No. 20-1307

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JEFFREY KENGERSKI,

Plaintiff-Appellant

v.

ALLEGHENY COUNTY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUES ADDRESSED HEREIN

SHARON FAST GUSTAFSON
General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
ELIZABETH E. THERAN
Assistant General Counsel
JAMES M. TUCKER
Attorney
Equal Employment
Opportunity Commission
Office of General Counsel
131 M St. NE, Rm. 5NW10P
Washington, D.C. 20507
(202) 663-5870

ERIC S. DREIBAND
Assistant Attorney General
ALEXANDER V. MAUGERI
Deputy Assistant Attorney
BONNIE I. ROBIN-VERGEER
KATHERINE E. LAMM
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the interpretation of the prohibition against retaliation set forth in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e-3(a). The Attorney General enforces Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the Equal Employment Opportunity Commission (EEOC) enforces the statute against private employers, 42 U.S.C. 2000e-5(a) and (f)(1). At issue here is whether the

district court correctly held that plaintiff-appellant Jeffrey Kengerski did not engage in protected opposition activity that Title VII shields from employer reprisal. Because of the federal government's interest in the proper interpretation of Title VII, the United States offers its views in this brief filed under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether the district court erred when it determined that Title VII's antiretaliation protections do not extend to a plaintiff-employee's opposition to a coworker's discriminatory statements about the employee's interracial association with a family member and the coworker's subsequent racist text messages.[1]

STATEMENT OF THE CASE

1. Factual Background

Kengerski, who is white, was a correctional officer at the Allegheny County Jail in Pittsburgh, Pennsylvania. J.A. 0003 (Summ. J. Op.).[2] On April 29, 2015, after allegedly complaining to the jail's deputy warden in person (J.A. 1114-1116 (Def.'s Resp. to Pl.'s Facts)), Kengerski wrote a memorandum to the jail's warden,

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[1] The United States takes no position on any other issue presented in this case. See note 6, *infra*.

[2] "J.A. __" indicates the page number of the Joint Appendix. "Doc. __, at __" refers to the docket entry and page number of documents filed in the district court that do not appear in the Joint Appendix. "Br. __" indicates the page number of Kengerski's opening brief.

Orlando Harper, saying that he wished to complain about "harassment and inappropriate racial text messages" stemming from an interaction he had a year prior with a colleague, Robyn McCall.[3] J.A. 0675. Kengerski's complaint described a conversation between himself and another colleague, in the presence of McCall and several other officers, regarding Kengerski's niece and her daughter Jaylynn, whose father is African-American. J.A. 0675. Kengerski wrote that he told the colleague that his niece might be unable to care for Jaylynn, and that Kengerski and his wife were prepared to assume parental responsibility and "take in" Jaylynn. J.A. 0675.

According to Kengerski's complaint, McCall "chuckled" and asked Kengerski, "[W]hat kind of name is Jaylynn? Is she Black?" J.A. 0675 (internal quotation marks omitted). When Kengerski explained that Jaylynn is biracial, McCall responded to Kengerski, "[S]o you will be that guy in the store with a little monkey on his hip like Sam Pastor," referring to another jail employee who had a biracial child. J.A. 0675; J.A. 0345 (Pl.'s Summ. J. Opp.). McCall then "laughed," and Kengerski "asked [McCall] not to speak like that about [his] situation." J.A. 0675.

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[3] Subsequently, McCall was promoted to a senior leadership position at the jail. See J.A. 0304 n.3 (Def.'s Summ. J. Br.).

"Not long after those comments," Kengerski wrote in his complaint, McCall began sending Kengerski "inappropriate racial text messages." J.A. 0675. She sent the text messages, which Kengerski appended to the complaint, over a period of several months in the year preceding the complaint. See J.A. 0677-0681. The messages included offensive, racist images and text regarding African Americans, Asians, and other minority groups, sometimes referencing the names of employees at the jail who were members of those groups. J.A. 0677-0681. Since the incident involving his grand-niece, Kengerski wrote, McCall had subjected him to a hostile work environment and the possibility of discipline. J.A. 0675. Kengerski related instances in which McCall allegedly had made false accusations against him, spoken ill of him to colleagues, retracted his access to scheduling information relevant to his work, and adversely affected his work schedule. J.A. 0675-0676.

Warden Harper referred Kengerski's complaint to the County law department to determine whether McCall had violated jail policies. J.A. 0004 (Summ. J. Op.). Within a month of Kengerski's complaint, McCall was placed on administrative leave. J.A. 0004-0005. Three months later, she resigned. J.A. 0005. The parties dispute whether, as Kengerski alleges, McCall was forced to resign because of his complaint. J.A. 0005; J.A. 1121-1122 (Def.'s Resp. to Pl.'s Facts).

The jail terminated Kengerski seven months after his complaint to Warden Harper. J.A. 0005. The parties dispute the reason for Kengerski's termination. J.A. 0005. The County claims that Kengerski was terminated for encouraging subordinates to provide false information in an internal investigation and revealing the existence of the investigation to its subject. J.A. 0005; J.A. 0319-0321 (Def.'s Summ. J. Br.). Kengerski claims that these reasons were a pretext for retaliation and that the real reason for his termination was his complaint to the warden about McCall's racist and hostile behavior. J.A. 0355-0370 (Pl.'s Summ. J. Opp.).

2. Procedural History

After filing a charge of discrimination and retaliation with the EEOC and receiving a right-to-sue letter (Docs. 16-1, 16-2), Kengerski filed a complaint in the U.S. District Court for the Western District of Pennsylvania (J.A. 0022-0032), and later the operative amended complaint (J.A. 0042-0049) following a motion to dismiss. Kengerski brought claims against the County and Harper for retaliation under Title VII and Pennsylvania state law, for discrimination under the Fourteenth Amendment, and for violations of the Family Medical Leave Act (FMLA), 29 U.S.C. 2601. J.A. 0048-0049.

After defendants filed a second motion seeking to dismiss the amended complaint on several grounds, plaintiff voluntarily withdrew his state law and federal constitutional claims. Doc. 24, at 4. In its order on the motion to dismiss,

the district court dismissed the latter claims and terminated Harper (who was a defendant to those claims only) from the lawsuit, allowing the Title VII and FMLA claims to proceed against the County. J.A. 0057-0058. Following discovery, the County moved for summary judgment. J.A. 0068-0071. The County argued, in relevant part, that Kengerski failed to make out the first and third elements of a *prima facie* case of retaliation under Title VII because he did not engage in protected activity and did not establish a causal connection between his claimed protected activity (his complaint to the warden) and his termination. J.A. 0303-0323. Even if Kengerski had established his *prima facie* case, the County argued that it had articulated legitimate, non-retaliatory reasons for the termination, which Kengerski failed to rebut as pretextual. J.A. 0323-0327.[4]

The district court granted summary judgment to the County on Kengerski's Title VII retaliation claim. J.A. 0002. The court held that Kengerski's complaint did not constitute protected opposition activity because he could not have had an objectively reasonable, good-faith belief that the conduct about which he complained was unlawful under Title VII. J.A. 0007. The court held that this was so for two reasons. First, Kengerski could not have had an objectively reasonable,

[4] The County also moved for summary judgment on plaintiff's FMLA claims, which Kengerski voluntarily withdrew in responding to defendant's motion. J.A. 0374.

good-faith belief that he was complaining about a hostile work environment under Title VII because McCall's harassment was directed at African Americans and Asians, and Kengerski was not a member of either protected group. J.A. 0008. The district court reasoned that even if the Third Circuit were to recognize a claim for "associational" discrimination, as some other courts of appeals have done, Kengerski's connection to his grand-niece (and to the coworkers referenced in McCall's text messages) was too "remote" to support such a claim.[5] J.A. 0008-0009. Second, even if Kengerski had what the court called "standing or associational standing" to pursue his claim (J.A. 0009), the court held that Kengerski could not have had a reasonable, good-faith belief that McCall's comments and behavior amounted to "severe or pervasive" conduct necessary to establish a hostile work environment. J.A. 0009-0010.[6]

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[5] The district court considered Kengerski to have complained about discrimination based on his relationships with his grand-niece and with the coworkers referenced in the McCall's text messages. J.A. 0008-0009. In addressing in his opening brief on appeal why his complaint to the warden was protected opposition activity, Kengerski discusses both discrimination with respect to his coworkers (*e.g.*, Br. 14-15, 23-24) and hostility toward him arising from his relationship with his biracial grand-niece (*e.g.*, Br. 2-3, 16-20). In this brief, the United States addresses the latter.

[6] Because the district court found that Kengerski could not demonstrate that he engaged in protected activity, it expressly declined to rule on whether there was a sufficient causal connection between Kengerski's complaint to the warden and his termination, and noted the "seven-month gap between the complaint and

(continued…)

The district court entered judgment in favor of the County on all counts in the amended complaint. J.A. 0002. Kengerski filed a timely notice of appeal. J.A. 0001.

SUMMARY OF ARGUMENT

To be protected under the opposition clause of Title VII's antiretaliation provision, 42 U.S.C. 2000e-3(a), it is sufficient for an employee to hold an objectively reasonable, good-faith belief that complained-of conduct violates Title VII. The district court misapplied this standard by making several legal errors in identifying whether Kengerski engaged in conduct protected by Title VII.

First, harassment toward an employee because of the employee's association with a person of a different race may give rise to an objectively reasonable, good-faith belief that the conduct violates Title VII. The proper analysis of such a claim focuses on whether the employee was discriminated against on the basis of his or her race by virtue of maintaining an interracial association, not on the degree of closeness of that interracial relationship. This is a fact-specific inquiry in which a substantial personal or familial association may be helpful—but is not determinative—in ascertaining whether unlawful discrimination occurred. Thus, the district court erred both in failing to undertake the correct legal analysis and in

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(…continued)
termination." J.A. 0006 n.1. The United States does not take a position on this issue.

holding that Kengerski's connection to his grand-niece was categorically too attenuated to support a good-faith belief that he had experienced actionable discrimination on the basis of his race. That is especially evident here, because the record shows that Kengerski's willingness to assume parental responsibility for his grand-niece led to the hostility he experienced and reported.

Second, discriminatory workplace harassment need not be "severe or pervasive" for an employee who opposes it to receive protection from reprisal under Title VII. To hold otherwise would contravene the purpose of Title VII's antiretaliation provision by exposing to reprisal individuals who promptly report discriminatory behavior while protecting only those who stand silently by until harassment becomes "severe or pervasive."

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE PLAINTIFF DID NOT ENGAGE IN PROTECTED OPPOSITION ACTIVITY FOR PURPOSES OF TITLE VII'S ANTIRETALIATION PROVISION

A. As This Court Has Recognized, Title VII's Antiretaliation Provision Protects Individuals Who Have An Objectively Reasonable, Good-Faith Belief That The Conduct They Oppose Violates The Statute

Title VII prohibits several forms of discrimination in employment. As relevant here, the statute makes it an "unlawful employment practice" for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin" with respect to hiring, firing, compensation,

terms, conditions, or privileges of employment. 42 U.S.C. 2000e-2(a)(1). A racially hostile work environment is an unlawful employment practice, and an employer may be liable for the harassing conduct of an employee's supervisors and colleagues under certain circumstances. See *Vance* v. *Ball State Univ.*, 570 U.S. 421, 424 (2013). A discriminatory hostile work environment is actionable only when it is "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Mandel* v. *M&Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013) (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986)); see also *Castleberry* v. *STI Grp.*, 863 F.3d 259, 264 (3d Cir. 2017).

At issue here is Title VII's proscription against retaliation for opposing workplace discrimination. It is illegal under the antiretaliation provision's "opposition clause" for "an employer to discriminate against any of his employees * * * because [the employee] has opposed any practice made an unlawful employment practice" under Title VII. 42 U.S.C. 2000e-3(a).[7] To establish a *prima facie* case of retaliation, an employee must show: (1) the employee "engaged in activity protected by Title VII"; (2) the employer took a "materially adverse" action against the employee; and (3) there was a "causal connection"

[7] The antiretaliation provision's "participation clause" prohibits retaliation against an employee who has "made a charge, testified, assisted, or participated" in a Title VII proceeding. 42 U.S.C. 2000e-3(a).

between the employee's "participation in the protected activity" and the "materially adverse" action. *Moore* v. *City of Phila.*, 461 F.3d 331, 340-341 (3d Cir. 2006) (citations omitted). If the employee establishes a *prima facie* case, the burden then shifts to the employer to put forth a legitimate, non-retaliatory reason for the materially adverse action against the employee, which the employee may then rebut with evidence that the stated reason is a pretext for retaliation. *Id.* at 342 (citing *Krouse* v. *American Sterilizer Co.*, 126 F.3d 494, 500–501 (3d Cir. 1997)).

The decision below hinges on the first element of a *prima facie* case of retaliation—whether Kengerski's complaint about McCall's conduct constituted activity protected by Title VII. As this Court has recognized, an employee engages in protected opposition activity only when he has an "objectively reasonable," "good faith" belief that the conduct he opposes violates Title VII. See *Moore*, 461 F.3d at 341 (citing *Clark Cty. Sch. Dist.* v. *Breeden*, 532 U.S. 268, 271 (2001)).[8] As relevant here, the underlying violation of Title VII is that the employer "discriminate[d] against [the plaintiff] * * * because of such individual's race."

[8] The Supreme Court in *Breeden* assumed, without deciding, that Title VII's antiretaliation provision protects individuals who oppose conduct that they reasonably, and in good faith, believe violates the statute—the standard that the Ninth Circuit had applied below. 532 U.S. at 270.

42 U.S.C. 2000e-2(a)(1); see, *e.g.*, *Daniels* v. *School Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015).

Under this Court's precedent, an employee claiming retaliation "need not prove the merits of the underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed." *Aman* v. *Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996) (citation and internal quotation marks omitted); accord *Moore*, 461 F.3d at 344. As the EEOC has explained, "a retaliation claim based on opposition is not defeated merely because the underlying challenged practice ultimately is found to be lawful," and it is sufficient for the complaining employee to hold "a reasonable good faith belief that the conduct opposed violates the EEO laws, or could do so if repeated." *EEOC Enforcement Guidance on Retaliation and Related Issues* 2.A.II.c (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues. This standard protects "aggrieved employees, whose efforts in the public interest would be severely chilled if they bore the risk of discharge whenever they were unable to establish conclusively the merits of their claims." *Parker* v. *Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); see also *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 67 (2006) (recognizing that Title VII "depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses").

B. The Complained-Of Conduct Could Give Rise To An Objectively Reasonable, Good-Faith Belief That The Employer Violated Title VII

The district court incorrectly applied the requirement that Kengerski have an "objectively reasonable, good-faith belief that his employer's activity was unlawful under Title VII" to establish that he engaged in activity protected by Title VII's antiretaliation provision. J.A. 0007. Although the court acknowledged that Kengerski need not "prove the merits of the underlying discrimination complaint" to be protected from retaliation (J.A. 0007), it made several legal errors in analyzing whether McCall's conduct could give rise to an objectively reasonable, good-faith belief that a Title VII violation had occurred.

1. An Employee Who Complains Of Harassment Because Of The Employee's Relationship With A Person Of Another Race May Possess An Objectively Reasonable, Good-Faith Belief That He Has Suffered Unlawful Discrimination Because Of His Race

The district court erred in ruling that Kengerski's race was fatal to his *prima facie* case of retaliation. The court reasoned, first, that Kengerski's claim failed because "[t]here is no hostile work environment experienced by the plaintiff when he is not the member of the protected class allegedly harassed." J.A. 0008. The court rejected the notion that Kengerski reasonably could have believed that he had a claim based on what the court called "associational" discrimination, a rationale, the district court noted, that this Court has not yet joined its sister circuits in recognizing. J.A. 0008. But even under an "associational discrimination" theory,

the district court reasoned, Kengerski could not have had an objectively reasonable, good-faith belief that harassment based on a relationship "as remote" as the one with his grand-niece fell within the realm of what Title VII prohibits. J.A. 0009.

These conclusions are incorrect. As a threshold matter, we address what the district court described as an "associational discrimination" claim, an imprecise term that may obscure the proper analytical focus in assessing a discrimination claim arising from an employee's interracial relationship, and which may have contributed to the district court's legal errors.

a. First, an employee may believe reasonably, and in good faith, that harassment based on the employee's relationship with a person of another race constitutes discrimination against the employee "because of such individual's race" in violation of Title VII's antidiscrimination provision, 42 U.S.C. 2000e-2(a)(1). Although this Court has not explicitly recognized a claim for discrimination in the context of an employee's interracial association, every court of appeals to consider the issue has done so. See *Holcomb* v. *Iona Coll.*, 521 F.3d 130, 138-139 (2d Cir. 2008); *Tetro* v. *Elliott Popham Pontiac*, 173 F.3d 988, 993-994 (6th Cir. 1999); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-589 (5th Cir.

1998), vacated in part on other grounds, 182 F.3d 333 (5th Cir. 1999); *Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-892 (11th Cir. 1986).[9]

Indeed, Title VII's text and purpose support the existence of such a claim. As the Sixth Circuit explained in *Tetro*, 173 F.3d at 993-994, the statute's prohibition on discrimination against an employee "because of such individual's race," 42 U.S.C. 2000e-2(a)(1), encompasses discrimination based on an employee's association with a person of another race. Reversing the district court's dismissal of a white plaintiff's race discrimination claims relating to his biracial child, the *Tetro* court reasoned that "[a] white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child." 173 F.3d at 994.[10] As the Second Circuit has explained, the reason such conduct violates Title VII "is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee

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[9] District courts within the Third Circuit have acknowledged the existence of such a claim, as well. See *LaRochelle* v. *Wilmac Corp.*, 210 F. Supp. 3d 658, 693-694 (E.D. Pa. 2016), aff'd on other grounds, 769 F. App'x 57 (3d Cir. 2019); *Zielonka* v. *Temple Univ.*, No. CIV. A. 99-5693, 2001 WL 1231746, at *5-6 (E.D. Pa. Oct. 12, 2001); *Holiday* v. *Belle's Rest.*, 409 F. Supp. 904, 908-909 (W.D. Pa. 1976).

[10] The Sixth Circuit found that this approach was bolstered by the fact that the EEOC, "which Congress charged with interpreting, administering, and enforcing Title VII," had consistently supported such an interpretation. *Tetro*, 173 F.3d at 994 (quoting *Parr*, 791 F.2d at 892).

suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d at 139. In *Holcomb*, the Second Circuit determined that a white employee had a valid claim of discrimination "because of his interracial marriage." *Ibid.* Likewise, in *Deffenbaugh-Williams*, the Fifth Circuit concluded that a reasonable juror could find that the plaintiff "was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person." 156 F.3d at 589. Applying the same reasoning, the Eleventh Circuit in *Parr* ruled in favor of a white plaintiff who was in an interracial marriage. 791 F.2d at 892.

In sum, Title VII prohibits an employer from discriminating against an employee based on his or her interracial relationship, *not* because that constitutes "associational discrimination" as such, but rather because that constitutes discrimination against the individual employee "because of such individual's race." 42 U.S.C. 2000e-2(a)(1). Thus, despite the lack of binding precedent in this Circuit, the plain text of Title VII and decisions from every circuit court to have considered the issue support the reasonableness of a belief that Title VII prohibits discrimination because of the plaintiff's association with a person of a different race. And, even if there were any doubt, Kengerski's retaliation claim is viable because "a layperson should not be burdened with the 'sometimes impossible task' of correctly anticipating how a given court will interpret a particular statute."

Parker, 652 F.2d at 1019 (quoting *Berg* v. *La Crosse Cooler Co.*, 612 F.2d 1041, 1045-1046 (7th Cir. 1980)).

The record in this case at the very least is sufficient for Kengerski to withstand summary judgment as to whether he could have had a reasonable, good-faith belief that he experienced discrimination because of his race due to his interracial association with his grand-niece. As Kengerski's complaint to the warden makes clear, McCall disparaged Kengerski, who is white, because of his relationship to his grand-niece (whom McCall described as "Black"): if Kengerski were to "take in" Jaylynn, McCall said, he would be "that guy in the store with a little monkey on his hip like Sam Pastor." J.A. 0675. The clear premise of the comment—bolstered by McCall's reference to another jail employee with a biracial child (see J.A. 0345 (Pl.'s Summ. J. Opp.))—was that there was something unseemly and wrong with a white adult maintaining a familial relationship with a part-black child. These facts permit a reasonable belief that Kengerski's race was a reason for McCall's hostility toward him.

b. Second, the district court erred in holding that the connection between Kengerski and his grand-niece was categorially too "remote" to support an objectively reasonable, good-faith belief that Kengerski had suffered unlawful discrimination. J.A. 0009. The district court noted that "[a]ssociational discrimination claims arise where there is a 'substantial relationship' between the

plaintiff and someone of a protected class," and thus concluded that *only* certain close familial ties—such as "marital or parental-child" relationships, as the court posited—may support such a claim. J.A. 0009 (quoting *LaRochelle* v. *Wilmac Corp.*, 210 F. Supp. 3d 658, 693-694 (E.D. Pa. 2016), aff'd on other grounds, 769 F. App'x 57 (3d Cir. 2019)).

It is true that successful discrimination claims based on an interracial association often are premised on close familial relationships. See, *e.g.*, *Holcomb*, 521 F.3d at 138-139 (marriage); *Tetro*, 173 F.3d at 993-994 (parent-child); *Deffenbaugh-Williams*, 156 F.3d at 588-589 (dating, then marriage); *Parr*, 791 F.2d at 891-892 (marriage); *Holiday* v. *Belle's Rest.*, 409 F. Supp. 904, 906 (W.D. Pa. 1976) (marriage). But while a close family tie may strengthen a claim that a plaintiff experienced discrimination on the basis of his or her race in the context of an interracial association, nothing in Title VII's text or structure adopts or even suggests that the "closeness" of the relationship is analytically significant in assessing such a claim. Indeed, Title VII prohibits discrimination against an employee "because of such individual's race." 42 U.S.C. 2000e-2(a)(1). That text in no way excuses discrimination against an employee because of his race on the ground that the employee's interracial relationship is too "remote."

Therefore, a plaintiff's ability to prevail on such a discrimination claim depends on a fact-intensive inquiry into the reason for the alleged discrimination.

In *Barrett* v. *Whirlpool Corp.*, the Sixth Circuit correctly rejected a "significant association" requirement in order to have a viable Title VII discrimination claim. 556 F.3d 502, 512-513 (6th Cir. 2009). In that case, the court determined that a white plaintiff could establish a hostile work environment claim based on her interracial friendship with black coworkers. *Ibid.* The *Barrett* court held, in line with the Seventh Circuit, that the key inquiry should be whether the "discrimination was 'because of' the employee's race." *Id.* at 512 (quoting *Drake* v. *Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998)). Although "one might expect the degree of an association to correlate with the likelihood of severe or pervasive discrimination," there is no specific level of closeness required before a plaintiff can bring such a claim. *Ibid.*

Consistent with this, the EEOC has refrained from identifying a particular degree of closeness to support a claim of discrimination based on an interracial association. In its Compliance Manual, the EEOC explains, by way of example, that "it is unlawful to discriminate against a White person because he or she is married to an African American or has a multiracial child, *or because he or she maintains friendships or otherwise associates with persons of a certain race*." EEOC Compliance Manual § 15-II (2006) (internal citation omitted; emphasis added); cf. *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 179 (2011) (Ginsburg, J., concurring) ("add[ing] a fortifying observation" that the majority's

holding "accords with the views of the [EEOC], [a] federal agency that administers Title VII").

Accordingly, the proper focus of a court's analysis of an employment discrimination claim based on an interracial association—and a retaliation claim premised on opposition to such discrimination—should simply be whether the employee experienced (or opposed) race discrimination because of that employee's race. The district court therefore erred in focusing on the closeness of Kengerski's connection to his grand-niece (J.A. 0009) rather than on whether the interracial association between Kengerski and his grand-niece was the reason for McCall's harassment. In light of facts in the record that, as he told McCall and reported in his complaint to the warden, Kengerski was close enough with his grand-niece to consider assuming parental responsibility for her—and that his willingness to do so for a biracial child was the source of McCall's hostility—the district court erred in holding that harassment based on this relationship could not give rise to a reasonable belief that a Title VII violation had occurred.[11]

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[11] Even if the nature of the relationship is important—and we believe it is not—the court was wrong that there was no viable discrimination claim based on Kengerski's relationship with his grand-niece. Although the case law may not address this precise relationship, there is substantial authority for a discrimination claim based on the relationship between a parent and his biracial child. See *Tetro*, 173 F.3d at 993-994; *Chacon* v. *Ochs*, 780 F. Supp. 680, 680-682 (C.D. Cal. 1991) (denying motion to dismiss because Title VII prohibits discrimination based on interracial association between white employee and her Hispanic husband and

(continued…)

2. An Employee May Have An Objectively Reasonable, Good-Faith Belief That Complained-Of Harassment Violates Title VII Even If The Harassment May Not Be Sufficiently Severe Or Pervasive To Constitute A Hostile Work Environment

The district court's second rationale for finding that Kengerski's retaliation claim could not survive summary judgment—that McCall's "comment and text messages fall woefully short of the [severe or pervasive] standard for a hostile work environment claim" (J.A. 0009)—also rests on legal error. Rather than evaluating whether Kengerski might have had an objectively reasonable, good-faith belief that the harassment he complained of was actionable, the district court essentially assessed whether the underlying harassment claim itself would survive summary judgment, *i.e.*, whether the conduct reported was "severe or pervasive." But as explained above, see p. 12, *supra*, an employee's retaliation claim is not doomed if the conduct about which he complains ultimately is found to be lawful. By collapsing the analysis of the retaliation claim into that of the underlying hostile work environment claim (a claim that Kengerski did not bring), the district court applied the wrong legal standard.

(…continued)
biracial child); see also *Young* v. *St. James Mgmt., LLC*, 749 F. Supp. 2d 281, 292 (E.D. Pa. 2010) (holding that Title VII claim based on employee's association with son who was in an interracial dating relationship should go to a jury to determine if discrimination was based on employee's race).

This Court already has recognized that harassment need not be severe or pervasive in order to give rise to an objectively reasonable, good-faith belief that the harassment violates Title VII, such that opposing the harassment constitutes protected activity. In *Moore*, the Court rejected the district court's conclusion that Title VII's antiretaliation provision did not protect plaintiffs who complained about repeated racial epithets that supervisors used outside the presence of African-American officers (sometimes in discussing managerial decisions) because there was insufficient evidence to infer that discrimination actually occurred. 461 F.3d at 345. Instead, the Court held that, "[a]s soon as a witness of such conduct reasonably believes unlawful discrimination has occurred, the anti-retaliatory provisions will protect their opposition to it." *Ibid.* An employee is "not required to collect enough evidence of discrimination to put the discrimination case before a jury before they blow the whistle." *Ibid.* The latter principle easily extends to the context of a complaint of harassment that may not have become severe or pervasive at the time an employee reports it.

And as the *Moore* Court explained, the Supreme Court's decision in *Clark Cty. Sch. Dist.* v. *Breeden*, 532 U.S. 268 (2001) (per curiam), is not to the contrary. 461 F.3d at 344-345. In *Breeden*, the Supreme Court held that a "single incident" in which the plaintiff's coworker made an off-hand, sexual joke regarding a statement contained in a job application could not give rise to a reasonable belief

that a Title VII violation had occurred. 532 U.S. at 271. The conduct at issue in *Moore*, this Court reasoned, was "far more substantial" than what the Supreme Court found deficient in *Breeden*, as it involved, *inter alia*, the repeated use of serious racial epithets, sometimes in connection with managerial decisions. 461 F.3d at 344-345.

The conduct opposed here likewise exceeds the *Breeden* standard. Kengerski complained not of a single tasteless joke, but instead of a senior jail official's racist comments—made in front of other jail employees—relating to Kengerski's relationship with his grand-niece, who was referred to using a degrading and dehumanizing racist slur, "monkey." See *Boyer-Liberto* v. *Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (en banc) (collecting cases regarding the significance of the term "monkey" as a slur against African Americans). This initial exchange was followed by text messages containing racist and offensive images, and, allegedly, hostility, discipline, and other adverse impacts on Kengerski's working conditions. See *Daniels*, 776 F.3d at 194-195 (isolated, off-hand remarks that were not directed at any particular person did not give rise to a reasonable belief of a Title VII violation, but complaints about particularized discriminatory comments and persistent hostile conduct were sufficient to clear the hurdle established in *Breeden*). Kengerski reasonably could have believed that the "monkey" slur, subsequent racist texts, and other alleged

hostile conduct were "severe" or "pervasive," but at the very least, he reasonably could have believed that this conduct would be unlawful if repeated. See *EEOC Enforcement Guidance on Retaliation and Related Issues* II.A.2.c (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues (explaining that protected opposition "must be based on a reasonable good faith belief that the conduct opposed violates the EEO laws, or could do so if repeated," and that *Breeden* did not alter the rule that conduct need not be "severe or pervasive").

The decisions of other courts of appeals further undercut the district court's holding that opposition to conduct that may not be severe or pervasive at the time of an employee's complaint does not entitle the employee to protection from reprisal. See, *e.g.*, *EEOC* v. *Rite-Way Serv., Inc.*, 819 F.3d 235, 243-244 (5th Cir. 2016) (explaining that "opposition clause claims grounded in isolated comments are not always doomed to summary judgment," and holding that the context and specificity of harassing comments created a fact issue about the plaintiff's reasonable belief); *Boyer-Liberto*, 786 F.3d at 268, 284 (explaining that an employee who complains about an isolated discriminatory incident may have a reasonable belief that she has opposed conduct that violates Title VII when the incident is sufficiently serious or when she "reasonably believes that a hostile work environment is in progress"); *Pomales* v. *Celulares Telefónica, Inc.*, 447 F.3d 79,

84-85 (1st Cir. 2006) (acknowledging that plaintiff's complaint about harassment that was not severe or pervasive constituted protected activity).

Finally, providing protection to employees who promptly report workplace harassment is consistent with the principle underlying the affirmative defense established in *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998), which may relieve an employer of liability if the employee unreasonably fails to avail herself of an employer's preventive or corrective measures, such as internal reporting mechanisms. A contrary rule would place employees in an untenable "catch-22" in which the employer may freely penalize the employee if she complained of harassment before it became severe or pervasive, but if the employee "kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability" by raising the affirmative defense. *Boyer-Liberto*, 786 F.3d at 283 (quoting *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cty., Tenn.*, 555 U.S. 271, 279 (2009)); see also *EEOC Enforcement Guidance on Retaliation and Related Issues* II.A.2.c (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues; *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 63 (Congress's purpose in enacting Title VII's antiretaliation provision was to prevent workplace discrimination by providing protection to those who come forward to report illegal conduct.).

CONCLUSION

For the foregoing reasons, the district court erred in granting summary judgment to the defendant on the issue of protected opposition activity.

Respectfully submitted,

SHARON FAST GUSTAFSON
General Counsel
JENNIFER S. GOLDSTEIN
Associate General Counsel
ELIZABETH E. THERAN
Assistant General Counsel
JAMES M. TUCKER
Attorney
Equal Employment
Opportunity Commission
Office of General Counsel
131 M St. NE, Rm. 5NW10P
Washington, D.C. 20507
(202) 663-5870

ERIC S. DREIBAND
Assistant Attorney General
ALEXANDER V. MAUGERI
Deputy Assistant Attorney

s/ Katherine E. Lamm
BONNIE I. ROBIN-VERGEER
KATHERINE E. LAMM
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel representing the United States.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: May 13, 2020

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUES ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5689 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font; and

(3) complies with the requirements of Local Rule 31.1(c) that the text of the electronic brief is identical to the text in any paper copies of this brief that are submitted to the Court, and that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: May 13, 2020

CERTIFICATE OF SERVICE

I certify that on May 13, 2020, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT ON THE ISSUES ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Pursuant to this Court's General Order dated March 17, 2020, the United States will await further notice before submitting paper copies of this filing.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney