CASE NO. 20-2361

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

TONYA R. CHAPMAN,

Plaintiff - Appellant,

v.

OAKLAND LIVING CENTER, INCORPORATED; ARLENE SMITH; MICHAEL SMITH; STEVE SMITH,

Defendants - Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ASHEVILLE

REPLY BRIEF OF APPELLANT

J. Scott Ballenger
Jennifer Elchisak (Third Year Law Student)
Zev Klein (Third Year Law Student)
Jehanne McCullough (Third Year Law Student)
Carly Wasserman (Third Year Law Student)
Appellate Litigation Clinic
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel for Appellant

LANTAGNE LEGAL PRINTING ,801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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INTRODUCTION

Appellee Oakland Living Center (OLC) argues that Ms. Chapman's *pro se* briefing below was insufficient to preserve her arguments on appeal. But the district court had an independent obligation to determine whether there where material disputed issues for trial, clearly understood Ms. Chapman's position, and actually resolved the issues that OLC now says are waived. Ms. Chapman also was not required to anticipate the court's own errors in its summary judgment opinion.

On the merits, OLC strains unsuccessfully to reconcile the outdated constructive discharge standard employed by the district court with the binding Supreme Court precedent. As the *amicus curiae* brief filed by the Equal Employment Opportunity Commission (EEOC) confirms, it is now settled law that a constructive discharge plaintiff need not prove that her employer subjectively intended to force a resignation. And the absence of such evidence was, plainly, the basis of the district court's decision.

OLC also offers no persuasive argument that it cannot be held responsible for the egregious harassment Ms. Chapman experienced. A reasonable jury could conclude that her supervisor's response to his son's use of the "N" word was not reasonably calculated to end the harassment and prevent its recurrence, since SS essentially slunk away after his son refused to apologize. A reasonable jury could also find that OLC management was on notice that something like this could happen.

Or it could find that SS enabled the harassment by abusing his supervisory power, making it attributable to OLC under agency principles.

OLC argues for affirmance on the alternative ground that the harassment was not serious enough to support a hostile work environment or constructive discharge claim. But this Court has recognized that the "N" word is "pure anathema" to African-Americans. Even a single use of the word by a supervisor can create a severely abusive working environment. OLC builds its argument around the fact that the insult came from the mouth of SS's son. But OLC does not deny that the statement "My daddy called you a lazy ass black n*****," JA-65 (Chapman 68), is not hearsay when offered for its impact on Ms. Chapman. Since "my daddy" was Ms. Chapman's supervisor, OLC's argument is built on sand.

The district court's grant of summary judgment should be reversed.

ARGUMENT

I. CHAPMAN'S APPELLATE ARGUMENTS ARE NOT FORFEITED

OLC argues that many of Ms. Chapman's appellate arguments are forfeited, because her *pro se* opposition to summary judgment in the district court did not argue the issues in precisely the same way. In particular, OLC argues that Ms. Chapman forfeited any argument: (1) that OLC "had actual and constructive knowledge of the alleged harassment"; (2) that OLC "failed to take adequate and preventive remedial measures"; (3) that the district court "used the wrong standard in determining

whether liability may be imputed to Oakland"; (4) that pre-2015 incidents can be considered under the continuing violation doctrine; (5) that they should be considered on other grounds; (6) that the district court "employed the incorrect standard in analyzing her constructive discharge claim"; and (7) that Ms. Chapman forecast enough evidence to satisfy the severity element of constructive discharge. Appellee's Br. 16. OLC's arguments are unpersuasive.

The waiver rule ordinarily bars appellate consideration of issues that were not pressed *or* passed upon below. *See, e.g.*, *Ricard v. Birch*, 529 F.2d 214, 216 (4th Cir. 1975) ("[W]e do not pass on questions that were not presented to or considered by the district court . . . "). If an issue "was decided by the district court" it "is properly before us on appeal." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004) (citing *Home Health Servs., Inc. v. Currie*, 706 F.2d 497, 498 (4th Cir. 1983)). That rule has many virtues, including appropriate deference to the district court's understanding of what was argued below and, in the summary judgment context, the district court's "obligat[ion] to search the record and independently determine whether or not a genuine issue of fact exists." *Campbell v. Hewitt, Coleman & Assocs.*, 21 F.3d 52, 55 (4th Cir. 1994). Summary judgment cannot be granted purely on the basis of a litigant's failure to respond if a triable issue is evident. *Id.*

Ms. Chapman's summary judgment responses reflected the lack of legal sophistication to be expected of a *pro se* litigant. But they repeatedly discussed the pre-2015 incidents, which the district court correctly understood as arguing their continuing relevance. *See* Dkt-52 at 2; Dkt-60 at 3-4; JA-294. She also argued that "[d]uring the course of employment with defendants, Plaintiff Chapman was subjected to racial discrimination and harassment based on [her] race," without limiting that claim in any way to 2018. Dkt-60 at 4, 7-9. Ms. Chapman also argued that the harassment she experienced was "severe or pervasive, unwelcome, [and] subjectively and objectively offensive," *id.* at 8, and indicated that SS knew his son used the "N" word, *see id.* at 5. Ms. Chapman also contended that "OLC failed to take appropriate action to end the racial harassment . . . in the face of Plaintiff's complaints, result[ing] in her being constructively discharged" because this "unlawful racial harassment would have caused any reasonable employee to resign." *Id.* at 9. Finally, Ms. Chapman sued OLC as an entity and argued that the harassment was "intentional, willful, and in reckless disregard for Plaintiff's legally protected rights"—which, together with her argument that OLC "failed to take appropriate action to end the racial harassment," clearly contended that OLC should be liable. *Id.* at 7-9.

The district court addressed and resolved issues (1), (2), (4), (5), and (6) in substance, and it never suggested that Ms. Chapman's briefing was insufficient to present them. *See* JA-291-296. On issue (4), for example, Ms. Chapman's briefing did not mention the "continuing violation" doctrine, but the district court understood its relevance and cited continuing violation case law in holding that the pre-2015 incidents were time-barred. *See* JA-296 (citing *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 223-24 (4th Cir. 2016)). Issue (3) challenges an error of law that the district court made concerning the standard for constructive discharge claims, and Ms. Chapman can hardly be faulted for failing to anticipate the court's error. As for issue (7), the district court focused on OLC's motivations and never held that Ms. Chapman failed to forecast sufficient evidence of intolerable conditions to support a constructive discharge claim. *OLC* has raised that issue on appeal as an alternate ground for affirmance. Ms. Chapman is entitled to respond.

Any remaining doubt should be resolved by the liberality with which this Court construes filings by *pro se* litigants. Indeed, this Court has recognized that when a *pro se* litigant does not respond to a motion for summary judgement, the *pro se* litigant's verified complaint should be considered and may defeat summary judgment. *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). Alternatively, a *pro se* litigant may merely file counter-affidavits as a response. *See, e.g.*, *Hummer v. Dalton*, 657 F.2d 621, 625 (4th Cir. 1981).

Ms. Chapman presented the essential issues in this case to the district court, and the district court resolved them on the merits. To the extent that Ms. Chapman, now represented by counsel, has presented more clearly formulated *arguments* for her positions on appeal, that is neither surprising nor inappropriate. Arguments always become more sophisticated on appeal, even when parties are represented by counsel throughout. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 533-35 (1992) (*per se* Takings argument below was sufficient to preserve a regulatory Takings argument in the Supreme Court).

II. A REASONABLE TRIER OF FACT COULD FIND THAT OLC IS RESPONSIBLE FOR THE HARASSMENT THAT MS. CHAPMAN EXPERIENCED

As Ms. Chapman's opening brief explained, a reasonable jury could find OLC responsible for this harassment on any of three independent grounds: negligence in responding to the August 2018 incident, negligence in failing to prevent the 2018 incidents, and liability under agency principles because the 2018 incidents were aided by SS's supervisory status.

A. A Reasonable Jury Could Find That SS Was Negligent In Responding To The August 2018 Incident

A reasonable jury could conclude that OLC is vicariously liable for the negligence of SS, its supervisor, because his handling of the August 2018 incident was not "reasonably calculated" to end the harassment and prevent its recurrence.

OLC argues that SS's response was not a "sham" because he punished the child and told him to apologize. Appellee's Br. 40. But an employer's response can be inadequate even if it is genuine. In one case, the employer actually tried to fire the employee it thought responsible. *Bailey v. USF Holland, Inc.*, 526 F.3d 880, 884 (6th Cir. 2008). In another case an employee's Internet access was temporarily removed because he was viewing pornography. *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 171 (4th Cir. 2009). These actions were hardly bad-faith efforts, but they were found insufficient. *See id.* at 178; *Bailey*, 526 F.3d at 887.

A reasonable jury could find SS's response negligent. OLC has no meaningful response to Ms. Chapman's argument that even a sincere apology from the child would not have done enough to address the severity of this incident, repair the working environment, and ensure the harassment would not recur. Opening Br. 24-25. And SS did not even accomplish that. When his son refused to apologize, SS did not address his disobedience. SS did not apologize himself. He did not remove the child from Ms. Chapman's presence. Instead, he left his son with Ms. Chapman and PW—and the child promptly said "Tonya, you are a n*****." JA-79 (Chapman 82).

Why did SS flee the scene when his attempt at discipline failed? OLC's brief offers only that SS "left the kitchen to handle something at the front desk," and the cited deposition testimony provides no further detail. Appellee's Br. 9 (citing JA-78-81 (Chapman 81-84); JA-238-39 (AS 19-20); JA-275 (SS-19)). We are left to

speculate that SS's behavior was not negligent because he had some more urgent matter to attend to. A fire? A medical emergency? This plainly presents a triable issue. Without more, a reasonable jury could conclude that SS retreated to the front desk to avoid interacting with Ms. Chapman any further, and that he completely abdicated his responsibility to address the situation. Evaluating negligence and witness credibility in situations like these is exactly why we have juries.

OLC argues that *Bailey* is distinguishable because it dealt with "ongoing measures in response to . . . repeated complaints." Appellee's Br. 39. But *Bailey* involved employer actions that were obviously insufficient *at the time they were taken* because they produced no change in heart. *See* 526 F.3d at 884, 887. In *Bailey*, the plaintiff was taunted with the word "boy." *Id.* at 882. The plaintiff's employer responded in part by holding employee meetings and firing one co-worker, who was reinstated after pursuing a grievance with his union. *Id.* at 884, 887. But the discharged-and-reinstated employee stated explicitly that he would "continue to use the word 'boy' as he saw fit." *Id.* at 884. The employee meetings were similarly fruitless: "[P]laintiffs' coworkers stated that they did not consider their use of 'boy' to be offensive and insisted that they would continue to use it." *Id.* at 887. The Sixth Circuit rightly found these unsuccessful attempts to control defiant employees insufficient. *See id.* at 887. SS's response was equally inadequate—or, at least, a reasonable jury could think so.

OLC again tries to blame Ms. Chaman for leaving rather than pursuing further complaints. It argues that "the record does not suggest [SS] would be anything short of receptive to concerns about ongoing conduct by the child." Appellee's Br. 41. But a reasonable jury could see the situation very differently. The child had just used a horrific slur. Ms. Chapman saw that SS's only response was to spank the child, order him to apologize, and then walk away when no apology was forthcoming. Furthermore, the child had told Ms. Chapman only a month before that "[m]y daddy called you a lazy ass black n*****." JA 65 (Chapman 68). OLC does not dispute that the child's statement is admissible to the extent it bears on Ms. Chapman's state of mind. *See* Opening Br. 15, 25. Ms. Chapman therefore had grounds to believe that the child's racist language and attitudes came directly from SS, and that SS was insulting her in the worst possible terms behind her back. A reasonable jury could conclude that Ms. Chapman was right to think that "[t]his is not going to stop. It's not. It's not going to stop." JA-78 (Chapman 81).

OLC also suggests that Ms. Chapman should have spoken with AS, MS, or BS. Appellee's Br. 41. MS testified that he did no "hands-on" supervising, that AS "pretty much does it all," and that BS had no management duties at OLC. JA-92, 98 (MS 9, 42). That leaves AS as the one person Ms. Chapman could, in theory, have called—although she was out of town on vacation. *See* JA-96-97 (MS 22-23). But Ms. Chapman had reasonable grounds for thinking AS would be little help. OLC

does not address the obvious fact that AS and MS were SS's parents and the child's grandparents. And OLC does not deny that a jury could consider the pre-2015 incidents in evaluating Ms. Chapman's state of mind. AS had previously insulted Ms. Chapman by giving her "slave numbers." JA-52 (Chapman 43). Ms. Chapman also overheard MS's niece say that AS and MS had to find a new condo because they thought there were "too many blacks at Myrtle Beach," which, again, is not hearsay when offered as relevant to Ms. Chapman's state of mind. *See* JA-84 (Chapman 87). A jury could conclude that Ms. Chapman reasonably thought it would do no good to complain to AS about the racial attitudes of her son and grandson.

OLC points to no evidence that it had a reporting policy, but argues it did not necessarily need one. OLC cites to *Brown v. Perry* for the proposition that the absence of a formal reporting policy is not necessarily fatal to the *Faragher*/*Ellerth* affirmative defense. Appellee's Br. 42 (citing 184 F.3d 388, 396 (4th Cir. 1999)). OLC immediately adds that it "does not rely on this defense for purposes of summary judgment." *Id.* at 42 n.6. Regardless, a jury could consider OLC's indifference to formal reporting structures for two purposes. First, OLC's indifference is evidence that OLC was negligent. Second, it is evidence that Ms. Chapman reasonably thought further reporting would be futile.

B. A Reasonable Jury Could Find That OLC Was Negligent In Failing To Prevent The 2018 Incidents

A reasonable jury could also find that OLC was negligent because it was on notice that SS's son might harass Ms. Chapman but failed to take reasonable steps to prevent harassment, such as removing him from the workplace.

OLC wrongly conflates this issue with whether the child actually learned the "N" word from his family (*i.e.* OLC's management). OLC observes that "six-year-old children . . . do not exist in a vacuum." Appellee's Br. 37. OLC accuses Ms. Chapman of an "untenable reach" in thinking the child learned the language from "family members who worked at [OLC], as opposed to any number of other potential influences." *Id.* Of course SS's son could have picked up the "N" word from someone outside the family. But where the child learned the word is actually not the issue. The issue for the jury would be whether it is more likely than not that SS, AS, or MS were aware of a danger that this child might use racist language in the workplace—wherever he might have acquired it. It is hardly an "untenable reach" to conclude that a six-year-old child is unlikely to use language, and harbor attitudes, this ugly without his parents and/or grandparents being aware of it. SS's son had no extraordinary powers of self-control, and it is undisputed that he was at OLC constantly and was basically raised there. *See* JA-63 (Chapman 66).

Regardless, a reasonable jury evaluating witness credibility and considering the evidence under a civil preponderance standard could find that SS's son more

likely than not picked up this language from his family. Ms. Chapman's testimony about the pre-2015 incidents would support a conclusion that AS, MS, and SS held racially insensitive views. OLC points out that Ms. Chapman did not hear anyone else use the "N" word around her. Appellee's Br. 37. But the adult members of the family would know not to use that word around Ms. Chapman. Ms. Chapman also testified that SS, MS, and AS were not around her very much, and that BS was "hardly ever there." JA-59, 71 (Chapman 62, 74). OLC offers no other explanation of how the child learned this word, and a reasonable jury would be entitled to consider that fact too.

In addition, PW knew of the July 2018 incident. OLC argues that PW was nothing but a coworker who "simply passed along job-related updates during the shift change." Appellee's Br. 37. But Ms. Chapman saw PW as an intermediary between herself and OLC management, and she reasonably expected PW to pass job-related information—like reports of harassment—in both directions. When asked about her supervisors, Ms. Chapman identified PW as one. JA-43 (Chapman 29). PW reached out to Ms. Chapman, spoke to MS to advocate for her, and ultimately succeeded in getting her re-hired. *See* JA-46 (Chapman 32); JA-94 (MS 19). Ms. Chapman testified that PW could recommend employee discipline and wage rates. JA-46-47 (Chapman 32-33). And Ms. Chapman could contact PW if she

was running late and AS was unavailable because, in her words, PW was "the next person on the chain of command to contact." JA-70 (Chapman 73).

OLC emphasizes that it is "as small as an employer can be" while meeting Title VII's threshold, and that Ms. Chapman had "unfettered access" to the management team. Appellee's Br. 42. But a reasonable jury could find that the small, family-run nature of this business also supports Ms. Chapman's belief that PW would pass her concerns along, and her belief that the family would process such a disturbing report better from someone they trusted. Ms. Chapman testified that she reported the child's July 2018 statement to PW instead of to a member of the child's family because "I figured it probably would sound better coming from, you know, another employer." JA-70 (Chapman 73). That reasonable impulse demonstrates Ms. Chapman's understanding that PW would pass the information along. And after the August 2018 incident PW *did* report the incident up the chain of command to SS. JA-272 (MS 16).

Given Ms. Chapman's testimony, it is simply incorrect to say that "the record does not reflect that [PW] had any greater supervisory authority than Chapman herself." Appellee's Br. 37. While PW did not have the power to fire or hire unilaterally, she obviously had significant influence on employment decisions. And if Ms. Chapman was wrong to think she could report misconduct to PW, OLC facilitated that misconception. OLC let PW manage Ms. Chapman day to day, and

it failed to effectively communicate a harassment reporting policy. AS could not even remember if a policy existed, despite looking through the employee handbook the day before her deposition. JA-248-49 (AS 29-30). If nothing else, a reasonable jury could conclude that OLC cloaked PW with apparent authority to receive reports of misconduct. *See* Restatement (Second) of Agency § 27 (1957).

OLC relies on Ms. Chapman's statement in her EEOC Charge that she "did not report" the incident, Appellee's Br. 35, but that statement should be understood as meaning that Ms. Chapman did not herself tell the boy's family.

C. A Reasonable Jury Could Find That The Harassment Was Enabled By SS's Supervisory Status And Agency Relationship With OLC

Ms. Chapman's opening brief also pointed out that SS's supervisory status enabled the harassment. Opening Br. 29-32. OLC argues that employers are only vicariously liable for harassment by *supervisors* under *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and that the fullest implications of the aided-by-agency relations principle embodied in § 219(2)(d) of the Restatement (Second) of Agency (1957) "would essentially negate the concept of nonsupervisory harassment," because most harassment can be attributed, in some sense, to management admitting the harasser into the workplace. Appellee's Br. 29-32.

All of this attacks a straw man. Ms. Chapman's opening brief began its discussion of this agency issue by recognizing that "the central divide in harassment

law is between supervisor harassment . . . and harassment by co-workers or third parties," and that employers are vicariously liable only "for a hostile environment created by a supervisor." Opening Br. 29-30. Our point was that SS *was* Ms. Chapman's supervisor, and that on these unique facts a reasonable trier of fact could find that SS's abuse of his supervisory authority enabled and aggravated the harassment. SS's status as a supervisor is the only reason the child was there, the only reason Ms. Chapman was obliged to engage with him, and one reason she thought pursuing further redress within OLC would be futile.

A reasonable jury could conclude on these facts that SS himself was responsible for creating the hostile environment, in a much more direct and important way than the abstract sense in which the presence of anyone "from a co-worker to a customer to a vendor or other third-party visitor" may, in theory, be "traced back to one or more decisions by management." Appellee's Br. 32. Co-workers, vendors, and customers have their own reasons to enter the workplace. Supervisors do not bring them along for purely personal reasons. Supervisors also tend to lack extraordinary influence on the words such persons say, or intimate knowledge about whether they pose a harassment danger. For all these reasons, a reasonable jury could find that SS is far more responsible for his six-year-old child's conduct than for the conduct of customers, vendors, or co-workers that he merely permitted to access the workplace. This harassment was uniquely facilitated by an

abuse of SS's supervisory authority, and therefore agency principles support holding OLC responsible.

III. CONSTRUCTIVE DISCHARGE DOES NOT REQUIRE PROOF THAT THE EMPLOYER WANTED THE EMPLOYEE TO RESIGN

The district court rejected Ms. Chapman's constructive discharge claim because "Plaintiff presents no forecast of evidence from which an inference can be drawn that the Defendants deliberately wanted to make the Plaintiff feel that she needed to resign." JA-294. Ms. Chapman's opening brief and the EEOC's *amicus* demonstrated that the court's reasoning reflected a clear error of law. Opening Br. 33-38; EEOC Br. 28-30. This Court used to hold that a constructive discharge claim requires proof of subjective intent to induce quitting, but the Supreme Court clearly rejected that view in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), and *Green v. Brennan*, 136 S. Ct. 1769 (2016).

OLC argues that "the deliberateness element as historically applied in this Circuit is not out of step with the holdings in *Suders* and *Green*" because it can be proved with "circumstantial evidence of such intent." Appellee's Br. 48-49. But the Supreme Court has held that *no* evidence of subjective intent to force a resignation is necessary. The inquiry is objective: "Did the working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141. The district court clearly did not apply that standard.

IV. A REASONABLE TRIER OF FACT COULD FIND THE HARRASSMENT WAS SUFFICIENTLY SEVERE OR PERVASIVE TO SATISFY BOTH THE HARASSMENT AND CONSTRUCTIVE DISCHARGE STANDARDS

A. A Reasonable Jury Could Find The 2018 Incidents Severe Enough To Support A Harassment And Constructive Discharge Claim

OLC argues for affirmance on the alternative ground that no reasonably jury could find the harassment that Ms. Chapman experienced to be sufficiently severe or pervasive to ground a harassment or constructive discharge claim. Even if it confines its focus to the 2018 incidents, this Court should reject OLC's arguments.

OLC concedes, as it must, that this Court has already held that use of the "N" word by a supervisor can be sufficient, all by itself, to satisfy the "severe or pervasive" element of a hostile work environment claim. Appellee's Br. 44; *see also* Opening Br. 14-16. OLC builds its argument around the fact that here the word was uttered by SS's son, not SS himself. *Id.* at 45.

The first and most obvious problem with OLC's reasoning is that SS's son directly attributed one of the statements to his father. He told Ms. Chapman in July 2018 that "My daddy called you a lazy ass black n*****, because you didn't come to work." JA-65, 67 (Chapman 68, 70). OLC now apparently concedes that as it bears on Ms. Chapman's "perception of the severity of the conduct" that statement is not hearsay. Appellee's Br. 46. It argues that Ms. Chapman's "subjective take on the events . . . does not change, for purposes of the objective prong of the analysis,

the fact that the comment was uttered by a young child." *Id*. But of course the statement is just as admissible for its *objective* impact on the listener, and hearing it second-hand from a young child does not diminish its objective impact.

We agree entirely with OLC that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a single recitation of the words used." Appellee's Br. 45 (quoting *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998)). Objective severity "should be judged from the perspective of a reasonable person in the plaintiff's position, considering *all* the circumstances," which "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale*, 523 U.S. at 81. But OLC wants to emphasize the fact that these words came from a child, while ignoring *whose child he was*. Any reasonable observer would understand the tremendous difference between an insult from (say) a customer's six-year-old child and the powerful statement from a supervisor's son that "My daddy called you a lazy ass black n*****, because you didn't come to work."

An objectively reasonable victim also would know that this child was the grandson of OLC's principals, and that SS was being groomed to take over the closely held family business. Ms. Chapman would reasonably fear that the child had his relatives' ear and could make life difficult for her. *See Boyer-Liberto*, 786 F.3d

at 279; EEOC Br. 14-15, 17. Ms. Chapman obviously and reasonably feared the consequences of reporting the child's conduct. She only spoke to PW, hoping the complaint would "sound better" if it came from PW rather than her. JA-70 (Chapman 73).

OLC argues that a perpetrator's diminished capacity can reduce harassment's severity. Appellee's Br. 46. OLC cites to a district court decision involving a special education teacher, *see Webster v. Chesterfield Cnty. Sch. Bd.*, --- F. Supp. 3d ---, 2021 WL 1555323 (E.D. Va. April 20, 2021), and to the Fifth Circuit's decision in *Gardner v. CLC of Pascagoula, L.L.C.*, which noted the need to account for "the unique circumstances involved in caring for mentally diseased elderly patients." 915 F.3d 320, 326 (5th Cir. 2019) (internal quotation marks omitted). *Webster* and *Gardner* involved persons with significantly diminished capacity, whose words could not possibly be attributed to the victim's employer. The record indicates that SS's son was a normal child who "[did] the stuff that little boys do." JA-73 (Chapman 76). More importantly, he was the child of Ms. Chapman's supervisor, and he directly attributed his racist sentiments to his father.

The objective severity threshold is higher for a constructive discharge claim, requiring proof that "a reasonable person in the employee's position would have felt *compelled* to resign." *Evans v. Int'l Paper Co.*, 936 F.3d 183, 193 (4th Cir. 2019) (internal quotation marks omitted). But constructive discharge is still ultimately a

factual question, and a reasonable trier of fact crediting Ms. Chapman's testimony could conclude that her working conditions were truly intolerable, such that resignation was the only reasonable option left. Again, the language she was repeatedly exposed to was "anathema"—the most egregious of all racial insults. It was made even worse by the July invocation of a vile stereotype ("lazy ass black n*****") dating back to chattel slavery. *See, e.g.*, Maurice E. R. Munroe, *Perspective: Unamerican Tail: Of Segregation and Multicultural Education*, 64 Alb. L. Rev. 241, 260 (2000). And that language was attributed directly to her supervisor.

When the August incident was brought to SS's attention, he made a half-hearted effort to procure an apology and then wandered off to attend to unspecified business at the front desk—even though he knew that Ms. Chapman was so upset that she felt a need to leave the premises. No wonder Ms. Chapman concluded that "[t]his is not going to stop. It's not. It's not going to stop," and "I can't stay here. I can't." JA-78, 81 (Chapman 81, 84). Indeed, although such proof is not required, a reasonable trier of fact could view SS's behavior as circumstantial evidence that he *wanted* Ms. Chapman to resign.

Of course a constructive discharge claim requires proof of "conditions . . . beyond ordinary discrimination." *Evans*, 936 F.3d at 193. But these conditions were not just "frustrating and unpleasant" for Ms. Chapman, Appellee's Br. 50, and the constructive discharge standard is not as impossible to satisfy as OLC implies. The

Third Circuit has recognized that "alteration of job responsibilities" or "unsatisfactory job evaluations" can be sufficient in the right circumstances. *See Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2003), *vacated and remanded on other grounds sub. nom. Pa. State Police v. Suders*, 542 U.S. 129 (2004).

A reasonable jury crediting Ms. Chapman's testimony could conclude on this record that SS had made clear through his behavior that he did not really care about the incidents' impact on Ms. Chapman, and that he had no intention of doing what it would take to stop them. Ms. Chapman felt that she had no choice but to resign. *See* JA-81 (Chapman 84) ("I can't stay here. I can't."). A reasonable jury crediting Ms. Chapman's testimony could find her conclusion reasonable.

B. The Pre-2015 Incidents Contributed To The Hostile Environment

OLC spends more than nine pages early in its brief arguing that any claim based directly on the pre-2015 incidents is barred by the statute of limitations or the scope of the EEOC charge. *See* Appellee's Br. 18-26. Even if OLC were correct, Ms. Chapman's testimony about those incidents would still be relevant to a host of critical issues. The jury could consider that testimony in deciding whether AS, MS, and SS were aware of the racially hostile atmosphere at OLC; whether it would have been reasonable to expect Ms. Chapman to complain to AS or MS about the actions of SS and his son; and the general credibility of AS, MS, and SS on every disputed issue in the case. The parties' dispute about these procedural doctrines is relevant

only to whether the jury *also* could rely on the pre-2015 incidents as support for a finding that Ms. Chapman's working environment was severely or pervasively abusive. And as explained above, the 2018 incidents are more than sufficient to clear that threshold on their own.

But with all that said, OLC's arguments fail to establish that the pre-2015 incidents are time-barred. It is settled law that because a hostile working environment "cannot be said to occur on any particular day," if "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 117 (2002).

OLC argues that *Morgan*'s holding does not apply if there are two distinct and unrelated hostile environments, and suggests several factors for this Court to consider: whether the incidents involved the same behavior, whether they involved the same supervisors, and how much time elapsed. Appellee's Br. 22. OLC cites no Fourth Circuit case adopting these factors, but even OLC's proposed factors do not support its conclusion. While OLC argues that the three-year gap between Ms. Chapman's two periods of employment was too long, it admits "[t]here is no 'magic number' to indicate how long the interval must be to sever the alleged violation." Appellee's Br. 23, 25. The incidents here occurred over a total span of about eight or nine years, from 2009 or 2010 to 2018. *See* JA-20. In *Tademy v. Union Pacific*

Corp. the Tenth Circuit found incidents occurring over an eight-year span were "sufficiently related." 614 F.3d 1132, 1144 (10th Cir. 2008).

OLC cites to *Tademy* in arguing that a continuing violation must involve the same supervisors. Appellee's Br. 22. But OLC acknowledges that it is a small business managed by a few members of the same immediate family, and Ms. Chapman's pre-2015 interactions with SS and other members of that family cannot be divorced from her experiences with SS and his son in 2018. Further, *Tademy* excluded one incident from the hostile work environment because it was "qualitatively different"—not because it involved a different supervisor. *See Tademy*, 614 F.3d at 1142. The Tenth Circuit actually rejected the argument that a hostile work environment must involve repeat actors. *Id.* at 1143. It reasoned that such a rule would allow an employer to "escape liability . . . by employing a legion of bigots, each of whom committed but a solitary act of racism," and that it would motivate employers "to avoid conducting thorough investigations aimed at rooting out the culpable party." *Id.*

The Seventh Circuit has stated that "[a] change in managers can affect whether incidents are related." *Ford v. Marion Cty. Sheriff's Office*, 942 F.3d 839, 853 (7th Cir. 2019). However, it distinguished between the significant act of transferring an employee to a different plant and less significant "'routine personnel actions' not taken to alleviate the harassment." *Id.* (quoting *Vickers v. Powell*, 493 F.3d 186, 199

(D.C. Cir. 2007)). Here the only relevant personnel change was SS's increased role in the family business, which had nothing to do with alleviating harassment.

Moreover, the pre-2015 incidents involved similar racially charged conduct: a cake depicting a noose, a reference to "slave numbers," racially motivated disdain for Myrtle Beach, and racially disparate support for employee med tech training. OLC itself cites a case that found racial graffiti, racial slurs, and the display of a noose to be sufficiently similar. *See* Appellee's Br. 22 (citing *Tademy*, 614 F.3d at 1142-44). OLC discounts Ms. Chapman's reliance on *Porter v. Cal. Dep't of Corr*., 419 F.3d 885 (9th Cir. 2005), because *Porter* did not find all the alleged incidents to be part of the continuing violation. Appellee's Br. 25. But the *Porter* incidents that OLC describes as "the same type of alleged conduct," *id.*, were no more homogenous than the incidents here. They included sexual propositioning, sexually explicit insults, and spitting in the victim's food. *Porter*, 419 F.3d at 893. The only events that the Ninth Circuit excluded lacked proof of discriminatory motive. *Porter*, 419 F.3d at 893.

OLC also argues that the pre-2015 incidents are outside the scope of Ms. Chapman's EEOC charge. As the opening brief explained, this objection only bears on Ms. Chapman's Title VII claim, not her parallel claim under 42 U.S.C. § 1981. And even under Title VII a plaintiff may pursue any claims that "are reasonably related to her EEOC charge and can be expected to follow from a reasonable

administrative investigation." *Sydnor v. Fairfax Cnty.*, 681 F.3d 591, 594 (4th Cir. 2012). Furthermore those charges must "be construed with the utmost liberality since they are made by those unschooled in the technicalities of formal pleading." *Alvarado v. Bd. of Trustees of Montgomery Cmty. Coll.*, 848 F.2d 457, 460 (4th Cir. 1988) (citation omitted). A reasonable investigation of Ms. Chapman's claims would have discovered the pre-2015 incidents immediately. And while this Court has explained that a lawsuit involving an entirely different kind of discrimination than was alleged in the EEOC charge will be barred, *see Sydnor*, 681 F.3d at 593-94, the earlier incidents here involved the same kind of discrimination (racial harassment), committed by members of the same small family and supervisory group.

Finally, OLC relies on *Chacko v. Patuxent Institution*, 429 F.3d 505 (4th Cir. 2005). Appellee's Br. 20. The plaintiff in *Chacko* filed EEOC complaints that concerned discrete actions or omissions by supervisors—not promoting the plaintiff, ordering him out a supervisor's office, and refusing to let him go home early. *Chacko*, 429 F.3d at 507. The plaintiff also claimed he was demoted and intimidated in retaliation for his initial complaints. *Id.* But none of the incidents involved derogatory remarks, which were the "centerpiece" at trial. See *id.* at 507, 511-12. Nor did the plaintiff bring up the derogatory remarks in his *ten* discussions with the employer's internal investigator and EEOC coordinator. *Id.* at 512. In contrast, Ms.

Chapman's EEOC complaint and the pre-2015 incidents both concerned racially derogatory speech.

CONCLUSION

The district court's summary judgment decision should be vacated, and the case remanded for trial.

Respectfully submitted,

/s/ J. Scott Ballenger
J. Scott Ballenger
Jennifer Elchisak (Third Year Law Student)
Zev Klein (Third Year Law Student)
Jehanne McCullough (Third Year Law Student)
Carly Wasserman (Third Year Law Student)
APPELLATE LITIGATION CLINIC
University of Virginia School of Law
580 Massie Rd.,
Charlottesville, VA 22903
(434) 924-7582
sballenger@law.virginia.edu

Counsel for Appellant

CERTIFICATION OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Reply Brief of Appellant contains 6,235 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

Dated: July 9, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger