NO. 05-1550

IN THE
Supreme Court of the United States

FLYING J INC.,

Petitioner,

v.

KYLE KEETON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

R. GARY WINTERS
Counsel of Record
MCCASLIN, IMBUS
& MCCASLIN
632 Vine St., Ste. 900
Provident Bank Bldg.
Cincinnati, OH 45202
(513) 421-4646

GREGORY A. BECK
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th St., NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondent

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QUESTION PRESENTED

Should this Court grant, vacate, and remand the decision below for further consideration in light of the Court's recent decision in *Burlington Northern v. White*, where the rationale for Petitioner's pre-*White* GVR request was expressly rejected by the Court in *White*?

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STATEMENT OF THE CASE

Flying J operates a chain of travel plazas catering to interstate travelers. *Keeton v. Flying J*, 429 F.3d 259, 261 (6th Cir. 2005). Respondent Kyle Keeton worked for Flying J as an associate restaurant manager assigned to the Walton, Kentucky plaza. *Id.* At the start of his employment, Flying J orally committed to keep Keeton at the Walton location for five years. *Id.*

Keeton worked at the Walton travel plaza between June and December 2001. During that time, he was never disciplined formally or informally and was never warned that his job was in jeopardy. *Id.* Keeton's immediate supervisor in Walton was Judy Harrell, the general manager of the Walton restaurant. *Id.* In December 2001, Harrell began making sexual advances toward Keeton. *Id.* When Keeton rejected the advances, Harrell fired him, explaining, "you're not supporting me." *Id.*

Keeton complained to district manager Jamal Abdalla, who told him he could maintain his position as associate manager if he transferred to the Flying J location in Cannonsburg, Kentucky, a town 120 miles away. *Id.* Keeton moved to Cannonsburg, but, because his wife suffered from a debilitating back problem, she could not move with him. *Id.* As a result, Keeton was forced to maintain separate residences for himself and his wife. *Id.* at 261-62.

In January 2001, Keeton resigned. *Id.* at 262. He then sued Flying J under Title VII of the Civil Rights Act of 1964, claiming sexual harassment, retaliation, and constructive discharge. *Id.* In his sexual harassment claim, Keeton alleged both that he suffered from sexual harassment resulting in a tangible employment action and, in the alternative, that he suffered from sexual harassment resulting in a hostile work environment. *Id.*

The district court denied Flying J's motion for summary judgment. *Id.* The court also denied Flying J's motion for judgment as a matter of law after Keeton presented his case to a jury and again after Flying J presented its defense. *Id.* The jury returned a verdict for Keeton and awarded $15,000 in compensatory damages for emotional suffering. *Id.* Importantly, the jury found Flying J liable for sexual harassment resulting in a tangible employment action, but not for retaliation or constructive discharge. *Id.* Because of the jury's verdict, the jury form did not require it to decide whether Keeton had also suffered sexual harassment resulting in a hostile work environment. *Id.* Thus, Keeton's claim for sexual harassment resulting in a tangible employment action is the only claim still at issue in this case.

After the verdict, Flying J renewed its motion for judgment as a matter of law, and the court again denied the motion. *Id.* Flying J appealed to the Sixth Circuit, arguing that a lateral transfer to a distant office could not give rise to liability for discrimination under Title VII. *Id.* at 263. The Sixth Circuit disagreed and upheld the jury's verdict. *Id.* at 263-66. In doing so, the court applied the standard set forth by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). *Keeton*, 429 F.3d at 262-63. In *Ellerth*, the Court held that an employer would be strictly liable for sexual harassment if an employee could show that the harassment resulted in a "tangible employment action." *Ellerth*, 524 U.S. at 753-54. Examining its own case law interpreting *Ellerth*, the Sixth Circuit determined that it had never rejected the proposition that a lateral transfer to a distant location could satisfy this test. *Keeton*, 429 F.3d at 264-65. The court held that when sexual harassment results in a lateral transfer to a town 120 miles distant, a jury could reasonably find an employer liable under Title VII. *Id.* at 265.

The Sixth Circuit denied rehearing *en banc*, and Flying J filed a petition for a writ of certiorari in this Court. Flying J asks for a GVR to give the Sixth Circuit an opportunity to consider the Court's recent decision in *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). At the time the petition was filed, a decision in *White* was still pending, so Flying J could only assume that the decision would ultimately affect the outcome in this case. Since then, however, the Court has issued an opinion in *White* that distinguishes Title VII's anti-retaliation provision from its substantive provision, holding that the two provisions have distinct language and purposes and are therefore "not coterminous." *Id.* at 2414.

In its petition, Flying J makes three arguments: 1) an issue similar to the issue before the Court in *White* is at issue in this case, 2) there is a conflict among the courts of appeals regarding the legal standard for a tangible employment action, and 3) the Sixth Circuit's decision in this case is contrary to *Ellerth* and its own precedent. With the benefit of the opinion in *White*, it is clear that Petitioner's arguments are wrong.

REASONS FOR DENYING THE WRIT

A. This Court's Decision in *Burlington Northern v. White* Did Not Alter the Applicable Standard for Title VII Harassment Claims.

Petitioner's first argument in favor of a GVR is that the Sixth Circuit might benefit from this Court's decision in *White*. A GVR is appropriate to give a lower court the benefit of an intervening decision of this Court when the intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Because this Court in *White* dealt only with Title VII's anti-retaliation provision, as opposed to the substantive provision at issue in this case, *White* has no bearing on the correctness of the decision below. In light of the Court's opinion in *White*, a GVR here would serve no purpose.

Under Title VII of the Civil Rights Act of 1964, an employer may not "discriminate against" any individual based on that individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). In *Ellerth*, the Court surveyed decisions from the courts of appeals and found that those courts that had considered the question had found employers liable when a discriminatory act results in a "tangible employment action." 524 U.S. at 760-61. Relying on these cases, the Court defined a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761. The Court did not define the outer

boundaries of the substantive discrimination provision, but rather established the consequences for an employer when the provision has been violated in a sexual harassment case. Specifically, the Court held that "[w]hen a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." *Id.* at 753-54.

Aside from the Act's substantive discrimination provision, a separate anti-retaliation provision provides that an employer may not "discriminate against" an employee or job applicant because that individual "opposed any practice" that Title VII forbids or "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). Prior to *White,* the courts of appeals were split on the meaning of the term "discriminate against" in this provision. *White*, 126 S. Ct. at 2410-11. The Sixth Circuit was one of several circuits that held "discriminate against" had the same meaning in both the substantive anti-discrimination provision, § 2000e-2(a), and the anti-retaliation provision, § 2000e-3(a). *Id.* at 2410. Other circuits had adopted a more restrictive standard for retaliation claims, requiring an "ultimate employment decision" that limited actionable conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (quotation omitted); *see also Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). Still other circuits provided a looser standard, requiring a plaintiff to show only that the employer's challenged action would have been material to a reasonable employee. *Rochon v. Gonzales*, 438 F.3d 1211, 1217-19 (D.C. Cir. 2006); *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

As noted above, the only claim still at issue in this case is Keeton's claim for sexual harassment resulting in a tangible employment action under Title VII's substantive provision, § 2000e-2(a). In contrast, the only claim at issue in *White* was an anti-retaliation claim under § 2000e-3(a). The question before the Court in *White* was, therefore, the proper standard to apply to a retaliation claim and, in particular, whether that standard was the same or different from the standard for discrimination claims set forth in *Ellerth*. Petitioner necessarily based its argument for a GVR on the assumption that the Court would conclude that the standards under the discrimination and retaliation provisions are the same; otherwise, this Court's clarification of the standard under the retaliation provision would have no bearing on the correctness of the Sixth Circuit's decision in this case.

Now that this Court has issued its decision in *White*, it is clear that Petitioner's assumption was wrong. In *White*, the Court resolved the circuit split over the Act's anti-retaliation provision by holding that "Title VII's substantive provision and its anti-retaliation provision are not coterminous." 126 S. Ct. at 2414. As the Court noted, the two provisions "differ not only in language but in purpose as well." *Id.* at 2412. Although "[t]he substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status," "[t]he anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct." *Id.* Adopting the standard used by the Seventh and D.C. Circuits, the Court concluded that the retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." *Id.* at 2409.

Given the fundamental distinction between a substantive discrimination claim and a retaliation claim, the Court in *White* would not have had any reason to overrule or modify *Ellerth*'s holding on the proper standard for strict liability in substantive discrimination cases, and it did not do so. Indeed, *White* noted that "*Ellerth* did not mention Title VII's anti-retaliation provision at all." *Id.* at 2413. For this reason, nothing in *White* casts any doubt on the correctness of the standard applied by the Sixth Circuit in this case.[1]

Furthermore, *White* casts no doubt on the Sixth Circuit's application of the law to the facts. The Court in *White* held only that a lateral transfer was sufficient to trigger the Act's anti-retaliation provision, but gave no indication that such a transfer would fail to satisfy the more stringent requirements of Title VII's substantive discrimination provision. Every judge on the *en banc* Sixth Circuit that applied the stricter standard in *White* found the standard satisfied there, as did Justice Alito in his concurring opinion in this Court. *Id.* at 2421-22 (Alito, J., concurring). Petitioner claims that lateral transfers are a mere inconvenience and a matter of personal preference that do not trigger Title VII liability, but the *White* majority rejected the contention that the lateral transfer in that case was a trivial harm or a minor annoyance, citing case law interpreting Title VII's substantive discrimination provision. *Id.* at 2415. Thus, the decision in *White* is consistent with the conclusion that a lateral transfer would satisfy the standard for *either* a discrimination or an anti-retaliation claim. Moreover, even assuming that there were some question as to whether Title VII's anti-

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[1]Because *White* resolved the split in the circuits on the proper standard of review, Petitioner's second argument, that there is a split regarding the proper standard, is no longer relevant.

discrimination provision could support a claim based on a lateral transfer, a GVR based on *White* would not assist the Sixth Circuit in resolving that question because, as explained above, *White* concerned the anti-retaliation provision. For this reason as well, the petition should be denied.

B. The Court Below Properly Applied Controlling Precedent.

Petitioner also urges this Court to issue a GVR because it contends that the decision below is contrary to both *Ellerth* and Sixth Circuit precedent. *Ellerth*, however, was decided in 1998 and is not an intervening decision that would justify a GVR in this case. Furthermore, the Sixth Circuit has already considered and rejected Petitioner's arguments about the correct application of its precedent to the facts here.

In *Ellerth*, this Court held that an employer's "tangible employment action" constitutes a change in the terms and conditions of employment that is actionable under Title VII's substantive discrimination provision. *Ellerth*, 524 U.S. at 753-54. In adopting the tangible employment action standard, the Court relied on decisions from the courts of appeals, including the Sixth Circuit in *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996). *See* 524 U.S. at 761. *Kocsis* held that a plaintiff must show "a materially adverse employment action" to demonstrate actionable conduct under Title VII. 97 F.3d at 885-86.[2] Neither *Ellerth* nor *Kocsis* set forth an exhaustive list of actions that satisfy the relevant standard. *Kocsis* held merely

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[2]The Sixth Circuit uses the terms "tangible employment action" and "adverse employment action" interchangeably. *Keeton*, 429 F.3d at 263 n.1.

that such actions might include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id.* at 886 (quotation omitted).

Carefully examining both *Ellerth* and its own case law, the Sixth Circuit in this case noted that "reassignments without salary or work hour changes do not *ordinarily* constitute adverse employment decisions in employment discrimination claims." *Keeton*, 429 F.3d at 264 (quoting *Kocsis*, 97 F.3d at 885). Nevertheless, the court noted that it had not precluded consideration of such factors as commuting distance or relocation, and concluded that, when sexual harassment results in a lateral transfer to a town 120 miles distant, a jury could reasonably conclude that the employee has suffered a materially adverse employment action. *Id.* at 265. The court found this case to be an instance where "other indices that might be unique to a particular situation" justify the jury's finding of liability. *Id.* (citing *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999)). Because the court already fully considered both *Ellerth* and its own case law, a GVR would serve no useful purpose. There is nothing further for the Court to consider.

Petitioner rehashes the same arguments already considered and rejected by the Sixth Circuit below. It quotes the court's statement in *Kocsis* that a change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities" to give rise to liability under Title VII. *Kocsis*, 97 F.3d at 886. Relying heavily on the Sixth Circuit's prior decision in *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002), Petitioner argues, as it argued in the Sixth Circuit, that a lateral transfer to a different

location can never constitute an adverse employment action. The Sixth Circuit, however, fully considered and rejected this argument, citing *Policastro*'s statement that "increased distance from home to a new position is a factor in determining whether a constructive discharge has occurred." *Keeton*, 429 F.3d at 265. The court also relied on its prior decision in *White*, where the *en banc* Sixth Circuit upheld Title VII liability for a lateral transfer (albeit under a stricter standard than necessary) to a position that was dirtier, more arduous, and less prestigious than the employee's prior position. *White v. Burlington Northern*, 364 F.3d 789, 803-04 (6th Cir. 2004).

Petitioner contends that "Flying J's case involves change even more minor than the slight change in job responsibilities and prestige of *White*." Pet. 16. In doing so, Petitioner minimizes the impact of the transfer—and the impact of the employer's actions as viewed by this Court in *White*— stating that "[t]he only aspect of Mr. Keeton's job that changed was that he would move to, and be working in, a different town." *Id.* 9. However, a transfer to a different town 120 miles distant (approximately the distance from Washington, D.C. to Philadelphia) is more than a mere inconvenience. An employee facing such a transfer as a result of sexual harassment would either be forced to endure the time and expense of a prolonged and arduous daily commute or else would have to uproot himself from his community to move to the new location. In this case, for example, the transfer forced Keeton to live separately from his wife. Any reasonable employee would find this situation to be a "materially adverse" change in the terms of his employment—and, thus, reasonable jurors should be entitled to find this to be the case.

Regardless of the merits of Petitioner's arguments, it is enough that the Sixth Circuit has already fully considered and

rejected them. This Court has recognized that liability under Title VII is necessarily a fact-dependent inquiry. *See Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."). *Cf. White*, 126 S. Ct. at 2415-16. After fully considering Petitioner's arguments, the Sixth Circuit concluded that the unique facts of the case satisfy the standard set forth in both *Ellerth* and its own case law. The court has already denied *en banc* review, and there is no reasonable likelihood that it would reconsider its decision on remand. At most, Petitioner's argument amounts to a claim that the Sixth Circuit incorrectly applied its own precedent. The correct application of Sixth Circuit precedent, however, is a question for that court, not this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

R. Gary Winters
Counsel of Record
McCaslin, Imbus & McCaslin
632 Vine St., Ste. 900
Provident Bank Bldg.
Cincinnati, OH 45202
(513) 421-4646

Gregory A. Beck
Brian Wolfman
Public Citizen Litigation Group
1600 20th St., NW
Washington, DC 20009
(202) 588-7713

Counsel for Respondent

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