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.

REPLY BRIEF OF PLAINTIFF-APPELLANT MAGAN WALLACE

James E. Sudduth, III
Kourtney L. Kech
Pierce A. Rapin
SUDDUTH & ASSOCIATES, LLC
1109 Pithon Street
Lake Charles, LA 70601

Roberta A. Kaplan
D. Brandon Trice
KAPLAN HECKER & FINK LLP
350 Fifth Ave., 63rd Fl.
New York, NY 10118

Joshua Matz
Raymond P. Tolentino
KAPLAN HECKER & FINK LLP
1050 K Street NW | Suite 1040
Washington, D.C. 20001

Brian Wolfman
Madeline Meth
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Jacob Demree
Student Counsel

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MAGAN WALLACE,

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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

Magan Wallace

Defendant-Appellee

Performance Contractors, Inc.

Sudduth & Associates, LLC

James E. Sudduth, III

Kourtney L. Kech

Pierce A. Rapin

Georgetown Law Appellate Courts Immersion Clinic

Brian Wolfman

Madeline Meth

Hannah Mullen

Jacob Demree

Pegah Nabili

Jacob Rosen

Kaplan Hecker & Fink LLP

Roberta A. Kaplan

Joshua Matz

Raymond P. Tolentino

D. Brandon Trice

Breazeale, Sachse & Wilson, LLP

Alexandra C. Hains

Murphy J. Foster, III

Jerry L. Stovall, Jr.

February 2, 2022

/s/ Brian Wolfman
Brian Wolfman

Counsel for Plaintiff-Appellant

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Introduction and Summary of Argument

Performance denied Wallace the opportunity to work at elevation because—in her supervisor's words—she was a woman with "tits and an ass." Other supervisors stated that they "didn't want to see women working elevated" and "did not want females brought on the project." As confirmed by unrebutted testimony from numerous witnesses, including several of her own supervisors at Performance, this discrimination deprived Wallace of a crucial opportunity. In practice, working at elevation distinguished higher-ranked Helpers from lower-ranked Laborers, and it was understood as central to professional advancement.

That's not all. Even as Wallace was thwarted from working at elevation because she was a woman, one supervisor asked to touch her breasts and texted her an image of his own genitals, another supervisor said he needed a "bucket of blow jobs," and a co-worker grabbed Wallace without consent after telling her she was in her "sexual prime."

Wallace opposed this discrimination and persisted in efforts to work at elevation. In the end, it was too much. Afflicted with psychological and physical symptoms, Wallace missed a day of work for a doctor's appointment (though she called in to alert her team). In a departure from its three-strike policy, Performance promptly suspended her. Unable to get clear answers about why this had occurred, Wallace sent a resignation letter. The next month, Performance formally fired her, supposedly based on a

failure to report. The supervisor who had texted her a picture of his genitals signed the separation notice.

Performance maintains that all of this was perfectly lawful. In its view, Title VII—which exists to eradicate sex discrimination in the workplace—says nothing about these circumstances. To reach this astounding conclusion, Performance commits all the cardinal sins of summary-judgment practice: It ignores or elides unhelpful facts; draws extravagant inferences in its own favor; misstates key legal principles; and treats this appeal as the opportunity to resolve factual disputes properly reserved for a jury.

For the reasons set forth in Wallace's opening brief—and those given below—the district court erred in dismissing her Title VII claims. That decision should be reversed and the case remanded for trial.

Argument

I. A reasonable jury could find that that Performance discriminated against Wallace "because of sex" with respect to the "terms, conditions, or privileges" of her employment.

Performance insists that no reasonable jury could find that Wallace suffered discrimination "because of … sex." Performance Br. 16-17, 25-28. It also asserts that no reasonable jury could find that its conduct affected the "terms, conditions, or privileges" of Wallace's employment. *Id.* at 17-23. But Performance misstates the governing legal standard, strains every inference against Wallace (rather than drawing inferences in her favor), and ignores

the abundant evidence giving rise to factual and credibility disputes properly reserved for a finder of fact.

A. A reasonable jury could find that Performance engaged in discriminatory conduct.

There are two independent grounds on which the evidence supports a reasonable inference that Performance engaged in discrimination because of Wallace's sex: (1) direct evidence and (2) circumstantial evidence.

1. Wallace presented direct evidence of discrimination.

a. The record is riddled with direct evidence confirming that Wallace's supervisors at Performance "clearly and explicitly … used [sex] as a factor in employment decisions." *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 993 (5th Cir. 2005) (citation omitted). Wallace's supervisor—the person charged with assigning projects—told her she could not work at elevation because "females stay on the ground," openly declaring that he treated female employees differently because they had "tits and an ass." ROA.464, 467, 470 (RE.29, 32, 35). If that is not direct evidence of discrimination based on sex, it is hard to imagine what would be. Performance's only response—that this "crude" language was directed at all workers, rather than "to Wallace personally," Performance Br. 16—is hardly a point in its favor: Announcing a sex-discriminatory standard to *all* employees does not make it any less discriminatory, especially when that standard is then expressly applied to the female worker present in the room.

But even here, Performance gets the facts wrong: Casey made these comments in direct response to Wallace's requests to work at elevation. *See* ROA.467 (RE.32) ("Every time I ask to go in the rack or offered to go in the rack … I was told, no. And that was the direct response, because you have tits and ass."); ROA.546 (Tapley recalls Casey stating "probably, three times a week" that "I don't want her in a rack because she has tits and an ass").

And there's more. Terro stated that "upper management and the client didn't want to see women working elevated," and Ferachi stated that he "did not want females brought on the project." ROA.464, 467, 469-71 (RE.29, 32, 34-36). The record reveals a barrage of these *expressly* discriminatory statements by supervisors at Performance. Of course, drawing inferences in favor of Wallace at this stage of the case, as a court must do, these statements confirm that the issue was *not* the availability of female-specific harnesses—which Performance, consistent with its discriminatory behavior, failed to order or keep on premises. Indeed, Wallace was allowed to work in a harness for several days until upper management had her taken down because she was a woman. *See infra* at 6. The real issue was a team of supervisors who made express discriminatory statements about how they assigned responsibilities to women in their workplace.

Thus, a reasonable jury could easily find that Performance engaged in sex-discriminatory conduct. There is no need to resort to the *McDonnell-Douglas* standard, which is designed as an aid to sift circumstantial evidence

of discrimination. Sex was plainly "a motivating factor" in Performance's decision not to allow Wallace to work at elevation. *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993). To put the point more formally, these statements were directly related to Wallace's protected characteristic; they were made contemporaneously with (or shortly after) the challenged employment decision; they were made by the relevant decisionmakers; and they directly concerned the decision at issue. *See Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, 778 F.3d 473, 476 (5th Cir. 2015).

b. In a bid to escape that straightforward conclusion, Performance points to other evidence, which (in its view) suggests that it prohibited Wallace from working at elevation based on a deal she allegedly made with Gautreau. *See* Performance Br. 16-17. Performance adds that this was necessary because Wallace lacked experience working at elevation—and because it had not yet installed protective "dance floors." *Id.* This argument fails for three separate reasons.

First, Performance misstates the law. Under Title VII, "statements or documents which show on [their] face that an improper criterion served as a basis—not necessarily the *sole* basis, but *a* basis—for the adverse employment action are direct evidence of discrimination." *Jones*, 427 F.3d at 993 (emphasis added). Even if Performance's decision involved several considerations, a reasonable jury could find that sex discrimination was among them and thus was "a basis" for its decision. *See Jerge v. City of*

Hemphill, Tex., 80 F. App'x 347, 350-51 (5th Cir. 2003) (finding direct evidence where statements showed decisionmakers "considered [plaintiff's] gender to be a relevant factor in their decision").

Second, Performance misstates the facts. Wallace testified that she *did* have experience working at elevation: She had worked at elevation at Sun Midstream. ROA.234-35, 466; *see* Opening Br. 7. Consistent with that background, she was hired by Performance for a position (Helper) whose responsibilities included working at elevation. *See* ROA.603, 638; Opening Br. 6, 26. And she was in fact allowed to work at elevation *before* dance floors were installed—though only after her husband agreed, in response to degrading questions from her supervisor (Casey), that he had no problem with how her "tits and ass" looked in a harness. ROA.468 (RE.33). It was only when "upper management" saw her working at elevation that they told a general foreman they "didn't want to see women working elevated" and "not to have [her] up there again." ROA.471-72 (RE.36-37). Under that sex-discriminatory directive, and contrary to the story pressed here by Performance, Wallace "stayed on the ground" for months even *after* dance floors were installed. ROA.236.

Finally, Performance misapplies the summary-judgment standard. At this stage, the only question is whether the record reveals genuine disputes of material fact. Rather than engage with that applicable standard, Performance presents a version of the facts that ignores contrary record

evidence, discredits testimony that supports Wallace's position, and draws inferences in the wrong direction. This Court should reject that upside-down understanding of the summary-judgment standard and reverse because a jury could easily find that Performance's motives for refusing to allow Wallace to work at elevation included considerations based on sex. *See Jones*, 427 F.3d at 993.[1]

2. Wallace presented circumstantial evidence of discrimination

For the reasons just given, circumstantial evidence need not be considered. The direct evidence of discrimination here is more than sufficient for Wallace to defeat summary judgment. But if the Court were to deploy the *McDonnell Douglas* test, that analysis would only confirm that Performance engaged in discrimination. *See* Opening Br. 22-24.

Performance raises two objections, both unfounded. Performance argues that Wallace was unqualified to work at elevation. But a reasonable jury could readily find her qualified because she was hired for a job whose description included working at elevation; she had previously worked at elevation; she was briefly permitted to work at elevation while at

[1] Performance erroneously contends that Wallace's claims nonetheless fail because she hasn't shown "she was treated less favorably than similarly situated male employees under nearly identical circumstances." Performance Br. 25-27. Because Wallace has shown *direct* evidence of discrimination, it is unnecessary to consider the issue of comparators, which arises only under the *McDonnell Douglas* test. Regardless, as explained below (at 8-10), that test is satisfied here.

Performance; and she was told (according to Performance) that she could work at elevation after dance floors were installed (but was prohibited from doing so after they were installed). *See supra* at 6.

This leaves only Performance's argument that Wallace was not treated worse than similarly situated male employees. *See* Performance Br. 26-27. Performance asserts that three of the comparators Wallace identified—Treadway, Crutchfield, and Thomason—had "more experience" than her. *Id.* Yet Performance does not claim, much less offer evidence, that these men's purportedly greater "experience" accounted for their preferential treatment. Performance does not even identify the experiences they had or show that they worked at elevation. *See id.* at 27. Further, their experiences were obtained before they came to Performance.

Wallace, by contrast, had several months' experience working with Performance, as well as experience working at elevation with another recent employer, and she had been hired by Performance as a Helper, a position whose duties included working at elevation. *See* Opening Br. 6-7. Performance fails to show that Treadway's, Crutchfeld's, and Thomason's circumstances rendered them materially dissimilar from Wallace when considered in light of the "totality of the circumstances." *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 260-61 & n.25 (5th Cir. 2009) ("nearly identical" is not the same as "identical").

In any event, Performance does not even attempt to show that Jordan was an improper comparator—yet Jordan, a man with the *lower*-ranked position of Laborer, was allowed to work at elevation while Wallace was not. The most Performance can muster is that Wallace "could not say how much time Jordan spent at elevation." Performance Br. 27. But Wallace testified that Jordan was allowed to work at elevation "almost immediately upon hire," even though Performance was his "first construction job" and he had less experience than she did. ROA.482-83. That preferential treatment is especially striking given Casey's testimony that Laborers were not supposed to work at elevation at all. *See* Opening Br. 29 (citing ROA.592 (RE.55)).

Because Wallace has identified a comparator to whom Performance offers no substantive response (Jordan), she satisfied this prong of the *McDonnell Douglas* test, especially at the summary-judgment stage. That conclusion is bolstered by the fact that Performance, in seeking to demonstrate dissimilarity as to other comparators, fails to credit Wallace's testimony or provide the required specifics to support its assertion that they are too dissimilar. Considering the record as a whole, Wallace has satisfied her "minimal initial burden of establishing a *prima facie* case" of discrimination by way of circumstantial evidence. *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 439 (5th Cir. 2012).

B. A reasonable jury could find that Performance's discriminatory conduct was actionable.

The district court erred in concluding that no reasonable jury could find that Performance's discrimination affected the "terms, conditions, or privileges" of Wallace's employment. Wallace has identified three independent respects in which that standard is met—and Performance's response only demonstrates why summary judgment was improper.

1. Performance's conduct affected the "terms, conditions, or privileges" of Wallace's employment.

a. As set forth in Wallace's opening brief (at 24-27) and the EEOC's amicus brief (at 15-16), Title VII prohibited Performance's denial of the opportunity to work at elevation because that was a "term," "condition," and "privilege" of Wallace's employment. *See* 42 U.S.C. § 2000e-2(a)(1). In resisting that conclusion, Performance ignores Title VII's text. Instead, it asserts that the deprivation of the opportunity to work at elevation does not satisfy this Court's "adverse employment action" requirement because it is not an "ultimate employment decision[] such as hiring, granting leave, discharging, promoting, or compensating." Performance Br. 18 (quoting *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 824 (5th Cir. 2019)). That argument is mistaken: As explained below and in Wallace's opening brief (at 27-31), Wallace provided sufficient evidence to defeat summary judgment under this Court's standard.

To the extent that the requirement of an "ultimate employment decision" stands as a barrier to relief, however, Wallace agrees with the EEOC that the Court should revisit en banc the scope of Title VII's anti-discrimination provision. *See* EEOC Br. 16; *see also Chambers v. District of Columbia*, 988 F.3d 497, 501, 506 (D.C. Cir. 2021), *reh'g en banc granted, judgment vacated*, 2021 WL 1784792 (May 5, 2021) (granting en banc review to assess when purely lateral transfers affect the "terms, conditions, or privileges" of employment). If the ultimate-employment-decision requirement is simply a "judicially-coined term" that serves as shorthand for the statutory text, as this Court has suggested, *Thompson v. City of Waco, Tex.*, 764 F.3d 500, 503 (5th Cir. 2014), then Wallace should prevail because an employer's decisions to assign or withhold the tasks of a job are (obviously) "terms, conditions, or privileges" of that job. In sum, that requirement should not be allowed to contradict the statutory text, Supreme Court precedent, and Title VII's objectives. *See Chambers*, 988 F.3d at 506.

b. In any case, reversal is consistent with the original purpose of the "ultimate employment decision" requirement. As the Fourth Circuit has explained, the requirement was originally meant to distinguish "ultimate" decisions from those "interlocutory or mediate decisions that have no immediate effect upon employment conditions … ." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc). This Court relied on *Page* when it first adopted this requirement in *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.

1995), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006).

Nothing about Performance's discriminatory conduct was "interlocutory or mediate"—and Performance's contrary arguments ignore key facts while bending inferences the wrong way. As Performance would have it, working at elevation was just another task, lacking any special significance, that a Helper just might happen to do (or not do). That premise undergirds Performance's entire brief, and it is contradicted by substantial evidence, which must be taken as true and read in Wallace's favor.

To summarize that evidence: Notwithstanding the language of Performance's job descriptions, whether an employee worked (or could work) at elevation was—in practice—the *central* difference between lower-ranked Laborers and higher-ranked Helpers. *See* Opening Br. 29. Casey testified to that point. *See id.* One of Wallace's key supervisors testified that a Helper is "a more valuable asset" if she can work at elevation, ROA.564, while another testified that Helpers are understood to be "more useful" if they can work at elevation, ROA.603 (RE.66). As Gautreau noted, a Helper who worked at elevation was seen "positively" and as showing "initiative." ROA.564. Gautreau added that Wallace wanted to work at elevation "because she wanted to go up there and hone her skills and get better so she could move up," which "ma[d]e sense" to him. ROA.563. To emphasize that point: It made sense to Gautreau—a senior supervisor at Performance—that

Wallace wanted to work at elevation so she could "move up," or, put differently, *so that she could be promoted*. In the same vein, Wallace testified that employees who worked at elevation learned more on the job, got more potential pay raises, and "show[ed] more production." ROA.482-83 (RE.47-48). Tapley agreed that working at elevation was essential for Wallace's growth and professional advancement: "Experience and knowledge. That was her craft. She was a pipe helper and that was part of the job." ROA.544.

Against all this evidence, Performance offers very little. It first attacks Wallace's job performance overall, which is irrelevant to deciding the significance of the opportunity she was indisputably denied. It then notes that her job description also included other tasks, which is unresponsive to the evidence that *this* task was uniquely significant, both in defining what it meant to be a Helper and in creating opportunities for growth and advancement. Performance even suggests that work at elevation was trivial because it did not separately track that time (or pay at a different rate for it), which at most creates a fact dispute when considered alongside contrary testimony from Wallace, Tapley, Casey, and Gautreau concerning the practical, financial, and professional significance of work at elevation in the Performance workplace. Finally, Performance faults Wallace for not enrolling in crafts skills courses, ignoring Wallace's unrebutted testimony that most employees "learn through the field, hands-on"—as well as her testimony that supervisors never encouraged such formal training "because

most … shadow or mentor under someone of a craft they desire to go into to learn the skill set they need to do the job." ROA.466, 469 (RE.31, 34).

Accordingly, when it prohibited Wallace from working at elevation, Performance engaged in an "ultimate employment decision" that affected the "terms, conditions, or privileges" of Wallace's employment. This would not—as Performance insists—require courts to ensure that employees get to do everything on their job description. *See* Performance Br. 19-20. Nor would it require staffing employees on projects for which they lack the necessary training. *See id.* Instead, it would prevent employers from acting with illegal, discriminatory motives in altering the "terms, conditions, or privileges of employment." *See, e.g.*, *Threat v. City of Cleveland*, 6 F.4th 672, 678-80 (6th Cir. 2021) (Sutton, J.). To the extent Performance objects to that result on policy grounds, its complaint is properly directed at Congress, which enacted Title VII to eliminate discrimination in employment.

2. Performance's conduct caused a significant diminishment of material responsibilities (that is, a demotion).

An alternate route to the same conclusion follows from this Court's precedent that an "ultimate employment action" occurs when an employee experiences "a significant diminishment of 'material responsibilities,' or a demotion." *Schirle v. Sokudo USA, L.L.C.*, 484 F. App'x 893, 898 (5th Cir. 2012).

Performance objects that Wallace suffered no "'loss' or 'change' in job duties" because she "did not start off working with all of [the] same exact duties as those with more experience at the position." Performance Br. 21.

But discrimination against Wallace on her first day does not authorize discrimination against her on her hundredth; it only makes the discrimination worse. As explained, Wallace was injured from the outset by the denial of opportunities to perform a Helper's core function.

Performance next asserts that Wallace cannot complain because the work she did was "squarely within her job description of Helper." Performance Br. 22. That is irrelevant. The denial of this particular duty changed her role and made it "objectively worse." *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999) (citations omitted); *see also Kessler v. Westchester Cnty. Dep't of Soc. Servs.*, 461 F.3d 199, 208-09 (2d Cir. 2006) (where "former and present duties fell within the same job description," reassignment was actionable where tasks "were dirtier, more arduous, and less prestigious").

The cases that Performance cites only demonstrate its error. Two involved mere temporary changes to employment. *See Thompson v. Microsoft Corp.*, 2 F.4th 460, 470 (5th Cir. 2021); *Matthews v. Pilgrims Pride*, 783 F. App'x 346, 349 (5th Cir. 2019). Here, the record demonstrates that the denial of the opportunity to work at elevation was far from "temporary." *See* Opening Br. 7-8; *supra* at 3-10. Performance's remaining cases are even further afield, as none involved the denial of a job responsibility or a demotion. *See, e.g.*, *Price v. Wheeler*, 834 F. App'x 849, 856 (5th Cir. 2020) (plaintiff "was asked at least once to perform administrative tasks outside her job description").

3. Performance's conduct amounted to a failure to train.

Yet another ground for reversal is that Performance's conduct resulted in a "failure to train" with more than "tangential evidence of a potential effect on compensation." *Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393, 397 (5th Cir. 2016) (citations omitted); *see* Opening Br. 29-31. Performance offers no response to this argument and, thus, forfeits anything it might have mustered. Regardless, Title VII expressly prohibits discrimination in "training." 42 U.S.C. § 2000e-2(d). Indeed, the Fourth Circuit in *Page* specifically cited "entry into training programs" as an example of a decision that would be akin to those in its list of "ultimate employment decisions." 645 F.2d at 233. Performance's discriminatory failure to train is actionable under Title VII.

II. A reasonable jury could find that Wallace was subjected to a hostile work environment for which Performance is liable.

Wallace's evidence was also sufficient to reach a jury on her hostile-work-environment claim. Opening Br. 31-46.

A. The district court correctly determined that Wallace was subjected to a severe or pervasive hostile work environment.

As the district court recognized, Wallace presented sufficient evidence for a jury to find a hostile work environment. ROA.1492-93 (RE.20-21). In seeking to overturn that determination, Performance again misapplies governing law, this time by disaggregating its conduct and "rob[bing] the incidents of their cumulative effect." *Donaldson v. CDB Inc.*, 335 F. App'x 494,

503 (5th Cir. 2009) (citation omitted). Viewed in context and in its totality—and assessed under the summary-judgment standard—the conduct of Wallace's supervisors and coworkers plainly constituted harassment.

Performance also fails to sanitize each incident in its own right.

Terro: Performance claims that Terro's repeated requests to touch Wallace's breasts are legally inconsequential because they were made "in passing," and she "just dismissed" them. Performance Br. 31. But there is no "in passing" exception for sexual harassment. Even comments made outside of an employee's presence, or not directed at the employee, can contribute to a hostile work environment. *See, e.g.*, *Johnson v. Pride Indus., Inc.*, 7 F.4th 392, 401 (5th Cir. 2021) (offensive language "outside of Johnson's presence"); *Donaldson*, 335 F. App'x at 502 ("[H]arassment does not have to be directed toward the plaintiff to be considered for a hostile-work-environment claim." (citation omitted)). Here, the statements were directed at Wallace.

And that was only the beginning. Terro also sent Wallace a text of his genitals and asked her to respond with a picture of her breasts. Opening Br. 31.[2] Wallace testified that she "consider[ed] this sexual harassment" and that she was "upset," "distraught," and could not "even explain the shock that it caused." ROA.478 (RE.43). A reasonable jury could easily conclude that

[2] Performance chides Wallace for not being able to produce a copy of Terro's lewd text message, Performance Br. 31, but Wallace testified extensively as to her recollection of the text message and said she immediately deleted it because she "wouldn't want to keep something like that." ROA.475-76 (RE.40-41).

Terro's conduct was "unwelcome." *See, e.g.*, *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (whether statements are "unwelcome" raises "credibility determinations committed to the trier of fact").

Casey: Performance claims that Casey's comment that he needed a "bucket of blow jobs" is not actionable because Wallace "only *overheard*" it. Performance Br. 31-32. But as just explained, discriminatory statements need not be directed at Wallace to contribute to a hostile work environment—and of course Casey's "blow jobs" statement must be understood in the context of his stream of statements to Wallace that she could not work at elevation because she was a woman who had "tits and an ass." Performance also argues that Casey's "bucket of blow jobs" comment and plethora of "tits and ass" comments are not actionable because Wallace stated in her testimony that she believed he was "joking around" and she "did not report him to anyone." *Id.* But a person can believe someone else is joking and still find their conduct harassing and offensive—and that is exactly what happened here. Wallace testified that she thought the comments were "unprofessional," that she was "offend[ed]," and that she felt compelled to "laugh[] it off because it's a construction field." ROA.467, 481 (RE.32, 46). Viewing the evidence in the light most favorable to Wallace, a reasonable jury easily could conclude that Wallace found these comments offensive. *See,*

e.g., *Wyerick*, 887 F.2d at 1275 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66, 68 (1986)).[3]

Laprairie: Performance does not dispute that Laprairie, Wallace's coworker, engaged in unwelcome conduct when he "commented that she was in her sexual prime, and almost immediately thereafter rubbed her shoulders." Performance Br. 32. That Performance "began to investigate the incident" does not strip Laprairie's conduct of its harassing, offensive character. *Id.* And regardless, the evidence indicates Laprairie left Performance for a higher-paying job, and the issue was never resolved. ROA.568, 695.

Stepping back and assessing the evidence together, it defies credulity for Performance to assert that no reasonable jury could find a hostile environment. Only by ignoring and distorting key facts—and bending all inferences in its own favor—can Performance insist otherwise. After all, Wallace testified that she suffered psychological harm that led her to take time off for treatment—which ultimately gave her offending supervisors pretext to retaliate. Opening Br. 33; *see also* ROA.687 (Wallace's draft resignation letter stating that the workplace was "beyond a nightmare"). These consequences, along with Performance's continued and explicit denial

[3] Similarly, a jury reasonably could find that the "mooning" by two of Wallace's other supervisors, Quebodeaux and Gautreau, which Wallace understandably found "inappropriate," ROA.488 (RE.53), contributed to a hostile work environment.

of the opportunity to work at elevation because Wallace is a woman, are "concrete examples of how" this toxic environment "interfered with [her] work performance." *Johnson v. Halsted*, 916 F.3d 410, 418 (5th Cir. 2019) (citation omitted).

This case is a far cry from those cited by Performance (at 33), where the plaintiffs complained of a handful of offensive comments or actions by a single employee. *See Gibson v. Potter*, 264 F. App'x 397, 401 (5th Cir. 2008) (statements and conduct by a single employee); *Shepherd v. Comptroller of Pub. Accounts of the State of Tex.*, 168 F.3d 871, 874 (5th Cir. 1999) (single employee's "touch[ing] of [plaintiff's] arm" and infrequent "boorish" statements); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981 (5th Cir. 2000) (single employee's isolated conduct and statements). As the district court concluded, this record supports a finding of harassment.

B. Performance is liable for the hostile work environment.

As explained in Wallace's opening brief (at 35-46), Performance is liable for the hostile work environment on three independently sufficient grounds: (1) negligence; (2) vicarious liability based on tangible employment actions taken against Wallace; and (3) Performance's failure to prove the *Ellerth*/*Faragher* defense.

1. Performance is liable based on its own negligence.

It is blackletter law that negligence is one of "two paths" to "impute liability" to a plaintiff's supervisors' conduct. *See, e.g.*, *Sharp v. City of*

Houston, 164 F.3d 923, 928-29 (5th Cir. 1999). Nonetheless, Performance offers no response to Wallace's argument—developed in detail in her opening brief (at 35-37)—that it is liable on this basis. Instead, Performance suggests that if a supervisor is involved in the harassment, as several of Wallace's supervisors were, the only way to prove employer liability is through agency principles of vicarious liability. *See* Performance Br. 28. That is incorrect. Again, negligence is a sufficient basis for liability (and, thus, reversal here). *See, e.g.*, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 755-59 (1998).

Performance further errs (at 34) when it states that Wallace's negligence-based claim is subject to the *Ellerth*/*Faragher* defense. As the Supreme Court made clear, that defense arises only when a plaintiff "seeks to invoke the more stringent standard of vicarious liability," not when she seeks to enforce the "minimum standard for employer liability under Title VII" established by negligence. *Ellerth*, 524 U.S. at 759. That is, "an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment." *Vance v. Ball State Univ.*, 570 U.S. 421, 446 (2013). In short, the negligence "standard was not disturbed by *Faragher* or *[Ellerth]*." *Sharp*, 164 F.3d at 929.

Here, a reasonable jury could find that Performance was negligent. As Wallace's opening brief shows (at 36-37), Performance knew or should have known of the pervasive environment of discrimination, yet it failed to

discipline Wallace's harassers while allowing the harassment to persist, rendering it liable under Title VII on that basis alone.

2. Performance is vicariously liable because Casey and Terro took tangible employment actions against Wallace.

Performance is also vicariously liable because two of Wallace's supervisors, Casey and Terro, took multiple "tangible employment actions" against her, all of which had a nexus to the harassment. Opening Br. 37-42; EEOC Br. 23-26. Again, Performance does not meaningfully engage with any of Wallace's arguments, leaving just its conclusory statement that "there has been no tangible employment action taken." Performance Br. 34. As already shown, however, a reasonable jury could conclude that Casey and Terro subjected Wallace to demotion, suspension, and the denial of experience and training important for advancing in the construction field. *See* Opening Br. 39.

A reasonable jury could also find that Casey and Terro took a tangible employment action against Wallace in the form of a constructive discharge. Opening Br. 39-40. Performance argues (at 24) that Wallace cannot show a constructive discharge because she did not "actually quit," while admitting (paradoxically) that Wallace testified that "she sent a resignation letter to Performance on August 23, 2017." And Casey corroborated her testimony, stating that she "resigned" "around the time" she was suspended, on August 16, 2017. ROA.600. That Performance claims that it "has no record of receiving such a letter," Performance Br. 24, simply gives rise to a triable

issue of fact for the jury. And Performance's boilerplate assertion that Wallace failed to show aggravating factors, *id*. at 25, is belied by the contrary evidence to which it has not responded, *see* Opening Br. 39-40.

3. Performance is vicariously liable even in the absence of a tangible employment action because it failed to establish its *Ellerth*/*Faragher* defense as a matter of law.

Even if Performance were not liable for its own negligence, and even if it were not vicariously liable as a result of its supervisors' tangible employment actions, Performance would still be liable for failure to establish an *Ellerth*/*Faragher* defense—that is, it has not established beyond dispute that (i) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (ii) Wallace "unreasonably failed to take advantage of any preventive or corrective opportunities provided by [Performance] or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *see* Opening Br. 43-46; EEOC Br. 26-31.

Performance argues that it met the first factor because its Employee Handbook policy "provided a very specific reporting mechanism" to contact "Human Resources" regarding discrimination. Performance Br. 35. But a reasonable jury could conclude that the policy was decidedly unclear in establishing a reporting structure: The policy also stated that employees should contact supervisors to report retaliation or to raise any "questions regarding the content or interpretation" of the policy. ROA.643; *see also E.E.O.C. v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 463-64 (5th Cir. 2013)

(en banc) (reasonable jury could conclude employer failed to satisfy first element of *Ellerth*/*Faragher* defense where its policy lacked "specific instructions regarding how to assert or investigate harassment complaints").

Even if Performance's policy were clear, Wallace presented sufficient evidence that it was inadequate and ineffective in light of HR's lack of awareness of the pervasively discriminatory work environment, particularly because the policy "urged" anyone with "knowledge" to report discrimination. ROA.642. Contrary to Performance's assertion (at 35-38), there is nothing unusual about looking to whether harassment is actually being reported and remedied to determine whether an anti-harassment policy is effective. This Court regularly asks that question to ensure that the employer has "suitable institutional policies" and training "regarding sexual harassment." *Pullen v. Caddo Par. Sch. Bd.*, 830 F.3d 205, 210, 213 (5th Cir. 2016) (reasonable jury could conclude employer failed to satisfy first element where evidence indicated "employees … were given no training or information about the sexual-harassment policy and were not even aware of its existence"); *see also Boh Bros.*, 731 F.3d at 463-67 (similar).

With respect to the second factor, Performance does not address Wallace's arguments that she reasonably took advantage of a mechanism for reporting harassment—complaining to her supervisors—and was not required to report to HR, particularly because the policy was ambiguous and there was evidence that Performance discouraged employees from getting

HR involved. *See* Opening Br. 45-46; *see also* EEOC Br. 29-31. Thus, a reasonable jury could conclude that Wallace did not "unreasonably fail" to take advantage of appropriate mechanisms under the circumstances.

III. A reasonable jury could find that Performance retaliated against Wallace for opposing discrimination.

Performance's defense of its decision to retaliate against Wallace by demoting, suspending, and discharging her depends entirely on resolving fact disputes in Performance's favor. Because that is not the role of a summary-judgment motion, the dismissal of Wallace's retaliation claim should be reversed.

A. Wallace engaged in protected activity.

Performance asserts that Wallace did not engage in any protected activity because her requests to work at elevation did not constitute opposition under Title VII's anti-retaliation provision. Performance relies on the purported agreement between Wallace and Gautreau that she would wait until dance floors were installed based on "concern for safety." Performance Br. 40. But as explained above (at 3-10), given all the evidence that Wallace was prohibited from working at elevation because she is a woman, why she was denied that opportunity is, at best for Performance, subject to a genuine dispute of material fact. Moreover, Performance's purported safety concern is inconsistent with the fact that Wallace was prohibited from working at elevation well after the dance floors were installed. Crediting Wallace's

testimony and accepting inferences in her favor, a reasonable jury could conclude that Wallace's repeated requests to work at elevation reflected sustained opposition to discriminatory conduct.

Performance separately argues that Wallace cannot rely on her opposition to Terro's harassment because "refusing sexual advances by a supervisor is insufficient to constitute a protected activity." Performance Br. 40 (citing *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 389 (5th Cir. 2007); *Frank v. Harris Cnty.*, 118 F. App'x 799, 804 (5th Cir. 2004)). But Performance does not contest Wallace's reliance on her opposition to Laprairie's and Casey's harassment. *See* Opening Br. 49. Wallace's opposition to these activities suffices to reach a jury on her retaliation claim, and for that reason alone reversal is warranted on this issue. *See* Opening Br. 47-57.

Moreover, Performance misreads this Court's precedents and ignores the record. *LeMaire* and *Frank* stand for the proposition that "[r]efusal of sexual advances, *alone*, is not 'opposition' to constitute protected activity for purposes of a retaliation claim." *E.E.O.C. v. Al Meghani Enters., Inc.*, 2021 WL 5450147, at *4 (W.D. Tex. Nov. 19, 2021) (citing *LeMaire*, 480 F.3d at 389) (emphasis added). But because "'opposition' is a fact-specific inquiry," "direct rejection of sexual advances of a supervisor may rise to the level of 'opposition' given the context and specific situation in which the rejection or

disapproval is expressed." *Id.* at *4-5 (citing *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276 (2009)).[4]

Here, a reasonable jury could conclude that Wallace's rejection rose to the level of opposition, especially given that (i) she had previously rejected Terro's requests to touch her breasts; and (ii) when she did not give in to his request for a picture of her breasts, he approached her and boasted that it "took guts [for him] to send" the picture of his own genitals. Opening Br. 50 (quoting ROA.479 (RE.44)); *supra* at 18; *see also Al Meghani Enters. Inc.*, 2021 WL 5450147, at *5 (looking at context to determine whether rejection amounted to opposition).

B. Performance's purported reasons for demoting, suspending, and discharging Wallace were pretextual.

Performance argues (at 42) that even if Wallace established a prima facie case of retaliation, it conclusively established that there was a legitimate, business-related reason for its actions because Wallace had attendance "issues." But Performance does not (and cannot) dispute that it grossly deviated from its written three-strike policy by abruptly suspending Wallace without any previous reprimand of any kind. *See* Opening Br. 13-14, 57. Though it is true that Performance's failure to follow its own policies "is not, in itself, proof of pretext of discrimination," Performance Br. 43, an employer

[4] To the extent that *LeMaire* and *Frank* stand as an obstacle to Wallace's retaliation claim, we agree with the EEOC that they are no longer good law in light of more recent Supreme Court precedent. *See* EEOC Br. 35.

still must "apply the penalties equally" and without discrimination, *Portis v. First Nat'l Bank of New Albany, Miss.*, 34 F.3d 325, 330 (5th Cir. 1994).

Here, a reasonable jury could conclude that Performance not only violated its own policies, but also "singled out" Wallace "for discriminatory treatment" because she opposed its discriminatory conduct. *Id.* (quoting *Corley v. Jackson Police Dep't*, 639 F.2d 1296, 1299 (5th Cir. Unit A 1981)). This fact dispute is properly reserved to trial, not summary judgment.

Conclusion

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

Respectfully submitted,

/s/ James E. Sudduth, III
James E. Sudduth, III
Kourtney L. Kech
Pierce A. Rapin
SUDDUTH & ASSOCIATES, LLC
1109 Pithon St.
Lake Charles, LA 70601

Roberta A. Kaplan
D. Brandon Trice
KAPLAN HECKER & FINK LLP
350 Fifth Ave., 63rd Fl.
New York, NY 10118

Joshua Matz
Raymond P. Tolentino
KAPLAN HECKER & FINK LLP
1050 K Street NW | Suite 1040
Washington, DC 20001

/s/ Brian Wolfman
Brian Wolfman
Madeline Meth
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Jacob Demree
Student Counsel

Counsel for Plaintiff-Appellant

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Certificate of Service

I certify that, on February 3, 2022, 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.

/s/ Brian Wolfman
Brian Wolfman

Counsel for Plaintiff-Appellant

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,455 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.

/s/ Brian Wolfman
Brian Wolfman

Counsel for Plaintiff-Appellant