No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

CRST EXPEDITED, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

GISELLE B. SCHUETZ
REBECCA J. HOULDING
JOSHUA FRIEDMAN
FRIEDMAN & HOULDING LLP
1050 Seven Oaks Lane
Mamaroneck, NY 10543
(888) 369-1119

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

(1) Section 703(a) of Title VII forbids an employer to discriminate against an employee on the basis of sex. An employer is liable for co-worker sexual harassment if the employer was negligent in its response to a complaint about such harassment. The question presented is:

> Where an employee complains to her employer about sexual harassment, does the employer fully satisfy its legal obligation under Title VII if it stops the harassment of that employee by the particular harasser complained of (the rule in the Eighth Circuit), or must the employer also take action to deter future harassment by other potential harassers (the standard in the Ninth and Tenth Circuits)?

(2) Section 704(a) of Title VII forbids an employer to "discriminate against" an employee who opposes discrimination forbidden by section 703 of Title VII. Under the employer's policy in this case, the court of appeals noted, "complaining of sexual harassment would directly lead to a net decrease in pay." The question presented is:

> If under an employer's policy a complaint of sexual harassment would "directly lead to a net decrease in pay" to the complaining employee, is that policy a per se violation of section 704(a), regardless of the employer's motivation in adopting the policy?

PARTIES

The individual plaintiffs are Cathy Sellars, Claudia Lopez, and Leslie Fortune. They sue on behalf of themselves and a class of all women who were employed as team truck drivers by CRST Expedited, Inc. at any time from October 12, 2013 to March 30, 2017, and who were required by CRST to exit the truck in response to their complaints of sexual harassment.

The defendant is CRST Expedited, Inc.

DIRECTLY RELATED CASES

Sellars v. CRST Expedited Inc., No. 19-2708, Eighth Circuit Court of Appeals, judgment entered September 8, 2021

Sellars v. CRST Expedited, Inc., No. C15-117-LTS, N.D. Iowa, judgment entered July 15, 2019

Sellars v. CRST Expedited, Inc., No. 19-8002, Eighth Circuit Court of Appeals, judgment entered March 5, 2019

Sellars v. CRST Expedited, Inc., No. 17-8018, Eighth Circuit Court of Appeals, judgment entered July 7, 2017

EEOC v. CRST Van Expedited, Inc., No. 14-1374, United States Supreme Court, decided May 19, 2016

EEOC v. CRST Van Expedited, Inc., No. 14-3159, Eighth Circuit Court of Appeals, judgment entered December 22, 2014

DIRECTLY RELATED CASES—Continued

EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, N.D. Iowa, judgment entered August 1, 2013

EEOC v. CRST Van Expedited, Inc., Nos. 09-374, 09-375, 10-1682, Eighth Circuit Court of Appeals, judgment entered May 8, 2012

EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, N.D. Iowa, judgment entered February 9, 2010

EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, N.D. Iowa, judgment entered April 30, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Petitioners Cathy Sellars, Claudia Lopez, and Leslie Fortune respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on September 8, 2021.

OPINIONS BELOW

The September 8, 2021 opinion of the court of appeals, which is reported at 13 F.4th 681 (8th Cir. 2021), is set out at pp. 1a-36a of the Appendix. The July 15, 2019 order of the district court, which is reported at 385 F.Supp.3d 803 (N.D. Iowa 2019), is set out at pp. 37a-118a of the Appendix. The January 15, 2019 order of the district court, which is reported at 359 F.Supp.3d 633 (N.D. Iowa 2019), is set out at pp. 119a-217a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on September 8, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set out in the Appendix.

STATEMENT OF THE CASE

Factual Background

CRST is a long-haul trucking company whose drivers begin and end trips at designated CRST terminals around the country. CRST's drivers work in pairs so that one driver can sleep in the truck's bunks while the other continues to drive. CRST does not directly pair the drivers; rather, drivers mutually agree to take on a truck load. Drivers earn an individualized mileage rate, and are paid based on the total miles driven on each job. New drivers usually spend a period of time in classroom training, and are then assigned to work with a lead driver for about 30 days. App. 2a-3a.

If during a trip a driver contacts CRST and complains about sexual harassment, it is CRST general policy to promptly remove her from the truck. Once she has been removed, the complainant no longer earns the mileage-based rate that would have been paid for the rest of the trip had she not complained. The victim does not begin again to earn that mileage-based rate until she resumes work driving another truck, usually after getting to one of the CRST terminals.[1] App. 4a,

[1] Prior to July 2015, a complainant was theoretically eligible to be paid a per-day layover rate if she were not offered another

9a. The alleged harasser, on the other hand, continues to be paid for the balance of the trip. Between 2013 and 2017 there were 135 instances in which female drivers were removed from CRST trucks—and deprived of mileage-based pay—after complaining about sexual harassment. App. 7a.

The named plaintiffs in this case are three women drivers who worked for CRST during this period. The plaintiffs were sexually harassed by a combined total of about fifteen male drivers. The harassment was exceptionally serious. App. 63a-84a. One plaintiff awoke in the truck bunk to find her naked male co-driver on top of her with his erect penis pressed against her. App. 6a. Another male driver almost tore the shirt of a plaintiff, who struggled and managed to escape. App. 5a. In one case a plaintiff was held at knife point until she was able to flee at a fuel stop. *Id.* Two male drivers threatened to rape their female co-driver, and one male driver threatened to kill his female co-driver. App. 5a, 6a, 74a, 79a. One male driver told a plaintiff that he and his friends wished to tie her up and "do things to [her]." App. 67a, 89a. Two male drivers masturbated in the presence of their female co-driver, and one male

---

driving job within 48 hours; in practice, however, this virtually never occurred. Subsequent to July 2015, CRST had a generally undisclosed policy of paying a set amount per day once a complainant was removed from her truck, and until she was offered a new pairing. Drivers were not told about that new policy, and generally learned of it only if they complained about sexual harassment. App. 11a.

driver exposed his genitals to his female co-driver. App. 5a, 7a, 71a, 91a.

The plaintiffs filed a total of ten complaints of sexual harassment with CRST officials. None of the alleged harassers were fired or suspended for harassment. The most common CRST response was to designate the harasser "male only," which meant that he could not again drive with a female co-driver. App. 4a, 6a, 7a. In several instances, CRST merely told the harasser to avoid contact with the victim. App. 5a, 7a. Once a plaintiff complained about a particular harasser, she was not again harassed by him, either because of this limited CRST action, or because she simply refused to drive with that harasser any more. But these repeated complaints did not end the sexual harassment by a succession of other male drivers. For each of the plaintiffs, most of the harassment she suffered occurred after she had initially complained about her first harasser. In addition, because of their complaints about sexual harassment, the plaintiffs were repeatedly removed from their trucks and experienced a net decrease in pay as a result. The plaintiffs resigned between 3 and 14 months after being hired; each claimed that she had been forced to resign by the repeated sexual harassment.

Prior EEOC Litigation

In 2007, prior to the period when the plaintiffs worked for CRST, the Equal Employment Opportunity Commission filed suit against CSRT, asserting that

women drivers at the firm were subject to unlawful sexual harassment. *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa).

The EEOC identified 270 women drivers whom it claimed were victim of sexual harassment. The EEOC litigation became embroiled in procedural and discovery disputes, as a result of which the trial judge refused to consider the sexual harassment claims of most of the asserted victims. The trial judge ultimately decided on the merits only the claims regarding 11 women drivers. The district court rejected each of those claims on the ground that CRST had not been negligent in responding to the complaints of those drivers. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012). That litigation did not encompass the claims of the plaintiffs in the instant case, who were hired several years after the trial in the EEOC case.

Following the resolution of the merits of the EEOC suit, the district judge awarded CRST counsel fees against the EEOC. The counsel fee dispute was considered by this Court in *EEOC v. CRST*, 578 U.S. 419 (2016).

District Court Decision

Plaintiffs commenced this action in 2015, asserting three related Title VII claims. First, the plaintiffs contended that the sexual harassment which each had suffered had created a hostile work environment that violated section 703(a). The plaintiffs contended that CRST had been negligent in failing to prevent and in

responding to that sexual harassment, and was thus liable for that harassment. Second, the plaintiffs asserted that CRST's policy of removing from a truck a woman who complained about sexual harassment, and denying the complainant mileage-based pay for the rest of the scheduled trip, violated section 704(a) of Title VII. 42 U.S.C. § 2000d. Third, the plaintiffs claimed that the harassment for which CRST was liable resulted in the constructive discharge of each of the plaintiffs.

The plaintiffs offered evidence that women drivers at CRST had complained about sexual harassment 265 times during the relevant time period. App. 185a. There were factual disputes about a number of subsidiary matters. But the parties largely agreed on two things. On the one hand, once CRST received a complaint of sexual harassment, harassment of the victim in question by the particular alleged perpetrator at least usually soon ended, most often because CRST would classify the perpetrator as "male only," precluding him from driving with the victim or any other woman. On the other hand, CRST rarely fired a male driver for sexual harassment.[2]

In response to CRST's motion for summary judgment, the district court concluded that a jury could find that the harassment inflicted on each of the plaintiffs was sufficiently serious to create an unlawful hostile work environment. App. 86a-97a. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). But the district

---

[2] *Sellars v. CRST Expedited, Inc.*, Eighth Circuit Oral Argument, 33:22-34:18.

court held that CRST was not negligent, as a matter of law, because it generally acted promptly to end harassment of a complaining woman driver by the particular alleged harasser. App. 103a-105a. The district court expressly refused to apply the Ninth Circuit decision in *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.2d 864 (9th Cir. 2001), insofar as it requires an employer to respond to sexual harassment in a manner that would deter harassment by future potential harassers. App. 108a-109a. Because, in the district court's view, ending harassment of a complaining victim by the particular perpetrator is all the law requires, the court did not address the conflicting evidence as to why CRST rarely fired a male driver for sexual harassment.[3]

With regard to plaintiffs' challenge to CRST's unpaid-removal policy for women who complained about sexual harassment, the district court certified a class of women who during a specified period of time had been required by CRST to exit the truck in response to their complaints of sexual harassment. The district court concluded that CRST had acted for benign motives in requiring women who complained

[3] For example, the court of appeals noted that CRST usually did not inflict punishment because CRST could not "corroborate" the statements of the complainant. App. 4a. Plaintiffs contended it was improper for CRST to regard those statements as nonprobative unless corroborated by some additional evidence, and argued that in practice CRST required that a complaint of sexual harassment be corroborated by a third party eye-witness, which could never occur when the victim was harassed in a truck. CRST, on the other hand, asserted that other forms of corroboration would have been accepted. App. 56a, 184a-187a.

about sexual harassment to exit the truck involved (App. 169a-175a).

The district court held that under Eighth Circuit precedent, a constructive discharge claim requires proof that the employer had acted with the purpose of forcing the plaintiff to resign. The court rejected the plaintiff's constructive discharge claim because it concluded there was no evidence CRST wanted to compel the named plaintiffs to quit. App. 113a-118a.

Court of Appeals Decision

With regard to plaintiffs' sexual harassment claims, the central legal issue on appeal was whether the Eighth Circuit would adopt or reject the Ninth Circuit negligence standard. The Ninth Circuit requires employers in responding to sexual harassment not only to end harassment by the specific perpetrator at issue, but also to take steps to deter such harassment by others. *E.g.*, *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d at 875–76. The panel expressly rejected the Ninth Circuit standard. "[W]e have not adopted the Ninth Circuit's requirement that an employer's remedial response to harassment must deter future harassment by any offender in order to be reasonable, *Nichols v. Azteca Rest. Enters., Inc*., . . . We decline to do so here." App. 31a. The panel concluded that CRST was non-negligent as a matter of law, because it generally ended

harassment of a complainant by the alleged perpetrator. App. 30a.

With regard to plaintiffs' section 704 claim, the court of appeals acknowledged that the CRST pre-July 2015 policy of removing from a truck a driver who complained about sexual harassment, and of not paying her for the rest of the trip, almost always injured women who complained about such harassment. "The record establishes that a vast majority of pre-2015 class members actually experienced a net decrease in pay upon removal. Thus, a reasonable employee in the pre-2015 class members' position would expect that complaining of sexual harassment would directly lead to a net decrease in pay." App. 16a. Such economic harm, the court acknowledged, "might often operate to induce aggrieved employees quietly to accept substandard conditions." App. 16a (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

But the court of appeals held that this did not render the unpaid-removal policy a per se violation of section 704. The Eighth Circuit ruled, as it had earlier in *Franklin v. Local 2 of the Sheet Metal Workers*, 565 F.3d 508 (8th Cir. 2009), that even if a policy would directly lead to injury as a consequence of protected activity, that is not a per se violation of section 704 unless the policy singles out and applies *solely* to protected activity. App. 12a-13a. The unpaid-removal policy in this case was not a per se violation, the court of appeals held, because it applied to complaints related to safety as well as to complaints about sexual harassment. *Id.* The Eighth Circuit thus refused to apply the Seventh

Circuit per se violation standard in *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 506 U.S. 906 (1992). It also concluded that there was not sufficient evidence that CRST's pre-July 2015 policy[4] of removing complainants from their trucks was the result of an invidious motive. App. 17a-21a. The court of appeals did not address CRST's motive in refusing to pay those complainants the rest of what they would have earned if they had not complained. App. 13a n.5.

The court of appeals rejected the plaintiffs' constructive discharge claims because the court had concluded that CRST was not legally responsible for the sexual harassment that the plaintiffs claimed had forced them to resign. App. 33a-35a.

REASONS FOR GRANTING THE WRIT

This petition presents two related circuit conflicts regarding Title VII of the 1964 Civil Rights Act. The Eighth Circuit decision expressly rejects the Ninth Circuit standard regarding when an employer is liable for negligently failing to prevent and respond to co-worker sexual harassment forbidden by section 703. The decision below also refuses to follow the Seventh Circuit's interpretation of the anti-retaliation provision of section 704(a). The Eighth Circuit rejected those Seventh and Ninth Circuit standards at the express urging of

[4] The court of appeals remanded to the district court to address the motive behind CRST's post-July 2015 policy. App. 30a.

CRST.[5] The decision below is squarely at odds with the interpretation of those provisions by the Equal Employment Opportunity Commission.

I. THERE IS AN IMPORTANT CONFLICT REGARDING HOW AN EMPLOYER MUST RESPOND TO COMPLAINTS OF SEXUAL HARASSMENT

This case presents an issue of great importance under Title VII and other federal statutes that forbid harassment on the basis of sex or race. An employer is liable under Title VII for co-worker sexual harassment if it was negligent in response to complaints about such harassment. *Vance v. Ball State University*, 570 U.S. 421, 445, 449 (2013). The Ninth Circuit has long held that the response of an employer to sexual harassment must not only address the conduct of the harasser at issue, but also deter such conduct by other potential harassers. The Sixth Circuit construes in the same way the Title IX prohibition against sexual harassment, and the Second Circuit applies the same interpretation to the Title VI prohibition against racial harassment. In the instant Title VII case, on the other hand, the Eighth Circuit expressly rejected the Ninth Circuit standard.

Whether the Eighth Circuit would follow or reject the Ninth Circuit rule was the central legal issue raised by the plaintiffs' sexual harassment claim. The

---

[5] Brief of Defendant-Appellee CRST Expedited, Inc., 22, 44-45.

District Court specifically rejected the Ninth Circuit decision in *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875–76 (9th Cir. 2001). App. 108a-109a. On appeal, plaintiffs urged the court of appeals to follow the established Ninth Circuit rule.[6] The defendant argued that the Ninth Circuit rule was wrong, and in conflict with several other circuits, and urged the Eighth Circuit to reject that Ninth Circuit standard.[7] The panel below did precisely that.

> The Plaintiffs argue that, given the constructive notice to CRST that its policies were not preventing harassment by employees whom it had no reason to suspect of being harassers, CRST should have taken additional steps—beyond those that presumably remedied the threat of repeat harassment by known harassers—to affirmatively prevent future harassment. Although employers may be required to escalate their response to repeated harassment by the same coworker, . . . we have not adopted the Ninth Circuit's requirement that an employer's remedial response to harassment must deter future harassment by any offender in order to be reasonable, *Nichols v. Azteca Rest. Enters., Inc.* . . . We decline to do so here.

App. 30a-31a (footnote omitted).

The Ninth Circuit has for 30 years insisted, to the contrary, that the sufficiency of an employer's response

---

[6] Brief for Plaintiffs-Appellants, 64.

[7] Brief of Defendant-Appellee CRST Expedited, Inc., 45.

to sexual harassment must be measured not only in light of its "ability to stop harassment by the person who engaged in harassment," but also based on "the remedy's ability to persuade potential harassers to refrain from unlawful conduct." *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991). An employer may be liable if its response does "not take into account the need to maintain a harassment-free *environment*." *Id.* (emphasis added). Merely stopping harassment by a particular perpetrator is not sufficient if the environment itself remains affected by harassment by others.

The Ninth Circuit decision in *Nichols v. Azteca Restaurant Enterprises*, which was the particular focus of the litigation below, is only one of a series of Ninth Circuit decisions reiterating this interpretation of Title VII. In *Nichols*, the court of appeals held that "[w]hen the . . . remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment." 256 F.3d 875-76. "Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment—by the same offender or others." *Fuller v. City of Oakland*, 47 F.2d 1522, 1528 (9th Cir. 1995). "The reasonableness and adequacy of the remedy depends upon its ability to stop the individual harasser from continuing to engage in such conduct and to discourage other potential harassers from engaging in similar unlawful conduct." *Mockler v. Multnomah County*, 140 F.3d 808, 813 (9th Cir. 1998). "We have been clear that in order to be adequate, remedial actions must be designed not only to

prevent future conduct by the harasser, but also by other potential harassers." *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1121 (9th Cir. 2004).

The Ninth Circuit has reiterated that rule in more than half a dozen additional decisions.[8] That interpretation of Title VII is codified in the Ninth Circuit model jury instructions:

> Whether the defendant's remedial action is reasonable and adequate depends on the remedy's effectiveness in stopping the individual harasser from continuing to engage in such conduct and in discouraging other potential harassers from engaging in similar unlawful conduct.

Ninth Circuit Model Jury Instructions Civil 10.7.

Under the Ninth Circuit rule, an employer could be liable, even if it did end harassment by the perpetrator complained, if its actions failed to deter harassment by others. In *McGinest v. GTE Service Corp.*, held the employer was liable even though

---

[8] *Christian v. Umpqua Bank*, 984 F.3d 801, 812 (9th Cir. 2020); *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1177 (9th Cir. 2001); *Wilson v. Elko County School Dist.*, 2000 WL 623136, at *1 (9th Cir. May 15, 2000); *Venkataraman v. Intel Corp.*, 1999 WL 980357, at *1 (9th Cir. Oct. 28, 1999); *Smith v. Oakland Scavenger Co.*, 1999 WL 661335, at *3 (9th Cir. Oct. 16, 1997); *Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997); *Riggs v. Louisiana-Pacific Corp.*, 1996 WL 623061, at *3 (9th Cir. Oct. 24, 1996).

> [the employer's] responses . . . may have been successful in persuading identified harassers to cease their activities. But over a ten-year period, [the plaintiff] was subjected to inappropriate comments by a minimum of six individuals, and was allegedly physically endangered or financially harmed through the actions of several others.

360 F.3d 1103, 1121 (9th Cir. 2004). The employer thus was not entitled to summary judgment. Judge O'Scannlain acknowledged that the defendant in that case, like the defendant in the instant case, had succeeded in stopping harassment by known harassers. "[W]hen GTE acted to address McGinest's specific allegations, discriminatory conduct from that particular employee appears to have ceased." 360 F.3d at 1135-36 (O'Scannlain, J., concurring and dissenting). But in the Ninth Circuit, unlike the Eighth Circuit, that was not legally sufficient.

> [D]espite GTE's efforts, opprobrious comments and behavior continued with some regularity from 1995 through 2000. And considering the totality of the circumstances, as we must, a reasonable factfinder could conclude that GTE's corrective measures were inadequate for failing "to impose sufficient penalties to assure a workplace free from . . . harassment.". . . . In other words, the totality of the circumstances may suggest that the discriminatory conduct still occurred with sufficient frequency and severity such that GTE's remedies did not reasonably "persuade

> potential harassers to refrain from unlawful conduct."

Id. (quoting *Ellison*, 924 F.2d at 882); *see Fuller v. City of Oakland*, 140 F.3d at 1528 ("[the employer's inaction would] fail the deterrence prong of the *Ellison* test whether or not the individual voluntarily ceased harassment").

The Tenth Circuit applied a similar standard in *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726, 747 (10th Cir. 2014). The district court had granted summary judgment in that case on the ground that the defendant had acted to stop any sexual harassment of which he was aware. "Overall, the Sheriff exercised reasonable care to promptly correct any sexual harassment of which he became aware. The record shows that whenever the Sheriff was actually informed about such type of behavior, he took immediate action." *Kramer v. Wasatch County Sheriff's Office*, 857 F.Supp.2d 1190, 1208 (D. Utah. 2012). But, the Tenth Circuit held that was not sufficient to avoid liability. The Tenth Circuit explained that

> [t]he County's evidence that the Sheriff responded to sexual harassment "of which he became aware," . . . does not automatically entitle the County to judgment as a matter of law. . . . A showing that an employer made "an attempt to promptly remediate the reported sexual harassment," . . . , without any showing that such attempts were "reasonably calculated to end the harassment" and deter

> future harassers, does not entitle the County to judgment as a matter of law.

743 F.3d at 747 (quoting 857 F.Supp.2d at 2108); *see Tilghman v. Kirby*, 662 Fed.Appx. 598, 602 n.3 (10th Cir. 2016) (applying the *Kramer* "deter future harassers" standard in an Equal Protection case); *Culp v. Remington of Montrose, LLC*, 2021 WL 3675165, at *5 (D. Colo. Aug. 19, 2021) (applying the *Kramer* "deter future harassers" standard to a Title VII claim); *Johnston v. Espinoza-Gonzalez*, 2016 WL 7188524, at *6 (D. Colo. Dec. 12, 2016) (same).

The same problem arises under Title IX, which prohibits discrimination on the basis of sex in educational programs receiving federal financial assistance. 20 U.S.C. § 1681(a). A school is liable for sexual harassment under Title IX when its response is deliberately indifferent (*Davis v. Monroe County Bd. of Education*, 526 U.S. 629, 642 (1999)), a standard more demanding than the negligence standard applicable to co-worker harassment under Title VII. Despite that more demanding Title IX standard, the Sixth Circuit has held that a school's response to sexual harassment cannot be limited to ending harassment by a known perpetrator, at least where the school knows its response has been insufficient to deter harassment by others. *Patterson v. Hudson Area Schools*, 551 F.3d 438 (6th Cir. 2009). The school board in *Patterson*, like the defendant in the instant case, argued that it had done all that was legally required when it stopped known harassers from again harassing the student victim at issue. "The thrust of [the school board's] argument is that [it] dealt

successfully with each identified perpetrator; therefore, it asserts that it cannot be liable under Title IX as a matter of law." 551 F.3d at 449. That board's response was legally insufficient, the Sixth Circuit held, because it did not deter harassment by *other* students, and the defendant knew that it had failed to do so.

> Though typically [the school board's response] largely stopped harassment by the . . . student, they did not stop other students from harassing [the victim]. . . . Moreover, [the school board] was aware that [its response] regarding a few students were not stopping the overall harassment of [the victim]; it is undisputed that [the victim] continued to have problems with other students, . . . and . . . reported those continuing problems to [the school board].

551 F.3d at 448. The board's success in dealing with individual known harassers was insufficient to bar liability where the board knew that those responses were not deterring harassment by others.

> We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student. Such a situation raises a

> genuine issue of material fact for a jury to decide.

Id.[9]

The Second Circuit construes in the same way Title VI, which prohibits racial discrimination by recipients of federal funds. *Zeno v. Pine Plains Central School District*, 702 F.3d 655, 668-69 (2d Cir. 2012); *see* 42 U.S.C. § 2000d. In *Zeno* a student had been subjected to racial harassment by fellow students. The school district disciplined the known harassers, and that was effective in preventing further misconduct by those particular students; other students, however, repeatedly harassed the victim. The district advanced that same interpretation of Title VI that the Eighth Circuit has adopted for Title VII, asserting that it was required only to end harassment by known harassers. "The District argued that its disciplinary response could not constitute deliberate indifference because it immediately suspended nearly every student who was identified as harassing [the victim]." 702 F.3d at 668. The Second Circuit rejected that interpretation of Title VI. The court of appeals held that a jury could have found the district deliberately indifferent because "it knew that disciplining [the victim's] harassers—through suspensions or otherwise—did not deter others from [subjecting the victim to] serious and offensive racial conduct." 702 F.3d at 669.

---

[9] A dissenting judge would have interpreted Title IX in a manner similar to the Eighth Circuit interpretation of Title VII. 551 F.3d at 452, 480 (Vinson, J., dissenting).

The federal agencies responsible for administering these anti-discrimination laws have consistently construed them in a manner consistent with the Ninth Circuit's interpretation of Title VII. The Department of Education, which is responsible for implementing Title IX, construes the statute to require action to deter harassment by others even when a known harasser has ceased to engage in that conduct, citing for that construction of Title IX the Ninth Circuit Title VII decision in *Fuller*.[10] In *Zeno*, the Department of Justice filed an amicus brief on behalf of the United States urging the court of appeals to apply to Title VI the Sixth Circuit's interpretation of Title IX in *Patterson*.

> [I]f a school district is aware that other students are not being deterred from engaging in harassment by individual disciplinary action, and the district continues to rely on those disciplinary measures as its exclusive remedy, that response would not be reasonably calculated to prevent persistent harassment from occurring again. This Circuit should adopt

---

[10] Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12043 n.78 (1997) ("Even if the harassment stops without the school's involvement, the school may still need to take steps to prevent or deter any future harassment—to inform the school community that harassment will not be tolerated. *Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995)").

> the Sixth Circuit's rationale in . . . *Patterson*. . . .[11]

The EEOC, which is responsible for enforcing Title VII, has repeatedly endorsed the Ninth Circuit's interpretation of that statute.[12]

Because of this conflict, whether a Title VII sexual harassment claim would prevail, or be dismissed, would depend on whether it was filed in the Eighth Circuit or the Ninth Circuit. An employer doing business in several circuits would have to comply with different standards in responding to complaints of sexual harassment. That has actually occurred to the instant defendant, CRST. In *Anderson v. CRST*, 685 Fed.Appx. 524, 526-27 (9th Cir. 2017), the plaintiff complained about being sexually harassed by the male driver with whom she was working; CRST responded by removing the plaintiff from the truck, but did not discipline the alleged harasser. CRST argued that its response was sufficient because the plaintiff was not thereafter harassed by the driver in question. The Ninth Circuit, at the urging of the EEOC,[13] disagreed, holding that there

---

[11] Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee Urging Affirmance, 26, available at 2011 WL 1636383.

[12] *E.g.*, Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal, *Christian v. Umpqua Bank*, No. 18-35522, at 17 (quoting *Fuller*); *see* n.13, *infra*.

[13] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff/Appellant and in Favor of Reversal, *Anderson v. CRST International, Inc.*, No. 15-55556 (9th Cir.), 31-32, available at 2015 WL 9449421 (quoting *Fuller*).

was a triable question of fact as to whether the CRST response was sufficient, as "measured by the twin purposes of ending the current harassment and deterring future harassment—by the same offender or others." 685 Fed.Appx. at 526-27 (quoting *Fuller*, 47 F.3d at 1528).

This case presents an excellent vehicle for resolving this conflict. During the relevant time period, CRST had received 265 sexual harassment complaints. App. 185a. A jury could thus conclude that CRST knew that the method in which it was responding to harassment complaints, even if adequate to end harassment by the complained-of perpetrators, was not deterring harassment by other drivers. In the case of the three plaintiffs, most of the harassment which each suffered occurred *after* she first complained about sexual harassment.

This Court has repeatedly granted certiorari to address the standard governing employer liability for sexual harassment, because that standard shapes the practices of countless employers, and because of the continued ubiquity of sexual harassment. *Vance v. Ball State Univ.*, 570 U.S. 421 (2013); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). This remains an unsettled area of federal law, and clarification by this Court is clearly needed.

II. THERE IS AN IMPORTANT CONFLICT REGARDING WHAT CONSTITUTES A PER SE VIOLATION OF SECTION 704(a)

This case presents a longstanding and complex circuit conflict regarding the meaning of section 704 of Title VII, and of the similarly worded and construed provision of the Age Discrimination in Employment Act. 29 U.S.C. § 623(d). The EEOC has for 35 years construed these provisions to prohibit practices that impose an adverse employment action on an employee as a consequence of the employee's engaging in protected activity. The Commission maintains that such a practice is a per se violation of Title VII and the ADEA, regardless of an employer's motive in adopting the practice itself. The Third, Sixth and Seventh Circuits agree with the EEOC's interpretation of these laws. On the other hand, the Second, Fifth and Eighth Circuits have rejected the Commission's construction, although they disagree among themselves about when such practices are indeed unlawful.

The EEOC's interpretation of Title VII and the ADEA dates from 1986. The Commission has filed a series of actions against employers arguing that such practices are a per se violation of federal law.[14] It has also filed amicus briefs advancing its interpretation of

---

[14] *EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006); *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1991); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085 (5th Cir. 1987); *EEOC v. General Motors Corp.*, 826 F.Supp. 1122 (N.D. Ill. 1993).

these provisions, including in the instant case.[15] The EEOC's interpretation of these statutes is spelled out in its Compliance Manual.[16] The Department of Justice, which is responsible for enforcing Title VII and the ADEA against state and local government agencies, advanced this interpretation of section 704 in *United States v. New York City Transit Authority*, 97 F.3d 672 (2d Cir. 1996).

The Seventh Circuit adopted the EEOC's interpretation in *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992), *cert. denied*, 506 U.S. 906 (1992). The collective bargaining agreement in that case provided employees with a right to a grievance proceeding to challenge disputed employment actions, but authorized the employer to halt any such proceeding if the employee sought relief "in any other forum, whether administrative or judicial." 957 F.2d at 426. The employer contended that this provision, and its practice of terminating grievance proceedings if an employee filed a charge with the EEOC, were lawful, because the employer's benign purpose was merely to "avoid[] duplicative litigation." *Id*. at 428. But the Seventh Circuit held that the employer's intent in adopting the policy was legally irrelevant:

---

[15] *E.g.*, Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, Watford v. Jefferson County Public Schools, available at 2016 WL 6247384.

[16] EEOC Compliance Manual Ch. 4, § 4:26 (quoting *Board of Governors*, 957 F.3d at 428).

> Nothing in [the law] requires a showing of intent in retaliatory policy cases. To the contrary, [the law] is concerned with the effect of discrimination against employees who pursue their federal rights, not the motivation of the employer who discriminates. . . . [T]he employer may not proffer a good faith reason for taking retaliatory action.

957 F.2d at 427. The court of appeals ruled that a policy is a per se violation if it makes engagement in statutorily protected activity "the determining factor."

> When an employee's participation in statutorily protected activity is the determining factor in an employer's decision to take adverse employment action, that action is invalid regardless of the employer's intent. If the employer's differential treatment of its employees is impermissible, the policy which provides for its differential treatment is invalid regardless of the employer's motivation for adopting or invoking the policy.

957 F.2d at 428.

The Sixth Circuit has twice endorsed this interpretation of federal law, in both instances relying on the Seventh Circuit's decision in *Board of Governors*. In *EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490, 498 (6th Cir. 2006), the Sixth Circuit agreed with the Seventh Circuit's conclusion that the employer's action in *Board of Governors* "clearly constituted retaliation in violation of [federal law]." 466 F.3d at 498. In *Watford v. Jefferson County Public Schools*, 870 F.3d

448 (6th Cir. 2017), the applicable collective bargaining agreement provided that an employee's grievance would be held "in abeyance" if the employee filed a complaint with "another agency." 870 F.3d 450. The Sixth Circuit held that the provision was "retaliatory on its face" (870 F.3d at 450) because it made "the availability of remedies contingent on not filing an EEOC charge." 870 F.3d at 454. Under the Sixth Circuit's analysis, the motive of the employer and union in adopting the disputed provision was irrelevant. The only issue was whether the provision "would dissuade a reasonable worker from" engaging in protected activity. *Id*. at 453.

The Third Circuit has repeatedly endorsed the Seventh Circuit's decision in *Board of Governors*. In *Fasold v. Justice*, 409 F.3d 178 (3d Cir. 2005), the Third Circuit cited *Board of Governors* for the rule that an employer "may not deny [an] employee's . . . grievance because the employee had sought administrative relief under the federal or state procedure." 409 F.3d at 189. In *DiBase v. Smithkline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995), the court of appeals explained that in *Board of Governors* "[t]he company's policy . . . *commanded* a violation of this provision anytime an employee filed an age discrimination charge with the EEOC." 48 F.3d at 730 n.13 (emphasis in original).

On the other hand, in *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir. 1991), the Fifth Circuit rejected the EEOC's longstanding interpretation of section 704, but adopted a construction that differs as well from that of the Eighth Circuit in the instant case. The

defendant in *Huber* had a policy of denying certain severance-related benefits to former employees if they were challenging their termination for any reason. The EEOC sued on behalf of a former employee who had been denied those benefits because she had filed an EEOC Title VII charge. The employer asserted it had withheld the benefits to avoid tax problems that might arise if the former employee were reinstated as a result of the Title VII claim. The Fifth Circuit rejected the EEOC's contention that the defendant's action was "a per se violation of Title VII" (927 F.2d at 1327), and that an employer's motive was irrelevant. *Id*.

The Fifth Circuit did not, however, hold that this type of practice is lawful so long as the employer had adopted the practice for a non-discriminatory reason. Rather, the Fifth Circuit held that the effect of the employer's practice on employees who engage in protected activity was a form of disparate impact. It reasoned that the EEOC had established a prima facie case of a section 704(a) violation because the Commission had demonstrated "a causal connection between the participation in the protected activity and the adverse employment decision." 927 F.2d at 1329 n.25. The EEOC was required only to establish that causal connection, and did not need to show that the employer had acted with "a retaliatory motive in a pejorative sense." *Id*. Under the Fifth Circuit's standard, "the nondiscriminatory character of the actual motive does not suffice to overcome a prima facie case of disparate impact." 927 F.2d at 1129. Rather, the burden was on the employer to offer evidence that its policy had "a

significant relationship to a legitimate business purpose." 927 F.2d at 1328 (emphasis in original).

The Second Circuit has rejected EEOC's interpretation of Title VII, on a ground, and in circumstances, different than that of either the Fifth or Eighth Circuit. The Second Circuit will not apply the EEOC interpretation where the defendant's policy is a "reasonable defensive measure." In *United States v. New York City Transit Authority*, 97 F.3d 672 (2d Cir. 1996), the employer usually considered discrimination matters through its EEO Division, but instead investigated them through the Law Department if the employee had filed a complaint with an outside agency. The Second Circuit rejected the contention of the federal Department of Justice that this violated section 704. The court of appeals reasoned that the employer's practice was lawful because it was a "reasonable defensive measure," in view of the possibility that a complaint to an outside agency would lead to litigation. 97 F.3d at 677. In *Richardson v. Commission on Human Rights & Opportunities*, 532 F.3d 114 (2d Cir. 2008), an employee of the state commission was subject to a collective bargaining agreement, under which a grievance could not go to arbitration if the employee filed a complaint with the commission in its capacity as the state anti-discrimination agency. The Second Circuit, rejecting the contention of the EEOC (532 F.3d at 117), and held that this arrangement did not violate Title VII, because it was a "reasonable defensive measure" to avoid duplicative proceedings where the employer itself

maintained two distinct forums for addressing such claims. 532 F.3d at 117, 123-24.

The Eighth Circuit also has rejected the view of the EEOC and the Seventh Circuit, but on yet a different theory and in a manner entailing yet a different rule. In the Eighth Circuit, the key issue is whether the policy that results in a harm to a worker who engages in protected activity is applicable only to that protected activity, or also applies to some instance of non-protected activity. If, under an employer's policy, an employee's participation in protected activity is the determining factor in the employer's decision, that is not a per se violation of section 704 so long as under the employer's policy a similar adverse action would be taken against some form of non-protected activity. Thus, the panel explained,

> [t]he Plaintiffs have not pointed to any evidence that CRST's removal policy applies differently to sexual harassment complainants than to complainants of other issues, such as safety. Moreover, the Plaintiffs do not dispute that CRST's removal policy applies regardless of the complainant's gender. CRST's removal policy thus does not constitute per se retaliation in this case. *See* [*Franklin*, 565 F.3d] at 521 (declining to follow *Board of Governors* because the allegedly retaliatory policy at issue applied broadly to all legal bills and did not single out members who filed EEOC charges).

App. 13a (footnote omitted). The CRST unpaid-removal policy that adversely affected women who complained about sexual harassment did not violate section 704(a), the Eighth Circuit held, because CRST imposed the same consequence on a worker who complained about a safety problem. The Eighth Circuit's earlier decision in *Franklin* had applied the same standard as in the instant case, holding that a union policy that on its face imposed adverse consequences on members who filed Title VII charges was not unlawful per se because the union policy "was not singling out members who filed EEOC charges." 565 F.3d at 521.

But the Eighth Circuit's "singling out" standard, in this case and in *Franklin*, was expressly rejected by the Seventh Circuit in *Board of Governors*. The defendant in *Board of Governors* made there the same argument that was the basis of those Eighth Circuit decisions.

> The Board challenges the characterization of its policy as discriminatory since [the policy] does not apply solely to employees who bring protected discrimination claims. Instead, it applies to any employee who brings an employment-related action in a judicial or administrative forum. In support of its argument, the Board notes several types of unprotected activity that would also lead to adverse employment action.

957 F.2d at 430 (footnote omitted). The policy at issue in *Board of Governors* clearly was not limited to the filing of EEOC charges, but applied broadly to authorize termination of grievance proceedings if the

"employee seeks resolution of the matter in *any other* forum, whether administrative or judicial." 957 F.2d at 426 (emphasis added).

But the Seventh Circuit held that federal law is violated by a practice which makes participation in protected activity the "determining factor" in the employer's action, regardless of whether other non-protected activity might also elicit the same consequence.

> [T]he fact that an employer can deny grievance proceedings on the basis of participation in unprotected activity is entirely irrelevant. . . . [I]f [the policy] authorized the Board to terminate grievance proceedings if and only if an employee filed an ADEA claim with the EEOC, that policy would be clearly discriminatory [under federal law]. The contention that the policy is any less discriminatory when its scope is broadened is unpersuasive. Employees' rights . . . would be as effectively stifled under either policy.

Id. Similarly, the practice held unlawful per se by the Sixth Circuit in *Watford* did not single out federal discrimination complaints, but applied broadly whenever the employee opted "to pursue a complaint using another agency," regardless of the nature of the complaint or the agency before which it was raised. 870 F.3d at 450.

This circuit conflict is widely recognized. The Seventh Circuit in *Board of Governors* expressly disagreed with the Fifth Circuit decision in *Huber*, arguing that

"*Huber* is inconsistent with the Supreme Court's holding in *International Union, UAW v. Johnson Controls, Inc.* . . . There the Court held that 'the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.'" 957 F.2d at 429 n.8 (quoting *Johnson Controls*, 449 U.S. 187, 199 (1991)).

The Sixth Circuit in *Watford* rejected the holding of the Second Circuit in *Richardson*.

> With due respect to our sister circuit, *Richardson* applied an outdated definition of "adverse employment action" that is inconsistent with *Burlington Northern*. . . . As such, *Richardson*'s focus was on whether "the election-of-remedies provision [at issue] qualif[ied] as a 'reasonable defensive measure.'" [532 F.3d] at 124. Our focus, as the Supreme Court has instructed, is broader. We ask whether a reasonable employee would be dissuaded from filing a charge. . . . Simply put, "the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.". . . And because the *Richardson* court so confined the forbidden actions and harms, its reasoning does not guide our decision.

870 F.3d at 455 (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68-69 (2006)).

The Second Circuit in *Richardson* explained that the Seventh Circuit decision in *Board of Governors* was

inconsistent with the Second Circuit's own precedent in *United States v. New York City Transit Authority*.

> Richardson also relies on *EEOC v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992). . . . Our case law does not permit us to follow this holding on the facts of this case. In reaching its conclusion, the *Board of Governors* court assumes, without explanation, that an employer's decision to withdraw from arbitration constitutes an adverse employment action, even though the language of the CBA explicitly authorizes such action. . . . *NYC Transit* does not permit us to make a similar assumption here.

532 F.3d at 125.

A number of district courts have noted this conflict. *Watford v. Jefferson County Public Schools*, 163 F.Supp.3d 456, 461 (W.D. Ky. 2016) ("the Second Circuit case of *Richardson* . . . reached the opposite conclusion [from *Board of Governors*] when presented with the same issue."); *Trayling v. St. Joseph County Employers Chapter of Local # 2955*, 953 F.Supp.2d 793, 797 (W.D. Mich. 2013) ("The Seventh and Second Circuit Court of Appeals cases upon which the parties rely, *Board of Governors* and *Richardson*, provide two different analyses of the question. . . .").

The circuit conflict is not only well established, but also multi-faceted. The rule in the Third, Sixth and Seventh Circuits, adopting the EEOC's interpretation of federal law, has been rejected by the Second, Fifth and Eighth Circuits. But the Second, Fifth and Eighth

Circuits in turn disagree about what standard should be applied instead of that of the EEOC. The Fifth Circuit rejects the whole idea that a policy can be unlawful per se, regardless of motive, but applies a form of disparate impact analysis instead of a motive-based standard. The Second Circuit rejects the Seventh Circuit standard only with regard to a policy that is a "reasonable defensive measure," a restriction that would not apply in the instant case. And neither the Second Circuit nor Fifth Circuit accept the Eighth Circuit view that, unless a policy singles out and applies only to protected activity, a plaintiff must prove the policy was adopted for the purpose of punishing employees who engage in protected activity.

Because the courts of appeals have adopted different interpretations of the prohibitions in Title VII and the ADEA, the outcome of a given case would depend on where it is filed. If CRST were headquartered in Chicago rather than Cedar Rapids, and this action had been filed in the Northern District of Illinois rather than the Northern District of Iowa, the plaintiffs would have been entitled to summary judgment on this claim. Because CRST is a nationwide trucking company, claims regarding its employment practices could arise in almost any circuit, depending on where in the country a woman driver was when she complained about harassment, was removed from her truck, and suffered a loss of income. A harassment victim removed from her truck in Davenport, Iowa would have no claim, but the same victim, if removed from her truck a few miles

away on the other side of the Mississippi River in Moline, Illinois, would be entitled to summary judgment.

The EEOC's longstanding interpretation of Title VII and the ADEA is clearly correct. Section 703(a) of Title VII, like section 704(a), forbids an employer to "discriminate" on certain prohibited grounds. In the case of section 703(a), which forbids discrimination in the terms and conditions of employment, a practice which expressly imposes adverse action on a protected group is unlawful regardless of whether it applies as well to some unprotected group. As the Seventh Circuit pointed out, if an employer adopts a policy which bans the hiring of anyone over 40 years of age,

> that policy constitutes facial discrimination under the ADEA. . . . But if an employer enacts a policy that prohibits hiring anyone over 35 years of age, that policy would also constitute a discriminatory policy with regard to members of the protected class since all protected class members are excluded from employment because of age. It would be incongruous for us to accept the . . . approach that the second policy did not amount to a policy of age-based discrimination against individuals over 40 solely because the policy also adversely affected individuals between the ages of 35 and 40.

Board of Governors, 957 F.2d at 430-31. There is no reason to think that the meaning of the term "discriminate" in section 704(a) is narrower than its meaning in section 703(a).

A wide range of federal statutes depend for their enforcement on the willingness of employees to bring violations to the attention of federal agencies, and of their own employers. For that reason, this Court has repeatedly granted review to remove obstacles that would impede access either to statutory enforcement mechanisms or to informal private corrective mechanisms. *Lawson v. FMR LLC*, 571 U.S. 429 (2014); *Kasten v. Saint-Germain Performance Plastics*, 563 U.S. 1 (2011); *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011); *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Action by this Court to address that problem is equally warranted in the instant case.

III. THE QUESTIONS PRESENTED ARE CLOSELY RELATED

The questions presented are as a practical matter inextricably intertwined. The Eighth Circuit's analysis of the plaintiffs' sexual harassment claim acknowledged that "[e]vidence that an employer . . . effectively discouraged complaints from being filed would be relevant to whether an employer was negligent in failing to prevent harassment." App. 25a (quoting *Vance v. Ball State Univ.*, 570 U.S. 421, 449 (2013)). The court of appeals correctly concluded that CRST's unpaid-removal policy would indeed discourage sexual harassment victims from filing complaints. App. 16a. Thus if the unpaid-removal policy was a per se violation of section 704(a), CRST's policy regarding sexual harassment

would be at least presumptively negligent. The panel stressed that the fifteen men who sexually harassed the plaintiffs had "no known history of harassment." App. 29a, 32a, 33a. But if the unpaid-removal policy was unlawful, that violation could itself have been responsible for CRST's lack of knowledge about whether a given driver might have harassed other women in the past.

Conversely, the chilling effect of the unpaid-removal policy was necessarily greater because sexual harassment victims would have understood, or quickly learned, that at CRST complaining about sexual harassment, although usually entailing a financial injury to the victim herself, would not result in the sort of disciplinary action that would deter any of the other male drivers from harassing the victim in the future. Thus the immediate financial cost to a harassment victim of filing a complaint could not be outweighed by any longer term benefit to the victim in the form of a reduction in the risk of future harassment by others.

In addition, the operation of the unpaid-removal policy permitted harassers to game the system to minimize the risk of a complaint. A driver intent upon harassing a female co-driver could deliberately choose do so under circumstances in which a complaint would likely be particularly costly for the harassment victim, such as at a location far from a terminal where the victim might quickly get another job, or at point when the truck still had a substantial distance to travel on its assigned route, during which the victim (if she did not complain) would continue to earn her mileage-based

pay. A harasser could time the harassment in a manner which would be least likely to result in a complaint, leaving the perpetrator—still with "no *known* history of harassment"—unencumbered by a "males-only" limitation, and able to prey upon future victims.

Because of the interrelationship between the two questions presented, it would be particularly appropriate to grant review of both.

CONCLUSION

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

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

GISELLE B. SCHUETZ
REBECCA J. HOULDING
JOSHUA FRIEDMAN
FRIEDMAN & HOULDING LLP
1050 Seven Oaks Lane
Mamaroneck, NY 10543
(888) 369-1119

Counsel for Petitioners