UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC,	)	
	)	
and	)	Cases. 14-CA-197985 &
	)	14-CA-208242
CHARLES ROBINSON,	)	
	)	
	)	
	)	

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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IDENTITY OF AMICUS CURIAE

The Equal Employment Opportunity Commission (EEOC or Commission) is the primary federal agency charged by Congress with administering and enforcing federal laws prohibiting employment discrimination, including, *inter alia*, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq*., and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq*.

INTRODUCTION

The National Labor Relations Board (NLRB or Board) has invited interested amici to file briefs discussing whether it should reconsider the "standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the" National Labor Relations Act (NLRA). The NLRB has invited the parties to address five questions, including "[w]hat relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act? How should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?" *General Motors LLC and Charles Robinson*, 368 NLRB No. 68, 2019 WL 4240696, at *3 (2019) (Question 5).

This amicus brief does not take a position on what standard the NLRB should use to determine when offensive statements or conduct lose protection under the NLRA. Instead, this brief will explain Title VII's prohibition on harassment based on race or sex and an employer's obligation to prevent and remedy harassment of its employees. Given that employers must address racist or sexist conduct that violates Title VII, and may need to do so even before the conduct becomes actionable in order to avoid liability for negligence, the EEOC urges the NLRB

to consider a standard that permits employers to address such conduct, including by disciplining employees, as appropriate.

STATEMENT OF THE CASE

A. Statutory Frameworks

Title VII's antidiscrimination provision makes it unlawful for an employer to 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." 42 U.S.C. § 2000e-2(a). The prohibition on discrimination as to "terms, conditions, or privileges of employment" encompasses harassment that "has created a hostile or abusive work environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (sex harassment case). Title VII also prohibits employers from retaliating against employees who oppose "any practice made an unlawful employment practice" under the statute. 42 U.S.C. § 2000e-3(a).

Section 7 of the NLRA, 29 U.S.C. § 157, sets out the rights of employees to engage in various activities:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 7 also gives locked-out employees the right to picket. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 n.10 (1965). Section 8(a) of the NLRA prohibits employers from interfering with, restraining, coercing, or discriminating against employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1)-(3). Ordinarily, an employer "must reinstate striking

employees at the conclusion of a strike." *Consolidated Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 7 (D.C. Cir. 2016).

B. Facts[1]

Charles Robinson worked as an electrician for General Motors in an automotive assembly plant and served as a union representative. *General Motors LLC and Charles Robinson, an Individual*, 2018 WL 4489341, No. 14-CA-197985 (NLRB Div. of Judges) (Sept. 18, 2018). He engaged in three outbursts while exercising his NLRA rights. First, on April 11, 2017, Robinson directed profanity at supervisor Nicholas Nikolaenko during a verbal altercation on the plant floor about overtime. *Id*. at II.B.[2] General Motors suspended Robinson for three days. *Id*.

Second, on April 25, 2017, Robinson attended a weekly meeting between union and management officials to discuss subcontracting of bargaining unit work. *Id*. at II.C. Plant manufacturing engineer Anthony Stevens and labor relations supervisor Ca-Sandra Tutt, among other managers, were present. *Id*. During the discussion, Stevens told Robinson he was getting too loud. Tutt also told Robinson he was too loud and should stop pointing at her. *Id*. When Stevens repeated that Robinson was too loud, Robinson responded, "sir, you want me to speak like this, sir, so I don't be intimidating to you?" *Id*. Robinson continued to speak loudly, and Steven again asked him to lower his voice. Robinson leaned over and said, "Yes, Master, sir. Is this what you look for, Master, sir?" *Id*. Stevens described Robinson as speaking in the tone of a slave to his master. *Id*. Tutt was offended because she was "not a slave" but Robinson was acting "like a slave." *Id*. In her view, Robinson was personally attacking Stevens and violated the

[1] These facts are taken from the NLRB's Notice and Invitation and the decision of the administrative law judge. The EEOC has not reviewed the underlying record.
[2] Because the decision lacks page numbers on Westlaw, the citations are to the relevant section of the order.

company's antiharassment policy. *Id*. Tutt issued Robinson a suspension based on being "verbally belligerent" and directing "racially inappropriate comments to members of management." *Id*.

Finally, October 6, 2017, Robinson attended a meeting on behalf of the union to discuss manpower changes and four new positions. *Id*. at II.D. The meeting became contentious. Robinson admitted that he intentionally disrupted the meeting by trying to get Stevens to leave and by playing loud music on his cell phone. *Id*. Although Robinson insisted he played country music, others at the meeting said Robinson played loud rap music by Public Enemy with "offensive lyrics," including "words such as the 'N' word, 'F—K the police' and other profanity." *Id*. Robinson also said he would "mess" Stevens up. General Motors suspended Robinson for thirty days. *Id*.

C. Decision of the Administrative Law Judge

Applying the four-factor test set forth in *Atlantic Steel*, 245 NLRB 814, 816 (1979), for workplace misconduct,[3] the administrative law judge (ALJ) found that Robinson's first outburst on April 11 retained protection under the NLRA and General Motors therefore violated the Act by suspending him. *Id*. at III.B. The second and third outbursts (on April 25 and October 6), however, lost protection under the NLRA. *Id*. at III.C., D. As to the April 25 outburst, the ALJ found that the first and second *Atlantic Steel* factors (location and subject matter of the dispute) weighed in favor of protection. *Id*. at III.C.1.,2. But the third factor (nature of the outburst) weighed against protection, the ALJ ruled, because Robinson personally attacked Stevens in a way that negatively impacted others at the meeting and rendered him unfit to perform his union

[3] The four-factor test looks at: (1) the location of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practices. *Atlantic Steel*, 245 NLRB 814, 816 (1979).

duties. *Id*. at III.C.3. The fourth factor (provocation) also weighed against protection, the ALJ concluded. *Id*. at III.C.4. Robinson's outburst lost the NLRA's protection, the ALJ ruled, because two of the four factors weighed against protection, including nature of the outburst. *Id*.

Finally, the ALJ ruled that the October 6 outburst lost its protection. *Id*. at III.D. Although the first two *Atlantic Steel* factors (location and subject matter) again weighed in favor of protection, the third and fourth factors (nature and provocation) weighed against. *Id*. The ALJ noted that the "type of language in the songs may have been commonly used on the work floor" but found that "there is no evidence that profane language was routinely used (or played) during . . . meetings between management and the Union." *Id*. at III.D.3. Citing Robinson's comment that he would "mess" Stevens up, the offensive music, and Robinson's use of profanity, the ALJ held that Robinson's conduct was "sufficiently opprobrious to weigh against protection of the Act." *Id*. The fourth factor also weighed against protection because Robinson's conduct was not provoked by an unfair labor practice. *Id*. at III.D.4. Citing the third and four factors, including nature of the outburst, the ALJ found that Robinson's conduct lost NLRA protection. *Id*.

D. General Motors' Exceptions Brief and Notice and Invitation to File Amicus Briefs

General Motors' exceptions brief urged the NLRB to overrule its precedent in *Plaza Auto Center, Inc*., 360 NLRB 972 (2014) (workplace misconduct), *Pier Sixty, LLC*, 362 NLRB 505 (2015), *enfd*. 855 F.3d 115 (2d Cir. 2017) (online misconduct), [4] and *Cooper Tire*, 363 NLRB

[4] Online misconduct is evaluated under a "totality-of-the-circumstances" test that looks at nine factors: (1) whether the record includes evidence of the employer's antiunion hostility; (2) whether the employer provoked the conduct; (3) whether the conduct was impulsive or deliberate; (4) the location of the post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the employer considered language similar to that used by the employee to be offensive; (8) whether the employer maintained a specific rule prohibiting the language; and (9) whether the discipline imposed was typical of that imposed for similar violations or was disproportionate to his offense. *Pier Sixty*, 362 NLRB at 506.

No. 194 (2016), *enfd.* 866 F.3d 885 (8th Cir. 2017) (picket line misconduct),[5] which had held that profane and racist outbursts did not lose their protection under the NLRA. In *Plaza Auto*, the NLRB held that the employee's workplace use of profanity—calling the owner a "fucking mother fucking" and an "asshole," and warning he would regret it if he got fired—did not lose its protection. 360 NLRB at 978. Similarly, in *Pier Sixty*, the NLRB found that profanity-laced Facebook posts attacking the employee's supervisor were protected under the NLRA. 362 NLRB at 506. Finally, in *Cooper Tire*, the NLRB held that the employee's use of racial slurs on the picket line—asking replacement workers who were crossing the picket line, most of whom were African-American, whether they had brought "enough KFC for everybody" and saying he smelled "fried chicken and watermelon" – did not lose its protection under the NLRA. 363 NLRB No. 194.

On September 5, 2019, a majority of the NLRB issued a Notice and Invitation to file amicus briefs. *General Motors*, 2019 WL 4240696. The Notice asks *amici* to address some or all of the following questions, paraphrased here: (1) under what circumstances should profane language or sexually or racially offensive speech lose protection; (2) whether the leeway traditionally granted Section 7 activity to account for "the realities of the industrial life and the fact that disputes over wages, hours, and working conditions" are likely to engender ill feelings and strong responses should extend to profanity or racist or sexist language; (3) whether the NLRB should continue to consider "the norms of the workplace, particularly whether profanity is commonplace and tolerated," and whether the NLRB "should consider employer work rules,

[5] The standard for evaluating picket line misconduct directed at fellow employees comes from *Clear Pine Moldings*, 268 NLRB 1044, 1046 (1984), *enfd.* 765 F.2d 148 (9th Cir. 1985), and looks at "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the NLRA."

such as those that prohibit profanity, bullying, or uncivil behavior"; (4) whether the NLRB should reconsider its standard for racially or sexually offensive language used on the picket line, and whether the picket line context is relevant; and (5) what relevance should be accorded "antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection" of the NLRA, and how should the NLRB accommodate both an employer's duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights. *Id*. at *2-3.

ARGUMENT

Employers should be able to address offensive statements or conduct that violate, or may violate, Title VII or other federal antidiscrimination laws.

A. Title VII and other federal antidiscrimination statutes.

1. Standard for a hostile work environment.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., prohibits an employer from "discriminat[ing] 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 Supreme Court has held that this prohibition encompasses harassment. *Meritor*, 477 U.S. at 65-67 (holding that Title VII's prohibition on discrimination as to "terms, conditions, or privileges of employment" encompasses discrimination that "has created a hostile or abusive work environment"), *id*. at 66 (relying on circuit decisions holding that racial harassment violates Title VII). However, not all workplace harassment is actionable. Rather, only harassment that is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment" is actionable. *Id*. at 67 (internal quotation marks and citation omitted).

Here, the Notice and Invitation focuses on race or sex-based discrimination that might violate Title VII, as this type of misconduct has arisen most often in the NLRA context. We note that Title VII also forbids discrimination based on national origin, color, and religion. 42 U.S.C. § 2000e-2(a)(1). As numerous courts have recognized, Title VII's prohibition on discrimination extends to harassment based on these protected traits as well. *See, e.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 314-15 (4th Cir. 2008) (reversing summary judgment on religious harassment claim where "[c]oworkers frequently used religious epithets or other religiously derogatory terms" and engaged in other harassing conduct); *Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796, 799-801 (8th Cir. 2003) (national origin harassment actionable where Hispanic employees were taunted about their accent and told "Hispanics should be cleaning" and "Hispanics are stupid"); *Abramson v. William Paterson Coll.*, 260 F.3d 265, 279-80 (3d Cir. 2001) (jury could find that hostility towards Orthodox Jewish professor who observed the Sabbath constituted religious harassment); *EEOC v. Pioneer Hotel, Inc.*, No. 11-1588, 2013 WL 3716447, at *3 (D. Nev. July 15, 2013) (refusing to dismiss harassment claim against Latino and/or dark-skinned employees based on national origin and/or skin color). Harassment may be based on more than one protected trait. *See May v. Chrysler Group, LLC*, 716 F.3d 963, 964-65 (7th Cir. 2013) (per curiam) (affirming verdict based on harassment that was anti-Semitic and anti-Cuban, including graffiti reading "death to the Cuban Jew" and "fuck Otto Cuban Jew nigger lover").

Two other federal antidiscrimination statutes that the EEOC enforces prohibit discrimination based on a protected trait and may be relevant to misconduct that occurs in the workplace, on social media, or on the picket line. First, the ADEA prohibits harassment based on age. *See* 29 U.S.C. § 623(a)(1) (prohibiting discrimination as to "terms, conditions, or privileges of employment" based on age); *see, e.g.*, *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 42

(2d Cir. 2019) (reversing summary judgment on age harassment claim, which included daily "age-disparaging criticisms" directed at the plaintiff); *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 442-43 (5th Cir. 2011) (evidence would support finding of age-based hostile work environment where the plaintiff's supervisor made profane, age-based references on a daily basis, displayed physically threatening behavior toward the plaintiff, and steered sales to younger salespersons). Second, the ADA prohibits harassment based on disability. *See* 42 U.S.C. § 12112(a) (prohibiting discrimination as to "terms, conditions, and privileges of employment" on the basis of disability); *see, e.g.*, *Fox v. Costco Wholesale Corp.*, 918 F.3d 65, 74 (2d Cir. 2019) (joining other circuits in holding that "claims for hostile work environment are actionable under the ADA"); *Quiles-Quiles v. Henderson*, 439 F.3d 1, 7-8 (1st Cir. 2006) (affirming jury verdict where employee's supervisors harassed him based on his disability (depression) by mocking him, making comments to other employees, and driving a truck at him while he crossed the street).

To be actionable under any statute, the harassment must be "objectively hostile or abusive" and the victim must subjectively perceive the environment as abusive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). Whether harassment is sufficiently hostile or abusive must be assessed by "looking at all the circumstances," which may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 23 (adding that "no single factor is required"). The EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(b), likewise state that the Commission

looks at the "totality of the circumstances" in determining whether sexual harassment is actionable.[6]

The totality of the circumstances may also include consideration of the harasser's status. Harassment perpetrated by a supervisor is inherently more severe than that of a coworker because of the supervisor's authority over the employee. *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 particular threatening character[.]"); *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015) (en banc) ("In measuring the severity of harassing conduct, the status of the harasser may be a significant factor—e.g., a supervisor's use of [a racial epithet] impacts the work environment far more severely than use by co-equals.") (internal quotation marks and citation omitted). However, an actionable hostile work environment can also be based on a subordinate's harassing conduct. *See, e.g., Franchina v. City of Providence*, 881 F.3d 32, 55 (1st Cir. 2018) (affirming jury's finding of a hostile work environment based on evidence that the plaintiff's subordinate subjected her to "humiliating sexual remarks and innuendos").

Harassment that an individual learns about secondhand can contribute to a hostile work environment, although harassment that occurs in the employee's presence is generally more severe. *See Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1253 (11th Cir. 2014) (where plaintiff heard about noose in breakroom but did not see it, stating that the noose "is a severe form of racial harassment, but [the plaintiff's] experience was less severe because he did not see

[6] The Supreme Court stated in *Meritor* that "these Guidelines, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (internal quotation marks and citation omitted). The principles applied in the Guidelines on Discrimination Because of Sex also "apply to race, color, religion or national origin" discrimination. 29 C.F.R. § 1604.11(a) at n.1.

it firsthand"); *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 647 n.2 (7th Cir. 2011) ("[S]econdhand harassment is less severe than firsthand harassment."). Harassment is more severe when it is directed at an individual. *See, e.g.*, *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 328-29 (4th Cir. 2010) ("[C]ommon experience teaches" that remarks that target an individual for ridicule "have a greater impact on their listeners and thus are more severe forms of harassment."). Conduct also may be more severe if it occurs in the presence of coworkers. *See, e.g.*, *Diaz*, 318 F.3d at 800-01 (noting that "other employees were sometimes present" when evaluating coworker's harassment and holding that a jury could find the harassment actionable); *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (fire lieutenant could establish a hostile work environment based on coworker's obscene and sexist comments at a meeting where she was the only woman and many men were her subordinates).

The Supreme Court has also instructed that context matters when determining whether conduct is actionable under Title VII. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998), the Supreme Court stated that the "real social impact of workplace behavior often depends on 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." The objective hostility of the harassment, the Court added, requires "an appropriate sensitivity to social context." *Id*.; *see also* 29 C.F.R. § 1604.11(b) (stating in Guidelines that whether conduct is actionable depends upon "the totality of the circumstances," including "the context in which the alleged incidents occurred").

Sensitivity to social context does not mean, however, that prevailing workplace culture negates discriminatory conduct. *Cf. General Motors*, 2019 WL 4240696, at *2 (asking in question three whether "the norms of the workplace, particularly whether profanity is

commonplace and tolerated" should be considered when determining whether an employee's outburst loses protection under the NLRA). Title VII does not have any "crude environment" exception for harassment that otherwise meets the standard. In other words, while context matters when assessing harassment, the fact that the work environment may be permeated with profanity, or other offensive language or conduct, does not negate a finding that the challenged conduct is actionable, so long as the offensive conduct is both objectively and subjectively severe or pervasive and is based on the plaintiff's protected trait. *See, e.g.*, *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 (11th Cir. 2010) (en banc) ("[A] member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct."); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008) (rejecting district court's suggestion that harassment might be discounted in environment that was "inherently coarse" and stating, "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most").

Title VII likewise lacks any so-called "blue collar" workplace exception. *Quiles-Quiles*, 439 F.3d at 7 (rejecting employer's argument that daily ridicule about plaintiff's mental impairment was not actionable because "this sort of conduct is common in blue-collar workplaces, such as a post office"). Similarly, the fact that harassment occurs in a particular kind of workplace, such a medical office, does not defeat a finding of an actionable hostile work environment. *See Fairbrook Med.*, 609 F.3d at 329 (in sexual harassment case involving comments about the plaintiff's breasts, sexual libido, and pumping of milk for her infant, rejecting the employer's argument that because "this interaction took place at a medical clinic" it

was not severe). Harassment can also be actionable even if the offensive conduct predated the plaintiff's presence in the workplace. *See, e.g.*, *Reeves*, 594 F.3d at 812-13 (female plaintiff could establish sexually hostile work environment based on vulgar, sex-based conduct, even though it began before she entered the workplace). Of course, individuals must themselves subjectively perceive the environment as hostile or abusive.

Although context matters under Title VII, there is no leeway granted employees who make racist or sexist comments because they may have heated feelings about workplace matters. *Cf. General Motors*, 2019 WL 4240696, at *2 (asking in question two whether employees' use of offensive language must be granted leeway when engaged in Section 7 activity because of the strong feelings that discussions about wages, hours and working conditions can invoke.). At least under Title VII and the statutes the EEOC enforces, *Oncale's* requirement of "appropriate sensitivity to social context" does not require employers to tolerate sexist and racist language, even if the language is used during contentious discussions about promotions, salary, transfers, and other working conditions, and even if the employer provokes the employee by confronting him about his work performance. *See Costrini v. Kroger Co. of Mich.*, No. 17-13688, slip op. at 20-21 (E.D. Mich. Sept. 10, 2019) (in ADA case, rejecting plaintiff's argument, based on NLRB precedent, that his supervisor provoked his use of profanity and stating that the doctrine of "provoked insubordination" is "unique to cases governed by the NLRA" and has not been adopted in employment discrimination cases).

Offensive conduct witnessed by an employee but directed towards others can also impact an employee's work environment and create an actionable hostile work environment. For instance, courts have held that vulgar sexual comments, gender epithets, and pornographic images of women created a hostile work environment for a female worker, even though the

conduct was not directed at her. *See Reeves*, 594 F.3d at 811 ("It is enough to hear co-workers on a daily basis refer to female colleagues as 'bitches,' 'whores' and 'cunts,' to understand that they view women negatively, and in a humiliating or degrading way. The harasser need not close the circle with reference to the plaintiff specifically: 'and you are a 'bitch,' too."). Similarly, anonymous harassment—such as a noose, anti-Semitic graffiti, or sexual graffiti—can contribute to a hostile work environment, even when the perpetrator is unknown. *See, e.g.*, *May*, 716 F.3d 963 (affirming verdict where perpetrators of racist and anti-Semitic graffiti, death-threat notes, and vandalism of plaintiff's car and bike were never identified); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1144-46 (10th Cir. 2008) (jury could find racial harassment based on conduct including bathroom graffiti and the display of a noose).

Employers may also be liable under Title VII for conduct occurring outside of work when that conduct impacts the employee's working environment. *See, e.g.*, *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-10 (1st Cir. 2002) (harasser's conduct outside the workplace helped show why his presence in the workplace created a hostile work environment). This includes harassment perpetrated on social media, particularly when the social media postings or messages concern workplace conduct. *See generally Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 63 n.4 (1st Cir. 2019) (holding that Facebook messages could be considered when determining whether conduct was based on sex, particularly where "they were about workplace conduct . . . and were sent over social media by an officer who worked in [plaintiff]'s workplace," and holding that cumulative harassment was actionable). Employees subjected on the picket line—or through social media—to racist or sexist comments or conduct outside the workplace may thus be impacted by that conduct, including when they return to work after picketing and must work alongside their harasser.

Significantly, the standard for harassment is "severe *or* pervasive." *Castleberry v. STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017). Conduct that is severe in nature may therefore become actionable if it occurs even once or twice in the workplace, while less severe conduct may become actionable if repeated often enough. *See Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) ("[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct."). Accordingly, courts have recognized in Title VII cases that even isolated uses of extremely severe racial slurs may be actionable, particularly when the harasser is a supervisor. *See, e.g.*, *Castleberry*, 863 F.3d at 265 (plaintiffs stated a harassment claim where a supervisor allegedly threatened to fire a group of workers, including the African-American plaintiffs, if they had "nigger-rigged" a fence, and stating, "[t]his constitutes severe conduct that could create a hostile work environment"); *Boyer-Liberto*, 786 F.3d at 280 (where supervisor twice called an African-American employee "porch monkey," stating that the term was "about as odious as the use of the word nigger," and holding that the conduct was sufficiently severe to be actionable); *Adams*, 754 F.3d at 1253-54 (concluding that although a Caucasian supervisor's carving of "porch monkeys" into the aluminum of a ship where he was working with the African-American plaintiff "was an isolated act, it was severe"); *Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (acknowledging that, where a supervisor "used a deeply offensive racial epithet ['nigger'] when yelling at Ayissi-Etoh to get out of the office," that "single incident might well have been sufficient to establish a hostile work environment"); *id.* at 580 (Kavanaugh, J., concurring) ("[I]n my view, being called the n-word by a supervisor—as Ayissi–Etoh alleges happened to him—suffices by itself to establish a racially hostile work environment."); *Henry v. CorpCar Servs. Houston, Ltd*., 625 F. App'x 607, 611-13 (5th Cir. 2015) (jury could find harassment that

occurred primarily over two days was sufficiently severe to create a hostile work environment where African-American employees were compared to gorillas).

Likewise, racial images in the workplace can be sufficiently severe to create a hostile work environment, even if the images are not pervasive. This includes nooses in the workplace. *See Burkes v. Holder*, 953 F. Supp. 2d 167, 179 (D.D.C. 2013) (holding that plaintiff plausibly pled a hostile work environment claim where supervisor left a monkey hanging in the office and stating, "both of the physical displays alleged to be perpetrated by a supervisor—a monkey and a noose—are powerful symbols of racism and violence against African Americans"); *see also Tademy*, 614 F.3d at 1145 (a "jury could easily find that the noose was an egregious act of discrimination calculated to intimidate African-Americans"); *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 213 (D. Mass. 2006) (in case of co-worker harassment based on the hanging of a noose, ruling that "a reasonable jury could determine that the noose incident, standing alone, was *objectively* hostile or abusive"). Other racial images can also contribute to a hostile work environment. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1303 (11th Cir. 2012) (reversing summary judgment on co-worker harassment claim where plaintiff was subjected to a racial slur, banana peels were left on his vehicle several times, he saw three coworkers wearing clothing with the Confederate flag, and coworkers threatened him while holding metal tools).

Sexually harassing conduct can also be so severe that an isolated incident, or a few incidents, can create an actionable hostile work environment. *See, e.g.*, *Gerald v. Univ. of P.R.*, 707 F.3d 7, 18 (1st Cir. 2013) (finding hostile work environment where male supervisor grabbed plaintiff's breast and made sexually suggestive noises); *La Day v. Catalyst Tech., Inc.*, 302 F.3d

475, 476, 482-83 (5th Cir. 2002) (in same-sex harassment case, finding supervisor's harassment actionable where he touched the plaintiff's anus, made a sexual comment, and spat on him).

2. Employer liability for harassment.

An employer's liability for harassment depends on whether it is perpetrated by supervisors, or by coworkers or customers.[7] In the context of *General Motors* and the situations most likely to arise before the NLRB, the coworker standard is most relevant: typically it is employees on picket lines, or employees speaking to or about managers or supervisors (in person or on social media), whose offensive language and conduct is at issue. An employer is liable for a hostile work environment created by a coworker under a negligence standard, i.e., if the employer failed to act reasonably to prevent harassment or to correct harassment about which it knew or should have known. *See Vance v. Ball State Univ.*, 570 U.S. 421, 424, 427 (2013) ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions."); *id.* at 427 & n.1 (discussing cases applying negligence standard); *Doe v. Oberweis Dairy*, 456 F.3d 704, 716 (7th Cir. 2006) (employer liable for coworker harassment if "it failed to have and enforce a reasonable policy for preventing harassment, or in short only if it was negligent in failing to protect the plaintiff from predatory workers").

[7] Employers are vicariously liable for a hostile work environment created by a supervisor when the harassment culminates in a tangible employment action, i.e., a demotion, termination, or other significant change in employment status. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762-63 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998). When supervisor harassment does not culminate in a tangible employment action, the employer may avoid liability by establishing a two-part affirmative defense: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise. *Burlington*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 807.

Under this negligence standard employers bear the obligation of preventing and correcting harassment in the workplace. Adopting and employing an effective antidiscrimination policy and complaint procedure is a key first step. *See Hollins v. Delta Airlines*, 238 F.3d 1255, 1258 (10th Cir. 2001) (existence of written harassment policy relevant to negligence analysis); *Doe*, 456 F.3d at 716 (same); *see also* Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace* ("Task Force Report") at pp. 43-45 (discussing recommendations for effective antiharassment policies, reporting procedures, and training, and emphasizing the need for employer leadership and accountability), *available at* https://www.eeoc.gov/eeoc/ task_force/harassment/report.cfm (last visited Oct. 30, 2019).

But it is also critical that employers are able to take corrective action as soon as they have notice of harassing conduct—even if the harassing conduct has not yet risen to the level of a hostile work environment. *See Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605-06 (7th Cir. 2006) (duty to prevent unlawful harassment may require employer to take reasonable steps to prevent harassment once informed of a reasonable probability that it will occur). This is because if the employer *fails* to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability. The "primary objective" of Title VII is "not to provide redress but to avoid harm." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotation marks and citation omitted). That objective is best served by encouraging employees to complain of harassing conduct even before it become actionable, so that employers can prevent an actionable hostile work environment.

The EEOC's "Guidelines on Discrimination Because of Sex," which also apply to "race, color, religion or national origin" harassment, expound on an employer's obligation to address harassment in the workplace. The Guidelines state that prevention is the best tool and advise that

employers "should take all steps necessary to prevent . . . harassment from occurring, such as . . . expressing strong disapproval" of it. 29 C.F.R. § 1604.11(f). The EEOC's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors provides additional guidance. *See* Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999) ("Vicarious Liability Guidance"), *available at* https://www.eeoc.gov/policy/docs/harassment.html (last visited Oct. 30, 2019). It further advises that to be effective an employer's antidiscrimination policy "should encourage employees to report harassment *before* it becomes severe or pervasive." *Id.* at § V.C.1. (p. 9). Although isolated instances of harassment are rarely actionable, "a pattern of such incidents may be unlawful." *Id*.

Employers should take steps reasonably calculated to end harassing conduct, although the steps they are advised to take depend upon the circumstances. The Guidance instructs that any disciplinary measures "should be proportional to the seriousness of the offense." *Id.* at V.C.1. (p. 12); *see also* 29 C.F.R. § 1604.11(f) (an "employer should . . . develop[] appropriate sanctions" to address harassment); Task Force Report at p. 43 ("Employers should ensure that where harassment is found to have occurred, discipline is . . . proportionate to the behavior(s) at issue and the severity of the infraction"). As courts have said, "the test is whether the employer's response to each incident of harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior." *Scarberry v. ExxonMobil Oil Corp.*, 328 F.3d 1255, 1259-60 (10th Cir. 2003).

Accordingly, if the harasser made "a small number of 'off-color' remarks" for the first time, "then counseling and an oral warning might be all that is necessary." Vicarious Liability Guidance at § V.C.1. (p.12). If, however, the harassment was severe or persistent, then

suspension or discharge may be appropriate, especially if prior corrective action proved ineffective. *See generally Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 343-44 (6th Cir. 2008) (separating harasser and victim insufficient where the harasser was a serial harasser and management repeatedly transferred the victims instead of taking corrective action aimed at stopping the harassment, such as training, warning, or monitoring the harasser; employer was required to take increasingly effective steps to end harassment); *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1126 (8th Cir. 2007) (stating that employer's "decision to respond to Herrera's continued harassment by decreasing, rather than increasing, its threatened sanctions may reasonably be viewed as contributing to a negligent response"). An employer may also be held liable where it delays in taking effective remedial action, even if that action ends the harassment. *See Bailey v. Runyon*, 167 F.3d 466, 467-68 (1999) (stating that "Title VII 'does not require an employer to fire a harasser'" but holding jury properly found employer liable where it prohibited the harasser from having further contact with the victim, warned him of termination if he did, and changed the harasser's assignments to avoid further contact but ignored earlier complaints).

However, if an employer uses an employee's offensive conduct as a pretext to fire or discipline that employee because of a protected characteristic, then the employer may be liable under the federal antidiscrimination statutes. *See Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (discussing disparate discipline); *Brown v. Middaugh*, 41 F. Supp. 2d 172, 185–86 (N.D.N.Y. 1999) (denying summary judgment on disparate discipline claim and stating that reasonable factfinders could determine that the employer's failure to discipline a white employee for his alleged misconduct shows that the employer "discriminated against plaintiff because he is black"). It is our understanding that similar principles apply under the NLRA. *See Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 465 (5th Cir. 2001) ("[I]f the General Counsel proves that

antiunion animus was a 'motivating factor' in an employer's decision to discharge or discipline an employee, the burden shifts to the employer to prove that the employee would have been disciplined in any event, for a valid reason."). Employers are advised to use consistent discipline to avoid allegations of disparate discipline. *See* Task Force Report at p. 43 ("Employers should ensure that discipline is consistent and does not give (or create the appearance of) undue favor to any particular individual.").

B. Employers should be able to address sexist or racist conduct.

Several decisions have held that a worker's use of racial slurs is protected under the NLRA, if made in the course of otherwise protected activity. In *Detroit Newspapers*, 342 NLRB 223, 268-69 (2004), the ALJ found that a striking worker's racial slur—"you fuckin' bitch, nigger lovin' whore"—remained protected under the NLRA. Since that ruling, the NLRB has issued several decisions finding similar racial slurs protected. *See Cooper Tire*, 363 NLRB No. 194 (2016), *enfd*. 866 F.3d 885 (8th Cir. 2017) (ordering reinstatement of striking worker who called out, "Did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon" at African-American replacement workers); *Airo Die Casting, Inc.*, 347 NLRB 810, 811-12 (2006) (striking worker did not lose NLRA's protection, despite saying "fuck you nigger" to African-American security guard). Likewise, several decisions have held that sexist language and conduct remains protected, although the circuits have not always agreed with those decisions. *See NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996) (denying enforcement of NLRB decision finding picketer's conduct protected where he carried a sign reading, "Who is Rhonda F [with an X through F] Sucking Today?"); *Fresenius USA Mfg., Inc.*, 358 NLRB 1261, 1267-68 (2012) (holding that employee's conduct remained protected where he wrote "Dear Pussies, Please Read!" on union newsletter left in a breakroom and female

employees complained), *affirming after remand*, 362 NLRB 1065 (2015) (recognizing that original NLRB decision was vacated in light of *NLRB v. Noel Canning*, 573 U.S. 513 (2014), and assuming but not deciding that handwritten note was protected but finding employee's discharge lawful based on his dishonesty).

The sex and race-based conduct in these cases may be sufficiently severe to violate Title VII, or it might violate Title VII if the conduct were to be repeated. Consequently, employers should be able to address and take corrective action vis-à-vis workers who use this kind of racist and sexist language while otherwise lawfully exercising their rights under the NLRA. For example, in our view the employer in *Fresenius* should have been able to address the female coworkers' complaint that someone had written, "Dear Pussies, Please Read!" on a union newsletter left in the breakroom. While this conduct may not have risen to the level of an actionable hostile work environment under Title VII, it could have done so were similar conduct repeated. Accordingly, once the employees reported it, the employer should have been able to address the sexually harassing conduct including, as appropriate, disciplining the employee who wrote the message. Similarly, in *Airo Die Casting*, the employer should have been able to address the striking worker's offensive conduct: saying "fuck you nigger" and flipping off an African-American security guard who was not on strike. 347 NLRB at 811, 812 (holding conduct protected under *Clear Pine Moldings* and stating that the "gestures and . . . racial slur, standing alone without any threats or violence, did not rise to the level where he forfeited the protection of the Act").

Finally, the Commission is not indicating what corrective action would be appropriate in situations like those in *Fresenius* or *Airo Die Casting*. Rather, as discussed above, remedial action should be timely and proportional to the seriousness of the offense.

C. Retaliation principles may provide a useful analogy.

In considering its standard for determining whether, or when, offensive conduct loses protection under the NLRA, the Board may find Title VII retaliation principles instructive. Title VII prohibits employers from discriminating against employees who oppose unlawful employment practices. 42 U.S.C. § 2000e-3(a). Thus, Title VII confers upon employees the right to oppose discrimination. However, the manner of the employees' opposition must be reasonable. *See Rollins v. State of Fla. Dep't of Law Enf't*, 868 F.2d 397, 401 (11th Cir. 1989) (per curiam) (stating that manner of opposition "must be reasonable" and that "otherwise protected conduct may be so disruptive or inappropriate as to fall outside [Title VII's] protections"); Enforcement Guidance on Retaliation and Related Issues ("Retaliation Guidance") at § II.A.2.b., No. 915.004 (August 25, 2016) ("Courts and the Commission balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment. For this reason, the protection of the opposition clause only applies where the *manner* of opposition is reasonable."), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. According to the Retaliation Guidance, it is not reasonable for an employee to "threaten[] violence to life or property" or to badger a subordinate into providing a witness statement or to coerce her into changing a statement. *Id*.

CONCLUSION

For the foregoing reasons, the NLRB should consider a standard that permits employers to take action to correct conduct that violates Title VII or other antidiscrimination statutes.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the limit of twenty-five pages for amicus briefs set forth in the NLRB's Notice and Invitation.

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November 4, 2019

CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that I electronically filed the foregoing brief with the NLRB on November 4, 2019, and also today served the foregoing brief via email on the parties listed below.

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