankins RMR FCRR United States District Court 6500 Cherrywood Lane Greenbelt, Maryland 20770

Proceedings recorded by mechanical stenography, transcript produced by notereading.

[2] THE CLERK: The matter now pending before this Court is Civil Case Number RWT-17-1648, Evangeline Parker versus Reema Consulting Services, Inc. The matter comes before this Court for a motions hearing. Counsel, please identify yourselves for the record.

MR. WALSH: Don Walsh on behalf of Reema Consulting Services.

MR. TISHMAN: Daniel Tishman on behalf of the plaintiff, Ms. Parker. With me is my colleague, Mr. Min Suk Huh from Fish and Richardson as well and Mr. Dennis Corkery from the Washington Lawyers Committee.

THE COURT: Good afternoon. First, I apologize for starting this late today. I had an unanticipated visit for the morning with a dentist. So if I look pained, it's not because I don't like your arguments. I'm having pain. But I'll do the best I can to get through it.

We are here on the defense motion to dismiss. I'll be glad to hear from you, sir.

MR. WALSH: Thank you Your Honor. Your Honor, we filed a motion to dismiss this particular complaint, which is a relatively simple complaint that has been made somewhat complicated through the response of the plaintiffs in the motions. They are basically three [3] counts. Count One is for hostile work environment, discrimination as a result of a hostile work environment. Count Two is retaliation. And then Count Three is a discrimination claim that arises out of a policy alleged to exist at Reema Consulting.

I want to kind of deal with these in reverse order only because it's a question of brevity. Count Three is one that we raised the issue that it should be dismissed for the simple reason that it was never raised with the EEOC. You have to exhaust your administrative remedies long before you can come to the court. The issue –

THE COURT: Well, her termination was raised with the EEOC, was it not?

MR. WALSH: The termination was. That's it, Your Honor. But there was – we're not even close to notice pleadings. So in paragraph 39 of the complaint, which feeds into Count Three, it said on information and belief, Reema had a three strikes rule under which employees are subject to termination after receiving three written warnings.

To Ms. Parker's knowledge, that rule was disparately enforced such that male employees were generally not fired even after receiving three or more warnings. While some female employees were terminated [4] without three warnings or with all three

warnings being issued [4] at once. Well, those are the only facts –

THE COURT: You're telling me that that allegation of a practice or policy of the company not being enforced in a gender neutral manner was never raised before the EEOC.

MR. WALSH: Absolutely, Your Honor. And so we attached to the motion to dismiss the actual EEOC charge that was filed and that EEOC charge only addresses the issues that Ms. Parker had with respect to the rumors circulating around her conduct. The entire charge itself that we attached talks about how she's been subjected to discrimination as a result of these rumors that were alleged, that's relative to the conduct that came out of these rumors. There's nothing even remotely close to suggest that there was some sort of policy that we had failed to adhere to. Consequently, it was never even addressed at the EEOC level because that was something that nobody brought up. Nobody had raised it before. So it's very easy to dismiss it based on that fact alone.

In addition to that, obviously, one of the other arguments that we've made with respect to Count One is the idea you have to have some factual predicate. You have to have facts that show, not merely did allege, but facts that actually show.

[5] The only allegation as to this particular policy is in this paragraph 39 that says on information and belief, there was some policy. She doesn't say where the policy was. She doesn't suggest that it was in a handbook. That it was unwritten, written. And then she said to her knowledge, it was disparately enforced. But she doesn't give any examples of anybody that it was disparately enforced with.

So there's really – not only the fact that it wasn't raised at EEOC, there's a complete derth of allegations that would support that claim in any way, shape or form. So because of that, it should be easy to claim that that particular count itself should be dismissed. That would be Count Three.

With respect to Counts One and Two, they both come off of this issue that Ms. Parker has raised that there were – alleged that there was a rumor to which subjected her to a variety of different disparate treatment that she believes existed that gives her the right to go to the EEOC, gives her the right to come to court to claim that she was discriminated against.

The problem is is that her complaint completely centers on the fact that there was a rumor that was a started by a subordinate employee that even she admits in her complaint was jealous of her success. What she claims [6] was this particular employee started a rumor that she was have an affair with a supervisor. The entire complaint focuses on her conduct. It doesn't focus on her gender. And she doesn't allege any facts. She certainly doesn't show any facts either consistent with the standards under Bass v. Dupont with the concept that in fact her gender is what led to the ultimate discrimination that she complains of.

Even if we accept her belief that this rumor led to all these conducts, led to her being subjected to different treatment by her supervisors, led to the fact that the company may have done different things with her, the reality is that is related to conduct, not related to gender.

One of the fundamental elements that has to be demonstrated in a Title VII case is you have to show

that it's related to gender, sex or age. She's clearly not claiming that it was related in any way – I'm sorry. Gender, race or age. It's clearly not related in any way to race. She hasn't alleged that it's related in any way to age. All she said was that I have a claim based on gender. But the substance of the claim based on gender is entirely based on this particular rumor.

She's given us no evidence. She's demonstrated no facts. She's alleged no facts that suggests that any [7] other female employee was subjected to the same sort of concept.

She tells us that her employment at Reema – she went through six promotions before this rumor started. That she was there for 18 months. She promoted. She was a good employee, performed well, went up six times. She's identified other female managers, including in-house counsel in her complaint and she doesn't make any allegations at all that either one of them were submitted to the same sort of rumor mill that would suggest that this rumor generates because of someone's gender, not because of conduct that occurs in this particular case.

On top of that, she's abundantly clear that the gentleman who started – that she believes started this particular rumor was jealous of her success. She doesn't say that he raised this rumor or he started this rumor because I was a woman. He said that he was in fact jealous of her success.

And I believe, Your Honor, just to point it out, it was paragraph 25 of the complaint actually. It says Ms. Parker explained to Mr. Moppins that the rumor was untrue and that it had been started by a co-

worker who was jealous of her success at the company.

It's not that he started the rumor because she was a female and none of the facts that she's alleged deal [8] with the concept that she was in fact female and that's the reason why she was treated this way. All of the conduct that she alleges goes back to the concept that you were treated this way because of certain conduct in which you engaged. You may have engaged in an extramarital affair. Even if you believe that that's what happened in this particular case. And again at this standard, I understand in testing the complaint, we are measuring whether in fact she's alleged sufficient facts. In this case, there are no facts that said my gender. She identifies other women. She identifies other managers. But she doesn't identify anybody who was treated differently as a result of the same kind of rumor. There's no men who are suddenly treated differently. The only other person in this particular rumor that was involved was her supervisor. So obviously he wasn't about to be treated in any different way. There was nothing more that could be done from that standpoint.

So had she come to the court and alleged that in fact there were plenty of rumors floating and they were always about the female employees and that it was always the male employee on the other side, nothing happened to him, we'd have a whole different story. We don't have that in this particular case. All we have is a situation where Ms. Parker has identified that the particular [9] complaint hereis that a rumor.

Then you get into the issue about whether it's sufficiently severe and pervasive and that's a whole other issue, Your Honor. But in this particular case,

Ms. Parker identifies that she's the one that was kept spreading the rumor. She was the one that kept trying to talk to people about it. I think that she pointed out she was the one that was going out trying to get explanations out of people and trying to basically set the record straight. As a result of all that, the company is not the one that created the severe and pervasive nature of this.

What happened, if anything, in this case is that Ms. Parker was upset about a rumor that was started by somebody that she seemed to identify exactly who it was. And I'm not saying that she shouldn't be upset. I understand that is upsetting that somebody would allege something that could be untrue. But the problem was it wasn't about her sex. And because it wasn't about her sex and it wasn't severely and pervasively propagated in any way, shape or form by the company, it can't form the legal basis for a Title VII action.

So we're in a situation where even accepting her complaint, she certainly was subjected to some uncivil conduct, something that was distasteful, maybe callously spread around by other employees. But it certainly isn't [10] the kind of thing that would give rise to a severe and pervasive claim based on her gender.

On top of that, Your Honor, the third element of a Title VII claim is that the company has to have not appropriately addressed it. They had to have been negligent somehow in the way in which they tried to handle or tamp down the hostile work environment.

In this particular case, she hasn't alleged facts that show that the company did anything wrong. She identified several different managers that were

involved, in-house counsel that were involved. Ultimately, she was dismissed and terminated, but she doesn't say that the company didn't investigate further, the company didn't stop the rumors or couldn't stop the rumors in some other fashion. She doesn't even focus on the company's conduct at all in order to show that in any way, shape or form, they actually were unreasonable in how they handled this particular situation.

So because of that, Your Honor, we also cited in our brief dozen of cases – well, I shouldn't say dozens. That's a little bit of exaggeration. About ten cases or so that have come along over the past 10, 15 years, a variety of jurisdictions, all dealing with this exact same issue. All people, mixed couples who are alleged to have committed adultery or alleged to have been involved in [11] affairs in a variety of way, in all those cases, the court have come back and said no, we're not going to find that that's sufficient to find a Title VII hostile work environment claim. We are dealing with a situation that you may have been subjected to, untoward comments related to your conduct. They have nothing to do with the gender in those particular situations.

There is only one case I think maybe that we've identified or that has been identified back in 1990. I believe the plaintiff's name was Jew. She was a faculty member at a college. And in that particular case, the court made it clear that she was subjected to 13 years, 13 years of abuse by other faculty members by the school. They sent slurs her way. They would post cartoons about sexual activity. They wrote in the bathroom about – it was horrendous back in 1990. Apparently, that had gone on for almost a decade before that point in time.

The situation we're dealing with is not that way at all. We're dealing with a situation where Ms. Parker identifies that this particular rumor came up during a very brief period of time where she was trying to stop the rumor or trying to get to the bottom of it and there was a variety of different treatment that went on. But none of that can be identified or traced back to her gender. Because of that, Your Honor, we believe that Counts One [12] and Two would also fall.

Count Two is the retaliation claim and in order for a retaliation claim, there has to be – you can be wrong on the facts, but you have to be right on the law. So if the law does not support the notion that this would be a hostile work environment, then you don't even have a retaliation claim at that point in time.

So in light of the idea that Title 1 – I'm sorry – Count One for the Title VII discrimination of hostile work environment, we believe that legally is insufficient. That would also suffice to dismiss Count Two as well. Thank you, Your Honor.

THE COURT: All right. Thank you very much. Let me hear from the plaintiff.

MR. TISHMAN: Good afternoon, Your Honor. May it please the Court. I forgot to introduce Ms. Parker. Ms. Parker is here with us in the courtroom today.

THE COURT: Glad to have you with us, ma'am.

MR. TISHMAN: Your Honor, this case is about unlawful gender based harassment, which began, but did not end with the false rumor that Mr. Walsh talked about. And I'm going to talk about the rumor a bit. But I want to stress that this case is not just about the rumor. It's about a series of escalating

hostilities that undermine Ms. Parker's position and her job and it undermined her [13] standing with her subordinate employees. It's about Ms. Parker, an exemplary employee, who did the reasonable thing in this situation and raised her concerns with the company. But it's also about a company that acted unreasonable in response to the situation and ultimately Ms. Parker was fired.

The workplace hostilities in this case began, but did not end with Mr. Donte Jennings starting a rumor that Ms. Parker advanced in the company because of a sexual affair. Mr. Walsh talked about conduct, but as alleged in the complaint, this rumor is absolutely false. And it's also important to note that the rumor if true would in and of itself be a civil rights violation, a quid pro quo. But it's not just about the rumor, Your Honor. But I do want to stress that the rumor is absolutely gender based. Unfortunately –

THE COURT: How is it gender based?

MR. TISHMAN: Unfortunately, we live in a society that this type of rumor disparately impacts women in the workplace. I think the Jew case addresses it head on and in that case, as to the issue of whether it was gender based, the court said it would not likely – were the plaintiff not a woman, it would not likely have been rumored that she gained favor with the department head by a sexual relationship with him. Here, too, the situation [14] is the same. Were Ms. Parker not a woman, this rumor would have never started in the first place, that she had gained her promotion –

THE COURT: Well, I've had cases before me of a male who was promoted and it was rumored that it

was because he had a sexual relationship with the female supervisor. I mean is that gender discrimination, too?

MR. TISHMAN: Your Honor, I think we need to look at things differently and in the light of the complaint as pled with inferences drawn in Ms. Parker's favor that the rumor absolutely was gender based. And we'd submit that in this male-dominated environment where Ms. Parker worked, this rumor would not have started were she not a woman. And it's not just a rumor about jealousy of Ms. Parker's success. It's a rumor about jealousy of Ms. Parker's success because as a female, she advanced more rapidly than her colleagues who started at the same time as her. So it absolutely is a gender-based rumor.

Mr. Walsh talked quite a bit about the fact that in-house counsel, for example, was a woman. In-house counsel, Ms. Reema-Vora, the daughter of the president of the company, Your Honor. She bears the company's name, Reema-Vora. So there's no element to a gender-based discrimination claim that requires that similarly situated women experienced the same type of hostile work [15] environment. This is a fact dependent inquiry that should focus on Ms. Parker's hostile work environment that she experienced.

So I'll address each of the claims. The hostile work environment based on sexual harassment we talked about a bit and I'll talk about a bit more of the different elements. The second claim is a retaliatory termination and the third is a discriminatory termination.

The hostile work environment claim as Mr. Walsh said there are four elements. That Ms. Parker experienced unwelcomed harassment, that the harassment

was based on her gender and that the harassment was severe and pervasive and that there's a basis for imposing liability on the employer. So most of the dispute relates to the second and third factors, whether it was based on gender, whether it was severe and pervasive.

On the based on gender factor, we've already talked about that a bit. But I want to stress that Reema's efforts to distinguish the Jew case are just not on the point of whether or not the rumor was gender based. Reema talked about the fact that the rumor lasted for nearly a decade and that the hostilities lasted for nearly a decade. There were cartoons and slurs used against Dr. Jew. That has nothing to do with whether the rumor and the hostilities were gender based. And unfortunately, [16] Ms. Parker was not allowed to endure this for ten years because she was fired after just three short months.

And we also addressed the Allen v. TV One case in our brief and Reema addressed that in a footnote in their reply. But I think on the point of whether the harassment was gender based, there's nothing to distinguish and this case is just like that. Where the court found – the District of Maryland found that there was nothing gender neutral about the harassment and but for her status as a woman in the workplace, the plaintiff would not have been subjected to the harassment by her supervisors and so this presents the same situation as Allen.

In the cases that Mr. Walsh talked about, they did cite quite a few cases in their reply brief, none of those involved a female plaintiff with false rumors of an affair used to gain a promotion and where the plaintiff was absolutely qualified for the position.

Many of the cases involved motion for summary judgment rather than a motion to dismiss as well, Your Honor.

Mr. Walsh talked a bit about the severity and the pervasiveness. But as I listened to his argument, he focused really on who started it and he alleges that Ms. Parker kept starting the trouble by raising her concerns and talking about the rumor. He didn't really address the [17] severity and pervasiveness. We submit that that's a factual intensive inquiry that should be addressed after the facts have been brought out through discovery.

The basis for imposing liability, the Vance versus Ball State University case that Reema cited in their brief states in it directly, if the supervisor – in cases in which a harasser is a supervisor, different rules apply. If the supervisor's harassment culminates in tangible employment action, the employer is strictly liable. So this is a situation where Mr. Moppins was also involved in spreading the rumor and he was also involved in the hostile work environments that Ms. Parker had to endure in her workplace.

THE COURT: Where did you allege that Moppins spread the rumor? What paragraph?

MR. TISHMAN: This is in paragraph 16. As to the rumor, the paragraphs that follow that relate to the subsequent hostile work environment that continued as a result of Mr. Moppins' actions and the other actions within the company. So Mr. Moppins was the highest up manager in the company and he was involved in spreading and increasing the hostilities that Ms. Parker experienced at her workplace.

So this is a situation where a supervisor is involved. We've also alleged facts that even when Ms.

[18] Parker did the reasonable thing by raising her concerns with the company through informal means by going directly to Mr. Moppins and eventually by raising it with H.R., they didn't act reasonably.

First, when she raised the issue with Mr. Moppins, he screamed at her and he told her that he should have fired her. He even told her that because of the rumor, he would no longer recommend her for promotions. So Mr. Moppins, the supervisor, absolutely contributed to the hostile work environment, but also he didn't act reasonably when she raised her concerns with him, nor did H.R., who merely asked the three managers to apologize to one other.

Which brings me to the next count, which is our retaliation count and that has to do with the fact that when Ms. Parker did raise her concerns, she was fired. And Mr. Walsh talked about the fact that there is no liability for retaliation claim if the law doesn't support the underlying complaint or the underlying issue. But in this case, the law does support the underlying issue of Ms. Parker had a reasonable belief that there was unlawful sexual harassment based on her gender. And when she complained of that –

THE COURT: She has to be right on the law. I mean she may be wrong on the facts. But doesn't she have [19] to be right on the law. And your opposing counsel argues forcefully that this rumor is not dealing with her gender, it's dealing with conduct. And you keep on saying, it's all about gender, but it can work both ways. You can have a male who gets promoted by a female supervisor. You can have a male who gets promoted by a same sex, but romantic relationship. You can have all kinds of situations in which somebody can allege that a sexual relationship

was the real reason for a promotion that doesn't look like it was based on merit. How do you convert that into a gender claim and legally?

MR. TISHMAN: Ms. Parker has alleged that she believed that she was harassed based on her gender. So that –

THE COURT: Believing you're harassed based on your gender is not enough. What she's complaining about is that she received what she considered to be a legitimately, well-deserved promotion and I'll assume that for purposes of discussion and that somebody tried to undermine the benefits of her merit-based promotion by suggesting it was done because she had sexual relations with the person who promoted her. How is that as a matter of law, gender-based discrimination, assuming that it happened?

MR. TISHMAN: Your Honor, we submit that the [20] rumor would not have happened but for her gender. This is just like the Jew case. And, you know, that is alleged in the complaint and with the inferences drawn in Ms. Parker's favor that the rumor was absolutely based on her gender. But the retaliation claim, she needed to have a reasonable belief that the rumor was based on her gender and that the subsequent activities were based on her gender.

The Boyer-Liberto case from 2015 in the Fourth Circuit says that an employee is protected from retaliation when she opposes a hostile work environment that although not fully formed is in progress. So even if the underlying activity did not raise to the level of unlawful activity, she's protected when she complains of something she reasonably believes is unlawful.

And where Reema gets the argument of you have to be right on the law, they cite the McGruder case and the facts here are entirely different from the McGruder case. In that case, the plaintiff complained that if the plaintiff were to terminate a subordinate based on poor performance, it would look like the plaintiff were discriminating based on race. So in that situation, the plaintiff was entirely wrong on the law.

In this situation, it's unlawful to discriminate against somebody based on their gender and to give them a [21] hostile work environment and sexual harassment based on their gender. Ms. Parker had a reasonable belief that she was subjected to a hostile work environment based on her gender.

As for the last count, the third count, the discriminatory determination, Your Honor, Ms. Parker adequately discharged her administrative remedies –

THE COURT: How? How? I mean I read her complaint to the EEOC. There's not a word in there – unless I'm misreading it – about a three-strikes policy being applied differently based upon gender. So where is that in her –

MR. TISHMAN: For –

THE COURT: I mean the whole purpose of requiring that matters go to the EEOC is because of the wisdom that the EEOC has in trying to help parties reach a resolution of a complaint without needing to go to court and it's a centerpiece of EEOC law that you need to go and say what it is you're complaining about. So then the EEOC with its mediation efforts can attempt to address it. And if something is not in the complaint and then suddenly

ends up in a complaint in court, there's a problem, isn't there?

MR. TISHMAN: Your Honor, she raised enough to allow the EEOC to adequately investigate this situation –

[22] THE COURT: The usual standard for this is and it's fairly liberal in the sense that it's not designed to be a trap for the unwary is when the matter is raised – and as inarticulate as they may have been because most of these are not done by lawyers – would a reasonable investigation as the matters that are set forth in this have led to a discussion about this? And I don't see that here at all and unless you are going to tell me that, you know, you were there and it was brought up and discussed that there was this three strikes and you're out and it's not applied uniformly, I don't understand how this is not a failure to exhaust in this count.

MR. TISHMAN: Well, Your Honor, she's alleged in her EEOC charge that she was terminated because of her gender.

THE COURT: Was she represented by counsel in the mediation before the EEOC?

MR. TISHMAN: Your Honor, that's getting beyond the motion to dismiss standard.

THE COURT: Well, I'm trying to understand whether there's a basis to conclude that this complaint – I'm trying to help you. I mean if you are going to tell me that it was in fact raised and discussed with the EEOC and they looked into and investigated the three strikes policy, then there's not much of a problem. But if the [23] three strikes policy and it's gender based in application in certain cases is

not in here and wasn't in fact discussed in mediation, don't we have a problem?

MR. TISHMAN: Your Honor, the types of cases where claims are dismissed for failure to raise and adequately raise an issue at the EEOC have to do with things like where you're alleging a race based discrimination, later where you alleged gender-based discrimination at the EEOC. So the courts look to whether the type of discrimination is the same. In this case, sex. She alleges she was terminated because of her sex, female and the people involved. So she alleged the underlying facts that are necessary to allow for an investigation. But Your Honor, as Your Honor noted, she's not a lawyer. So she wrote the EEOC charge and the framework is designed to not hold her to a higher standard that would be expected of a lawyer. She's a nonlawyer. She drafted the EEOC charge and that's what the law requires.

So the case that we've cited in our brief, High versus R & R Transportation goes through the types of situations where cases are found to be insufficient at the EEOC level and this doesn't fit with any of those factors that the court examined in that case.

So we submit that by alleging that the [24] discrimination and that the firing was based on her gender, that's all that's required at this stage. Unless there are any other questions, Your Honor, that concludes –

THE COURT: All right. Let me hear from the defense.

MR. WALSH: I'll be very brief, Your Honor. I just want to touch on a couple of quick things. I'll sort of start in reverse order. Getting to that Count Three and the EEOC. What I just heard was that the two

things that need to be alleged before the EEOC are the type and people involved. Well, when we're talking in the complaint about this policy that we don't even know where it exists and we're talking about all these people who are treated differently under this policy that we don't know where it exists, there's certainly not enough information even remotely close in that EEOC charge that would give us enough information to suggest that the people involved or this policy was involved in any fashion. I will proffer to the Court that I was involved on Reema's behalf and certainly that issue was not raised before the EEOC. It was not something that we had responded to or were even aware of until the complaint was filed.

THE COURT: Well, I mean their complaint is – their response would be, well, we complained about [25] termination and isn't that enough to lead an inquiry into the reasons for the termination and whether they were based on gender or retaliation.

MR. WALSH: And that would be one thing, Your Honor. To suggest that there is a policy that other people are impacted by and that other people are actually being subject to systemic discrimination as a result of that, that's a whole other issue and that's what's being raised in that particular paragraph of the complaint. That paragraph of the complaint doesn't say that just Ms. Parker was subjected to this policy. It suggests that the variety of employees were subjected to this exact same policy. What that paragraph, that bald paragraph with absolutely no other facts, no other substance to it is merely a means of trying to go after discovery that has absolutely nothing to do with what her actual termination or her complaints were.

So from that standpoint, we believe that that clearly was not raised with the EEOC and is clearly dismissed at this point.

Just briefly with respect to the other two counts, Your Honor. What we have always talked about, what has always existed in the law under Title VII is that it is not a general code of civility. The courts are not here to make sure that everybody plays nice in the sand [26] box and that everybody is friendly with each other.

I have no doubt that when Ms. Parker was going through this particular circumstances, that it was offensive to her, that it was troubling to her. I haven't questioned that at all. I'll even accept that as part of the complaint. The reality though is just because you are upset by something doesn't give you the right to sue your employer to say that you guys maintained a hostile work environment.

The rumor that upset her was not something that can substantiate a Title VII hostile work environment claim. It is dealing with her behavior. It doesn't deal with her gender. The Jew case is horribly enlightening. It is a horrible case.

If you actually read the facts for a period of through the '70s and all through the '80s, this poor professor was subjected to just a string of awful incidents where she was called a variety of names, they posted things, she was yelled at down the hallway. It was horrible. That's not the situation we have here at all. And that not to mention, Your Honor, was 27 years ago. I'd like to believe that the country has come a far way and that the law has evolved in how it views relationships at this point in time. That we're not necessarily assuming that

women are disparately impacted by the fact [27] that there's a rumor going on in any particular situation. It is a rumor about two people. It was a rumor about Ms. Parker and it was a rumor about the particular supervisor that she was alleged to have done this with.

They've suggested somehow that Mr. Moppins propagated this rumor, spread this rumor. The only allegation in the complaint is that he asked Mr. Pickett is this true. That's the only thing he did, which frankly, would be what he would be required to do as an employer and as a supervisor anyway. That's not the kind of thing that suddenly he can ask about it and say, oh, you've been spreading the rumor. That would turn around and flip on the company in an untoward way that would be completely inequitable and unfair.

The only other thing that I thought was appropriate to mention in here is that the plaintiff seem to suggest somehow that this was a male-dominated company and that's not even supported in the complaint. In fact not only was Reema in-house counsel identified as being one of the people involved who looked into this as a female, Ms. Wallace was identified in there as well as a manager who was subjected.

If in fact Ms. Parker believed that all women who moved up the ladder at Reema were subjected to the same types of rumors, she certainly didn't allege that and [28] she certainly didn't support it in the complaint in any way in reference to at least two other managerial or supervisory employees that existed there. In fact, she didn't identify anybody else who had a similar thing to suggest that this rumor was gender based. Your Honor, we continue to

believe that the complaint should be dismissed. Thank you.

THE COURT: On May 15th of this year, the plaintiff in this case, Evangeline J. Parker, filed a complaint against the defendant, Reema Consulting Services, Inc., in the United States District Court for the Eastern District of Virginia. That case was later transferred to this court by an order signed by Judge O'Grady on June 16th and the case then arrived in this district.

In response to the complaint, the defendant on June 28th filed a motion to dismiss with a supporting memorandum and attachments. The response has been filed and a reply as well and the matter has come before the Court for argument today.

The facts of the case as set forth in the complaint which I have to accept as true and give all reasonable inferences in favor of the plaintiff with regard to those factual allegations are that the plaintiff between December of 2014 and May of 2016 worked for the [29] defendant and she was quite successful. Over that fairly short period of time, she enjoyed a number of promotions though last of which is what has created the issues that are before the Court today.

In March of 2016, she alleges that she was given a promotion to the position of Assistant Operations Manager. Following that promotion, which appears to have been richly deserved, she alleges that a rumor was circulated that she had gained her promotion by having sexual relations with the company's CEO and she contends that that created a difficult environment in which to work and that the employer through its managers did nothing to stifle the rumor.

And when she went to the Human Resources officials of the company to complain, the person who she claims started the rumor filed a complaint against her for creating a hostile work environment. So there were dueling as it were complaints about a hostile work environment. Ultimately, she was terminated. And in response, she filed a complaint that I just mentioned in the Eastern District of Virginia that was transferred to this court.

In her complaint, she asserts three claims in the three counts of the complaint. That first is the hostile work environment of gender-based harassment. Second is retaliatory termination and, three is [30] discriminatory termination.

Let me start with the third count because that's the way the arguments were presented to me and I'll just address them in that order. The third count alleges that – and I'm quoting from paragraph 39 on page 8 of the complaint – that on information and belief, the defendant has a three strikes rule under which employees are subject to termination after receiving three written warnings. And she alleges that to her knowledge that rule was disparately enforced such that male employees were generally not fired even after receiving three or more warnings while some female employees were terminated without three warnings or with all three warnings being issued at once. The defendant complains that this is not a matter that was raised in the complaint filed by Ms. Parker with the EEOC and that it should be precluded from being considered by this Court unless and until she does so.

In this case, the plaintiff filed her charge of discrimination with the Virginia Division of Human Rights on a referral basis with the EEOC and set

forth what it was she was complaining about. She complained about discrimination based on sex, retaliation and other. I have read carefully her – the language she put into her complaint. And I recognize that since this was not [31] prepared by a lawyer, I'm going to give it a very generous reading as to what it is that she's complaining about.

As I mentioned in colloquy with counsel, the purpose of the requirement that one go first to the EEOC before going to court is to allow the EEOC to use its good offices and its professional expertise to try to bring people together and reach a solution that will eliminate any discriminatory conduct.

The corollary to that is that if somebody does not raise something in a complaint filed before the EEOC, they cannot go forward in court with that same allegation if they've not given the EEOC a chance to work its magic and try to resolve the matter.

Giving all benefit to the status of the plaintiff as a lay person in filling this out, it is entirely premised upon the alleged false rumor of her having a relationship with a person who brought about her promotion. And it has factual allegations, but nowhere in these factual allegations is there anything indicating that there was such a policy. Nowhere in here is there any mention that to the extent that there was such a policy, it was applied disparately based upon gender or that the reason for her termination was the gender-based mis-application or non-application of this policy in the case of certain genders.

[32] Accordingly, I believe that Count Three of the complaint simply cannot stand and I will grant the motion to dismiss as to that count without prejudice.

Assuming that she is not otherwise time barred, she certainly has the right to take that complaint to the EEOC if there's a factual basis for it and if there is no time bar and to refile asserting that. So I'm not dismissing that count with prejudice.

That brings us around to Counts one and Two. Count One is a complaint alleging a hostile work environment. In order to make a claim for hostile work environment, a plaintiff must allege and ultimately prove that she experienced unwelcomed harassment, that the harassment was based on her gender, race or age. In this case, she's alleging gender. Third, that the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere and, four, there is some basis for imposing liability on the employer.

Now I will second what both sides have said is that it would be truly offensive to me or anybody else to have someone spread a rumor that I or any other person received a promotion because of sexual favors or having sexual relations with the person who made the decision. That goes right to the core of somebody's merit as a human [33] being to suggest that they were promoted and the promotion was not based upon merit, but rather was based upon the giving of sexual favors. And so I would condemn as I think any reasonable person would in the strongest possible terms that making a rumor like that and spreading it is vial, vulgar behavior, which is alleging that somebody's conduct has been totally unacceptable and inappropriate.

The problem for Ms. Parker is that her complaint as to the establishment and circulation of this rumor is not based upon [34] her gender, but rather based upon her improper allegations of her conduct.

As the courts have repeatedly said, the civil rights laws are not a workplace civility code. They are not designed to assure that every employee have a tranquil employment environment. They are not intended to deal with the slights and insults that are unfortunately the part of daily life in a variety of different context. But here, I conclude that the harassment claim fails because it is not alleging harassment based upon gender.

Even if she were to satisfy the element of harassment being based upon gender, I conclude that she's also failed to allege that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. She alleges that it was frequent, but the temporal element here is very short in terms of how long this rumor was in circulation. Just a matter of a few weeks. And a few slights that she's referenced here do not rise up to the level that would suffice for it being severe and persuasive. Accordingly, I find that Count One of the complaint fails to state a claim and I will dismiss that count.

The second count is alleging retaliatory termination. In order to assert a viable claim for retaliatory termination, a plaintiff must allege and, of [35] courses, ultimately prove that she engaged in a protected activity. The employer took an adverse employment action against her and, third, that a causal connection exists between the protected activity and the asserted adverse action.

That first element has two categories, opposition and participation and I believe here that the appropriate focus is on the opposition aspect, which includes utilizing informal grievance procedures as well as staging informal protests and voicing opinions

and that is I think where this protected activity falls in this case.

With regard to the protected activity, it has both a subjective and objective component. The employee must believe – have beliefs concerning the unlawful practice and it must be – those beliefs must be subjectively and objectively reasonable.

Here, I have little doubt that Ms. Parker was offended and legitimately so by the rumors that she complains of in this case. The problem here is that I have concluded rightly or wrongly that what took place in this case with respect to the circulation of a rumor does not amount to gender discrimination such that a harassment claim can survive and I think that the comments by the Fourth Circuit in the Coleman case are apropos.

[36] In that case, the court after reciting the basic requirement that the plaintiff have a good faith belief that the employer is engaging in an unlawful employment practice and that the belief is objectively reasonable in light of the facts. Here, the legal question is whether spreading a rumor or circulating a rumor that somebody's promotion was based upon the providing of sexual favors is not gender-based discrimination. It is conduct based rumor mongering, for the sake of a better word, and it could apply without regard to gender as has happened in other cases that I have had before me.

Here, the unhappy and unfortunate circumstances that took place at this place of employment were not terribly civil for everybody involved. But the rumor, just the existence or circulation of a rumor of that nature without more is only relating to someone's conduct, not to gender. And because the complaint

fails to establish that the matters alleged in Count One were discriminatory, she has failed to establish, therefore, that her belief was objectively reasonable and, therefore, she cannot establish a prima facie case of retaliation.

Accordingly, I conclude that Count Two of the complaint must also be dismissed. For those reasons, I will enter an order granting the defense motion to dismiss the case and will direct the clerk to close it. Thank you [37] very much.

MR. WALSH: Thank you, Your Honor.

(Proceedings concluded.)

[38] I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the motions hearing in the case of the Evangeline Parker versus Reema Consulting Services, Inc., Civil Action Number RWT-17-1648, in said court on the 7th day of December, 2017.

I further certify that the foregoing 37 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 25th day of December, 2017.

Lisa K. Bankins
Lisa K. Bankins
Official Court Reporter

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil No. _____

EVANGELINE J. PARKER,

Plaintiff,

v

REEMA CONSULTING SERVICES, INC.

Defendant.

Jury Trial Demanded

COMPLAINT

Plaintiff Evangeline J. Parker, by and through her attorneys, for her complaint against her former employer, Reema Consulting Services, Inc., respectfully alleges and states as follows:

INTRODUCTION

This civil rights lawsuit seeks to remedy the hostile work environment to which Evangeline J. Parker ("Plaintiff" or "Ms. Parker") was subjected at Reema Consulting Services, Inc. because of her sex and the company's unlawful and discriminatory termination of her. Ms. Parker was an exemplary employee who earned six promotions based on her performance and

professionalism while at the company. Faced with the hostile work environment caused by unfounded and sexually-explicit rumors targeting her, Ms. Parker tried to resolve the situation both formally or informally, including by reporting to the Human Resources at the company. Rather than correct the hostile environment, the company discharged Ms. Parker in retaliation and discriminatorily for her reporting of the sexual harassment incidents. With nowhere else to turn, Ms. Parker has been forced to resort to litigation.

NATURE OF THE ACTION

1. Plaintiff Evangeline J. Parker brings this action against Defendant Reema Consulting Services, Inc. ("Defendant" or "RCSI"), her former employer, for subjecting her to a hostile work environment on the basis of her sex, discharging her in retaliation for submitting a sexual harassment complaint to RCSI's Human Resources, and discriminating against her based on her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

2. Plaintiff seeks back pay, compensatory damages, and punitive damages, among others, to redress injuries suffered as a result of Defendant's unlawful harassment, discrimination, and retaliation committed in violation of Title VII.

PARTIES

3. Plaintiff is a female resident of Temple Hills, Maryland and a former employee of Defendant. During her employment with Defendant, Plaintiff worked at Defendant's Sterling, Virginia facility.

4. On information and belief, Defendant is a Maryland company with its principal place of business in Gaithersburg, Maryland, and Defendant owns and operates a warehouse facility located in Sterling, Virginia. On information and belief, Defendant employs fifteen or more employees.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3) because this action arises under the laws of the United States.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because most or all of the events or omissions giving rise to the claims occurred in the Eastern District of Virginia.

FACTS

7. On December 1, 2014, Ms. Parker was hired by RCSI as an inventory control clerk to work at RCSI's Sterling, Virginia warehouse facility. She continued to work at that facility until her unlawful termination on May 18, 2016.

8. Ms. Parker was a promising employee while at RCSI. Although she started as a clerk, one of the lowest-level positions at RCSI, she quickly and continuously earned promotions.

9. During the course of her employment, Ms. Parker was promoted six times including to supervisory positions, specialist positions, and finally to the managerial position of Assistant Operations Manager.

10. To Ms. Parker's knowledge, she earned each of these promotions based on her distinguished performance and professionalism.

11. On or about March 1, 2016, when she assumed the position of Assistant Operations Manager, Ms. Parker was one of few female employees who had reached the managerial level in several years. She remained in that position until her unlawful termination.

12. Approximately two weeks after she accepted the managerial role, Ms. Parker was made aware of an unfounded, sexually-explicit rumor about her that certain male employees were circulating within RCSI. The rumor falsely and maliciously portrayed her as having a sexual relationship with a co-worker, Mr. Damarcus Pickett, RCSI's Deputy Program Manager, in order to obtain her managerial position. Mr. Pickett was a married, higher-ranking manager at RCSI. Mr. Pickett has also stated that the rumor was untrue.

13. The rumor originated with one RCSI employee, Mr. Donte Jennings, as confirmed by multiple witnesses. For instance, Ms. Parker was informed by Ms. Romaine Thompson, a former employee of RCSI, that Mr. Jennings was spreading the rumors. On another occasion, Ms. Parker heard from Mr. Pickett that Mr. Jennings was the source of the rumors.

14. Mr. Jennings began working at RCSI's warehouse as a clerk (the same position Ms. Parker began in) around the same time Ms. Parker joined the company. Although they both began working at the same level, Ms. Parker soon became Mr. Jennings's superior because of the promotions she earned.

15. Among those who were spreading the rumor was Larry Moppins, RCSI's Program Manager. Mr. Moppins was (and, on information and belief, still is)

the highest-ranking manager at the warehouse facility.

16. Mr. Pickett recounted to Ms. Parker that Mr. Moppins had derogatively asked him: "hey, you sure your wife ain't divorcing you because you're fucking [Parker]?"

17. As the rumor spread, Ms. Parker's work environment became increasingly hostile. She was treated with open resentment and disrespect from a number of her co-workers, including employees that she was responsible for supervising.

18. In an effort to resolve the hostility in her work environment informally, Ms. Parker confronted Mr. Jennings and asked him to speak directly with her if he had any questions about her conduct. Ms. Parker also met with other employees in an effort to set the record straight.

19. On or about April 21, 2016, Mr. Moppins called a full staff meeting, the topic of which was unknown to Ms. Parker prior to the meeting; however, it was widely understood that attendance at the meeting was mandatory for all warehouse employees.

20. Ms. Parker was running a few minutes late for the meeting after being delayed by a work-related telephone call. She arrived at the conference room with Mr. Pickett. When they arrived, Mr. Moppins opened the door just enough to let Mr. Pickett in and promptly slammed the door in Ms. Parker's face and locked her out.

21. Ms. Parker was humiliated, in front of all the warehouse employees, by Mr. Moppins's inappropriate behavior. The meeting continued on without

her, and as a result, Ms. Parker was denied an opportunity to speak for herself in the meeting.

22. Ms. Parker learned the next day from a co-worker that the rumor was discussed at the meeting.

23. The following day, on April 22, 2016, Ms. Parker arranged a meeting with Mr. Moppins to speak about the rumor. Ms. Angela Wallace, RCSI's Transportation Manager, attended that meeting as a witness.

24. In the meeting, Mr. Moppins blamed Ms. Parker for bringing the situation to the workplace. Further, Mr. Moppins stated that he had "great things" planned for Ms. Parker at RCSI but that he could no longer recommend her for promotions or higher-level tasks because of the rumor. He also stated that he would not allow her to advance any further within the company.

25. Ms. Parker explained to Mr. Moppins that the rumor was untrue, and that it had been started by a co-worker who was jealous of her success at the company, but Mr. Moppins did not want to listen to Ms. Parker's explanation.

26. Mr. Moppins's harsh comments and failure to listen to Ms. Parker's side of the story not only aggravated the hostile work environment to which she was subjected, but put her in fear of losing her job.

27. On or about April 25, 2016, Ms. Parker was called to another meeting with Mr. Moppins, at which Mr. Pickett and Ms. Wallace were present as witnesses. Again, Mr. Moppins blamed Ms. Parker for the disruption to the workplace and stated that he should have fired her the day before when she came

in "huffing and puffing about this BS rumor." During the meeting, Mr. Moppins lost his temper and began screaming at Ms. Parker. He dismissed her after saying, "don't let this happen again."

28. Following this meeting, it became clear to Ms. Parker that Mr. Moppins had no intention of fairly and appropriately handling the issues caused by the rumor or disciplining any of the employees who were perpetuating the rumor. That same day, Ms. Parker went to Ms. Cathy Price, RCSI's Human Resources Manager, to file a sexual harassment complaint against Mr. Moppins and Mr. Jennings.

29. A few days later, on April 27, 2016, Ms. Price organized a meeting with Ms. Parker, Mr. Moppins, and Mr. Pickett, during which Ms. Price encouraged the three managers to apologize to one another and instructed them to put the prior incidents behind them and move on. After the meeting, Ms. Price assured Ms. Parker that her job was not in jeopardy.

30. Several days later, Ms. Parker left for a pre-approved vacation from May 11, 2016, through May 16, 2016.

31. On May 12, 2016, while Ms. Parker was on vacation, Mr. Jennings submitted a complaint alleging that Ms. Parker was creating a hostile work environment against him through inappropriate conduct. Upon her return to work on May 17, 2016, Ms. Parker was instructed to have no contact with Mr. Jennings, even though she had not been given an opportunity to review or respond to his complaint. Later, when Ms. Parker was informed of the specifics of Mr. Jennings's complaint, she denied Mr. Jennings's allegations to Mr. Moppins. Upon

information and belief, there were no witnesses to support Mr. Jennings's claim.

32. Ms. Parker never acted inappropriately towards Mr. Jennings.

33. Despite her knowledge that Mr. Jennings's complaint was untrue, Ms. Parker followed the instruction she had been given and kept away from him. However, Mr. Jennings was permitted by his supervisor to spend time in Ms. Parker's work area conversing with employees under her supervision during working hours and distracting them from their duties. During these conversations, Mr. Jennings directed long stares at Ms. Parker, and he smirked and laughed at her.

34. As a result of Mr. Jennings's behavior, Ms. Parker continued to be subjected to a hostile work environment. Although she raised this situation with Mr. Shaun Reeves, her immediate supervisor, and the Human Resources Department, neither resolved the situation for Ms. Parker.

35. On May 18, 2016, Ms. Parker was called to a meeting with Mr. Moppins, Ms. Price, and Ms. Reema Vora, RCSI's in-house counsel.

36. During the meeting, Mr. Moppins issued two written warnings to Ms. Parker and immediately fired her.

37. One of the warnings was based on Mr. Jennings's allegations against Ms. Parker. The other warning accused her of poor management ability and insubordination to Mr. Moppings. These were the first written warnings Ms. Parker had ever received while at RCSI, and both were unfounded.

38. Ms. Parker was terminated by Mr. Moppins approximately three weeks after she had filed a sexual harassment report against him.

39. On information and belief, RCSI has a "three strikes" rule under which employees are subject to termination after receiving three written warnings. To Ms. Parker's knowledge, that rule was disparately enforced such that male employees were generally not fired even after receiving three or more warnings, while some female employees were terminated without three warnings or with all three warnings being issued at once.

40. RCSI's unlawful termination of Ms. Parker has caused, and continues to cause, her to suffer economic loss, pain and suffering, and humiliation.

41. RCSI's hostile work environment has caused, and continues to cause, Ms. Parker to suffer economic loss, pain and suffering, and humiliation.

INVOCATION OF ADMINISTRATIVE REMEDIES

42. On or about August 24, 2016, Plaintiff timely filed a charge with the Equal Employment Opportunity Commission ("EEOC").

43. On or about February 18, 2017, Plaintiff was issued a Notice of Right to Sue by the EEOC. This Complaint is filed within 90 days of receipt of that Notice.

COUNT I

Discrimination under 42 U.S.C. § 2000e-2
(Hostile Work Environment Harassment)

44. Plaintiff re-alleges and incorporates by reference all of the allegations set forth in paragraphs 1 through 43 above.

45. Through the forgoing actions, Defendant subjected Plaintiff to a hostile work environment and allowed harassing conduct because of her sex that was unwelcome and severe or pervasive enough to alter the conditions of her employment.

46. Senior management personnel had actual knowledge of the harassment and did nothing to stop it.

47. These employment practices by Defendant constitute discrimination on the basis of sex in violation of 42 U.S.C. § 2000e-2.

COUNT II

Discrimination under 42 U.S.C. § 2000e-3
(Retaliatory Termination)

48. Plaintiff re-alleges and incorporates by reference all of the allegations set forth in paragraphs 1 through 47 above.

49. Defendant took an adverse employment action against Plaintiff in retaliation for her opposition of what she reasonably and in good faith believed to be a violation of Title VII's prohibition on sexual harassment.

50. Through the foregoing actions, Defendant terminated Plaintiff in retaliation for opposing unlawful and discriminatory employment practices in violation of 42 U.S.C. § 2000e-3.

COUNT III

Discrimination under 42 U.S.C. § 2000e-2
(Discriminatory Termination)

51. Plaintiff re-alleges and incorporates by reference all of the allegations set forth in paragraphs 1 through 50 above.

52. Through the foregoing actions, Defendant unlawfully terminated Plaintiff on the basis of sex in violation of 42 U.S.C. § 2000e-2.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Enter a declaratory judgment finding that the foregoing actions of Defendant violated 42 U.S.C. §§ 2000e-2 and 2000e-3;

B. Award back pay in an amount to be proven at trial;

C. Award compensatory damages in an amount to be determined by the jury that would fully compensate Plaintiff for the humiliation, embarrassment, or mental and emotional distress caused by the conduct of Defendant alleged herein;

D. Grant appropriate injunctive relief, including the return of Plaintiff to the employment position she would have held but for Defendant's wrongful conduct and a prohibition of similar conduct in the future;

E. Award punitive damages to Plaintiff in an amount to be determined by the jury that would punish Defendant for its willful, wanton, or reckless conduct alleged herein and that would effectively deter Defendant from engaging in similar conduct in the future;

F. Award Plaintiff reasonable attorneys' fees and costs incurred in this action; and

G. Order such other relief as this Court deems just and equitable.

JURY DEMAND

Plaintiff demands trial by jury for all claims which may be so tried.

Dated: May 15, 2017

Respectfully submitted,

By: */s/ Christine T. Dinan*

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