No. 09-1446

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LYNETTE HARRIS,

Plaintiff-Appellant

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

LORETTA KING
Acting Assistant Attorney General

DENNIS J. DIMSEY
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4706

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*., prohibits discrimination on the basis of sex in employment, including sexual harassment. The Attorney General is responsible for enforcing Title VII with respect to public employers, such as the defendants in this case. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as a principal enforcer of Title VII and as an employer, has a strong interest in the fair and balanced enforcement of Title VII.

QUESTION PRESENTED

The United States will address the following question:

Whether the magistrate judge erred in granting summary judgment to the defendants on plaintiff's claim that she was subjected to a hostile work environment based on her sex, in violation of Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

Plaintiff Lynette Harris brought this action alleging, *inter alia*, discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq*. App. 189.[1] Plaintiff alleged that her employer had (1) failed to promote her to the position of Electrical Maintenance Technician Supervisor I because of her sex on numerous occasions; and (2) subjected her to a hostile work environment based on her sex. App. 18-19, 190-192. By consent of the parties, the case was referred to a magistrate judge pursuant to 28 U.S.C. 636(c). App. 189. The magistrate judge granted defendants' motion for summary judgment on plaintiff's hostile environment claim and on the majority of her promotion claims on September 30, 2008. App. 189. After additional discovery,

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[1] Citations to "App. __" refer to pages in the Joint Appendix filed by the parties to this appeal.

the magistrate judge granted defendants' summary judgment motion on plaintiff's remaining promotion claim. App. 280. Plaintiff appealed directly to this Court pursuant to 28 U.S.C. 636(c)(3).

1. Facts Relating To The Hostile Environment Claim

Plaintiff is employed by the City of Baltimore's Department of Public Works as a Maintenance Technician III Electrical. App. 190. As described below, plaintiff's evidence established a workplace in which male employees frequently and openly referred to women as "bitches," "cunts," and "troublemakers"; male employees frequently and openly discussed male and female body parts and sexual activities; and pictures of naked and partially-clad women were frequently displayed in the workplace.

a. Plaintiff "heard co-workers and supervisors refer to women as 'bitches' almost daily from the beginning of [her] employment to approximately April 2005." App. 615. She also heard co-workers and supervisors discussing sexual topics that she found offensive. App. 335-336, 375-376, 616-618.

In addition, pictures of naked and partially-clad women were displayed in plaintiff's workplace. App. 329-331, 551. In July 2002, plaintiff complained to Judy Coleman, a supervisor in the storeroom, about a calendar posted on the wall in the motor shop area, where James Gernhart was the supervisor. App. 329.

Coleman spoke to another supervisor, Rick Slayton, and the calendar was taken down, but it was put back up the following day. App. 329-330. Plaintiff again complained to Coleman, and the picture was finally removed. App. 333.

b. In December 2004, plaintiff was assigned to work under Gernhart's supervision in the motor repair shop. App. 555. In September 2001, Gernhart had called plaintiff a "bitch" after plaintiff took a phone call from Gernhart's wife and asked her to call Gernhart back rather than going to find him. App. 323-328, 632. Because of this encounter, and because of her experience with the pictures of women posted in the motor shop, plaintiff objected to this assignment, contacting several managers, including EEO Officer Anthony Delbarto, Slayton, Plant Manager Nick Frankos, and Tony Bressi, who was in charge of Maintenance. App. 555.

Within days of her assignment to the motor repair shop, plaintiff noticed provocative pictures of women in the workplace. App. 362-363, 555. According to plaintiff, several of the male technicians had photographs of naked or scantily-clad women under the plexiglass on their work benches and on the table where the employees ate lunch. App. 364-367. During the time she was assigned to the motor repair shop, plaintiff was required to sit at a table displaying such pictures while other employees attended "safety meetings," from which she was excluded,

in Gernhart's office. App. 616. She reported the pictures to Bressi and Plant Manager Nick Frankos. App. 363, 555. Bressi reported that he did not see any objectionable pictures, and the managers determined that she should continue working in the motor repair shop under Gernhart's supervision. App. 555-556.

Plaintiff also continued to hear offensive and sexually derogatory language in the shop. On December 28 and December 30, 2004, a co-worker referred to women as "bitches" in the presence of plaintiff and Gernhart, who said nothing. App. 555. Plaintiff then complained to the union shop steward, Ron Williams. On January 4, 2005, Williams met with plaintiff's co-workers and her supervisors, Gernhart and Slayton, to discuss plaintiff's complaints about foul language in the workplace. App. 619. During the meeting, which plaintiff was not allowed to attend, Ron Sutton, another supervisor, repeatedly referred to her as a "bitch" until Williams objected. App. 554, 619. When Sutton asked Slayton if there was a policy prohibiting him from cursing, Slayton said "no." App. 554. Gernhart then said that he did not want plaintiff working in his shop but that he was being forced to allow her to work there. App. 554. Williams wrote in his notes that he "was very disappointed with the action (verbal) of the men in the motor shop and both supv's that were there. That meeting showed a clear message of the prejudic[ial] practice in the electrical shops." App. 554.

Following the meeting, the use of derogatory and offensive language continued. On January 5, 2005, in the presence of plaintiff, Sutton "made a comment about a guy having 'three balls.'" Supervisors Slayton and Gernhart were also present and said nothing. App. 632. On January 11, 2005, Sutton commented that speed bumps were a "pain in his dick." App. 632.

In a letter dated January 11, 2005, plaintiff complained to Barbara Neale, a personnel officer with responsibility for investigating EEO complaints. App. 555-556, 609-610. Neale visited the motor repair shop and the mechanical maintenance shop on February 3, 2005. App. 557, 610. In both shops, she observed "provocative" pictures "displayed on tables, walls, workstations and two offices." App. 557. In her affidavit, Neale described the pictures as "less than appropriate for the shop for males or females." App. 611. She directed Slayton and the manager of the mechanical maintenance shop to remove all such pictures, and to instruct their employees to "curtail derogatory language being used." App. 557, 610-611. A week later, however, EEO Officer Delbarto visited the shop and found additional pictures. App. 610. On February 23, 2005, Slayton was reprimanded and suspended for one day for his failure to remove all of the pictures. App. 558, 610.

The use of derogatory and offensive language still continued. On February 1, 2005, Sutton said the word "bitch" several times in front of plaintiff and other co-workers, then said "he would 'bet his left nut.'" App. 633. On February 22, 2005, plaintiff overheard two co-workers discussing a trip to "the titty bar." App. 633. On February 23, 2005, Sutton told Gernhart that he would "eat his dick." App. 633. On April 13, 2005, as plaintiff walked into the shop, Sutton said "I told them the story about my balls." App. 633. On April 25, 2005, in plaintiff's presence, a co-worker told Gernhart, "if my dick was that little, I wouldn't pull it out." Another co-worker was asked if he "got any pussy" that weekend. App. 634. On May 25, 2005, one co-worker commented to another, in plaintiff's presence, that "if his wife's pussy got wet you would hear it sloshing." App. 634.

On April 5, 2005, plaintiff told Neale that she wanted a transfer and, eventually, plaintiff was transferred to the instrumentation shop. App. 369-370, 610-611.

c. Plaintiff's account of derogatory language, discussions of sex, and inappropriate photographs in the workplace was corroborated by her co-workers – both male and female. Judy Coleman, supervisor of the Storeroom, said that she had witnessed "loud language, females being embarrassed in front of others," and that at times this occurred "almost every day." App. 385-386. She said that she

had heard male technicians in the Department of Public Works refer to women with derogatory words, including the "B word," and the "C word," and that she had heard men refer to women as "troublemaker[s]." App. 387-389. Coleman, whose deposition was taken in October 2007, said that she had heard this kind of language "off and on" during the previous five years, although the situation had improved in the previous two years. App. 390. She said that the occurrence of derogatory language seemed to increase when women were around. App. 390. Coleman said that she had complained to her supervisors three years before but that they took no action. App. 390-391. Coleman also said that she had seen pictures of nude women and women in bathing suits displayed "in all the shop areas." App. 401-402. Coleman said that she often encountered plaintiff in the women's locker room crying because of her treatment in the workplace. App. 403-405.

Edwin Moye, previously a technician and now a supervisor, said that he frequently heard men discussing sex and/or using crude language – including the "C" word and the "F" word – in the workplace. App. 420, 424-427. Moye refused to give specific examples of the conversations he heard among the men because it made him uncomfortable. App. 424-426. He said that such language was appropriate in the workplace only when it was between two people having a

private conversation. App. 427. Moye also said that he had seen pictures of naked or scantily-clad women posted in the shop area and on the hall bulletin board. App. 429.

Kevin Lee worked out of the same shop as the plaintiff. App. 434. Lee said that men had conversations about sex and male anatomy "a lot" in the workplace. App. 435. He said that men are "always talking about what they have done the night before with women. That goes on every day." App. 436, 440. He said that he was "sure" that plaintiff heard such discussions because the only way she could avoid hearing them would be to retreat to the women's locker room. App. 436. Lee said that he heard conversations about "gentlemen's clubs" and about female anatomy almost every day, and that such conversations took place in front of female employees. App. 436-437, 440. Lee said that there had been pictures of nude women under glass on the lunchroom tables until they were removed and employees were notified through a memorandum that such pictures were prohibited in the workplace. App. 435-437. He said that pictures of nude women were displayed in "[j]ust about any shop you go into." App. 438.

d. Plaintiff also adduced evidence regarding psychological problems that were related to her work environment. Plaintiff was examined in September 2007 by Dr. Patrick Sheehan, who diagnosed plaintiff with major depressive disorder.

App. 484-485, 488. According to Dr. Sheehan, plaintiff's depression began following the telephone incident with Gernhart in 2001 and continued. App. 485-488. He said that she reported missing work and having difficulty sleeping because of "things that happened at work," and that she had lost weight at one time. App. 487-489.

Dr. John Lyon, a physician employed by defendants, also examined plaintiff in October 2007, and concluded that she "display[ed] no indications of despondency or melancholia" and that she "show[ed] no evidence of major mental illness at the present time." App. 608. Dr. Lyon acknowledged, however, that plaintiff attributed her psychological problems to her treatment at work, reporting "moodiness, mental fatigue, nervous energy and some panic attacks," as well as "insomnia, * * * stomach aches and occasional crying spells which ha[d] led her to miss some 20 days of work in the past year." App. 606. Dr. Lyon wrote that plaintiff also reported that anxiety and depression caused her to lose concentration on activities at home and to lose interest in recreational activities. App. 606.

2. Magistrate Judge's Decision

The magistrate judge found no material facts in dispute and granted summary judgment to the defendants on plaintiff's hostile environment claim. App. 208-228. Citing *Ocheltree* v. *Scollon Productions, Inc.*, 335 F.3d 325, 331 (4th Cir. 2003) (en banc), cert. denied, 540 U.S. 1177 (2004), the magistrate judge recited the elements of a hostile environment claim: "the plaintiff must establish that (1) the conduct in question was unwelcome; (2) the harassment was because of her sex; (3) the [conduct was] sufficiently severe or pervasive to create an abusive working environment; and (4) some basis exists for imputing liability on the employer." App. 209. While finding that the harassment in this case was unwelcome, the magistrate judge concluded that plaintiff's claim failed because she had not established that the harassment occurred because of her sex or that it was sufficiently severe or pervasive. App. 209-210. The magistrate judge did not address the fourth prong – whether there was a basis for employer liability. App. 228 n.6.

a. In analyzing whether the offending conduct occurred "because of sex," the magistrate judge distinguished "harassment that is sexual in content, on the one hand, and harassment that is sexually motivated on the other." App. 210 (citing *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)). The

magistrate judge thus discounted all of the male employees' workplace conversations about male and female anatomy and about their sexual exploits as "locker room talk," concluding that these discussions were not directed at plaintiff because of her sex. App. 210-211.

The magistrate judge acknowledged that "references to women generally as 'bitches,' 'cunts' or 'troublemakers' could be seen as sexually motivated and expressing hostility to women in the workplace." App. 211. Even if "not directed to plaintiff or apparently to any specific woman," the magistrate judge wrote, such words "are relevant to determining whether plaintiff was subject to harassment based on her sex." App. 211 (citing *Jennings* v. *University of North Carolina*, 482 F.3d 686, 695 (4th Cir.), cert. denied, 128 S. Ct. 247 (2007); *Spriggs* v. *Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001)). "The critical issue in this context," the magistrate judge wrote, "is 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" App. 212 (quoting *Lack* v. *Wal-Mart Stores, Inc.*, 240 F.3d 255, 261 (4th Cir. 2001)) (internal quotations omitted). The magistrate judge noted, however, that some courts had held "that the term 'bitch' is not necessarily evidence of hostility based on sex." App. 213 (citing *Kriss* v. *Sprint Commc'ns*

Co., 58 F.3d 1276, 1281 (8th Cir. 1995); *Lyle* v. *Warner Bros. Television Prods.*, 132 P.3d 211, 228 (Cal. 2006)).

As to the incident in 2001 in which Gernhart called plaintiff a "bitch" when she did not call him to the telephone, the magistrate judge concluded that "it is not at all clear that a reasonable jury could find that the use of the term 'bitch' in that context is necessarily evidence of different treatment of or greater hostility to Ms. Harris 'because of' her sex." App. 213. The magistrate judge noted that the incident involved a personal phone call that had "nothing to do with work," App. 213, and that there was no evidence Gernhart used the term on any other occasion to refer to plaintiff or any other woman, App. 214. As to the second instance, in the meeting with the union shop steward, when a supervisor referred to plaintiff as a "bitch" repeatedly and plaintiff's immediate supervisor said that he did not want her in his shop, the magistrate judge found that "a reasonable jury might find that" this incident "demonstrated hostility to her based on her sex." App. 214.

The magistrate judge found no evidence that the pictures of nude or partially-clad women displayed in the workplace "were aimed at [plaintiff] to embarrass or humiliate her." App. 214. Thus, the presence of the pictures did not constitute "harassment 'because of her sex.'" App. 215. The magistrate judge wrote that "their presence might nonetheless be considered by the court in its

overall evaluation of the hostile and abusive work environment." App. 215 (citing *Carlson* v. *C.H. Robinson Worldwide, Inc.*, No. 02-3780, 2005 WL 758602, at *39-40 (D. Minn. March 31, 2005)).

b. The magistrate judge next considered whether the harassment to which the plaintiff was subjected was sufficiently severe or pervasive to be actionable, explaining that "[h]arassment is only actionable under Title VII when sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive [working] environment.'" App. 216 (quoting *Albero* v. *City of Salisbury*, 422 F. Supp. 2d 549, 558 (D. Md. 2006)). The evidence must be viewed "both objectively and subjectively," the magistrate judge wrote, to determine whether "'the harassment interfered with [the plaintiff's] ability to perform her work or significantly affected her psychological well-being,' and also [whether] 'the harassment would interfere with the work performance or significantly affect the psychological well-being of a reasonable person in the plaintiff's position.'" App. 217 (quoting *Paroline* v. *Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), vacated in part on other grounds, 900 F.2d 27, 105 (4th Cir. 1990) (en banc)). The magistrate judge noted the four factors to be considered in determining whether the "totality of the circumstances" leads to a finding of actionable harassment: "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." App. 217 (quoting *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)).

i. *Frequency*. Noting that in cases involving verbal harassment, this Court generally requires evidence of "almost daily" harassment to survive summary judgment, the magistrate judge emphasized that there were only two incidents in this case in which "sex specific language" was directed at the plaintiff over a five-year period. App. 218. The magistrate judge acknowledged that the "frequent use of derogatory and demeaning references to women as 'bitches,' 'cunts,' and 'troublemakers' could be seen as sexually motivated and considered in determining whether plaintiff was subjected to sex-based harassment." App. 219. But it ruled that the display of pictures of nude or partially-clad women and the "locker room" talk that occurred almost daily were not actionable and could be considered only as "background" in assessing the actionable incidents. App. 219-221 & n.5.

ii. *Severity*. The magistrate judge noted that plaintiffs alleging verbal harassment must meet a "high bar" and that plaintiff had "failed to show that she was, in the main, subjected to anything more than offensive or vulgar statements." App. 220. The magistrate judge emphasized that the most severe conduct to which plaintiff was subjected was being called "bitch" on two occasions. App. 220. The

magistrate judge considered the "crude and sexually vulgar language" about sex and body parts only as "background evidence when considering the 'totality of the circumstances.'" App. 221. And the magistrate judge considered the evidence of derogatory terms used generally in the workplace as "'second-hand harassment' or 'ambient harassment'" that was "less likely to be considered severe than harassment directed specifically at plaintiff." App. 221. The magistrate judge concluded that "[e]ven taking into consideration all of the instances Harris alleges, the conduct does not rise to the level of severity found necessary to satisfy this prong." App. 222.

iii. *Whether Harassment Is Physically Threatening Or Humiliating*. The magistrate judge limited the analysis of this factor to (1) plaintiff's statement that she felt threatened when Gernhart destroyed items in the shop with a crowbar in a rage and (2) plaintiff's contentions that she was given unsafe work assignments. App. 225-226. The magistrate judge found that the crowbar incident was not directed at plaintiff and was not related to her sex, and that the alleged unsafe assignments were not motivated by her sex. App. 225-226.

iv. *Whether Harassment Unreasonably Interferes With Work Performance*. The magistrate judge acknowledged that plaintiff had been diagnosed with major depressive disorder, that she complained of sleeplessness, and that she had missed

work as a result of the harassment. App. 227. But the magistrate judge noted that plaintiff had not sought professional treatment for the depression. App. 227. The magistrate judge expressed "grave questions" as to whether plaintiff had established either subjectively or objectively "harassment [that] would interfere with the work performance or significantly affect the psychological well-being of a reasonable person in the plaintiff's position." App. 227 (quoting *Paroline*, 879 F.2d at 105).

Considering all four factors, the magistrate judge concluded that the conduct in this case did not "rise to the level of 'severe or pervasive' as established by the significant case law within this circuit." App. 228.

ARGUMENT

THE MAGISTRATE JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON PLAINTIFF'S HOSTILE WORK ENVIRONMENT CLAIM

"Sexual harassment which creates a hostile or offensive environment for members of one sex" violates Title VII. *Meritor Sav. Bank, F.S.B.* v. *Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson* v. *City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)). The statute, however, "does not prohibit all verbal or physical harassment in the workplace; it is directed only at '"*discriminat[ion]* . . . because of . . . sex.'" *Oncale* v. *Sundowner Offshore Servs., Inc*., 523 U.S. 75, 80 (1998).

And "it forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment. *Id.* at 81.

To establish a claim of a hostile environment based on sex, a plaintiff must show: "that the offending conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer." *Ocheltree* v. *Scollon Prods., Inc*., 335 F.3d 325, 331 (4th Cir. 2003) (en banc), cert. denied, 540 U.S. 1177 (2004). In this case, the magistrate judge concluded that plaintiff established the first element, but concluded that she failed to establish either that the offensive conduct was based on her sex, or that it was sufficiently severe or pervasive to be actionable. App. 209-210.

Over the course of her employment with the Department of Public Works, plaintiff was subjected, on a daily basis, to an environment in which her male co-workers referred to women by such terms as "bitch," "cunt," and "troublemaker." The men talked about their sexual exploits with such regularity that one co-worker said the only way the plaintiff could have avoided hearing this talk was to retreat to the women's locker room. Plaintiff also was subjected to pictures of naked and scantily-clad women displayed in the workplace. She complained about these pictures in July 2002. After a female supervisor intervened, the pictures were taken

down, then put back up, before they were finally removed. In December 2004, plaintiff was reassigned to work in the motor repair shop – where some of the offensive pictures had been displayed, and under a supervisor who had called her a "bitch" three years before. She protested this assignment to management, to no avail. She then complained to the union shop steward about the assignment and about foul language in the workplace. But when the shop steward met with her supervisors and co-workers, a supervisor referred to plaintiff as a "bitch" repeatedly, without objection from the other supervisors, and plaintiff's immediate supervisor said that he did not want her working in his shop. After the meeting, the offensive language continued unabated. Plaintiff also found the same kind of pictures of nude and partially-clad women about which she had complained in 2002 still displayed in the shop, hanging on the wall and under plexiglass on work tables and even on a table where employees ate their lunch. She appealed to the Department's EEO Office, and the pictures were removed only after her supervisors were ordered to remove them. Even then, additional pictures were later found in the workplace and the use of offensive and derogatory language continued. Plaintiff finally was reassigned in April 2005.

The magistrate judge wrote that the conduct to which plaintiff was subjected "would * * * be destructive of a productive work environment and the basic human

dignity of those working there." App. 228. But the court nonetheless found that the conduct was not actionable. That conclusion stemmed from fundamental errors in the way the magistrate judge analyzed the evidence of harassment. First, the magistrate judge applied an overly restrictive definition of the term "because of sex," and concluded that much of the offensive conduct in plaintiff's workplace was not directed at her. The magistrate judge thus minimized the significance of the hostile environment to which she was subjected on a daily basis. Second, the magistrate judge applied to this diminished universe of offensive conduct an erroneous legal standard to conclude that the harassment was not sufficiently severe or pervasive to constitute actionable harassment.

A. The Magistrate Judge Erred In Finding That A Majority Of The Offensive Conduct Did Not Occur Because Of Plaintiff's Sex

The magistrate judge correctly noted that harassment is not "automatically discrimination because of sex merely because the words [used] have sexual content or connotations." App. 210 (quoting *Oncale*, 523 U.S. at 80). As this Court explained in *Ocheltree*:

> "'The critical issue [in the "because of sex" inquiry] is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Oncale*, 523 U.S. at 80 (quoting *Harris* [v. *Forklift Systems, Inc.*], 510 U.S. [17,] 25 [1993] (Ginsburg, J., concurring)). * * * A trier of fact may reasonably find discrimination, for example,

> when a woman is the individual target of open hostility because of her sex, *Smith* [v. *First Union Nat'l Bank*], 202 F.3d [234,] 242-43 [(4th Cir. 2000)], or when "a female victim is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace," *Oncale* 523 U.S. at 80.

335 F.3d at 331-332. Thus, in *Ocheltree*, this Court held that a jury could reasonably find that "shop talk that portrayed women as sexually subordinate to men" was aimed at the plaintiff because of her sex and that the men were "motivated by general hostility to the presence of women in the workplace." *Id.* at 332-333.

In *Spriggs* v. *Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001), the plaintiff "was exposed on a 'continuous daily' basis to [his supervisor's] racist comments concerning African Americans in general, and [the supervisor's] wife most particularly." This Court specifically rejected a contention that such racially derogatory language directed at others should not be considered in evaluating a racially hostile environment, stating, "[w]e are, after all, concerned with the 'environment' of workplace hostility, and whatever the contours of one's environment, they surely may exceed the individual dynamic between the complainant and his supervisor." *Ibid.* This principle is equally applicable to cases of hostile environment based on sex.

In this case, the magistrate judge found that "locker room" talk among the male technicians was not directed to plaintiff and did not occur because of her sex. App. 210-211. As in *Ocheltree*, however, much of this sex talk was demeaning to women. One of plaintiff's male co-workers acknowledged that such talk in front of women was inappropriate. App. 439-440. Another was too uncomfortable to repeat, during his deposition by a female attorney, the words that he had heard in the workplace. App. 424-426. Moreover, a female co-worker said that women were often embarrassed by such talk and that derogatory language seemed to increase when women were present. App. 385, 390. Discussions of "titty bars," whether co-workers "got any pussy" over the weekend, and similar talk treats women as sexually subservient to men, and a jury could reasonably find that it was calculated to embarrass the plaintiff and other women present when the discussions took place. See *Gallagher* v. *C.H. Robinson Worldwide, Inc.*, No. 08-3337, 2009 WL 1423967, at *6 (6th Cir. May 22, 2009) (concluding that, even though much of the offensive conduct was not directed at plaintiff, "considering the nature of the patently degrading and anti-female nature of the harassment, it stands to reason that women would suffer, as a result of the exposure, greater disadvantage in the terms and conditions of their employment than men") (citing *Oncale*, 523 U.S. at 80).

At a minimum, once plaintiff had made it clear that she objected to the vulgar language she heard in the motor repair shop, her male co-workers and supervisors were on notice that such "locker room talk" was offensive to her. But at the very meeting called to discuss the matter, one of the supervisors repeatedly referred to plaintiff as a "bitch," and her immediate supervisor said that he did not want her working in his shop. App. 554, 619. Even though plaintiff was not present at this meeting, the conduct of her co-workers and supervisors was evidence that they were "motivated by general hostility to the presence of women in the workplace," *Ocheltree*, 335 F.3d at 331-332 (quoting *Oncale,* 523 U.S. at 80), and thus was relevant to determining whether their use of derogatory and offensive language was "because of her sex." As to that question, the shop steward wrote afterward that he was "disappointed with the action (verbal) of the men in the motor shop and both supv's that were there," and that the men's conduct "showed a clear message of the prejudic[ial] practice in the electrical shop." App. 554. Moreover, plaintiff's evidence shows that the derogatory and offensive language continued even after the meeting. In these circumstances, a reasonable jury could find that the men's continued discussion of sexual topics and use of gender-based derogatory terms in plaintiff's presence – and management's failure to put a stop to such discussions and terms – occurred because of her sex and was directed at her.

The magistrate judge also discounted the display of offensive pictures of women in the workplace because it found no evidence that the pictures were directed at plaintiff. App. 214-215. As the magistrate judge acknowledged, however, such pictures "belittl[e]" women. App. 215 (quoting *Carlson* v. *C.H. Robinson Worldwide, Inc.*, No. 02-3780, 2005 WL 758602, at *39-40 (D. Minn. March 31, 2005)). Like discussions of sex in the workplace, the display of such pictures portrays women as subservient to men. Moreover, once plaintiff complained about such pictures, in 2002 and again in 2005, the men – including supervisors as well as co-workers – were on notice that she found them offensive. Yet on both occasions, the men balked at removing the pictures even after being ordered to do so. And, during her assignment to the motor repair shop, plaintiff was regularly required to sit at a table displaying such pictures while the male employees held meetings, from which plaintiff was excluded, in Gernhart's office. Under these circumstances, a reasonable jury could find that the continued display of pictures of nude and partially-clad women occurred because of plaintiff's sex and was directed at her. *Petrosino* v. *Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004) (holding that, even though both male and female employees were exposed to "sexually offensive language and graphics, * * * a reasonable jury could find this conduct more demeaning of women than men").

The magistrate judge did acknowledge that references to women as "'bitches,' 'cunts' or 'troublemakers' could be seen as sexually motivated and expressing hostility to women in the workplace." App. 211. Even if not directed toward plaintiff, the magistrate judge wrote, "they are relevant to determining whether plaintiff was subject to harassment based on her sex." App. 211 (citing *Jennings* v. *University of North Carolina*, 482 F.3d 686, 695 (4th Cir.), cert. denied, 128 S. Ct. 247 (2007); *Spriggs*, 242 F.3d at 184). But the magistrate judge discounted the incident when James Gernhart called plaintiff a "bitch" in the telephone call incident in 2001, finding that it was not "necessarily evidence of different treatment of or greater hostility to Ms. Harris 'because of' her sex." App. 213.

This Court has recognized, however, that the use of "[e]xplicit and derogatory references to women" creates a triable issue of whether hostile conduct is gender-based. *Smith* v. *First Union Nat'l Bank*, 202 F.3d 234, 242 (4th Cir. 2000); see also *EEOC* v. *Sunbelt Rentals, Inc.*, 521 F.3d 306, 314 (4th Cir. 2008) (co-workers' use of "religious epithets or other religiously derogatory terms" indicates that their conduct was based on religion). Surely the term "bitch" would not have been applied to a male employee. *Ibid.* (noting that terms "Taliban" and "towel head" "would not have been applied to a non-Muslim employee"). Thus a reasonable jury could find that Gernhart used the term "bitch" because of plaintiff's sex, particularly

in light of his subsequent conduct – *i.e.*, failing to ensure that offensive pictures were removed from the workplace in 2002 and again in 2005; failing to object when Sutton repeatedly referred to plaintiff as a "bitch" during the meeting with the shop steward in January 2005; and stating, during the same meeting, that he did not want plaintiff working in his shop. This subsequent conduct was evidence of his motivation.

The magistrate judge should have considered all of this evidence – the sex talk, the pictures, and the derogatory terms used to refer to plaintiff and other women – *together* in determining whether the harassment was based on sex. Instead, the magistrate judge parsed the evidence, considering each type of conduct in isolation. By doing so, the magistrate judge failed to recognize that it is a hostile *environment* that violates Title VII. As the Supreme Court explained in distinguishing between hostile environment claims and discrete acts of discrimination: "The 'unlawful employment practice' therefore, cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. * * * Such claims are based on the cumulative effect of individual acts." *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002); *id.* at 117 ("A hostile work environment claim is composed of a series of separate acts that

collectively constitute one 'unlawful employment practice.'"); see also *Harris*, 510 U.S. at 23 ("whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances"); *Jennings*, 482 F.3d at 696 ("[e]vidence of a general atmosphere of hostility toward those of the plaintiff's gender is considered in the examination of all the circumstances") (citing *Harris*, 510 U.S. at 19).

Therefore, the magistrate judge erred in ruling that there was not a triable issue of fact as to whether plaintiff was subjected to offensive conduct because of her sex.

B. The Magistrate Judge Erred In Finding That The Harassment Was Not Severe Or Pervasive

The magistrate judge also erred in concluding that the harassment in this case was not sufficiently severe or pervasive to be actionable. App. 216-228.

The magistrate judge correctly recited the familiar four-factor standard for determining whether, based on the totality of the circumstances, the harassment is sufficiently severe or pervasive: "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." App. 217 (quoting *Harris*, 510 U.S. at 23). The magistrate judge's application of this standard was tainted, however, by its limiting definition of the

term "because of sex," as described above. Thus, in considering the first two factors – the frequency and the severity of the conduct – the magistrate judge erroneously found that the display of offensive pictures and the "locker room talk" in the workplace were not actionable, and thus relevant only as "background" evidence. App. 219-222 & n.5. See *Gallagher*, 2009 WL 1423967, at *7-8 (criticizing district court's evaluation of the evidence because it discounted evidence of conduct that was not directed at plaintiff).

Next, as to the third factor, whether the harassment is physically threatening *or humiliating*, the magistrate judge limited the discussion to plaintiff's contentions that she had felt threatened by Gernhart's conduct in destroying shop items with a crowbar, and by the assignments she was given that involved unsafe conditions. App. 225-226. The magistrate judge simply ignored evidence that the other harassing conduct was humiliating to the plaintiff, including plaintiff's statement that she found the language used in the workplace to be "demeaning to me as a woman," App. 556; Judy Coleman's testimony that she heard "females being embarrassed in front of others," and that at times this occurred "almost every day," App. 385-386; and that Coleman often found plaintiff crying in the women's locker room because of her treatment in the workplace, App. 403-404.

Finally, the magistrate judge applied the wrong legal standard in concluding that the harassment did not unreasonably interfere with plaintiff's work performance. App. 226-227. The magistrate judge wrote that the plaintiff was required to show that "the harassment interfered with her ability to perform her work *or* significantly affected her psychological well-being." App. 227 (quoting *Paroline* v. *Unisys Corp.*, 879 F. 2d 100, 105 (4th Cir. 1989), vacated in part on other grounds, 900 F.2d 27 (4th Cir. 1990) (en banc)) (emphasis added). In applying this standard, however, the magistrate judge ignored the evidence that the harassment interfered with plaintiff's ability to work, and based the decision solely on plaintiff's failure to seek psychological treatment. App. 227.

In *Harris*, the Supreme Court expressly rejected a requirement that a plaintiff suffer serious psychological harm to make out a case of a hostile work environment:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

* * * * *

> We therefore believe the District Court erred in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury." Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor, supra*, 477 U.S. at 67, there is no need for it also to be psychologically injurious.

510 U.S. at 22. *Harris* emphasized that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. * * * But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." *Id.* at 23.

In this case, there was ample evidence that the harassment interfered with plaintiff's ability to do her job. Plaintiff stated that she found the harassment to which she was subjected "demeaning." A co-worker said that she often found plaintiff crying in the women's locker room because of the treatment to which she was subjected in the workplace. There was also evidence that she reported "moodiness, mental fatigue, nervous energy and some panic attacks," as well as "insomnia, * * * stomach aches, and occasional crying spells which ha[d] led her to miss some 20 days of work in the past year," and that these effects interfered with her enjoyment of life. App. 606.

Further, the question whether plaintiff had suffered psychological harm was a disputed question of fact. Plaintiff's expert concluded that she suffered from major depression as a result of her treatment at work, beginning with the incident in which Gernhart called her a "bitch." While the physician employed by the defendants disagreed and found no "major mental illness," App. 608, he acknowledged that she reported "moodiness, mental fatigue, nervous energy and some panic attacks," as well as other adverse effects. App. 606.

The magistrate judge therefore erred in ruling, as a matter of law, that there was not even a triable issue as to whether the conduct to which plaintiff was subjected was sufficiently severe or pervasive as to create an abusive work environment.

CONCLUSION

The district court's grant of summary judgment to defendants with respect to plaintiff's hostile work environment claim should be reversed.

Respectfully submitted,

LORETTA KING
Acting Assistant Attorney General

/s/ Linda F. Thome
DENNIS J. DIMSEY
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4706

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains 6,891 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ Linda F. Thome
LINDA F. THOME
Attorney

Date: June 10, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users. The following participants in this case will be served by the CM/ECF system:

Joyce E. Smithey
Rifkin, Livingston, Levitan & Silver, LLC
225 Duke of Gloucester Street
Annapolis, Maryland 21401

Justin S. Conroy
Baltimore City Department of Law
City Hall
100 North Holliday Street
Baltimore, Maryland 21202

I further certify that on June 10, 2009, I mailed two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE to the following non-CM/ECF participant, by first class mail, addressed as follows:

Cheryl Simpson-Parker
Baltimore City Department of Law
City Hall
100 North Holliday Street
Baltimore, Maryland 21202

/s/ Linda F. Thome
LINDA F. THOME
Attorney