No. 26-846

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Theresa Collins,
Plaintiff-Appellant,

v.

Applegreen CT Travel Plazas, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

This appeal raises important questions concerning the appropriate standards for pleading and proving a hostile-work-environment claim premised on third-party harassment—that is, harassment perpetrated by someone other than an employee or agent of the employer—under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Equal Employment Opportunity Commission (EEOC) administers and enforces Title VII and thus has a substantial interest in the proper interpretation of the statute. *See* 42 U.S.C. § 2000e-5(a), (f)(1). The EEOC files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES

Theresa Collins asserts a sex-based hostile-work-environment claim against her former employer, Applegreen CT Travel Plazas, LLC. Collins alleges that Applegreen negligently allowed a man who worked in the same workplace (but was not employed by Applegreen) to harass her because of her sex. The district court dismissed the operative complaint for failure to state a claim.

The questions presented are:

1. Whether an employer's degree of control over a third-party harasser is a relevant consideration in assessing employer liability for negligently failing to prevent or remedy harassment rather than a precondition for liability.

2. Whether Collins adequately pleaded that Applegreen was negligent in failing to prevent or remedy sex-based harassment by a third party.

3. Whether Collins adequately pleaded the remaining elements of her hostile-work-environment claim.[1]

STATEMENT OF THE CASE

A. Statement of the Facts

Because this appeal involves a dismissal for failure to state a claim, we draw these facts from Collins's Amended Complaint and present them in the light most favorable to her. *See Shultz v. Congregation Shearith Israel of City of N.Y.*, 867 F.3d 298, 302 (2d Cir. 2017).

[1] The EEOC takes no position on any other issue in this appeal.

1. Collins begins working for Applegreen and immediately suffers persistent and ongoing sex-based harassment.

Collins, who is a woman, began working for Applegreen in April 2022. JA073 (¶¶ 14, 17). Applegreen operates a service/travel plaza located along an interstate in Plainfield, Connecticut, and it hired Collins to work at a Dunkin' Donuts store in the plaza. JA073 (¶¶ 11, 12, 15).[2] The plaza had an open floorplan, so no walls separated the Dunkin' Donuts from the rest of the building. JA078 (¶ 71). In addition to the Dunkin' Donuts, a Mobil Mart retail store also operated inside the plaza. JA073 (¶ 13).

During the five months that Collins worked at Applegreen's plaza, the manager of the Mobil Mart, David Dixon, physically and verbally harassed her on a regular basis. JA074 (¶¶ 19-22). On Collins's first day of work, Dixon came up behind her and tugged on both her ears. JA075 (¶¶ 39-40). She told him to never touch her again. JA075 (¶ 41). Over the following months, Dixon frequently threw objects at Collins while she was working, including pens, straws, bags of chips, and pastries. JA075 (¶¶ 42-43). On one occasion, Dixon straightened out a coat hanger and threw it

[2] For its part, Applegreen maintains that it does not own the plaza. JA095.

directly at Collins, barely missing her. JA075 (¶ 45). Collins estimates that Dixon threw things at her twenty-five to thirty times. JA075 (¶ 44).

Dixon also frequently mocked Collins's job performance, including while she was serving customers. JA076 (¶ 48). For example, Dixon told Collins "a five year old could do a better job" than she. JA076 (¶ 49(b)). "Dixon would walk up to the Dunkin counter, take the tip jar and comment: 'you don't deserve half the tips in here.'" JA076 (¶ 50). Dixon remarked about Collins, "she plays sports … being this slow … really?" JA076 (¶ 49(a)). Once, while Collins was waiting on a customer, Dixon called her a "f-cking scumbag." JA076 (¶ 46). The customer was so alarmed by the incident, and concerned about Collins's safety, that she gave Collins her contact information. JA076 (¶¶ 46-47). Collins estimates that Dixon made "loud, rude, insulting and abusive remarks" to her about twenty-five to thirty times. JA076 (¶ 48). Dixon also indicated that his views on Collins's abilities were based on her sex, asking her, "need help … want me to go back there and show you how a man gets the job done[?]" JA076 (¶ 49(c)).

2. Collins repeatedly notifies Applegreen about Dixon's harassment and Applegreen takes no action.

Collins repeatedly sought Applegreen's help to stop Dixon's harassment. She first sought help from Applegreen's district manager, Jennifer Dadio. JA076-77 (¶¶ 51-56). About two weeks after Collins began her job, Dadio visited the plaza and personally witnessed Dixon throwing an object at Collins. JA076 (¶¶ 51-52). Collins also told Dadio that Dixon had touched her ears, was throwing other objects at her, and was making insulting comments about her work. JA076 (¶ 53). When Collins asked Dadio what could be done about Dixon's abusive behavior, Dadio responded, "just ignore him … he will get bored with it and stop." JA077 (¶¶ 54-55). The harassment did not stop. JA077 (¶ 56).

Collins next sought help from Applegreen's store manager, Kaylee Chubka. JA077 (¶¶ 57-62). Like Dadio, Chubka personally witnessed Dixon throwing objects at Collins, and Collins reported Dixon's insulting comments to Chubka, including Dixon's comment about showing Collins "how a man gets the job done." JA077 (¶¶ 59-60). Collins asked Chubka how she could contact upper management to report Dixon's harassment. JA077 (¶ 57). Chubka never provided Collins with that contact information.

JA077 (¶ 62). Instead, she simply told Collins "to go get a restraining order against Dixon." JA077 (¶ 61).

When neither Dadio nor Chubka would help her, Collins tried to contact Applegreen's upper management herself to report Dixon's harassment. JA077 (¶ 63). Collins called the company's corporate phone number three to four times between June and August 2022. JA077 (¶ 63). Applegreen never responded to her calls. JA077 (¶ 63).

Left with nowhere else to turn, Collins contacted Mobil Mart's owner to report Dixon's conduct. JA077 (¶ 64). The owner told Collins he would check the security cameras and follow up with her. JA077 (¶ 64). He never followed up. JA077 (¶ 64).

In the meantime, Dixon learned that Collins had tried to report him. JA079 (¶ 74). One of Applegreen's assistant managers, Collen Rivera, who worked at the same Dunkin' Donuts as Collins, told Collins that Dixon had threatened to physically hurt her. JA078 (¶¶ 72-73). According to Rivera, Dixon said Collins "should watch her back because one day he would be waiting at her car when her shift was over." JA078 (¶ 73).

3. Rather than helping Collins, Applegreen fires her.

Applegreen never tried to help Collins. JA074 (¶ 28). Instead, in September 2022, it fired her. JA074 (¶ 29). Applegreen claimed it did so because the deposit from her cash drawer was $100 short. JA074 (¶ 30). Collins denies her drawer had ever been short. JA074 (¶ 31). Moreover, Applegreen did not fire other employees who had discrepancies in their drawers and deposits. JA074 (¶ 32). Collins identified six employees who held the same title, performed the same job, and had discrepancies in their cash drawers. JA078 (¶ 65). To Collins's knowledge, none of these other employees had made complaints about discrimination or harassment. JA078 (¶ 67). To Collins's knowledge, Applegreen did not fire any of them. JA078 (¶ 66).

B. District Court's Decision

Collins filed this action, asserting a sex-based hostile-work-environment claim under Title VII (among other claims). JA079 (¶¶ 75-79). On Applegreen's motion, the district court dismissed Collins's Amended Complaint for failure to state a claim. SA022-23. As relevant, the court determined that Collins had not alleged facts showing that Applegreen could be liable for Dixon's harassment. SA008-14. The court reasoned that

because Dixon was not Applegreen's employee, the company could be liable for his harassment only if (1) it exercised a "high degree of control" over his behavior and (2) its own negligence permitted or facilitated his conduct. SA010-11 (quoting *Menaker v. Hofstra Univ.*, 935 F.3d 20, 38-39 (2d Cir. 2019)).

The court determined that Collins had not pled the first element because "[n]othing in the Amended Complaint suggests that Applegreen had an ability to control Dixon's behavior." SA012. It determined that Collins had not pled the second element because, although she had complained to Applegreen about Dixon's harassment, she did not expressly complain that the harassment was sex-based. SA013-14. The court stated: "While there are numerous factual allegations that could establish that [Collins] complained about a hostile work environment, none could show that she advised [Applegreen] that she was being subjected to *sexual* harassment by Dixon…." SA013 (emphasis added).

Collins timely appealed. JA146.

ARGUMENT

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Given this liberal pleading standard, a complaint need only "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the facts alleged allow for a "reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Importantly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (citation modified).

Under the correct legal standards, Collins's Amended Complaint states a hostile-work-environment claim because it alleges facts supporting a reasonable inference that Applegreen negligently allowed Dixon to harass her because of her sex. Accordingly, the district court's dismissal of that claim should be reversed.

I. An employer's degree of control over a third-party harasser is a relevant consideration in assessing employer liability for negligently failing to prevent or remedy harassment rather than a precondition for liability.

The district court erred in requiring Collins to plead that Applegreen exercised a high degree of control over Dixon. Contrary to that ruling, an employer need not exercise significant control over a third party's behavior to be liable for negligently allowing the third party's harassing conduct. Instead, the extent of an employer's control over a third party's conduct is simply a relevant consideration in assessing whether the employer's remedial action, if any, taken in response to the third party's harassment was appropriate under the circumstances. That outcome is sensible because, although an employer's degree of control over the harasser may often determine what types of remedial measures were available, an employer almost always has the ability to undertake *some* remedial action even when it lacks significant control over the harasser. Furthermore, although this Court has suggested a high-degree-of-control requirement, it has done so only in non-binding dicta.

A. Negligence governs employer liability for third-party harassment.

Title VII makes it unlawful for an employer to discriminate against any individual with respect to her "terms, conditions, or privileges of employment" because of her sex. 42 U.S.C. § 2000e-2(a)(1). "This prohibition of sex discrimination extends to sexual harassment, which encompasses conduct that has the purpose or effect of creating an intimidating or hostile work environment." *Moll v. Telesector Res. Grp., Inc.*, 94 F.4th 218, 228 (2d Cir. 2024) (citation modified). To prove a hostile-work-environment claim, a plaintiff must show that (1) she suffered harassment that was severe or pervasive enough to alter the conditions of her employment and create an abusive working environment, (2) the harassment occurred because of her sex, and (3) there is a specific basis for imputing the conduct creating the hostile work environment to the employer. *See Tolbert v. Smith*, 790 F.3d 427, 439 (2d Cir. 2015).

Where, as here, the harasser is a third party, this Court applies a negligence standard in determining whether the employer may be liable for failing to prevent or remedy the harasser's conduct. *See Summa v. Hofstra Univ.*, 708 F.3d 115, 123-25 (2d Cir. 2013). A negligence standard is

appropriate because, although an employer cannot be vicariously liable for a third party's harassing conduct, the employer may be directly liable for its own negligence in allowing such conduct. *See id.* at 124 (employer liable for its "own negligence" (quoting *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009))); *see also Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005) ("Because liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer."). As the Supreme Court has explained, "an employer will *always* be liable when its negligence leads to the creation or continuation of a hostile work environment." *Vance v. Ball State Univ.*, 570 U.S. 421, 446 (2013) (emphasis added).

In this context, this Court has held that an employer is negligent if it either (i) "failed to provide a reasonable avenue for complaint" or (ii) "knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action." *Summa*, 708 F.3d at 124 (quoting *Duch*, 588 F.3d at 762).

B. The extent of an employer's control over a third-party harasser is a relevant consideration in assessing negligence, but it is not dispositive.

This Court's decision in *Summa*, 708 F.3d at 123-24, makes clear that while an employer's ability to control a third-party harasser is one relevant factor in evaluating whether the employer's remedial action, if any, was appropriate under the circumstances, that factor is not dispositive. The *Summa* court stated that "we 'will *consider* the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.'" *Id.* at 124 (emphasis added) (quoting 29 C.F.R. § 1604.11(e)). And it explained that "[i]n determining the appropriateness of an employer's response, we look to whether the response was 'immediate or timely and appropriate in light of the circumstances, particularly the level of control and legal responsibility [the employer] has with respect to [the harasser's] behavior.'" *Id.* (second alteration in original) (quoting *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997)).

Under *Summa*'s reasoning, the fact that an employer cannot directly control a third party's conduct does not preclude liability, although it may impact what kind of remedial response was appropriate under the

circumstances. Indeed, the Eighth Circuit's decision in *Crist*, on which *Summa* relied, makes precisely that point. In *Crist*, the issue was whether an employer, "a residential program for developmentally disabled individuals," could be liable for sexual harassment based on its "failure to respond appropriately to the conduct of a mentally incapacitated resident toward program employees." 122 F.3d at 1108. The district court said no, reasoning that the program "could not be held responsible for [the resident's] behavior because it could not control the behavior," and thus granted summary judgment. *Id.* at 1110.

The Eighth Circuit reversed, flatly rejecting the notion that an employer's limited control over a third-party harasser precludes liability for negligence. *Id.* at 1111-12. The court emphasized that evaluating the appropriateness of an employer's response involves a "fact-intensive" inquiry that focuses on all of the surrounding circumstances. *Id.* at 1111. Under that approach, the court reasoned, an employer's inability to immediately stop a harasser's conduct "does not end the inquiry." *Id.* at 1111-12. The court explained that although the residential program at issue there could not control the resident's behavior, it nonetheless "clearly controlled the environment in which [the resident] resided, and it had the

ability to alter those conditions to a substantial degree." *Id.* at 1112. The court then outlined various actions the program could have taken to address the harassment, including providing additional staff, more training, or alarm systems. *Id.* Given these possibilities, the court concluded, "factual disputes remain as to whether [the program's] response was appropriate." *Id.*

This Court recently employed similar reasoning in *Riggins v. Town of Berlin*, No. 23-868, 2024 WL 2972896 (2d Cir. June 13, 2024) (unpub. summary order). There, the question was whether the employer, a town, could be liable for failing to stop a resident from harassing one of its employees. *Id.* at *1-2. In resolving that question, this Court rejected the employer's argument that it could not be liable because it "did not have a high degree of control" over the harasser's actions. *Id.* at *3. This Court reasoned that "although the [employer] may not have had the ability to control all of [the harasser's] behavior, it does not follow that the [employer] lacked any ability to attempt to dissuade [the harasser] from continuing his abusive conduct." *Id.* at *4. To the contrary, this Court explained, the employer "*did* have exclusive control over its workplace and over the email system to which [the harasser] sent many of the harassing

communications," and it "presumably could dictate the way in which [the harasser] was permitted to communicate with [the employer's] employees." *Id.* at *3. Accordingly, this Court concluded, "the [employer's] degree of control over [the harasser's] actions is not dispositive of whether the [employer's] remedial actions were sufficient and appropriate." *Id.*

The key takeaway from decisions like *Crist* and *Riggins* is that even when an employer cannot directly control the conduct of a third-party harasser, its control over its employees' work environment always gives it some ability to deter or influence the third party's behavior. *See Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001) (while an employer "cannot control every act of" a third party, "it does control the [work] environment at large"). And that means an employer always has a range of options at its disposal to combat third-party harassment. *See Dunn*, 429 F.3d at 691 (even when employers cannot "control" an actor's conduct, they "have an arsenal of incentives and sanctions … that can be applied to affect conduct"). Normally, for instance, an employer can ask the harasser to stop

or tell them to leave its premises. *See, e.g.*, *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074-75 (10th Cir. 1998).[3]

Under most circumstances, an employer can also take other steps short of controlling the harasser's conduct to protect a worker from third-party harassment. Where the harasser is a repeat offender, for example, the employer could offer the employee an equivalent alternative schedule that avoids or limits interactions with the harasser, it could ensure that a supervisor or other employee is present when the harasser is around, or it could ensure any surveillance cameras document the situation. Importantly, these kinds of remedial actions require no control over the harasser but are instead centered on the employer's control over the victim's work environment.

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[3] This is not to suggest that an employer can never be liable for "off-premises" third-party harassment. For example, if an employee's job requires her to meet customers off-site and she reports being harassed by those customers because of a protected trait, the employer must take some appropriate action to stop or remedy the harassment and could be liable if it does not. *See, e.g.*, *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (employer could be liable for hostile work environment where client raped female manager at a business meeting outside her workplace because "[h]aving out-of-office meetings with potential clients was a required part of the job"). In any event, this Court need not resolve that question here because the harassment at issue occurred in Applegreen's plaza.

For these reasons, an employer's lack of direct and immediate control over a third party's conduct is not dispositive.

C. This Court's dicta in *Menaker* does not compel a different result.

In *Menaker v. Hofstra University*, 935 F.3d 20 (2d Cir. 2019), this Court cited *Summa* for the proposition that an employer may be liable for third-party harassment where "the employer exercises a 'high degree of control over the behavior' of the non-employee." *Id.* at 38-39 & n.89 (quoting *Summa*, 708 F.3d at 124). For a variety of reasons, *Menaker* does not control here.

To begin, *Menaker* is inapposite: the case did not involve a hostile-work-environment claim, the plaintiff did not allege that he had experienced harassment, and the court was not evaluating whether the employer was potentially liable under a negligence theory. Rather, the plaintiff, a former university tennis coach, alleged that his employer-university had "discriminated against him because of his sex when it fired him in response to allegedly malicious allegations of sexual harassment" by a student athlete. *Id.* at 26. The key question, the court said, was whether the complaint raised "an inference of discriminatory intent" by the

employer. *Id.* at 31. Analogizing to employer liability standards for harassment, the court held that because the university exercised a high degree of control over the student athlete, her discriminatory intent could be imputed to the university under a cat's paw theory. *See id.* at 38-39.

Because the *Menaker* court was not presented with any harassment claim—let alone a third-party harassment claim—its statement about employer liability standards for such claims was non-binding dicta. *See Barclays Cap. Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 899 (2d Cir. 2011) ("It is axiomatic that appellate judges cannot make law except insofar as they reach a conclusion based on the specific facts and circumstances presented to the court in a particular appeal.").

Aside from that, *Summa* did not hold that a "high degree of control" is necessary to establish employer liability for third-party harassment, as *Menaker* suggested. Rather, as explained above, the *Summa* court reasoned that the employer's degree of control is a relevant consideration in assessing the appropriateness of an employer's remedial action, and it treated a "high degree of control" as a sufficient basis for evaluating the employer's remedial response by the same standards as those used for co-worker harassment. *See* 708 F.3d at 123-25. By purporting to require a high

degree of control, *Menaker* erroneously transformed that *sufficient* condition into a *necessary* condition.

This Court quoted *Menaker* for the same proposition in a footnote in *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 76 n.33 (2d Cir. 2021) (en banc). But *Francis* did not arise under Title VII or involve a hostile-work-environment claim. Instead, the plaintiff principally sought to hold a landlord liable for discrimination under the Fair Housing Act and other statutes based on the landlord's deliberate indifference to tenant-on-tenant racial harassment. *See id.* at 72-80; *see also id.* at 80-81 (rejecting additional claims). The decision expressly noted that although the plaintiff had previously "asserted the existence of a negligence claim based chiefly on an asserted analogy between the FHA and Title VII," the plaintiff had since "abandoned his negligence theory of landlord liability" and "concede[d] that it would be reasonable for this Court to reject such a claim." *Id.* at 72 n.15. Additionally, *Francis* did not cite *Summa* or independently interpret its reasoning, but instead simply relied on *Menaker*'s reading of *Summa*. For these reasons, *Francis* does not control here any more than *Menaker*.[4]

[4] This Court similarly quoted *Menaker* in *Leroy v. Delta Air Lines, Inc.*, 36 F.4th 469, 475 (2d Cir. 2022). But that opinion was later withdrawn and

II. Collins adequately pleaded that Applegreen was negligent in failing to prevent or remedy Dixon's sex-based harassment.

The district court determined that the Amended Complaint did not contain factual allegations supporting an inference that Applegreen negligently failed to prevent or remedy sex-based harassment by Dixon. SA013-14. The court acknowledged that Collins alleged she complained to Applegreen about Dixon's harassment, but it faulted Collins for failing to allege that she had expressly informed Applegreen that Dixon's harassment was because of her sex. SA013.

That determination was incorrect for two principal reasons. First, contrary to the court's ruling, Collins adequately alleged that Applegreen had actual knowledge Dixon's harassment was based on Collins's sex yet failed to take appropriate remedial action. Second, even if Applegreen did not have actual notice, Collins adequately alleged that Applegreen was

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superseded by an amended summary order. *See Leroy v. Delta Air Lines*, No. 21-267, 2022 WL 12144507, at *3 (2d Cir. Oct. 27, 2022) (unpub. summary order). Besides lacking precedential value, that order also did not address a hostile-work environment claim; rather, the plaintiff asserted claims for retaliation and vicarious liability under state law. *Id.* at *2. And although the order recited *Menaker*'s language in assessing whether the plaintiff had engaged in protected activity by reporting third-party harassment, it expressly declined to consider whether the plaintiff had adequately pleaded the employer's degree of control. *Id.* at *4.

negligent under two additional theories: (i) it *should* have known Dixon's harassment was sex-based (and thus had constructive notice) yet failed to take appropriate remedial action or (ii) it failed to provide a reasonable avenue of complaint.

A. Collins alleged that Applegreen had actual notice Dixon's harassment was sex-based and that Applegreen failed to take appropriate remedial action.

An employee can put an employer on actual notice of harassment in several ways, including by reporting it to someone who has a duty to act on or inform the employer of such reports. *See Torres v. Pisano*, 116 F.3d 625, 636-37 (2d Cir. 1997). As the Eighth Circuit has explained: "An employer has actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 690 (8th Cir. 2012) (citation omitted). Even when an employee does not report the harassment, the employer may still be on actual notice if a manager or supervisor witnessed the harassment. *See, e.g.*, *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 350 (6th Cir. 2005)

(employer may be on notice of harassment where supervisors personally witnessed some incidents of harassment).

Critically, as Collins explains in her opening brief (at 21), an employee need not use "magic words" like "sex" or "sexual" to put her employer on actual notice of sex-based harassment. *See, e.g.*, *Okoli v. City of Balt.*, 648 F.3d 216, 224 n.8 (4th Cir. 2011) ("Several sister circuits have noted that sexual harassment complaints need not include 'magic words' such as 'sex' or 'sexual' to be effective."); *Olson v. Lowe's Home Ctrs. Inc.*, 130 F. App'x 380, 391 n.22 (11th Cir. 2005) ("There is no magic word requirement. That is, the employee need not label the events 'sexual harassment' in order to place an employer on notice of the offending behavior.").

Along similar lines, an employee need not identify conduct that is overtly sexual or motivated by sexual desire. *See Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001) ("[N]either 'sex-specific and derogatory terms' nor any evidence that 'sexual desire' motivated the harassment is needed to prove an actionable hostile work environment."); *Alfano v. Costello*, 294 F.3d 365, 375 (2d Cir. 2002) (rejecting argument that sex-based hostile-work-environment claim "can be supported only by overtly sexual incidents"). Rather, it is enough for her to identify conduct that, "though lacking any

sexual component or any reference to the victim's sex, could, in context, reasonably be interpreted as having been taken on the basis of plaintiff's sex." *Gregory*, 243 F.3d at 695.

Moreover, where a plaintiff suffers both explicitly sex-based harassment and facially sex-neutral harassment, she "may rely on [the] incidents of sex-based abuse to show that other ostensibly sex-neutral conduct was, in fact, sex-based." *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 118 (2d Cir. 2010). It is therefore "improper to isolate incidents of facially neutral harassment and conclude, one by one, that each lacks the required discriminatory animus." *Jensen v. Potter*, 435 F.3d 444, 450 (3d Cir. 2006) (Alito, J.), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006); *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 317-18 (4th Cir. 2008) (Muslim employee's allegations of facially neutral harassment that included co-workers hiding his timecard, unplugging his computer, and writing insults on his business card must be considered along with allegations of explicitly religious harassment).

Here, viewing the allegations in the light most favorable to Collins and drawing all reasonable inferences in her favor, Collins's reports to

Applegreen supplied enough information to apprise the company that Dixon's harassment was "taken on the basis of [her] sex." *Gregory*, 243 F.3d at 695. Collins alleges that she reported Dixon's harassment to Applegreen's district and store managers, Dadio and Chubka, and that both managers personally witnessed some of Dixon's harassment. JA076-77 (¶¶ 51-54, 58-60). Multiple facets of Collins's complaints could have reasonably informed Applegreen that Dixon's harassment was motivated by her sex.

First, Collins alleged that she reported to Dadio that Dixon had touched her ears, JA075-76 (¶¶ 39-40, 53), which necessarily would have required Dixon to invade Collins's personal space to engage in what could be construed as intimate touching. *Cf. Capaldo v. Remington Long Island Emps.*, No. 18-cv-2746, 2023 WL 2710251, at *3 (E.D.N.Y. Mar. 30, 2023) (harassment included multiple incidents of a manager "touching" and "fondling" victim's ear). Although Collins does not say as much, her allegations appear to permit a reasonable inference that Dixon may have been attempting to flirt with her and then reacted negatively when she spurned his romantic advance. *See Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 549 (2d Cir. 2010) ("A rational juror could permissibly infer that

[harasser's] harsh treatment of [victim] was the result of his spurned advances."); *Clegg v. Falcon Plastics, Inc.*, 174 F. App'x 18, 25 (3d Cir. 2006) (a jury could find that harasser's facially neutral conduct was motivated by "anger at [plaintiff] for rebuffing his advances").

Second, Collins alleges that she specifically told Chubka about Dixon's comments mocking her abilities and that Dixon had tied his insults to her sex by asking, "need help … want me to go back there and show you how a man gets the job done[?]" JA077 (¶ 60). That conduct reasonably suggested that Dixon's verbal harassment was "motivated by general hostility to the presence of women in the workplace." *Raniola v. Bratton*, 243 F.3d 610, 621 (2d Cir. 2001) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)); *see also Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 694 (7th Cir. 2001) (although harassment at issue "was not of a sexual nature," it included "questioning [the victim's] abilities and the ability of women to do her job in general"). It likewise reasonably suggested that Dixon's other harassment—including his throwing of trash and food at Collins, JA075 (¶¶ 42-45)—was similarly motivated. *See Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005) ("Conduct that appears gender-

neutral in isolation may in fact be gender-based, but may appear so only when viewed in the context of other gender-based behavior.").

Other facts alleged in the Amended Complaint bolster this conclusion. Collins alleged that an Applegreen assistant manager, Rivera, later learned that Dixon had threatened to physically harm Collins after she reported his harassment by saying she "should watch her back because one day he would be waiting at her car when her shift was over." JA078-79 (¶¶ 72-74). Dixon's threats of violence and stalking, which came on the heels of his unwanted touching and other harassment, could reasonably suggest sex-based harassment. *See Kaytor,* 609 F.3d at 549 ("[A] rational juror could permissibly infer from [harasser's] sexual comments that his physical threats were also motivated by [plaintiff's] sex.").

In short, Collins's factual allegations were sufficient to support a reasonable inference that Applegreen had actual knowledge Dixon's harassment was because of Collins's sex. Discovery might bolster this inference or undercut it, but at the pleading stage, these allegations were enough to plausibly link Dixon's conduct to Collins's sex.

Collins also adequately alleged that Applegreen failed to take appropriate remedial action despite its awareness of Dixon's harassment.

Indeed, Collins alleges that Applegreen did not take *any* action, let alone appropriate action, to address Dixon's behavior. JA074 (¶ 28) ("Nothing was done and the harassment continued."). According to Collins, neither Dadio nor Chubka took any action to address the situation or even escalate her complaints to someone who could do something about it. Far from it, Dadio simply told Collins to "just ignore" Dixon, and Chubka told Collins to "go get a restraining order." JA077 (¶¶ 55, 61). There is likewise no indication in the complaint that Rivera took any action to protect Collins after learning about Dixon's threat of physical violence. *See* JA078-79 (¶¶ 72-74).

To be clear, Collins's allegations give reason to believe Applegreen's managers could have undertaken *some* remedial action, however limited, to address Dixon's harassment even if they could not control his behavior. Collins did not—and did not need to—identify precisely what remedial actions Applegreen could or should have taken. But possible options readily present themselves: the managers could have offered to escalate Collins's concerns or speak to Mobil Mart's upper management; they could have offered to change her shift to avoid or limit interactions with Dixon; they could have even spoken with Dixon to at least ask him to stop

harassing Collins. *Cf. Crist*, 122 F.3d at 1112 (describing employer's options for addressing harassment without directly controlling the harasser).

To be sure, at later stages of litigation, Applegreen's ability (or inability) to control Dixon's behavior will be a relevant consideration in ultimately assessing whether Applegreen was negligent in allowing or failing to remedy Dixon's harassment. Discovery may well reveal that Applegreen exercised contractual or other authority over the plaza that would have enabled it to take some action to exclude Dixon from Collins's immediate workspace or compel Mobil Mart to take some action. It could likewise clarify the corporate structure and property-management roles of Applegreen and Mobil Mart in a way that would support or undermine Collins's claims. On the other hand, discovery might reveal that Applegreen had only limited ability to deter or influence Dixon's behavior or that the company had in fact taken some action of which Collins was unaware. But at the pleading stage, Collins has done enough to plausibly allege that Applegreen did not take reasonable steps to prevent or correct Dixon's harassment.

B. Collins alleged that Applegreen was negligent under alternative theories that do not require actual knowledge.

Even if Applegreen did not have actual notice that Dixon's harassment was sex-based, that would not end the inquiry. Rather, as we have already noted, an employer may also be negligent when it either (i) *should* have known about the harassment (and thus had constructive notice) and fails to take appropriate remedial action or (ii) fails to prevent sex-based harassment by offering a reasonable avenue for complaint. *See Summa*, 708 F.3d at 124; *Duch*, 588 F.3d at 762.

Neither of these routes requires a plaintiff to allege that her employer actually knew about the harassment at all, let alone that the employer knew the harassment was motivated by sex. *See Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 63 (2d Cir. 1998) ("[A]n employer need not have actual knowledge of the harassment."). And here, Dixon plausibly alleged that Applegreen was negligent under both theories.

1. Collins alleged that Applegreen had constructive knowledge of Dixon's harassment and failed to take appropriate remedial action.

An employee can put an employer on constructive notice of harassment by "provid[ing] management level personnel with enough

information to raise a *probability* of sexual harassment in the mind of a reasonable employer." *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 105 (3d Cir. 2009) (emphasis added) (citation and quotation marks omitted). If an employee provides such information, the employer has "a duty to make at least a minimal effort to discover whether" sex-based harassment has occurred. *Duch*, 588 F.3d at 765. When an employer fails to conduct such an inquiry, it cannot then cite its lack of knowledge as a defense. As this Court has explained: "[W]hen an employee's complaint raises the specter of sexual harassment, a supervisor's purposeful ignorance of the nature of the problem … will not shield an employer from liability under Title VII." *Id.* at 766.

At a bare minimum, Collins's complaints to Dadio and Chubka "raise[d] the specter" of sex-based harassment and thus triggered Applegreen's "duty to make at least a minimal effort to discover whether [Dixon] had engaged in sexual harassment." *Duch*, 588 F.3d at 765-66. Neither Dadio nor Chubka made that minimal effort. They did not investigate Collins's complaints to confirm whether Dixon was harassing her because of her sex. They did not escalate Collins's complaints to someone above them who could initiate or conduct such an investigation.

And, as explained above, they took no other action to stop or remedy Dixon's harassment.

2. Collins alleged that Applegreen failed to provide a reasonable avenue for complaint.

Generally, an employer can provide a reasonable avenue for complaint by creating and administering mechanisms and procedures by which employees can report harassment. *See, e.g.*, *P.F. v. Delta Air Lines, Inc.*, No. 99-cv-4127, 2000 WL 1034623, at *8 (E.D.N.Y. June 20, 2000) (relevant factors include whether "employees are informed how to report sexual harassment" and whether "the policy is effectively communicated to employees"). "The question of whether an employer has provided a 'reasonable avenue of complaint' is a question for the jury…." *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1181 (2d Cir. 1996).

Importantly, however, "an employer is not necessarily insulated from Title VII liability simply because a plaintiff does not invoke her employer's internal grievance procedure *if the failure to report is attributable to the conduct of the employer or its agent*." *Distasio*, 157 F.3d at 64 (emphasis added). In other words, an employer cannot frustrate an employee's ability to report harassment and then cite its lack of knowledge as a defense. *Cf.*

Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1237, 1253 (M.D. Ala. 2001) (explaining that although employer's exercise of reasonable care to prevent and promptly correct harassment can serve as an affirmative defense to allegations of supervisory harassment, "[i]t goes without saying a shield cannot double as a sword; an employer may not protect itself by strewing mines throughout its safe harbor").

Here again, Collins's allegations support an inference that Applegreen failed to provide a reasonable avenue for complaint. Indeed, although Collins repeatedly sought out such an avenue, Applegreen offered none. For example, Collins alleges that when she asked Applegreen's store manager, Chubka, how to contact upper management to report Dixon's harassment, Chubka never provided any contact information. JA077 (¶¶ 57, 62). The Amended Complaint gives no indication that Chubka otherwise informed Collins how to submit a complaint. Collins further alleges that she repeatedly called Applegreen's corporate phone number in an attempt to report Dixon's harassment, but Applegreen never responded to her calls. JA077 (¶ 63). At the pleading stage, those allegations should suffice to suggest the absence of reasonable reporting mechanisms.

III. Collins adequately pleaded the remaining elements of her hostile-work-environment claim.

Because the district court dismissed Collins's hostile-work-environment claim solely on employer-liability grounds, it did not address the remaining elements of her claim (i.e., whether the harassment was severe or pervasive and occurred because of her sex). *See* SA008-14. To the extent this Court reaches these elements, Collins adequately pleaded them as well.

The severe-or-pervasive element requires little analysis. Applegreen did not meaningfully challenge this element in its motion to dismiss. *See* JA098-101. Nor could it. The harassment Collins described was plainly enough to create an objectively abusive working environment, and there appears to be no dispute that Collins subjectively perceived Dixon's conduct as abusive. *See* JA074 (¶ 19-22); JA075-76 (¶¶ 39-50); JA078-79 (¶¶ 73-74); JA079 (¶¶ 76, 78-79); *see also Williams v. N.Y.C. Hous. Auth.*, 61 F.4th 55, 74 (2d Cir. 2023) (in assessing objective offensiveness of harassment, relevant considerations include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably

interferes with an employee's work performance" (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993))); *Banks v. Gen. Motors, LLC*, 81 F.4th 242, 262 (2d Cir. 2023) ("Evidence of a general work atmosphere—as well as evidence of specific hostility directed toward the plaintiff—is an important factor in evaluating the claim." (citation modified)). That is especially true given Dixon's threat to physically harm Collins. *See Castagna v. Luceno*, 558 F. App'x 19, 21 (2d Cir. 2014) (unpub. summary order) ("[E]vidence of physical threats is highly probative of the severity of the alleged hostile work environment." (citation omitted)).

As to the causation element, the allegations support a reasonable inference that Dixon harassed Collins because of her sex. As explained above, Collins's reports to Applegreen supplied enough information to apprise the company that Dixon's harassment was sex-based. *See supra* Part II.A. For same reasons set forth there, her allegations in the Amended Complaint supply enough information to plausibly suggest the same.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Collins's hostile-work-environment claim under Title VII and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Second Circuit Local Rules 29.1(c) and 32.1(a)(4), because it contains 6,850 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on June 15, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the Appellate Case Management System (ACMS). I certify that all counsel of record are registered ACMS users, and service will be accomplished via ACMS.

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