

No. _____

**In The
Supreme Court of the United States**

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IDAHO DEPARTMENT OF CORRECTION,

Petitioner,

v.

CYNTHIA FULLER,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals err by reversing the district court's grant of summary judgment, and allowing the Plaintiff-Appellant to proceed with her sexual harassment case without having to make any showing that the allegedly harassing conduct was because of her sex?

PARTIES TO THE PROCEEDINGS

Petitioner is the Idaho Department of Correction which was a defendant-respondent in the proceedings below.

Respondent is Cynthia Fuller. Respondent was the plaintiff/appellant below.

The district court's ruling dismissing the claims against defendants Henry Atencio and Brent Reinke was affirmed by the Ninth Circuit Court of Appeals. App. 53.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals issued two separate opinions affirming in part and, reversing in part the ruling from the district court granting Petitioner's motion for summary judgment. The published opinion is reported at 865 F.3d 1154 (9th Cir. 2007). App. 1. A second, unpublished opinion issued concurrently with the published opinion, is reported at 694 F.Appx. 590 (9th Cir. 2017) and is reproduced at App. 53. The denial of rehearing and rehearing en banc is reproduced at App. 89. The district court's unpublished opinion is available at 2014 WL 6809258 (D. Idaho 2014), and is reproduced at App. 57.

**JURISDICTION**

Petitioner seeks review of the decision of the United States Court of Appeals for the Ninth Circuit entered July 31, 2017. Timely petitions for rehearing and rehearing en banc were denied on October 5, 2017. App. 89. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-2, Unlawful employment practices.

A. Employer Practices

It shall be an unlawful employment practice for an employer –

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

**STATEMENT OF THE CASE**

Cynthia Fuller filed a Complaint in the United States District Court for the District of Idaho on January 22, 2013 alleging she had been raped by a co-worker, Herb Cruz, whom she had been dating. App. 57. The alleged assaults occurred in a social setting outside the workplace or any work-related environment. App. 4, 30, 59. Fuller alleged the assaults subjected her to a sexually hostile work environment which violated the Equal Protection Clause of the Fourteenth Amendment and, constructively discharged her from the employ of the Idaho Department of Correction (IDOC). App. 9. She sought relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a)(1), 42 U.S.C. § 1983 and, state tort law. The

district court granted summary judgment to the IDOC defendants dismissing all claims. *Id.*

The Ninth Circuit Court of Appeals, in two separate opinions, affirmed in part and reversed in part the district court's decision. In an unpublished opinion, the Ninth Circuit panel affirmed the trial courts' ruling that found the reported assaults had not subjected Fuller to a hostile work environment because the rapes occurred outside the workplace after Mr. Cruz had been placed on administrative leave pending a criminal investigation into other non-workplace conduct. *See* 694 F. Appx. at 591; App., p. 54. The Ninth Circuit also dismissed all claims alleging the reported rapes constituted a constructive discharge, or that the IDOC's denial of her request for paid administrative leave violated Title VII or the Equal Protection Clause. *See* 694 F. Appx. at 591; App., p. 54-55.

In its published opinion, the Ninth Circuit reversed the trial court's dismissal of any hostile work environment claims that may have arisen after Fuller reported she had been assaulted and, after the IDOC commenced its investigation of those reports. *See* 865 F.3d 1154, 1164-1165 (9th Cir. 2017); App. 18. The Court focused upon whether the IDOC investigation independently created a hostile work environment which violated Title VII. *Id.*

A. Factual Background.

Cynthia Fuller began working for the IDOC as a probation and parole officer in January of 2011. App. 3.

During her first week, she met Herb Cruz, a senior probation officer. In March of 2011, Fuller and Cruz began dating and, thereafter, maintained a romantic and intimate relationship. *Id.* Although they were required by IDOC policy to report the relationship to their supervisors, Fuller and Cruz kept their relationship a secret. *Id.*

In early August of 2011, a criminal investigation of Mr. Cruz was opened by the Canyon County Sheriff's Office over an alleged rape of another woman who was not an IDOC employee. App. 3. On August 15, 2011, after IDOC learned of the criminal investigation, Cruz was placed on administrative leave pending the outcome of the investigation. App. 3, 29. Employees were notified Cruz was on administrative leave and, was not allowed on the premises during the investigation. *Id.* 3. Cruz and Fuller continued their romantic relationship after he was suspended and, after she learned he had been accused of rape. App. 3. However, Fuller disclosed the relationship to her supervisor. *Id.*

Fuller claims she was sexually assaulted by Cruz at his home on August 22, 2011. App. 4. Two other assaults occurred on August 30, 2011 and September 3, 2011. *Id.* All of the assaults occurred outside the workplace after Cruz was suspended. App. 4, 30. Despite the assaults, Fuller continued her sexual relationship with Cruz. App. 59. She disclosed she had been assaulted to her supervisor on September 6, 2011. The supervisor encouraged her to report the rapes to local law enforcement and, accompanied her to the Canyon County Sheriff's Office where she was interviewed by a

detective. *Id.* 30-31. The IDOC expanded the ongoing internal affairs investigation to include the reported rapes of Ms. Fuller. App. 5.

Following her reports, Fuller was allowed unpaid leave. App. 5-6, 33-34. She utilized her vacation and sick leave benefits while she was at home. Additionally, she was approved for intermittent leave under the Family Medical Leave Act. App. 59-60. The IDOC completed its investigation of Cruz in late October 2011. App. 5. A final decision concerning possible discipline was delayed to see if Cruz would be criminally charged by the local prosecuting attorney. *Id.* When criminal charges were not pursued, on December 27, 2011, the IDOC provided Cruz with a Notice of Contemplated Action advising him it intended to terminate his employment. *Id.* Rather than respond to the notice, Cruz resigned. *Id.*



REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE EXPRESS LANGUAGE OF 42 U.S.C. § 2000e-2(a)(1), SUPREME COURT PRECEDENT, AND THE HOLDINGS OF OTHER CIRCUITS.

Under this Court's decision in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998), the Ninth Circuit erred by holding an employer

can be liable under Title VII in the absence of evidence of workplace conduct that is discriminatory “because of . . . sex.” Title VII makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). “The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993) (citations and some internal quotation marks omitted; underline added). “When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.” *Harris*, 510 U.S. at 21 (citations omitted). Thus, “a plaintiff may establish a violation of Title VII by proving that discrimination *based on sex* has created a hostile or abusive work environment.” *Meritor*, 477 U.S. at 66 (emphasis added). *See also, Oncale*, 523 U.S. at 78 (“Title VII’s prohibition of discrimination ‘because of . . . sex’ protects men as well as women, . . .”). The Ninth Circuit’s decision in this case eliminates the requirement that the discrimination be “based on sex,” thereby creating a conflict not only with this Court but holdings from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and

Eleventh Circuits. Because the question presented is recurring and important to employers seeking to comply with Title VII, it merits this Court’s review.

A. This Court Has Held That A Hostile Work Environment Claim Requires A Showing That The Discrimination Was Because Of Sex.

This Court has repeatedly held that to prevail on a claim that he or she has suffered a hostile work environment claim a plaintiff must show that the harassment was because of his or her sex. This requirement was discussed at length in *Oncale v. Sundowner Offshore Services, supra*. The court pointedly noted “[t]he critical issue, Title VII’s text indicates, 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.” *Oncale*, 523 U.S. at 80, 118 S. Ct. at 1002 (quoting *Harris, supra*, 510 U.S. at 25, 114 S. Ct. at 372 (Ginsburg, J., concurring)). This Court noted three ways a plaintiff could demonstrate their harassment was “because of sex” by: (1) showing the harassment was motivated by sexual desire; (2) that the harasser was motivated by general hostility to the presence of members of the plaintiff’s sex in the workplace; or (3) by showing that the harasser disparately treated the sexes. *Oncale* 523 U.S. at 80, 118 S. Ct. at 1002. This Court emphasized that “[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina[tion] . . . because

of . . . sex.’” *Id.* As will be demonstrated below, the circuits have applied the foregoing discussion on the “because of sex” element to cases involving claims of a hostile working environment.

B. The Clear Majority Of Circuits Have Held That A Hostile Work Environment Claim Requires A Plaintiff To Not Only Show She Was A Member Of A Protected Class, But That She Was Subject To Unwelcome Harassment Because Of, Or Based On, Her Sex.

The clear majority of Circuit Courts of Appeals have held that a hostile work environment requires some evidence or proof that the harassing conduct was “because of sex.” For instance, in *Maldonado-Catala v. Municipality of Naranjito*, 876 F.3d 1 (1st Cir. 2017), the First Circuit Court of Appeals noted that a hostile work environment claim required a showing that “[t]he harassment . . . stem[med] from an impermissible motivation. . . .” *Id.* at 10.

In *Pucino v. Verizon Wireless Commc’ns, Inc.*, 618 F.3d 112, 117 (2d Cir. 2010), the Second Circuit noted that the plaintiff’s hostile work environment claim required her “to proffer sufficient evidence to allow a trier of fact to find disparate treatment based on gender, resulting in a hostile working environment that was ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. . . .’” *Pucino*, 618 F.3d at 117 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. at 21. The

court also held that “[i]n assessing the ‘totality of the circumstances’ offered to prove a hostile work environment, a fact-finder may consider only abusive conduct proven to be ‘based on sex,’” and that this could be proven by harassment in such sex-specific and derogatory terms as to make it clear that the harasser was motivated by general hostility to the presence of women in the workplace. *Pucino*, 618 F.3d at 117-118.

The Third Circuit has similarly held that one of the elements of a hostile work environment claim is that “the employee suffered intentional discrimination because of his/her sex[.]” *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 213 (3d Cir. 2017). Elsewhere, the Third Circuit noted that “[t]o make out a case under Title VII it is only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner.” *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (internal quotations removed; superceded in part by statute, *Moody*, *supra*).

The Fourth Circuit holds that in order to make out a hostile work environment claim based on sex, a plaintiff must show that the offending conduct: (1) was unwelcome; (2) was because of her sex; (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment; and (4) was imputable to her employer. *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 331 (4th Cir. 2011); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003). In *Hoyle*, the court addressed the second

element – that the harassment was because of her sex – and instructed that the plaintiff did not necessarily need to show she was subjected to sexual advances or propositions, but could alternatively establish discrimination through a showing that the harasser is motivated by general hostility to the presence of women in the workplace. *Hoyle*, 650 F.3d at 331 (citing *Oncale*, *supra*, 523 U.S. at 80). In *Ocheltree*, the court similarly wrote concerning the “because of sex” element:

A woman may prove sex-based discrimination in the workplace even though she is not subjected to sexual advances or propositions. *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 242 (4th Cir. 2000); *see also Oncale*, 523 U.S. at 80, 118 S. Ct. 998. A trier of fact may reasonably find discrimination, for example, when a woman is the individual target of open hostility because of her sex, *Smith*, 202 F.3d at 242-243, or when “a female victim is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace,” *Oncale*, 523 U.S. at 80, 118 S. Ct. 998.

Ocheltree, 335 F.3d at 331-332.

The Fifth Circuit evaluates four factors to determine if the plaintiff was subject to a hostile work environment: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) *the harassment complained of was based upon sex*; and (4) the harassment complained of

was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999); *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996).

The Sixth Circuit similarly requires a plaintiff alleging a hostile work environment to show that: (1) she is a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) *the harassment was based on her sex*; (4) the harassment created a hostile work environment; and that (5) the employer is vicariously liable. *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 347 (6th Cir. 2005). In explaining the “based on her sex” requirement, the Sixth Circuit had earlier explained that “harassing behavior that is not sexually explicit but is directed at women and motivated by discriminatory animus against women satisfies the ‘based on sex’ requirement.” *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999). That is, “[a]ny unequal treatment of an employee *that would not occur but for the employee’s gender* may, if sufficiently severe or pervasive under the *Harris* standard, constitute a hostile environment in violation of Title VII.” *Id.* (italics in original).

The Seventh Circuit also requires that a hostile work environment claim be based on harassment due to the plaintiff’s sex. The court has written:

‘[T]itle VII prohibits the creation of a hostile work environment.’ *Vance v. Ball State Univ.*,
 — U.S. —, 133 S. Ct. 2434, 2441, 186

L. Ed. 2d 565 (2013). This doctrine finds its textual grounding in the language of the statute: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] . . . terms [or] conditions . . . of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a). As such, to avoid summary judgment on a hostile work environment claim, a plaintiff must establish four elements: “(1) the work environment must have been both subjectively and objectively offensive; (2) her gender must have been the cause of the harassment; (3) the conduct must have been severe or pervasive; and (4) there must be a basis for employer liability.” *Chaib v. Indiana*, 744 F.3d 974, 985 (7th Cir.2014) (citing *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 383 (7th Cir.2012)).

Orton-Bell v. Indiana, 759 F.3d 768, 773 (7th Cir. 2014) (underline added). *See also Liu v. Cook Cty.*, 817 F.3d 307, 318 (7th Cir. 2016) (noting that one of the elements of a hostile work environment claim is that “her . . . sex . . . must have been the cause of the harassment; (3) the conduct must have been severe or pervasive; and (4) there must be a basis for employer liability[.]”); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 692 (7th Cir. 2001) (explaining that in hostile work environment claims, a plaintiff must show that she was “exposed to disadvantageous terms or conditions of employment to which members of the other sex were not exposed.”) (quoting *Oncale*, *supra*).

The Eighth Circuit, in *Rickard v. Swedish Match North America, Inc.*, 773 F.3d 181 (8th Cir. 2018), noted that proof of a hostile work environment based on sex requires that the plaintiff show that: (1) he or she belongs to a protected group; (2) he or she was subjected to unwelcome harassment *based on sex*; (3) the harassment affected a term, condition, or privilege of his or her employment; (4) the employer knew or should have known of the harassment; and (5) the employer failed to take proper action. *Rickard*, 773 F.3d at 184. Moreover, to establish that the harassment was sex-based, the court indicated that the plaintiff could: (i) show that the actions were motivated by sexual desire; (ii) show his employer had a general hostility toward members of the plaintiff's sex in the workplace; or (iii) offer evidence that similarly situated individuals of the opposite sex were treated more favorably. *Rickard*, 773 F.3d at 185. In that particular case, because the plaintiff had failed to show that his supervisor's actions were motivated by sexual desire, or that the supervisor was generally hostile to men in the workplace, the court upheld dismissal of the hostile work environment claim. *Rickard*, 773 F.3d at 185. *See also Elmahdi v. Marriott Hotel Servs., Inc.*, 339 F.3d 645, 655 (8th Cir. 2003) (in determining whether discrimination was based on sex, the plaintiff is required to prove the harasser's comments were motivated either by sexual desire, special attention to plaintiff because of his or her sex, or that harasser treated males and females differently in a mixed gender environment).

The Tenth Circuit has also held that a hostile work environment claim requires proof that the harassment was “because of sex,” noting that “[t]he term ‘sex’ under Title VII refers to a class delineated by gender.” *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1263 (10th Cir. 2005). In a later case, *Harsco Corp. v. Renner*, 475 F.3d 1179 (10th Cir. 2007), the court addressed the element that “the harassment must be because of the plaintiff’s sex.” *Id.* at 1186. As a mixed sex case, the court held that the plaintiff could prove this element through at least two evidentiary routes: first, demonstrating that the conduct at issue involves “explicit or implicit proposals of sexual activity”; or, second, “a plaintiff may prove that the harasser treats men and women differently in the workplace.” *Id.*

Finally, in the Eleventh Circuit, an employee wanting to bring a hostile work environment claim under Title VII must show: (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that *the harassment must have been based on the sex of the employee*; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (*en banc*).

In short, consistent with the text of 42 U.S.C. § 2000e-2(a) and Supreme Court precedent, ten other

Circuit Courts of Appeals recognize that a Title VII hostile work environment claim requires proof that the harassment conduct be motivated by and based upon, the plaintiff's sex or gender. The Ninth Circuit decision removes the requirement of gender based discrimination or that sexual harassment create "an abusive working environment." *See Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998), citing *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405, 2406, 91 L. Ed. 2d 49 (1986).

C. The Ninth Circuit's Decision Conflicts With Decisions Of This Court And The Other Circuits And Was Clearly Erroneous.

The hostile work environment claims Ms. Fuller pursued against the IDOC were dependent upon the sexual attacks she alleged she suffered at the hands of her co-employee, Herb Cruz. She alleged the fact she was raped by Cruz created a sexually hostile work environment. Her criticism of IDOC management focused upon the denial of her request for paid leave after she reported she had been raped and, IDOC's refusal to publish a sealed protective order she had obtained against Cruz. App. 54-55. The Ninth Circuit ruled the rapes did not subject Fuller to a hostile work environment because the attacks took place outside the workplace and, after Cruz had been placed on leave due to an unrelated criminal investigation. *See Fuller v. IDOC*, 694 F. Appx. 590, 591 (9th Cir. 2017); *Id.* The Ninth Circuit also ruled Fuller had not been

constructively discharged by the refusal to publish the sealed protective order because, despite her claimed fear of Cruz, it was undisputed he had been removed from the workplace and did not attempt to return. *Id.* Finally, the Ninth Circuit ruled the IDOC's denial of paid leave did not violate state or federal law. *Id.* Accordingly, the Court affirmed the dismissal of all claims alleging violations of the Equal Protection Clause and Title VII surrounding the reported rapes. *Id.*

In its published opinion, the panel removed the “because of sex” requirement, ruling a hostile work environment could arise through the actions of Fuller’s supervisors during the IDOC’s investigation of the rape allegations it had already determined did not violate the Act. *Fuller*, 865 F.3d at 1164, App. 18. Under the Ninth Circuit’s published opinion, an investigation of employee conduct which, standing alone does not violate Title VII, could become an actionable hostile work environment if the complaining employee felt that his or her supervisors did not sufficiently champion their complaints prior to completing the investigation intended to determine whether workplace harassment had occurred. *Id.* at 1162, App. 12.

The dissent recognized this flaw writing “[t]he majority has lost sight of the key elements of Title VII liability and effectively holds that an employer can be found liable even in the absence of evidence the workplace conduct at issue constitutes ‘discriminat[ion] . . . because of . . . sex’. 42 U.S.C. § 2000e-2(a)(1)”. *Fuller*, 865 F.3d at 1174, App. 39. The dissent addressed the

flawed suggestion the IDOC's investigation could be viewed as discrimination against women in general noting "the IDOC diligently investigated Fuller's allegations, believed them, and ultimately used them as the basis of the decision to terminate Cruz' employment. . . . [N]o reasonable jury would equate an employer's decision to terminate an employee accused of harassment with condoning the employee's behavior." *Id.* at 1178, App. 48-49.

To support its ruling, the Ninth Circuit panel incorrectly held that the only issue to be considered was "whether an objective, reasonable woman would find her work environment had been altered because the employer condoned the rape and its effects." 865 F.3d at 1162, App. 12. (internal quotations and citation omitted). Addressing the dissent's argument that the panel was ignoring the "because of sex" requirement, the majority quoted from *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002) that "[b]eing raped is, at minimum, an act of discrimination based on sex. Thus, the employer's reaction to a single serious episode may form the basis for a hostile work environment claim." *Fuller*, 865 F.3d at 1166 (quoting *Little*, 301 F.3d at 968), App. 23. However, in *Little*, the court was discussing a rape that occurred in the workplace. For that reason, the "based on sex" element was satisfied by the fact that the rape occurred on the job. Conversely, the rape involved in this case occurred outside the workplace and, as determined in the unpublished opinion, did not create a hostile work environment that implicated Title VII. *Fuller*, 694 F. Appx. at 591; App. 54.

More significantly, the issue considered in *Little* was not the “because of sex” element, but “whether [the] environment [was] sufficiently hostile or abusive to violate Title VII[.]” *Little*, 301 F.3d at 967. In that regard, the *Little* court held that “[b]eing raped by a business associate, while on the job, irrevocably alters the conditions of the victim’s work environment.” *Little*, 301 F.3d at 967. Thus, the Ninth Circuit’s reference to *Little* relies upon standards that were to be applied to the “severity” element, and not the “because of sex” element.

The Ninth Circuit suggested it had not ignored the “because of sex” requirement because of “evidence of Fuller’s *male* supervisors’ solicitous treatment of the *man* whom they knew may have raped Fuller and their less solicitous treatment of the *woman* that reported the rape.” *Fuller*, 865 F.3d at 1166-1167 (emphasis in original), App. 25. However, that is not the standard created in *Oncale*, *supra*, where this Court held that harassment “because of sex” could be shown where the harasser has disparately treated the sexes. *Oncale*, 523 U.S. at 80, 118 S. Ct. at 1002. Disparate treatment claims have always required the plaintiff show that his or her employer treated them less favorably than similarly situated employee’s outside his or her protected group, which requires evidence the employer’s discriminatory actions were motivated by a plaintiff’s sex. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977);

Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000); *Philip v. Ford Motor Co.*, 413 F.3d 766, 768 (8th Cir. 2005); *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004). In this case, the unpublished opinion upheld the district court's ruling dismissing the Title VII disparate treatment claims. *Fuller*, 694 F. Appx. at 591, n. 2; App. 55. Accordingly, the majority opinion's reliance upon the disparate treatment theory discussed in *Oncale* is inconsistent with its ruling in the unpublished opinion that concluded those claims were without merit and should be dismissed.

The Ninth Circuit's erroneous emphasis upon whether Ms. Fuller would perceive supervisors who were not involved in the investigation were more supportive of Cruz without requiring evidence establishing their actions were motivated by her gender is highlighted by the scenario where, at the conclusion of an investigation into allegations of sexual harassment, the employer concludes insufficient evidence exists to sustain the complaining employee's complaints. Applying the logic expressed in the Ninth Circuit's published opinion, the fact the complaining employee may believe their employer's decision expresses support for the individual they accused of harassment would, standing alone, support a Title VII claim. The dissent recognized a Title VII claim would not arise in those situations where the complaining employee's allegations were promptly investigated and, while the investigation was ongoing, the employer took intermediate measures to ensure the complainant was not subjected to sexual harassment at work. *See Fuller*, 865 F.3d at

1177-1178; App. 48-49. *See also Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir. 2001) (an employer fulfills its obligation to take corrective action through temporary steps aimed “to deal with the situation while it determines whether the complaint is justified” and, “permanent remedial steps . . . once it has completed its investigation.”).

The Ninth Circuit’s published opinion does not require that Ms. Fuller establish the actions of her supervisors were motivated by sexual desire, animosity toward her gender or, whether they chose a course of treatment of her complaints that was different from how they treated men in similar circumstances. *See Oncale, supra*, 523 U.S. at 80, 118 S. Ct. at 1002. The panel’s reasoning clearly ignored the language of the statute as well as the elements of a hostile work environment claim as established by this Court and applied by other Circuit Courts of Appeals.



CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari. In the alternative, it should summarily reverse the decision below and reinstate the district court's entry of summary judgment in favor of the petitioner on all counts.

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