No. 03-887

In the Supreme Court of the United States

SANDRA VASQUEZ, PETITIONER

v.

JOHN SNOW, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys

Department of Justice
Washington, D.C. 20530-001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Secretary of the Department of Treasury was entitled to judgment as a matter of law on petitioner's claim that the agency retaliated against her for exercising her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

2. Whether the Secretary was entitled to judgment as a matter of law on petitioner's hostile work environment claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not published in the *Federal Reporter* but is *reprinted in* 75 Fed. Appx. 275, and is *available in* 2003 WL 22121028. The opinion of the district court (Pet. App. 2a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2003. The petition for a writ of certiorari was filed on December 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 1995, petitioner Sandra Vasquez began working as a computer operator at the Financial

Management Service (FMS) in the Department of Treasury. Dennis Marek was her supervisor. 1 Tr. 72. In 1998, petitioner was selected as lead operator on Marek's shift and was responsible for distributing work to other computer operators. *Id.* at 20-21.

During her career at FMS, petitioner received regular promotions and salary increases: She began as a GS-7, Step 1 employee, and rose to GS-10, Step 2; her salary rose from $24,038 to $37,582 per year. 1 Tr. 70-71; Exh. D-4. Petitioner also received ten monetary awards totaling $3000.80. 1 Tr. 73-74; Exh. D-6. Petitioner's supervisors rated her performance "outstanding," with the exception of her first rating, when she received an "excellent." 1 Tr. 73-74; 2 Tr. 27. While employed at FMS, petitioner attended seven in-house training courses. Exh. D-8.

In 1998, FMS provided off-site training for one lead operator and a computer operator from another shift. 1 Tr. 76-77. Neither petitioner nor anyone else from Marek's shift attended the training. *Ibid.*; Exh. D-13. Petitioner requested consideration for the next out-of-town training, and Marek forwarded her request to his supervisor. *Ibid.*

In February 1999, petitioner applied for another FMS position. 2 Tr. 28-30. That same month, however, petitioner announced that she was leaving FMS, 1 Tr. 69, 79; Exh. D-10, at 7, and petitioner withdrew from consideration for the FMS position before her interview. 1 Tr. 70; 2 Tr. 21-22, 29-30. In July 1999, petitioner applied for a position at the Department of Veterans Affairs. 1 Tr. 70, 83.

In that same month, a computer operator other than petitioner was selected for an out-of-town training on claim processing because that person had experience in that area and had volunteered to work on the midnight

shift during tax season. See Exh. D-10, at 9-10, 28-30; 2 Tr. 46. Petitioner was upset when she heard that she had not been selected. 1 Tr. 83. The next day, petitioner contacted an EEO counselor. 1 Tr. 64. She also requested that the FMS personnel supervisor immediately transfer her. 1 Tr. 83-84; Exh. D-14. FMS agreed to transfer petitioner, but she retracted her request. Exhs. D-14, D-15; 1 Tr. 35, 85.

In September 1999, petitioner filed a formal complaint of discrimination with the agency. 1 Tr. 64, 84. The following day, petitioner applied for an FMS vacancy for a Computer Specialist position. 1 Tr. 70. In November 1999, Marek signed a performance evaluation of petitioner giving her a summary rating of "outstanding." 1 Tr. 110-111. Shortly thereafter, petitioner resigned, claiming constructive discharge. 1 Tr. 55-56. The next day, petitioner began working for the Department of Veterans Affairs at a higher graded position with greater pay. 1 Tr. 71-72.

2. In August 2001, petitioner filed suit in federal district court, alleging that FMS retaliated against her for filing an EEO complaint, and that she was subject to a hostile work environment on account of her national origin during her career at FMS. The case went to trial. At the close of petitioner's evidence, the government moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The district court granted the motion, and entered judgment for the Secretary. Pet. App. 2a. The court found no evidence of "actionable hostile work environment so pervasive that it affected the employment relationship." *Id.* at 4a. The court further found the alleged retaliation did not have any "employment result." *Id.* at 5a.

3. In an unpublished, per curiam opinion, the court of appeals affirmed the district court's judgment without explanation. Pet. App. 1a.

ARGUMENT

1. Petitioner contends that the Court should grant review to resolve a conflict in the circuits on whether a Title VII plaintiff must show an ultimate employment action in order to state a retaliation claim. According to petitioner, two circuits require proof that retaliation has taken the form of an ultimate employment decision, while six other circuits permit proof that retaliation has taken the form of an adverse employment action that falls short of an ultimate employment decision. Review of that question is not warranted in this case for three reasons.

First, the court of appeals' unpublished and nonprecedential decision in this case does not present the question whether retaliation must take the form of an ultimate employment decision. The court of appeals affirmed *without explanation or opinion* a district court judgment in favor of the Secretary on petitioner's retaliation claim. It did not indicate that it was applying the "ultimate employment decision" rule that petitioner now seeks to challenge. Indeed, even petitioner is left to suggest that "it must be assumed" that the panel was implicitly relying on prior Fifth Circuit precedents embracing the "ultimate employment decisions" test. Pet. 10. Nor did the district court apply an "ultimate employment decision" test; rather, it ruled against petitioner based on a finding that the alleged retaliation did not have "an employment result." Pet. App. 5a. In any event, whatever rule the district court applied, the court of appeals' unpublished disposition only affirmed the district court's judgment, not its reasoning. And

the court of appeals did not itself announce any standard for its rejection of petitioner's retaliation claim.

Second, it is unclear that there is any real difference in practice between the "ultimate employment decision" standard to which petitioner objects and the "adverse employment action" standard that petitioner contends should be adopted. As petitioner concedes, see Pet. 11 n.3, while the Eighth Circuit has agreed with the Fifth Circuit and adopted the "ultimate employment decision" standard, that court has defined an ultimate employment decision to include any "tangible change in duties or working conditions that constituted a material employment disadvantage." *Manning* v. *Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). The Eighth Circuit has also held that an ultimate employment decision includes reduction of duties, actions that disadvantage or interfere with the employee's ability to do his or her job, negative reviews, and reprimands. *Kim* v. *Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997). Those descriptions of the applicable standard do not differ in any appreciable way from the standard that petitioner favors.

Third, petitioner has failed to show that she would benefit from the adverse employment action standard as it has been applied by the six circuits on which she relies. Petitioner relies on two forms of alleged retaliation. First, she alleges that her supervisor engaged in various acts of harassment, such as failing to talk to her, treating a different person as the lead operator, and increasing the level of scrutiny of her decisions. Pet. 6-7. Second, she alleges that two co-employees wrote e-mails to which she objected: one of the e-mails alleged that she had engaged in discrimination, the other contained offensive language. In petitioner's view, management did not respond adequately to those e-mails.

Ibid. None of the circuits on which petitioner relies has held that such conduct is sufficient to make out a retaliation claim.

The Tenth Circuit has held that "co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute [an] 'adverse employment action' for purposes of a retaliation claim." *Gunnell* v. *Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998)). But the conduct discussed in *Gunnell* involved a co-worker's institution of a malicious prosecution action, at the employer's behest, against the employee. *Id.* at 1264 (citing *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 986-987 (10th Cir. 1996)). The court did not suggest that two co-worker e-mails, one complaining about discrimination, the other offensive, would be sufficiently severe to constitute an adverse employment action.

Furthermore, the Tenth Circuit held that "an employer can only be liable for co-workers' retaliatory harassment where its supervisory or management personnel either (1) orchestrate the harassment or (2) know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers' actions." *Gunnell*, 152 F.3d at 1265. Petitioner did not allege that management orchestrated co-worker harassment, and she failed to show that management condoned co-worker harassment. Indeed, petitioner acknowledges that her supervisor agreed that she did not discriminate against the co-worker who wrote the first e-mail, see Pet. 6, and the record shows that after petitioner complained about the e-mails, the Director of FMS's Austin Financial Center sent an e-mail to all employees stating that "[t]his is to remind all Austin Financial Center employees that we are required to deal with others, especially our coworkers, in a courteous and businesslike manner," and that "[a]ll inter-

personal dealings within this center, including, but not limited to, e-mails, conversations, telephone calls and correspondence, MUST comply with the standards." Exh. D- 23, 1 Tr. 103-104.

Although the Ninth Circuit has held that retaliation can include harassment by co-workers, the court made clear that Title VII protects against only such co-worker retaliation "that rises to the level of an adverse employment action." *Fielder* v. *UAL Corp.*, 218 F.3d 973, 985 (9th Cir. 2000), vacated on other grounds, 536 U.S. 919 (2002). The alleged co-worker retaliation in the present case did not rise to that level.

Nor does the First Circuit's decision in *Wyatt* v. *City of Boston*, 35 F.3d 13 (1994), support petitioner's claim that she suffered actionable retaliation. In that case, the court stated in dicta that, apart from discharge, "other adverse actions are covered by" Title VII's anti-retaliation provision, including "toleration of harassment by other employees." *Id.* at 15-16. But the court did not suggest that two co-employee e-mails are sufficient to establish actionable retaliation, and, as discussed above, petitioner failed to establish that there was "toleration" by management of any harassment. Moreover, the plaintiff in *Wyatt* alleged that he had been discharged in retaliation for filing an EEO complaint, and therefore alleged an ultimate employment decision as part of his prima facie case. *Id.* at 14, 16.

The Seventh Circuit has held that "significantly diminished material responsibilities" can constitute an adverse action. *Flaherty* v. *Gas Research Institute*, 31 F.3d 451, 456 (7th Cir. 1994)). But petitioner has failed to show that her material responsibilities were significantly diminished after she initiated the EEO process. Although she alleged that her supervisor treated her

differently, she did not present evidence that her actual duties, position, or benefits changed in any material respect.

In *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998), the plaintiff presented evidence that (1) she was improperly listed as a no-show on a day she was scheduled to have off, and that when she brought this to her manager's attention he required her to work without a lunch break; (2) she received two written reprimands and was suspended for one day from employment; (3) her manager solicited negative comments about her; (4) when she stated that she intended to call headquarters to ask why she had not been scheduled to work on a particular day, an assistant manager threatened to shoot her in the head; and (5) when she had an allergic reaction at work, an assistant manager needlessly delayed authorizing necessary medical treatment. *Id.* at 1455. The Eleventh Circuit held that these actions "*considered collectively* are sufficient to constitute prohibited discrimination" under Title VII's anti-retaliation provision. *Id.* at 1456 (emphasis added). The actions about which petitioner complains do not remotely approach the treatment of the plaintiff in *Wideman*.

Petitioner's reliance on *Von Gunten* v. *Maryland*, 243 F.3d 858, 866 (4th Cir. 2001), is similarly misplaced. There, the Fourth Circuit held that in order to establish actionable harassment, a plaintiff must prove that she has suffered an adverse employment result that has caused a change in the terms and conditions of her employment. *Id.* at 867-870. Applying that principle, the Fourth Circuit ruled that allegations that plaintiff suffered from greater scrutiny from management after the filing of an EEO complaint, that other employees were not similarly scrutinized, and that the employer

did not sufficiently address her complaints was not evidence of an adverse employment result or a change in the terms and conditions of her employment. *Id.* at 869. Petitioner's allegations are similar to the allegations rejected in *Von Gunten.* As in that case, petitioner failed to show any adverse employment result or change in the terms or conditions of her employment.

In sum, because there is no indication that the Fifth Circuit applied the "ultimate employment decision" standard in this case, because that standard may not differ in practice from the adverse employment action standard that petitioner favors, and because petitioner has not shown that she would have stated a claim in any other circuit, review of petitioner's first question is not warranted.

2. Petitioner also contends (Pet. 16-17) that certiorari is also warranted to decide whether emotional distress damages are sufficient to prove a hostile work environment claim under Title VII. Review of that question is not warranted.

Under this Court's decisions, an employee's showing that she has suffered emotional distress is not sufficient by itself to establish actionable harassment. An employee must show that conditions were objectively so severe and pervasive as to result in a change in the terms and conditions of employment. *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993). To determine whether an environment is sufficiently hostile or abusive to be cognizable under Title VII, courts must look at all the circumstances, including "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." *Id.* at 23.

Reviewing those considerations, the district court concluded that petitioner failed to establish actionable harassment. The court stated that "I see no evidence in this record of actionable hostile work environment so pervasive that it affected the employment relationship." 2 Tr. 122. The evidence fully supports the district court's finding.

The court rejected petitioner's allegation that the agency discriminated against her by not selecting her for off-site training in 1999. 2 Tr. 121. The court explained "Why would anybody send [petitioner] to training after she started in February of '99, indicating she was seeking other employment? It would be irresponsible to send her to training at that point in time." *Ibid.* And, as the record shows, the training was offered to another computer operator because of her experience processing claims, and as a reward for volunteering to work on the midnight shift during tax season. Exh. D-10, at 9-10, 28-30; 2 Tr. 46.

As the district court judge further concluded, the evidence is "without dispute [that petitioner] continued on, did a good job, and by all testimony, including [her supervisor's], was an outstanding employee." 2 Tr. 122. Petitioner "got all the raises that she was entitled to. She got the promotions that she sought, and she got a better job when she left." 2 Tr. 125. In addition, the district court found that "when I look at what the case law is across the country," petitioner's "evidence of the [alleged harassment by] other employees" is "just not sufficient for a prima facie case." 2 Tr. 125-126.

Thus, the district court correctly found that petitioner failed to demonstrate that she was subjected to an actionable hostile work environment, and the court of appeals correctly affirmed that finding. In any event,

that fact-bound determination in an unpublished decision does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys

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