IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-10270

INGRID REEVES,

Plaintiff/Appellant,

v.

C.H. ROBINSON WORLDWIDE, INC.,

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

EN BANC BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, *ET AL.*, IN SUPPORT OF APPELLANT

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Interests of Amici Curiae

Amici curiae are organizations dedicated to eradicating unlawful discrimination in the workplace. In furtherance of this purpose, each has an abiding interest in ensuring the proper interpretation and implementation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq., ("Title VII"), which prohibits employment discrimination on the basis of sex, race, color, religion, and national origin, including workplace harassment. *Amici* submit this brief to address several very troubling issues raised by this Court's statement of the questions for rehearing *en banc*: (1) the potential creation of a new, heightened standard for hostile work environment cases, on which a plaintiff could not show that the sexual harassment she endured was "because of" her sex; and (2) the inappropriate grant of summary judgment where genuine issues of material fact exist on which a jury could find in favor of the plaintiff. Statements of interest of *amici* are attached.[1]

Introduction

The district court's opinion failed to recognize the gender bias that inherently underlay the hostile language and slurs about women that permeated Ms. Reeves' work environment. Words such as "sl-t," "wh-re," and "c-nt" are inescapably gender-motivated and demeaning to women. The denigration and

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[1] The parties have consented to the filing of this brief. Pursuant to Local Rule 35-9, amici also file a motion for leave to file this brief.

objectification of women that is revealed by these terms, together with degrading commentary about women as sexual objects, creates a work environment that is hostile "because of sex" – even if some men are also offended by the pervasive and misogynous language. The district court erred in concluding otherwise. These errors arose from the district court's failure to construe the evidence and all inferences therefrom in a manner favorable to Ms. Reeves, the non-movant in this Rule 56 proceeding. Only by reading the evidence in a light that favored the employer's arguments could the district court conclude that the plaintiff presented "no evidence" of gender bias. The district court's decision should be reversed, as the panel properly observed over a year ago.

Argument

I. *The Harassment of Which Ms. Reeves Complains Was "Because of Sex" in Violation of Title VII.*

The district court erred in concluding that the sexually-charged behavior and use of gendered epithets by Ms. Reeves's supervisor and co-workers did not satisfy the "because of sex" requirement in hostile work environment claims. Where gender-specific slurs are used in the workplace, and sexual commentary and materials sexualize and objectify women in particular, the gender-biased, gender-motivated nature of the conduct at issue is obvious and indisputable.

The racial harassment jurisprudence of this Court and others is instructive in

evaluating the gender based treatment alleged in the present case. It is clear that "[h]ostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment," *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002); *see also, e.g., Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999) ("the same principles that govern sexual harassment also govern claims of racial harassment") (*citing Risinger v. Ohio Bureau of Workers' Compensation,* 883 F.2d 475, 479 (6th Cir. 1989)). As this Circuit observed over two decades ago, "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

The inherent race-based nature of particular materials and language historically used to denigrate individuals on the basis of race has been repeatedly recognized by this Court, even without comment, to satisfy the "because of race" criterion. Thus, in *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982), cited in the panel decision in the present case at 525 F.3d 1139, 1144-45 (11th Cir. 2009), the Court deemed the use of "racially offensive language" including "n----r-rigged" and "black ass" to be so obviously "because of race" that the defendant's contention that the language was not "intended to carry racial

overtones" was summarily dismissed in one sentence. Likewise, the Court glossed over the "because of" analysis and found it self-evident that terminology such as "n----r" and "boy" were used "because of race" regardless of whether they were directed at the plaintiff personally in hostile work environment cases such as *Tomczyk v. Jocks & Jills Rests., LLC,* 198 Fed.Appx. 804, 808-09 (11th Cir. 2006), *rev'd on other grounds,* 269 Fed.Appx. 867 (11th Cir. 2008)); *Barrow v. Ga. Pac. Corp.*, 144 Fed.Appx. 54, 57-58 (11th Cir. 2005); *Ruffin v. Great Dane Trailers*, 969 F.2d 989, 991, 993 (11th Cir. 1992) (agreeing with district court that work environment was not "sufficiently racially neutral," citing as evidence use of phrase "hang us a n----r").

Particularly relevant to the present case is *Mack v. ST Mobile Aero. Eng'g, Inc.*, 195 Fed.Appx. 829, 834-37 (11th Cir. 2006), in which the presence of both racial epithets and racially-charged symbols (nooses and confederate flags) in the workplace appeared to be so clearly "because of race" that not even a simple statement of that fact was deemed necessary; rather, this Court proceeded directly to an analysis of the "severe or pervasive" element of a hostile work environment.

Just as certain words and symbols are inextricably, inherently race-motivated slights, and their use is presumed to fulfill the "because of race" factor of racially hostile work environment claims, so are certain words and actions

inherently sex-motivated. The use of gendered epithets like "b-tch," "c-nt", and "wh-re", of sexualized language to discuss sexual activity, and of pornography depicting women cannot reasonably be seen as anything but sex-motivated.

Terms like "c-nt," "wh-re," and "b-tch" – all of which were used in Ms. Reeves's workplace – are inescapably gender-motivated and demeaning to women. "Few epithets convey a more demeaning attitude towards women than the word c-nt." *Cardin v. VIA Tropical Fruits, Inc.,* No. 88-14201-CIV-Marcus, 1993 WL 945324 at *15 (S.D. Fla. July 9, 1993). Many courts have reached the conclusion that sex-specific terms like those at issue in the present case are necessarily used "because of sex".

In *Windsor v. Hinckley Dodge, Inc.*, for example, the Tenth Circuit observed, "The names plaintiff was called [including wh-re, c-nt, and b-tch]...were...sexual in nature...These sexual epithets have been identified as 'intensely degrading to women,'" and 'inherently sex-related.'" 79 F.3d 996, 1000-01 (10th Cir. 1996) (*citing Jenson v. Eveleth Taconite Co.,* 824 F.Supp. 847, 883 (D.Minn. 1993)); *Burns v. McGregor Electronic Indus., Inc.,* 989 F.2d 959, 964 (8th Cir. 1993) (noting that use of "b-tch," "sl-t," and "c-nt," to woman was harassment based on her sex); *Huddleston v. Roger Dean Chevrolet, Inc.,* 845 F.2d 900, 902 (11th Cir. 1988) (detailing incidents of sexual harassment, including

comments by other salesmen calling plaintiff a "b-tch" and a "wh-re"); *EEOC v. A. Sam & Sons Produce Co.,* 872 F.Supp. 29, 35-36 (W.D.N.Y. 1994) (holding that "the term 'wh-re' is usually gender-specific and is certainly more offensive when directed at a woman," and noting that "a man calling a woman a 'wh-re'-thereby reducing her to an illicit sexual being-is a direct affront to her self-respect rather than a simple vulgarity that might offend her sensibilities"). The Ninth Circuit likewise found that harassing behavior that employs gender identified words like c-nt, satisfies the "because of sex" factor in hostile work environment claims. *See, e.g., Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1463-64 (9th Cir. 1994).

"B-tch," one of the terms frequently used in Ms. Reeves's workplace to refer to women, has been incorrectly categorized by some courts as a term that is not hostile or degrading to women.[2] The dictionary definition of "b-tch", however, completely belies this argument. "B-tch" means "a lewd or promiscuous woman"

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[2] *See Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (*abrogated on other grounds by National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)), disagreeing that use of "b-tch" is inherent discrimination "because of sex," and offering the following logically questionable reasoning: "But [b-tch] does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for 'woman.'" The Seventh Circuit's analysis begs the question how a word can be simultaneously an acknowledged derogatory term for women, but somehow not necessarily indicative of any negative or female characteristic.

or a "malicious, bad-tempered, or aggressive woman."[3] The term's very purpose – its widely-understood meaning – is to attribute negative characteristics, particularly to women.[4] Indeed, this Court too recognized the fundamentally hostile and gendered nature of the term "b-tch," finding in *Baldwin v. Blue Cross/Blue Shield of Alabama*, in reference to a supervisor's use of the words "b-tch," "sl-t," and "tramp," "Some of the…words ... used were…sex specific, which is to say more degrading to women than to men." 480 F.3d 1287, 1302 (11th Cir. 2007). Given its inherent gender-specific and derogatory nature, "[o]ne cannot help but wonder the sense in which use of a pejorative term for a woman is not gender based." L. Camille Hebert, *Sexual Harassment as Discrimination "Because of Sex": Have We Come Full Circle?*, 27 Ohio N. Univ. L.Rev. 439, 469-70 (2001). Indeed, "[i]t is difficult to imagine that a court would conclude that use of a pejorative term to

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[3] Webster's New World Dictionary 143 (3d College ed. 1988).

[4] Commentaries about the social meaning of "b-tch" abound, and make clear its central gendered and derogatory nature. For example: "B-tch not only is a defining archetype of female identity, but also functions as a contemporary rhetoric of containment disciplining women with power… B-tch is more than an epithet – it is a rhetorical frame, a metaphor that shapes political narratives and governs popular understanding of women leaders." Karrin Vasby Anderson, *Rhymes With Rich: B-tch as a Tool of Containment in Contemporary American Politics*, 2 Rhetoric & Public Affairs 600-01 (1999). "[T]he prevalent use of the term b-tch remains a valuable linguistic tool for devaluing and harassing women solely because of their gender." Yvonne Tamayo, *Rhymes With Rich: Power, Law, and the B-tch*, 21 St. Thomas L.Rev. 281, 290 (2009).

refer to a particular racial group was not race based." *Id.*

Several circuits have found that the use of terms hostile to women, such as the ones at issue in this case, are such strong evidence of gender harassment that the presence of such epithets convert other, non-gender related acts, into gender harassment. The Second Circuit, for example, held that use of sex specific language that included "c-nt" was such strong evidence that the harassing behavior was perpetrated "because of sex" that it could establish an inference of gender motivation as to other, not overtly sex-related harassment. *Raniola v. Bratton,* 243 F.3d 610, 618, 621-22 (2nd Cir. 2001) ("b-tch" and "c-nt" are "sex-specific verbal abuse" that "make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.") (*citing Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80 (1998)). The Eighth and Sixth Circuits explicitly agree. *Carter v. Chrysler Corp.*, 173 F.3d 693, 700-01 (8th Cir. 1999) ("gender-based insults, including the term 'b-tch,' may give rise to an inference of discrimination based on sex."); *Williams v. General Motors Corp.,* 187 F.3d 553, 565-66 (6th Cir. 1999) (use of "gender-specific epithets" in a workplace, including "c-nt" and "f-cking woman," supply sufficient evidence of "because of sex" motivation to defeat a motion for summary judgment).

The district court failed to recognize the inherently gender-based nature of

offensive discussions of sex and the appearance of pornography in Ms. Reeves's workplace. The material and conversations cited by Ms. Reeves did not concern sex generally, but rather emphasized the sexual subjugation and objectification of women in particular. For example, the district court details comments such as saying that a female co-worker had a big ass, slip op. at 5; a song about "women's teeth on a man's dick," *id.* at 6; a picture of a naked woman on a co-worker's computer, *id.* at 7; and radio commentary about women's breasts and nipples and Playboy Playmates, *id.* at 11.

Numerous courts recognize that the existence of such sexual material in the workplace evidence an intent to discriminate "because of sex." The Third Circuit, for example, noted, "The intent to discriminate on the basis of sex in cases involving ... pornographic materials, or sexually derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3rd Cir. 1990). The Fifth Circuit analyzed the fundamental sex-discriminatory nature of sex talk and sexual materials in the workplace by recognizing their historical function – they rob women of professional status and turn them into subservient objects. Sexual graffiti, cartoons, and other materials, even when they depict both men and women in a sexual context, are by their very nature and appearance at work "highly offensive to a

woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." *Waltman v. International Paper Co.,* 875 F.2d 468, 477 n.3 (5th Cir. 1989) (*citing Bennett v. Corroon & Black Corp.,* 845 F.2d 104, 106 (5th Cir. 1988)). *See also O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093, 1099 (10th Cir. 1999) (reversing the district court and finding that co-worker's comparison of wife to Playboy and his description of a dream about naked women jumping on trampoline had "gender-related implications[] [and] we cannot, with straight faces, say that [this conduct] had nothing to do with gender ... a jury readily could find that they were based on gender or sexual animus.") (*citing Penry v. Federal Home Loan Bank of Topeka,* 155 F.3d 1257, 1263 (10th Cir. 1998)).

As each of these circuit courts recognize, it is not the *topic* of sex itself that is offensive or demeaning to women. *See Oncale,* 523 U.S. at 80. Rather, it is the presence of materials and conduct in the workplace that sexually objectify women that is inextricably discriminatory "because of sex," and a hallmark of gender-based hostile work environments. As one district court put it, "the presence of sexual graffiti, photos, language and conduct...create[s] a sexualized work environment which detrimentally affect[s] women." Women are thereby "told...that the sex stereotypes reflected in and reinforced by such behavior [are]

part and parcel of the working environment." *Jensen,* 824 F.Supp. at 884. Another district court found that display of pornographic materials in the workplace, "creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment." *Robinson v. Jacksonville Shipyards, Inc.,* 760 F.Supp. 1486, 1523 (M.D. Fla.1991). "That Title VII outlaws such conduct," the *Robinson* court said, "is beyond peradventure." Further, as one law professor notes,

> "In the workplace, such conduct... shows lack of respect for women workers... Women, particularly women entering formerly male-dominated industries and workplaces, struggle to win the respect of and to be taken seriously by their male and female colleagues. When they are...the target of sexual jokes and comments instead of [being treated] as valued workers, they, their coworkers, and their superiors are being told that they have failed. Additionally, women who must go to work in sexually charged surroundings, in which sexual pictures and sexual comments are rampant, constantly are subject to reminders about the view of women held by their superiors, coworkers, and even their subordinates."

L. Camille Hebert, *Sexual Harassment is Gender Harassment*, 43 U. Kan. L.Rev. 565, 571-72 (1995).

If this Court fails to recognize that use of gendered epithets, male-oriented discussions of sex, and materials depicting women as sexual objects are methods of intimidation and harassment that are used, and have a seriously damaging effect,

"because of sex," it will set forth an impermissible double standard. On the one hand, the words and symbols that have long been used to strip particular races or religions of dignity are easily presumed to meet the "because of" standard. But, similar words and symbols used to subjugate women would be subject to further testing and analysis. Because there is no legal distinction between protected classes under Title VII, the district court erred. Because a jury could find that the complained-of actions were by definition perpetrated because of sex, the district court's decision should (again) be reversed.

II. *The Particular Problem of Sexual Harassment in Male-Dominated Work Environments*

Amici are particularly concerned that the inherent gender motivation of the harassment at issue be recognized, in light of its occurrence in a male-dominated work environment. In the present case, as in many others, the sex-specific epithets and sexualized commentaries that pervaded the workplace eventually drove Ms. Reeves, because of her sex, out of a predominantly male work environment. Hostility towards women breaking into heavily male workplace environments is commonplace. "Male-dominated work environments are more likely to feature discussions of sex and comparisons of sexual experiences than are female-dominated work environments." Kelly Cahill Timmons, *Sexual Harassment & Disparate Impact; Should Non-Targeted Workplace Sexual Conduct Be Actionable*

Under Title VII?, 81 Neb. L.Rev. 1152, 1215 (2003) (*citing* Barbara A. Gutek, Sex and the Workplace 137 (1985)).

The high prevalence of harassing and sexualized behavior in male-dominated workplaces is demonstrated by numerous accounts of such behavior in professions like firefighting and police work, construction, and mining. For example, female firefighters – who constituted just 3.7% of all paid firefighters nationwide as of 2000 – reported experiencing near-universal differential treatment on the job because of their gender. Denise Hulett, Marc Bendick, Jr., Sheila Y. Thomas, Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 The International Journal of Diversity in Organisations, Communities, & Nations 189, 191, 193 (2008). More specifically, 42.9% reported verbal harassment, 31.9% were faced with pornography in the workplace, 30.2% received sexual advances, 18.2% were presented with hostile notes, cartoons, or other written material, and 6.3% had survived workplace assaults. *Id.* at 193-94.

In construction trades, harassment of women has been particularly brutal. A study of the first wave of gender integration in construction in New York City reported that, "By ignoring or penalizing women who complained of or reacted to extreme male sexual taunts, the construction industry became a 'hostile work environment' for pioneer tradeswomen... [T]he frequently isolated tradeswomen

had no public or private recourse for help. Consequently, out of fear or a sense of futility, many tradeswomen tolerated aggressive behavior aimed at displaying or preserving masculine superiority." Elvia R. Arriola, *What's the Big Deal?: Women in the New York City Construction Industry and Sexual Harassment Law, 1970-1985*, 22 Colum. Hum. Rts. L.Rev. 21, 62-63 (1990).

In mining, sexually-themed harassing behavior "stems from the high proportion of men [in the industry] behaving in a typically male way," according to a researcher who conducted an intensive study of gender-based harassment in that occupation. Kristen Yount, *Sexualization of Work Roles Among Men Miners: Structural and Gender-Based Origins of 'Harazzment', in* IN THE COMPANY OF MEN: MALE DOMINANCE AND SEXUAL HARASSMENT 70 (James E. Gruber and Phoebe Morgan eds., 2005). This study revealed that, "The topic of sexuality permeated work life in mines. Men swore, told 'dirty' jokes and tales of sexual adventure, teased each other about sexual abilities, touched in suggestive ways, and 'propositioned' each other." *Id.* at 76. "As women pioneered these masculine domains, many experienced," and continue to encounter, "especially pernicious forms of sexual harassment ... understood ... to be acts of resistance—attempts to discourage [women] from infiltrating higher-paying, male-dominated fields." Carrie N. Baker, *Blue-Collar Feminism: The Link Between Male Domination and*

Sexual Harassment, *in* IN THE COMPANY OF MEN: MALE DOMINANCE AND SEXUAL HARASSMENT 249 (James E. Gruber and Phoebe Morgan eds., 2005).

The use and ability of sex harassment to keep women out of—or drive women out of—male-dominated workplaces is especially pernicious because traditionally male jobs often offer higher salaries than traditionally female-dominated occupations. Thus, sexual harassment in a male-dominated work environment has a tremendous negative effect on women's economic security and amplifies the problems of sex segregation in the workplace.

Women are already disproportionately segregated into so-called "pink collar" professions: as of 2007, about 44% of working women held one of the twenty most common occupations for women, and all but three of these twenty occupations were substantially dominated by women. Women's Bureau, Department of Labor, 20 Leading Occupations of Employed Women, (2007).[5] Men occupy more than 75% of positions in fields like computer engineering, firefighting, and trucking, while women heavily predominate in fields that include elementary education, social work, and waitressing. Bureau of Labor Statistics, Current Population Survey 2008, Table 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity.[6] The former three

[5] Online at http://www.dol.gov/wb/factsheets/20lead2007.htm

[6] Online at http://www.bls.gov/cps/cpsaat11.pdf.

professions feature median weekly wages of $1529, $970, and $702, respectively; the latter three, $890, $784, and $391. Bureau of Labor Statistics, Current Population Survey 2008, Table 39. Median weekly earnings of full-time wage and salary workers by detailed occupation and sex.[7] These figures demonstrate that, when women are pushed out of male-dominated workplaces by the perpetuation of sexually hostile work environments, as in the present case, the striking segregation of men into higher-paying and women into lower-paying occupations is reinforced.

Substantial scholarship asserts that the form of harassment found in Ms. Reeves' workplace at C.H. Robinson serves a particular sex-segregating purpose in predominantly-male workplaces. Sexual discussions serve to normalize stereotypically masculine interactions in the workplace and to make women feel out of place in that context. Harassment also operates to "maintain the most highly rewarded forms of work as domains of masculine competence" and "denigrate women's competence for the purpose of keeping them away from male-dominated jobs." Vicki Schultz, *Reconceptualizing Sexual Harassment,* 107 Yale L.J. 1683, 1755 (1998); *see also Oncale,* 523 U.S. at 80-81 (use of sex-specific and derogatory terms can indicate that there is "general hostility to the presence of women in the workplace"); Gertrud M. Fremling & Richard A. Posner, *Status*

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[7] Online at http://www.bls.gov/cps/cpsaat39.pdf.

Signaling and the Law, with Particular Application to Sexual Harassment, 147 U. Pa. L.Rev. 1069, 1084-85 (1999) (men working in male-dominated professions "are on a status ladder where traditionally all women were below them, and so their status is challenged if any women are allowed to hold the same jobs. When men want to drive women out of the workplace [to preserve their sense of status], they sometimes do so by flaunting symbols of male sexuality, as by using obscene language...and posting pornographic photographs."); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment,* 83 Cornell L.Rev. 1169, 1210-11 (1998); Hebert, *Sexual Harassment is Gender Harassment*, 43 U. Kan. L.Rev. at 572 (all identifying sex talk and posting of pornography as means used by men to establish a normative baseline of typically "masculine" behavior and thereby keep women out of male-dominated workplaces).

III. *The District Court Erred in Granting Summary Judgment to the Defendant*

It took the district court 14 pages to describe the myriad of occasions, some daily or near-daily, when Ms. Reeves was forced to listen to misogynous comments and terms, words that were facially derogatory to women, and comments about sexually explicit topics such as oral sex, masturbation, pornography, naked women, breasts, sexual acts between two women, and other sexual acts.

It took the district court just six pages to explain how it came to agree with the employer that there was no Title VII liability. It concluded that, regardless of the anti-female attitude that permeated the language and behavior Ms. Reeves encountered in her workplace, the hostility of that environment was not "because of sex." And it reached this conclusion as a matter of law; there were, the district court held, no disputed facts that entitled Ms. Reeves to a jury trial.

The district court erred in several regards when reaching this conclusion. First, it misapprehended the burden of proof the plaintiff must meet to show that she has "been subject to unwelcome sexual harassment." The district court said that this proof had to reveal such actions as "sexual advances, requests for sexual favors, and other conduct of a sexual nature." Slip op at 18. While this would be one way to prove sexual harassment, it is not the only way. Over fifteen years ago, in fact, the Supreme Court described a hostile work environment that violates Title VII because of sex is one that consists of "discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (*citing Vinson,* 477 U.S. at 65, 67) (internal quotation marks omitted).

Second, the district court mistakenly accepted as true evidence that the terms "b-tch" and "wh-re" were sometimes used as references to men. Slip op. at 24 ("Rather, the evidence demonstrates that these words were used to refer to both to

men and women."). A jury could choose to believe that testimony. It could, on the other hand, reject it – especially given Ms. Reeves' testimony that, while the men with whom she worked routinely used the word "b-tch" to refer to women in general, she never heard them use that term when referring to any male employees, male customers, or men in general. Given that the district court was asked to determine whether there was a genuine issue of material fact as to the gender-based nature of the harassment in question, its acceptance of the employer's version of these disputed facts was improper. *See, e.g., Lane v. Celotex Corp.*, 782 F.2d 1526, 1528 (11th Cir. 1986) ("The district court must not "assess[ ] the probative value of any evidence presented to it, for this would be an unwarranted extension of the summary judgment device.") (citation omitted); *see also Avocent Huntsville Corp. v. ClearCube Technology, Inc.*, 443 F.Supp.2d 1284, 1325 (N.D. Ala. 2006) ("ClearCube ignores the hornbook principle that it is not proper for this court to assess witness credibility when considering a motion for summary judgment; such determinations are reserved for the jury.").

Third, the district court overlooked several inferences that could be made from the evidence that were favorable to Ms. Reeves (the non-movant), and instead drew inferences that favored the defendant, the movant. Those conclusions are, of course, improper under Rule 56 because, in those proceedings, a court should

construe all inferences from the evidence such a way that they favor Ms. Reeves' claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Johnson v. Booker T. Washington Broadcasting Svc., Inc.*, 234 F.3d 501, 509 n.8 (11th Cir. 2000); *cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (proceeding under Rule 50).

The district court concluded that none of the offensive behavior occurred because of Ms. Reeves' gender since there was no "evidence" that the various sexualized terms like "c-nt," "sl-t," or "wh-re," were deliberately aimed at her. Ms. Reeves, for example, did not affirmatively state that she knew for a fact that, when her colleague said "F-ck you, f-ck you, f-ck you," he was specifically referring to her. The district court inferred from this "lack of evidence" that neither Ms. Reeves nor her gender had anything to do with the language used and comments made in the workplace that specifically denigrated women. But, the district court overlooked other inferences – those favorable to Ms. Reeves – that could be reached from the evidence:

> • On many of the occasions when Ms. Reeves tried the technique of simply turning the radio to a station that did not routinely denigrate women, the men stepped in and changed the station back so they could bombard the listening audience with graphic discussions about how women and their breasts and genitalia appeared in various pornographic clips. This indicates that the men intentionally thwarted Ms. Reeves' objections with the goal of making her uncomfortable.

• Men who perpetuated the misogynous terms and chatter did not like having a woman in their midst, and hoped to drive her away.

• Management's tolerance of this poisonous atmosphere emboldened the leaders of these misogynous attacks on women.

• Since the men knew that Ms. Reeves found their misogynous statements offensive, and since they knew that they could continue that behavior with impunity, they stepped up the pace, and the level of offensiveness.

The district court further erred when it decided that the harassment was not "because of sex" since Ms. Reeves had not offered "evidence" that the men were even implying that Ms. Reeves was among the group of women they described as "c-nt," or "sl-t," or "wh-re." A jury, on the other hand, might infer from the evidence that the men who so frequently used these terms to describe other women could very well be thinking about Ms. Reeves in the same denigrating manner, but were not brave enough to tell her this to her face.

A similar error led the district court to conclude – as a matter of law – that (a) all the sexualized comments and all the derogatory references to women would have been present regardless of Ms. Reeves' employment in that workplace, and (b) this meant that the harassment was not "because of sex."[8] While a jury might

[8] The corollary to this conclusion in the racial harassment sector would be that, so long as white bigots used the same racially-offensive language in the presence of an African American employee that they enjoyed when they worked in an all-white workforce, the harassment would not be "because of race."

agree with the employer that the men's derogatory language about women would have been present regardless of whether a woman worked in their midst, it might not. A different inference from the same record could be that the men made more offensive comments about women than they might ordinarily have chosen in an all-male workplace because they knew it offended the lone female employee, and that management did not care.

Further, the suggestion that a similar workplace with the same atmosphere could have existed without the presence of a female does not negate the gender-based hostility experienced by Ms. Reeves in this particular work assignment. This was the conclusion reached by the Second Circuit in *Petrosino v. Bell Atlantic,* 385 F.3d 210 (2nd Cir. 2004). There, the court concluded that, even if all the sexual insults and graffiti could have been present before the female employee entered the workplace, that fact did not, as a matter of law, preclude a jury from finding that the conduct subjected that employee to a hostile work environment based on her sex. *Id.* at 222. *See also Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003) (*en banc*), *cert. denied,* 540 U.S. 1177 (2004) (rejecting employer's argument that the offensive conduct was not "because of sex" since it was experienced by both male and female employees, and noting instead that a jury could find "[m]uch of the conduct ... particularly offensive to women and ...

intended to provoke [plaintiff's] reaction as a woman."). The *Petrosino* court also discussed a long-respected district court case brought by a female welder who was one of only a handful of female employees working in a large shipyard. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1495-98 (M.D. Fla. 1991). In *Robinson*, the court found that even if the sexually provocative photos of nude and partially nude women constantly displayed around the workplace were put up before any female employees started working there, the photos had a "disproportionately demeaning impact" on the female employees and thus "convey[ed] the message that [women] do not belong." *Petrosino*, 385 F.3d at 223.

Furthermore, in the *Ocheltree* case, dissenting from the panel opinion that was later reversed *en banc*, Judge Michael emphasized that "[i]f the right to be free from a . . . hostile environment means anything at all, surely it includes the right to be free from a workplace permeated by . . . slurs." *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 376 (4th Cir. 2002) (Michael, J., dissenting), *rev'd en banc*, 335 F.3d 325 (4th Cir. 2003) (analyzing verbal sexual harassment of a female plaintiff in a workplace dominated by male employees). This is so, Judge Michael explained, even if the slurs are not "directed at" the plaintiff and the pattern of offensive conduct had been established in the workplace before the first female was hired. *Id.* at 376; *see also Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 184

(4th Cir. 2001) (including in analysis of work environment racially hostile comments that supervisor made directly to his wife, but in the presence of the plaintiff).

The district court similarly erred by seizing on the evidence that there was one male employee in the workplace who reported that he too was occasionally offended by the misogynous atmosphere, and concluding from that evidence that the hostile environment could not be "because of sex." This conclusion flies in the face of a "common sense view to the realities of normal life." *United States v. Four Parcels of Real Property*, 941 F2d 1428, 1440 (11th Cir. 1991) (*en banc*). It belies logic that one male employee's objection to sexist slurs in the workplace removes the sting of that misogyny. One white employee's objection to blatant racism in the workplace does not, after all, mean that the racism never existed. And, one Muslim employee's objection to a Taliban-produced litany of anti-Christian invectives that regularly aired in the workplace would not negate the religious bias underlying any such broadcast.

And, while the district court did not necessarily err while stating that Title VII was not "automatically" violated every time that an employee or manager uses such terms as "b-tch" and "wh-re," it wrongly concluded that the use of those terms in Ms. Reeves' workplace did not – as a matter of law – indicate a bias against

women based on their gender. Reasonable jurors could disagree. They could reasonably conclude, based on their own experiences in everyday society, that the use of such derogatory terms as "b-tch" and "wh-re" are more likely than not used to describe women, not men. *See generally* Section I, *infra.* at 2-11, about inherently gendered terms. This is particularly so when one considers the totality of the anti-female rhetoric that constituted Ms. Reeves' workplace environment on a near-daily basis. *See Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 69 (1986) ("the trier of fact must determine the existence of sexual harassment in light of the 'record as a whole' and 'the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'") (*quoting* 29 C.F.R. § 1604.11(b) (1985)).

In sum, the record shows that the district court overlooked evidence from Ms. Reeves that disputed the evidence offered and arguments asserted by her former employer. It shows as well that several conclusions reached by the district court resulted from inferences the court drew from the evidence – inferences that improperly construed the evidence favorably to the employer.

Conclusion

The district court's opinion failed to recognize the gender bias that inherently underlay the hostile work environment suffered by Ms. Reeves. Because

the atmosphere was permeated with gender-specific slurs and sexual commentary that denigrated and objectified women in particular, the gender-biased, gender-motivated nature of the harassment is obvious and indisputable. The district court also improperly construed the evidence and all inferences therefrom in a manner that was favorable to movant, instead of to Ms. Reeves. These errors led the district court to improperly conclude that the plaintiff presented "no evidence" of gender bias. This court should not repeat those mistakes; it should instead adopt the reasoning of and conclusions reached by the three-judge panel.

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 6026 words, excluding the parts of the brief that are exempted by Rule 32(a)(7)(B).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6). This brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

s/ Alicia K. Haynes
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Certificate of Service

I, Alicia K. Haynes, counsel for amicus curiae National Employment Lawyers Association, certify that on July 1, 2009, the foregoing brief was transmitted electronically, and two copies were served by first class U.S. mail, to counsel of record, as follows:

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APPENDIX

INTERESTS OF *AMICI*

The *American Jewish Congress* (AJCongress) is an organization of American Jews founded in 1918 to preserve the political, civil, economic and religious rights of American Jews. It believes that the rights of Jews can best be protected if the rights of all Americans are protected. Although we often think of rights as political constructs, the ability to access the economic opportunities the society offers are no less essential than political rights. Because Title VII's guarantees against harassment in the workplace are essential to ensure universal access to economic opportunities, and the decision below vitiates the strength of those guarantees, AJCongress joins this brief.

The *American Medical Women's Association* (AMWA) is pleased to sign onto the Amicus Brief prepared for the National Partnership for Women and Families in the case of *Reeves* Sexual Harassment in the workplace. Our organization, founded in 1915, has always stood for the right of women to be employed in an atmosphere free of such distractions and personal pestering and persecution.

The *Coalition of Labor Women* (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. Since 1974, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its more than 80 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination and pay equity. CLUW provides training and educational support to its members on issues relating to Title VII enforcement and prevention of workplace harassment and discrimination.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on

eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Reeves v C.H. Robinson Worldwide, Inc.* case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in the Reeves case.

Founded on Labor Day in 2000, the *DC Employment Justice* ("EJC") seeks to secure, protect, and promote workplace justice in the DC metropolitan area. Each year the EJC helps over 1,500 workers with their employment claims, including sexual harassment and discrimination. The EJC believes that no worker should be forced to endure sexually explicit and pervasive behavior, and that employers must be held accountable under Title VII.

The *Institute for Women's Policy Research* (IWPR) was founded in 1987 as an independent research organization to conduct rigorous research and disseminate its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. IWPR's research addresses issues of race, ethnicity, and socioeconomic status, and particularly focuses on policies that can help women achieve social and economic equality. The Institute works with policymakers, scholars, and public interest groups around the country to design, execute, and disseminate research that illuminates economic and social policy issues affecting women and families.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from sexual harassment. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before the federal circuit courts of appeal and the U.S. Supreme Court.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's employment

and economic security. Discriminatory workplace policies and practices have a negative impact on women's immediate and long-term economic security. Non-discrimination in employment is the surest path out of poverty and toward economic well-being. Obtaining and maintaining employment in non-traditional occupations (where women make up 25 percent or less of the workers) is of particular importance for women to reach these goals. Sexual harassment has no place in the workplace. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices, including access to family-sustaining employment, which serve as a barrier to economic equity.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.