RECORD 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 NORTH CAROLINA AT ASHEVILLE

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-2361 Caption: Tonya R. Chapman v. Oakland Living Center, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Arlene Smith
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
   If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jonathan W. Yarbrough Date: June 11, 2021

Counsel for: Appellees

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-2361 Caption: Tonya R. Chapman v. Oakland Living Center, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michael Smith
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Jonathan W. Yarbrough Date: June 11, 2021

Counsel for: Appellees

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No. 20-2361 Caption: Tonya R. Chapman v. Oakland Living Center, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Oakland Living Center, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Jonathan W. Yarbrough Date: June 11, 2021

Counsel for: Appellees

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No. 20-2361 Caption: Tonya R. Chapman v. Oakland Living Center, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Steve Smith
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Jonathan W. Yarbrough Date: June 11, 2021

Counsel for: Appellees

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ISSUES PRESENTED FOR REVIEW

Appellant Tonya Chapman has made in her opening brief new arguments that she did not present to the District Court below. As described later in this brief, these arguments have been forfeited and may not be made for the first time on appeal. Without conceding that Chapman's newly raised arguments are properly before this Court, the following issues are presented in Appellant's opening brief and will be addressed herein:

I. Whether Chapman's allegations dating back to her initial period of employment at Oakland Living Center are barred by the applicable procedural prerequisites and limitation periods.

II. Whether Chapman has forecast sufficient evidence to impute liability for the alleged hostile work environment to Oakland Living Center.

III. Whether Chapman has presented sufficient evidence of an actionable hostile work environment or resulting constructive discharge to create a genuine issue of material fact as to either of those claims.

STATEMENT OF CASE

Chapman's Employment Background

Tonya Chapman worked at Oakland Living Center, a small family-owned assisted living facility, on two separate occasions—from 2004 until 2015, and again in 2018. JA 36, 38-41, 60-82, 92-94, 106. Oakland is co-owned by Michael and

Arlene Smith, husband and wife. JA 42, 91-93, 228-29. Michael Smith serves as president and handles various operational matters, including maintenance, materials and payroll. JA 90-92. Arlene Smith, as the facility's administrator, oversees clinical operations and also provides direct care to residents. JA 227-28.

Chapman began her employment with Oakland Living Center in 2004 as a personal care assistant and later became a cook, working in the kitchen and also performing housekeeping duties as needed. JA 36-38, 48. Chapman worked at the facility part-time on the weekends. JA 36-38, 48, 62. As the second shift cook, Chapman was scheduled to work from 12:30 to 7:30 PM. JA 37. She reported to work after lunch was served to clean up the dining room and prepare snacks and dinner for Oakland's residents. JA 37-38.

Her counterpart on the first shift was Patricia Warner, who prepared breakfast and lunch and, upon Chapman's arrival at work, conveyed to Chapman any menu changes that Michael Smith might have made for the day. JA 43-46. Chapman and Warner were friends and, as Chapman put it, the two of them "pretty much talked about everything." JA 69. Although she now claims that she perceived Warner as her supervisor, Chapman testified in her deposition that Warner worked in the kitchen as a cook—the same job position Chapman held. JA 43-44, 46-47, 69-70. According to Chapman, Warner also was the one who told her the job was available in 2018 and communicated with her about returning to Oakland Living Center. JA

69. But she conceded that Warner had no authority to hire or discharge employees, and Chapman was not aware of Warner taking other supervisory actions such as recommending pay raises or setting pay rates. JA 69-70.

In the Charge of Discrimination that Chapman submitted in September 2018 to the U.S. Equal Employment Opportunity Commission, she referenced as her supervisor the co-owners' son, Steve Smith, who works at Oakland Living Center. JA 68-69, 88, 100, 265. Chapman testified that during her first period of employment, Steve Smith was operating his own separate pool service business and, at least from her perspective, had "no authority" at Oakland. JA 40-41. But by the time Chapman returned in 2018, Steve Smith was preparing to take over the administrator role. JA 43, 266. At that point, he performed maintenance and grounds-keeping at the facility, helped Michael Smith supervise the kitchen/dietary department where Chapman worked, and also oversaw operations when his parents were out of town. JA 68-69, 228-29, 265-66.

Steve Smith and his wife Beth have four children, the youngest of whom, JC,[1] was six years old during the relevant time period in 2018. JA 63, 262-63, 273. Even though the children did not work at Oakland Living Center, JC and his brothers frequently spent time playing at the facility. JA 63-64, 73, 196. According to

---

[1] Appellants use the initials "JC" to identify the minor child, in accordance with Fed. R. App. P. 25(a)(5).

Chapman, Steve Smith's children were there "all the time" and were essentially "raised" at the facility. JA 63-64.

When JC visited Oakland Living Center, he spent his time riding his bike, running around, and playing—as Chapman put it, "[d]oing the stuff that little boys do." JA 73. JC often visited Chapman while she was at work, and she let him help with tasks such as clearing silverware from the dining room tables. JA 200. Chapman testified that, aside from the two occasions—in July and August 2018, respectively—on which JC allegedly called her the "N" word, the child always behaved in a friendly manner toward her. JA 200.

The 2009 or 2010 Photo ID Incident

In 2009 or 2010, Arlene Smith photographed Chapman and other employees to create employee identification badges. JA 49-51, 106. Chapman alleges that Arlene Smith took her photograph from the front and side, and then commented that Chapman would be given a "slave number" on her badge. JA 51-52. Chapman recalls that she last wore the ID in 2012, and by the time she returned in 2018, Oakland Living Center employees no longer used identification badges. JA 52-53, 106-07. Chapman never complained to Oakland about the alleged incident, and she continued working there for five to six more years before resigning. JA 54, 250-51.

The 2014 Birthday Cake Incident

Chapman shares her birthday on February 15th with Steve Smith's twin sons, who turned four years of age in 2014. JA 54, 99, 263. Chapman alleges that on February 15, 2014, Steve and Beth Smith gave her a birthday cake depicting three stick figures—two small ones, with a larger one in the middle, which she now describes as a "black hangman from a noose." JA 12, 55. She alleges that she was asked to serve dinner early so the twins could have a birthday party in the facility's dining room, which she claims was decorated for the occasion with cardboard cut-outs of monkeys on the walls. JA 12, 57, 119.

Chapman testified that she thanked Steve and Beth Smith for the cake, then took it home to share it with her own children. JA 56. Chapman claims that her son was the one who first pointed out to her that one of the stick figures on the cake looked like a stick figure hangman with a noose. JA 56. Even then, Chapman simply replied, "Okay," and she ate some of the cake herself. JA 56. She never asked Steve or Beth Smith about the cake or discussed the alleged incident with any of the Smiths. JA 56-57, 250-51. She continued working at the facility for another year and five months before she resigned. JA 57.

Chapman's 2015 Resignation

Chapman resigned from Oakland Living Center in 2015 because she was tired of working in the kitchen and had expressed interest in becoming a med tech, but

received no support from her employer in obtaining her license. JA 38-41. According to Chapman, she quit the same day she heard other employees talking about going to get their med tech licenses. JA 40. At that point, Chapman picked up her paycheck and "just left," without notifying Michael or Arlene Smith. JA 40.

Chapman testified that, to her knowledge, Oakland never employed a black person in the med tech position. JA 128. She stated generally that "several" other black employees were interested in becoming a med tech, but she could not identify anyone, other than herself, who spoke with any of the Oakland Living Center principals about the role. JA 128-31. Chapman did not file an EEOC charge, a lawsuit, or any other complaint against Oakland Living Center or any of its principals in 2015. JA 41-42.

Chapman asserts in her opening brief that she resigned in 2015 due to "repeated racist statements and job discrimination," Opening Brief, Doc. 20 at pp. 9, but when asked in her deposition why she resigned in 2015, Chapman focused exclusively on the denial of the med tech opportunity and never mentioned any alleged race-related statements. JA 38-39. Moreover, Chapman's civil complaint characterized the resignation as "voluntary." JA 11.

Chapman's Return to Oakland Living Center

Chapman rejoined Oakland Living Center in the spring of 2018, after Warner had spoken with her a few times about coming back to work. JA 60-61, 106. She did

not express any reservations to Warner about returning to Oakland. JA 60. Upon her return, Chapman resumed her previous role and work schedule as the second shift cook. JA 60-62.

July 2018 Incident

One day in July 2018, Chapman was making cupcakes for the residents and, in anticipation of Steve Smith's children arriving at the facility, she made some extra cupcakes for the boys to decorate. JA 63-64. JC, who was six years old at the time, joined Chapman in the kitchen as he often did. JA 64, 273. After he finished decorating the cupcakes Chapman had set aside for him, the child asked to decorate more. JA 64-65. Chapman told JC that she needed to prepare the rest of them herself for the residents. JA 64-65. Chapman claims that the child got mad, hit and kicked her, and said, "My daddy called you a lazy ass n***** because you don't come to work." JA 65-67.

Chapman told the child to stop, but never reported the incident to Oakland Living Center's management. JA 69-72; *see also* JA 100 ("In July or August 2018, the son of my supervisor said I was a 'n*****.' I told him to stop, but I did not report it.") (asterisks added). She did, however, mention the incident to Warner, her friend and co-worker, when both of them were at work the next day. JA 69.

During her deposition, Chapman could not readily explain why she did not talk with Steve Smith about his youngest child's purported behavior. JA 70-71. Chapman conceded that she had never heard Steve Smith use similar language

toward her or, for that matter, make any racially derogatory comments at all. JA 67-68, 80, 82-83. She acknowledged that she could have walked down to Michael Smith's office, where Steve Smith frequently could be found, to talk with him about the incident. JA 68, 70-71. Or she could have talked with Beth Smith the next time Beth was at the facility. JA 71. Even though Michael or Arlene Smith were out of town at the time, Chapman could have called either of them on their cell phones, or she could have spoken with them after they returned. JA 71-72. But she did not do any of these things. JA 70-71.

August 2018 Incident

The second and final incident involving JC occurred on August 24, 2018. JA JA 74-81. Chapman alleges that the child was showing her tricks on his bicycle outside the facility and, after she had watched for about five minutes, one of his brothers called him away to talk with his father. JA 74-75. At that point, Chapman went inside and began cleaning up the dining room. JA 75. According to Chapman, JC came up to the window on his bike and called to her. JA 75-76. She walked over, opened the window, and told the child she had to work, and he allegedly responded, "N*****, n*****, get to work, n*****." JA 75-76.

Chapman claims she was astounded by the child's behavior, even though he had allegedly used the same language toward her within the previous month: "I couldn't believe the child had – a child of his age would even know that word, that

I didn't know what to do . . . I just kind of balanced everything out and just started cleaning up the dining room." JA 77. She then went into the kitchen, told Warner what had happened, and finished washing the dishes. JA 77-78. She told Warner, "This is not going to stop. It's not. It's not going to stop." JA 78.

Warner went to find Steve Smith, who was working elsewhere in the facility, and informed him that Chapman was leaving because JC had called her the "N" word. JA 272. Steve Smith immediately went to the kitchen and asked Chapman whether JC had said something ugly to her. JA 78, 272-73. Chapman replied that he had. JA 78, 272-73. He told Chapman he would straighten the child out. JA 199. He went directly outside to find JC, spanked the child, reprimanded him for his language, and told him to go inside and apologize to Chapman. JA 273-74. The child was screaming while being punished. JA 273-74. He and his father went into the kitchen but the child—who, according to Chapman, was "very upset" and crying at that point—did not apologize. JA 78-79, 199. Steve Smith, who was managing the facility in his parents' absence, left the kitchen to handle something at the front desk. JA 78-81, 238-39, 275. According to Chapman, JC then said, "Tonya, you are a n*****." JA 78-81. Chapman walked off the job, without any word to Steve Smith. JA 81. She told Warner, "I've got to go. I can't stay here. I can't. I'm sorry. 6-year olds should not know that." JA 81.

Chapman admitted she had never heard Steve Smith, Beth Smith, Michael Smith, or Arlene Smith use the "N" word or any similar term, and during her second stint at Oakland Living Center, six-year old JC was the only person who made any sort of racial slur or comment.[2] JA 82-84, 88. Still, however, Chapman never told Steve Smith that JC had repeated the slur. JA 81, 271-72. Beth Smith left a voice mail message for Chapman saying she did not know where JC would have gotten that kind of language and asking Chapman to please call her back. JA 86. Chapman refused to answer the phone and she never returned Beth's call. JA 82, 86.

Administrative Proceedings Before the EEOC

Chapman filed with the EEOC a Charge of Discrimination dated September 26, 2018. JA 88, 100. In this Charge, Chapman recounted JC's alleged remarks to her in July and August 2018. JA 100. She described the alleged conduct as follows:

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[2] Aside from the photo ID and birthday cake incidents and JC's purported comments in 2018, the only other race-related remark Chapman could recall during her combined periods of employment at Oakland Living Center was allegedly made by Arlene Smith's teenage niece, who was helping out at the facility on weekends. JA 84-87. According to Chapman, she overheard the niece say, in 2012 or 2013, that Michael and Arlene Smith had to buy another condo because there were too many blacks at Myrtle Beach. JA 84-85. Although Chapman referenced this alleged incident in her appellate brief, she did not include it in her civil complaint or her responses filed in the District Court in opposition to summary judgment. *See* District Court Docs. 52, 60, 61. To the extent this testimony is now offered to support the alleged hostile work environment, the claim is untimely and exceeds the scope of the EEOC Charge, and therefore should be excluded on the same bases as other pre-2015 incidents.

> In July or August 2018, the son of my supervisor said I was a "n*****." I told him to stop, but I did not report it. On August 24, 2018, the son came to me again and said, "n*****, n*****, get to work." A co-worker heard the son and told my supervisor. I confirmed what the son said to my supervisor and he told me he would take care of it. After he spoke with his son, the son came back to me and said "Tonya, you are a n*****."

JA 100 (asterisks added). Chapman indicated in the Charge that the earliest date this alleged discrimination took place was July 15, 2018 and it last occurred on August 24, 2018. JA 100. She did not check the box for "continuing action." Id. The EEOC—now an *amicus curiae* in this appeal—dismissed the Charge on September 28, 2018, three days after it was filed. JA 101.

Chapman's Civil Action

On December 3, 2018, Chapman filed a *pro se* Complaint in the U.S. District Court for the Western District of North Carolina, asserting a claim of race discrimination. Complaint, District Court Doc. 1. After retaining counsel, Chapman filed an Amended Complaint on April 1, 2020, asserting claims against Oakland Living Center for harassment under Title VII and Section 1981, against Steve Smith, Michael Smith, and Arlene Smith for harassment under Section 1981, and against Oakland Living Center for constructive discharge under Title VII and Section 1981. Amended Complaint, District Court Doc. 39. Chapman's attorney subsequently withdrew from representation. Order Granting Consent Motion to Withdraw, District Court Doc. 53.

Summary Judgment Award and Appeal

Appellees filed in the District Court a motion for summary judgment as to all of Chapman's claims under Rule 56 of the Federal Rules of Civil Procedure. Motion for Summary Judgment, District Court Doc. 49. Chapman, who was again proceeding *pro se*, received an extension of the response deadline and made multiple submissions in opposition to the motion. Order, District Court Doc. 53; Responses in Opposition, District Court Docs. 52, 60, 61. After receiving the parties' respective submissions and hearing oral arguments, the District Court entered an Order and Judgment on November 24, 2020, granting summary judgment in favor of Appellees and dismissing Chapman's claims in their entirety. Order Granting Summary Judgment, District Court Doc. 64; Clerk's Judgment, District Court Doc. 65. Chapman filed a Notice of Appeal on December 21, 2020. Notice of Appeal, District Court Doc. 66.

SUMMARY OF THE ARGUMENT

As the District Court correctly held, Appellees have satisfied their burden, as the movants on summary judgment, of demonstrating that there is no genuine issue as to any material fact, Consequently, Appellees are entitled to judgment as a matter of law. Chapman, however, has failed to present sufficient evidence for a reasonable jury to find in her favor on any of her claims.

As an initial matter, the majority of the arguments contained in Chapman's Opening Brief (and, for that matter, in the Amicus Curiae Brief submitted by the EEOC) were never presented to the District Court. Issues raised for the first time on appeal generally may not be considered, absent exceptional circumstances that do not exist here. Accordingly, Chapman has forfeited these newly raised arguments.

Even if all of the arguments contained in Chapman's opening brief were properly before this Court, the summary judgment award should be affirmed.

First, Chapman has failed to demonstrate any legitimate basis for pursuing her Title VII and Section 1981 claims based on allegations that preceded the applicable limitations periods and, in the case of her Title VII claims, exceed the scope of her EEOC Charge and any reasonable investigation of the Charge. Accordingly, all such claims are procedurally barred.

Secondly, the record contains no support for Chapman's contention that any of the Oakland Living Center managers knew or should have known that the purported harasser, a six-year-old child, had a propensity to use racial slurs. And once the alleged harassment came to management's attention, Chapman's supervisor (and the child's father) immediately took action reasonably directed toward ending the behavior. When the child purportedly repeated the conduct, Chapman walked off the job without notifying Oakland of the recurrence or affording her employer an opportunity to take further remedial steps. Based on these facts, Chapman cannot

establish any basis for imputing liability for the alleged hostile work environment to Oakland.

Thirdly, Chapman has failed to forecast sufficient evidence of severe or pervasive harassment to establish an actionable hostile work environment, much less demonstrate that she has endured workplace harassment so intolerable that a reasonable person in her position would have felt compelled to resign as required to prove constructive discharge.

For all of these reasons, this Court should affirm the District Court's entry of summary judgment in favor of Appellees.

ARGUMENT

Standard of Review: Summary Judgment Standard

This Court should review the granting of summary judgment *de novo*, using the same standards of law applied by the district courts. Hartsell v. Duplex Prods, 123 F.3d 766, 771 (4th Cir. 1997). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the non-movant. Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986). However, "the mere existence of a scintilla of

evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). The moving party on a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the non-movant can prove its case. Cray Commc'ns v. Novatel Comput. Sys., 33 F.3d 390, 393-94 (4th Cir. 1994). This is consistent with "one of the principal purposes of the summary judgment rule"—namely, "to isolate and dispose of factually unsupported claims or defenses." Celotex, 477 U.S. at 323-24.

Standard of Review: Forfeiture of Arguments

Chapman failed to raise most of her present arguments in the District Court, which fundamentally alters that standard of review. Arguments raised for the first time on appeal generally will not be considered. Muth v. U.S., 1 F.3d 246, 250 (4th Cir. 1993); *see also* Williams v. Prof'l Transp., 294 F.3d 607, 614 (4th Cir. 2002). Exceptions are made only in very limited circumstances, such as where refusal to consider the newly-raised issue would amount to plain error or would result in a fundamental miscarriage of justice. Id.; *see also* In re Celotex Corp., 124 F.3d 619, 631 (4th Cir. 1997) (describing the criminal plain-error standard as a "minimum" standard that must be met before undertaking discretionary review of a waived argument in a civil case).

Here, Chapman raises multiple new arguments challenging the District Court's dismissal of her claims on summary judgment. She disputes, for example, the District Court's holding that no legitimate basis exists for imputing to Oakland Living Center liability for the alleged hostile work environment. In this regard, Chapman argues that, based on the record evidence, a reasonable jury could conclude Oakland had actual and constructive knowledge of the alleged harassment or that it failed to take adequate preventive and remedial measures, and that the District Court used the wrong standard in determining whether liability may be imputed to Oakland. She maintains that she should be permitted, in accordance with the continuing violation doctrine, to pursue claims based on otherwise time-barred allegations. She contends that allegations outside the scope of her EEOC Charge should nonetheless be considered in support of her Title VII claims. She argues that the District Court employed the incorrect standard in analyzing her constructive discharge claim, and argues that she has forecast sufficient evidence to satisfy the required elements of constructive discharge under the appropriate standard. The EEOC, in its *amicus* brief, weighs in on some of these same arguments.

Chapman did not, however, raise any of these arguments below. She submitted to the District Court three separate responses in opposition to Appellees' summary judgment motion. Responses in Opposition, District Court Docs. 52, 60, 61. Even construing these submissions liberally, Chapman presented to the court

below, at best, an argument and some legal authority for the proposition that she has alleged sufficiently severe or pervasive conduct to prove an actionable hostile work environment. *See* District Court Doc. 60 at pp. 2, 4-6. Although Chapman has proceeded intermittently on a *pro se* basis,[3] she was given ample opportunities to state her grounds in opposition to summary judgment through written responses and in oral argument.

Chapman has not addressed her failure to raise all of her present arguments to the District Court, much less identified any exceptional circumstances that would justify departure from the general rule. Absent such circumstances, any arguments Chapman failed to raise below have been forfeited and may not be made for the first time to this Court. Muth, 1 F.3d at 250. This holds true not only for Chapman, but also for the EEOC as *amicus curiae*. *See* Snydor v. Phelps, 580 F.3d 206, 216-17 (4th Cir. 2009) (refusing to consider argument raised solely by amicus brief, when the appellant had waived the argument); *see also* Cellnet Commc'ns v. FCC, 149 F.3d 429, 443 (6th Cir. 1998) ("[t]o the extent that the amicus raises issues or makes

[3] Chapman is no stranger to civil proceedings. She is documented as a frequent litigant who has been warned about the implementation of pre-filing requirements in the District Court. *See* Chapman v. Lil Ceaser Co., No. 1:18-cv-00093-MR-DLH (W.D.N.C. April 20, 2018) (dismissing claims *sua sponte*, noting this was the second case filed by Chapman dismissed on initial review, and cautioning her at p. 5 that "future frivolous filings will result in the imposition of a pre-filing review system").

arguments that exceed those properly raised by the parties, [the Court] may not consider such issues").

Discussion of the Issues

I. CHAPMAN'S CLAIMS FROM HER FIRST PERIOD OF EMPLOYMENT WITH OAKLAND LIVING CENTER ARE BARRED BY THE APPLICABLE PROCEDURAL PREREQUISITES AND LIMITATION PERIODS.

Chapman premises her claims of harassment and constructive discharge, in part, upon incidents that allegedly occurred in 2009 or 2010 and 2014, during her first stint of employment at Oakland Living Center. Specifically, Chapman alleges that: (1) in 2009 or 2010, Arlene Smith forced her to take an employee badge photograph while standing in profile and assigned her "slave numbers"; and (2) in February 2014, Steve and Beth Smith gave her a birthday cake that had a black stick-figure hangman on it. As the District Court correctly found, these allegations are time-barred, procedurally barred, and, moreover, far too remote to substantiate a constructive discharge in 2018.

A. Chapman's fact allegations from her initial period of employment exceed the scope of her EEOC Charge and any reasonable investigation stemming from the Charge.

Under Title VII, plaintiffs are required to file a Charge of Discrimination with the EEOC within 180 days of the allegedly unlawful employment practice. 42 U.S.C. 2000e–5(e)(1). "Only those discrimination claims stated in the initial charge, those

reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 963 (4th Cir. 1996). Claims that fall outside of the scope of the EEOC charge are procedurally barred. Dennis v. Cnty. of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995).

Chapman's EEOC Charge exclusively referenced the racial remarks that JC allegedly directed toward her in July and August 2018, and made no mention of any continuing violation or previous unlawful conduct. Chapman cites this Court's decision in Sydnor v. Fairfax Cnty., Va., 681 F.3d 591 (4th Cir. 2012), for the proposition that her lawsuit allegations are reasonably related to those in her EEOC charge, but the circumstances in Sydnor are readily distinguishable. Sydnor involved a plaintiff who alleged that her employer discriminated against her because of her disability by failing to provide reasonable accommodations. The defendant employer claimed that the plaintiff had failed to exhaust her administrative remedies because she did not reference in her EEOC charge the specific accommodation at issue in the litigation, the use of a wheelchair. In Sydnor, this Court held that "[t]he touchstone for exhaustion is whether plaintiff's administrative and judicial claims are 'reasonably related' . . ., not precisely the same," and sufficient similarities existed to provide the defendant with ample notice of the allegations and fulfill the exhaustion requirement. 681 F.3d at 595 (citation omitted). In this manner, the Court

reasoned, the matter before it differed markedly from cases like Chacko, for example, where the plaintiff's EEOC charge referenced different time frames, actors, and discriminatory conduct than that alleged in the lawsuit. Id. (citing Chacko v. Patuxent Inst., 429 F.3d 505, 511-12 (4th Cir. 2005)).

The case at hand is akin to Chacko, which Chapman also cites in her brief. Like Chapman, the plaintiff in Chacko limited the allegations in his EEOC charges to specific acts of harassment at specific times and did not check the "continuing violation" box. Chacko, 429 F.3d at 511. Further, the administrative charge in Chacko alleged only supervisor harassment based on the plaintiff's national origin, and failed to mention the alleged co-worker harassment involving national-origin epithets at issue in the litigation. Id. at 511. Here, Chapman limited her EEOC Charge allegations to third-party harassment by her supervisor's six-year old child, and did not mention the previous incidents involving different alleged harassers. Even recognizing the liberal instruction afforded administrative charges, this Court in Chacko "decline[d] to interpret the exhaustion requirement so narrowly as to render it a nullity and undermine the purposes of fair notification, conciliation, and preservation of resources that Congress intended for it." Id. at 512-13. The District Court correctly reached the same conclusion below as to Chapman's failure to exhaust her administrative remedies before the EEOC.

B. Chapman's allegations that precede the governing limitation periods are not part of a continuing violation and, thus, are time-barred.

Chapman's allegations relating to her first period of employment, including the photo ID incident and birthday cake occurrence, are time-barred, and she cannot get around the applicable limitation periods by relying on the continuing violation doctrine. As to her Title VII claim, Chapman filed her Charge on September 26, 2018. Thus, any allegations predating March 30, 2018, precede the 180-day limitations period specified by the statute. 42 U.S.C. § 2000e–5(e)(1). Chapman's claims under Section 1981 are subject to a 4-year statute of limitations. *See, e.g.*, Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382 (2004). She filed her complaint in the District Court on December 3, 2018. Consequently, any alleged incidents predating December 3, 2014, precede the limitations period established by Section 1981.

Under the continuing violation doctrine, courts may consider conduct that would ordinarily be time-barred as long as the untimely incidents represent "part of the same actionable hostile work environment practice" as the acts that fall within the statutory time period. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 120 (2002). The Supreme Court in Morgan held that, in general, "the entire hostile work environment encompasses a single unlawful employment practice," but cautioned that acts bearing "no relation" to one another would belong to separate employment

practices. 536 U.S. at 117-18. The Morgan decision quoted favorably the Ninth Circuit's reasoning for concluding, in the proceedings below, that a single continuing employment practice existed: "the pre- and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers." 536 U.S. 120-21.

The Fourth Circuit and other Circuit Courts of Appeal have identified factors that guide the Morgan relatedness inquiry, including whether the pre-limitations allegations involved the same sort of behavior and the same supervisors. In Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134 (4th Cir. 2007), for example, the plaintiff's supervisor had reprimanded her several times prior to the limitations period for performance deficiencies similar to those involved in post-limitation period reprimands, providing a basis for deeming the entire course of conduct part of the same alleged violation. 474 F.3d at 139-41. But in Tademy v. Union Pac. Corp., 614 F.3d 1132 (10th Cir. 2008), the Tenth Circuit held that although racial graffiti and slurs that took place before the limitations period began were sufficiently related to similar graffiti and the display of a noose occurring within the charge-filing period, a confrontation between the plaintiff and his supervisor several years earlier was materially different in nature and could not be included in the same alleged violation. 614 F.3d at 1142-44.

Another pertinent factor is the passage of time, as "[a] significant gap between alleged incidents of discriminatory harassment can sever the hostile work environment claim." Ford v. Marion Cnty. Sheriff's Off., 942 F.3d 839, 852 (7th Cir. 2019) (listing cases where spans of two or three years or more bifurcated the alleged hostile work environment and holding that the 18-month gap between the plaintiff's complaints to her employer distinguished the matter from cases where plaintiffs continuously complained about the alleged harassment). There is no "magic number" to indicate how long the interval must be to sever the alleged violation—rather, the question is whether the "series of allegations describe continuous conduct rather than isolated incidents." Id.

Here, Chapman's allegations from her first period of employment—Arlene Smith taking her photograph in 2009 or 2010, and Steve and Beth Smith bringing her a birthday cake in February 2014—bear no relationship to six-year-old JC's alleged use of the "N" word toward her in 2018. The two earlier events were separated from one another by four to five years and involved different alleged perpetrators. Moreover, the racial remarks allegedly took place in the summer of 2018, more than four years after the birthday cake incident and almost a decade after the photo ID occurrence. And the 2018 events at issue were separated from the earlier allegations by a three-year break in Chapman's service.

Chapman asks the Court to ignore these key distinctions, arguing that even if the alleged harassers were not the same, the allegations all involved racial harassment by the same family and, as to the birthday cake incident, the same supervisor. According to Chapman, however, Steve Smith lacked any authority at Oakland Living Center during her first period of employment, when the birthday cake incident allegedly occurred. Moreover, she references no case law authority suggesting that familial relations among alleged bad actors are enough to combine otherwise distinct conduct into one extended hostile work environment.

Chapman cites Spriggs v. Diamond Auto Glass, 242 F.3d 179 (4th Cir. 2001), for the proposition that her three-year break in service is "irrelevant" to the Court's analysis. The Spriggs decision, however, did not discuss the continuing violation doctrine, as the facts differed materially from those at issue here. The plaintiff in Spriggs alleged that he resigned from his first period of employment due to "incessant" racial slurs made on a "continuous daily" basis by his supervisor, and he was persuaded to return approximately one year later based on his employer's promises that the race-related conduct would stop. 242 F.3d at 181-82, 184. Upon his rehire, the plaintiff in Spriggs was again subjected to ongoing (and, in at least one instance, worsening) racial slurs by the same supervisor, ultimately leading him to resign a second time. Id. at 182.

In Chapman's case, however, zero overlap exists among the alleged harassers in the pre- and post-limitations allegations, the isolated incidents of alleged harassment were far from "incessant," she never raised complaints about them, and her resignation in 2015 did not stem from the alleged harassment. Additionally, the three-year gap between Chapman's two stints at Oakland Living Center was far longer than the single year at issue in Spriggs. And, unlike the Spriggs plaintiff, Chapman expressed no reservations about returning to Oakland in 2018 based on her previous work experience there.

Chapman also relies on the Ninth Circuit's ruling in Porter v. Cal. Dep't of Corr., 419 F.3d 885 (9th Cir. 2005), for her proposition that the two earlier incidents of alleged harassment at Oakland Living Center amounted to the same type of employment actions, occurred relatively frequently, or were perpetrated by the same managers. But unlike the matter at hand, the continuing violation at issue in Porter involved the same type of alleged conduct by the same two managers over a period of time. 419 F.3d at 894. In fact, the Ninth Circuit in Porter differentiated this single continuing employment practice from other unrelated conduct attributed to a third manager, and found that those unrelated allegations did not comprise the same actionable hostile work environment under the Morgan principles. 419 F.3d at 893.

According to Chapman, the Supreme Court's ruling in Green v. Brennan, --- U.S. ---, 136 S. Ct. 1769 (2016), permits a plaintiff to dredge up old conduct, no

matter how far back in time it occurred, to support allegations a hostile work environment that results in constructive discharge. Although the Court ruled in Green that the limitations period on a constructive discharge claim does not commence until an employee resigns, this decision did not dispense with the requirement that the discriminatory conduct leading up to the termination comprise a single unlawful employment practice. 136 S. Ct. at 1777-78 ("*So long as those acts are part of the same, single claim under consideration*, they are part of the 'matter alleged to be discriminatory,' whatever the role of discrimination in each individual element of the claim") (emphasis added).

Expanding the hostile work environment to include every incident that allegedly occurred during Chapman's combined years of employment at Oakland Living Center, regardless of the alleged harasser's identity or supervisory status, without regard to dissimilarities in the alleged conduct, and no matter how temporally remote the alleged incidents, would effectively negate the requirement that plaintiffs adhere to statutory procedural requirements and limitation periods. The Supreme Court in Morgan rejected such an approach, referencing with approval established precedent stating that strict adherence to Title VII's filing requirements "is the best guarantee of evenhanded administration of the law." Morgan, 536 U.S. at 108-09 (citing Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980)).

II. NO BASIS EXISTS FOR IMPUTING LIABILITY TO OAKLAND LIVING CENTER FOR THE ALLEGED HOSTILE WORK ENVIRONMENT.

To state a claim for harassment under Title VII or Section 1981, a plaintiff is required to set forth sufficient fact allegations to demonstrate that there was: "(1) unwelcome conduct; (2) that is based on the plaintiff's . . . race; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer." Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 277 (4th Cir. 2015) (en banc); *see also* Spriggs, 242 F.3d at 184 (the elements of a hostile work environment claim "are the same under either § 1981 or Title VII").

Chapman argues that the District Court incorrectly determined that no basis exists to impute liability for the alleged hostile work environment to Oakland Living Center.[4] First, she contends that the District Court incorrectly analyzed imputability using the negligence standard applicable in cases involving third-party harassment,

[4] The district court also dismissed Chapman's claims against Arlene Smith, Michael Smith, and Steve Smith because Chapman failed to forecast admissible evidence that any of the individual managers had violated Section 1981 and therefore there is no basis for holding them personally liable. JA 297-99. Chapman does not address this issue in her opening brief and consequently has waived any argument that the District Court erred in this respect. *See* Fed. R. App. P. 28(a)(8)(A) ("The argument . . . must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies[.]"); Hensley v. Price, 876 F.3d 573, 580-81, n. 5 (4th Cir. 2017) (internal citations omitted). And, as Chapman concedes, supervisors are never individually liable for harassment under Title VII.

as opposed to the vicarious liability standard for supervisor harassment. She also asserts that the District Court erred in concluding that Chapman failed to forecast sufficient evidence of negligence on the part of Oakland Living Center. According to Chapman, a reasonable jury could find that Oakland knew or should have known of the alleged harassment prior to August 2018, when Warner informed Steve Smith of the child's behavior, and even then, it failed to take appropriate actions reasonably calculated to end the harassment. As described below, however, the District Court used the correct standard to determine whether liability may be imputed to the employer, and its conclusions were fully consistent with the established case law authority and the record evidence.

A. Oakland Living Center may not be held vicariously liable for the six-year-old child's alleged harassing conduct.

As this Court has recently reinforced, the standard for analyzing the imputability requirement "is informed by the status of the alleged harasser." Bazemore v. Best Buy, 957 F.3d 195, 201 (4th Cir. 2020); *see also* Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) ("an employer's liability for such harassment may depend on the status of the harasser"). If the alleged harasser is the plaintiff's supervisor, the employer will be either strictly or vicariously liable for the supervisor's actions. Strothers v. City of Laurel, Md., 895 F.3d 317, 333 (4th Cir. 2018). If the harassing conduct came from an individual other than a supervisor, such as a co-worker or third party, "the employee must show that the employer was

negligent in controlling working conditions—that is, the employer knew or should have known about the harassment and failed to take effective action to stop it." 895 F.3d at 332 (internal quotation marks omitted); *see also* Freeman v. Dal-Tile Corp., 750 F.3d 413, 422-23 (4th Cir. 2014) (applying negligence standard to third-party harassment).

According to Chapman, the child "was not genuinely a third party," and consequently Oakland Living Center should be held vicariously liable for JC's behavior due to Steve Smith's alleged "abuse of his supervisory authority" in bringing the child to the workplace. Opening Brief, Doc. 20 at pp. 29, 36-39. Chapman asserts that the appropriate question is not the identity of the alleged harasser, as this Court has consistently held, but instead whether the supervisor was "aided in accomplishing the tort by the existence of the agency relation." Id. at p. 37. Per Chapman, Steve Smith's status as a supervisor enabled him to bring a six-year-old child into the workplace in the first place, thereby creating an opportunity for the child to harass Chapman. Surely, Chapman posits, an employer would be vicariously liable for a hostile work environment created through third-party proxies, e.g., if the supervisor used his authority to give "malignant third parties"—in this case, a six-year-old child—access to the workplace. Id. at p. 37.

Not surprisingly, Chapman cites no case law applying this novel theory, which contravenes established precedent holding that vicarious liability, without a showing

of negligence, attaches only when the alleged harasser is a supervisor. *See, e.g.*, Vance, 570 U.S. at 428-29; Strothers, 895 F.3d at 333. Instead, she references language from the Supreme Court's decisions in Faragher and Ellerth acknowledging that Title VII jurisprudence borrows in some respects from common law agency principles, and in particular the "aided-by-agency-relations principle embodied in § 219(2)(d)" of the Restatement (Second) of Agency (1957).[5] The Supreme Court has made clear, however, that although the Restatement provides "a useful beginning point for a discussion of general agency principles," common law principles "may not be transferable in all their particulars to Title VII." Burlington Indus. v. Ellerth, 524 U.S. 742, 755 (1998) (quoting Meritor Savings

[5] Chapman also drops a footnote asserting that a jury could find that Steve Smith's negligence as a parent—not as a supervisor or agent of her employer—enabled the harassment. In support of this proposition, Chapman cites various state court decisions related to circumstances when parental negligence caused injury, along with a North Carolina statute imposing strict liability for parents when a child maliciously or willfully insures another. She cites no case holding that a supervisor's status as a parent provides a basis for imputing liability to the employer. Also, the cases cited by Chapman in her footnote 3 require a showing of negligence—as she stated, "that Steve Smith knew of his son's dangerous proclivity for speaking racial insults"—which, as addressed further in the subsequent section of this brief, is not substantiated by the record here. *See* Condel v. Savo, 39 A.2d 51, 52 (Pa. 1944) ("At common law the mere relation of parent and child imposes upon the parent no liability for the torts of the child, but the parents may be liable where the act of the child is done as the agent of the parents or where negligence of the parents makes the injury possible."); Jackson v. Moore, 378 S.E.2d 726, 728 (Ga. App. 1989) ("Recovery has been permitted where there was some parental negligence in furnishing or permitting a child access to an instrumentality with which the child likely would injure a third party."); Rios v. Smith, 744 N.E.2d 1156, 1159 (N.Y. 2001) (same).

Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986)); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 791-92 (1998).

As to the aided in the agency relation standard, the Supreme Court in Ellerth acknowledged that "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims." 524 U.S. at 758. But if workplace proximity and regular contact were enough to satisfy the aided in agency relation standard, "an employer would be subject to vicarious liability not only for all supervisor harassment, but also for all co-worker harassment," an untenable result that the Supreme Court recognized was not enforced by the EEOC or any court of appeals that had addressed the matter. 524 U.S. at 760. Adapting the aided in agency relation concept to the Title VII context, "Ellerth and Faragher identified two situations in which the aided-in-the-accomplishment rule warrants employer liability even in the absence of negligence, and both of the situations involve harassment by a supervisor as opposed to a co-worker." Vance, 570 U.S. at 428-29 (internal quotation marks omitted). If, however, the harassing employee is the victim's co-worker, "the employer is liable only if it was negligent in controlling working conditions." 570 U.S. at 424.

Chapman would have this Court hold an employer vicariously liable simply because a supervisor allowed the alleged harasser access to the workforce on a

regular basis. Such a holding, without regard to the identity of the harasser or any negligence on the part of the supervisor, would effectively impose vicarious liability on employers based solely on workplace proximity and regular contact, the very result the Supreme Court rejected in Ellerth. 524 U.S. at 758; *see also* Mikels v. City of Durham, NC, 183 F.3d 323, 332 (4th Cir. 1999) (quoting Ellerth for the proposition that "absent some elaborate scheme," harassment by a co-worker having no authority of any kind over the victim can never be found to be aided by the agency relation because the agency relationship provides no "aid" for the conduct but workplace proximity). It also would essentially negate the concept of non-supervisory harassment, as the presence of virtually any harasser in the workplace—from a co-worker to a customer to a vendor or other third-party visitor—typically may be traced back to one or more decisions by management personnel.

In support of her position, Chapman points to this Court's statement in Mikels that the "determinant is whether as a practical matter [the supervisor's] employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not." Mikels, 183 F.3d at 333. The Mikels case, however, involved the question of whether *the alleged harasser* was a supervisor, for purposes of determining whether vicarious liability was appropriate, not whether harassment by a non-supervisory actor was somehow

"aided by the agency relation" of a supervisor. 183 F.3d at 331-34. This Court in Mikels plainly states, when discussing what conduct short of a tangible employment action might nevertheless be aided by the agency relation, that the identity of the alleged harasser is key—it must be the harassing conduct of a person with "some measure of supervisory authority" over the plaintiff, not a "mere co-worker, one with no form of authority." 183 F.3d at 332.

Even Chapman does not maintain that the alleged harasser—a six-year-old visitor—exercised any sort of authority over her. She does suggest, however, that the family relationship between JC and his father, a supervisor, caused her to feel obliged to continue to engage with the child, even after his use of the "N" word in July 2018, and to conclude that pursuing any further redress with her employer would be futile. That does not change the identity of the alleged harasser, the determining factor as to the appropriate standard for imputing liability to the employer. *See* Mikels, 183 F.3d at 332. Moreover, the record shows that Chapman instructed the child on at least twice in July and August 2018 to stop interfering with her work and, according to her EEOC Charge allegations, she told him in July 2018 to stop using the "N" word. As this Court acknowledged in Mikels, the ability to "walk away or tell the offender where to go" is a hallmark of non-supervisory harassment, whereas such a response might not be feasible in response to harassment

by a supervisor authorized to threaten discharge or promise promotion. Id., 183 F.3d at 333-34 (citing Faragher, 524 U.S. at 803).

B. Chapman cannot demonstrate that Oakland Living Center had actual or constructive notice of the alleged harassment before August 24, 2018.

Chapman asserts that the District Court erred in concluding that Oakland Living Center first received notice of the alleged harassment on August 24, 2018, when Steve Smith learned of his son's alleged racial slur toward Chapman. According to Chapman, Oakland at least had constructive knowledge, if not actual knowledge, of the alleged hostile work environment before that time.

First, Chapman argues that a reasonable jury might conclude that Arlene Smith and Steve Smith were each respectively involved in the pre-limitations period incidents involving the photo ID and birthday cake and, consequently, knew about the alleged hostile work environment before 2018. The pertinent question is whether Oakland Living Center reasonably should have anticipated that the alleged harasser—six-year-old JC, who was not involved in the earlier incidents, and in fact was not even born at the time of the alleged 2009-2010 occurrence—would harass Chapman, not whether Oakland was aware of isolated incidents that had occurred in the past involving other alleged perpetrators. Foster v. Univ. of Md.—E. Shore, 787 F.3d 243, 255-56 (4th Cir. 2015) (employers will be liable if they "anticipated or reasonably should have anticipated that a particular employee would harass a

particular co-worker and yet failed to take action reasonably calculated to *prevent* such harassment") (emphasis in original) (citing Paroline v. Unisys Corp., 879 F.2d 100, 107 (4th Cir. 1989), vacated in part on other grounds, 900 F.2d 27, 28 (4th Cir. 1990) (en banc)); *see also* Mikels, 183 F.3d at 330-31 (noting that, in Paroline, liability arose because the employer was already on notice of the harasser's propensities); Freeman, 750 F.3d at 423-24 (attributing constructive knowledge to supervisor who was aware of the perpetrator's inappropriate behavior, had received several complaints about him, and had witnessed the plaintiff crying due to his actions, which included racial epithets).

Chapman also asserts that her alleged complaint to Warner about JC's conduct in July 2018 should have put Oakland Living Center on notice of the child's propensities. According to Chapman, her deposition testimony supports the inference that Warner controlled Chapman's daily schedule and work environment and, consequently, was required to report the incident up the chain. As the District Court aptly noted, however, Chapman stated in her sworn EEOC Charge that she "did not report" the July 2018 incident and, as a result, she is now precluded from taking a contradictory position. *See* Williams v. Genex Servs., 809 F.3d 103, 110 (4th Cir. 2015) ("It is well-settled that a plaintiff may not avoid summary judgment by submitted contradictory evidence"); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue

of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct”).

Even crediting Chapman’s testimony that she told Warner about the July 2018 incident, the record does not support a finding that Warner was authorized or obligated to act on it, as required for effective employer notice. The established case law, including authority cited by Chapman, provides that employers are on notice for negligence purposes when management officials or other authorized personnel, such as human resources officials, know about or reasonably should know about the alleged harassment. *See* Sandoval v. Am. Bldg. Maint. Indus., 578 F.3d 787, 802 (8th Cir. 2009) (actual notice is established by proof that *management* knew of the harassment, whereas constructive notice is established when the harassment was so severe or pervasive that *management* reasonably should have known about it) (emphasis added); EEOC v. Sunbelt Rentals, 521 F.3d 306, 320 (4th Cir. 2008) (holding that reports to managers, supervisors and human resources personnel constituted notice to employer).

In asserting that the notice requirement was satisfied, Chapman materially overstates Warner’s position and authority at Oakland Living Center. Citing her own deposition testimony, Chapman asserts that Warner “controlled Chapman’s daily schedule and work environment.” Opening Brief, Doc. 20 at p. 35 (citing JA 44-47). In the very deposition excerpt cited in her brief, however, Chapman testified that

Warner worked as the first shift cook and, when Chapman arrived for the second shift, Warner relayed to Chapman any changes that Oakland management had made to the menu for the day. JA 43-46. In other words, Warner—a fellow cook—simply passed along job-related updates during the shift change, and the record does not reflect that Warner had any greater supervisory authority than Chapman herself.

Chapman also speculates that the principals at Oakland Living Center "must have known, or at least were on inquiry notice, that this child, who was at the facility essentially full-time, had been exposed to some truly awful attitudes and posed a serious risk of creating exactly the sort of workplace situation that manifested here." Opening Brief, Doc. 20 at pp. 35-36. Referencing the so-called "elephant in the room," Chapman claims that young children do not come into the world with racial biases and primarily absorb the language and attitudes of their families—in this case, the "entire management structure" of Oakland Living Center. Id. Even six-year-old children, however, do not exist in a vacuum, and Chapman makes an untenable reach by attributing JC's alleged use of racial epithets to family members who worked at Oakland, as opposed to any number of other potential influences. That is particularly true here, given Chapman's admission that she never once heard JC's father or any other member of the child's family use the "N" word or similar language despite working at the family-owned business for many years. JA 82-84, 88.

C. Chapman cannot establish that Oakland Living Center failed to take action reasonably calculated to stop the alleged harassment once it received notice.

According to Chapman, the District Court erred in concluding that Oakland Living Center, after receiving notice of the child's behavior on August 24, 2018, took action reasonably directed to end the harassment. She does not dispute that upon receiving Warner's report, Steve Smith immediately took JC outside, reprimanded and corporally punished him, and directed the child to apologize. But she faults Steve Smith for walking afterward and leaving the child in the kitchen with her, allowing him the opportunity make another racial comment. According to Chapman, a reasonable jury could conclude that Steve "thoroughly abdicated his responsibility to take further measures when his first effort proved ineffective." Opening Brief, Doc. 20 at p. 31; *see also* id. at p. 32 (Steve Smith "walk[ed] away and abandon[ed] any further role or responsibility in redressing the situation").

As this Court stated in Xerxes, "[p]laintiffs often feel that their employer could have done more to remedy the adverse effects of the employee's conduct. But Title VII requires only that the employer take steps reasonably likely to stop the harassment." EEOC v. Xerxes Corp., 639 F.3d 658, 674 (4th Cir. 2011) (quotation marks omitted). Title VII does not prescribe specific action for an employer to take in response to racial harassment, as long as it is reasonably designed to be effective. Bazemore, 957 F.3d at 201. Moreover, the effectiveness of an employer's remedial

measures is not the sole measure of whether its actions were adequate. Xerxes, 639 F.3d at 669-70. Even an action that proves to be ineffective to stop the harassment may nevertheless be found reasonably calculated to prevent future harassment and therefore adequate as a matter of law. Id.

Chapman cites this Court's decision in Sunbelt Rentals as an example of a case in which the employer's corrective actions were deemed inadequate, and asserts that Steve Smith "did significantly less" than the employer in that case. Opening Brief, Doc. 20 at pp. 30-31. In Sunbelt Rentals, however, the employer issued no sanctions or even reprimands in response to the plaintiff's numerous verbal complaints about ongoing religious harassment, and even after receiving a written complaint, it merely warned co-workers not to comment on the plaintiff or Muslims in general, and told the plaintiff there was little more to be done. Sunbelt Rentals, 521 F.3d at 320. Chapman also relies on Bailey, which like Sunbelt Rentals, involved a situation where the employer's ongoing measures in response to the plaintiffs' repeated complaints proved to be ineffective in ending the harassment. Bailey v. USF Holland, 526 F.3d 880, 881-83 and 887 (6th Cir. 2008). And she cites Paroline, in which the employer had received prior complaints from other female employees regarding inappropriate conduct by the alleged harasser, and not only did the discipline issued to the harasser prove to be ineffective, but the office head also openly joked about sexual harassment complaints, giving rise to a reasonable

inference that the remedial action was "nothing more than a slap on the wrist and perhaps even an outright sham." Paroline, 879 F.2d at 106-07. Additionally Id. at 107.

Unlike the employers in the cases described above, Oakland Living Center was afforded only one opportunity to remedy the harassment before Chapman decided to walk out the door, and there is no indication that Steve Smith's initial response was a sham. When Steve Smith learned of the second incident, he promptly reprimanded the child, plainly demonstrating to Chapman and anyone else in the vicinity that he deemed the behavior unacceptable. But when JC subsequently repeated the slur, Chapman abruptly quit without notice, and then she refused to accept or return Beth Smith's calls. Given this evidence, the District Court correctly determined that Oakland had no opportunity to take increasingly progressive measures to address the harassment, as the case law authority contemplates. *See* Xerxes Corp., 639 F.3d at 669 (citing Adler v. Wal-Mart Stores, 144 F.3d 664, 676 (10th Cir. 1998) and EEOC v. Central Wholesalers, 573 F.3d 167, 178 (4th Cir. 2009)); *see also* Cooper v. Smithfield Packing Co., 724 F. App'x 197, 204 (4th Cir. 2018) (when an employee resigned only days after lodging a complaint and before her employer could provide any meaningful redress, "a finding of negligence . . . would be tantamount to requiring [the employer] to 'exercise an all-seeing

omnipresence over the workplace'") (quoting Howard v. Winter, 446 F.3d 559, 567 (4th Cir. 2006)).

Chapman claims she had no "realistic audience" for a complaint, suggesting that since Michael and Arlene Smith were out of town, Steve Smith was her only available resource. Opening Brief, Doc. 20 at pp. 32-33. First, given his immediate response to Warner's report regarding JC's behavior, the record does not suggest Steve Smith would be anything short of receptive to concerns about ongoing conduct by the child. Moreover, Chapman admitted that she had cell phone numbers for both Michael and Arlene Smith and could have contacted either one of them while they were traveling, and she pointedly rebuffed Beth Smith's efforts to contact her and discuss the situation. Nothing in the record indicates that these alternative avenues were anything less than appropriate or effective options, had Chapman chosen to seek redress.

And, finally, Chapman claims Oakland Living Center failed to implement a harassment policy with an effective complaint mechanism. Chapman asserts, relying solely on testimony from Arlene Smith's deposition, that Oakland's employee handbook was never shared with Chapman and contains no harassment reporting policy. Opening Brief, Doc. 20 at p. 32 (citing JA 246-48). In deposition excerpt cited by Chapman, Arlene Smith actually testified differently—that she does not know whether Chapman had reviewed the employee handbook and she could not

recall one way or the other whether the handbook included a policy regarding harassment. JA 246-48.

Regardless, even the case law cited by Chapman, Brown v. Perry, 184 F.3d 388 (4th Cir. 1999), states that an employer can meet its burden under the first element of the Faragher/Ellerth defense to supervisor harassment[6]—i.e., that it exercised reasonable care to prevent and promptly correct any harassing behavior—without implementing such a policy. 184 F.3d at 396 (citing Faragher, 524 U.S. at 807). Oakland Living Center is as small as an employer can be while still meeting Title VII's fifteen-employee coverage threshold. JA 92-93 (Oakland had approximately thirteen employees on payroll, not including the owners). As Chapman's testimony made clear, she had unfettered access to multiple members of the Oakland management team with whom she admittedly could have raised her concerns. Given all of these circumstances, combined with Steve Smith's swift punishment of the child in response to Warner's report, the absence of a written complaint policy, at least according to the summary judgment record, does not substantiate a finding of negligence on Oakland Living Center's part.

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[6] Chapman has asserted that there is at last a triable fact issue regarding whether Oakland Living Center can establish the affirmative defense articulated in Faragher and Ellerth. Opening Brief, Doc. 30 at pp. 47-48. Oakland, however, does not rely on this defense for purposes of summary judgment.

III. THE ALLEGED HARASSMENT WAS INSUFFICIENTLY SEVERE OR PERVASIVE ENOUGH TO COMPRISE A HOSTILE WORK ENVIRONMENT, MUCH LESS SATISFY THE HIGHER STANDARD REQUIRED TO PROVE A CONSTRUCTIVE DISCHARGE.

Harassment is considered sufficiently severe or pervasive so as to alter the terms or conditions of employment if a workplace is "permeated with 'discriminatory intimidation, ridicule, and insult.'" Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (quoting Meritor Savings Bank, 477 U.S. at 65 (1986)). Constructive discharge requires a showing that the plaintiff's working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. Perkins v. Int'l Paper Co., 936 F.3d 196, 212. Proof of constructive discharge requires workplace harassment to be even more severe or pervasive than the minimum required to prove a hostile work environment. Id.

A. Chapman cannot present sufficient evidence of severe or pervasive conduct to establish an actionable hostile work environment.

To create an actionable hostile work environment, the harassment must be objectively hostile and abusive, and the victim must subjectively perceive it as such. Harris, 510 U.S. at 22. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all of the circumstances. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998). These circumstances include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably interferes with an employee's work performance. Harris, 510 U.S. at 23. The inquiry also "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." Oncale, 523 U.S. at 81.

Here, the District Court acknowledged, and Appellees agree, that the six-year-old child's use of the "N" word constituted "atrocious language that is entirely unacceptable in society." JA 293. And, as the cases cited by Chapman and the *amicus* show, when such words are uttered by someone in a supervisory capacity, even isolated or sporadic instances may be enough to create a hostile work environment. *See, e.g.*, Boyer-Liberto, 786 F.3d at 280 (collecting cases involving supervisor usage of racial slurs); Castleberry v. STI Grp., 863 F.3d 259, 265 (3d Cir. 2017) (same); *see also* Spriggs, 242 F.3d at 185 ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [n*****] *by a supervisor in the presence of his subordinates*.") (emphasis added). In vacating the district court's summary judgment award in Boyer-Liberto, this Court distinguished between the racial epithet directed at the plaintiff by her supervisor in the case before it and the racial slur spoken by a "mere co-worker," which had been deemed insufficiently severe or pervasive to constitute a hostile work environment in Jordan v. Alternative Resources Corp., 458 F.3d 332 (4th Cir. 2006). Boyer-Liberto, 786 F.3d at 281.

Here, of course, the epithet was not uttered by a management official or even by a co-worker, but instead by a six-year-old child visiting his father's workplace. As the Supreme Court's decision in Oncale instructs, the alleged harassment must be viewed in context, as "[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." Oncale, 523 U.S. at 81-82.

According to Chapman, the context of the conduct at issue demonstrates its objective severity, as the racial comments purportedly came "directly from the family" in control of her employment. Opening Brief, Doc. 20 at p. 23. The *amicus* similarly asserts that, in assessing the severity of the alleged harassment, the Court should take into account the close relationship between the child and the family who ran Oakland Living Center. Amicus Curiae Brief, Doc. 22-1 at pp. 20, 24.

But the case law authority cited by Chapman and the *amicus* for this proposition are unavailing. The Ziskie case, for example, involved a noted disparity in power between *the harasser* and the victim, not *the harasser's family relations* and the victim. Ziskie v. Mineta, 547 F.3d 220, 227-28 (4th Cir. 2008). And the district court's decision in EEOC v. Sam & Sons Produce Co., 872 F. Supp. 29 (W.D.N.Y. 1994), entailed harassment by the vice president of the company, who was the son of the president. 872 F. Supp. at 35. Here, of course, JC was not

employed by Oakland Living Center and had no authority, presumptive or otherwise, over Chapman or any other employee.

Chapman and the *amicus* further point out that the child's attribution of the racist comment to his father, who was a supervisor and son of the company's owners, enhanced Chapman's perception of the severity of the conduct. That may be true, in terms of Chapman's subjective take on the events, but it does not change, for purposes of the objective prong of the analysis, the fact that the comment was uttered by a young child.

Courts have explicitly recognized, when analyzing hostile work environment claims arising in educational institutions, "that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." Webster v. Chesterfield Cnty. Sch. Bd., --- F. Supp. 3d ---, 2021 WL 1555323, at *7 (E.D. Va. April 20, 2021) (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999)). Based on these social dynamics, sporadic incidents of otherwise objectionable behavior by children or others with diminished capacity, such as nursing home residents, have been deemed insufficiently severe or pervasive to create an objectively hostile work environment. Webster, 2021 WL 1555323, at *8 (collecting cases); *see also* Gardner v. CLC of Pascagoula, 915 F.3d 320, 326 (10th Cir. 2019) (citing cases in which verbal harassment by nursing home residents, although it was offensive, did not rise to the

level of actionable conduct because it was not physically threatening and did not pervade the work experience of a reasonable nursing home employee, especially considering its source).

Finally, Chapman would not be able to establish the required level of severity or pervasiveness even if the Court were to consider the pre-limitations period incidents, as both Chapman and the *amicus* urge. The alleged incidents of inappropriate conduct are remote in time with regard to one another and in relation to either of Chapman's resignations, and are insufficiently severe or pervasive to establish an actionable abusive work environment. *See* Perkins, 936 F.3d at 210 (two incidents of racial conduct, occurring several years apart and also preceding his retirement decision by years, were too remote to be pervasive); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753-54 (4th Cir. 1996) (intermittent sexually discriminatory incidents over a seven-year period, with gaps between incidents as lengthy as a year, not sufficiently pervasive).

B. Chapman cannot demonstrate that her working conditions became so intolerable that a reasonable person in her position would have felt compelled to resign.

Chapman and the *amicus* claim that the District Court used the wrong standard to determine whether she can forecast sufficient evidence of constructive discharge to withstand summary judgment. Specifically, they fault the District Court for relying on the elements of a constructive discharge claim recited by this Court in

Freeman— "[a]n employee is considered constructively discharged if an employer deliberately makes the working conditions intolerable in an effort to induce the employee to quit." Freeman, 750 F.3d at 425 (quotation omitted). According to Chapman and the *amicus*, the Supreme Court overruled the deliberateness aspect of this standard in Suders and the announced in Green that "the constructive discharge doctrine contemplates a situation in which an employer discriminates against an employee to the point such that his working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign." Green, 136 S. Ct. at 1776 (citing Pa. State Police v. Suders, 542 U.S. 129, 141 (2004)) (quotation omitted).

Although Chapman claims that courts elsewhere have recognized the abrogation of the Fourth Circuit's pre-Suders constructive discharge jurisprudence, she supports this assertion by citing a single district court decision from Arizona, Cecala v. Newman, 532 F. Supp. 2d 1118, 1167-68 (D. Ariz. 2007). In fact, the deliberateness element as historically applied in this Circuit is not out of step with the holdings in Suders and Green. As Chapman points out, the Green decision states, "We do not . . . require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer's plan all along." Green, 136 S. Ct. at 1779-80. Likewise, the Fourth Circuit has not historically

construed the deliberateness element to require a plaintiff to prove that his employer subjectively intended for him to resign; instead, deliberateness may be demonstrated by actual evidence of intent by the employer or circumstantial evidence of such intent, such as a series of actions that single out a plaintiff for detrimental treatment. Johnson v. Shalala, 991 F.2d 126, 131 (4th Cir. 1993); *see also* Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1132-33 (4th Cir. 1995) (the deliberateness element of constructive discharge may be inferred from the employer's failure to act in the face of known intolerable conditions).

Even without considering the deliberateness element, however, summary judgment was still appropriately entered in favor of Appellees based on Chapman's failure to satisfy the intolerability standard. Intolerability is assessed by the objective standard of whether a reasonable person in the employee's position would have felt compelled to resign—in other words, "whether the employee would have had *no choice* but to resign." Evans v. Int'l Paper Co., 936 F.3d 183, 193 (4th Cir. 2019) (emphasis in original). Evidence "that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign," is not enough. Id. "Unless conditions are beyond ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress." Id.

To demonstrate the alleged intolerability of the work environment, Chapman merely incorporates the very same evidence and arguments that she used in connection with her hostile work environment claim. Opening Brief, Doc. 20 at p. 45. As stated in the previous section of this brief, these assertions are not enough to establish an actionable hostile work environment, much less make the stronger showing needed to demonstrate the level of intolerability required for constructive discharge. *See* Perkins, 936 F.3d at 212 (proof of constructive discharge requires a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment).

The alleged harassment—racial epithets stated by a six-year-old child on two separate workdays in two successive months—might very well have been frustrating and unpleasant for someone in Chapman's position, but still cannot be construed to have left no reasonable alternative but to resign. This is true even if the Court were to consider the earlier allegations from Chapman's first period of employment with Oakland Living Center, which did not even trigger her first resignation in 2015. And it is particularly true given Chapman's admitted failure to seek redress from her employer before deciding to quit, even after the child's father (and her supervisor) made clear that the child's behavior was not acceptable. Evans, 936 F.3d at 193; *see also* Aryain v. Wal-Mart Stores Tex., 534 F.3d 473, 481-82 (5th Cir. 2008) (in the constructive discharge context, part of the employee's obligation to be reasonable is

an obligation not to assume the worst and not to jump to conclusions too quickly). For these reasons, the entry of summary judgment as to Chapman's constructive discharge claim should be affirmed.

CONCLUSION

Appellees respectfully request that this Court affirm the judgment of the District Court dismissing Chapman's claims pursuant to Rule 56 of the Federal Rules of Civil Procedure.

REQUEST FOR ORAL ARGUMENT

Appellees request, pursuant to Local Rule 34(a), that the Court allow oral argument to enable the parties to further address their respective assertions regarding the factual record and pertinent case law authority.

Respectfully submitted,

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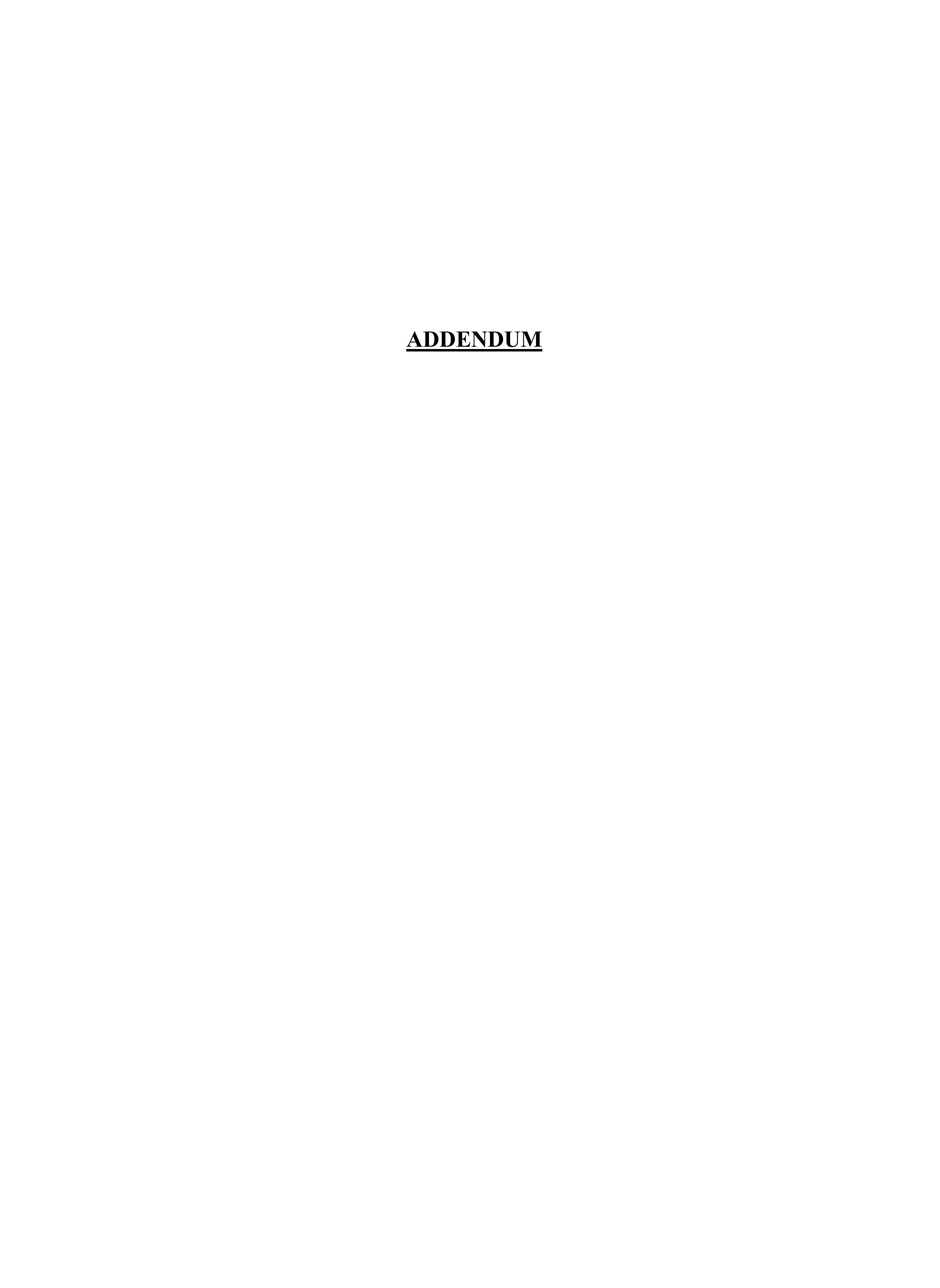

ADDENDUM

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Addendum Page

Order of
The Honorable Martin Reidinger
Re: Dismissing Plaintiffs' Complaint for Lack of Subject Matter Jurisdiction
filed April 20, 2018..Add. 1

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL CASE NO. 1:18-cv-00093-MR-DLH

TONYA R. CHAPMAN and KENNYACHTTA S. CHAPMAN,	)	
Plaintiffs,	)	
vs.	)	**O R D E R**
LIL CEASER COMPANY, MELOTTE ENTERPRISES, INC., PAUL MELOTTE, LORA LEIGH, ACURA BLANTON, and AMANDA SIMS,	)	
Defendants.	)	

THIS MATTER is before the Court *sua sponte*.

The Plaintiffs Tonya R. Chapman and Kennyachtta S. Chapman bring this action against a Little Caesars pizza restaurant and several of that restaurant's employees. The Plaintiffs assert that subject matter jurisdiction exists on the basis of a federal question (specifically 42 U.S.C. § 1983). [Doc. 1 at 3]. Specifically, the Plaintiffs assert claims of racial discrimination, assault, defamation, perjury, and slander. [Id. at 5].

Because the Plaintiffs have paid the $400 fee associated with the filing of this action, the statutory screening procedure authorized under the *in*

forma pauperis statute, 28 U.S.C. § 1915(e)(2), is not applicable. Nevertheless, the Court has inherent authority to dismiss a frivolous complaint *sua sponte.* See Ross v. Baron, 493 F. App'x 405, 406 (4th Cir. 2012) (noting that "frivolous complaints are subject to dismissal pursuant to the inherent authority of the court, even when the filing fee has been paid") (citing Mallard v. United States Dist. Ct. for S.D. of Iowa, 490 U.S. 296, 307-08 (1989)). Further, the Court may address the issue of subject matter jurisdiction at any time. See Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 196 (4th Cir. 2008). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Here, the Plaintiffs appear to assert claims for racial discrimination, assault, defamation, perjury, and slander arising from mistreatment they allegedly received at the Defendant restaurant. Specifically, the Plaintiffs claim that the restaurant employees "avoid[ed] taking [their] order"; that the employees "ma[de] gestures of wanting to assault" the Plaintiffs; and that the employees threatened to have them arrested. [Doc. 1 at 5].

To the extent that the Plaintiffs' claims are brought pursuant to 42 U.S.C. § 1983, such claims are frivolous and fail to state a claim upon which relief can be granted. As the Fourth Circuit has explained:

> To implicate 42 U.S.C. § 1983, conduct must be fairly attributable to the State. The person charged must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions. Thus, the Supreme Court has held that private activity will generally not be deemed "state action" unless the state has so dominated such activity as to convert it into state action: [m]ere approval of or acquiescence in the initiatives of a private party is insufficient.

DeBauche v. Trani, 191 F.3d 499, 506-07 (4th Cir. 1999) internal quotation marks and citations omitted). Here, the Plaintiffs have not brought suit against a state actor; instead, they have attempted to sue a restaurant and its employees for violating their federal civil rights. The Plaintiffs have made no allegation that the Defendants have a sufficiently close relationship with state actors such that the Court could conclude that the Defendants were engaged in governmental action. The Plaintiffs' § 1983 claims, therefore, are dismissed.

To the extent that the Plaintiffs attempt to assert a claim for racial discrimination under federal law, they have failed to allege their race or that the conduct complained of was motivated by any sort of discriminatory animus. Accordingly, the Plaintiffs' claims for racial discrimination are therefore dismissed.

Because the Plaintiffs' Complaint fails to present any cognizable claim under federal law, the Court lacks subject matter jurisdiction over the Plaintiffs' claims. Having dismissed all of the claims over which the Court could exercise original jurisdiction, the Court in its discretion declines to exercise supplemental jurisdiction over the Plaintiffs' remaining claims for assault, defamation, perjury, and slander, and these claims are dismissed without prejudice.[1]

The Court notes that this is at least the second lawsuit filed by the Plaintiff Tonya R. Chapman that has been dismissed on initial review. See Chapman v. USPS/US Attorney, No. 1:17-cv-00132-MR-DLH, ECF Doc. 4 (W.D.N.C. June 22, 2017). Litigants do not have an absolute and unconditional right of access to the courts in order to prosecute frivolous, successive, abusive or vexatious actions. See Demos v. Keating, 33 F. App'x 918, 920 (10th Cir. 2002); Tinker v. Hanks, 255 F.3d 444, 445 (7th Cir. 2002); In re Vincent, 105 F.3d 943, 945 (4th Cir. 1997). District courts have inherent power to control the judicial process and to redress conduct which abuses that process. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001).

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[1] The Court expresses no opinion as to whether the Plaintiffs have stated a claim under state law for these causes of action.

The Plaintiffs are hereby informed that future frivolous filings will result in the imposition of a pre-filing review system. Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 818 (4th Cir. 2004); Vestal v. Clinton, 106 F.3d 553, 555 (4th Cir. 1997). If such a system is placed in effect, pleadings presented to the Court which are not made in good faith and which do not contain substance, will be summarily dismissed as frivolous. See Foley v. Fix, 106 F.3d 556, 558 (4th Cir. 1997). Thereafter, if such writings persist, the pre-filing system may be modified to include an injunction from filings. In re Martin–Trigona, 737 F.2d 1254, 1262 (2d Cir. 1984).

IT IS, THEREORE, ORDERED that the Plaintiffs' Complaint is hereby **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Signed: April 20, 2018

Martin Reidinger
United States District Judge

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

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Dated: June 18, 2021

/s/ Jonathan W. Yarbrough
Counsel for Appellees

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 18th day of June, 2021, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users:

/s/ Jonathan W. Yarbrough
Counsel for Appellees