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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

An employer can be held liable for coworker harassment where it unreasonably fails to prevent the harassment. This is a straightforward negligence standard. If provided appropriate instructions, a jury could have found that Sun Chemical unreasonably failed to prevent Nevarez's harassment of Banks—use of the N-word paired with a punch near Banks's head that dented a locker—when it ignored complaints of Nevarez's prior harassing conduct, including his use of the N-word against Smallwood, the facility's only other Black employee.

The jury instructions did not allow for such a finding. They tasked the jury with determining only whether "the defendant failed to take prompt and appropriate corrective action to *end* the harassment." EEOC Appendix ("App.") 146; R.100 at 21 (emphasis added). The harassment, according to the instructions, was the conduct Nevarez inflicted on Banks. *Id.* The instructions offered no room for the jury to consider how Sun Chemical addressed complaints about Nevarez's similar harassment of Smallwood.

Where the facts require it, the negligence analysis must include an inquiry into whether an employer took reasonable steps to prevent

foreseeable harm. Sun Chemical does not contend with authority establishing this basic principle, nor does it cite authority holding otherwise. Instead, it wrongly recasts the EEOC's argument as seeking to impose a strict liability standard and eliminate the knowledge requirement for employer liability. The EEOC makes no such arguments.

Sun Chemical next argues that the instructions were adequate because they articulated a version of the employer liability standard that appears in this Circuit's caselaw. In doing so, Sun Chemical does not address the EEOC's argument that the articulated standard, while appropriate for many cases, is simply the wrong fit for the facts of this case—a single, severe incident of harassment by a coworker following unaddressed complaints about similar behavior committed by the same coworker. Sun Chemical then argues that even though the standard underpinning the instructions does not include a preventative inquiry, the jury nevertheless was allowed to consider whether Sun Chemical took reasonable steps to prevent Nevarez's harassment of Banks and simply found in favor of Sun Chemical. But "[i]t is axiomatic that jurors are presumed to follow the court's instructions," *United States v. Wisecarver*, 598 F.3d 982, 989 (8th Cir. 2010) (citation and quotation marks omitted). A new

trial is warranted precisely because the jury heard evidence that Sun Chemical ignored Smallwood's complaints about Nevarez's harassing conduct and the instructions did not allow it to take that evidence into account.

ARGUMENT

I. Under a negligence standard, an employer is liable if it failed to take reasonable steps to prevent coworker harassment.

The proper standard for determining whether an employer is liable for coworker harassment is negligence. As in a negligence case of any stripe, this standard includes an inquiry into whether the employer took reasonable measures to prevent the harassment. *Vance v. Ball State Univ.*, 570 U.S. 421, 448-49 (2013). Sun Chemical dodges binding precedent by recasting the EEOC's argument as asking for an employer liability standard that imposes strict liability and that eliminates the knowledge requirement. The EEOC asks for neither. Sun Chemical then reiterates correction-focused language common in Eighth Circuit cases without addressing the EEOC's argument that such language—appropriate in many cases—is simply the wrong fit for this one.

A. Sun Chemical incorrectly construes the EEOC's argument as seeking to impose a strict liability standard.

As explained in the EEOC's Opening Brief at 21 to 22, the Supreme Court in *Vance* repeatedly made clear 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." 570 U.S. at 448–49 (emphasis added); *see also id*. at 445-46. It then stated that evidence of an employer's unreasonable failure to prevent harassment could include, among other things, "[e]vidence that an employer … failed to respond to complaints." *Id.* at 449. This Court too has found relevant to the negligence analysis that an employer "exercised reasonable care to prevent" harassment, *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009), and has noted that negligence can be established with evidence such as failing to respond to complaints, *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 696–97 (8th Cir. 2021) (citing *Vance,* 570 U.S. at 449).

Sun Chemical acknowledges this precedent, quoting the same language from *Vance* that the EEOC relies on. Appellee Br. at 21. But it then sidesteps this authority by claiming that the EEOC asks for a *strict* liability

standard, one different from the standard articulated in *Vance. See* Appellee Br. at 19, 22-23, 36.

That is not correct. The EEOC argues for the exact standard set forth in *Vance:* whether the employer was negligent in failing to prevent harassment from taking place. 570 U.S. at 448–49. This is a standard with which Sun Chemical initially appears to agree. *See* Appellee Br. at 21.[1] As argued in the EEOC's Opening Brief, the standard is not only required by precedential authority but also aligns with black-letter negligence principles that necessarily include inquiries into causation and foreseeability, and comports with Title VII's primary objective of avoiding harm. Opening Br. at 21-23.

Sun Chemical is correct that the employer liability analysis differs depending on whether supervisors or coworkers committed the

[1] Sun Chemical recites many statements of law that the EEOC agrees with and that form the foundation of this appeal. *See* Appellee Br. at 23 ("*Sandoval* confirms that evidence of prior complaints may be relevant in the context of knowledge and whether the employer had notice to reasonably anticipate the harassment at issue, triggering its duty to act."); *id.* at 21 ("The Supreme Court also clearly stated that '[i]f the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions.'" (quoting *Vance*, U.S. 570 at 424)); *id. at* 17-18 ("[T]he employer is liable only if the employer's own negligence caused the harassment." (citing *Sellars*, 13 F.4th at 696)).

harassment. "As an initial matter, an employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment," regardless of the harasser's status. *Vance,* 570 U.S. at 446; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) ("Negligence sets a minimum standard for employer liability under Title VII[.]"). For coworker harassment, negligence is also the ceiling for liability, *Vance*, 570 U.S. at 424, and plaintiffs bear the burden of its proof, *id.* at 445 ("[D]ifferent parties bear the burden of proof…. [For coworker harassment], the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur….").

In comparison, employers are strictly liable for harassment where the harassment is committed by a supervisor and "culminates in a tangible employment action." *Id.* at 424. When an employer does not take a tangible employment action, the employer is liable for supervisor harassment unless it can satisfy its burden of proving the *Faragher-Ellerth* affirmative defense. *Id.* at 424. The defense requires the employer to prove both "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were

provided." *Id.* at 430 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Ellerth*, 524 U.S. at 765).

Thus, while similar evidence may be relevant to both rebutting the *Faragher-Ellerth* defense in a supervisor harassment case and establishing negligence in a coworker harassment case (a failure to respond to complaints, for instance, *id.* at 449), the analysis differs, and different parties bear the burden of proof, *id.* at 424, 428-30, 445. As the EEOC has consistently argued, the negligence standard applies in this coworker harassment case.

This Court in *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007), considered prevention as part of the employer liability analysis in an analogous harassment case. Sun Chemical ignores this precedent. In *Dillard's*, even though the employer fired an employee immediately after she called a customer the N-word, this Court nevertheless held that a jury could find the employer liable because the employer had kept the employee on the sales floor despite knowing of her "racially hostile propensities." *Id.* at 535–36, 540–41. "Under agency law an employer is directly liable for harm resulting from his own negligent or reckless conduct." *Id.* at 540. *See also* Opening Br. at 23-24. The facts of *Dillard's*

mirror this case. If the jury credited Smallwood's testimony, it would have found that Sun Chemical ignored an employee's "racially hostile propensities" (use of the N-word and other racist behavior against Smallwood) and it thus may have held Sun Chemical liable for the harm (use of the N-word paired with violence against Banks) resulting from that negligent conduct.

Sun Chemical deploys the same strict liability straw man to avoid grappling with the persuasive value of circuit cases. These cases squarely hold that the negligence standard for employer liability includes a prevention inquiry where the facts demand it. *See Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074–75 (10th Cir. 1998); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136–37 (2d Cir. 2001); *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605–06 (7th Cir. 2006); *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 255 (4th Cir. 2015). Indeed, *Paroline* and *Ferris* share a similar fact pattern as here: evidence showed that an employer responded inadequately to past complaints about a coworker, and the court thus held that a factfinder could conclude that the employer was negligent in failing to prevent the same coworker's similar

harassment of a different employee. *Paroline*, 879 F.2d at 107–08; *Ferris*, 277 F.3d at 136–37; *see also Erickson*, 469 F.3d at 605–06 (involving the same employee who both alerted employer of potential future harassment and who suffered a later assault).

Sun Chemical's attempts to distinguish *Ferris* on the facts fall flat. Appellee Br. at 27-28. The Second Circuit held that, like here, the employer liability inquiry centers on whether the employer took reasonable measures to protect other workers from the known abusive proclivities of a coworker. *Ferris*, 277 F.3d at 136–37. The court noted that the negligence inquiry accounted for the undoubtedly serious harassment at issue: "the more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims," even if those future victims had no prior abusive interaction with the coworker. *Id.* at 137. Ultimately, it was the employer's inadequate response to the coworker's known prior abuse that would allow a

factfinder to conclude that the employer's "negligence made it responsible" for the later assault. *Id.* at 136.[2]

Sun Chemical's treatment of *Paroline* is also confusing. It quotes a correction-focused negligence standard from that case, Appellee Br. at 25, but ignores the *Paroline* court's subsequent holding that a correction-focused standard was incomplete for the facts of the case, which required a prevention inquiry, *Paroline*, 879 F.2d at 107—just as the EEOC argues here. Sun Chemical then points to *Paroline*'s acknowledgment that "an employer's knowledge of previous incidents of sexual harassment of other female workers will not necessarily indicate that an employer should have anticipated the plaintiff's harassment as well." Appellee Br. at 26 (quoting *Paroline*, 879 F.2d at 107). The EEOC agrees—but as the Fourth Circuit underscores in the next sentence, that is "an issue for a fact finder,"

[2] Moreover, although a wholly different type of abuse, use of the N-word is no trivial matter as Sun Chemical implies by downplaying its use against both Smallwood and Banks, *see infra* pp. 22-24; it 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).

Paroline, 879 F.2d at 107, and a fact finder must be given accurate instructions.

B. Sun Chemical wrongly construes the EEOC's argument as seeking to eliminate the knowledge requirement for employer liability.

Sun Chemical's brief uses another straw man: that the EEOC is attempting to eliminate the knowledge requirement for establishing employer liability. Appellee Br. at 29; *id.* at 25-28. That is also incorrect.

As an initial matter, the EEOC agrees that an employer can be liable only for coworker harassment about which it knew or should have known. *Sandoval*, 578 F.3d at 801. There is no dispute that Sun Chemical knew about Nevarez's harassment of Banks—the only harassment for which the EEOC seeks to hold Sun Chemical liable.

More to the point, the EEOC agrees that if Sun Chemical had neither actual nor constructive knowledge about Nevarez's past harassing conduct, such conduct could not serve as evidence that Sun Chemical was negligent in preventing Nevarez's harassment of Banks. But as explained in its Opening Brief at 28 to 35, and below, *see infra* pp. 19-27, the jury heard such evidence but could not consider it under the jury instructions. Indeed, it is the evidence that Sun Chemical *knew* of Nevarez's past harassing

behavior—including use of the N-word against a Black employee—and ignored that behavior that would allow a jury to find Sun Chemical negligent in preventing Nevarez's latter harassment.

C. Sun Chemical continues to erroneously argue that an employer is liable for coworker harassment only if the employer unreasonably failed to correct the harassment at issue.

Sun Chemical doubles down on its trial court argument that an employer is liable for coworker harassment only if it fails to take reasonable measures to remediate that harassment. *See. e.g.*, Appellee Br. at 23 ("[T]he question presented in the instant case is not a matter of prevention, but only whether the employer knew or should have known about the harassment and failed to take corrective action."), 18, 26-27, 31. Sun Chemical supports its argument solely by pointing out that courts have often used this language in articulating the employer liability standard. *See, e.g.*, Appellee Br. at 18, 29.

As emphasized in its Opening Brief at 25 to 26, the EEOC does not quarrel with correction-focused language when it fits the facts of the case. That language is incomplete for this case, however, because the EEOC offered evidence the Sun Chemical knew of and ignored complaints that Nevarez previously harassed a different Black employee in a similar way—

evidence that a negligence analysis must take into account. As outlined by the Supreme Court and recognized by the Eighth Circuit, where there is evidence that an employer failed to respond to prior complaints, the question of whether Sun Chemical took reasonable measures to prevent the harassment becomes relevant. *See Vance*, 570 U.S. at 448–49; *Sellars*, 13 F.4th at 696–97;[3] *Sandoval*, 578 F.3d at 801.

Sun Chemical does not engage with this argument, ignoring that other courts have squarely addressed how the common correction-focused inquiry may be incomplete depending on the facts of the case. Nor does it acknowledge that the Eighth Circuit Model Jury Instructions themselves recognize that the model instructions may be inappropriate for the facts of a certain case. Model Instructions at xviii; Opening Br. at 31. Sun Chemical instead recites cases that use a correction-focused inquiry, such as *EEOC v.*

[3] Sun Chemical's understanding of *Sellars*, Appellee Br. at 38 n.15, 22, is wrong. This Court rejected a requirement that "an employer's remedial response to harassment *must* deter future harassment by *any* offender in order to be reasonable." *Sellars*, 13 F.4th at 699 (emphases added). The EEOC does not argue for such a requirement. Sun Chemical omits that *Sellars* also stated that "employers may be required to escalate their response to repeated harassment by the same coworker." *Id.* (citations omitted). This presumes that the employer is obliged to take *some* steps to prevent repeated harassment, which aligns with the EEOC's argument.

Xerxes Corp., 639 F.3d 658, 675 (4th Cir. 2011), Appellee Br. at 29, while bypassing the same circuit's explanation in *Paroline* that although such cases "focus[] on the adequacy of an employer's remedies *after* the harassment had occurred … the logic of [those cases] also allows us to impute liability, under certain circumstances, to an employer who failed to take steps to try to *prevent*" the harassment. 879 F.2d at 107 (citations omitted) (emphases in original).

The court in *Foster v. University of Maryland-Eastern Shore*, 787 F.3d 243 (4th Cir. 2015), unaddressed in Sun Chemical's brief, similarly offered a roadmap for how a negligence standard for employer liability may require both correction- and prevention-focused inquiries. It first held that as to whether "the employer knew or should have known about the harassment and failed to take effective action to stop it," the employer undisputedly took appropriate corrective action. *Id.* at 255 (citations and quotation marks omitted). But that was an incomplete inquiry, the court held, where the plaintiff also offered evidence that another employee had previously complained about the harasser. *Id.* Under such circumstances, an employer is "liable if they 'anticipated or reasonably should have anticipated' that a particular employee would sexually harass a particular coworker and yet

'failed to take action reasonably calculated to *prevent* such harassment.'" *Id.* (quoting *Paroline*, 879 F.2d at 107). It then concluded that unlike in *Paroline,* the employer could not be liable under the prevention-focused inquiry because it undisputedly investigated the prior allegations and found them not credible. *Id.* at 256 (citing *Paroline*, 879 F.2d at 103).

Finally, Sun Chemical suggests that under the EEOC's theory of the case, the company would be liable for coworker conduct that falls short of being actionable "severe or pervasive" harassment. Appellee Br. at 39 n.15. That is not correct. The only harassment that Sun Chemical can be *liable* for is severe or pervasive harassment, "caused" by its "own negligence." *Sellars*, 13 F.4th at 696. Sun Chemical is not liable for earlier harassment that is not severe or pervasive. *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 419 (8th Cir. 2010). But a failure to respond to a complaint about that earlier harassment, committed by the same coworker and similar to the latter harassment, is directly relevant to the negligence inquiry, and a jury should be allowed to take that into account. *Vance*, 570 U.S. at 448–49.

II. The instruction given to the jury amounted to an abuse of discretion because it wrongly barred the jury from taking into account evidence that Sun Chemical unreasonably failed to prevent Nevarez's harassment of Banks.

After arguing that the applicable employer liability standard prohibits consideration of whether an employer took reasonable measures to prevent the harassment at issue, Sun Chemical next argues that the instruction given to the jury actually *did* allow the jury to consider evidence that Sun Chemical ignored Smallwood's complaints about Nevarez's racial harassment, and was thus not an abuse of discretion. *See, e.g.,* Appellee Br. at 24, 31.

A plain reading of the instructions shows otherwise. The instructions required the jury to consider only whether "the defendant knew or should have known of the harassing conduct" and whether "the defendant failed to take prompt and appropriate corrective action to end the harassment." App. 146; R.100 at 21. The "harassing conduct" could have referred only to the conduct inflicted on Banks by Nevarez. *Id.* Specifically, the first element states that the jury must decide whether "Banks was subjected to harassing conduct by … Nevarez." *Id.* The next four elements refer solely to the conduct described in the first element. *Id.* (referring to "such conduct").

The same goes for the sixth and seventh elements, which deal with employer liability. These elements use the terms "the harassing conduct" and "the harassment" without mentioning that any harassment other than that inflicted on Banks could be relevant to the analysis. *Id.* Thus, contrary to Sun Chemical's argument, Appellee Br. at 24-25, the jury instructions offered no room to creatively interpret "the harassing conduct" or "the harassment" to include Nevarez's behavior toward Smallwood.

Sun Chemical similarly misreads other aspects of the jury instructions as encompassing prevention. It contends that because the jury was allowed to evaluate the "totality of the circumstances"—including "conditions giving rise to the conduct"—they could have taken into account that Cornelsen ignored Smallwood's complaints about Nevarez's racially harassing behavior. Appellee Br. at 15, 36-37. But the directions to "look at all the circumstances" in the instructions is tied solely to the element of whether the harassment suffered by Banks was severe or pervasive. App. 146; R.100 at 21. That element is disconnected from the question of employer liability. And as previously explained, Opening Br. at 30, the district court *could* have included "conditions giving rise to the

conduct," as the Eighth Circuit Model Jury Instructions outline[4] and as requested by the EEOC,[5] but instead excluded such language.

Finally, Sun Chemical argues that because the district court understood, at various times, that the employer liability standard includes an inquiry into whether an employer took reasonable measures to prevent the harassment, the instructions comport with the district court's understanding. Appellee Br. at 10, 13, 24, 31. This argument fails.

The district court may well have recognized that determining employer liability in this case required an inquiry into whether Sun Chemical ignored Smallwood's complaints about Nevarez. At summary judgment, it held that 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. It made a similar acknowledgment when discussing the jury instructions, Pretrial. Tr. 25:4-8,

[4] Sun Chemical does not address this argument.

[5] Sun Chemical quibbles repeatedly with the EEOC's initial proposal for jury instructions, which did not articulate an employer liability standard. Appellee Br. at 9-10, 19 n.8, 28. That obscures the argument at hand, which centers on the EEOC's consistent argument below and on appeal regarding the need for the employer liability standard in this case to include a prevention inquiry.

in denying defendant's motion for directed verdict, Tr. 338:7-344:25, and again in considering the jury's question to the court, Tr. 418:20-22.

But even if the district court understood the law, this understanding did not make its way to the jury or the jury instructions. Discussion about the relevant employer liability standard all occurred outside the presence of the jury, so the jury did not have the benefit of either the parties' back-and-forth or the court's verbal reconciliation of the standard used in the instructions. And as argued above, *see supra* pp. 16-17, and by Sun Chemical in its closing, the instructions are clear: where the instructions demand the jury consider only whether Sun Chemical took "prompt and appropriate corrective action to end the harassment" of Banks, there is no room to also consider whether Sun Chemical took reasonable measures to *prevent* Nevarez's harassment of Banks.

III. A new trial is warranted because the jury heard, but was not allowed to take into account, evidence establishing employer liability.

Sun Chemical's final argument is that a new trial is not warranted because the jury heard evidence of Nevarez's harassment of Smallwood as well as the EEOC's theory of employer liability and still decided in favor of

Sun Chemical. Appellee Br. at 36.[6] Sun Chemical again misunderstands the role of jury instructions. A new trial is warranted precisely because the jury heard evidence that Sun Chemical ignored Smallwood's complaints about Nevarez's harassment—but the instructions blocked it from taking that evidence into account. *See Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494, 500 (8th Cir. 2010) (new trial warranted because erroneous instruction "deprived the jury of the law's guidance on an issue over which reasonable jurors could have differed"). Similarly, the jury is presumed to have followed the instructions over the EEOC's advancement of its contrary theory of liability. *See United States v. Wisecarver*, 598 F.3d 982, 989 (8th Cir. 2010) ("It is axiomatic 'that jurors are presumed to follow the court's instructions.'" (quoting *United States v. Espinosa*, 585 F.3d 418, 429 (8th Cir. 2009)).

To be sure, the jury heard evidence that Sun Chemical ignored Smallwood's complaints about Nevarez's racially harassing behavior. As

[6] Sun Chemical makes statements such as "the jury simply believed Cornelsen when she testified that Smallwood never made a complaint." Appellee Br. at 24, 39. But it is impossible to discern what the jury believed on this issue because it was not an element of the jury instructions. The statement instead shows that the parties disputed whether Smallwood complained to Cornelsen.

Sun Chemical acknowledges, Appellee Br. at 12, 15, Smallwood testified that he reported Nevarez's harassing conduct to Cornelsen.[7] He told 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. 302-303, 307, 312; Ex. 38[8] at 11-12, 16, 21.[9] If a jury credited Smallwood's testimony, it would conclude that Cornelsen ignored the complaints. This evidence *alone* would allow a jury

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[7] Sun Chemical appears to argue that Smallwood complained solely about one heated incident in 2017 between himself and Nevarez. Appellee Br. at 8-9, 15. That is incorrect. Although Calderon recalled to Warren that Nevarez might have used the N-word during this incident, App. 272-73, Ex. 11 at 4-5, Smallwood did not tether his complaints to this incident.

[8] "Ex." refers to Trial Exhibits, which are not available on the district court's docket but are included in the appendix.

[9] The statement that the "district court found … no such evidence" of Sun Chemical's negligence, Appellee Br. at 22 (citing Tr. 339), is wrong. The court asked Plaintiffs' counsel, outside the presence of the jury and regarding Sun Chemical's motion for a directed verdict, what evidence supported their argument that Sun Chemical was negligent in preventing Nevarez's harassment of Banks. Tr. 338-39. The court observed that "there is no evidence" regarding training or a method of registering complaints. Tr. 339. But when Plaintiffs pointed to evidence that Sun Chemical failed to adequately monitor the workplace and ignored Smallwood's complaints, including Nevarez using the N-word, Tr. 339-341, the court responded, "that's a good point," Tr. 341. It ultimately denied the motion because Plaintiffs had submitted enough evidence supporting employer liability to put the issue to the jury. Tr. 345.

to find that Cornelsen knew of Nevarez's propensity to use the N-word and did nothing about it. Under proper instructions, the jury could find that information dispositive.

Resisting this conclusion, Sun Chemical seeks to downplay the evidence of both Nevarez's harassing behavior and its knowledge of that behavior. For instance, Sun Chemical omits from its briefing key evidence that a jury could rely on to find Smallwood credible in his report. It overlooks that four other employees reported that Nevarez used the N-word around the workplace. Opening Br. at 6-8. Banks reported that Smallwood told him that Nevarez use the N-word against him. App. 269; Ex. 11 at 1. Van Dolah reported that he heard Nevarez refer to Banks as an N-word not only during the October 2019 incident, but also at an earlier training. App. 271; Ex.11 at 2-3; Tr.87:4-88:3. Kristofer Savage and Maurilio Calderon ("Flacco") both reported hearing Nevarez use the N-word in the workplace before the October 2019 incident. Tr. 76:22-77:20; App. 272-273, Ex. 11 at 4-5.

Sun Chemical further omits that Cornelsen reported Banks's complaint to HR only when she thought that Banks had called into a hotline, Opening Br. at 5-6; App. 291; Ex. 37; Tr. 65:3-11, 155:21-159:23, and

that she had never heard or addressed any other uses of racist language in her decades-long tenure at the company, Tr. 173:6-11. This evidence supports a finding that Cornelsen received and simply ignored Smallwood's complaints.

Sun Chemical also continues to characterize Nevarez's harassment of Banks as a "mutual altercation" and "mutual disagreement," Appellee Br. at 4, 5, even though it is undisputed that Nevarez used an egregious racial slur and threw a punch (another undisputed fact omitted by Sun Chemical), while Banks did neither of those things. Indeed, the fact that the slur was used in combination with violent behavior makes the harassment particularly severe. *See Watson v. CEVA Logistics U.S., Inc.*, 619 F.3d 936, 942–43 (8th Cir. 2010) (analysis considers whether conduct is "physically threatening" and the "physical proximity to the harasser") (citations omitted); *id.* at 943 ("This is not a situation where racial jokes and innuendo were merely bandied about the workplace with no particular target … [S]ome of the comments were made in a manner that a jury could reasonably conclude would be particularly demeaning." (citation omitted)); *Green v. Franklin Nat. Bank of Minneapolis*, 459 F.3d 903, 912 (8th Cir. 2006)

(physical threat "accentuated the effect of his racial slurs directed at [plaintiff]").

Sun Chemical nevertheless tries to cast doubt on whether Nevarez even used the slur against Banks, despite Sun Chemical's firm conclusion at the time of the incident that the slur and punch occurred. App. 274; Ex. 12; Tr. 154:11-16. For instance, Sun Chemical claims that only Van Dolah and Banks testified Nevarez used the slur and that "[o]ther witnesses stated that [Nevarez] did not," Appellee Br. at 7—even though it is undisputed that Van Dolah was the only bystander present when Nevarez used the slur.[10] It also highlights that Warren, who investigated the incident and confirmed that Nevarez used the N-word while punching a locker near Banks, nevertheless continued to believe that Nevarez's behavior was not race-based. Appellee Br. at 6 (citing Tr. 100-101).

Sun Chemical similarly focuses on the bitter relationship between Nevarez and Smallwood to cast doubt on Smallwood's report to Cornelsen

[10] At summary judgment, the district court similarly "reject[ed] Sun Chemical's contention that evidence Nevarez used the n-word is 'conflicting'—the only employees who denied hearing Nevarez say the n-word were not present in the locker room." App. 71-72; R. Doc. 73 at 5-6.

about Nevarez's racist behavior and use of the slur. Appellee Br. at 8-9. This credibility argument may or may not have persuaded the jury, but if jurors believed Smallwood, the instructions gave them nothing to do with that information. Moreover, Sun Chemical's continued suggestion that Nevarez's acrimonious relationships with Smallwood and Banks justified his uses of the N-word is consistent with Smallwood's testimony that he reported Nevarez's harassment to Cornelson, and Cornelson did nothing.

Finally, although the erroneous jury instructions alone warrant a new trial, the jury's request for clarity about the employer liability instruction, and the court's response, further show that the instructions misled the jury. Sun Chemical argues that the court's response was appropriate because it recited a rule from Eighth Circuit law. Appellee Br. 32-34. But again, Sun Chemical misses the point by relying on a rule that is incomplete for the facts of the case.

The jury's question ("'Appropriate corrective action' – are we determining if it was 'appropriate' or only if it ended the harassment?'" App. 122; R. Doc. 98 at 1) shows that the jury was focused on employer liability and specifically Sun Chemical's actions to *end* the harassment. And the court's response— "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—reinforced the key error of the instructions: 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 earlier complaints. *Cf. Wisecarver*, 598 F.3d at 989 ("When a jury explicitly requests a supplemental instruction, a trial court must take great care to ensure that any supplemental instructions are accurate and clear." (citation modified)).

Contrary to Sun Chemical's suggestion otherwise, Appellee Br. 33 n.12, the EEOC preserved its argument that the instructions were erroneous as given and also protested the court's response to the jury's question, Tr. 410, 413. The EEOC could not further contest the jury instructions at this point, so the EEOC argued that if the court responded by adding further instructions, that response would "suggest outright that the corrective action they took in response to the incident with Mr. Banks would somehow absolve them of liability." Tr. 413-14.

In sum, Sun Chemical makes contradictory arguments that the employer liability standard and corresponding instructions given to the

jury prohibit consideration of an employer's preventative measures but that the instructions nevertheless allowed the jury to consider such measures. As Sun Chemical underscored to the jury in its closing, because the employer liability instruction did not include an option to consider whether the employer took "appropriate action to prevent the harassment," the jury could not consider such facts. Tr. 393:5-19; *see also* Tr. 393:20-22 ("[Y]ou are judges of the facts, but you are duty bound; you took an oath to follow the Court's law. This is the law."). A new trial is warranted precisely because, under proper instructions, the jury could have found Sun Chemical liable for Nevarez's harassment of Banks due to its failure to respond to Smallwood's complaints but were blocked from doing so under the instructions given to it by the court.

CONCLUSION

For the foregoing reasons and those in the EEOC's Opening Brief, this Court should reverse and remand for a new trial.

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 5,598 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 September 24, 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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