No. 25-1318

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

SUN CHEMICAL CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Missouri Western Division

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

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SUMMARY OF THE CASE

Sun Chemical Corporation (Sun Chemical) subjected Bryan Banks to a race-based hostile work environment at its Kansas City facility. A Sun Chemical employee called Banks, who is African American, a "fucking N[*****]" multiple times after swearing at him, following him, and punching a locker near his head so hard that it left a dent. Prior to this incident, Sun Chemical had ignored a complaint about a similar incident where the same employee deployed the same slur against the only other African American worker at the facility.

In instructing the jury on the negligence standard for employer liability, however, the district court permitted the jury to consider only whether Sun Chemical reasonably *responded* to the harassment of Banks and not whether Sun Chemical unreasonably failed to *prevent* the harassment. Eliminating this viable route to employer liability mattered. Properly instructed, the jury could have found that Sun Chemical's complete failure to address the employee's past harassing conduct led to the employee's later harassment of Banks. Use of the instructions is thus reversible error.

The EEOC requests 15 minutes of oral argument.

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STATEMENT OF JURISDICTION

The EEOC brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The district court had jurisdiction under 28 U.S.C. § 1331. After a three-day trial, on December 11, 2024, the jury returned a defense verdict on the Title VII hostile-work-environment claim. App. 121; R. Doc. 97. The district court entered final judgment for Sun Chemical, based on the jury's verdict, on December 18, 2024. App. 158; R. Doc. 104. The EEOC timely appealed on February 13, 2024. App. 159; R. Doc. 116. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court issue erroneous jury instructions regarding the EEOC's racial harassment claim that seeks relief for Bryan Banks, eliminating one avenue to employer liability, so that a new trial is warranted?

Apposite Authority:

- *Vance v. Ball State Univ.*, 570 U.S. 421 (2013)
- *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681 (8th Cir. 2021)
- *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787 (8th Cir. 2009)

- *Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494 (8th Cir. 2010)

STATEMENT OF THE CASE

A. Statement of Facts[1]

Sun Chemical produces printing inks and pigments and has annual sales exceeding $3.5 billion and an 8,000-plus person workforce spanning hundreds of locations around the globe. App. 167; Ex. 4 at 3; Tr. 61:14-62:6.[2] Bryan Banks,[3] who is African American, works for Sun Chemical's Kansas City manufacturing facility. App. 64-65; R. Doc. 72 ¶¶ 1, 14; Tr. 265:7-9. He started as a temporary production technician in Summer 2019 and quickly became a full-time production technician in October 2019, just days before the racial harassment incident underlying this case. App. 64; R. Doc. 72 ¶¶ 1-5. During the relevant time period, the Kansas City facility employed

[1] The parties set forth the following facts at trial.
[2] "App." refers to the Appendix, "R. Doc." refers to the district court docket, and "Tr." refers to the trial transcript, which is available on the district court's docket from R. Doc. 111 to R. Doc. 113, and which is not included in the appendix. "Ex." refers to Trial Exhibits, which are not available on the district court's docket but are included in the appendix.
[3] Banks intervened in the case below but has not filed a notice of appeal.

approximately ten to twelve workers, App. 294-295; Ex. 38 at 3-4;[4] Tr. 254:13-255:14, two of whom were African American (Banks and Michael Smallwood), App. 303; Ex. 38 at 12; Tr. 265:7-16.

1. Ricardo Nevarez calls Banks the N-word, swears at him, and punches a locker near Banks's head.

On the morning of October 23, 2019, Banks was in the breakroom before the start of his shift with two of his coworkers, Larry Wilhite and Joe Stahl. Tr. 270:4-271:13, 276:23-25. When the group questioned the whereabouts of Nevarez, Nevarez overheard someone mentioning his name, entered the room and immediately started yelling at Banks, demanding to know why Banks was talking about him. App. 269-272; Ex. 11 at 1-4; Tr. 270:17-271:3. Nevarez's colleagues described Nevarez as a "really big guy," Tr. 168:15-17, 269:6-16, 53:1, and witnesses to this portion of the incident recalled that Nevarez threatened Banks and tried to intimidate him, Tr. 52:21-53:4; App. 270; Ex. 11 at 2. The two got "toe to

[4] Trial exhibits 36 and 38 were entered into evidence and are transcripts that reflect the portions of the video depositions of Maurilio Calderon and Michael Smallwood played at trial. *See* Tr. 138:7-10, 252:13-16. The district court did not retain them and, like the other exhibits, they are not available on the district court docket. The EEOC has included them in the appendix and represents that they are an accurate copy of the exhibits entered into evidence.

toe" and "cuss[ed] back and forth," calling each other "mother fucker." Tr. 271:22-272:19; App. 269-272; Ex. 11 at 1-4. Banks eventually walked away from Nevarez, out of the breakroom, and into the locker room to change for his shift. Tr. 272:22-273:23.

Nevarez followed Banks into the locker room, where he continued screaming and swearing at Banks. Tr. 52:10-17, 49:4-17, 274:5-25; App. 269-271; Ex. 11 at 1-3. While Banks was bent down near his locker, Nevarez punched the locker close to Banks's head and called him a "fucking n****r." Tr. 48:23-25, 49:11-17, 52:10-53:4, 274:4-25; App. 269-270; Ex. 11 at 1-2. Banks jumped up, shaken, and saw a fresh dent in the locker near his head. Tr. 154:11-17, 274:5-17; App. 269-271; Ex. 11 at 1-3. Banks exchanged more words with Nevarez and then again walked away from Nevarez and left the locker room while, according to Banks, Nevarez screamed "fucking n****r" at him three more times. Tr. 274:19-25; App. 269-271; Ex. 11 at 1-3.

2. Sun Chemical investigates the October 2019 incident.

Later that morning, Banks reported the incident to Sue Cornelsen, who was Plant Manager of the Kansas City facility and Banks's direct

manager. App. 64, 268; R. Doc. 72 ¶¶ 3, 5;[5] Ex. 10; Tr. 151:15-19, 158:3-9, 276:17-279:5. Banks testified that he told Cornelsen that Nevarez called him "out of my name." Tr. 278:1-3, 299:20-25. But he could not recall if he told her specifically that Nevarez used the N-word. *Id.* Cornelsen discussed the incident with Banks, Nevarez, and Wilhite, and documented the discussions. Tr. 151:15-153:15; App. 268; Ex. 10. She also went to the locker room to verify Banks's complaint and indeed observed a dent in the locker that Nevarez punched. Tr. 154:11-16. Nonetheless, according to Banks, Cornelsen was "nonchalant" about the situation. Tr. 279:4. Cornelsen's documentation does not mention Nevarez's use of the N-word, and she concluded that her discussions with both Nevarez and Banks left them "satisfied with the result." App. 268; Ex. 10; Tr. 192:17-19. At this point, Cornelsen considered the matter "resolved." Tr. 154:1-24.

The next morning, however, Cornelsen heard a false rumor that Banks had called the company's ethics hotline. Tr. 158:15-159:8; App. 291; Ex. 37. Cornelsen found it "irritating" that he would do so when she

[5] Some documents, such as the parties' stipulated facts, list the date of the incident as October 24. *See, e.g.*, App. 64; R. Doc. 72. The correct date is October 23. *See* App. 291; Ex. 37.

"thought everything had been settled." Tr. 159:6-23. She then sent an email about the incident to Antonella Warren, a Sun Chemical Human Resources Manager based near Chicago. App. 291; Ex. 37; Tr. 65:3-11, 45:13-46:9, 155:21-159:23.

Over the next few days, Warren conducted phone interviews with the five employees present for the incident: Banks, Nevarez, Wilhite, Stahl, and Van Dolah. Tr. 95:7-11; App. 65; R. Doc. 72 ¶ 8. According to Warren, Van Dolah (the only witness to the locker room portion of the incident) corroborated that Nevarez followed Banks into the locker room, yelling at him and calling him the N-word. Tr. 52:4-20; App. 270-271; Ex. 11 at 2-3; R. Doc. 72 ¶ 12. Specifically, he recalled that "Ric was saying … he was an F'ing N[****r] … he slammed his palm into the locker next to Bryan's. Bryan looked shaken and just walked away. Ricardo stood there red faced and breathing hard …." App. 270-271; Ex. 11 at 2-3.

Van Dolah also shared that he had heard Nevarez refer to Banks as an N-word before. App. 271; Ex. 11 at 3 ("When I was training with him, he once said that he didn't like that F'g N[*****], referring to Bryan."); Tr. 87:4-88:21. And he observed that when he and Banks were training together,

"Ric never spoke directly to Bryan or looked him in the eye," instead asking Van Dolah to serve as the intermediary. App. 271; Ex. 11 at 3.

Warren also interviewed two employees, Kristofer Savage and Maurilio Calderon (sometimes called "Flacco"), who were not present for the incident but who both reported hearing Nevarez use the N-word in the workplace before the incident. Tr. 76:22-77:20; App. 272-273, 65; Ex. 11 at 4-5; R. Doc. 72 ¶ 9. Calderon told Warren that he thought he heard Nevarez say the N-word during a prior confrontation between Nevarez and Mike Smallwood, the only other African American employee at the Kansas City facility at the time. Tr. 75:23-76:3, 77:3-20; App. 272-273; Ex. 11 at 4-5. Banks, too, told Warren that Nevarez had called Smallwood the N-word. App. 269; Ex. 11 at 1. Warren did not interview Smallwood. Tr. 81:25-82:2.

Calderon also testified that Nevarez used the N-word at work but could not recall the frequency. App. 289; Ex. 36 at 6. Similarly, Savage told Warren that he heard Nevarez use the N-word in reference to his coworkers, but did not remember him directly calling them the slur. Tr.

91:2-21; App. 273; Ex. 11 at 5.[6] In total, three of the five people that Warren interviewed told her that they heard Mr. Nevarez use the N-word in the workplace prior to the incident involving Banks. Tr. 95:12-17.

3. Sun Chemical disciplines Nevarez and Banks.

On November 7, 2019, Sun Chemical issued Nevarez a "Final Written Warning Notice" for "Aggressive, inappropriate behavior in violation of Company policy." App. 274; Ex. 12. The summary of incident included that Nevarez "physically intimidated" Banks, "us[ed] a lot of profanity toward him," and "used an inappropriate racial slur towards him …." *Id.* The notice imposed as discipline a five-day suspension without pay and warned that "[s]hould a similar incident occur again, you will be subject to further discipline, up to and including immediate termination of employment." *Id*. Cornelsen signed the notice. *Id*.

Also on November 7, Sun Chemical issued Banks a "Written Warning Notice" for "Inappropriate behavior." App. 267; Ex. 6. The notice, also signed by Cornelsen, identified the "Discipline" imposed as "Warning

[6] Savage also told Warren that he witnessed a prior incident involving Nevarez and Banks where Nevarez screamed at Banks using profanity, and Banks walked away. App. 273; Ex. 11 at 5; Tr. 90:4-91:1, 284:1-286:7 (Banks recalling the episode).

only" and stated that although Sun Chemical did not condone Nevarez's "verbally and physically harassing" behavior, Banks should not have "used profanity" during the incident. *Id.* "Verbal profanity," it emphasized, "is considered inappropriate behavior that will not be tolerated." *Id.*

Evidence showed that other employees used profanity at Sun Chemical's Kansas City facility and, according to Banks, no other employee was ever written up for doing so. *See, e.g.,* Tr. 180:10-181:4, 290:20-291:18, 302:1-303:2; App. 269-273; Ex. 11. Banks was therefore "stunned" that he was written up. Tr. 290:22.

After the incident and receiving the written warning, Banks tried to avoid Nevarez at work—a facility of just ten to twelve people—and testified that he felt stressed, had difficulty eating and sleeping, and missed work because he "didn't want to be there." Tr. 293:8-18, 294:12-295:7; App. 294-295; Ex. 38 at 3-4; Tr. 254:13-255:14. Nevarez took medical leave within a few months after the incident and has since died. App. 65; R. Doc. 72 ¶ 13; Tr. 60 at 7-12. Although no evidence showed that Nevarez directly called Banks the N-word again in the months between the incident and taking medical leave, Banks remained concerned about Nevarez's treatment of him. Tr. 301:7-9. For instance, Banks testified that when he

walked by Nevarez conversing with other employees, Nevarez would suddenly switch from English to Spanish and say the word "negro," which translates to "black." Tr. 301:7-19. Neither Nevarez nor Cornelsen—nor anyone from Sun Chemical—ever apologized to Banks about the N-word incident. Tr. 293:19-294:11.

4. Sun Chemical ignored an earlier complaint about Nevarez using the N-word against a different African American employee.

It was well known that Nevarez also did not get along with Smallwood, the other African American worker at Sun Chemical's Kansas City facility. *See* App. 296-297, 302-303, 269, 271-273, 275, 276; Ex. 38 at 5-6, 11-12; Ex. 11 at 1, 3-5; Ex. 14; Ex. 17; Tr. 75:18-77:20; *see also* App. 283, 316-318; Ex. 19 at 7; Ex. 38 at 25-27 (Smallwood testifying that he submitted a general list of complaints to Cornelsen about Nevarez).

According to Smallwood, prior to the October 2019 incident between Banks and Nevarez, he reported to Cornelsen that Nevarez treated him unfairly and called him names, including the N-word, and that Nevarez was "prejudice[d]" and creating a "hostile work environment." App. 297-

299, 302-303, 307, 312-313; Ex. 38 at 6-8, 11-12, 16, 21-22.[7] Banks and Calderon also recalled that Nevarez had directly called Smallwood the N-word. App. 269, 273; Ex. 11 at 1 ("[Banks] knew [Nevarez] had also called Mike Smallwood a N[*****] because Mike told him that"); *id. at* 5 (Calderon recalling to Warren that he thought he heard Nevarez use the N-word in a confrontation with Smallwood); Tr. 288:15-22 (Banks testifying that "Mike Smallwood told me that [Nevarez] called him a n[****]r"). And Van Dolah, Savage, and Calderon all recalled Nevarez using the slur around the workplace. App. 271, 273, 289; Ex. 11 at 3, 5; Ex. 36 at 6; Tr. 288:13-22.

Cornelsen denied receiving any such complaints from Smallwood. Tr. 174:5-7, 177:23-25, 240:2-18. She further denied *ever* hearing racist language in the manufacturing facility during her decades-long tenure. Tr. 173:6-11.

[7] Smallwood testified that he reported Nevarez's use of the N-word to Cornelsen approximately "four or five years" prior to the date of his 2024 deposition and prior to Banks being hired. App. 307, 312-313; Ex. 38 at 16, 21-22. As to Smallwood's reports that Nevarez was creating a "hostile work environment" and was "prejudice[d]," he testified that he also reported them sometime prior to Banks being hired. App. 307; Ex. 38 at 16.

B. District Court Proceedings

The parties presented the evidence above at a three-day trial. As relevant here, the EEOC and Intervenor Banks (collectively, "Plaintiffs") argued throughout litigation that if a jury found that Sun Chemical unreasonably failed to correct *or prevent* the harassment from occurring, it could hold Sun Chemical liable for coworker harassment. App. 4-5, 18, 55; R. Doc. 1 ¶¶ 21, 28; R. Doc. 55 at 10, 47. The district court seemed to agree with this argument at summary judgment; it held that the question of employer liability for the hostile-work-environment claim was disputed by pointing solely to the evidence that Sun Chemical ignored Smallwood's earlier complaint about Nevarez's racist language. App. 74; R. Doc. 73 at 8.

Plaintiffs pressed their argument regarding the proper standard for employer liability for coworker harassment again in response to Sun Chemical's proposed jury instructions. At the final pretrial conference, Plaintiffs argued that Sun Chemical's proposed seventh element ("the defendant failed to take prompt and appropriate corrective action to end the harassment," App. 94; R. Doc. 78 at 2), although patterned after model jury instructions, was "intended for a failure to correct type of case" and

did not fit a "failure to prevent case." Pretrial Tr. at 24:3-11.[8] Relatedly, Plaintiffs objected to Sun Chemical's proposed sixth element, which asked the jury to determine whether "defendant knew or should have known of the racially hostile work environment created by Nevarez." App. 94; R. Doc. 78 at 2. Plaintiffs instead proposed that the jury be asked to consider whether "Sun Chemical knew or should have known of the *conditions giving rise to* the harassing conduct." App. 83; R. Doc. 77 at 4 (emphasis added). That proposal is one variation of the model instructions and aligned with Plaintiffs' theory that Sun Chemical knew of and ignored Nevarez's harassing behavior before October 2019, and that such unchecked behavior gave rise to Nevarez's harassment of Banks. *See* Eighth Circuit Model Civil Jury Instruction 8.42, Sixth Element (2023) (hereinafter "Model Instruction 8.42") ("*Sixth*, the defendant knew or should have known of the (describe alleged conduct *or conditions giving rise to* the plaintiff's claim) (emphasis added)).

The case proceeded to trial and on the first day, after the attorneys examined Warren, a juror proposed that the court ask Warren the

[8] The transcript of the final pretrial conference is available on the district court docket at R. Doc. 109 and is not included in the appendix.

following question: "[W]as Mr. Nevarez asked about using N word with Smallwood."[9] Tr. 120:22-25. The court declined to pose the question to Warren. Tr. 121:3-9.

The issue of Sun Chemical's preventative obligations arose again at the close of evidence when Sun Chemical moved for judgment as a matter of law. *See* Tr. 317:23-323:15. Plaintiffs pointed out that Sun Chemical's liability hinged not on how the managers addressed the October 2019 incident, but rather on "what they did to *prevent* [the October 2019 incident] when they knew or should have known of harassing behavior in the workplace that occurred prior to [the October 2019 incident]" and failed to address such behavior. Tr. 318:2-10 (emphasis added).

On the court's instruction, both parties briefed the issue. Plaintiffs argued that an employer may be liable for coworker harassment if it unreasonably failed to prevent the harassment by ignoring the same coworker's prior harassing conduct, even if the earlier conduct would not be ultimately actionable. App. 100-102; R. Doc. 93 at 3-5; *see also* Tr. 336:9-337:15, 338:7-343:2. Sun Chemical argued that the employer liability

[9] The district court used the Eighth Circuit's model procedure for jury questions. App. 135; R. Doc. 100 at 10.

standard for coworker harassment does not have a preventative component and focuses solely on a company's corrective measures as to the racial harassment incident at issue, which must be actionable. App. 116-117; R. Doc. 94 at 12-13; *see also* Tr. 332:17-25, 343:3-345:11.

Plaintiffs also explicitly renewed their objection to the instructions on the seventh element at the close of evidence. Tr. 347:19-3:49:12 ("We believe that [paragraph seven] should say preventative action. That's the way that the case was tried. … [A]s written the seventh element fails to conform to the evidence that's been submitted.").

The court orally denied Sun Chemical's motion for a directed verdict, Tr. 345:12-16, but nevertheless used a version of Sun Chemical's proposed jury instructions for the sixth element and its exact wording for the seventh element, Tr. 349:13-18; App. 146; R. Doc. 100 at 21 ("*Sixth*, the defendant knew or should have known of the harassing conduct; and *Seventh*, the defendant failed to take prompt and appropriate corrective action to end the harassment).

During closing argument, Plaintiffs attempted to argue that the sixth and seventh elements allowed the jury to consider that Sun Chemical took no action to prevent Nevarez's harassment of Banks. *See* Tr. 371:21-374:17,

376:2-9. Sun Chemical objected during the closing argument to the explanation of the preventative component. Tr. 374:18-375:25. The court overruled the objection, but Sun Chemical responded in its closing by pointing directly to the seventh element's text:

> I want to be clear about what the law requires them to do. And I would ask you to read this instruction because this is what they want to you believe it says. They want you to believe it says, [t]he defendant prevented and failed to take prompt and corrective action or that defendant failed to take prompt and appropriate action to prevent the harassment. Does it say that? Is that what the instruction says? … Remember, you are judges of the facts, but you are duty bound; you took an oath to follow the Court's law. This is the law. And it's not what they say it is.

Tr. 393:11-22.

After the jury deliberated for about three hours, it submitted a question to the court regarding the seventh element of the harassment instruction:

> Element #7 – How was the wording chosen? What does the law stipulate and/or allow and/or prohibit regarding hate speech in an employment environment?
>
> #7 – "Appropriate corrective action" – are we determining if it was "appropriate" or only if it ended the harassment? (Instruction 16 element 7)

App. 122; R. Doc. 98 at 1. When the court discussed with counsel how to respond to the questions, Plaintiffs reiterated their objection to the court's

use of the seventh element and argued that the court should not provide any further explanation to the jury:

> We did not believe the seventh element was properly submitted as it was. We did not think it was appropriate for the case as the evidence came in because there was no evidence that any affirmative action was taken by the employer before Mr. Banks' harassment. I think the jury's questions highlight the confusion that that element now has introduced to their deliberations.
>
> So we do think it would be error to further instruct them on this element, especially to tell them that – and suggest outright that the corrective action they took in response to the incident with Mr. Banks would somehow absolve them of liability.

Tr. 413:17-414:3. Sun Chemical, citing *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681 (8th Cir. 2021), suggested the court respond with: "Proper remedial action … need be only reasonably calculated to stop the harassment. And remedial action that does not end the harassment can still be adequate if it is reasonably calculated to do so." Tr. 407:4-12. The court agreed with Sun Chemical, providing the following written response to the jury:

> The wording of element 7 was chosen by the Court based on the law. Proper remedial action need be only reasonably calculated to stop the harassment, and remedial action that does not end the harassment can still be adequate if it is reasonably calculated to do so.

App. 122; R. Doc. 98 at 1. The jury returned a verdict for Sun Chemical. App. 121; R. Doc. 97.

SUMMARY OF ARGUMENT

The district court abused its discretion when it issued jury instructions on the question of employer liability that did not fit the facts presented at trial for Plaintiffs' hostile-work-environment claim. An employer is liable for coworker harassment if it unreasonably failed to prevent the harassment, such as by ignoring reports of prior harassing conduct committed by the same coworker. *See Vance v. Ball State Univ.*, 570 U.S. 421, 449–50 (2013). The erroneous jury instructions, however, blocked the jury from considering that avenue to employer liability. They instead allowed the jury to consider only whether Sun Chemical "failed to take prompt and appropriate *corrective* action to end the harassment." App. 146; R. Doc. 100 at 21 (emphasis added).

Blocking this route to liability mattered. Based on the evidence produced at trial, a jury could indeed find that Sun Chemical ignored Nevarez's prior harassing conduct—calling Smallwood the N-word—and that its inaction greenlit Nevarez's subsequent behavior: using the slur again, this time exacerbated by profanity and physical intimidation.

The jury instructions, however, forced the jury to analyze solely how Sun Chemical responded to Nevarez's use of the epithet against Banks without the option to consider whether Sun Chemical shirked its responsibility to address Nevarez's prior harassing behavior before its escalation. To be sure, correction-focused instructions are appropriate in some cases. But here, instructions that also included the employer's preventative obligations were necessary to permit the jury to consider the theory of the case presented by the Plaintiffs. Because a jury could have found under proper instructions that Sun Chemical unreasonably failed to prevent Nevarez from harassing Banks by ignoring Nevarez's prior harassment of Smallwood, use of the erroneous instructions is reversible error, and a new trial is warranted.

ARGUMENT

I. Standard of Review

This Court reviews "the district court's formulation of the jury instructions for abuse of discretion and its interpretation of the law de novo." *United States v. Thetford*, 806 F.3d 442, 446 (8th Cir. 2015). The review focuses on "whether the instructions, when viewed together in light of the evidence and the applicable law, fairly submitted the issues in the case to

the jury." *Andrews v. Neer*, 253 F.3d 1052, 1059 (8th Cir. 2001). A new trial is warranted if the "instructional error adversely affected the substantial rights of the appellants," *id.* at 1062—that is, if it "misled the jury or had a probable effect on the verdict," *Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494, 499 (8th Cir. 2010) (citation omitted).

II. An employer is liable for coworker harassment if a jury finds that it failed to take reasonable measures to prevent the harassment.

To establish a race-based hostile-work-environment claim, a plaintiff "must show (1) he is a member of a protected class, (2) he was subjected to unwelcome harassment, (3) the harassment was based on [race], (4) the harassment affected a term, condition or privilege of employment, and (5) employer liability." *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005).

"Negligence sets a minimum standard for employer liability under Title VII," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998), and plaintiffs bringing non-supervisor harassment claims bear the burden of its proof. *See Vance*, 570 U.S. at 424 ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions"). A plaintiff can prove an employer's negligence by

establishing either that an employer failed to take reasonable corrective action in response to harassment about which it knew or should have known or—as the Supreme Court and this Court recognize—that an employer unreasonably failed to prevent the harassment.

The Supreme Court has underscored that a plaintiff can prevail in a non-supervisor harassment claim "by showing that his or her employer was negligent in failing to *prevent* harassment from taking place." *Vance,* 570 U.S. at 448–49 (emphasis added); *see also id*. at 446 ("[A]n employer will always be liable when its negligence leads to the *creation* or continuation of a hostile work environment." (emphasis added)); *id.* at 445 ("[Complainant] will be able to prevail simply by showing that the employer was negligent in permitting … harassment to occur."). Evidence of an employer's unreasonable failure to prevent harassment could include "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed…." *Id.* at 449.

Citing *Vance*, this Court in *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 696–97 (8th Cir. 2021), reiterated that such evidence helps prove an employer's negligence in failing to prevent harassment. And it emphasized

that an employer could be liable if its "own negligence *caused* the harassment …." *Id.* at 696 (citing *Ellerth*, 524 U.S. at 759) (emphasis added). Similarly, even before *Vance*, this Court in *Sandoval v. American Building Maintenance Industries, Inc.*, found relevant to the analysis that the employer "exercised reasonable care to *prevent* sexually harassing behavior by establishing an anti-harassment policy and reporting procedures." 578 F.3d 787, 801 (8th Cir. 2009) (emphasis added).

Prevention is necessarily part of the employer liability inquiry because, "in evaluating employer liability" for claims of non-supervisor harassment, "Title VII adopts ordinary tort principles of negligence," *id.* at 801 (citation omitted), including causation and foreseeability, *Hirase-Doi v. U.S. W. Commc'ns, Inc.*, 61 F.3d 777, 783 (10th Cir. 1995), *abrogated on other grounds by Ellerth*, 524 U.S. 742, *and Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). As this Court has explained, "an employer may be negligent … if it reasonably should have anticipated the harassment" before it occurs. *Sandoval*, 578 F.3d at 801 (discussing constructive notice triggering the employer's duty to act); *see also Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998) (explaining that the "basis for employer liability [for coworker harassment] is a negligence theory under Restatement (Second)

of Agency § 219(2)(b)," and that this negligence theory encompasses a duty to prevent harassment).

Indeed, preventing harassment also comports with Title VII's "primary objective," which is "not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 805 (citation omitted). *See also Ellerth*, 524 U.S. at 764 (noting that Title VII includes the "basic polic[y] of encouraging forethought by employers"); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (Title VII's "primary objective was a prophylactic one.").

Drawing on black-letter negligence and agency principles that Title VII embraces, this Court has applied the preventative component for employer liability in an analogous section 1981 case, *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007) ("*Dillard's*"). There, a retail employee called African American customers the N-word. *Id.* at 534–35. This Court, in setting forth the appropriate employer liability standard for the employee's harassment, reasoned that "[u]nder agency law an employer is directly liable for harm resulting from his own negligent or reckless conduct." *Id.* at 540 (citing Restatement (Second) of Agency § 213 & cmts). *Cf. Hirase-Doi*, 61 F.3d at 784 (citing § 213, comment d, in determining employer liability for coworker harassment under Title VII). This Court then concluded that

although Dillard's fired the employee immediately after the incident, the question of employer liability was still disputed because "a trier of fact could find that Dillard's kept [the employee] on its sales floor to deal with customers even though it had reason to know that [her] hostile propensities could lead to incidents like the [plaintiffs] experienced." *Dillard's*, 483 F.3d at 535, 540–41.

Other circuits have squarely held that an unreasonable failure to prevent coworker harassment can establish employer liability under Title VII. For instance, in *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989), *opinion vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc), the Fourth Circuit held that an employer is liable if it "failed to take action reasonably calculated to *prevent*" the coworker harassment. Applying that standard, the court held that a factfinder could conclude that the employer failed to prevent the harassment of the plaintiff where it "had received complaints that [the harasser] had made improper sexual overtures toward [other] female workers" but did not reasonably address those complaints. *Id.* at 107–08. *See also Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 255 (4th Cir. 2015) (reaffirming *Paroline*, 879 F.2d at 107).

The Second, Seventh, and Tenth Circuits have taken similar approaches. *See, e.g.*, *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 130, 136–37 (2d Cir. 2001) (concluding that a jury could find Delta unreasonably failed to prevent coworker's assault of plaintiff where it responded inadequately to earlier complaints against that coworker by other employees); *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 604–06 (7th Cir. 2006) (holding that employers have a duty to "tak[e] reasonable steps to prevent harassment once informed of a reasonable probability that it will occur."); *Lockard*, 162 F.3d at 1074 (10th Cir.) (holding that the "same standard of liability applies to both co-worker and customer harassment": "employers may be held liable … if they fail to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." (citation modified)).

To be sure, this Court in many cases has articulated an employer liability standard for coworker harassment that focuses on whether an employer took appropriate measures to correct the harassment at issue. *See, e.g., Green v. Franklin Nat. Bank of Minneapolis*, 459 F.3d 903, 910 (8th Cir. 2006) (plaintiff must prove that "the employer knew or should have known of the harassment and failed to take proper remedial action." (citation

omitted)). This correction-focused liability standard is indeed appropriate in cases like *Green*, 459 F.3d at 906–08, 912, which involve the common fact pattern of ongoing harassing conduct in which an employer has an opportunity to intervene. But the Court's use of this standard where it fits the facts does not mean this Court has absolved employers of their preventative obligations, which create another pathway to liability. *See Vance*, 570 U.S. at 445, 448–49; *Sellars*, 13 F.4th at 696–97; *Sandoval*, 578 F.3d at 801. The correction-focused liability standard is incomplete where an employer's preventive failures are also relevant.[10]

The Fourth Circuit has explicitly addressed the incomplete nature of the common correction-focused inquiry. In *Paroline*, 879 F.2d at 107, the court recognized that prior cases "focused on the adequacy of an employer's remedies *after* the harassment had occurred." It nonetheless reasoned that "the logic of [those cases] also allows us to impute liability, under certain circumstances, to an employer who failed to take steps to try

[10] Indeed, the district court recognized prevention as a component of negligence at summary judgment when it held that the question of employer liability was disputed by pointing solely to evidence that Sun Chemical ignored Smallwood's earlier complaint about Nevarez's racist language. App. 74; R. Doc. 73 at 8. But it then inexplicably rejected a prevention-related instruction at trial.

to *prevent* sexual harassment of the plaintiff." *Id. See also Ferris*, 277 F.3d at 136–37 (reciting a remedial-focused standard but concluding that "[g]iven all the circumstances, a reasonable factfinder could find that [the employer] was negligent in failing to take steps that might have protected [the plaintiff] from [the harasser]"). Thus, adherence to a standard focused solely on remedial measures for *all* cases would wrongly immunize employers when they take reasonable steps to respond to the harassment once it occurs even if they could reasonably have prevented the incident in the first place.

Finally, although the Eighth Circuit's model jury instruction for element seven mirrors the correction-focused standard, its instruction for element six contemplates an employer's preventative obligations. Specifically, it allows the jury to consider, in the negligence inquiry, not just the "alleged conduct" but also the "conditions giving rise to the plaintiff's claim." *See* Model Instruction 8.42 ("Sixth, the defendant knew or should have known of the (describe alleged conduct or *conditions giving rise* to the plaintiff's claim)" (emphasis added)). Failure to prevent harassment includes failing to address the conditions giving rise to the harassment.

In sum, an employer is liable for coworker harassment if it unreasonably failed to prevent the harassment, such as by failing to address the coworker's prior harassing conduct.

III. The district court abused its discretion in giving jury instructions that prohibited the jury from considering whether Sun Chemical took reasonable measures to prevent Nevarez's harassment of Banks.

The jury received the following instructions regarding Sun Chemical's liability: "*Sixth*, the defendant knew or should have known of the harassing conduct; and *Seventh*, the defendant failed to take prompt and appropriate corrective action to end the harassment." App. 146; R. Doc. 100 at 21. According to the jury instructions, the "harassing conduct" referred to conduct inflicted "by defendant's employee, Ricardo Nevarez" on "plaintiff Banks." *Id.* (element 1).

These instructions directed the jury to consider only Sun Chemical's response to Nevarez's harassment of Banks and not Sun Chemical's response (or lack thereof) to Nevarez's prior conduct. In other words, the instructions provided no way for the jury to consider key facts relevant to the question of employer liability: that Sun Chemical ignored Smallwood's

complaint about Nevarez calling him the N-word—the same racial epithet Nevarez later yelled at Banks.

Notably, Nevarez's earlier conduct is no trivial matter; far from a mere offensive utterance, the N-word is "a term that sums up all the bitter years of insult and struggle in America, a pure anathema to African-Americans, and probably the most offensive word in English." *Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) (citation modified). A jury could therefore find it significant that Sun Chemical chose to ignore Smallwood's complaint that Nevarez used the slur against him.

And importantly, whether Nevarez's harassment of Smallwood amounts to actionable conduct is beside the point. Although an employer cannot be liable for prior conduct that never becomes actionable harassment, *see, e.g.*, *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010), its failure to address such conduct may prove relevant if that conduct later escalates into actionable harassment—as it did here. *See, e.g.*, *Vance,* 570 U.S. at 448–49 (evidence supporting employer liability could include "[e]vidence that an employer … failed to respond to complaints"); *Paroline*, 879 F.2d at 107–08 (analyzing whether prior conduct should have led employer to anticipate and prevent the harassment at issue and not

whether that prior conduct itself amounted to actionable harassment). Because the instructions blocked a key avenue to employer liability, they were erroneous.

The EEOC's proposed changes to the sixth and seventh elements of the jury instructions would have fixed the problem. As to the sixth element, the EEOC proposed that it state, "Sun Chemical knew or should have known of the *conditions giving rise to* the harassing conduct." App. 83; R. Doc. 77 at 4 (emphasis added). This instruction aligns with the model jury instructions, and it would have allowed the jury to consider Sun Chemical's lack of response to Nevarez calling Smallwood the N-word as the "conditions giving rise" to Nevarez using the slur against Banks. *Cf.* Model Instruction 8.42 ("*Sixth*, the defendant knew or should have known of the (describe alleged conduct or conditions giving rise to the plaintiff's claim)"). For the seventh element, the EEOC proposed that the instruction explicitly include Sun Chemical's preventive obligation, such that it would permit the jury to consider Sun Chemical's lack of response to Smallwood's complaint. *See* Pretrial Tr. at 24:3-11.

That the seventh element of the given jury instruction was based on the Eighth Circuit Model Jury Instructions is of no import where the

instruction does not fit the facts and theory of the case tried to the jury. *See United States v. Wilson*, 565 F.3d 1059, 1067 (8th Cir. 2009) ("[M]odel jury instructions are just that, models. They are not mandatory … and their formulation is largely entrusted to the discretion of the district court.") (citation omitted); *United States v. Williams*, 308 F.3d 833, 837–38 (8th Cir. 2002) (holding that the district court erred in instructing the jury with a model jury instruction relating to the Hobbs Act because it was inconsistent with the Act); *United States v. Evans,* 272 F.3d 1069, 1081 (8th Cir. 2001) (similar).

As explained above, *supra* at p. 25-26, the instructions given to the jury here could be appropriate in cases involving ongoing harassment. But they were inappropriate for the facts and theories of the particular case tried before this jury. Indeed, the model jury instructions expressly caution that although "[e]very effort has been made to assure conformity with current Eighth Circuit law … it cannot be assumed that all of these model instructions in the form given necessarily will be appropriate under the facts of a particular case." Model Instructions at xviii. Under the facts of this case, as the EEOC argued to the district court, the instructions needed to include "preventative action" because "[t]hat's the way that the case was

tried." Tr. 347:19-3:49:12. *Cf. Neer*, 253 F.3d at 1061–62 (instructions were erroneous where they were based on theories of liability not tried to the jury; although the theories may "have been available on the facts of [the] case, excessive force was the case that was tried and argued to the jury").

Thus, the instructions were erroneous because they prevented the jury from considering Sun Chemical's lack of response to Nevarez's prior use of the N-word—a fact a jury could have credited and that bears directly on whether Sun Chemical was negligent in permitting Nevarez to repeat his harassing behavior.

IV. A new trial is warranted because a jury could have found that Sun Chemical unreasonably failed to prevent Nevarez's harassment of Banks.

"An erroneous instruction warrants a new trial only if the error misled the jury or had a probable effect on the verdict." *Friedman & Friedman*, 606 F.3d at 499 (citation and quotation marks omitted). Appellants do not have to show that the correct instruction would necessarily change the outcome in their favor; a new trial is warranted even if a jury "may well return the same verdict … after a new trial upon proper instruction." *Id.* at 501 (citation omitted) (alteration in original).

A new trial is warranted in this case because if the jury had been allowed to consider Sun Chemical's prior inaction, it could have found that the company was negligent and thus liable for the hostile work environment. The jury could have credited that Smallwood reported Nevarez's racially harassing behavior, including use of the N-word, to Cornelsen, and that Cornelsen ignored the complaint. *See supra* at p. 10-11. And the jury could have found that had Sun Chemical investigated Smallwood's complaint, Sun Chemical could have discovered (as it did when it investigated the Banks incident) that Nevarez was using the N-word with some frequency with his colleagues, *see supra* at p. 7-8, 10-11, thus requiring intervention to prevent his harassing behavior from continuing and escalating. Therefore, under proper instructions, the jury could have found that Sun Chemical was negligent in failing to prevent Nevarez's later harassment of Banks. Because that finding would be outcome-altering on the question of employer liability, a new trial is warranted. *See Friedman & Friedman*, 606 F.3d at 500 (concluding that omission of an instruction warranted new trial because it "deprived the jury of the law's guidance on an issue over which reasonable jurors could have differed").

That the jury could have found Sun Chemical liable under proper instructions alone warrants a new trial. The jury's request for clarification of the instruction and the court's response, however, make it further apparent that the erroneous instruction misled the jury. *See United States v. Dooley*, 580 F.3d 682, 685 (8th Cir. 2009) (concluding that instructional error was not harmless where jury's request for additional instruction reflected confusion). The jury pointed to element seven ("the defendant failed to take prompt and appropriate corrective action to end the harassment," App. 146; R. Doc. 100 at 21) and asked whether, as to "appropriate corrective action," it was supposed to "determin[e] if it was 'appropriate' or only if it ended the harassment." App. 122; R. Doc. 98 at 1. This question revealed that the jury was focused on the question of employer liability. It also suggests that the jury may well have been solely considering Sun Chemical's response to the incident involving Banks, given that Sun Chemical took no corrective measures responsive to Smallwood's complaint.

Further, the court's answer to the jury's question ("The wording of element 7 was chosen by the Court based on the law. Proper remedial action need be only reasonably calculated to stop the harassment, and

remedial action that does not end the harassment can still be adequate if it is reasonably calculated to do so." App. 122; R. Doc. 98 at 1) compounded the error caused by the seventh element because it reinforced that the jury *should* focus solely on Sun Chemical's response to the October 2019 incident rather than Sun Chemical's failure to respond to Smallwood's complaint. The court's answer also underscored for the jury that the argument they had just heard from defense counsel in closing—that the law forbade the jury from considering whether Sun Chemical took appropriate preventative actions, Tr. 393:11-22—was the correct interpretation of the law. But as we argued above, an employer may be liable for harassment that it unreasonably failed to prevent.

Because a jury operating with proper instructions could have found Sun Chemical liable for Nevarez's harassment of Banks, a new trial is warranted.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for a new trial to consider whether Sun Chemical was negligent in failing to prevent Nevarez's harassment of Banks.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 7,384 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

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CERTIFICATE OF SERVICE

I certify that on June 6, 2025, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

I further certify that, pursuant to 8th Cir. R. 28A(d), within five days of receipt of the notice that the brief has been filed by this Court, ten paper copies of the foregoing brief will be sent by Federal Express to the Clerk of the Court and one paper copy will be sent by Federal Express to each of the following counsel of record for Defendant-Appellee:

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