No. 21-30482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Magan Wallace,

Plaintiff-Appellant,

v.

Performance Contractors, Incorporated,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Western District of Louisiana
Case No. 2:19-CV-00649, Hon. James D. Cain, Jr.

OPENING BRIEF OF PLAINTIFF-APPELLANT MAGAN WALLACE

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October 29, 2021

No. 21-30482

MAGAN WALLACE,

Plaintiff-Appellant,

v.

PERFORMANCE CONTRACTORS, INCORPORATED,

Defendant-Appellee.

Certificate of Interested Persons

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff-Appellant

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Statement Regarding Oral Argument

Oral argument would significantly aid the Court in understanding this appeal. The first issue presented concerns which discriminatory employment practices are prohibited by Title VII—an issue frequently litigated yet the subject of confusion for employees, employers, and the lower courts. The second issue concerns imputation of liability to employers in Title VII hostile-work-environment cases. Even when courts find severe-or-pervasive harassment, as did the district court here, courts have sometimes erred in applying the Supreme Court's decisions recognizing vicarious liability for actions by supervisors, as Plaintiff-Appellant maintains occurred here. The third issue concerns retaliation for opposition to discrimination and to a hostile work environment. Oral argument would help the Court resolve each of these issues measured against the summary-judgment record.

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Introduction

Title VII of the Civil Rights Act of 1964 "tolerates no … discrimination, subtle or otherwise," in the workplace. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Plaintiff-Appellant Magan Wallace, a Louisiana construction worker, was actively precluded from working at elevation—above the ground on scaffolding and on scissor lifts—because she is a woman. She suffered unending sexual harassment. And when she challenged the discrimination and harassment, she was demoted, suspended, and discharged. Yet the district court granted her employer's motion for summary judgment on all counts.

Wallace worked for Defendant-Appellee Performance Contractors—a construction company—as the only female helper in her unit. Most days, she picked up tools, put out water coolers, rolled power cords, and otherwise kept the jobsite clean. By contrast, Performance permitted its male helpers to work at elevation next to pipefitters and welders. Wallace had worked at elevation for another employer and knew that working at elevation provided invaluable, hands-on experience crucial to her job duties and career advancement. She was eager and qualified.

But none of that mattered to Performance. Every time Wallace asked her general foreman if she could work at elevation, he said "no." Wallace couldn't work at elevation because, in his profane words, she had "tits and ass." And when workers raised their hands to volunteer for job assignments,

Wallace alone was told by one of her supervisors to put down her hand because, as a woman, she didn't "count." Over several months, Performance continued to prohibit Wallace from working at elevation because of her sex, despite her repeated complaints and pleas to be afforded job opportunities equal to those of her male counterparts.

These derogatory and objectifying remarks about Wallace, made in front of twenty to thirty coworkers during weekly meetings, contributed to a workplace suffused with sexual harassment. Another of her supervisors repeatedly asked to fondle Wallace's breasts and sent her a photograph of his genitals. Yet another coworker massaged her shoulders without her consent and told her she was in her "sexual prime." Wallace complained to her supervisors to no avail.

Because of the harassment, Wallace suffered great anxiety for which she repeatedly sought medical attention. She had trouble sleeping, ground her teeth, and was often nauseated. She took off work for an anxiety-related doctor's appointment in August 2017 and, the next day, was suspended without pay, though she had no prior reprimands of any kind. Soon after, she was fired. To this day, because of her anxiety, Wallace avoids crowds and public places.

Wallace sued Performance for violating Title VII's antidiscrimination and antiretaliation provisions. The district court granted Performance's motion for summary judgment. It found that Performance's determined effort to

prevent Wallace from working at elevation—though based on her sex—was not a so-called "adverse employment action" and thus not actionable under Title VII. The court also ruled that Performance was not liable for the hostile work environment created and maintained by its supervisors, even while holding that the harassment suffered by Wallace was severe or pervasive. Finally, the court held that Wallace's opposition to the harassment and discrimination was not protected activity under Title VII and, thus, could not support a claim under the Act's antiretaliation provision.

If affirmed, the impact of the district court's opinion would be stunning in its breadth and in its affront to the equal-opportunity principles enshrined in Title VII. An employer could lawfully assign or withhold job duties on the basis of any protected characteristic, whether it be sex, race, color, religion, or national origin. Performance could favor any group of workers and allow them to practice their trade in the scaffolding, while forcing the disfavored group to stay on the ground to clean up after them. Then, it could fire anyone with the courage to oppose its discrimination. That cannot be right. This Court should reverse.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 2000e-5(f)(1). Summary judgment was entered against Plaintiff-Appellant Magan Wallace as to all claims and all parties on July 12, 2021.

Wallace filed a notice of appeal on August 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

Title VII of the Civil Rights Act of 1964 prohibits discrimination because of an employee's sex with respect to all "terms, conditions, or privileges of employment" and retaliation against employees who oppose discrimination. *See* 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a).

Performance repeatedly prohibited Magan Wallace from working at elevation because she is a woman. During her employment, a supervisor asked to fondle Wallace's breasts and sent her a photograph of his genitals, another employee massaged her shoulders without her consent, and others told her she couldn't work at elevation because, as one supervisor repeatedly put it, she had "tits and ass." Performance did nothing in response. Wallace objected to all of this debasement, again without response. Afterward, she was suspended and discharged.

The district court erred in applying the summary-judgment standard with respect to the three issues presented in this appeal:

1. Title VII discrimination. Whether there is a genuine dispute as to any material fact that Performance took adverse actions against Wallace, thus discriminating against her in the "terms, conditions, or privileges of employment" because of her sex in violation of Section 703(a)(1) of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1).

2. Hostile work environment. Whether there is a genuine dispute as to any material fact that Performance employees and supervisors created an unlawful hostile work environment imputable to Performance. *See* 42 U.S.C. § 2000e-2(a)(1).

3. Retaliation. Whether there is a genuine dispute as to any material fact that Performance retaliated against Wallace because she opposed both Performance's practice of prohibiting women (including Wallace herself) from working at elevation and its employees' sexual harassment in violation of Section 704(a) of the Civil Rights Act, 42 U.S.C. § 2000e-3(a).

Statement of the Case

In 2017, Plaintiff-Appellant Magan Wallace was hired by Defendant-Appellee Performance Contractors, a construction company, to work at a chemical manufacturing complex known as the Sasol project. ROA.160, 164. Wallace sued Performance for violations of Title VII. This appeal arises from a grant of summary judgment to Performance. As the district court should have done, this Court must "view all evidence in the light most favorable to the non-moving party"—here, Wallace—"and draw all reasonable inferences in that party's favor." ROA.1486 (RE.14).

In this section, we first describe Performance's employment structure. We then discuss Performance's discrimination, harassment, and retaliation against Wallace. Finally, we recount the proceedings below.

I. Performance Contractors

Performance's employees fall into different classifications, two of which are particularly relevant. Laborers support the other employees by doing paperwork and cleaning. ROA.589. Helpers are classified above laborers and have more responsibilities. ROA.638-39. Helpers follow craftsmen, such as pipefitters or welders, around the construction site, assisting them where they work—on the ground or at elevation. ROA.603 (RE.66).

Performance assigned male helpers to work next to and learn from skilled pipefitters and welders at elevation based on various factors, including prior experience and expressed interest. ROA.630. According to Performance's job descriptions, both laborers and helpers are qualified to work at elevation, involving above-ground work on "the racks" (scaffolding). ROA.638-39. In practice, however, laborers were not permitted to work at elevation. ROA.592 (RE.55).

Experience working at elevation helps employees learn how to work at heights and navigate construction obstacles. ROA.564. Although Performance offered training and certification programs for its employees to gain skills, most Performance employees learn their craft through on-the-job training. ROA.466 (RE.31); ROA.591. Indeed, personnel records of three male helpers who worked at elevation on the Sasol project do not indicate that any of them completed formal training or certification courses. ROA.194, 198, 204, 497.

II. Wallace experienced discrimination, harassment, and retaliation at Performance.

Performance initially hired Wallace in December 2016. ROA.148, 160. She was laid off in April 2017 in a reduction in force but was soon rehired as a helper on the Sasol site based on the recommendation of Matthew Gautreau, her previous supervisor and a Sasol area manager, and Luke Terro, another of Wallace's previous supervisors and a Sasol superintendent. ROA.149, 164, 463, 558. Gautreau testified that Wallace's helper position was a promotion from her previous position with Performance. ROA.558. As a helper, Wallace's job was to "assist in maintenance and construction" at the Sasol jobsite. ROA.638. She was the only female helper in her area. ROA.565.

Gautreau broadly managed the personnel and safety in one area of the Sasol worksite. ROA.556. Gautreau found Wallace to be a "great asset to have on the job." ROA.558. Wallace's husband, Kris Tapley, was her direct supervisor, but Wallace was also supervised by Tapley's supervisor, general foreman Charles Casey, and his superior, Terro. ROA.463-64, 559.

A. Performance's sex-based discrimination

Prior to working at Performance, Wallace had worked at elevation for another construction company. ROA.466 (RE.31). Wallace wanted to advance her skills and career by working at elevation at Performance. ROA.465-66 (RE.30-31).

Soon after starting at Performance, Wallace was told that she was not allowed to work at elevation because she is a woman. ROA.467 (RE.32).

Casey told her weekly, in front of her co-workers, that she could not work at elevation because she had "tits and an ass." ROA.467 (RE.32). Casey testified that "females" were not allowed "on the rack" and that Performance did not have harnesses that fit women. ROA.595 (RE.58).

At weekly safety meetings, Casey would ask helpers to raise their hands so that he could assign them work. When Wallace raised her hand to work assignments at elevation, Casey told her she did not "count" because she was a woman and had "tits and an ass." ROA.467 (RE.32). Casey acknowledged at his deposition that "I very easily could have said, due to tits and an ass, no female is allowed in the rack." ROA.595 (RE.58).

Wallace also saw text messages and overheard conversations between Terro and Tapley stating that Project Manager A.C. Ferachi, who was "over the entire project," ROA.590, did not want women working on the project, ROA.464-65 (RE.29-30); ROA.544. Wallace knew women that would want to work on the Sasol project and was told that Ferachi did not want any more female employees. ROA.466 (RE.31).

Wallace approached both Gautreau and Terro multiple times to complain that Casey was preventing her from working at elevation because she is a woman. ROA.467-68 (RE.32-33). But, still, Performance permitted only male employees—several male helpers and at least one male *laborer* (that is, a man in a position *below* Wallace's)—to work at elevation. ROA.496-97.

At times, Performance needed more helpers to work at elevation, and Wallace wanted to help and was available. ROA.470 (RE.35). In rejecting her requests to work at elevation, Performance was adamant in maintaining its discriminatory practice rather than allowing Wallace to assist her team. Wallace was eventually permitted to work briefly on a scissor lift, but only after Casey was sure that her husband, Tapley, did not have a problem with the way her "tits and ass" looked in a harness. ROA.468 (RE.33). But after Performance's upper management saw Wallace on the scissor lift during a walk-through of the site, Terro was told not to let it happen again because Performance did not want women at elevation. ROA.471-72 (RE.36-37).

B. Harassment, Wallace's complaints, and Performance's complicity

Casey's "tits and ass" comments were part of a broader atmosphere of persistent sexual harassment by Wallace's supervisors and coworkers.

1. Casey's incessant lewd comments and Wallace's complaints

Beyond his weekly "tits and ass" comments, Casey once told a group of workers including Wallace that he needed "a bucket of blowjobs." ROA.480 (RE.45). When asked at deposition whether he ever said that, he responded, "I could've said that within [Wallace's] earshot," noting that his comment was "funny." ROA.598 (RE.61). He admitted that "in a construction setting you are not always looking over your shoulder to see who you are going to offend." ROA.598 (RE.61).

Wallace complained about Casey's comments to Terro and Gautreau several times. ROA.467-68 (RE.32-33). When Casey eventually relented and permitted Wallace to work on the scissor lift for three days, he nonetheless continued to publicly objectify and demean her. ROA.468, 470 (RE.33, 35).

2. Terro's pornographic message and sexual assault, and Wallace's complaints

In June 2017, Terro texted Wallace a picture of his genitals while they were both at work. ROA.475 (RE.40). The accompanying message asked Wallace to send him a picture of her chest. ROA.478 (RE.43). Wallace "was upset by it. I was distraught by it. I was in shock." ROA.478 (RE.43). Coworker Lynn Plumer took Wallace aside and asked her what happened; she, too, was shocked to hear about the photo. ROA.477 (RE.42). Wallace never replied, instead deleting the message "[i]mmediately." ROA.476 (RE.41). Later, Terro approached Wallace, saying that it took "guts to send that" message to her. ROA.479 (RE.44). She shrugged, unsure how to respond. ROA.479 (RE.44). Several times the following month, Terro again approached Wallace and asked to grab and squeeze her breasts, which she dismissed. ROA.475 (RE.40).

Performance's harassment and retaliation procedures suggest that employees should report to the human resources department, ROA.642, or to their supervisors, ROA.173, 643. Initially, Wallace was too shocked to report Terro to human resources. ROA.478 (RE.43). Wallace was concerned, as well, that her report would be ineffective: "What is supervision going to

do if I've been reporting my other issues in the field and they haven't helped me or backed me, why would they back me now?" ROA.478 (RE.43). Instead, Wallace reported Terro's conduct to her immediate supervisor, Tapley. ROA.541. Tapley tried to contact Performance's human resources department to report Terro's conduct, but no one ever called back. ROA.542.

3. Laprairie's assault and Wallace's report

Also in June 2017, Wallace was sweeping the work area when Charles Laprairie, a welder, crept up behind her. He asked how old she was, and when Wallace responded, Laprairie replied that Wallace's age put her in her "sexual prime." ROA.479 (RE.44). Wallace shook her head, dumbfounded, walked away, and sat down. ROA.479 (RE.44).

But Laprairie persisted: "[H]e come up behind me and started grabbing, massaging my shoulders and it just shocked me because I didn't see him coming." ROA.479 (RE.44). General Foreman Justin Quebodeaux witnessed the incident, as did another of Wallace's coworkers. ROA.479 (RE.44). Wallace immediately reported Laprairie to Tapley, her supervisor, who then talked to Quebodeaux and Casey. ROA.479 (RE.44). Terro and Gautreau, too, learned about the incident and asked Wallace about it. ROA.479 (RE.44).

4. Performance's complicity and indifference

But Performance did nothing. Both Terro and Gautreau knew about the continuous harassment. After all, Terro was one of the harassers, and both attended regular safety meetings where Casey harassed Wallace. ROA.546.

Still, Casey's harassment continued. ROA.467-68 (RE.32-33). And Gautreau knew that Terro had an unsavory reputation at Performance. When asked whether he was surprised by the allegations against Terro, he replied, "No." ROA.571. And when asked, "Why?," he responded, because Terro is a "throwed off little dude." ROA.571. But, again, the record contains no evidence that Performance ever disciplined Terro. Further, Terro and Gautreau told Wallace they would reprimand, suspend, and transfer Laprairie, but they never did. ROA.480 (RE.45). According to Gautreau, the incident never "got resolved." ROA.568. Indeed, according to Laprairie's separation notice, he later voluntarily quit "to make more money." ROA.695.

In fact, Performance supervisors were often complicit in or responsible for the harassment-saturated atmosphere. Quebodeaux and other male employees, for example, once pulled down their pants in front of Wallace on the jobsite. ROA.488 (RE.53). Area Manager Gautreau was there, ROA.488 (RE.53), but, as far as the record shows, Gautreau never disciplined the employees. Even Ferachi, the project manager, once commented to Tapley about a female employee: "[H]ave you ever seen her chest[?] … [W]ell, you ought to, they are nice." ROA.546.

C. The daily torment had serious and enduring effects.

Because of her harassment at Performance, Wallace suffered worsening anxiety and depression. ROA.482 (RE.47). Wallace sought medical attention for her symptoms in July and August 2017. On July 10, Wallace reported

depression and anxiety to a doctor. ROA.686. She was prescribed one set of medications to treat her anxiety; however, she had a severe allergic reaction that twice sent her to the emergency room. ROA.481 (RE.46). On August 16, Wallace again saw a doctor who prescribed her a new medication. ROA.684. That one didn't help either. ROA.482 (RE.47).

Wallace testified that, after her separation from Performance in August 2017, she continued to suffer physical and social effects of the anxiety and depression: "I have trouble sleeping. I grind my teeth, grit my teeth…. I pretty much stay at home. I don't go anywhere, usually, without [Tapley]…. My stomach stays upset a lot." ROA.482 (RE.47).

D. Wallace's suspension, resignation, and firing

Before Wallace took off for her August 16, 2017 doctor's appointment, she called in to alert Performance that she would be absent that day. ROA.485-86 (RE.50-51).

Wallace had missed work before, including for visits to physicians trying to treat her anxiety and depression, ROA.678-86. Still, she was an asset on the job. ROA.562, 570. To deal with lateness or absenteeism, Performance had a "progressive," or three-strike, discipline policy. ROA.640. Employees were supposed to receive a verbal warning for the first offense, a written warning for the second, and a suspension or possible termination after the third. ROA.640.

When Wallace missed one day of work for her August 16 appointment, however, she was immediately suspended for three days without pay. ROA.648 (RE.67). Wallace's suspension notice shows that she received her verbal and written warnings on the same day she was suspended, yet she had never been warned that another absence could lead to discipline. ROA.648 (RE.67). Terro signed the suspension notice, ROA.648 (RE.67), and Casey testified that he may have weighed in on the suspension decision, ROA.600 (RE.63). In a declaration, Gautreau also claimed that he recommended the suspension. ROA.273.

Wallace tried to call Performance's human resources department about her suspension several times, ROA.305-06, but was able only to leave a message. ROA.487 (RE.52). No one ever returned her calls. ROA.487 (RE.52). Wallace even visited the human resources department's office in person but was told that no one was available to help. ROA.487 (RE.52). The day before Wallace was suspended, Tapley learned that he would be fired for absenteeism. ROA.540. Though Tapley was able to contact human resources, Terro told Tapley that he had "opened a can of worms" by getting HR involved. ROA.540. Performance fired Tapley soon after. ROA.540.

For Wallace, working at Performance had become "beyond a nightmare." ROA.687. She sent Performance a resignation letter near the end of August 2017, which Performance maintains it never received. ROA.487 (RE.52). Performance formally fired Wallace the next month, asserting that she had

excessive absences and had failed to report. ROA.645. Terro signed the separation notice. ROA.645.

III. Procedural background and decision below

After receiving a right-to-sue notice from the EEOC, ROA.30, Wallace sued Performance under Title VII. ROA.10-27. She raised claims of sex discrimination, sexual harassment, and retaliation. Following discovery, the district court granted Performance's motion for summary judgment on all claims.

A. As to Wallace's discrimination claim, the district court held that Performance's refusal to allow Wallace to work at elevation was not an "ultimate employment decision," which this Court views as an essential element of a Title VII discrimination claim. ROA.1488-89 (RE.16-17). Although this Court construes "ultimate employment decisions" to include demotions, including some that do not result in a change in compensation, *see Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014), the district court rejected Wallace's argument that the material limitations on her job duties amounted to a demotion. ROA.1489 (RE.17). Because Wallace was asked to perform certain tasks that are included in the written job description for both the helper and laborer positions, and in the absence of "more concrete evidence" of a pay cut, the court held that she could not have been demoted. ROA.1489 (RE.17). The court did not consider how responsibilities were actually divided between the two positions on the jobsite, ROA.1489 (RE.17),

and it did not address the thrust of Wallace's argument: that the demotion occurred because she was prohibited from performing important job tasks—namely, working at elevation. ROA.21.

Instead, the court characterized Wallace's claim as an allegation that Performance denied her training. According to the court, she could not succeed on that theory because she did not produce more than "tangential evidence" that the failure to train would "have impacted her compensation or job title." ROA.1489 (RE.17).

B. Turning to Wallace's hostile-work-environment claim, the court held that Wallace's "workplace harassment" satisfied the severe-or-pervasive standard required for Title VII liability. ROA.1490-93 (RE.18-21). According to the court, however, Wallace could not impute liability to Performance based on its employees' severe misconduct. The court stated, without further explanation, that Wallace had not shown a nexus between the harassment perpetrated by her supervisors—Terro and Casey—and a "tangible employment action," which would automatically impose liability on Performance. ROA.1494 (RE.22).

Given the purported absence of a nexus, the court applied the *Ellerth*/*Faragher* test—an affirmative defense that allows employers to avoid liability for harassment committed by supervisors in limited circumstances. To make out the defense, the employer must show both that it exercised reasonable care to prevent and promptly correct any sexual harassment and

that the employee unreasonably failed to take advantage of any available procedures for dealing with sexual harassment. ROA.1494 (RE.22); *see Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). The court determined that Performance could escape liability for its supervisors' serious misconduct because it satisfied both prongs and no reasonable jury could conclude otherwise. ROA.1494-95 (RE.22-23).

The court did not address at all whether Laprairie's harassment could be imputed to Performance. ROA.1489-95 (RE.17-23).

C. The district court rejected Wallace's retaliation claim, concluding that Wallace had not "opposed" an action made unlawful under Title VII. ROA.1495-98 (RE.23-26). The court maintained that Wallace had failed to oppose Terro's and Casey's sexual harassment, as well as Performance's sex-based discrimination. ROA.1496 (RE.24). The court did not address Wallace's refusal to comply with Terro's demand for a nude photograph of herself, her affirmative rejection of Terro's request to fondle her, or her complaints to Terro and Gautreau about Casey's refusals to let her work at elevation (all discussed above, at 7-11). ROA.1251-52. And, although the court recognized that Wallace had opposed Laprairie's conduct, it held that the retaliation claim failed because, in its view, Wallace could not have "reasonably believed" that his conduct—massaging Wallace and remarking

to her that she was in her "sexual prime"—was actionable under Title VII. ROA.1498 (RE.26).

Summary of Argument

I. Performance violated Title VII when it prevented Wallace from working at elevation because of her sex. Wallace presented more than sufficient evidence to surmount summary judgment, including direct statements from her supervisor that she was not allowed to work at elevation because she is a woman and because she had "tits and ass." Performance's sex-based discrimination demoted Wallace "with respect to" the "terms, conditions, and privileges" of Wallace's employment under this Court's precedent and Title VII's broad language. 42 U.S.C. § 2000e-2(a)(1).

II. Wallace's hostile-work-environment claim also surpasses any possible summary-judgment barrier. Performance's employees, including its supervisors, persistently harassed Wallace, subjecting her to severe-and-pervasive abuse because she is a woman. Performance is liable for this hostile environment because it negligently failed to respond to the harassment, even though it knew or should have known about it. Moreover, Performance is vicariously liable because its supervisors were responsible for much of the harassment and for the resulting tangible employment actions taken against Wallace. Performance cannot escape liability through the *Ellerth*/*Faragher* defense even if we assume (counterfactually) that its supervisors had not taken tangible employment actions against Wallace.

III. A reasonable jury could find that Performance retaliated against Wallace for opposing conduct she reasonably believed was unlawful. Wallace complained to her supervisors about the harassment and discrimination, consistently requested to work at elevation, rejected Terro's requests to "grab and squeeze" her breasts, and, after Terro sent Wallace a picture of his genitals, did not capitulate to Terro's demand that she reciprocate by sending him a photo of her chest. Because of her opposition, Wallace was demoted, suspended, and discharged—each an adverse action. Performance has failed to show nonpretextual reasons for deviating from its discipline policy in suspending Wallace and for preventing Wallace from working at elevation.

Standard of Review

The Court reviews a grant of summary judgment de novo, "viewing all the facts and evidence in the light most favorable to the non-movant." *Badgerow v. REJ Props., Inc.*, 974 F.3d 610, 616 (5th Cir. 2020). Summary judgment is appropriate only when there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). When a reasonable jury could return a verdict for the nonmoving party on the summary-judgment record, summary judgment is inappropriate. *Badgerow*, 974 F.3d at 616.

Argument

A reasonable jury could conclude, based on the summary-judgment record, that Performance discriminated against Wallace with respect to her

"terms, conditions, or privileges of employment" because of her sex, maintained a hostile work environment, and retaliated against Wallace for opposing that discrimination and harassment. The district court incorrectly found otherwise after overlooking material disputed facts, impermissibly drawing inferences in Performance's favor, and misapplying this Circuit's law.

I. Performance discriminated against Wallace because of her sex in violation of Title VII with respect to the "terms, conditions, or privileges" of her employment.

A reasonable jury could easily find that Performance discriminated against Wallace when it prevented her from working at elevation because she is a woman. Wallace provided ample evidence, which must be taken as true at the summary-judgment stage, that Performance (1) "discriminated against" her "because of sex" (2) with respect to the "terms, conditions, and privileges of [her] employment." 42 U.S.C. § 2000e-2(a)(1). Accordingly, summary judgment on Wallace's discrimination claim should be reversed and the case remanded for trial.

A. Wallace presented more than sufficient evidence of discrimination under the summary-judgment standard.

Under Title VII, Wallace may prove discrimination through direct or circumstantial evidence. *See Etienne v. Spanish Lake Truck & Casino Plaza, LLC*, 778 F.3d 473, 475 (5th Cir. 2015). Wallace provided more than sufficient direct evidence because "no inference [is] required to conclude that [she] was

treated differently because of her sex." *Herster v. Bd. of Supervisors of La. State Univ.*, 887 F.3d 177, 185-86 (5th Cir. 2018). Though circumstantial evidence need not be considered here, the record is also sufficient on that score under the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

1. Performance's statements are direct evidence of discrimination.

As noted, "[d]irect evidence is evidence which, if believed, proves the fact without inference or presumption," *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993), and includes any statement "showing a discriminatory motive on its face." *Herster*, 887 F.3d at 185.

In *Portis v. First National Bank of New Albany*, 34 F.3d 325, 326 (5th Cir. 1994), for instance, a supervisor's statements that the plaintiff "wouldn't be worth as much as the men would be to the bank" and that "she would be paid less because she was a woman" constituted direct evidence of discrimination. Here, as in *Portis*, Casey prevented Wallace from working at elevation because she had, in his words, "tits and ass." As Casey put it, "females stay on the ground." ROA.469-70 (RE.34-35). To Performance, because Wallace is a woman, she didn't "count." ROA.467 (RE.32).

And that's not all. Terro told Wallace that Performance did not want to see women working at elevation. ROA.471 (RE.36). Wallace also heard conversations between the general foremen in which they stated that the project manager, Ferachi, did not want women to be on the project. ROA.464

(RE.29). Eventually, Casey allowed Wallace to work at elevation very briefly, and then only because her husband allowed it. ROA.467 (RE.32). Because these statements must be taken as true at summary judgment, no inference is required to conclude that Wallace's supervisors prevented her from working at elevation because of her sex, and Performance has offered no alternative explanation for its actions.[1]

2. Though reversal is required under a direct-evidence regime, which applies here, reversal is also required under the *McDonnell Douglas* circumstantial-evidence test.

Even if (counterfactually) this case depends on circumstantial evidence to resist summary judgment, Wallace can establish a prima facie case of sex discrimination under the *McDonnell Douglas* burden-shifting framework, because (1) she is a member of a protected group, (2) she was qualified for the position, (3) she suffered an adverse employment action, and (4) similarly situated employees outside of her protected group were treated

[1] Once a plaintiff presents direct evidence of discrimination, an employer may seek to avoid liability by establishing that the same decision would have been made regardless of the discrimination. *See Brown*, 989 F.2d at 861. But here, Performance maintained only that preventing Wallace from working at elevation was not an "adverse employment action." ROA.119-23 (Performance's summary-judgment brief); *see infra* Part I.B. (at 24-31) (showing that Performance's conduct is actionable under Title VII because it relates to the terms, conditions, and privileges of Wallace's employment).

more favorably. *See Nasti v. CIBA Specialty Chems. Corp.*, 492 F.3d 589, 593 (5th Cir. 2007).[2]

The burden of establishing a prima facie case is "not onerous." *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). Performance does not dispute that Wallace was a member of a protected class (female) and was qualified for her position. ROA.118-27. Wallace also provided examples of several similarly situated male helpers who were permitted to work at elevation. ROA.443. Even a male *laborer*, an employee ranked *below* Wallace, was permitted to work at elevation, though his position should have precluded him from doing so (according to Casey). ROA.446. Performance suggested that these employees' respective experiences distinguished them from Wallace; however, it did not offer any evidence that the male employees' experience in construction accounted for the favoritism they received. ROA.123-27. To the contrary, as Casey and others made clear, Wallace was prohibited from working at elevation simply because she is a woman. ROA.467 (RE.32).

Because Wallace has established a prima facie case, the burden shifts to Performance to produce a legitimate, non-discriminatory reason for its actions. *Nasti*, 492 F.3d at 593. As discussed above (at 22), Performance has

[2] That Wallace suffered an adverse action is discussed below in Part I.B (at 24-31).

not articulated any legitimate, non-discriminatory reason for preventing Wallace from working at elevation.

B. Performance's conduct affected the "terms, conditions, or privileges" of Wallace's employment and, thus, was actionable under Title VII.

The district court did not address, let alone question, the ample evidence of explicit, sex-based discrimination against Wallace discussed above. Instead, it granted summary judgment to Performance on Wallace's sex-discrimination claim solely on the basis that Performance did not take a so-called "adverse employment action" against her. ROA.1487-89 (RE.15-17). On this record, a reasonable jury could easily find that Wallace suffered actionable harms under this Court's precedent: a demotion and a denial of training.

1.a. As in any case of statutory construction, the analysis must begin with the statute's words. *United States v. Maturino*, 887 F.3d 716, 723 (5th Cir. 2018). The "[t]ext is the alpha and the omega of the interpretive process." *See id.* The statute's words here do not limit prohibited employer conduct to "adverse employment actions" or "ultimate employment decisions," but state only that employers may not "discriminate" because of sex "with respect to" the "terms, conditions, or privileges" of employment. 42 U.S.C. § 2000e-2(a)(1).

Those words, taken together, "evince[] a congressional intent to strike at the *entire spectrum* of disparate treatment of men and women in

employment." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (emphasis added). Put differently, "terms, conditions, or privileges of employment" comprise all of "the 'incidents of employment' or [conduct] that form 'an aspect of the relationship between the employer and employees.'" *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (citations and footnote omitted); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62 (2006) ("terms, conditions, or privileges of employment" are all the attributes of the employer-employee relationship that "affect employment or alter the conditions of the workplace").

Though "[i]t's not even clear that we need dictionaries to confirm what fluent speakers of English know," *Threat v. City of Cleveland*, 6 F.4th 672, 677 (6th Cir. 2021) (Sutton, J.), definitions of the words "terms," "conditions," and "privileges" contemporaneous with Title VII's enactment are, not surprisingly, confirmatory. "Terms" are defined as "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third Dictionary 2358 (1961). A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third Dictionary 473 (1961). And, finally, a "privilege" is "a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third Dictionary 1805 (1961).

A shift schedule is (of course) a "term" and "privilege" of employment because "[h]ow could the *when* of employment not be a *term* of employment?" *Threat*, 6 F.4th at 677. If *when* an employee works is a "term, condition, or privilege," *see id.*, then *where* an employee works and *what* they do there (here, assisting pipefitters at elevation) must be as well. Put otherwise, as the EEOC instructs, "job assignments and duties" are "terms, conditions, and privileges of employment." EEOC Compliance Manual, § 613.1(a), 2006 WL 4672701 (2009).

In sum, working at elevation is a job requirement for helpers and fits comfortably within these broad definitions of "terms, conditions, or privileges" of employment. It is a "term" or "condition" because it was listed on the "helper" job description for which Wallace was hired. It was thus a "proposition" offered for the acceptance of the job and a "requisite" of the job once Wallace was in the position. And, because Performance only permitted a limited number of employees to work at elevation, working at elevation at Performance was a "peculiar right" or "benefit" and therefore a "privilege" of employment.

b. Title VII's enactment record underscores the breadth of "terms, conditions, or privileges of employment." Congress borrowed sweeping language from the National Labor Relations Act (NLRA) in drafting Title VII. *See Hishon*, 467 U.S. at 76 n.8. Like Section 703(a)(1) of the Civil Rights Act of 1964, Section 8(d) of the NLRA uses the phrase "terms and conditions,"

29 U.S.C. § 158(d), connoting an expansive set of mandatory subjects of collective bargaining, including transfers, *e.g.*, *Gruma Corp.*, 350 NLRB 336, 336 (2007), work rules, *e.g.*, *Virginia Mason Hospital*, 357 NLRB 564, 566 (2011), and safety practices, *e.g.*, *Public Service Company of New Mexico*, 364 NLRB No. 86, slip op. at 5-6 (2016).

Similarly, NLRA Section 8(a)(3) makes "discrimination in regard to … any term or condition of employment" to encourage or discourage membership in a labor organization unlawful. 29 U.S.C. § 158(a)(3). Employers can violate this provision by causing even "comparatively slight" changes to employee "terms and conditions." *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240, 1249 (8th Cir. 1982); *see also, e.g.*, *Wendt Corp.*, 369 NLRB No. 135, slip op. at 3, 17 (2020) (finding discriminatory the employer's reassignment of a welder to work using a saw, despite no change in compensation). "[T]here is little doubt" that even a one-day transfer with no loss of pay or benefits is a "term or condition" under the NLRA. *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991).

For all of these reasons, the job duty at issue here—working at elevation—is a "term, condition, or privilege" of employment under Title VII.

2.a. A demotion is actionable under this Circuit's precedent. *See Sharp v. City of Hous.*, 164 F.3d 923, 933 n.21 (5th Cir. 1999); *Weidinger v. Flooring Servs. Inc.*, 178 F.3d 1290, 1290 (5th Cir. 1999). For an employee to suffer a demotion, the employer need not formally reassign the employee. An employer's

action is a demotion when the employee's work becomes "less prestigious or less interesting or provid[es] less room for advancement," *Alvarado v. Texas Rangers*, 492 F.3d 605, 613 (5th Cir. 2007), or results in a "significant diminishment of material responsibilities," *Thompson v. City of Waco*, 764 F.3d 500, 504 (5th Cir. 2007); *see Schirel v. Sokudo USA, LLC*, 484 F. App'x 893, 898 (5th Cir. 2012).

Preventing Wallace from working at elevation provided her with "less room for advancement." *Alvarado*, 492 F.3d at 613. Her supervisors—Gautreau and Casey—acknowledged that helpers are more valuable when they can work at elevation. ROA.564; ROA.603 (RE.66). Working at elevation also offered employees with opportunities for learning important skills. ROA.564 (Gautreau deposition). By prohibiting Wallace from working at elevation, her supervisors prevented her from learning more complex tasks and the skills of craftsmen who worked at elevation. Working at elevation was also prestigious because only a select group of qualified workers were permitted to do so. ROA.961-62.

The district court erroneously rejected Wallace's claim that she was demoted because all the tasks she was completing at Sasol were within her job description. ROA.1489 (RE.17). The court reasoned that, because the job descriptions of both helpers and laborers shared cleaning duties, Wallace was not demoted when she was relegated to completing only those tasks. ROA.1489 (RE.17). But the commonalities between the job descriptions of

helpers and laborers are not relevant to whether Wallace was demoted. Instead, and as unaddressed by the district court, the question is what actually distinguishes the two job positions in practice—what tasks Wallace was assigned and what tasks she was prevented from doing.

A hypothetical helps illustrate. At a restaurant, if the job descriptions for "kitchen staff" and "dishwasher" both include cleaning, but the kitchen staff also is in charge of food preparation, preventing a kitchen-staff employee from food preparation and demanding that she only clean dishes constitutes a demotion. The similarities in the job descriptions would be irrelevant, because what distinguishes the kitchen-staff employee from the dishwasher is her role in preparing food. At Performance, working at elevation distinguished helpers from laborers because of Performance's practice of preventing laborers from working at elevation. *Cf.* ROA.592 (RE.55) (Casey's testimony that, in his recollection, Wallace must have been a laborer because she was not permitted to work at elevation). Thus, by preventing Wallace from working at elevation, Performance demoted her to laborer.

b. The district court also erred by holding that Performance's failure to train Wallace was not actionable. Even if, as this Court has held, a failure-to-train claim is actionable under Title VII only when the plaintiff can show more than "tangential evidence of a potential effect on compensation," *Brooks v. Firestone Polymers, LLC*, 640 F. App'x 393, 397 (5th Cir. 2016), Wallace has easily met that standard at the summary-judgment stage.

The district court erroneously viewed the facts in Performance's favor—exactly the opposite of what the summary-judgment standard demands—and found that Wallace's testimony that it was "common knowledge" that individuals were trained through hands-on experience was "mere speculation that limitations on her duties impacted her compensation or her job title." ROA.1489 (RE.17). The district court's understanding runs headlong into the record evidence, which shows more than "tangential evidence," *Brooks*, 640 F. App'x at 397, that on-the-job experience in the construction field leads to promotion and job advancement. Indeed, two of Wallace's supervisors testified that a helper who was able to work at elevation is more valuable than a helper who was not. ROA.564; ROA.603 (RE.66).

In contrast to cases where this Court has rejected failure-to-train claims because the training was peripheral to the main duties of the employee, *see Munoz v. Seton Healthcare, Inc.*, 557 F. App'x 314, 320 (5th Cir. 2014), here, receiving additional training at elevation was central to Wallace's duties as a helper. Helpers gain skills by accompanying pipefitters, and Wallace was prevented from working with the pipefitters who worked above ground, thus losing valuable training experience. ROA.603 (RE.66). Thus, Wallace's own testimony, as well as the testimony of two of her supervisors, viewed in the light most favorable to Wallace (not to Performance, as the district

court erroneously viewed the evidence), shows a genuine dispute of fact as to whether Performance failed to train her.

In any case, Performance's denial of training was adverse irrespective of its effect on Wallace's future compensation. Title VII expressly notes that discrimination because of sex in "training or retraining, including on-the-job training programs" is unlawful, without any exclusion for training unrelated to compensation. 42 U.S.C. § 2000e-2(d). And training, by its very nature, is a benefit provided to employees to help them advance in their careers. Consequently, Performance was not free to dole out that training benefit "in a discriminatory fashion," even if it would have been "free … to simply not provide the benefit at all." *Hishon*, 467 U.S. at 76. That is, even if the opportunity to work at elevation benefitted helpers only "tangential[ly]," *see Brooks*, 640 F. App'x at 397, Performance was not free to decide who received that benefit because of sex. The district court's grant of summary judgment on Wallace's sex-discrimination claim should therefore be reversed.

II. Performance subjected Wallace to a hostile work environment in violation of Title VII.

Performance subjected Wallace to intolerable working conditions because she is a woman by creating and maintaining a sexually hostile work environment. As the district court correctly held, a reasonable jury could find that her workplace was suffused with severe and pervasive sexual harassment. ROA.1492-93 (RE.20-21). And as discussed further below (at 34-46), a reasonable trier of fact could hold Performance liable for this hostile

environment. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 758-59, 765 (1998). The district court erred in finding otherwise.

A. As the district court held, a reasonable jury could find that Performance subjected Wallace to severe or pervasive harassment.

Performance created and maintained a hostile work environment in violation of Section 703(a)(1) because Wallace was the victim of unwelcome harassment based on her sex that was severe or pervasive, thus altering a term, condition, or privilege of her employment. *See Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 399-400 (5th Cir. 2021); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 453 (5th Cir. 2013) (en banc). Every week, Casey told Wallace that she could not work at elevation because, to use his obscene words, she had "tits and an ass." ROA.467 (RE.32). He said in her presence that he needed "a bucket of blowjobs." ROA.480 (RE.45). Over June and July 2017, Terro sent Wallace a nude photograph of his genitals with a request to reciprocate and repeatedly asked to touch her breasts. ROA.475-76 (RE.40-41). Also in June 2017, Laprairie told Wallace that she was in her "sexual prime" and massaged her shoulders without her consent. ROA.479 (RE.44). All this took place on a jobsite where employees did not bother to "look[] over your shoulder to see who you are going to offend." ROA.598 (RE.61).

As the district court correctly held, a reasonable jury could find that Casey's, Terro's, and Laprairie's sexual tormenting was severe and pervasive, ROA.1492-93 (RE.20-21), altering Wallace's terms, conditions, or

privileges of employment and creating an abusive working environment. Taken together, the conduct was hostile, abusive, frequent, severe, threatening, and humiliating. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1998); *Boh Bros.*, 731 F.3d at 461 (upholding a jury verdict finding severe-or-pervasive harassment when a construction worker faced repeated "raw sex-based epithets").

All this misconduct was, not surprisingly, unwelcome. Wallace was stunned by the conduct, ROA.477-78 (RE.42-43), reported it, ROA.467-68, 479 (RE.32-33, 44), pursued an EEOC charge about it, ROA.31, and is currently suing Performance over it. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). And it was all based on Wallace's sex: "By its very nature, this conduct"—which was graphically sex-based and objectifying—"could not be said to be equally offensive to men and women." *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989); *see also Boh Bros.*, 731 F.3d at 456-57.

Finally, Wallace suffered psychological harm because of this hostile environment, ROA.482 (RE.47), driving her to take time off to visit healthcare providers, ROA.485 (RE.50); ROA.678, 684-86. In sum, this undisputed evidence of harassment unreasonably interfered with her job responsibilities, *see Johnson*, 7 F.4th at 403, and is exactly the kind of harm Title VII sexual-harassment doctrine is supposed to prevent, *see Harris*, 510 U.S. at 22.

B. Casey's, Terro's, and Laprairie's conduct should be imputed to Performance.

A reasonable jury could hold Performance liable for creating and maintaining this hostile work environment. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court laid out two paths for imputing liability for harassment. First: negligence. When an employer knows about its employees' (including supervisors') harassment and fails to promptly respond, it is negligent and, therefore, liable for its employees' actions. *Ellerth*, 524 U.S. at 758-59. Here, a reasonable jury could determine that Performance was negligent because it knew or should have known about the hostile work environment yet did nothing in response. On that score alone, reversal is required.

Second (and separately): vicarious liability. An employer may be vicariously liable when its supervisors are responsible for the harassment. *Ellerth*, 524 U.S. at 765. Supervisors were responsible for the hostile work environment here. When supervisors take "tangible employment actions" as a part of that harassment (that is, exercise "the means by which the supervisor brings the official power of the enterprise to bear on subordinates," *id*. at 762), the employer is *always* vicariously liable. *Id.* at 765. Here, Wallace's supervisors took tangible employment actions against her as part of their harassment, so a reasonable jury could conclude that Performance is vicariously liable.

When supervisors are responsible for the harassment but do not take any tangible employment actions, the employer is *still* vicariously liable unless it can prove the two-part *Ellerth*/*Faragher* defense. *Ellerth*, 524 U.S. at 765. Though the Court need not reach this point (because Performance could also be held liable under separate negligence and vicarious-liability theories), Performance has still not met this burden: It cannot show (1) it exercised care to prevent and promptly correct sexual harassment, and that (2) Wallace unreasonably failed to take advantage of the available procedures for avoiding harm. *See id*. Following either the negligence or vicarious-liability path, therefore, a reasonable jury could find Performance liable for its employees' harassment. Summary judgment on Wallace's hostile-work-environment claim should be reversed and the case remanded for trial.

1. A reasonable jury could find that Performance is liable because it was negligent in responding to the harassment.

A reasonable jury could hold Performance liable for its hostile work environment because Performance knew or should have known about the harassment but failed to take prompt, remedial measures. *See Johnson*, 7 F.4th at 405; *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 189 (5th Cir. 2012).

An employer can be held liable *both* "where its own negligence is a cause of the harassment," *Ellerth*, 524 U.S. at 759, *and* "for an actionable hostile environment created by a supervisor," *id.* at 765. When an employer is negligent in failing to respond to its supervisors' harassment, it is liable for that harassment, and the *Ellerth*/*Faragher* defense, on which the district court

focused, ROA.1494-95 (RE.22-23), never arises. *See Sharp v. City of Hous.*, 164 F.3d 923, 928-29 (5th Cir. 1999).

a. A reasonable jury could find that Performance knew or should have known about the hostile environment. Upper management and supervisors were aware of the harassing conduct because they were themselves the harassers, because the relevant conduct was otherwise open and pervasive, and because Performance should have already been on notice because of these employees' unsavory reputations. *See Sharp*, 164 F.3d at 929-30; *see also Johnson*, 7 F.4th at 405. Casey's conduct was especially transparent. He profanely referred to Wallace's sex during regular safety meetings in front of about twenty to thirty coworkers, as well as supervisors Tapley, Terro, Gautreau, and Quebodeaux. ROA.546. Terro had a seedy reputation as a "throwed off little dude," according to Gautreau, ROA.571, so Performance should have been alert to his harassment as well. As described in greater detail above (at 11-12), employees also pulled down their pants and massaged Wallace without her consent in plain view of Performance supervisors.

And there's more. Wallace alerted supervisors to the harassment. She complained about Casey to Terro and Gautreau, ROA.467-68 (RE.32-33), reported Laprairie to Tapley, who alerted other supervisors, ROA.479-80 (RE.44-45), and complained about Terro to Tapley, ROA.541. Based on the

record, then, Performance was on notice about all the harassment. In short, it knew about the hostile work environment.

b. Performance failed to respond at all, let alone respond promptly. Because Performance refused to discipline any of Wallace's harassers, the harassment continued. *See Johnson*, 7 F.4th at 405; *Cherry*, 668 F.3d at 189. The only reason Laprairie left was to find a higher-paying job, ROA.695; Performance never disciplined him for harassing Wallace. Perhaps even more to the point, Performance presented no evidence that it ever disciplined Casey or Terro, despite their repeated profane and outrageous misconduct. In fact, Casey continued to prohibit Wallace from working at elevation—using the obscene "tits and ass" rationale—because of her sex until her suspension. ROA.467-68, 470 (RE.32-33, 35). Because Performance knew about the harassment and did nothing to respond, it is liable for maintaining a hostile work environment. The Court should reverse on this ground alone.

2. A reasonable jury could also find that supervisors Casey and Terro took tangible employment actions against Wallace as part of their harassment, thus imputing liability to Performance.

Supervisors Casey and Terro demoted, suspended, and discharged Wallace, as well as prevented her from working at elevation, as part of their campaign of harassment. These are tangible employment actions, and, thus,

Performance is liable for its supervisors' creation of a hostile work environment. *See Ellerth*, 524 U.S. at 762.

As the district court found, ROA.1494 (RE.22), Terro and Casey were Wallace's supervisors because they were empowered to take tangible employment actions against her. *See Vance v. Ball State Univ.*, 570 U.S. 421, 438 (2013). Terro signed off on both her suspension and termination, ROA.645; ROA.648 (RE.67), and Casey may have participated in the decision to suspend Wallace, ROA.600 (RE.63). Casey also demoted Wallace by prohibiting her from working at elevation, ROA.595 (RE.58) (a term, condition, or privilege of her employment, as explained above at 24-31).

a. Supervisors Terro and Casey took tangible employment actions against Wallace. Though the Supreme Court has never required, let alone defined, a so-called "adverse employment action" for standard discrimination claims, it has defined "tangible employment action" in the context of holding employers liable for their supervisors' harassment: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. Other tangible employment actions recognized within this Circuit include demotion, *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 162 (5th Cir. 2007), suspension without pay, *Moore v. Bolivar Cnty.*, No. 4:15-CV-145-DMB-JMV, 2017 WL 5973039, at *3

(N.D. Miss. Dec. 1, 2017), constructive discharge, *Donaldson v. CDB, Inc.*, 335 F. App'x 494, 500 (5th Cir. 2009), and denial of training that could lead to promotions, *Guillory v. S. Natural Gas Co.*, No. CIV.A. 99-2011, 2000 WL 1273403, at *2 (E.D. La. Sept. 6, 2000).

Wallace suffered several tangible employment actions, including demotion, ROA.600 (RE.63), suspension, ROA.648 (RE.67), and firing, ROA.645. Here, too, not permitting Wallace to work at elevation significantly changed her current and potential employment status. Performance has admitted that it selects employees to work on the rack based on, in part, their experience "working at heights." ROA.630. Gautreau and Casey testified that helpers are more useful and valuable in the industry if able to work at elevation. ROA. 564; ROA.603 (RE.66). Based on this evidence, a reasonable jury could conclude that Performance denied Wallace experience and training important for advancing in the construction field. *See Guillory*, 2000 WL 1273403, at *2.

Wallace was also constructively discharged because her working conditions were "so intolerable that a reasonable person would have felt compelled to resign." *Pa. State Police v. Suders*, 542 U.S. 129, 147 (2004). This Court requires that plaintiffs claiming constructive discharge show aggravating factors beyond the actual harassment, such as demotion, reduction in job responsibilities, and reassignment to menial or degrading work. *See, e.g.*, *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 481 (5th Cir.

2008). As explained earlier (at 7-9, 27-29), Casey demoted Wallace and assigned her to menial work, given her qualifications. ROA.471 (RE.36). Performance suspended her without pay. ROA.648 (RE.67). These circumstances aggravated the severe-and-pervasive hostile work environment, making it so intolerable that a reasonable person would have to resign. Wallace was, consequently, constructively discharged—yet another tangible employment action.

The district court, however, held that "[u]nder the hostile environment claim, there is no need to address the [constructive discharge] allegation because Performance has shown that it is entitled to summary judgment based on the *Ellerth*/*Faragher* defense." ROA.1498 (RE.26). That's simply incorrect: Performance may not assert the *Ellerth*/*Faragher* defense when its supervisors have taken tangible employment actions as part of the harassment. *See Ellerth*, 524 U.S. at 765.

The district court also rejected constructive discharge as a tangible employment action by improperly crediting Performance's assertions that Wallace's resignation letter never arrived and that a draft letter was "improper summary judgment evidence." ROA.1498 (RE.26). That holding is incorrect because the letter is irrelevant. Wallace herself testified that she resigned, ROA.487 (RE.52), a matter about which she had personal knowledge. *See* Fed. R. Civ. P. 56(c)(4). Casey also testified that Wallace

resigned. ROA.600 (RE.63). Rejecting the constructive discharge as a tangible employment action on these grounds was therefore wrong.

b. The tangible employment actions have a connection to, or "nexus" with, Wallace's harassment. Evidence that harassment is connected to tangible employment actions includes whether the harassing supervisors were responsible, *Russell v. Univ. of Tex. of Permian Basin*, 234 F. App'x 195, 203-04 (5th Cir. 2007), the temporal proximity between the harassment and tangible employment actions, *Frensley v. N. Miss. Med. Ctr., Inc.*, 440 F. App'x 383, 387 (5th Cir. 2011) (per curiam), and whether the harassing supervisors bypassed the employer's discipline policy to take the actions at issue, *McKenzie v. Collins*, Civ. A. No. 5:07cv68-DCB-JMR, 2008 WL 2705530, at *6 (S.D. Miss. July 9, 2008).

Here, Casey and Terro were responsible for each tangible employment action. Casey repeatedly prevented Wallace from working at elevation, even after she complained. ROA.467 (RE.32). A reasonable jury could conclude that Casey's dogged refusals to permit her to work on the racks, which led to Wallace's effective demotion and constructive discharge, were connected to her complaints. Terro's signature was on Wallace's suspension and termination notices, ROA.645; ROA.648 (RE.67), meaning that a reasonable jury could also find that he was directly involved in those decisions. Further, Casey admitted that he may have taken part in recommending Wallace's suspension. ROA.600 (RE.63). The district court improperly discounted this

evidence, drawing an inference against Wallace, solely because of evidence that Gautreau was also involved in these decisions. ROA.1493-94 (RE.21-22).

Moreover, Wallace's suspension and firing were within days or weeks of Casey's and Terro's ongoing harassment, indicating that the suspension and firing were temporally connected—that is, part and parcel of the harassment. *See Frensley*, 440 F. App'x at 387; *McKenzie*, 2008 WL 2705530, at *6.

Further evidence of the nexus between the harassment and tangible employment actions, as in *McKenzie*, 2008 WL 2705530, at *6, is Casey's and Terro's decision to bypass Performance's three-strike discipline policy for absences or lateness, discussed above (at 13). They gave Wallace a verbal warning, written warning, and suspension all on the same day and for the same infraction. ROA.648 (RE.67). Performance had never disciplined Wallace for absenteeism before, and Wallace's attendance record was evaluated as "fair" (rather than "poor") on an evaluation form dated the day Wallace was discharged. ROA.647.

In sum, evidence indicates that the tangible employment actions are intertwined with the harassing conduct. Therefore, a reasonable jury could find Performance liable for creating the hostile work environment. This Court should reverse the district court's hostile-work-environment decision on the vicarious-liability theory alone based on the supervisors' tangible employment actions.

3. Performance has not made out the *Ellerth*/*Faragher* defense.

Even assuming (counterfactually) both that no tangible employment action is present and that Performance was non-negligent, a reasonable jury could still find Performance liable for its supervisors' harassing conduct because it has not met its burden to make out the two-part *Ellerth*/*Faragher* defense. *See Ellerth*, 524 U.S. at 765. Viewing the facts in the light most favorable to Wallace, a reasonable jury could find that (1) Performance did not exercise "reasonable care" to prevent and promptly correct any sexual harassment, and (2) Wallace did not "unreasonably fail" to take advantage of available procedures for dealing with sexual harassment or otherwise avoiding harm. *See id.*

a. A reasonable jury could find that Performance did not exercise reasonable care to promptly correct sexual harassment. For starters, Performance has failed to satisfy this prong because it was negligent (discussed above at 35-37). It knew about the hostile environment but failed to exercise reasonable care to promptly respond.

Further, though having an antiharassment policy with a complaint process is relevant to proving this first part of the defense, *see Ellerth*, 524 U.S. at 765, a reasonable jury could find that Performance has not satisfied this element because its policy was so ineffective as to dissuade harassment victims from coming forward. *See id.*; *Meritor*, 477 U.S. at 72-73.

Part of Performance's policy requires employees to bring any questions to supervisors or the human resources department. ROA.173. The record,

however, suggests that no supervisor above Tapley (Wallace's husband) responded to Wallace's complaints, and Tapley's attempt to respond to the harassment was ignored. ROA.542. Like the employer in *Boh Brothers*, 731 F.3d at 465-66, which neither seriously investigated reports of harassment nor disciplined harassing supervisors, Performance failed to enforce its sexual-harassment policy. Evidence of Wallace's unsuccessful attempts to contact human resources after her suspension, ROA.487 (RE.52), could suggest to a reasonable jury that human resources, itself, would not have been effective in processing Wallace's complaints.

Further, Performance's policy "urged" *all* employees—not just victims—who became aware of sexual harassment to report to human resources, ROA.642. Tellingly, the record indicates that no one did so, even though Wallace told her supervisors and a coworker about the various incidents, and many of the incidents took place in their view. *See supra* at 10-12.

In any case, Performance's policy and its implementation were bewilderingly unclear. When Wallace received the policy, she signed an acknowledgement that advises employees to bring "questions regarding the content or interpretation of the Discrimination/Harassment/Retaliation Policy" to a supervisor *or* human resources. ROA.173. The policy itself, however, under the heading "PROCEDURE," directs employees to report harassment to human resources. ROA.642. Yet, on top of the next page, under the heading "RETALIATION," the policy instructs employees to

report retaliation either to supervisors *or* human resources. ROA.643. What distinguishes a "question" from a "report," and why should reporting harassment be different from reporting retaliation? That cannot be an effective policy, given that harassment policies are supposed to "encourage victims of harassment to come forward." *Meritor*, 477 U.S. at 73.

b. Wallace took reasonable steps to avoid harm by contacting her supervisors. Wallace took advantage of a mechanism for avoiding further harm. *See Donaldson*, 335 F. App'x at 505; *Lauderdale*, 512 F.3d at 165. An employee is not required to complain to her harassing supervisor, even if the grievance procedure demands it. *See Meritor*, 477 U.S. at 73; *Donaldson*, 335 F. App'x at 505; *Puebla v. Denny's, Inc.*, 294 F. App'x 947, 949 (5th Cir. 2008). And, as this Court has held, an employee's use of alternative mechanisms for reporting harassment (such as a union grievance system, rather than a company's sexual-harassment complaint process) can be reasonable. *Watts v. Kroger Co.*, 170 F.3d 505, 511 (5th Cir. 1999).

The district court (agreeing with Performance and impermissibly resolving a fact dispute against Wallace) believed that the policy required Wallace to report to human resources or to supervisors outranking her harassers. ROA.1495 (RE.23). But a reasonable jury could conclude that the policy only advises employees to contact their "supervisor or the Corporate Human Resources Manager" with harassment concerns. ROA.173. Wallace complained to her supervisors on several occasions to bring the harassment

to light, ROA.467-68 (RE.32-33); ROA.542—that is, she followed the policy. In crediting Performance's self-serving interpretation, the district court suggested that Wallace "could have" complained to "at least two individuals … who outranked Terro and Casey," ROA.1495 (RE.23)—presumably Ferachi and Gautreau. Beyond inappropriately reading additional requirements into the policy, the court overlooked two key facts: Wallace *did* complain to Gautreau, ROA.467-68 (RE.32-33), and Ferachi was himself involved in contributing to the general hostile environment at Performance, ROA.546, as discussed above (at 12). Again, no employee should have to report to her harasser. *See, e.g.*, *Meritor*, 477 U.S. at 73.

In any case, Wallace was reasonable in not contacting human resources. One time, when Tapley called human resources, Terro told him that he had "opened a can of worms" by getting that department involved. ROA.486 (RE.51). A reasonable jury could conclude from this fact that Performance both dissuaded employees from reporting to human resources and did not take complaints to human resources seriously.

In sum, Wallace took reasonable steps to report the harassment—and actually reported it repeatedly—which Performance failed to exercise reasonable care to prevent. Thus, even if the *Ellerth*/*Faragher* defense were applicable here—and it's not—a jury should decide the question of hostile-work-environment liability.

III. A reasonable jury could find that Performance retaliated against Wallace for opposing what she reasonably believed was unlawful discrimination and harassment.

Retaliation claims follow the *McDonnell Douglas* burden-shifting framework. *See, e.g.*, *Feist v. La., Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 454 (5th Cir. 2013). To establish a prima facie case of retaliation, Wallace must show that (1) she participated in an activity protected by Title VII; (2) Performance took an adverse action against her; and (3) a causal link exists between the two. *Id.* At summary judgment, the non-moving party—here, Wallace—need only submit enough evidence that a reasonable jury could find in her favor on each point.

A. Wallace can establish a prima facie case that Performance retaliated against her for opposing Terro's, Casey's, and Laprairie's misconduct.

1. Wallace participated in Title VII protected activity.

Protected activity under Title VII includes "oppos[ing] any practice made … unlawful … by this subchapter." 42 U.S.C. § 2000e-3(a). Drawing all inferences in Wallace's favor, a reasonable jury could find that she opposed both the discriminatory work-at-elevation prohibition and the harassment targeted at her.

a. Regarding Wallace's sex-discrimination claims, the district court acknowledged that Wallace made "contemporaneous complaints" about the "limitations on her job duties." ROA.1498 (RE.26). These complaints were insufficient in the court's view, however, because they were supposedly only

"'general gripes' about not being allowed to work in the rack" and because Wallace did not allege that "her job duties were being constrained because of her sex." ROA.1498 (RE.26). This reasoning does not withstand scrutiny, particularly given the court's duty to draw all inferences in Wallace's favor.

Wallace testified that she explicitly complained several times to Terro and Gautreau that Casey refused to let her work at elevation "because [she] was a female." ROA.467-69 (RE.32-33). In other words, Wallace "communicate[d] to her employer a belief that the employer … engaged in … a form of employment discrimination," conduct that "virtually always 'constitutes … *opposition* to the activity.'" *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009).

The district court was also incorrect because, by considering only the complaints Wallace made to Terro and Gautreau, it narrowed the scope of qualifying oppositional conduct. The term "oppose" must be given its "ordinary meaning," *Crawford*, 555 U.S. at 276, and includes an employee's efforts to "resist … confront … [or] withstand" practices made unlawful by Title VII, *id*. Under this commonsense understanding, an employee who "took a stand against an employer's discriminatory practices" by, for example, merely "standing pat" was opposing those practices. *Id.* at 277. Wallace did more than stand pat. Despite knowing that humiliation and rejection awaited her, Wallace demanded that she have the same opportunities as her male colleagues, asking Casey "several times a day[,]

every day" to let her work at elevation. ROA.470 (RE.35). In short, she "resist[ed]" and "confront[ed]" the discriminatory policy that victimized her. *Crawford*, 555 U.S. at 276.

Wallace also opposed Laprairie's, Casey's, and Terro's sexual harassment. The district court acknowledged that Wallace opposed Laprairie's non-consensual massaging of her shoulders and comments about her "sexual prime." ROA.1496 (RE.24). As just discussed, Wallace opposed Casey's discriminatory remarks that she could not work at elevation because of her "tits and ass" by complaining to Terro and Gautreau, which also shows that Wallace opposed Casey's harassment. As to Terro, Wallace alleged that when Terro asked to "grab and squeeze" her breasts several times, she dismissed him. ROA.475, 478 (RE.40, 43). This rejection constitutes the "most basic form of protected activity." *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000); *see EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015).

Wallace also opposed Terro's request that she send him a picture of her "chest" in response to the photo he sent her of his genitals by refusing to capitulate to that demand. ROA.478-79 (RE.43-44). The district court held that Wallace's decision not to expose herself to Terro did not qualify as opposition because, in its view, there is a legally salient difference between affirmatively "reject[ing]" his request and ignoring his pleas for her to reciprocate. ROA.1493 (RE.21).

That distinction is untenable, however, particularly in the context of sexual harassment at the summary-judgment stage. It defies common sense—and draws impermissible inferences against Wallace—to suggest that an employee's inaction in response to a supervisor's specific improper requests for sexual reciprocation would not put the supervisor on notice that his advances had been opposed. The Court need not look any further than this case for support for the proposition that inaction can alert the harasser that their advances were rejected: logically, Terro would not have approached Wallace after she did not reciprocate and proclaimed that it "took guts to send [the picture of my genitals] to you" if he felt he had gotten what he wanted from his initial request. ROA.479 (RE.44). Drawing all reasonable inferences from the facts in Wallace's favor, a jury could find that Terro believed he had been rejected and thus had a motive to retaliate against her.

In any event, even if Wallace's choice to "ignore" Terro's outrageous picture and request for reciprocation somehow does not count as a rejection of his demand, ROA.1493 (RE.21), it is still an independently sufficient means of opposing his conduct. "[O]pposing" also includes responses, active or otherwise, that may "antagonize" the employer. *Crawford*, 555 U.S. at 276. Terro's face-to-face confrontation with Wallace shows that Terro was antagonized by Wallace's unwillingness to give in to his demands. ROA.479 (RE.44). Thus, even under the district court's own (mis)characterization of

Wallace's actions, a reasonable jury could find that she opposed Terro's demand that she send him naked images of herself.

b. As the district court correctly noted, to succeed under the "opposition" clause, a plaintiff need show only that she maintained a "reasonable belief" that the conduct was unlawful under Title VII. ROA.1497 (RE.25) (citations omitted). A reasonable person in Wallace's position would reasonably believe that the opposed conduct was unlawful.

To determine what falls within the "zone of conduct" that can be reasonably perceived as violating Title VII, *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 242 (5th Cir. 2016), courts look at "all the circumstances," including the severity and frequency of the alleged conduct, and the context, *Satterwhite v. City of Hous.*, 602 F. App'x 585, 588 (5th Cir. 2015) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1998)) (per curiam). At no time, however, may a court "require an employee to be an expert in Title VII law." *Cuellar v. Sw. Gen. Emergency Physicians, PLLC*, 656 F. App'x 707, 710 (5th Cir. 2016) (per curiam) (quotation marks omitted); *see also Rite Way*, 819 F.3d at 242 n.5.

It was reasonable for Wallace to believe that the limitations on her job duties were unlawful conduct under Title VII. Wallace was told daily that she could not do the same things as her male colleagues only because she had "tits and an ass" and that, in her supervisor's mind, she did not "count." ROA.467 (RE.32). A reasonable person would believe that these facially discriminatory comments and differential treatment were unlawful. Thus,

had the court correctly found that Wallace opposed the discriminatory policy, Wallace would have satisfied the first element of her prima facie retaliation claim as it relates to the sex-based discrimination.

It was also reasonable for Wallace to believe that the many instances of sexual harassment she opposed constituted part of an unlawful hostile work environment. The district court's contrary finding stemmed from the same mistake we have already addressed: its belief that Wallace had not opposed Terro's and Casey's misconduct. ROA.1496 (RE.24). Operating from this incorrect premise, the court considered only Laprairie's actions in isolation. ROA.1498 (RE.26). But because Wallace *did* oppose Terro's and Casey's harassment, as shown above (at 47-51), the court had no basis for excluding those actions from its analysis. Had the court properly considered Terro's and Casey's actions alongside Laprairie's, it would have found that Wallace's belief was eminently reasonable because the totality of the conduct could easily "persuade a jury that the total amount of harassment alleged could have affected a term or condition of her employment." ROA.1492-93 (RE.20-21).

Even under the district court's incorrect premise that only opposition to Laprairie's conduct was potentially actionable, the court was still mistaken as to the reasonableness of Wallace's belief that his conduct was unlawful. The district court dismissed the reasonableness of Wallace's belief because Laprairie's misconduct was an isolated incident of "limited duration."

ROA.1498 (RE.26). But as this Court has held, an employee can reasonably believe that "isolated comments" are unlawful Title VII conduct, particularly when those comments are directed at a specific employee. *See, e.g.*, *Rite Way*, 819 F.3d at 243; *Cuellar*, 656 F. App'x at 710. And because Laprairie *physically* grabbed hold of Wallace when he massaged her without consent, this case involves even more severe conduct than did the "isolated *comments*" cases just cited.

The district court also conspicuously failed to consider the context in which Laprairie's harassment took place, despite the court's recognition that context matters. ROA.1497 (RE.25). Had the court properly considered the context alongside the conduct itself, Wallace's belief that Laprairie's harassment was unlawful was even more reasonable.

For instance, at the time Laprairie harassed her, Wallace possessed Performance's "Discrimination/Harassment/Retaliation Policy," which included provisions that Performance would not "tolerate <u>any</u> offensive, intimidating or hostile conduct" such as "comments … that in any way relate to an individual's … sex" or "offensive or abusive physical … conduct." ROA.170. The existence of internal policies specifically proscribing the opposed conduct bolsters the reasonableness of an employee's belief about the unlawfulness of that conduct. *Rite Way*, 819 F.3d at 244. And Laprairie's actions occurred in a context infused with Terro's and Casey's ongoing harassment of Wallace. Whether their conduct was opposed or not—and it

was—that conduct still informed Wallace's perception of the unlawfulness of Laprairie's conduct. *Cf. id.* at 243-44. A jury could thus find that a reasonable person in Wallace's position would believe that the work environment at Performance was unwaveringly hostile and that Laprairie's explicitly prohibited conduct fit within Wallace's broader experiences at the company.

2. Performance took adverse actions against Wallace.

An employer may not take any action that would "dissuade a reasonable worker" from opposing the unlawful conduct. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). Wallace suffered several adverse actions that easily satisfy this standard. Wallace was suspended without pay, ROA.151; ROA.648 (RE.67), and discharged soon after, ROA.645; *see LeMaire v. La. Dept. of Transp. & Dev.*, 480 F.3d 383, 390 (5th Cir. 2007); *see supra* at 13-14. And, as explained above (at 27-29), by barring her from working at elevation, Performance demoted Wallace from her position as a helper. *See Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014). Because each of these actions surpasses this Circuit's more stringent "adverse employment action" requirement for Section 703(a)(1) discrimination claims, they necessarily exceed the lesser standard required here. *See Burlington N.*, 548 U.S. at 57.

3. A causal link existed between Wallace's protected activity and her demotion, suspension, and discharge.

To show a causal connection at the prima facie stage, an employee may point to evidence that her employment record does not support the action taken, as well as an employer's departure from typical discipline policies and procedures. *See Schroeder v. Greater New Orleans Fed. Credit Union*, 664 F.3d 1016, 1024 (5th Cir. 2011); *McKenzie v. Collins*, No. 07cv68, 2008 WL 2705530, at *6 (S.D. Miss. July 9, 2008). As discussed above (at 42), Wallace had never previously been disciplined for absenteeism, ROA.648 (RE.67), and her employment records show that her attendance was viewed by Performance as "fair." ROA.647. Performance thus deviated from its three-strike, progressive-discipline policy when it suspended Wallace for a first-time offense, ROA.640, a decision at odds with her employment record. Viewing these facts and all inferences in Wallace's favor, a reasonable jury could find a nexus between the oppositional conduct and Wallace's suspension.

Showing "close enough timing" between the protected activity and relevant employment actions is another independently sufficient means of showing a causal link at the prima facie stage. *Brown v. Wal-Mart Stores E., LP*, 969 F.3d 571, 577 (5th Cir. 2020); *McCoy v. City of Shreveport*, 492 F.3d 551, 562 (5th Cir. 2007). "[A] time lapse of up to fourth months may be sufficiently close." *Feist*, 730 F.3d at 454 (quotation marks omitted). All the misconduct detailed above occurred well within four months of Wallace's opposition.

Wallace's suspension occurred within four months of her opposition. ROA.164; ROA.648 (RE.67). So, too, with Wallace's termination on September 13, 2017. ROA.645. Casey's discriminatory comments occurred on a "weekly" basis throughout Wallace's employment, and because Wallace continually opposed that misconduct, her opposition was, by definition, proximate. ROA.470 (RE.35). And Wallace received the text message containing the picture of Terro's genitals on June 3, 2017, ROA.476 (RE.41); Laprairie's massage and comments took place in June 2017, ROA.479 (RE.44); and Terro asked to "grab and squeeze" her breasts in July 2017, ROA.475 (RE.40)—all within about three months or less of September 13, 2017.

Finally, Wallace's demotion also occurred well within four months of her oppositional conduct. The material limitations on her job duties occurred throughout her time at Performance on an ongoing basis, which Wallace opposed "several times a day[,] every day," ROA.470 (RE.35).

B. Performance's purported non-retaliatory justification—absenteeism—is pretextual.

Wallace would prevail on her retaliation claim unless Performance could present a genuine, non-retaliatory reason for all of its adverse actions. As discussed above (at 22), in moving for summary judgment Performance did not offer any non-discriminatory reason for its refusal to allow Wallace to work at elevation. And as to the suspension and discharge, Performance's stated reason for its actions—absenteeism—does not survive scrutiny.

To establish pretext, the plaintiff must show that her protected activity was the cause of the alleged adverse action by the employer. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013); *Brown*, 969 F.3d at 581. Performance's assertion that it suspended and discharged Wallace because of her absenteeism is undermined by its abandonment of its own discipline policies, as discussed above (at 42, 55). *See* ROA.640. Performance gave no explanation why it diverged from its standard procedures in Wallace's case. And Wallace provided various doctor's notes to support her contention that her August 16 absence, which led to her suspension, was excused. ROA.677, 681, 684. Without an explanation from Performance, and given Wallace's countervailing evidence (which must be credited at the summary-judgment stage), a reasonable jury could find that the absenteeism explanation is pretext.

Conclusion

This Court should reverse the district court's judgment on all of Wallace's claims and remand for further proceedings.

Respectfully submitted,

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Certificate of Service

I certify that, on October 29, 2021, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,841 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Palatino Linotype.

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