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

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellant Tonya R. Chapman ("Ms. Chapman") filed this action against Appellee Oakland Living Center ("OLC") and several individual defendants on December 3, 2018 in the United States District Court for the Western District of North Carolina, alleging racial harassment and discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and 42 U.S.C. § 1981 ("Section 1981"). The district court had jurisdiction under 28 U.S.C. § 1331, and issued a summary judgment opinion and order resolving all claims on November 24, 2020. Ms. Chapman filed a notice of appeal on December 18, 2020. JA-300. This Court has jurisdiction over her timely appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

Ms. Chapman testified that she felt compelled to resign her position at OLC after experiencing repeated racial insults from the minor child of her supervisor, who failed to appropriately address these incidents. The district court held that OLC cannot be held responsible, and that the supervisor's conduct was reasonable, as a matter of law. The court also held that Ms. Chapman cannot make out a constructive discharge claim because the child was a third party and there is no evidence that OLC subjectively wanted her to resign. The issues presented are:

(1) Was there a triable issue concerning whether OLC's response to the August 2018 incident was negligent?

(2) Was there a triable issue concerning whether OLC is liable, either in negligence or vicariously, for failing to prevent the harassment?

(3) Did the district court err in holding that a constructive discharge claim requires proof that the employer subjectively wanted the employee to quit, and that a constructive discharge cannot be based on the actions of a third party?

STATEMENT OF THE CASE

Tonya Chapman worked for more than a decade at OLC, an assisted living facility owned and managed by a single extended family. Ms. Chapman testified that she experienced repeated racist statements and job discrimination from members of that family, eventually leading her to quit in 2015. After she was persuaded to return in 2018, Ms. Chapman was again subjected to repeated racist insults—this time from the minor child of her supervisor, who was routinely left unsupervised in the working environment and who told Ms. Chapman that "My daddy called you a lazy ass black n*****, because you didn't come to work," and taunted her "N*****, n*****. Get to work, n*****." JA-65, 67, 79 (Chapman 68, 70, 82). After learning of one of these incidents her supervisor told the child to apologize but failed to follow through or to remove the child from the workplace, and instead simply walked away. The

child refused to apologize and repeated the slur, at which point Ms. Chapman, realizing the working environment would never improve, felt compelled to resign.

The district court failed to see even a triable case against OLC and granted summary judgment against Ms. Chapman. The court reasoned that her supervisor made a reasonable effort to address the August 2018 situation, that OLC had no notice or responsibility for anything that happened prior to that point, and that Ms. Chapman cannot establish a constructive discharge claim because there is no proof that OLC engineered this hostile working environment with the specific purpose of inducing Ms. Chapman to quit.

All three holdings reflect a misunderstanding of the governing legal standards. A reasonable trier of fact could conclude that Ms. Chapman's supervisor failed to take reasonable steps to address and remediate this serious problem in the workplace. A reasonable trier of fact also could conclude that OLC is responsible for failing to prevent this harassment. That liability could be based in OLC's negligence, because managerial employees knew or should have known what was happening and likely to happen, or on vicarious liability because the child's presence in the workplace, and his effect on Ms. Chapman's working environment, were facilitated and enhanced by his father's status as Ms. Chapman's supervisor and an agent of OLC. And the district court was led astray by older precedents of this Court in holding that a constructive discharge requires proof that OLC *intended* to force Ms. Chapman's

resignation. It has been settled law since *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), that constructive discharge only requires proof that resignation was an objectively reasonable response to the working conditions. A reasonable trier of fact certainly could conclude that Ms. Chapman's resignation was reasonable.

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

Statement of Facts

We understand that the facts are hotly disputed. Because the district court granted summary judgment to OLC, this summary of the factual background accepts as true Ms. Chapman's deposition testimony and reasonable inferences therefrom.

OLC is an assisted-living facility owned by MS and AS. JA-42 (Chapman 28); JA-91 (MS 8).[1] During the critical incidents in 2018, the facility was managed in part by their son, SS. JA-43 (Chapman 29); JA-229, 240 (AS 10, 21).[2]

Ms. Chapman initially worked at OLC for eleven years, from 2004 to 2015, as a housekeeper, cook, and personal care aide. She testified that she quit in 2015

[1] We recognize that the Rules only require the use of initials for the minor children. Given the factual allegations in this case, however, counsel respectfully believes it is appropriate to obscure the names of the adults as well, to avoid the unnecessary creation of a searchable document that could indirectly compromise the identity of the children. If the Court disagrees we will, of course, file a revised brief.

[2] Citations to the deposition testimony will reference the relevant page in the Joint Appendix, as well as the original deposition pagination.

after repeatedly experiencing racially motivated incidents and insults at the hands of members of the extended MS/AS family.

Beginning in 2009 or 2010, OLC required staff members to wear ID badges with their names and pictures. JA-49 (Chapman 36). Most employees were photographed only from the front, but AS (the child's grandmother) insisted on photographing Ms. Chapman from both the front and the side. JA-52 (Chapman 43). When taking the picture, AS told Ms. Chapman "I'm going to take a picture of you from the side and I'm going to give you some slave numbers." *Id.* AS then wrote the "slave numbers" on Ms. Chapman's badge. *Id*; JA-157 (picture).

Ms. Chapman continued to be exposed to racist language and attitudes from members of the extended family. In 2012 or 2013, AS's teenage niece was employed at OLC as a med tech. JA-84-85 (Chapman 87-88). Ms. Chapman overheard her tell another employee that MS and AS "had to buy another condo" because there were "too many blacks at Myrtle Beach." JA-84 (Chapman 87).

Ms. Chapman's birthday is the same as that of SS's twin sons. JA-54 (Chapman 45); JA-99 (MS 43). In February of 2014, the twins' birthday party was held in OLC's dining room. JA-118-19 (Chapman 49-50). Ms. Chapman had to prepare and serve dinner an hour earlier than usual, then clean up the dining room for the party. JA-115, 119, 122 (Chapman 46, 50, 53). The party's theme involved monkeys, and the decorations included cardboard cutouts of monkeys on the walls

of the dining room. JA-117, 122 (Chapman 48, 57). When Ms. Chapman finished clearing the dining room after the residents' dinner, SS gave her a cake depicting a black figure hanging from a noose. JA-115 (Chapman 46). Ms. Chapman was then told to leave so the children could enjoy their party. *Id.*

Ms. Chapman also perceived that AS prevented her from advancing in her career, for racially motivated reasons. Ms. Chapman asked AS several times to support her in obtaining a med tech license, but "there was always an excuse." JA-38-39, 41 (Chapman 24-25, 27). Despite that, AS took multiple other groups of employees to obtain their licenses during Ms. Chapman's employment. JA-38-39 (Chapman 24-25). AS's teenage niece even worked at the facility as a med tech. JA-84 (Chapman 87). During Ms. Chapman's employment, AS never allowed a black employee to obtain a med tech license, though many black employees were interested. JA-128-130 (Chapman 59-61). In 2015, AS yet again ignored Ms. Chapman's requests and took another batch of employees to get their med tech licenses. JA-39-40 (Chapman 25-26). Ms. Chapman realized AS would never help her obtain the license, so she quit. *Id.*

In 2018, OLC employee PW contacted Ms. Chapman four or five times to persuade her to return to work at OLC. JA-60-61 (Chapman 63-64). Although OLC denies that PW is a supervisor, PW took the initiative to bring Ms. Chapman back to OLC and Ms. Chapman understood PW to be her supervisor in the kitchen, with

the authority to set her schedule, give instructions for meal preparation, and recommend employee discipline to MS and AS. JA-44-47 (Chapman 30-33).

During Ms. Chapman's initial employment at OLC, SS had his own pool business. JA-42-43 (Chapman 28-29). When she returned to OLC in April 2018, she understood that SS would be receiving his business license and would be taking over the business. JA-43 (Chapman 29). SS's young sons (MS and AS's grandsons) were a constant presence at the facility. They were "raised there." JA-63 (Chapman 66).

In July of 2018, Ms. Chapman was preparing cupcakes for the residents, and set some aside for the boys to decorate. JA-62 (Chapman 65). She knew without being told that the boys would spend time in the kitchen, because "They're there all the time," and "when they come, they're always in the kitchen with me." *Id*. When one of the children, then age six, finished decorating his cupcakes, she had no more to give him. JA-65 (Chapman 68). When she would not give him any more, he hit and kicked her, and then told her, "My daddy called you a lazy ass black n*****, because you didn't come to work." JA-65, 67 (Chapman 68, 70). Ms. Chapman reported the incident to PW the next day. JA-69 (Chapman 72).

In August of 2018, at the beginning of Ms. Chapman's shift, the same child called for her to come outside and watch him do tricks on his bicycle. JA-74-75 (Chapman 77-78). She did, but the child was soon summoned by his father, SS. JA-75 (Chapman 78). Ms. Chapman went back to cleaning the dining room. *Id*. Shortly

after speaking with his father, the child came to a window and again yelled Ms. Chapman's name. JA-75-76 (Chapman 78-79). She opened the window and told the child that she had to work. *Id.* In response, the child said, "N*****, n*****. Get to work, n*****." *Id*. Ms. Chapman again immediately reported the incident to PW. JA-79 (Chapman 82). She also told PW, "This is not going to stop. It's not. It's not going to stop." JA-78 (Chapman 81).

SS learned of what the child had said, because he brought the child into the kitchen to apologize and pushed him toward Ms. Chapman. JA-78-79 (Chapman 81-82). The child refused to approach Ms. Chapman, and instead ran to PW and cried. JA-79 (Chapman 82); JA-274 (SS 18). SS then left the kitchen, without making sure the child apologized, and left the child with Ms. Chapman and PW. JA-79 (Chapman 82). After SS left, the child once again said, "Tonya, you are a n*****." *Id*.

Ms. Chapman did not see whether SS punished the child before bringing him back to the kitchen, but believed any punishment SS might have imposed "couldn't have been too bad for him [the child] to come back in there and say it again." JA-80-81 (Chapman 83-84). Ms. Chapman told PW, "I've got to go. I can't stay here. I can't. I'm sorry. Six-year-olds should not know that." JA-81 (Chapman 84). As she left, the child's brother asked her where she was going. She told him, "I've got to go. I can't stay. I can't stay." JA-81-82 (Chapman 84-85)

Statement of Procedural History

Ms. Chapman filed a charge of discrimination with the EEOC on September 26, 2018. JA-100. On September 28, 2018, the EEOC closed the file and granted her a right to sue letter. JA-101. Ms. Chapman commenced this action on December 3, 2018, alleging both racial harassment and constructive discharge because of racial discrimination, all in violation of Title VII and Section 1981. JA-10 (amended complaint), 282.

After discovery, the district court granted defendants' Motion for Summary Judgment on November 24, 2020.

The district court reasoned that the racial harassment Ms. Chapman experienced in the summer of 2018 was not imputable to her employer OLC, but instead was "based on the actions of a third party, the six-year-old grandchild of the company's owners, [MS] and [AS], and son of a supervisor, [SS]," and that therefore she could recover only by showing that "the employer was negligent in controlling the working conditions." JA-290. The district court reasoned that PW was not a supervisor because Ms. Chapman supposedly admitted that she did not have the ability to hire and fire, and concluded that Ms. Chapman therefore "did not report the July incident to anyone in authority so as to put OLC on notice." JA-291 n.3. The district court then reasoned that SS's spanking of the child "was an effort directed to reasonably stop the harassment," and that after that effort at

discipline proved ineffective Ms. Chapman quit rather than giving OLC another opportunity to address the situation. JA-292. The district court acknowledged that "the child used atrocious language that is entirely unacceptable in society," but held that there was no genuine issue of fact as to whether the resulting harassment and hostile work environment could be attributed to OLC. JA-293.

The district court further held that Ms. Chapman's constructive discharge claim failed because she "did not present sufficient evidence to create a question of fact as to whether OLC deliberately attempted to induce her to resign." JA-293-94. It held that any claims related to her first period of employment from 2004 to 2015 were both broader than the allegations in the EEOC charge and time-barred, and too distinct to be considered under a "continuing violation" theory. JA-295-96. The court also held that Ms. Chapman presented insufficient evidence of intentional discrimination by any individual defendant. JA-297-99. The court reasoned that the child's statement that "My daddy called you a lazy ass black n*****" was "rank hearsay," and therefore would not be admissible at trial to prove any intentional discrimination by the father. JA-298-99.

After informal briefing in which Ms. Chapman proceeded *pro se*, this Court granted a motion by new *pro bono* counsel for Ms. Chapman to set a full briefing schedule.

SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment to OLC rests on at least three important legal errors.

First, even accepting the district court's premise that OLC had no notice of this hostile working environment prior to August 2018, OLC is liable in negligence if it failed to take reasonable steps to address the harassment after learning of it. A reasonable jury could disagree with the district court's conclusion that spanking a six year old child and directing him to apologize are, standing alone, an appropriate and sufficient response to a known workplace problem of this magnitude. A reasonable jury crediting Ms. Chapman's testimony also could conclude that it would have been unfair to expect Ms. Chapman to further "report" this incident beyond SS. It was perfectly reasonable for Ms. Chapman to conclude, particularly after her long experience with this family, that nothing useful would come from any further complaint to MS or AS about their son's management of racist comments made by their grandson.

Second, a reasonable jury could disagree with the district court's premise that OLC had no notice of this harassment prior to the August 2018 incident and no responsibility for that incident itself. A reasonable jury could find that OLC is liable for failing to prevent that harassment and for the conditions that made it possible. That liability could be based in OLC's negligence, because a reasonable trier of fact

could find that OLC's management knew or should have known about the hostile environment Ms. Chapman faced and the risk that this child would make statements like these. OLC also could be vicariously liable for SS's role in bringing this child to the workplace and expecting OLC employees like Ms. Chapman to babysit him. Because only a supervisor could behave in this manner, a reasonable jury could conclude that the harassment Ms. Chapman experienced was aided by her supervisor's agency relationship with OLC.

Finally, the district court committed a clear error of law in granting summary judgment on the constructive discharge claim based on the absence of evidence that OLC wanted Ms. Chapman to quit, or the fact that the hostile working environment was created, in part, by a child. When the concept of constructive discharge first entered the law, it was indeed considered an indirect, but nonetheless intentional, means of firing an employee. But since the Supreme Court's decision in *Suders* it has been clear that an employee is constructively discharged whenever quitting is an objectively reasonable response to workplace conditions—regardless of the employer's intent. The Supreme Court reiterated in *Green v. Brennan* that "[w]e do not also require an employee to come forward with proof—proof 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." 136 S.Ct. 1769, 1779-80 (2016).

OLC might be permitted an opportunity to prove, as an affirmative defense, that it "exercised reasonable care to prevent and correct promptly any … harassing behavior" and that Ms. Chapman "unreasonably failed to take advantage of any preventive or corrective opportunities" available to her. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). But OLC would bear the burden of proof, and certainly would not be entitled to summary judgment on this record.

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

ARGUMENT

I. MS. CHAPMAN HAS A TRIABLE CLAIM AGAINST OLC FOR A HOSTILE WORK ENVIRONMENT

A. The Record Supports A Triable Claim That Ms. Chapman Faced A Hostile Work Environment

In order to satisfy the requirements of a hostile work environment under Title VII or Section 1981, a plaintiff has to demonstrate "'(1) unwelcome conduct; (2) that is based on the plaintiff's sex [and/or 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.'" *Okoli v. City of Balt.*, 648 F.3d 216, 220 (4th Cir. 2011) (citations omitted). *See also Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183-84 (4th Cir. 2001) (same under Section 1981). The district court's summary judgment decision rested entirely on the fourth

element: whether the conduct in question is imputable to OLC. *See* JA-293 ("Because the Plaintiff has not set forth evidence to create a genuine issue of material fact supporting the claim that the child's actions should be attributed to OLC as a matter of law, the Defendants' Motion for Summary Judgment on the claim of hostile work environment/harassment under Title VII and Section 1981 will be granted as to OLC."). We will address that issue in §§ I(B) and I(C) below. But as a threshold matter, a reasonable jury certainly could conclude that the first three elements are present here.

The district court correctly acknowledged that "the child used atrocious language that is entirely unacceptable in society." JA-293. This Court and others have recognized repeatedly that the language in question is inherently race-based and "pure anathema to African-Americans," *Spriggs*, 242 F.3d at 185, and that in appropriate circumstances even a single use of it or similar language can create an abusive working environment, *see, e.g., Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (collecting cases); *Castleberry v. STI Grp.*, 863 F.3d 259, 264-65 (3d Cir. 2017) (same). "'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.'" *Spriggs*, 242 F.3d at 185 (quoting *Rodgers v. Western–Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir.1993) (cleaned up)).

Of course in this case the language did not come directly from the mouth of Ms. Chapman's supervisor. But as the Supreme Court has emphasized, a hostile work environment analysis "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). A reasonable jury crediting Ms. Chapman's testimony could conclude that this racial harassment was particularly severe and pervasive because the slur was linked to her job performance; it happened on at least three separate occasions; it came from the minor child of her direct supervisor and was attributed, by the child, to that supervisor; and her supervisor's lackluster response conveyed that he would not follow through with any effective intervention to prevent it from happening again. As relevant to Ms. Chapman's state of mind and perception of the severity of the insult, the child's statement that "My daddy called you a lazy ass black n*****, because you didn't come to work," JA-XX (Chapman 68, 70), is not hearsay.

In addition, this was not some anonymous child and SS was no mere mid-level supervisor. They were the grandchild and the child of the sole co-owners of the business, and SS was being groomed to take over management of the entire facility. JA-43 (Chapman 29); JA-229, 240 (AS 10, 21). MS testified that OLC is a family-managed "mom-and-pop" operation in which "[n]obody's got titles," and that SS

"would make the decisions when we're gone" since "[t]he only people that ever made a decision is last name Smith." JA-95 (MS 20).

A reasonable trier of fact could conclude that the objective severity of these incidents was substantially aggravated, from Ms. Chapman's perspective, by the knowledge that this awful racist abuse was coming directly from the family with total, alter-ego control over her employer and employment—and that no escape from them was, realistically, possible. *See, e.g., Ziskie v. Mineta*, 547 F.3d 220, 227-28 (4th Cir. 2008) (explaining that "a disparity in power between the harasser and the victim" is relevant in evaluating severity); *EEOC v. Sam & Sons Produce Co., Inc*., 872 F. Supp. 29, 35 (W.D.N.Y. 1994) ("The severity of the incidents was enhanced further in that [the harasser], as vice president of the company and son of the president, was not merely an obnoxious co-worker but rather had presumptive authority over [the victim]").

Although the 2018 incidents would be sufficient to establish a triable claim, Ms. Chapman also testified that during her first term of employment at OLC, prior to 2015, AS wrote "slave numbers" on her employee badge, SS presented her with a cake depicting a black figure hanging from a noose, she overheard a family member say that MS and AS had to sell their condo because there were "too many blacks at Myrtle Beach," and AS consistently refused to support her in training for

a med tech license while extending that opportunity to numerous white employees. *See* supra pp. 5-6 (collecting citations).

On summary judgment the court is required to credit that testimony and to "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 151 (2000). The noose and "slave badge" references are just as "anathema" as the 2018 incidents, and came from adult members of the family—including SS and OLC co-owner AS. *See, e.g., Tademy v. Union Pac. Corp*., 614 F.3d 1132, 1141-42 (10th Cir. 2008) (discussing the violent racial history and symbolism of the noose, and collecting cases); EEOC Compliance Manual, Section 15, Race & Color Discrimination, text accompanying notes 128-131 ("Examples of the types of single incidents that can create a hostile work environment based on race include: an actual or depicted noose or burning cross (or any other manifestation of an actual or threatened racially motivated physical assault), a favorable reference to the Ku Klux Klan, an unambiguous racial epithet such as the 'N-word,' and a racial comparison to an animal."), available at https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination (last visited May 13, 2021).

The district court held that any claim based on those pre-2015 incidents is barred by the statute of limitations, and by the fact that they are not explicitly mentioned in the EEOC charge. Neither rationale is persuasive.

The Supreme Court has explained that a hostile work environment "cannot be said to occur on any particular day. It occurs over a series of days or perhaps years." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). Since hostile work environment claims by "[t]heir very nature involve[] repeated conduct," so long as "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." *Id.* at 115, 117. This Court has recognized that *Morgan* "allows for consideration of incidents that occurred outside the time bar when those incidents are part of a single, ongoing pattern of discrimination, *i.e.*, when the incidents make up part of a hostile work environment claim." *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

The district court cited *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 223-24 (4th Cir. 2016), for the proposition that prior incidents must still be part of "the 'same actionable hostile work environment.'" JA-296. But in *Guessous* this Court *reversed* a district court decision that distinguished between a pre-limitations-period hostile environment and supposedly separate later "discrete acts," recognizing instead that in hostile environment cases "the constituent acts [are] effectively indivisible." *Guessous*, 828 F.3d at 223-24. *Guessous* also held that the *Morgan* analysis applies to § 1981 hostile environment claims as well as to those brought under Title VII. *Id.*

Ms. Chapman's testimony about the racial abuse and discrimination she suffered at OLC pre-2015 concerns the same hostile work environment as her 2018 allegations. The two sets of incidents "were 'sufficiently severe or pervasive'" and "amounted to 'the same type of employment actions, occurred relatively frequently, [or] were perpetrated by the same managers.'" *Porter v. Cal. Dep't. of Corr.*, 419 F.3d 885, 893 (9th Cir. 2005) (quoting *Morgan*, 536 U.S. at 116, 120, 122) (alteration in original). They involve the same type of severe racial harassment, the same family, and—in the case of the birthday cake incident—the same supervisor, SS. JA-115 (Chapman 46).

The fact that Ms. Chapman left OLC's employ between these incidents is irrelevant. The same was true, for example, in *Spriggs*, and this Court explicitly held that a reasonably jury could find a hostile environment considering *both* terms of employment. *See* 242 F.3d at 181-82, 185-86. And in *Green v. Brennan* the Supreme Court held that the limitations period does not begin to run on a constructive discharge claim until the employee's actual resignation, regardless of when the discriminatory conduct precipitating that resignation occurred. 136 S. Ct. at 1782.

Nor did Ms. Chapman fail to exhaust her administrative remedies. With respect to the content of the EEOC charge, Title VII "prescribes only minimal requirements" and leaves the details to the EEOC. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984); 42 U.S.C. § 2000e-5(b) (charges shall "be in such form as the

Commission requires"). The Commission's regulations provide that a charge will be sufficient "when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

In a subsequent lawsuit, 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). Under those principles a claim will generally be barred if it alleges discrimination on an entirely different basis (*e.g.*, race rather than sex) than the EEOC charge, or a retaliation claim when the charge alleges only discrimination. *E.g., Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300-01 (4th Cir. 2009); *Chacko v. Patuxent Inst.*, 429 F.3d 505, 509 (4th Cir. 2005) (collecting cases). Or in *Parker v. Reema Consulting Servs., Inc.*, cited by the district court (JA-295-96), this Court held that an EEOC complaint about a hostile environment and retaliatory termination did not encompass a discrete claim that the termination violated the employer's own "three-strikes" rule. 915 F.3d 297, 306 (4th Cir. 2019).

EEOC charges must, however, "'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). Ms. Chapman's EEOC charge fairly alleged harassment

and a hostile working environment based on her race. JA-100. In light of the Supreme Court's holding in *Morgan* and this Court's recognition that the constituent acts forming a hostile work environment are "effectively indivisible," *Guessous*, 828 F.3d at 223-24, a reasonable investigation of those claims would not have been narrowly limited to the 2018 events but would have attempted to evaluate Ms. Chapman's whole period of employment holistically, *see, e.g., Chisholm v. Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981) (charge alleging promotion discrimination "put USPS on notice that the entire promotional system was being challenged, including aspects of the system such as discipline and testing which were not specifically enumerated in the complaint."). And in any event any concerns about the scope of the EEOC charge are relevant only to Ms. Chapman's Title VII claims, not to her claims under § 1981—which are governed, substantively, by the same standards. *See Guessous*, 828 F.3d at 224 (noting "this Court's policy of treating Title VII and § 1981 hostile work environment claims the same").

Finally, even if the earlier events could not contribute directly to Ms. Chapman's claims, the jury would still be entitled to consider them to assess witness credibility and to decide other issues, such as whether OLC had notice of the environment and whether it would have been reasonable to expect Ms. Chapman to pursue further complaints for the 2018 incidents. *See Morgan*, 536 U.S. at 114 (even where alleged discrete acts of discrimination are time-barred and thus not actionable,

Title VII does not "bar an employee from using the prior acts as background evidence in support of a timely claim.").

B. Ms. Chapman Has, At A Minimum, A Triable Claim For Negligence Because OLC Failed To Respond In A Manner Reasonably Calculated To Stop The Harassment And Repair The Workplace Environment

The district court held that any hostile work environment that Ms. Chapman experienced in 2018 is not attributable to OLC because SS's child was a "third party." JA-290. The court cited authority holding that an employer is liable for the actions of a third party, like a customer, only if the employer was negligent and "'knew, or should have known, about the harassment and failed to take action reasonably calculated to stop it.'" *Id.* (quoting *Bazemore v. Best Buy*, 957 F.3d 195, 201 (4th Cir. 2020)). The district court also held that OLC had no notice of any hostile work environment before SS learned of what his child had said in August 2018. JA-291 & n.3. As explained below in § I(C), both premises are incorrect. OLC was on notice well before August 2018, and the child was not genuinely a third party. But even accepting all of the district court's premises, Ms. Chapman has a triable claim for negligence.

OLC acknowledges that SS learned about the August 2018 incident shortly after the child's initial statements, and Title VII required a reasonable response. This Court has recognized that "[t]he adequacy of [the employer's remedy] is a question of fact which a court may not dispose of at the summary judgment stage if reasonable

minds could differ as to whether the remedial action was 'reasonably calculated to end the harassment.'" *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989) (citation omitted), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc); *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995).

The district court reasoned that SS's testimony that he spanked the child and asked the child to apologize was, as a matter of law, "an effort directed to reasonably stop the harassment." JA-292. A reasonable trier of fact could disagree with that assessment. Even accepting SS's testimony that he spanked the child, Ms. Chapman testified that SS simply pushed the child toward her, but then did nothing when the child refused to apologize. JA-78-80 (Chapman 81–83). SS simply walked away and left the child with Ms. Chapman—and the child made yet another racist comment. JA-79-81 (Chapman 82–84). A reasonable trier of fact could conclude that leaving a distressed six-year-old child, who has just been making racist comments, alone in the workplace with the victim and target of those comments certainly is not action "reasonably calculated" to stop the harassment or to repair the working environment.

The case law requires far more than this from a supervisor who has been made aware of a serious workplace incident of this nature. In *EEOC v. Sunbelt Rentals*, for example, this Court acknowledged that "[a]dmittedly, there were corrective steps undertaken by Sunbelt," such as investigations into the victim's written complaint and warnings given to co-workers. 521 F.3d 306, 320 (4th Cir.

2008). However, because Sunbelt "failed to take additional action that a rational juror might consider reasonably calculated to end the harassment," summary judgment was inappropriate. *Id.* SS did significantly less than Sunbelt Rentals. Similarly, in *Bailey v. USF Holland* the employer was liable even though it "'consistently had a reasonable harassment policy,' conducted employee meetings to respond to plaintiffs' complaints, and disciplined the employee responsible for the graffiti." 526 F.3d 880, 887 (6th Cir. 2008).

As this Court made clear in *EEOC v. Central Wholesalers*, a response "reasonably calculated" to end harassment requires *at least* "taking increasingly progressive measures to address the harassment when [the company's initial] responses proved ineffective." 573 F.3d 167, 178 (4th Cir. 2009). A reasonable jury crediting Ms. Chapman's testimony could conclude that SS thoroughly abdicated his responsibility to take further measures when his first effort proved ineffective.

Indeed, SS's response would have been inadequate even if the child had apologized. Surely an employee in Ms. Chapman's position is owed more from her employer than a coerced apology delivered by a six year old child. An apology would have left two questions entirely unaddressed: first, how the child developed these racial attitudes and the shockingly specific view that Ms. Chapman was a "lazy ass black n*****" who "didn't come to work," JA-137, 139 (Chapman 68, 70), and second, whether the child would remain a constant presence in the workplace. A

serious and appropriate response to an incident of this severity would have required a real reckoning with how it happened, how OLC would prevent it from recurring, and how Ms. Chapman's confidence in the integrity of her workplace and her primary supervisor could be restored.

The district court essentially blamed Ms. Chapman for quitting when the child repeated the slur, because she supposedly did not give SS the opportunity to "learn[] of the insufficiency of his discipline" and take "more stringent measures." JA-292. That reasoning fails to credit Ms. Chapman's testimony that SS had already made the decision to walk away and abandon any further role or responsibility in redressing the situation. JA-79-81 (Chapman 82-84). It also fails to credit Ms. Chapman's testimony about her past history with SS, *see* JA-115 (Chapman 46), and her testimony that the child attributed his racist criticism of her work performance directly to his father SS, *see* JA-65, 67, 79 (Chapman 68, 70, 82). Again, as relevant to Ms. Chapman's state of mind and to whether it would have been reasonable for her to pursue further redress from SS, the child's statements are not hearsay.

A reasonable trier of fact also could conclude that OLC had no functioning complaint mechanism, particularly when the issue concerned SS and his children. AS testified that OLC has an employee handbook but only one copy of it. The single copy is kept at the front desk, was never shared with Ms. Chapman, and contains no harassment reporting policy. JA-246-48 (AS 27-30). MS testified that employee

supervision was entirely the province of his wife AS and son SS. *See* JA-92-93 (MS 9-10) (testifying that he does not supervise employees and AS "pretty much does it all"); JA-95 (MS 20) (SS "would make the decisions when we're gone" and daughter BS has no managerial or other responsibilities); JA-240 (AS 21) (confirming that SS was in charge when AS and MS were gone). AS testified that SS supervised the dietary staff and operation, including Ms. Chapman, by himself. JA-229 (AS 10). And of course OLC has argued vigorously that the other employee whom Ms. Chapman understood to be her supervisor, PW, is not a supervisor and has no management authority. JA-291 n.3.

MS and AS were out of town at the time of the critical August 2018 incident, leaving SS entirely in charge. JA-96 (MS 22). A complaint policy "must be both reasonably designed and reasonably effectual." *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999); *see also Sunbelt Rentals*, 521 F.3d at 320 (an anti-harassment policy "must be effective in order to have meaningful value"). On this record it appears that Ms. Chapman had no realistic audience for a complaint about SS's handling of a serious workplace incident other than SS himself or, perhaps, his mother or father if they could be reached on vacation, *see* JA-97 (MS 23), none of which were appropriate and effective options.

C. Ms. Chapman Has A Triable Case That OLC Is Liable For Failing To Prevent This Harassment

The district court held that OLC's only obligation was to respond reasonably once SS learned of his child's statements in August 2018. A reasonable trier of fact could disagree with that premise. Ms. Chapman also has a triable case that OLC is responsible for failing to prevent the harassment she experienced. OLC's liability could be based in its own negligence, because OLC knew or should have known of the hostile environment Ms. Chapman experienced and was at risk of experiencing. Or OLC's liability could be vicarious because SS was responsible for bringing his child to the workplace and was aided in doing so by his agency relationship with OLC.

1. OLC Knew Or Should Have Known About The Hostile Work Environment Ms. Chapman Experienced, And Failed To Take Reasonable Action To Stop Or Prevent It

OLC is liable in negligence if it "knew, or should have known, about the harassment and failed to take action reasonably calculated to stop it." *Bazemore*, 957 F.3d at 201. "Knowledge of harassment can be imputed to an employer if a reasonable person, intent on complying with Title VII, would have known about the harassment." *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325, 334 (4th Cir. 2003); *see also, e.g., Sunbelt Rentals*, 521 F.3d at 320 (employer may be liable for "practicing something akin to willful blindness"). A reasonable jury could find that OLC's management team knew or should have known about the hostile working

environment that Ms. Chapman had experienced, and was likely to experience in the future, well before August 2018—and that OLC failed to take reasonable steps to address or prevent the problem.

First, a reasonable jury crediting Ms. Chapman's testimony would conclude that AS and SS were aware of the pre-2015 incidents in which they were directly involved. *See, e.g.,* JA-52 (Chapman 43) ("slave badge" incident with AS); JA-115 (Chapman 46) (noose cake incident with SS).

Second, Ms. Chapman reported the July 2018 incident to PW. Even if PW is not a "supervisor" for vicarious liability purposes under *Vance v. Ball State Univ.*, 570 U.S. 421 (2013), because she did not have authority to hire and fire, Ms. Chapman's testimony was that PW controlled Ms. Chapman's daily schedule and working environment and had the authority to recommend employee discipline to the family management team. JA-44-47 (Chapman 30-33). That testimony supports a reasonable inference that PW was required to report that incident up the chain. *See, e.g., Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) (employer has notice of harassment when someone with power to stop it or responsibility to report it learns of harassing conduct).

Third, SS, MS, and/or AS must have known, or were at least on inquiry notice, that this child, who was at the facility essentially full-time, had been exposed to some truly awful attitudes and language and posed a serious risk of creating

exactly the sort of workplace situation that manifested here. This is a civil case governed by a preponderance standard, and the trier of fact need not ignore the elephant in the room. Six year old children do not come into the world thinking and talking this way, and primarily absorb the language and attitudes of their families—which, in this case, includes the entire management structure of OLC.

A reasonable jury could conclude that OLC was negligent in failing to prevent these incidents in several ways. This child should never have been left unsupervised in the workplace given the things he might say. OLC failed to put in place a supervisory and reporting structure reasonably calculated to prevent incidents like this or to effectively redress them. Depending on its evaluation of witness credibility and some of the obvious looming questions in this case, a reasonable jury might conclude that OLC was negligent in leaving SS in charge of the working environment at this facility, period. The district court erred in holding that OLC bore no responsibility for preventing this harassment *as a matter of law*.

2. OLC Is Vicariously Responsible For The Role That SS Played In The 2018 Incidents

A reasonable jury also could conclude that OLC is vicariously liable because the harassment that Ms. Chapman experienced was aided by OLC's agency relationship with SS.

As the district court recognized, the central divide in harassment law is between supervisor harassment, on one side, and harassment by co-workers or third

parties on the other. Employers are vicariously liable for a hostile environment created by a supervisor, subject to the *Faragher/Ellerth* affirmative defense, but when the hostile environment is created by a co-worker or third party the employer is liable only in negligence. That line comes directly from common law agency principles, and in particular from "the aided-by-agency-relation principle embodied in § 219(2)(d)" of the Restatement (Second) of Agency (1957). *Faragher*, 524 U.S. at 802. The Supreme Court has recognized that under traditional agency principles "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority," and that "there is a sense in which a harassing supervisor is always assisted in his misconduct by the supervisory relationship." *Id.*

Although those principles are usually invoked in cases where the supervisor was the harasser, the crucial question under § 219(2)(d) of the Restatement is not whether the harassing language came directly from a supervisor's mouth, but instead whether the supervisor was "aided in accomplishing the tort by the existence of the agency relation." Surely an employer would be vicariously liable for a hostile work environment that a supervisor created through third-party proxies, for example, if the supervisor used his authority to give malignant third parties access to the workplace.

Nor is there any requirement that the supervisor *intend* to create a hostile working environment. *See, e.g., King v. Bd. of Regents of Univ. of Wisconsin Sys.,* 898 F.2d 533, 537–38 (7th Cir.1990) ("One difference between sexual harassment under equal protection and under Title VII, however, is that the defendant must intend to harass under equal protection ... but not under Title VII, where the inquiry is solely from the plaintiff's perspective.") (internal citation omitted); *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265, 277-78 (3d Cir. 2001) (harassment claim does not require "direct proof that her harasser's intent was to create a discriminatory environment" but simply proof that the plaintiff's treatment "was attributable to her [race]"). Indeed, many hostile environment cases involve insensitivity and carelessness rather than outright malice.

This record supports a reasonable inference that the child's harassment of Ms. Chapman was aided by SS's status as a supervisor and agent of OLC. As this Court explained in *Mikels v. City of Durham, N.C.,* the critical question "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 to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not." 183 F.3d 323, 333 (4th Cir. 1999). As a practical matter, only a supervisor could bring a six year old child to the workplace and expect his employees to, in effect, babysit the child. SS's status as a supervisor and agent is

the reason the child was there, the reason that Ms. Chapman felt obliged to engage with him in August 2018 despite her previous terrible experience in July, and one of the reasons that Ms. Chapman thought that pursuing any further redress within OLC would be utterly futile.

It is not critical to that aided-by-agency-relationship analysis that SS bear any individual legal responsibility for his child's actions. Supervisors are *never* individually liable for harassment under Title VII, because the statute imposes liability only on employers. *See, e.g., Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 180-81 (4th Cir. 1998). So while the case law frequently says that employers are "vicariously" liable for harassment created by supervisors, the liability is not vicarious in the usual sense of a master's secondary or derivative responsibility for a servant's liability. If an unacceptable workplace condition was facilitated by an employer's agency relationships, Title VII shifts the burden to the employer to establish an affirmative defense. Whether the agent would also be responsible for that condition is irrelevant. And even if it were necessary for some reason to establish SS's personal responsibility for his son's words, general tort law principles provide standards under which Ms. Chapman could prevail.[3]

[3] Of course Title VII borrows from general agency law principles to answer related questions. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998). And a jury could find that the parent's negligence enabled the injury, *see, e.g.*, *Condel v. Savo*, 39 A.2d 51, 52 (Pa. 1944), that SS knew of his son's dangerous proclivity for speaking racial insults, *see, e.g.*, *Jackson v. Moore*, 378 S.E.2d 726, 728 (Ga. App.

II. MS. CHAPMAN HAS A VIABLE CONSTRUCTIVE DISCHARGE CLAIM

A reasonable jury also could conclude that OLC is liable for constructively discharging Ms. Chapman. The district court recited this Court's statement in *Freeman v. Dal-Tile Corp* that "[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,'" 750 F.3d 413, 425 (4th Cir. 2014) (quoting *Honor v. Booz- Allen & Hamilton, Inc.*, 383 F.3d 180, 186–87 (4th Cir. 2004)), and reasoned that OLC was entitled to summary judgment because "[t]he child was a third party and not acting on behalf of defendants," and "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. The district court's reasoning misunderstood the governing law.

First, it is now settled law that a constructive discharge claim *does not* require proof that the employer subjectively wanted the employee to resign. That was the

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1989), or that the racial slur was a dangerous instrument entrusted to the boy, *see, e.g.*, *Rios v. Smith*, 744 N.E.2d 1156, 1159 (N.Y. 2001). A court also could hold that the standard that best serves Title VII's purposes is strict liability, by analogy to the strict liability that parental responsibility statutes impose for a child's malicious or willful injury. *E.g.*, N.C. Gen. Stat. Ann. § 1-538.1. And of course any such theories of liability would be tempered, like the vicarious liability recognized in *Faragher*, by the affirmative defense the Supreme Court has recognized in all cases not involving a tangible employment action. *See* §III, *infra*.

law of this Circuit decades ago, and it made sense in the context of the jurisprudence at that time. But the Supreme Court firmly rejected that conception of the doctrine in *Suders* and again in *Green*, opting instead for an entirely objective test tempered by the *Faragher/Ellerth* affirmative defense. The post-*Suders* throwback language in *Freeman* has confused the lower courts, and this Court should take the opportunity to clear up that confusion.

Second, to the extent the district court believed that a constructive discharge claim cannot be based on a hostile environment created by a third party, that holding also is inconsistent with precedent. *Suders* makes clear that a constructive discharge claim requires nothing more than a hostile environment so aggravated that quitting was an objectively reasonable response. The Supreme Court and this Court have developed a robust jurisprudence of when employers are responsible for hostile environments created, in part, by third parties or co-workers. There is no reason why those imputation principles should be any different in a constructive discharge claim.

A. Constructive Discharge Does Not Require Proof That The Employer Engineered A Hostile Environment Because It Subjectively Wanted The Employee To Resign

When the concept of constructive discharge first entered federal non-discrimination law, it was borrowed from National Labor Relations Act decisions addressing situations in which an employer deliberately made working conditions intolerable in order to force pro-union employees to resign. *See generally Suders*,

542 U.S. at 141-42 (explaining the history of constructive discharge). Against that backdrop, some courts of appeals, including this Court, required that "the employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit," but treated the resulting constructive discharge as a tangible employment action—just like an actual firing—for which the employer was automatically responsible. *See id.* at 153 (Thomas, J., dissenting).

For example, in *Bristow v. Daily Press, Inc.* this Court cited NLRA precedents to hold under the ADEA that "[a] constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job," and thus requires "proof of the employer's specific intent to force an employee to leave." 770 F.2d 1251, 1255 (4th Cir. 1985) (citing *J.P. Stevens & Co., Inc. v. NLRB*, 461 F.2d 490, 494 (4th Cir.1972)). And a constructive discharge satisfying those requirements would automatically satisfy the ADEA's requirement of an "adverse employment action by the employer." *Id.* at 1254. As Justice Thomas explained in his *Suders* dissent, "[i]f, in order to establish a constructive discharge, an employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit, it makes sense to attach the same legal consequences to a constructive discharge as to an actual discharge." *Suders*, 542 U.S. at 153 (Thomas, J., dissenting).

But as Justice Thomas acknowledged, the Supreme Court in *Suders* embraced the other side of the then-existing circuit split and for Title VII purposes "adopted a definition of constructive discharge … that does not in the least resemble actual discharge." *Id.* The *Suders* majority instead held that a Title VII plaintiff pursuing a constructive discharge theory must show the elements of a hostile work environment claim and "[b]eyond that, … a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." 542 U.S. at 134. The constructive discharge portion of that 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?" *Id.* at 141. It does not require specific intent to force a resignation.

The absence of specific intent also explains why an employer in a constructive discharge case may have access to the *Faragher/Ellerth* affirmative defense for reasonable good-faith efforts to prevent or address the harassment. *See Suders*, 542 U.S. at 148; *id.* at 154 (Thomas, J., dissenting). This "good faith" defense would make no sense if a constructive discharge claim required proof that the employer *deliberately fostered* the hostile working environment to drive out the employee. But once the concept of constructive discharge no longer requires any "official action" by the company but instead just "a 'worse case' harassment scenario, harassment ratched up to the breaking point," there is no reason why the employer should not

have the opportunity to establish that it acted reasonably within the *Faragher/Ellerth* framework. *Id.* at 147-48. As the Court explained, it would "make[] scant sense to alter the decisive instructions from one claim to the next when the only variation between the two claims is the severity of the hostile working conditions." *Id.* at 149.

If there were any doubt after *Suders*, the Supreme Court reiterated in *Green* that constructive discharge does not require specific intent to force a resignation. "The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him." 136 S. Ct. at 1779. "We do not also require an employee to come forward with proof … 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." *Id.* at 1779-80.

Unfortunately, this Court's opinion in *Honor v. Booz-Allen & Hamilton* was issued a few months after *Suders* and applied this Court's pre-*Suders* standards without acknowledging the Supreme Court's recent decision. *See* 383 F.3d 180, 186-87 (4th Cir. 2004) (quoting *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1345 (4th Cir. 1995)). Ten years later *Freeman* recycled the same citations, also without acknowledging *Suders*. *See* 750 F.3d at 425.

Although later cases in this Court have applied the correct objective standard, *see, e.g. Perkins v. Int'l Paper Co.,* 936 F.3d 196, 211-12 (4th Cir. 2019) (citing

Green), *Freeman* and this Court's pre-*Suders* specific intent case law have continued to produce confusion in the lower courts, *see, e.g., Dunlap v. TM Trucking,* 288 F. Supp. 3d 654, 667-68 (D.S.C. 2017) (citing *Bristow* for the deliberateness prong).[4] The decision below is an example. *See* Doc 64 at 12-13. Citing *Freeman*, the district court in this case granted OLC's motion for summary judgement on the 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*." *Id.* (emphasis added).

This Court should take the opportunity to clarify the appropriate standard. The district court's grant of summary judgment on the constructive discharge claim should be vacated and remanded. The district court did not consider whether Ms. Chapman has presented a triable claim of sufficient objective severity on the merits, but for all of the reasons discussed in § I(A) *supra* this Court should hold that a reasonable trier of fact could find a constructive discharge here.

[4] Courts elsewhere have recognized that this Court's pre-*Suders* constructive discharge jurisprudence was abrogated by *Suders. See Cecala v. Newman*, 532 F. Supp. 2d 1118, 1167 (D. Ariz. 2007) (noting in a legal malpractice case that "[a] constructive discharge claimant in the Fourth Circuit in late 1999 was also required to show that the employer 'deliberately made his working conditions intolerable in an effort to induce him to quit,'" but that "[t]he Supreme Court overruled the deliberateness requirement in 2004" in *Suders*).

B. Third-Party Conduct May Create A Basis For Employer Liability For Constructive Discharge, If It Is Imputable To The Employer

The district court also reasoned that summary judgment was merited because "[t]he child was a third party and not acting on behalf of defendants." JA-294. To the extent that reasoning is distinct in any way from the court's misunderstanding of the specific intent issue, this Court should reject it as well.

Freeman and the pre-*Suders* case law it relied upon articulated a two-part test for constructive discharge that considered "(1) the deliberateness of [the employer's] actions, motivated by racial bias, and (2) the objective intolerability of the working conditions." *Freeman*, 750 F.3d at 425 (quoting *Honor*, 383 F.3d at 186-87). The district court appeared to understand the "deliberateness" prong as precluding constructive discharge liability based on the actions of a third party. This Court should clarify that the "deliberateness" prong of the *Freeman* standard is either wholly obsolete after *Suders* or satisfied by all of the accepted bases for imputing responsibility for a hostile environment to an employer.

Every hostile environment claim requires a basis for holding the employer responsible—whether it is harassment by someone so senior as to be the organization's proxy, harassment meaningfully aided by an agency relationship, or the employer's own negligence. In *Suders* the Supreme Court explained that a "compound" constructive discharge claim based on a hostile working environment is simply "a 'worse case' harassment scenario, harassment ratcheted up to the

breaking point." 542 U.S. at 147. And "[l]ike the harassment considered in our pathmarking decisions, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts." *Id.* at 148. The Court went out of its way to explain that since "the only variation between the two claims is the severity of the hostile working conditions" it would make no sense to treat them any differently for purposes of the *Faragher/Ellerth* affirmative defense. *Id.* at 149. The same logic precludes any different approach to imputation.

For all of the same reasons that OLC is liable on Ms. Chapman's hostile environment claim, therefore, it also is responsible for the conditions underlying her constructive discharge claim. *See supra* §§ I(B) and I(C). The district court erred by holding that the child's status as a "third party … not acting on behalf of defendants" is in any way dispositive. JA-294.

III. THERE IS AT LEAST A TRIABLE ISSUE CONCERNING WHETHER OLC IS ENTITLED TO THE AFFIRMATIVE DEFENSE RECOGNIZED IN *FARAGHER* AND *ELLERTH*

OLC could attempt to prove up the *Faragher/Ellerth* affirmative defense, but it would bear the burden of proof to establish "(a) that [it] exercised reasonable care to prevent and correct promptly any … harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective

opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807.

OLC clearly is not entitled to summary judgment under that standard. For reasons discussed above, OLC and its agents did not exercise reasonable care to prevent or correct this situation. There is no evidence, let alone conclusive evidence, that OLC had a functioning and effective complaint mechanism, particularly for complaints that would involve SS and his family. And in the posture of rebutting an affirmative defense of reasonable care from OLC, Ms. Chapman would be entitled to rely on her testimony about her experiences with AS and others during her first period of employment pre-2015, even if this Court concludes that those incidents are procedurally barred as the basis of independent claims for relief. *See Morgan*, 536 U.S. at 114 (even time-barred prior acts can be used "as background evidence in support of a timely claim.").

Finally, any effort by OLC to prove that Ms. Chapman unreasonably failed to take advantage of corrective opportunities available to her would run into the same issues discussed above. A trier of fact crediting Ms. Chapman's testimony certainly could agree with her assessment that the atmosphere at OLC was never going to change, and that complaining further to SS or other members of his immediate family would be futile in light of her long experience and SS's behavior.

CONCLUSION

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

Respectfully submitted,

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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 Opening Brief of Appellant contains 10,109 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: May 19, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger