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**CROSSING JORDAN: HOW A BARTENDING CRISIS REVOLUTIONIZED¹
THE LAW OF WORKPLACE HARASSMENT**

Robin R. Cockey and Laura E. Hay*

INTRODUCTION

Americans work more than the inhabitants of any other developed country. However, because our legal system is based upon the common law, the laws that govern our workplace can depend upon such vagaries as the time it takes to make a cocktail. The case of *Boyer-Liberto v. Fontainebleu Corp.* illustrates this surprising but indisputable proposition.² According to online mixology accounts, a “Hula Hula” is comprised of equal parts gin, curacao, and orange juice.³ Although there appears to be widespread agreement it should take about thirty seconds to make a Hula Hula, the laws barring workplace harassment, and the laws protecting workers who complain about it, changed significantly when a bartender in Ocean City, Maryland complained that a Hula Hula takes too long to make.

The chain of events set in motion by this bartending crisis culminated in *Boyer-Liberto v. Fontainebleu Corp.*, a landmark decision of the United States Court of Appeals for the Fourth Circuit that made it clear workers could regard even a single incident of targeted abuse as intolerable, and could complain about it with impunity.⁴ Thus, from small beginnings came great consequences for countless members of the American workforce.

This work sets out to demonstrate the inherently random nature of the American legal system, in which the right facts must combine with the right judges on the right day in order to produce progress. Part I will discuss the factual background of *Boyer-Liberto*.⁵ Part II will give an overview of workplace harassment law in the Fourth Circuit prior to *Boyer-Liberto*.⁶ Parts III and IV will address in detail the progression of *Boyer-Liberto*, and how it could easily have been

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¹ Perhaps a bit of hubris: The *Boyer-Liberto* majority felt they were simply following long-standing Supreme Court precedent, and said so. See *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015) (en banc).

² *Id.*

³ *Hula Hula or Hoola Hoola Cocktail*, DIFFORD’S GUIDE, <https://www.diffordsguide.com/cocktails/recipe/2448/hula-hula-or-hoola-hoola-cocktail> (last visited Nov. 4, 2017).

⁴ *Boyer-Liberto*, 786 F.3d 264.

⁵ See *infra* Part I.

⁶ See *infra* Part II.

resolved under *Jordan v. Alternative Resources Corp.*,⁷ the then controlling case law.⁸ Part V will offer a critical analysis of the majority, dissenting, and concurring opinions of *Boyer-Liberto*, examining how the majority's approach is appropriate and why the dissent erred in its reasoning.⁹ Lastly, Part VI will explore the future of workplace harassment law in the Fourth Circuit and how the unresolved questions created by this case could be addressed moving forward.¹⁰

I. FACTUAL BACKGROUND OF *BOYER-LIBERTO V. FONTAINEBLEU CORP*

The night of September 14, 2010, a traveler came into one of the many bars of the Clarion Hotel in Ocean City, Maryland.¹¹ After some back-and-forth with the waitress, Reya Boyer-Liberto, about what drink to order, the traveler decided to try a "Hula Hula," one of the specialty cocktails listed in the bar menu.¹² Ms. Boyer-Liberto hurried to fill the order, anxious to avoid causing her customer more frustration.¹³

Ms. Boyer-Liberto was experienced in the hospitality business, but had only worked at the Clarion for one month.¹⁴ She had apparently done well, as she had no disciplinary record, and – critically – had remained on the staff after the busy summer season ended on Labor Day.¹⁵

⁷ 458 F.3d 332 (4th Cir. 2006), *rev'd en banc*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015).

⁸ *See infra* Parts III and IV.

⁹ *See infra* Part V.

¹⁰ *See infra* Part VI.

¹¹ The account given here is drawn primarily from the facts presented by *Boyer-Liberto* in defending a Motion for Summary Judgment as recounted by the Fourth Circuit. 786 F.3d at 269–71. Because the Summary Judgment standard requires the court to construe the facts in the light most favorable to the non-moving party, *i.e.* Ms. Boyer-Liberto, it is important to remember that the Defendants would no doubt tell the story rather differently. *Id.* at 269 n.1.

¹² *Id.* at 269.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Brief of Petitioner-Appellant at 8, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (No. 13-1473).

But this night proved her Waterloo. Her troubles began when the bartender refused to make the drink, claiming it was too time consuming.¹⁶ Undaunted, Ms. Boyer-Liberto quickly dashed through the adjoining kitchen to reach another bar manned by a more compliant bartender, and then, Hula Hula in hand, she made her way back through the kitchen.¹⁷ As she weaved through cooks and dishwashers, she was accosted by Trudi Clubb, the Food and Beverage Manager.¹⁸ Ms. Clubb had apparently been trying for some time to get Ms. Boyer-Liberto's attention, and her first audible barrage was "Hey, girl that can't hear."¹⁹ Ms. Clubb berated Ms. Boyer-Liberto for cutting through the kitchen; she raised her voice and drew so close she sprayed saliva on Ms. Boyer-Liberto, who could feel Ms. Clubb's breath on her face.²⁰ As Ms. Boyer-Liberto walked away, she heard Ms. Clubb yell, "I am going to get you ... I am going to make you sorry."²¹ According to Ms. Boyer-Liberto, Ms. Clubb concluded by muttering, "Damn [or dang] porch monkey."²²

Ms. Clubb is White, and Ms. Boyer-Liberto African-American. Unamused by Ms. Clubb's tirade, Ms. Boyer-Liberto complained to the Clarion management office the following day.²³ She had barely begun her account to the hotel's Food and Beverage Director, Richard Heubeck, when Ms. Clubb burst in and announced, "I need to speak to you, little girl."²⁴ When Ms. Boyer-Liberto remonstrated she was meeting with Mr. Heubeck, Ms. Clubb retorted, "I am more important," and led her out of the office to an adjoining table.²⁵ After the women had seated themselves, Ms. Clubb reprised her lecture of the night before, castigating Ms. Boyer-Liberto for passing through the

¹⁶ See *Boyer-Liberto*, 786 F.3d at 269.

¹⁷ *Id.*

¹⁸ See *id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Boyer-Liberto*, 786 F.3d at 270.

²² *Id.* The record is unclear as to whether Ms. Clubb referred to Ms. Boyer-Liberto as a "dang porch monkey" or "damn porch monkey." *Id.* The slur refers to the negative stereotype of a lazy African American. See Jonathon Green, *Porch*, GREEN'S DICTIONARY OF SLANG, <https://greensdictofslang.com/entry/hugtd2y#i4w5tlq> (last visited Nov. 7, 2017). Ms. Clubb denies using the term "porch monkey." *Boyer-Liberto*, 786 at 270.

²³ *Boyer-Liberto*, 786 at 270.

²⁴ *Id.*

²⁵ *Id.*

kitchen and angrily shouting, “I’m gonna get you. I’m gonna go to [hotel owner] Dr. [Leonard] Berger.”²⁶ According to Ms. Boyer-Liberto, as the women stood to leave, Ms. Clubb looked directly at her and again muttered, “porch monkey.”²⁷

This time, Ms. Boyer-Liberto formally complained to the Clarion Human Resources Director, Nancy Berghauer.²⁸ A write-up of her complaint was sent to General Manager Mark Elman, who then personally met with Ms. Boyer-Liberto. The complaint also found its way to the desk of Dr. Berger, who directed Mr. Elman to fire Ms. Boyer-Liberto.²⁹ Mr. Elman, Mr. Heubeck and Ms. Berghauer all met with Ms. Boyer-Liberto and dismissed her from her position on September 21, five days after her formal complaint.³⁰ Meanwhile, Ms. Clubb was issued a written warning, even though she denied having called Ms. Boyer-Liberto a “porch monkey” on either occasion.³¹

Unfortunately, Ms. Boyer-Liberto’s run of bad luck was not over. After lodging a harassment and retaliation complaint with the Equal Employment Opportunity Commission (“EEOC”) and then filing suit,³² she found herself in a head-on collision with an inauspicious decision entered five years before by the United States Court of Appeals for the Fourth Circuit. That case, *Jordan v. Alternative Resources Corp.*,³³ was commonly viewed as prohibiting single-incident workplace harassment claims. This view was adopted

²⁶ *Id.*

²⁷ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 270 (4th Cir. 2015) (en banc).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Brief of Petitioner-Appellant at 3–4, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (No. 13-1473).

³¹ *Boyer-Liberto*, 786 F.3d at 270.

³² Ms. Boyer-Liberto asserted claims under both Title VII of the Civil Rights Act and 42 U.S.C. §1981. *Id.* at 271. Her Title VII claims, for workplace harassment and retaliatory discharge, were asserted against Fontainebleau Corporation, the corporation that owned the hotel. *Id.* Her §1981 claim, for retaliatory discharge, was asserted both against Fontainebleau Corporation and Dr. Berger, as the corporate owner and the decision maker who directed she be terminated. *Id.*

³³ 458 F.3d 332 (4th Cir. 2006), *rev’d en banc*, *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015).

by Judge James K. Bredar,³⁴ the District Court Judge who threw Ms. Boyer-Liberto's case out on a motion for summary judgment.³⁵

II. *JORDAN V. ALTERNATIVE RESOURCES CORPORATION:*
LEGAL PRECEDENT AND ITS CONSEQUENCES

Jordan, like Ms. Boyer-Liberto's story, makes ugly reading. The case arose at the height of the D.C. sniper attacks, which terrorized the Washington metropolitan area for most of October 2002.³⁶ The attacks left ten victims dead and three others critically wounded.³⁷ Public hysteria was endemic, whipped up by lurid media coverage.³⁸ Since the snipers attacked public places like gas stations and parking lots, there were widespread reports of people afraid to pump gas or even wheel a shopping cart across supermarket parking lots.³⁹ Finally, on October 23, 2002, it was announced that Montgomery County police had arrested two suspects, John Allen Muhammad and Lee Boyd Malvo.⁴⁰

³⁴ Judge Bredar recently received attention after he refused to delay implementation of a consent decree created to address issues within the Baltimore City Police Department in the wake of the death of Freddie Gray. The Trump administration sought, unsuccessfully, to put the reforms on hold. See Brendan McDermid, *Judge Approves Baltimore Police Decree Over Sessions Concerns*, NEWSWEEK (Apr. 7, 2017, 6:54 PM), <http://www.newsweek.com/baltimore-freddie-gray-jeff-sessions-police-police-brutality-racism-donald-580883>.

³⁵ See *Boyer-Liberto v. Fontainebleau Corp.*, No. JKB-12-212, 2013 WL 1413031, at * 4–5 (D. Md. Apr. 4, 2013), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

³⁶ *Jordan*, 458 F.3d at 336.

³⁷ *Id.* at 337.

³⁸ The exaggerations and outright fabrications of New York Times reporter Jayson Blair forced the paper's top editors, Howell Raines and Gerald Boyd, to resign. Dan Barry, et al., *CORRECTING THE RECORD; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES (May 11, 2003), <http://www.nytimes.com/2003/05/11/us/correcting-the-record-times-reporter-who-resigned-leaves-long-trail-of-deception.html?mcubz=1>; Jacques Steinberg, *Executive Editor of the Times and Top Deputy Step Down*, N.Y. TIMES (June 5, 2003), <http://www.nytimes.com/2003/06/05/national/executive-editor-of-the-times-and-top-deputy-step-down.html?mcubz=1>.

³⁹ See Jean Marbella, et al., *Shootings Recall Deadlier D.C. Sniper Rampage of 2002*, BALT. SUN (Mar. 4, 2015), <http://www.baltimoresun.com/news/maryland/bs-md-fort-meade-sniper-20150304-story.html>.

⁴⁰ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 336 (4th Cir. 2006) *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006).

A group of IBM employees, including Jay Farjah and the Plaintiff, Robert Jordan, watched the local news on a breakroom television set.⁴¹ To no one in particular, Farjah – who is White – exclaimed, “They should put those two Black monkeys in a cage with a bunch of Black apes and let the apes f-k them.”⁴² Jordan, who is Black, overheard the comment, found it offensive, and reported it to his supervisors.⁴³ He was then terminated a little less than a month later for “being disruptive.”⁴⁴

Like Boyer-Liberto, Jordan filed suit under Title VII in the U.S. District Court for the District of Maryland.⁴⁵ Like Boyer-Liberto, Jordan asserted a claim for retaliatory discharge, based on Jordan’s reporting of workplace harassment.⁴⁶ Unlike Boyer-Liberto, Jordan asserted no claim for the underlying harassment itself.⁴⁷ Judge Deborah Chasanow granted the defendant’s Motion to Dismiss, ruling it was not “objectively reasonable” to believe that Farjah’s comment, which was not directed at Jordan, could suffice to create “an abusive working environment.”⁴⁸

Jordan appealed, backed by the EEOC, the Public Justice Center and the Metropolitan Washington Employment Lawyers Association, all of whom filed amicus briefs.⁴⁹ Given the conservative complexion of the Fourth Circuit panel assigned to the appeal,⁵⁰ it might have gone better for Jordan if his bevy of liberal amici had supported the opposition.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 337.

⁴⁴ *Id.*

⁴⁵ *Id.* at 336.

⁴⁶ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 337 (4th Cir. 2006) *reh’g en banc denied*, 467 F.3d 378 (4th Cir. 2006).

⁴⁷ *Jordan*, 458 F.3d at 332, 335–36.

⁴⁸ *Id.* at 337–38. *See Jordan v. Alternative Resources Corp.*, No. Civ.A. DKC 2004-1091, 2005 WL 736610, at *5, *12 (D. Md. Mar. 30, 2005) *aff’d* 485 F.3d 332 (4th Cir. 2006).

⁴⁹ *Jordan*, 458 F.3d at 332, 335–36.

⁵⁰ *Jordan’s* case was heard by Judges Emory Widener, Paul Niemeyer, and Robert King. *Id.* Judges Widener and Niemeyer, who formed the majority, were both appointed by Republican presidents. *See Judges of the Fourth Circuit Since 1801*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/docs/pdfs/historyjudges.pdf> (last visited Nov. 5, 2017). Judge King, a Clinton appointee, dissented. *See id.*; *see also Jordan* 457 F.3d at 336.

The Opinion was written by Judge Niemeyer, who perhaps found in the case much to exemplify the temptations of liberalism.⁵¹ Judge Niemeyer's Opinion seemed to treat Jordan's debacle as a cautionary tale: just as Jordan erred in letting his revulsion at "a single abhorrent slur" precipitate him into making an ill-advised complaint, so might a well-meaning but misguided judge err in letting the case's bad facts lead to the production of bad law.⁵² Judge Niemeyer avoided the perceived trap.⁵³

Although Jordan had not asserted a workplace harassment claim, Judge Niemeyer devoted much of his Opinion to an explanation of why no workplace harassment claim was available to Jordan.⁵⁴ Judge Niemeyer emphasized that such claims depended upon exposition of a workplace "permeated" with discriminatory intimidation, ridicule and insult, an environment in which those elements were – to use the Supreme Court's rubric – so "severe or pervasive" as to create an abusive workplace that virtually altered the conditions of the employment.⁵⁵ In assessing the viability of such a claim, Judge Niemeyer held, the Courts look to "the frequency of the discriminatory conduct, its severity, whether it is accompanied by physical threats or humiliation, and whether it unreasonably interferes with the plaintiff's work performance."⁵⁶ Applying these factors, Judge Niemeyer reasoned that the single incident of invective overheard by Jordan could not possibly be said to have transformed Jordan's workplace into the toxic environment proscribed by prevailing harassment jurisprudence.⁵⁷ Then Judge Niemeyer made a bit of a leap: Since no workplace harassment claim was available to Jordan, then Judge Chasanow was right in holding that it was not even

⁵¹ Judge Niemeyer's Opinion could easily have been written by his father, distinguished conservative political theorist Gerhart Niemeyer, who felt that "[l]iberalism is essentially sentimental benevolence. Liberals are in love with their own feelings rather than the reality at which their benevolence is aiming. If Conservatives find liberals repugnant for this reason it must be that they affirm life's reality rather than their own emotions." Gerhart Niemeyer, *Russell Kirk & Ideology*, 30 INTERCOLLEGIATE REV. 35, 35–36. (1994).

⁵² See *Jordan*, 458 F.3d at 341.

⁵³ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 343 (4th Cir. 2006) *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006).

⁵⁴ *Id.* at 342–43.

⁵⁵ *Id.* at 339–40.

⁵⁶ *Id.* at 339 (citing *Faragher v. City of Boca Raton*, 524 U.S. 774, 787–88 (1998)).

⁵⁷ *Id.* at 340.

“objectively reasonable” for Jordan to believe that he might have such a claim.⁵⁸ That leap got Judge Niemeyer to the end of his syllogism.⁵⁹ Jordan had made no objectively reasonable complaint, his complaint was therefore unprotected,⁶⁰ and Jordan was at the mercy of Maryland’s at-will employment doctrine. Unsurprisingly, Judge Widener joined with Judge Niemeyer.⁶¹

There was, however, an eloquent dissent by Judge King.⁶² Judge King emphasized that, from the beginning, the notion of affording protection to workplace whistleblowers had been calculated to enable employers to act upon early warnings of workplace shenanigans before they ripened into actionable misconduct.⁶³ Judge King pointed out that the courts had not only encouraged early, preventive reporting of evolving misconduct, but had also dismissed the claims of plaintiffs who put off complaining.⁶⁴ Accurately, Judge King characterized Jordan’s plight as a “Catch-22.”⁶⁵ If Jordan complained before full-blown workplace harassment had developed, he could be fired with impunity; but if Jordan put off complaining until the workplace environment had actually become “permeated” with harassment, his procrastination would result in the dismissal of his claims.⁶⁶ Jordan’s counsel, Washington lawyer Stephen Chertkof,

⁵⁸ See *Jordan*, 458 F.3d at 341.

⁵⁹ *Id.* at 340–41

⁶⁰ *Id.*

⁶¹ *Id.* at 336. A Nixon appointee, Judge Widener was widely regarded as a senior statesman among the Court’s conservatives. *H. Emory Widener Jr.; Longtime Judge on U.S. Appeals Court*, WASH. POST (Sept. 21, 2007)

<http://www.washingtonpost.com/wp-dyn/content/article/2007/09/20/AR2007092002531.html>.

⁶² *Jordan*, 458 F.3d at 349–59.

⁶³ *Id.*

⁶⁴ *Id.* at 54–57.

⁶⁵ *Id.* at 349. The original “Catch-22” was the centerpiece of Joseph Heller’s 1961 novel of the same name. In the novel, which dramatized the plight of World War II bomber crews, the crewmen found themselves in a *Jordan*-esque dilemma: if the rigors of combat made them crazy, they need only report this to the medical officer, and they would be sent home. However, if anyone reported to the medical officer that he found combat unendurable, he was obviously saner than his crewmates and had no grounds for being sent home. JOSEPH HELLER, *CATCH-22* (Simon & Schuster 2011) (1961).

⁶⁶ *Jordan*, 458 F.3d at 355.

petitioned for *en banc* review and almost got it.⁶⁷ Under the Federal Rules, an *en banc* petition will be granted if supported by the votes of a majority of the active, sitting judges.⁶⁸ Chertkof fell one vote short, rehearing was denied,⁶⁹ and *Jordan* became the *bête noir* of Fourth Circuit workplace harassment law.

III. THE *BOYER-LIBERTO* CASE IN THE LOWER COURT

A. *The District Court Case*

In applying *Jordan* to the *Boyer-Liberto* case, Judge Bredder could easily have distinguished *Jordan*. For starters, *Boyer-Liberto* wasn't truly a "single incident" case at all. Ms. Boyer-Liberto had been called the same racial epithet not once but twice, and it is sophistry to rely on the fact they "arose" from a single incident, since that would lead to manifest absurdity.⁷⁰ Imagine, for example, Ms. Clubb continuing to call Ms. Boyer-Liberto a "porch monkey" every day for a year, conduct which even Judge Niemeyer would probably agree "permeated" the workplace, and would not be merely a "single incident" harassment. Additionally, *Jordan* had not been the target of the offensive language, but had merely overheard it,⁷¹ whereas Boyer-Liberto was directly targeted.⁷² In *Jordan*, the racist invective was unaccompanied by any threats against the plaintiff;⁷³ in *Boyer-Liberto*, it was accompanied by threats which unmistakably put the plaintiff's job on the line.⁷⁴ In *Jordan*, there was nothing violent or physical about the offensive outburst;⁷⁵ in *Boyer-Liberto*, the perpetrator literally "got up in plaintiff's face," spraying her with saliva.⁷⁶ Finally, in *Jordan*, the offensive remarks were made by someone who was

⁶⁷ *Jordan v. Alternative Res. Corp.*, 467 F.3d 378, 378 (4th Cir. 2006) (denying rehearing *en banc*)

⁶⁸ FED. R. APP. P. 35.

⁶⁹ *Jordan*, 467 F.3d 378.

⁷⁰ See *Boyer-Liberto v. Fontainebleau Corp.*, No. JKB-12-212, 2013 WL 1413031, at *5 (D. Md. Apr. 4, 2013), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

⁷¹ *Jordan*, 467 F.3d at 379.

⁷² *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 269–70 (4th Cir. 2015) (*en banc*).

⁷³ *Jordan*, 467 F.3d at 379.

⁷⁴ *Boyer-Liberto*, 786 F.3d at 270.

⁷⁵ *Jordan*, 467 F.3d at 379.

⁷⁶ *Boyer-Liberto*, 786 F.3d at 270.

indisputably a mere coworker;⁷⁷ in *Boyer-Liberto*, although Ms. Clubb's status presented a bit of a vexed question, there was clearly sufficient evidence in the record from which a jury could conclude that Ms. Clubb was a manager and not a mere coworker.⁷⁸ All of this could have provided abundant fodder for distinguishing *Jordan* and allowing *Boyer-Liberto*'s case to go forward. Instead, Judge Bedard took the position that *Jordan* was applicable, eschewing factual and analytical nuances.⁷⁹

B. *The Fourth Circuit Case*

Ms. Boyer-Liberto appealed and had sufficient cause for optimism. In 2008, when *Jordan* was decided, a bare majority of the fifteen judges sitting on the Fourth Circuit Court of Appeals rejected *Jordan*'s petition for rehearing.⁸⁰ Since then, several vacancies had opened on the Court, which President Obama had filled with appointees who were presumably more liberal than the outgoing incumbents.⁸¹ Because appeals were assigned randomly to three judge panels for decision,⁸² the possibility of *Boyer-Liberto* drawing at least two sympathetic judges was encouraging.

In what seemed an auspicious omen, Ms. Boyer-Liberto's case was selected for oral argument.⁸³ Unlike many state appellate systems, the Federal Appeals system does not guarantee an oral argument in every case.⁸⁴ Whether to assign appeals for oral argument is left up to

⁷⁷ *Jordan*, 467 F.3d at 379.

⁷⁸ *Boyer-Liberto*, 786 F.3d at 270–71.

⁷⁹ Judge Bedard's opinion was a mere four pages. See *Boyer-Liberto v. Fontainebleau Corp.*, No. JKB-12-212, 2013 WL 1413031 (D. Md. Apr. 4, 2013), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

⁸⁰ *Jordan v. Alternative Resources Corp.*, 467 F.3d 332, 378 (4th Cir. 2006).

⁸¹ Anne E. Marimow, *There's a Word That No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08_story.html?utm_term=.1d7da4c7b6da.

⁸² See 4TH CIR. R. 34(c) ("The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding.").

⁸³ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

⁸⁴ 4TH CIR. R. 34(a).

the Federal Circuits to determine and the Fourth Circuit rarely grants arguments.⁸⁵ The Fourth Circuit has the lowest incidence of oral argument of any Federal Circuit, and the great majority of appeals in the Fourth Circuit are decided without it.⁸⁶ Thus, when Ms. Boyer-Liberto's appeal was selected for oral argument, it indicated that the Court was taking her case seriously, and most lawyers would have assumed that the Court was entertaining reversal of the district court judgment.⁸⁷

Whether these harbingers of success would be borne out could not be told until the morning of oral argument, since everything depended on which judges were assigned the panel. Their identities are not disclosed by the Court until "check in," the pre-hearing ritual in which the lawyers report to the Clerk's office, confirm which lawyers will be arguing the case and which are merely "on the brief," and – most critically – are told for the first time which three judges will hear the case.⁸⁸

Oral argument in the *Boyer-Liberto* case was held the morning of January 29, 2014.⁸⁹ Counsel for Ms. Boyer-Liberto had made the trip from the Eastern Shore the day before, arriving in Richmond in the midst of a snow storm.⁹⁰ But January 29th, though bitter cold, dawned bright, sunny, and seemingly full of portent. But here, Ms. Boyer-Liberto's four year run of bad luck kicked in with renewed vigor: Even though Republicans were now a minority on the Court,⁹¹ Ms. Boyer-Liberto had drawn a panel comprised exclusively of

⁸⁵ ADMIN. OFF. OF THE U.S. CTS., U.S. COURTS OF APPEALS—CASES TERMINATED ON THE MERITS, http://www.uscourts.gov/sites/default/files/data_tables/stfj_b5_630.2016.pdf (last visited Nov. 16, 2017).

⁸⁶ *Id.*

⁸⁷ *See id.* (showing the low rate of accepted cases).

⁸⁸ *See* 4TH CIR. R. 34(a) ("Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs.").

⁸⁹ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

⁹⁰ NAT'L. OCEANIC AND ATMOSPHERIC ADMIN., ISSN 0039-1972, STORM DATA (2014).

⁹¹ Marimow, *surpa* note 81.

Republican appointed judges.⁹² And one of the three – in defiance of fifteen-to-one odds – was none other than Judge Niemeyer himself.⁹³

The other two panelists were both South Carolinians.⁹⁴ One, Judge Dennis Shedd, was a former Strom Thurmond staffer,⁹⁵ who was widely regarded as one of the Court’s staunchest conservatives. The other, Chief Judge William Traxler, was generally considered a “moderate” – a characterization borne out by events in this case.⁹⁶ Going into oral argument that morning, it was clear Ms. Boyer-Liberto’s only hope lay in persuading the panel the differences between Ms. Boyer-Liberto’s story and the facts in *Jordan* were sufficient for her case to warrant a reprieve from *Jordan*’s seeming ban on “single incident” workplace harassment claims. Although oral argument in the Fourth Circuit is often spirited, with the judges peppering the lawyers with questions and interjections, none of the panelists had much to say or ask about the merits of the case; the only fireworks came in an exchange with counsel and Judge Niemeyer over whether a party’s Answers to Interrogatories could be used to support her own opposition to a summary judgment motion,⁹⁷ a topic of mild interest to technically minded lawyers but suitable as a general anesthetic for just about everyone else.⁹⁸ The panelists said nothing to which counsel for either side could fasten their hopes in awaiting the

⁹² The panel consisted of Chief Judge Traxler, Judge Niemeyer, and Judge Shedd. *Boyer-Liberto*, 752 F.3d at 350.

⁹³ *Id.*

⁹⁴ *Judges of the Court*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/judges/> (last visited Nov. 16, 2017).

⁹⁵ *Judge Dennis W. Shedd*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-dennis-w-shedd> (last visited Nov. 16, 2017).

⁹⁶ Carl Tobias, *A New Chief Judge for the Fourth Circuit*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/07/08/a-new-chief-judge-for-the-fourth-circuit/?utm_term=.2c39184962dd.

⁹⁷ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 355–56 (4th Cir. 2014), *rev’d en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

⁹⁸ It is not surprising Judge Niemeyer was drawn to the topic. Judge Niemeyer is a renowned proceduralist and co-author of MARYLAND RULES COMMENTARY, which, since its publication in 1984, has held near-biblical status as the premier gloss on the Maryland Rules. PAUL V. NIEMEYER ET AL., MARYLAND RULES COMMENTARY (4th ed. 2006).

decision, which did not come until almost five months later, on May 13, in a published opinion.⁹⁹

In the Fourth Circuit, as with most intermediate appellate courts, the vast majority of decisions are unpublished.¹⁰⁰ Lawyers are discouraged from citing unreported opinions as authority for any proposition.¹⁰¹ Historically, that proscription was quite real and certainly easy to obey, since most unpublished opinions were inaccessible, even to lawyers.¹⁰² However, with the advent of legal research archives like WestLaw and Lexis, unreported opinions became easy to find. That notwithstanding, published opinions still have a totemic significance, as evidenced by *Jordan*, which, of course, was a published opinion.

Thus, it was yet another Sophoclean continuation of Ms. Boyer-Liberto's sad story that her defeat in the Fourth Circuit came to her through a published opinion.¹⁰³ Authored by Judge Niemeyer, the Opinion adopted Judge Bredar's characterization of the events as "single-incident" harassment and adopted Judge Niemeyer's own reasoning in *Jordan* to reach the conclusion that such harassment could not as a matter of law be deemed sufficiently severe or pervasive to be actionable.¹⁰⁴ As he had done in *Jordan*, and as Judge Bredar had done under the mantle of *Jordan*, Judge Niemeyer collapsed the rule that the plaintiff in a retaliation case must merely have an objectively reasonable belief that the subject of his or her complaint is wrongful – not a legally accurate belief.¹⁰⁵ In effect, Judge Niemeyer again held that if the plaintiff gets it wrong, then the complaint could not possibly be "objectively reasonable."¹⁰⁶ In short, Judge Niemeyer held that

⁹⁹ *Boyer-Liberto*, 752 F.3d at 350.

¹⁰⁰ The courts for the eleven Federal Circuits comprise the penultimate level in the Federal Appellate process given the infrequency with which the United States Supreme Court agrees to review cases. They are the defacto last resort for most litigants.

¹⁰¹ Citations to unreported opinions is permitted by the rules, but custom discourages their use. *See* FED. R. APP. P. 32.1.

¹⁰² Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. C. L. REV. 185, 204 (2007).

¹⁰³ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

¹⁰⁴ *See Boyer-Liberto*, 752 F.3d 350.

¹⁰⁵ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 356–57 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

¹⁰⁶ *Jordan v. Alternative Resources Corp.*, 467 F.3d 332, 379–80 (4th Cir. 2006).

neither Ms. Boyer-Liberto's workplace harassment claim nor her retaliation claim was tenable, and affirmed the decision of the District Court.¹⁰⁷

Chief Judge Traxler wrote a partial dissent.¹⁰⁸ Cryptically, the Chief Judge wrote he agreed that, "under existing precedent," Ms. Boyer-Liberto had failed to establish a hostile workplace harassment claim.¹⁰⁹ But the Chief Judge parted company on Ms. Boyer-Liberto's retaliation claim. Citing Judge King's invocation of "Catch-22,"¹¹⁰ he adopted a phrase from Ms. Boyer-Liberto's brief, concluding "I cannot accept that an employee in circumstances like these can be forced to choose between her job and her dignity."¹¹¹

Perhaps the most intriguing part of the *Boyer-Liberto* Opinion was Judge Shedd's concurrence, which, virtually in its entirety, read as follows:

I agree ... that, under our precedent, as a matter of law the facts of this case do not demonstrate a hostile work environment. Based on this Court's decision in *Jordan v. Alternative Resources Corp* ... I agree ... that summary judgment should also be affirmed on the retaliation claim.¹¹²

When the Decision was published, Judge Shedd's concurrence seemed to many readers inscrutable, although its real meaning became clear enough through subsequent events.

IV. THE FOURTH CIRCUIT, *EN BANC*

A. *Oral Argument*

When an appellant loses, she faces three options: the first is to accept the outcome, the second is to petition the United States

¹⁰⁷ *Boyer-Liberto*, 752 F.3d at 360.

¹⁰⁸ *Id.* at 361–63 (Traxler, J., concurring in part, dissenting in part).

¹⁰⁹ *Id.*

¹¹⁰ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 349 (4th Cir. 2014), *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006) (King, J., dissenting).

¹¹¹ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 763 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

¹¹² *Id.* at 360–61 (Shedd, J., concurring) (internal citations omitted).

Supreme Court for certiorari,¹¹³ and the third is to petition the Circuit Court for rehearing *en banc*.¹¹⁴ Since the Supreme Court seldom grants certiorari, Ms. Boyer-Liberto's real options were acceptance or seeking *en banc* review. Usually, petitioning for *en banc* review is almost as much a nonstarter as trying to go to the Supreme Court. The Fourth Circuit typically grants only two or three such petitions per year.¹¹⁵ However, the fact that the Chief Judge had dissented suggested that many of his colleagues might – if for no other reason than out of deference – agree to give a second chance to a case in which he had found merit. Additionally, there was Judge Shedd's concurrence. That one of the Court's most conservative members had declined to join in Judge Niemeyer's Opinion, and instead had written a painfully parsed concurrence, suggested he and perhaps his conservative allies on the Court might entertain a reappraisal of the principles upon which the case had been decided.¹¹⁶ Finally, students of the Fourth Circuit claimed to detect a liberalizing trend in the decisions of the Court since the Obama appointees had joined it in the years following the *Jordan* decision.¹¹⁷ Given the changes in the ideological makeup of the court,¹¹⁸ it just might be possible to recruit the bare majority needed to rehear the case, and even possible to persuade that majority either to overrule or distinguish *Jordan*, were rehearing granted.

Just as in *Jordan*, the appellant petitioned for rehearing *en banc*, and supporting amicus briefs were filed by the EEOC, the Public Justice Center and the Metropolitan Washington Employment Lawyers Association.¹¹⁹ It was at this point Ms. Boyer-Liberto got her

¹¹³ 4TH CIR. R. 41.2.

¹¹⁴ 4TH CIR. R. 35(a).

¹¹⁵ The *Boyer-Liberto* case was one of three *en banc* arguments in 2014. In 2015, the following year, there were no *en banc* arguments. See *En Banc Cases*, UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/opinions/en-banc-cases> (last visited Sep. 24, 2017).

¹¹⁶ See Brian S. Clarke, *The Clash of Old and New Fourth Circuit Ideologies: Boyer-Liberto v. Fontainebleau Corp. and the Moderation of the Fourth Circuit*, 66 S.C. L. Rev. 927 (providing context as to the shifting political ideology of the Fourth Circuit).

¹¹⁷ See Marimow, *supra* note 81.

¹¹⁸ *Id.*

¹¹⁹ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 268 (4th Cir. 2015) (*en banc*).

first break: On July 1, 2014, the Court granted her petition, and agreed to rehear the case *en banc*.¹²⁰

The underlying logic of *en banc* review is that the panel decision is vacated, and the entire Court reviews the original decision of the District Court.¹²¹ There are no new briefs, but there is a brand new oral argument before all fifteen judges of the Circuit. In theory, during oral argument the lawyers are to address themselves, not to the panel decision, but to the merits and demerits of the District Court decision,¹²² and the judges are to adopt the same approach. In practice, it is difficult if not impossible to avoid discussion of the panel decision, because the three panelists are among the fifteen judges rehearing the case, and thus are physically present and typically quite active during the rehearing.

En banc oral arguments are held in the courthouse's ceremonial courtroom.¹²³ The courthouse itself is a massive antebellum structure which served during the Civil War as the office of Confederate President Jefferson Davis. Most of the courtrooms have been "modernized," and look much like their counterparts all over the country, but the ceremonial courtroom is an exception, set up like a 19th Century courtroom, full of dark wood and plush carpets.

At the *en banc* hearing, the fifteen judges are ranged in a u-shaped, three-sided phalanx in the front of the courtroom. There is a podium in the middle of the room for use by the lawyers, with the usual rows of pews behind. Perhaps because of the room's very high ceilings, it is difficult for the lawyer standing at the podium to tell which judge is currently speaking: The sound seems to ricochet around the room, so that the voice of a judge on the left seems to be coming from his counterpart on the right. Some of the judges deal with the problem by waving their hands when they speak, but most just let the lawyers try to figure it out.

¹²⁰ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350 (4th Cir. 2014), *rev'd en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

¹²¹ 4TH CIR. R. 35(c).

¹²² *Id.* ("[G]ranting of rehearing *en banc* vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel.").

¹²³ *Lewis F. Powell, Jr. U.S. Courthouse, Richmond, VA*, U.S. GENERAL SERVICES ADMINISTRATION, <https://www.gsa.gov/historic-buildings/lewis-f-powell-jr-us-courthouse-richmond-va> (last visited Nov. 7, 2017).

Unlike most courtroom proceedings, which typically draw a handful of onlookers, *en banc* rehearings often attract a standing room only crowd of law students, professors, lawyers, and reporters. Those who cannot make the trip to Richmond can listen to a live feed of the oral argument.¹²⁴ The recordings are archived on the court's website, so interested parties who are tied up at the time of oral argument can listen at their convenience.¹²⁵

Ms. Boyer-Liberto's rehearing oral argument was held the morning of September 18, 2014, four years to the day after she had sat in the office of the Clarion's General Manager and presented her complaint.¹²⁶ Presiding was Chief Judge Traxler, who had written the panel decision's dissent. Although appellate arguments are usually subject to rigorous time constraints – fifteen minutes for the Appellant, twenty minutes for the Appellee, then five minutes more for the Appellant¹²⁷ – no such restrictions apply to *en banc* rehearings,¹²⁸ and this one went on for almost two hours, in part because the court had allowed additional time for one of the amici, the EEOC, to participate. Fourteen of the fifteen judges actively took part, engaging all three lawyers with questions and colloquies: The sole exception was Judge Niemeyer, who sat silently throughout.¹²⁹

Ms. Boyer-Liberto, who attended in person, also sat silently throughout. To her, it must have seemed her luck was finally turning. From the comments and questions of the judges, it seemed clear most felt her complaint should have been protected against retaliation. What was not clear was whether the judges would overrule or merely distinguish *Jordan*. Even less clear was the interesting question of whether the judges would hold she could actually sue her employer for workplace harassment, or merely complain about it. In other words, it seemed clear her retaliation claim was likely to be revived, but far from clear whether the court would go on to hold that the two

¹²⁴*Listen to Oral Arguments*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments> (last visited Sep. 24, 2017).

¹²⁵ *Id.*

¹²⁶ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc).

¹²⁷ 4TH CIR. R. 34(d).

¹²⁸ 4TH CIR. R. 35 (including no time restrictions for arguments).

¹²⁹ *Oral Argument: Reya Boyer-Liberto v. Fontainebleau Corp.*, COURT OF APPEALS FOR THE FOURTH CIRCUIT (Sept. 18, 2014), <http://coop.ca4.uscourts.gov/OAarchive/mp3/13-1473-20140918.mp3>.

outbursts of racist invective attributed to Ms. Clubb were sufficient to constitute actionable workplace harassment.

B. Historical Developments in Workplace Civil Rights

To appreciate fully this “moment” of suspense – which lasted seven months, until the issuance of the court’s Opinion May 7, 2015¹³⁰ – it is necessary to retrace the evolution of workplace civil rights protections over the last half-century. In 1964, Congress enacted the Civil Rights Act, whose workplace protections were codified in Title VII of the Act, and hence became known in the legal profession simply as “Title VII.”¹³¹ Title VII makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹³² To ensure not only that the Act had teeth but that there was someone to do the chewing, Congress simultaneously established the EEOC and empowered the agency to entertain complaints of violations and to undertake enforcement of the law.¹³³ The EEOC began promulgating regulations to flesh out the barebones protections afforded by Title VII.¹³⁴ In adopting regulations effectuating discrimination based on sex, the EEOC decided it was not enough simply to prohibit personnel actions which showed favoritism to men.¹³⁵ The EEOC went further, acknowledging the reality that women were often subjected to sexual conditions of employment to which men were immune.¹³⁶ Accordingly, the EEOC regulations prohibited *quid pro quo* sexual harassment, by which submission to

¹³⁰ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc).

¹³¹ *Milestones: 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/50th/milestones/1964.cfm> (last visited Sep. 24, 2017).

¹³² 42 U.S.C. § 2000(e)-2 (a)(1) (2016).

¹³³ 42 U.S.C. § 2000(e)-4 (2016).

¹³⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (“[I]n 1980 the EEOC issued Guidelines specifying that ‘sexual harassment,’ as there defined, is a form of sex discrimination prohibited by Title VII.”).

¹³⁵ U.S. EQUAL EMP. OPPORTUNITY COMMISSION, N-915.048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 12, 1990), <https://www.eeoc.gov/policy/docs/sexualfavor.html> (describing when sexual favoritism may become sexual harassment).

¹³⁶ *Id.*

sexual advances was made a condition of employment.¹³⁷ But the EEOC went still further. Focusing on the statute's "terms [and] conditions ... of employment" language, the EEOC regulations also proscribed what came to be known as "hostile environment" sexual harassment, reasoning it was a form of discrimination based on sex to require employees to work in an environment that had become permeated by offensive sexual themes, images, language and/or conduct.¹³⁸

For a while, it was unclear whether the courts would support the EEOC's expansion of Title VII to include prohibition of workplace sexual harassment. But, in *Meritor Savings Bank, FSB v. Vinson*, the uncertainties were dispelled, as the Supreme Court ruled that both types of sexual harassment violated Title VII.¹³⁹ In holding that the Plaintiff had (arguably) framed a claim for hostile environment sexual harassment, the Supreme Court, in an opinion by Chief Justice Rehnquist, cautioned that, in order to be actionable, workplace harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁴⁰

Courts applying Chief Justice Rehnquist's formulation of the workplace harassment doctrine received additional guidance in 1998, in *Faragher v. City of Boca Raton*.¹⁴¹ There, Justice Souter wrote that a "recurring point in these [harassment] opinions is that 'simple teasing' . . . off-hand comments, and isolated incidents, (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"¹⁴² As in *Jordan*, some courts focused exclusively on the "pervasive" prong of the "severe or pervasive" test established by Chief Justice Rehnquist, and interpreted

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

¹⁴⁰ *Id.* at 67 (citations omitted). During the course of an eleven-day trial, Ms. Vinson testified that her supervisor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.* at 60.

¹⁴¹ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (citations omitted).

¹⁴² *Faragher*, 524 U.S. at 788 (citations omitted).

Justice Souter's remarks to hold that "isolated incidents" could never constitute actionable harassment.¹⁴³

Meanwhile, the trail blazed by the EEOC widened to embrace racial harassment, disability harassment and ageist harassment.¹⁴⁴ As the doctrine of workplace harassment expanded, it became clear the courts and the EEOC would interpret Title VII to prohibit any workplace environment that had become hostile or abusive based on any of the suspect classifications outlined in Title VII or in any of the statutes that followed its lead – the Americans with Disabilities Act (ADA),¹⁴⁵ the Pregnancy Discrimination Act, (PDA)¹⁴⁶ and the Age Discrimination and Employment Act (ADEA).¹⁴⁷ As the doctrine of workplace harassment expanded, however, its application was simultaneously limited by courts who interpreted *Meritor*¹⁴⁸ and *Faragher*¹⁴⁹ to apply only to harassment which through repetition had become "pervasive."¹⁵⁰ For these courts, the critical "or" dropped out of Chief Justice Rehnquist's formulation. For them, the standard was not "severe *or* pervasive," but rather "severe *and* pervasive."¹⁵¹

A full understanding of the dynamic tension underlying the *Boyer-Liberto* case also requires a brief review of the doctrine of workplace retaliation. Title VII forbids discrimination against an employee "because he [or she] has opposed any practice made . . .

¹⁴³ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340 (4th Cir. 2006) *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006). *See, e.g., Meritor Sav. Bank, FSB*, 477 U.S. at 67; *Faragher*, 524 U.S. at 788. Thus, the Fourth Circuit ignored Justice Souter's exception for "isolated incidents" that were "extremely serious." *Id.*

¹⁴⁴ *The Law*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/history/50th/thelaw.cfm> (last visited Aug. 26, 2017).

¹⁴⁵ 42 U.S.C. §§ 12101–12213 (2016) (prohibiting the disparate treatment of individuals on the basis of disability). Title I of the Americans with Disability Act addresses discrimination in employment. *Id.* at §§ 12111–12117.

¹⁴⁶ 42 U.S.C. § 2000e(k) (2016) (prohibiting disparate treatment of individuals on the basis of sex, including if the individual is pregnant).

¹⁴⁷ U.S.C. §§ 621–34 (2016) (protecting those over age 40 from employment discrimination).

¹⁴⁸ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

¹⁴⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

¹⁵⁰ *See, e.g., Singleton v. Dep't of Correctional Educ.*, 115 F. App'x 119, 122 (4th Cir. 2004) ("The conduct that she complains of, though boorish and offensive, is more comparable to the kind of rude behavior, teasing, and offhand comments that we have held are not sufficiently severe and pervasive to constitute actionable sexual harassment.").

¹⁵¹ *Id.*

unlawful” by Title VII.¹⁵² In plain English, an employee cannot be retaliated against because he or she complained of workplace discrimination. In order to establish a workplace retaliation claim under Title VII, an employee must prove “(1) that she engaged in a protected activity; (2) that her employer took an adverse employment action against her; and (3) that there was a causal link between the two events.”¹⁵³ To be protected, a complaint need not be accurate or well-founded.¹⁵⁴ It need only be based upon a reasonable belief that the conduct violates Title VII.¹⁵⁵ Or, as the Fourth Circuit itself put it, in a 2005 case, Title VII protects not only “employment actions actually unlawful under Title VII but also employment actions an employee reasonably believes to be unlawful.”¹⁵⁶ But here, too, there was a countervailing limitation: As evidenced by *Jordan*¹⁵⁷ and the panel decision in *Boyer-Liberto*,¹⁵⁸ some courts took the position that if the complainant got it wrong, and the conduct about which she complained was not actually unlawful, then, *ipso facto*, no one could reasonably believe it was unlawful.

It was at the convergence of these two threads of developing jurisprudence that the *Boyer-Liberto* case arose. If, as some courts had held, workplace harassment was not actionable until it had fully ripened through a series of recurrent incidents, and if, as some courts had (in effect) held, a workplace complaint was only protected if it targeted fully ripened misconduct, then someone like Ms. Boyer-Liberto would have to put up with the offensive mistreatment until it became “pervasive.”¹⁵⁹ But, if she did, as Judge King and Chief Judge

¹⁵² 42 U.S.C. § 2000e-3(a) (2016).

¹⁵³ *Equal Emp’t Opportunity Comm. v. Navy Fed. Credit Union*, 424 F.3d 397, 405–06 (4th Cir. 2005).

¹⁵⁴ *Id.* at 407.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 406.

¹⁵⁷ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340–41 (4th Cir. 2006) *reh’g en banc denied*, 467 F.3d 378 (4th Cir. 2006).

¹⁵⁸ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 359 (4th Cir. 2014), *rev’d en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

¹⁵⁹ *Id.* at 358 (“Liberto has not pointed to any Fourth Circuit case, nor could she, finding the presence of a hostile work environment based on a single incident.”); *see also Jordan*, 458 F.3d at 341 (noting that, based on the plaintiff’s observations, the plaintiff must reasonably believe the “violation is actually occurring.”).

Traxler had warned in their dissents,¹⁶⁰ she ran the risk of seeing her complaint dismissed under long-standing Supreme Court precedent to the effect that early complaints were to be encouraged, for the sake of prevention, and tardy claims were to be dismissed.¹⁶¹ In effect, the Supreme Court had fashioned a constitutional version of the equity doctrine of laches, by which someone who “sleeps on his rights” forfeits them through inaction.¹⁶² And that, of course, created the “Catch-22” against which both judges cautioned: If you complain in time to prevent misconduct from developing into full blown harassment, your complaint is unprotected because it is premature; but, if you defer complaining until the acts of harassment have become sufficiently “pervasive” to frame actionable harassment, then your complaint will be dismissed because it is tardy.

While legal scholars wondered how these legal doctrines would align in the *Boyer-Liberto en banc* decision,¹⁶³ astrologers might well have wondered at the alignment of the stars, for it is as an interesting coincidence that the *Jordan* decision,¹⁶⁴ the original *Boyer-Liberto* panel decision¹⁶⁵ and the *Boyer-Liberto en banc*¹⁶⁶ decision

¹⁶⁰ *Boyer-Liberto*, 752 F.3d at 363 (Traxler, J., dissenting) (noting that employees experiencing discrimination can either report misconduct and be fired or remain in a hostile environment); *Jordan*, 458 F.3d at 341, 349 (King, J., dissenting) (stating that the majority’s ruling has placed “employees who experience racially discriminatory conduct in a classic ‘Catch-22’”).

¹⁶¹ Known as the “*Ellerth/Faragher* defense,” employees are required to report misconduct in a timely manner in order to prevent hostile environments from developing, or risk dismissal of future claims. *See* *Faragher v. City of Boca Raton* 524 U.S. 775, 806–07 (1998) (stating that failing to report discrimination through the employer’s preventative system could result in the plaintiff not recovering damages for any preventable discrimination suffered); *see also* *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (noting that an affirmative defense to an employer’s vicarious liability has two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”).

¹⁶² *Laches*, BLACK’S LAW DICTIONARY (10th ed. 2014). *See* cases cited *supra* note 161.

¹⁶³ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 268 (4th Cir. 2015) (*en banc*).

¹⁶⁴ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir.) *reh’g en banc denied*, 467 F.3d 378 (4th Cir. 2006)

¹⁶⁵ *Boyer-Liberto v. Fontainebleau Corp.*, 752 F.3d 350, 763 (4th Cir. 2014), *rev’d en banc*, 786 F.3d 264, 269 (4th Cir. 2015).

were all issued under the sign of Taurus the bull; *Jordan* having been handed down May 12, 2006, the first *Boyer-Liberto* decision May 13, 2014 and the *Boyer-Liberto en banc* decision May 7, 2015.¹⁶⁷ And, in a dramatic turn around, the majority opinion was written by Judge King, who had authored the *Jordan* dissent.¹⁶⁸

V. THE FOURTH CIRCUIT'S REASONING

Not surprisingly, Judge King's Opinion, written on behalf of a dozen judges, partakes a bit of a victory lap. Although acknowledging that *Jordan* could easily be distinguished from the facts in *Boyer-Liberto*, Judge King and his colleagues held that *Jordan* was overruled to the extent it conflicted with their rulings in *Boyer-Liberto*.¹⁶⁹ In a closely reasoned, fourteen page decision, the majority cited Justice Souter's language in *Faragher*¹⁷⁰ for the proposition that an "isolated incident" could suffice to create an actionable hostile work environment "if extremely serious."¹⁷¹ Observing that comparisons to lesser primates (apes, monkeys, gorillas)¹⁷² were singularly repugnant forms of racist invective, comparable to use of the n-word, and noting that the attacks on Boyer-Liberto were accompanied by a degree of physicality and by the evident ability to effectuate them, the majority held that Boyer-Liberto had alleged facts sufficient to take her hostile work environment claim beyond summary judgment, to final resolution by the jury.¹⁷³ But, the majority cautioned, even if the two racist tirades were insufficient to frame a cause of action for hostile workplace harassment, it was still objectively reasonable for Boyer-Liberto to regard them as unlawful and hence for her complaint to be

¹⁶⁶ *Boyer-Liberto*, 786 F.3d. at 285.

¹⁶⁷ See *supra* notes 163–66

¹⁶⁸ *Jordan*, 458 F.3d at 349 (King, J., dissenting); *Boyer-Liberto*, 786 F.3d at 268.

¹⁶⁹ *Boyer-Liberto*, 786 F.3d at 269.

¹⁷⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

¹⁷¹ *Boyer-Liberto*, 786 F.3d at 285–86.

¹⁷² The majority in the *Boyer-Liberto en banc* decision point out the especially odious nature of the insult "porch monkey." *Id.* at 280. The Court places the remark within the historical context that "[p]rimate rhetoric has been used to intimidate African-Americans' and that '[t]he use of the term "monkey" and other similar words,' including the variation "porch monkey," has 'been part of actionable racial harassment claims across the country.'" *Id.* at 280 (citing *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006)).

¹⁷³ *Boyer-Liberto*, 786 F.3d at 280–81.

protected against retaliation.¹⁷⁴ The majority resolved the “Catch-22” previously identified by Judge King and Chief Judge Traxler in favor of preventive maintenance.¹⁷⁵ The victim of workplace invective need not wait until it had assumed the dimensions of full blown harassment, nor – as suggested by Judge Niemeyer in *Jordan* – did she have to establish that a “plan was afoot” to do so, but could instead complain of her mistreatment with impunity, at least where the invective was “physically threatening or humiliating.”¹⁷⁶ Interestingly, and presumably because the majority explicitly overruled *Jordan*, Judge Shedd joined in the majority opinion.¹⁷⁷

Judge Niemeyer, of course, dissented.¹⁷⁸ Judge Niemeyer pointed out it was unnecessary to overrule *Jordan* to justify the outcome reached by the majority.¹⁷⁹ The outcome was itself insupportable, in his view, because the very nature of a claim based on the creation of a hostile work environment depends upon the pollution of that environment through repetition.¹⁸⁰ Since the two episodes of racist invective in *Boyer-Liberto* arose from the same incident, they could not support a claim for hostile workplace harassment.¹⁸¹ And, absent some evidence the harassment was likely to recur, they could not form the basis for a protected complaint, because it was not objectively reasonable to believe that an actionable hostile environment was evolving:

While Liberto had every right to be offended by Clubb’s use of a racial epithet and acted reasonably and responsibly in reporting the incident . . . she lacked a reasonable belief . . . that she was opposing her employer’s commission of ‘a[] practice made . . . unlawful . . . by [Title VII]’ . . . [f]or that reason . . . as a matter of law . . . she did not engage in protective activity . . .¹⁸²

¹⁷⁴ *Id.* at 285.

¹⁷⁵ *Id.* at 284.

¹⁷⁶ *Boyer-Liberto*, 786 F.3d at 284. *But see* *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 340 (4th Cir.) *reh’g en banc denied*, 467 F.3d 378 (4th Cir. 2006).

¹⁷⁷ *Boyer-Liberto*, 786 F.3d at 268.

¹⁷⁸ *Id.* at 293 (Niemeyer, J., dissenting).

¹⁷⁹ *Boyer-Liberto*, 786 F.3d at 303 (Niemeyer, J., dissenting).

¹⁸⁰ *Id.* at 294–95.

¹⁸¹ *Id.* at 303.

¹⁸² *Id.* at 305.

In other words, Ms. Boyer-Liberto had every right to complain about her mistreatment, and her boss had every right to fire her.

Between the majority's fourteen pages and the dissent's thirteen, were nestled a little more than three pages authored by Judge Wilkinson, joined by Judge Agee.¹⁸³ Literally and analytically, they occupied the middle ground. Although acknowledging "that a good workplace environment is poisoned by the kind of remarks alleged here is an understatement," Judge Wilkinson found Ms. Clubb's two outbursts insufficient to impute liability to her employer for the creation of a hostile workplace environment.¹⁸⁴ However, Judge Wilkinson went on to conclude that "Liberto's belief that a hostile work environment existed or was coming into existence was objectively reasonable," and hence he joined in the majority's conclusion that Ms. Boyer-Liberto's retaliation claim should have survived summary judgment.¹⁸⁵ Although Judge Wilkinson did agree that, "under the circumstances presented here," complaining about the harassment was "objectively reasonable" and hence protected, he chided the majority for their insensitivity to "the dangers of over-reporting," which, in his view, "drifts every so casually toward draconian consequences for mere utterance and speech."¹⁸⁶ If, Judge Wilkinson warned, courts became overzealous in taxing employers for reckless statements by workers that offend co-workers, then the workplace would become polarized along lines drawn by race and gender, with employees afraid to speak to each other freely or at all; moreover, employers would be driven "into the role of censors," all at the cost of free speech.¹⁸⁷

VI. THE FUTURE OF WORKPLACE HARASSMENT CLAIMS

¹⁸³ *Boyer-Liberto*, 786 F.3d at 288 (Wilkinson, J., dissenting). Judge Wilkinson, a former Chief Judge of the circuit, has elsewhere expounded the view that a proliferation of civil rights litigation has engendered the suppression of free speech and also, perversely, worsened race relations. See, J. HARVIE WILKINSON III, ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA (1997).

¹⁸⁴ *Boyer-Liberto*, 786 F.3d at 288–90 (Wilkinson, J., dissenting).

¹⁸⁵ *Id.* at 290.

¹⁸⁶ *Id.* at 290–92.

¹⁸⁷ *Id.* at 289.

Following the *en banc* decision, Ms. Boyer-Liberto's case was returned to District Court in Baltimore.¹⁸⁸ Judge Bredar referred the parties to a settlement conference, which quickly led to a resolution of the case.¹⁸⁹ Ms. Boyer-Liberto has moved on, but the remarkable final act of her five-year courtroom drama changed the law of the land. It is clear the *en banc* decision in *Boyer-Liberto*¹⁹⁰ has displaced *Jordan*¹⁹¹ as the touchstone for workplace harassment and retaliation claims, but what does that portend? Certainly, it provides greater security for workers unwilling to tolerate workplace racism and little detriment to workplace comradery and freedom of aggression.

A. *While Judge Niemeyer's Dissent May Appear to Present a Workable Solution to the Unique Challenges of Workplace Harassment, it is Untenable in Practice and the Majority was Correct to Reject it.*

Given that Judge Niemeyer was the only dissenting voice out of fifteen judges, it seems unlikely his views will be adopted by any three-judge panel of the court.¹⁹² But, as evidenced by the fact the *Jordan* dissent¹⁹³ eventually became the majority view adopted by twelve out of fifteen judges, it is unwise to ignore a cogently argued dissent. Looking first at Judge Niemeyer's rejection of Ms. Boyer-Liberto's hostile work environment claim, one notes with interest it devolves – like the majority opinion – from an interpretation of Justice Souter's pronouncement that “isolated incidents, (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”¹⁹⁴

¹⁸⁸ *Id.* at 288 (majority opinion).

¹⁸⁹ The substance of that resolution is confidential. If the case had continued another six weeks, it would have been five years since the incident that sparked the lawsuit.

¹⁹⁰ *Boyer-Liberto*, 786 F.3d at 268–69.

¹⁹¹ *Jordan v. Alternative Resources Corp.*, 458 F.3d 332, 339 (4th Cir. 2006) *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006)

¹⁹² Unless, of course, fate joins him with Judges Wilkinson and Agee, which might augur bad news for a plaintiff complaining of workplace harassment.

¹⁹³ *Jordan*, 458 F.3d at 349 (King, J., dissenting).

¹⁹⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 294 (4th Cir. 2015) (Niemeyer, J., dissenting).

Judge Niemeyer points out that Justice Souter referred to “isolated incidents,” in the plural, from which he infers that a hostile workplace environment will only arise through the repetition of multiple “isolated incidents.”¹⁹⁵ But that inference, as they say, gets him “into the weeds,” because, by definition, an isolated incident is isolated. If something happens and then is repeated, it makes no sense to refer to it as an “isolated incident,” because the fact that it is repeated suggests it is in no way “isolated.”¹⁹⁶ Upon reflection, it seems safer to assume, as the majority evidently did, that what Judge Souter meant was that “an isolated incident, (unless extremely serious) will not amount to a discriminatory change in the terms and conditions of employment.”¹⁹⁷ Semantic niceties aside, Judge Niemeyer seems to have given short shrift to the genesis of the workplace harassment doctrine, which lay in Chief Justice Rehnquist’s holding that the EEOC was right to proscribe workplace harassment that was “sufficiently *severe* or pervasive ‘to alter the conditions of [the victim’s] employment.’”¹⁹⁸ Certainly, the Chief Justice’s holding allowed abundantly for the possibility that a single horrific event might “be sufficiently severe” to “create an abusive working environment.”¹⁹⁹

Turning to Judge Niemeyer’s handling of the retaliation claim, it appears he suggests a new and promising standard. If the harassment about which the plaintiff complains seems “likely to recur,” then it is objectively reasonable to complain about it and the complaint will be protected.²⁰⁰ On its face, the “likely to recur” standard presents an ingenious solution to the early reporting dilemma. If an outburst of racist invective seems just that – an extemporaneous outburst, unlikely to be repeated – then reporting it to upper management might arguably be seen as an overreaction and therefore unprotected; conversely, if the perpetrator seems to be acting upon some plan or design, or otherwise appears to be the sort of person for whom the use of racial epithets might be habitual, then reporting it immediately seems a

¹⁹⁵ *Boyer-Liberto*, 786 F.3d at 294 (discussing *Faragher*, 524 U.S. at 788).

¹⁹⁶ *Faragher*, 524 U.S. at 788.

¹⁹⁷ *Boyer-Liberto*, 786 F.3d at 285–86.

¹⁹⁸ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (emphasis added) (citation omitted).

¹⁹⁹ *Id.*

²⁰⁰ *Boyer-Liberto*, 786 F.3d at 304 (Niemeyer, J., dissenting).

defensible precaution and therefore entitled to legal protection.²⁰¹ However, it is difficult to imagine what would earmark an act of harassment as “likely to recur.” Oddly, the one thing that would seem to qualify would be the fact that it *does* recur, as in *Boyer-Liberto*. In Ms. Boyer-Liberto’s case, the perpetrator allegedly subjected her to a racial epithet, and then, the very next day, targeted her again with precisely the same racial epithet.²⁰² Given that the harassment in this case *did* recur, it seems plausible to suppose it likely will recur again, but yet Judge Niemeyer – the would-be creator of the “likely to recur” standard – would have none of it.²⁰³ All this suggests that the “likely to recur” standard is unworkably nebulous, and the majority was wise not to adopt it.

B. While Judge Wilkinson’s Concurrence Presents Persuasive Concerns Surrounding Freedom of Speech in the Workplace, those Concerns are Outweighed by the Benefits of the Majority Approach

The concurrence by Judge Wilkinson sounds warnings that seem prescient and are expressed with an eloquence that undoubtedly will win supporters.²⁰⁴ Heightening the responsibility of employers for the hurtful words of their employees will likely make employers and employees more vigilant in self-policing – perhaps at the expense of candor or even at the expense of wholesome debate.²⁰⁵ Making racist and sexist language risky may well induce cautious employees to stay away from co-workers of a different race or of the opposite gender.

²⁰¹ See Amy Gallow, *How to Respond to an Offensive Comment at Work*, HARV. BUS. REV. (Feb. 8, 2017), <https://hbr.org/2017/02/how-to-respond-to-an-offensive-comment-at-work> (“There’s no denying that this is a tough situation. Joan Williams, founding director of the Center for WorkLife Law at UC Hastings College of the Law, says that these decisions are particularly risky because they involve “two of the most corrosive elements of bias in the workplace:” the uncertainty that whether what you heard is bias and the fear that you might be penalized for how you handle it. It’s normal to question ourselves in these situations, wondering whether we heard the person right or if it was just a joke.”).

²⁰² *Id.* at 270 (majority opinion).

²⁰³ *Id.* at 304–05 (Niemeyer, J., dissenting).

²⁰⁴ See *Boyer-Liberto*, 786 F.3d at 288–93 (Wilkinson, J., concurring in part, dissenting in part).

²⁰⁵ *Id.* at 289.

Depending upon one's ideology, this may not turn out to be "a good thing." But this case does not truly present any of these dangers.

Prohibiting the use of racial epithets should not inhibit the free speech of anyone, and, to the extent there was any debate or discourse in this case, it concerned neither politics nor religion nor the expression of any ideas at all, but rather, the advisability of cutting through the kitchen.²⁰⁶ So, while Judge Wilkinson's concurrence holds interest to those who ponder the advisability of civil rights litigation and civil rights laws, it has little direct relevance to the "circumstances" of this case (as he acknowledges), and, frankly, it is hard to envision a case upon which it would have a decisive bearing.

Perhaps the real problem, in Judge Wilkinson's view – which he makes implicit here but has made explicit elsewhere²⁰⁷ – is that prohibiting even overtly racist invective arguably subverts racial unity by imposing race-based restrictions upon speech.²⁰⁸ The underlying premise is that the law should be truly colorblind and race-based government measures designed to assist minorities, such as affirmative action, ethnic quotas and, as in this case, protection against racist abuse, should be prohibited.²⁰⁹ It is an application of the old playground monitor conundrum. If the teacher intervenes to protect the bespectacled, violin-toting waif who is being bullied, there is always the risk that her well-intended intervention will backfire, resulting either in drawing more abuse upon the victim when her back is turned, or result in the victim becoming utterly shunned and isolated. And it is certainly true that intervening to protect individuals and groups who would otherwise be oppressed inevitably calls attention to their separateness and engenders resentment from those who would prefer there be no intervention.²¹⁰ But without the intervention, what will there be but a continuation of the status quo?

Hoping that white supremacists will somehow come to embrace cultural diversity on their own is as realistic as expecting that a playground gang will somehow develop an appreciation for classical

²⁰⁶ *Id.* at 269.

²⁰⁷ See J. HARVEY WILKINSON, III, *ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA* (1997) (discussing the dangers of racial division, including how affirmative action contributes to that divide).

²⁰⁸ See *Boyer-Liberto*, 786 F.3d at 288–93 (Wilkinson, J., concurring in part, dissenting in part).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 292–93.

music and the fashion potential of well-styled eyewear. It seems sad that a country founded upon broad principles of equality for all men, and upon tolerance of all ideas and creeds, should now require special civil rights laws and a legion of civil rights lawyers, to ensure that those principles find practical expression in the workplace, but such is the case. Our civil rights laws are not without their deleterious side effects, but like any strong medicine, they are worth it. If we are not willing to concede the field to the bullies of this world, then we must be willing to act forcefully to tax speech that is not merely disrespectful, that is not merely frank or impetuous, but which would actually deny its targets the fundamental human dignity our laws guarantee them.

C. The Majority Presents an Appropriate Solution to a Complex Problem, Eliminating the Catch-22 of Jordan and Creating a Workable Standard for Courts to Apply in the Future

In assessing the durability of the majority opinion, the clear starting point is the fact that half of the opinion – resuscitating Ms. Boyer-Liberto’s retaliation claim – enjoyed the support of fourteen out of fifteen judges, and the other half – resuscitating her workplace harassment claim – enjoyed the support of twelve. But to that must be added the observation that the opinion just makes sense. It is illogical to expect employees to put up with racist invective in the workplace, and counterproductive to put them at risk for reporting it before it gets worse.²¹¹ Moreover, if it takes a horde of lawyers, judges, and EEOC bureaucrats five years to figure out whether calling somebody a “porch monkey” more than once constitutes actionable workplace harassment, how can we expect a layperson to risk her job in a gamble on getting it right?

Providentially, the majority opinion restored the “objectively reasonable” rule, which had gotten only lip service in *Jordan* and in

²¹¹ Boyer-Liberto v. Fontainebleau Corp, 786 F.3d 264, 288 (4th Cir. 2015) (en banc) (majority opinion).

the original *Boyer-Liberto* panel decision.²¹² And, wisely, the majority opinion resolved the harassment-reporting Catch-22 in favor of early, preventive reporting.²¹³ Judge Niemeyer was technically correct in observing that, having effectively distinguished *Jordan*, the majority did not need to overrule it. However, overruling it was nonetheless right. Just as, at common law, where every dog got one “free bite,”²¹⁴ *Jordan* effectively enshrined the “free bite” rule for workplace harassment and that simply cannot be good law. Moreover, *Jordan* stood for the untenable proposition that for a complaint of workplace misconduct to be protected the layperson making it had to get it right.²¹⁵ Ultimately, whether the complaint was protected because the complainer “got it right” depended on variables such as whether Judge Niemeyer or Judge King got the case, with the result that workers truly did have to choose between their dignity and their job.²¹⁶ Finally, *Jordan* created a lose-lose dilemma for abused employees, who had to choose between losing their job through premature complaints or losing their lawsuit through tardy complaints.²¹⁷ *Jordan* was bad law and its passing should not be mourned.

Judge Niemeyer’s dissent gets it wrong because his workplace harassment analysis depends on an unmanageable “likely to recur” standard, and his retaliation analysis depends on discarding the “objectively reasonable” standard in favor of protecting only complaints that are well-founded, as determined by neoconservative legal tenets. Judge Wilkinson’s concurrence is overly concerned with open debate and racial unity, neither of which truly depend upon the use of racist invective at work. Judge King’s majority opinion is correct and should endure because it slays all the dragons. It puts the “or” back in “severe or pervasive,” it restores the “objectively reasonable” standard, it resolves the reporting Catch-22 in favor of early reporting, and it eliminates the “first bite” defense for workplace harassers.

Of course, we are still left with a somewhat uncharted border between offensive, “stray” remarks which do not alter the terms or

²¹² *Id.* at 284.

²¹³ *Id.*

²¹⁴ See RESTATEMENT (SECOND) OF TORTS § 509 (AM. LAW INST. 1979).

²¹⁵ *Boyer-Liberto*, 786 F.3d at 283.

²¹⁶ See *supra* Section III.A. for a description of the impact of the composition of the judges.

²¹⁷ *Jordan*, 458 F.3d at 343.

conditions of employment, and offensive remarks which do. Ironically, it often is impossible for an employee to tell which is which until she reports. If the employer responds appropriately, then the episode may be written off as merely the rudeness of a co-worker; but if, conversely, the complainant gets fired, then the terms or conditions of employment have been altered, because they now apparently include submission to racist invective. By encouraging early reporting, the *Boyer-Liberto en banc* decision makes it easier for employees to get to the truth and to survive the trip. That is good law.

In the two years that have followed the *Boyer-Liberto en banc* decision, that decision has been cited multiple times in opinions dispersed throughout the country.²¹⁸ Most, however, have cited the case simply as an affirmation of long-standing principles governing the law of workplace harassment and retaliation.²¹⁹ A significant exception was a decision by Judge Bedar himself, who invoked the decision to afford protection to a woman who complained of sexual harassment based upon a single incident which, prior to *Boyer-Liberto*, most courts would not have regarded as sufficient to support a claim of hostile environment sexual harassment.²²⁰

The case also engendered numerous commentaries in the popular press and in blogs and webpage op-ed pieces by the employment bar.²²¹ Perhaps not unsurprisingly, the case was sensationalized by reporters and vilified by management-side employment lawyers as standing for the proposition that a single incident of “insensitive” remarks would suffice to support federal civil rights claims.²²² This

²¹⁸ See, e.g., *Castleberry v. STI Group*, 836 F.3d 259, 265 (3d Cir. 2017); *Equal Emp’t Opportunity Comm. v. Rite Way Serv., Inc.*, 819 F.3d 235, 242 n.5 (5th Cir. 2016).

²¹⁹ See cases cited *supra* note 218.

²²⁰ See *Jones v. Family Health Care Centers of Balt. Inc.*, 135 F. Supp.3d 372, 379 (D. Md. 2015).

²²¹ See, e.g., Paul Mollica, *Boyer-Liberto v. Fontainebleau Corp., No. 13-1473 (4th Cir. May 7, 2015)*, DAILY DEVELOPMENTS IN EEO LAW (May 8, 2015), <http://www.employmentlawblog.info/2015/05/boyer-liberto-v-fontainebleau-corp-no-13-1473-4th-cir-may-7-2015.shtml>; Matthew F. Nieman & Jeremy S. Schneider, *Fourth Circuit Sets Employee-Friendly Standard for Title VII Retaliation Claims*, JACKSON LEWIS P.C (May 15, 2015), <https://www.jacksonlewis.com/resources-publication/fourth-circuit-sets-employee-friendly-standard-title-vii-retaliation-claims>

²²² See, e.g., Matthew F. Nieman and Jeremy S. Schneider, *Fourth Circuit Sets Employee-Friendly Standard for Title VII Retaliation Claims* (May 15, 2015), <https://www.jacksonlewis.com/Resourcess-publication/fourth-circuit-sets-employee->

approach was adopted by a review article on the case, by a Boston College law student who echoed Judge Wilkinson's warning that the majority opinion blurred the line between mere insensitivity and abuse in a manner which, perversely, would actually hamper race relations.²²³ On the other hand, a widely-disseminated commentary by Robert Fitzpatrick, a prominent plaintiff's employment lawyer, praised the decision for overturning *Jordan* and touted it as a harbinger of liberal trends in federal employment law.²²⁴ This view was adopted by South Carolina law professor Brian S. Clarke, who cited the case as a stand out illustration of how the Fourth Circuit, once regarded as the most conservative federal judiciary in America, had drifted far to the left.²²⁵

Amidst the debate, perhaps it is wise to cling to a few facts. First, calling an African-American a "porch monkey" is not merely rude or "insensitive." As the Court noted, likening someone to a jungle animal is grossly offensive, and likening African-Americans to jungle animals carries with it considerable historical baggage.²²⁶ Moreover, while use of racist invective by a manager or even a co-worker is obnoxious, it is particularly so where, as in the *Boyer-Liberto* case, it became clear that it could be done with impunity and with the acquiescence of upper management.²²⁷ Third, in *Boyer-Liberto*, Plaintiff had to endure the

friendly-standard-title-vii-retaliation-claims ("Although it is unlikely that this decision will cause a stampede to the courthouse, employees (or their counsel) may raise claims of retaliation in their discrimination complaints more often than they might have previously. This relaxed standard means that arguments that offensive, yet isolated, conduct is neither severe nor pervasive enough to establish discrimination are no longer as strong. It also brings a higher likelihood that retaliation claims will survive summary judgment and, therefore, proceed to trial (and a jury)").

²²³ See Sean Ahern, Note, *Waving Goodbye to Your Rights: Retaliation and Invalidity in the Context of Waivers Under Title VII, the ADA, and the ADEA*, 97 B.U. L. REV. 659, 676 (2017).

²²⁴ See Robert B. Fitzpatrick, *Fourth Circuit Overturns Decade of Precedent in Blockbuster En Banc Hostile Work Environment Decision*, FITZPATRICK ON EMPLOYMENT LAW (May 15, 2015, 7:40 PM), <http://robertfitzpatrick.blogspot.com/2015/05/>

²²⁵ Brian S. Clarke, *The Clash of Old and New Fourth Circuit Ideologies: Boyer-Liberto v. Fontainebleau Corp. and the Moderation of the Fourth Circuit*, 66 SOUTH CAROLINA L. REV. 940 (2015).

²²⁶ See *supra* note 22.

²²⁷ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 270–71 (4th Cir. 2015) (en banc).

same racial slur not once but twice, a sequence of events which could be characterized as “isolated” only by splitting quite a few semantic and logical hairs.²²⁸ Thus, at least on its actual facts, the opinion in *Boyer-Liberto* did not take the Court particularly close to the worrisome border between workplace invective that is merely insensitive and workplace invective that constitutes intolerable racial abuse.

These distinguishing factors, moreover, should provide a roadmap for those who wish to carry forward the principles laid down in the *Boyer-Liberto* decision. It is reasonable to expect the courts will observe the distinction between invective that is based upon a suspect classification, (“n-gger,” “kike,” “geezer,” and perhaps “faggot” and “dyke”), and invective that is merely rude (“jerk,” “knucklehead,” etc.). The first is socially and legally unacceptable,²²⁹ while the latter is merely socially unacceptable. Moreover, even overtly racist invective uttered randomly by a co-worker or even a manager is less obnoxious to our constitutional values than is workplace invective that enjoys the complicity or tacit approval of upper management.²³⁰ Lastly, even a paragon of political correctness might be capable of an angry outburst that goes beyond mere discourtesy, and even a paragon might top off such an outburst with a dose of racist, sexist, or ageist invective. If, for example, Ms. Clubb had called Ms. Boyer-Liberto a porch monkey and then apologized the next day, the case probably never would have gotten to court and if it had it probably would have been dismissed under the “stray remarks” doctrine.²³¹ Repetition necessarily implies premeditation, making the perpetrator’s course of conduct actionable.

If, indeed, a worker’s self-expression will be “chilled” by a workplace ban on racist invective, then that is probably a good thing. If, moreover, a worker truly feels the only way he can avoid racially abusing co-workers is to stay away from them, then that is probably a good thing. If there is a bottom line, it is that zero tolerance for racist

²²⁸ *Id.* at 270.

²²⁹ *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001).

²³⁰ *Boyer-Liberto*, 786 F.3d at 270–71.

²³¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (“Thus, stray remarks in the workplace, while perhaps probative of sexual harassment . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria.”).

conduct and language in the workplace, even if zealously enforced by the courts, should impair no one in the performance of their job duties, the expression of their opinions, or their choice of who to sit next to in the lunch room.

CONCLUSION

There is an old saying that making law is like making sausage: not for the squeamish. But that is a saying about legislation, which, in our country, is only half the story of how laws are made. The other half is the refinement of law through litigation, which could more aptly be likened to a bingo game, since it is driven by seemingly random events. This tale never would have been told, and the hard work that made it known people need not choose between their jobs and their dignity, never would have been done, if the nameless barfly who started it all had just ordered a Bud Light. The law is a mighty machine, but its cogs and pistons turn on tiny hinges.