No. 21-843

In The Supreme Court of the United States

CATHY SELLERS, CLAUDIA LOPEZ, and LESLIE FORTUNE, On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

CRST EXPEDITED, INC.,

Respondent.

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

PETITIONERS' REPLY BRIEF

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I. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT REGARDING WHAT CONSTITUTES A NEGLIGENT RESPONSE TO A COMPLAINT OF SEXUAL HARASSMENT

CRST does not deny that the Eighth and Ninth Circuits apply fundamentally different legal standards regarding what an employer must do when it learns that one of its employees has been subjected to unlawful sexual harassment. CRST itself urged the Eighth Circuit to reject the Ninth Circuit standard. Pet. 12 n.6.

CRST acknowledges that the Ninth Circuit holds that an "employer['s] remedial responses should both stop the present harassment and deter future harassment." Br. Opp. 5. The Ninth Circuit requires such an employer not only to exercise reasonable care to prevent further harassment by the individual who has already harassed the victim, but also to exercise reasonable care to prevent similar misconduct by other potential harassers in the future. The Eighth Circuit, on the other hand, requires only reasonable care to prevent additional harassment by the single identified harasser. App. 30a-31a. The employer need not make any effort to prevent harassment by others, until and unless there is a second Title VII violation as well as a second complaint. If a second violation and complaint occur, the employer need only seek to prevent further harassment by that second harasser, and again need

make no effort to protect the victim from a third harasser.

The facts of this case illustrate the nature and consequences of CRST's policies. Petitioner Sellars complained to CRST officials in December 2013 that she was being harassed by Lydell Wilkerson. CRST told Wilkerson to have no further contact with Sellars, but took no action to prevent harassment by others. On January 7, 2014, Sellars complained to CRST officials that she had been harassed by Jesse Radford; CRST put Radford on "male only" status, but took no action to prevent harassment by others. On January 26, 2014, Sellars complained to CRST officials that she was harassed by L.W.; CRST removed Sellars from the truck, but took no action to prevent harassment by others. On February 10, 2014, in the wake of that inaction, Sellars was harassed by Dwain Moore. App. 63a-70a. Petitioners Lopez and Fortune also filed a series of sexual harassment complaints, only to be subsequently harassed by other drivers. App.70a-83a.

CRST insists that the Eighth Circuit's rejection of the Ninth Circuit standard was an "alternative holding" (Br. Opp. 20), asserting that the Eighth Circuit also rejected the plaintiffs' claims because they "failed to adduce evidence of actual or constructive notice that triggers the employer's duty to respond in the first place." Br. Opp. 4. But as the district court noted, and CRST does not deny, the named plaintiffs filed a total of fourteen sexual harassment complaints with CRST, each of which provided actual notice of the harassment complained of. App. 63a-83a. The portion of the Eighth

Circuit opinion to which the brief in opposition refers points out only that CRST did not *also* have notice of the additional harassment that occurred after each plaintiff's complaints, until each plaintiff complained a second (or third, or fourth) time. App. 26a-30a. That lack of additional notice of the subsequent harassment was only dispositive because the Eighth Circuit had rejected the Ninth Circuit standard that an employer is required to take steps to deter harassment by others without waiting for subsequent harassment to occur or be reported.

CRST insists that this case would have come out the same way in the Ninth Circuit because that circuit "requires the type of notice that the Eighth Circuit found absent here." Br. Opp. 21. That is not correct; the difference between the Eighth Circuit and Ninth Circuit notice requirements is central to this appeal. The Eighth Circuit requires a separate notice regarding each of the successive harassers. In the Ninth Circuit, on the other hand, the only notice required is of the harassment by the first harasser, which triggers an obligation to take reasonable care to prevent harassment by others. In the Ninth Circuit Model Jury Instructions, the "harassment" of which an employer must have had actual or constructive notice is the harassment by the first harasser. See p. 3a-4a, *infra*.

Adler v. Wal-Mart Stores, Inc., 144 F.3d 662, 678 (10th Cir. 1998), rejected the Eighth Circuit's view that if an employer ends the misconduct of the known harasser, it does not matter that the employer did nothing to deter harassment by others. "The Ninth Circuit has

held that in measuring the reasonableness of an employer response a court may consider whether other potential harassers are deterred. . . . We also think this fact relevant. . . .” 144 F.3d at 678 (citing *Ellison v. Brady*, 942 F.2d 872, 882 (9th Cir. 1991)). That clearly conflicts with the Eighth Circuit standard. On the other hand, the Tenth Circuit also requires the plaintiff to show a subsequent harasser “knew of, or was [at least in part] motivated by, [the employer’s inadequate response].” *Id*. That requirement conflicts with the standard in the Ninth Circuit.

If, as the Second and Sixth Circuits hold, a lack of reasonable care to deter future harassers can establish deliberate indifference (in violation of Title VI and Title IX), a fortiori that lack of care would satisfy the less demanding Title VII negligence standard. *Foster v. Bd. of Regents of Univ. of Mich*., 982 F.3d 960 (6th Cir. 2020) (en banc), did not abrogate the holding in *Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009), that a school board could be liable under Title IX if it failed to take reasonable steps to deter harassment by “other students.” 551 F.3d at 448. *Foster* only held that the failure of a school board’s actions to successfully deter such subsequent harassment did not “necessarily” prove a lack of reasonable care. 982 F.3d at 968. *Zeno v. Pine Plains Central School District*, 702 F.3d 655, 668-69 (2d Cir. 2012), did not “merely hold[ ] that inaction or half-measures . . . can rise to the level of deliberate indifference. Br. Opp. 25-26. *Zeno* also held that the school board could be held liable if its actions “did not deter others” from harassing the plaintiff, a

circumstance that would be legally irrelevant in the Eighth Circuit. 702 F.3d at 669.

CRST notes that the EEOC amicus brief in *Anderson v. CRST Int'l, Inc.*, 685 Fed.Appx. 524 (9th Cir. 2017), supported the appeal of the plaintiff based on "case-specific circumstances." Br. Opp. 23. But CRST does not deny that EEOC in that brief expressly endorsed the Ninth Circuit deterrence standard. We set out below a list of ten EEOC briefs adopting that Ninth Circuit standard. CRST does not deny that the Department of Justice and the Department of Education construe in the same manner the anti-discrimination provisions of Title VI and Title IX respectively. See Pet. 20 and 20 n.10.

CRST contends that this case is "unique," because here the alleged harassment occurred "without any witnesses to corroborate either driver's version of events." Br. Opp. 1. But the absence of witnesses is the norm in sexual harassment cases. Harassers for obvious reasons choose to abuse their victims when no one else is around. That is why "he said, she said" is an all too familiar expression in the discussion of sexual harassment.

We do not contend that employers should be strictly liable for any co-worker harassment that occurs after a victim has filed a complaint. We urge only that this Court adopt the standard applied by the Ninth, Second and Sixth Circuits, and advocated by the EEOC, the Department of Justice, and the Department of Education. In determining whether a

defendant was negligent in its response to a complaint of unlawful harassment, consideration should be given to whether the defendant exercised reasonable care to prevent harassment by others.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT REGARDING WHETHER SECTION 704(a) REQUIRES PROOF OF A RETALIATORY MOTIVE

CRST does not exactly dispute the existence of a circuit conflict regarding whether section 704(a) prohibits certain per se violations. CRST does not deny, for example, that the Seventh Circuit rejects the Fifth Circuit standard, that the Second Circuit rejects the Seventh Circuit standard, and that the Sixth Circuit rejects the Second Circuit standard. Pet. 31-33. CRST contends only that "[t]his case does not implicate any circuit split over 'per se retaliation.'" Br. Opp. 29.

1. The brief in opposition advances a multi-faceted account of why the conflict regarding per se violations of section 704(a) is irrelevant to the instant case. CRST asserts that women who complained about sexual harassment did not necessarily experience financial harm. The CRST policy which plaintiffs assert caused harm did not even exist. Even if some women who complained about sexual harassment did thereafter earn less, that was not caused by any CRST policy. If all that were true, it would be difficult to understand why the plaintiffs even brought this claim, and

impossible to understand why the EEOC filed a brief in the court of appeals arguing that CRST's practices were a per se violation of section 704(a).

The court of appeals expressly concluded that the CRST policies *did* injure almost all the women who, like the named plaintiffs, complained prior to July 2015 about sexual harassment. "The record establishes that a vast majority of pre-2015 class members actually experienced a net decrease in pay upon removal [from their trucks]." Pet. App. 16a. CRST does not seek review of that determination.

The brief in opposition states that "the district court found, the evidence did 'not demonstrate that this pay [of women who were removed from a truck after complaining about sexual harassment] was consistently less than a driver would have made had she stayed on the truck.'" Br. Opp. 15 quoting Pet. App. 164a. But this quotation refers to the effect of the CRST *post*-July 2015 pay practices, the period when the plaintiffs no longer worked for the company and after the company's pay practices had to some degree changed. The quotations at pages 15 (quoting App. 163a-164a) and 30 (quoting App. 22a) of the brief in opposition also refer only to the post-July 2015 practices. The brief in opposition objects to the phrasing of the second question presented insofar as the question states that "complaining of sexual harassment would directly lead to a net decrease in pay." Pet. i. "That is wrong." Br. Opp. 30. But this passage is a quotation from the Eighth Circuit opinion itself. App. 16a.

There is no actual dispute about the substance of the CRST practices; they are described in identical ways by the brief in opposition, the petition, and both lower court decisions. If a woman complained about sexual harassment while she was co-driving a truck, it was CRST's practice to remove her from the truck, a practice which CRST labels its "removal policy." Br. Opp. 9-10, 32. It was CRST practice to only pay a driver the "split-mileage" rate for the distance the truck traveled when she was in the truck, but not for the distance the truck traveled after she was removed. Br. Opp. 3, 11-12. CRST labels this practice part of its "compensation policies." Br. Opp. 4.[1] Those policies resulted in a loss of wages for the pre-July 2015 women, as the Eighth Circuit recognized, because a substantial amount of unpaid time was usually needed to travel to a CRST terminal from where a woman had been removed from the truck, and then to arrange to drive another truck and begin a new trip.

CRST insists that it did not have a policy of "unpaid removal" or "unpaid suspension." But this only a semantic objection about how to label the CRST policies, not a disagreement about the substance of those policies themselves. CRST does not claim that there is any particular in which the petition's detailing of the CRST policies is incorrect. CRST insists that "the court below unequivocally held that no [unpaid removal]

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[1] Although CRST refers to the possibility of layover pay during the pre-July 2015 period, the district court concluded that this had occurred on no more than one or two occasions. App. 161a.

policy exists." Br. Opp. 30. But the phrase "unpaid removal" never appears in the opinions below.[2]

2. The outcome of this case would clearly have been different if it had been decided in the Seventh Circuit, or in any of the other circuits that apply the interpretation of section 704(a) in *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992). The parties agree that in *Board of Governors* the Seventh Circuit held that section 704(a) is violated, regardless of an employer's motive, "[w]hen an employee's participation in statutorily protected activity is the determining factor in an employer's decision to take adverse employment action." Br. Opp. 31, quoting 957 F.2d at 425. CRST insists that the Seventh Circuit's interpretation of section 704(a) is irrelevant here, "because participation in statutorily protected activity was *not* the determining factor in the adverse employment action claimed in this case." Br. Opp. 31 (emphasis in original). But CRST does not deny that the CRST removal policy was the determining factor in whether a woman who complained about sexual harassment would be removed from her truck (she would be), or deny that the company's compensation policy caused a removed women to be denied the mileage rate she would have earned for the rest of the truck's trip. See Pet App.16a (CRST policies "would

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[2] The Eighth Circuit declined to "characterize" the CRST policy as one of "unpaid suspension," "[b]ecause at least some drivers did not experience a net decrease in pay" App. 13a n.4. Whether that label is used does not affect the legal sufficiency of the claims of the women whose net pay *was* decreased.

result in . . . decreas[ing] earning their split-mileage rate of pay" and "*directly lead* to a net increase in pay") (emphasis added).

CRST contends that the Third and Sixth Circuit decisions set out in the petition, which endorse the holding in *Board of Governors*, are irrelevant because the particular facts of those cases did not involve the "circumstances like these." Br. Opp. 31-32. But what is important is that the legal standard in those circuits, as in the Seventh Circuit, conflicts with the legal standard applied in this case by the Eighth Circuit.

3. The decision below commented that "the facts of this case do not call for us" to apply "the Seventh Circuit 'retaliatory *per se*' standard." App. 12a. The statement reflects the Eighth Circuit's idiosyncratic account of the Seventh Circuit standard. In *Franklin v. Local v. of the Sheet Metal Workers International Ass'n*, 565 F.3d 508, 521 (8th Cir. 2009), the Eighth Circuit asserted that the *Board of Governors* standard only applies to a policy that singles out workers who had engaged in protected activity, which had not occurred in *Franklin*. In the instant case, the Eighth Circuit pointed out that in *Franklin* "the allegedly retaliatory policy at issue . . . did not single out [union] members who [engaged in protected activity]." Pet. App. 13a. The court below reasoned that for the same reason the CRST policies could not be unlawful per se, stressing that the company removed from a truck (and cut off mileage-based pay for) not only women who complained about sexual harassment, but also drivers who complained about safety problems. Pet. App. 13. The

most plausible reading of the court of appeals' opinion is that the Eighth Circuit in the instant case interpreted the *Board of Governors* standard in the same narrow manner as it had in *Franklin*. If the *Board of Governors* standard really had been as described in *Franklin*, it would not apply to the facts of this case.[3]

This Court's decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) did not resolve the question presented in the instant case. The issue in *Nassar* was who bears the burden of proof as to but-for causation in a section 704(a) motive-based case. In the context of that dispute, the Court explained that the burden was on the plaintiff to show that an impermissible motive was the but-for cause of the adverse action. 570 U.S. at 352. But the purpose of that statement was only to assign the burden of proof in a motive-based case, not to address whether proof of motive is required in all section 704(a) cases. In other passages, *Nassar* stated instead that protected activity (not a retaliatory motive) must be the but-for cause of the adverse action at issue. E.g., 570 U.S. at 362 ("a plaintiff making a retaliation claim under [section 704(a)] must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer").

CRST suggests that the EEOC has abandoned its support of the *Board of Governors* standard. Br. Opp.

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[3] As we explained in the petition, that is not a proper reading of *Board of Governors* (Pet. 30-31), and the brief in opposition does not defend it. See Br. Opp. 31.

34. But the EEOC in this very case filed an amicus brief reiterating its endorsement of that standard. Brief of the Equal Employment Opportunity Commission as Amicus Curiae, 14-15, available at 2019 WL 6351466.

Petitioners' claims are not interlocutory in nature. The court of appeals decision was a final rejection of the section 704(a) claims of all employees who worked for CRST prior to July 2015, which includes all of the named petitioners. App. 15a-21a, 35a. The appellate court remanded only the claims of employees who worked for CRST after July 2015. App. 21a-23a, 35a.

CONCLUSION

If the Court believes that clarification of the EEOC's position on the questions presented would be helpful, it should invite the Solicitor General to file a brief expressing the views of the United States.

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

Respectfully submitted,

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