No. 20-2361

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TONYA R. CHAPMAN,
Plaintiff-Appellant,

v.

OAKLAND LIVING CENTER, INC., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The district court held that the plaintiff could not survive summary judgment on her race-based hostile-work-environment and constructive-discharge claims. This case raises several questions important to the administration and enforcement of Title VII's prohibitions on race discrimination. In particular, the case implicates significant questions about how courts should evaluate whether workplace harassment is objectively severe or pervasive and how courts should apply the negligence standard for imputing liability for third-party harassment to employers. This case also raises the question of the legal standard governing constructive-discharge claims. Because the EEOC has a strong interest in these important issues, it offers its views to the Court pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES[1]

1. Whether a reasonable jury could conclude that Plaintiff-Appellant Tonya Chapman experienced objectively severe or pervasive harassment in July and August 2018.

2. Whether a reasonable jury could impute liability to Chapman's employer for the harassment because the employer was negligent in addressing it.

3. Whether the district court misapprehended the standard for constructive-discharge claims when it required Chapman to demonstrate the "deliberateness" of her employer's actions.

STATEMENT OF THE CASE

A. Factual Background[2]

Chapman, who is African American, began working for Oakland Living Center (Oakland), an assisted living facility, in 2004. JA.36;

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[1] The EEOC takes no position on any other issue raised in this appeal.

[2] Because this is an appeal of the district court's order granting summary judgment, we summarize the factual background "in the light most favorable to [Chapman,] the nonmoving party." *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 276 (4th Cir. 2015) (en banc).

JA.92; JA.239. She worked there from 2004 to 2015, first as a personal care assistant and housekeeper and later as a weekend cook, and returned in 2018 as a weekend cook. JA.36-38; JA.48; JA.269.

Oakland was a family-run business owned by Michael and Arlene, a married couple. JA.227-29.[3] All of the managers at Oakland were family members, including Michael, Arlene, and their son Steven. JA.93; JA.229. Steven described his role as "supervisor in charge" and "maintenance." JA.265. Steven and Michael were jointly in charge of the kitchen where Chapman worked, and Steven made all company decisions when Michael and Arlene were not present. JA.95; JA.228; JA.265. Oakland kept a company handbook at the facility's front desk, but Arlene could not remember whether the handbook contained a policy for reporting harassment, and she acknowledged that she never gave a copy of the handbook to Chapman or any other staff member. JA.246-48.

Steven often brought his young children (Michael and Arlene's grandchildren) to visit the Oakland facility and the kitchen where

[3] We use first names when referring to adult members of the family that owned and managed Oakland to protect the child's privacy.

Chapman worked. JA.73; JA.96; JA.250; JA.262-63. The children were "raised" at Oakland and were present at the facility "constantly, all the time." JA.73. Chapman recalled that the children were "always in the kitchen with me." JA.62.

Around 2009, Arlene photographed Chapman for Chapman's work identification card. JA.50-51. After Arlene photographed Chapman from the front, she said to Chapman, "I'm going to take a picture of you from the side and I'm going to give you some slave numbers." JA.51-52. Arlene wrote the number "7639821" on Chapman's photograph. JA.52.

Around February 2014, Steven and his wife, Beth, held a monkey-themed birthday celebration for their twins at Oakland. JA.54-57. Chapman shares a birthday with the twins. JA.54. On the day of this celebration, Steven and Beth gave Chapman a cake that depicted a hangman with a noose image. JA.55-56.

Chapman asked Arlene on several occasions to transfer to a health-care position and inquired about obtaining a medical-technician license. JA.38-41. Arlene selected several employees—but not Chapman—to obtain a such a license. JA.39-41. Chapman believed that Arlene did not select her because of her race. *See* JA.128-30. In 2015,

Chapman left Oakland because she was frustrated that she had not been allowed an opportunity to obtain a medical-technician license. JA.39-40.

Then, around April 2018, Chapman returned to her weekend cook position at Oakland when Patricia Warner, who also worked in the kitchen, asked her to return. JA.43; JA.60-61; JA.269. Chapman assumed that Warner was her supervisor during her 2018 tenure at Oakland and she believed that Warner had authority to rehire her. JA.43-46.

In July 2018, Chapman set aside some cupcakes in the kitchen for Steven's children to decorate. JA.62-65. One of Steven's children, who was six years old at the time, wanted to decorate additional cupcakes. JA.63-65; JA.273. When Chapman said no, the child hit and kicked Chapman and said, "My daddy called you a lazy ass black n*****, because you didn't come to work." JA.65-67. Chapman testified that she reported the incident to Warner. JA.69. At the time of this episode, Michael and Arlene were out of town, and Steven was in charge of the facility. JA.68-71; JA.95.

In August 2018, while Chapman was working, the same child was outside the kitchen riding his bicycle. JA.74-75. The child called to Chapman through a window and told her to come over. JA.75. Chapman went to the window and told the child she had to work. JA.75-76. The child responded: "N*****, n*****. Get to work, n*****." JA.76. Michael and Arlene were not present at the time of this incident, and Steven was in charge of the facility. JA.95-97; JA.238-39.

Shortly after this incident, Steven learned from Warner that the child had called Chapman "an 'n' word." JA.271-72. Steven asked Chapman if his child "sa[id] something ugly" to her, and Chapman replied in the affirmative. JA.78; JA.272-73. Steven told Chapman that he would "straighten [the child] out." JA.199. Steven spanked the child, and he then brought the child into the kitchen and directed him to apologize to Chapman. JA.273-75. But the child did not approach Chapman and instead ran to Warner. JA.274-75. Steven witnessed that the child did not apologize to Chapman, and there is no evidence in the record indicating that Steven himself apologized to Chapman for the child's conduct. *See* JA.273-76. Nonetheless, Steven walked away,

leaving the child with Chapman. JA.79-81; JA.179. After Steven left, the child said to Chapman, "Tonya, you are a n*****." JA.179.

Chapman immediately resigned. 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." *Id.*

B. Procedural Background

Chapman filed suit asserting, *inter alia*, Title VII claims for (1) hostile work environment based on race and (2) constructive discharge. The district court granted Oakland summary judgment.

In rejecting Chapman's race-based hostile-work-environment claim, the court did not explicitly address the question whether Chapman's work environment was objectively hostile. However, the court agreed with Chapman that "the child used atrocious language that is entirely unacceptable in society." JA.293.

Instead of discussing objective hostility, the court focused on whether liability could be imputed to Oakland for the July and August 2018 incidents involving the child. As the court recognized, "a third party's actions can provide a basis for recovering against an employer if the employer was negligent in controlling the working conditions."

JA.290. An employee can make this showing, the court explained, by offering evidence that the employer "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 court asserted that "it is the employee's responsibility to notify the employer that a problem exists" "[f]or an employer to be expected to correct harassment." *Id.* (citing *EEOC v. Xerxes Corp.*, 639 F.3d 658, 674 (4th Cir. 2011)).

The district court first concluded that Oakland could not be charged with knowledge of the harassment before Steven learned of the first August incident. According to the court, Chapman "admit[ted] that she did not report the July incident to a supervisor or anyone that could have reprimanded the child or corrected the situation." JA.291. Although the court acknowledged Chapman's testimony that she told Warner about the July incident, it apparently assumed that a report to Warner could not have put Oakland on notice because Warner was not a supervisor under *Vance v. Ball State University*, 570 U.S. 421 (2013). JA.291 n.3. The court did not analyze whether Oakland had constructive knowledge of the July incident.

The district court went on to determine that Oakland's response to the first August incident was "reasonably calculated to stop" the harassment as a matter of law. JA.291-92. The court stated that an employer's "remedial actions . . . need not be guaranteed to stop the harassment." JA.291 (citing *Xerxes*, 639 F.3d at 669). According to the court, "[s]panking the child after the child directed a racial slur at [Chapman] may not have stopped the harassment in this case, but it was an effort directed to reasonably stop the harassment." JA.292. The court added that Chapman "did not give [Oakland] the opportunity" to take "more stringent methods" "[a]fter the second [August] incident," "as she immediately quit." *Id.*

The district court also addressed prior racially discriminatory incidents—the slave-number and noose-cake episodes—that occurred during Chapman's first period of employment at Oakland. JA.294-97. The court rejected any separate claims based on these incidents because, *inter alia*, in the court's view, such claims fell outside the scope of Chapman's EEOC charge. JA.295-96.

In dismissing Chapman's constructive-discharge claim, the court asserted that Chapman "must prove (1) the deliberateness of

[Oakland's] actions, motivated by [Chapman's] race[] and (2) [that] [Chapman's] working conditions were objectively intolerable." JA.293-94 (citing *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 425 (4th Cir. 2014)). The court faulted Chapman because she "did not present sufficient evidence to create a question of fact as to whether [Oakland] deliberately attempted to induce her to resign." JA.294.

ARGUMENT

I. A reasonable jury could conclude that Chapman experienced objectively hostile racial harassment that can be imputed to Oakland.

To prove that an employer is liable for a race-based hostile work environment, a plaintiff must show "(1) unwelcome conduct; (2) that is based on [her] . . . race; (3) which is sufficiently severe or pervasive to alter the . . . conditions of [her] employment and to create an abusive work environment; and (4) which is imputable to the employer." *Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc). The district court addressed only the fourth element (the sole element the parties disputed), JA.289-93, but nonetheless we address both the third and fourth elements in the event Oakland raises the third element as an alternative ground for affirmance. As explained

below, a reasonable jury could find that Chapman endured objectively severe or pervasive harassment in July and August 2018 that is imputable to Oakland.

A. A reasonable jury could conclude that Chapman experienced objectively hostile harassment.

The third element of a hostile-work-environment claim "requires a showing that 'the environment would reasonably be perceived, and is perceived, as hostile or abusive.'" *Boyer-Liberto*, 786 F.3d at 277 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)). "Whether the environment is objectively hostile or abusive is 'judged from the perspective of a reasonable person in the plaintiff's position.'" *Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)). "[A]ll the circumstances" are relevant to that determination, including the "severity" and "frequency" "of the discriminatory conduct," "whether [the conduct was] physically threatening or humiliating[,] . . . and whether it unreasonably interfere[d] with [the] employee's work performance." *Harris,* 510 U.S. at 23.

Several governing principles inform the severe-or-pervasive inquiry. First, this Court should follow the approach of other circuits that examine whether the harassment in question would be perceived

as severe or pervasive by "a reasonable person *of the same protected class*." *West v. Phila. Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995) (emphasis added); *see also, e.g.*, *Torres v. Pisano*, 116 F.3d 625, 632-33 (2d Cir. 1997) (analyzing objective hostility in sex- and national-origin harassment claims from perspectives of a "reasonable woman" and a "reasonable Puerto Rican"); *Ellison v. Brady*, 924 F.2d 872, 880-81 (9th Cir. 1991) (analyzing objective hostility in sexual harassment suit from perspective "of a reasonable woman"). Some of this Court's harassment decisions refer to a "reasonable person" rather than a "reasonable person of the same protected class." *E.g.*, *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995). However, the EEOC is not aware of any decision by this Court that forecloses adoption of the latter standard. Such a standard is critical to ensuring that Title VII covers *all* discriminatory actions that constructively alter an employee's terms or conditions of employment.

Although this Court should adopt the "reasonable person of the same protected class" standard as a general rule, this standard is especially apt when analyzing the severity of the racial slurs at issue here. The "reasonable person of the same protected class" standard is

consistent with this Court's recognition that the n-word is "pure anathema to African-Americans." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001). Accordingly, this Court should assess whether the repeated use of that slur would have been objectively hostile to a reasonable African American person in Chapman's position.

Second, given the young age of the child, it may well be that the child did not intend to harm Chapman, and did not realize the likely effect of the words. Intent to harm should not be the focus, however. Courts have explained that "whether a workplace environment is sufficiently polluted for purposes of a [harassment] claim should not be based on whether an alleged harasser possessed the motivation or intent to cause discriminatory harm or offense." *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1228 (10th Cir. 2015); *see also, e.g.*, *Ellison*, 924 F.2d at 880 (conduct may be "classifie[d] . . . as unlawful . . . harassment even when harassers do not realize that their conduct creates a hostile working environment"). Accordingly, harassment based on a protected characteristic may be actionable where it "has the purpose or *effect* of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)) (emphasis added). Here, a jury could conclude that even assuming the child had no intent to harm Chapman, the July and August 2018 incidents nevertheless affected the "terms, conditions, or privileges of [Chapman's] employment." *Id.* at 64 (quoting 42 U.S.C. § 2000e-2(a)(1)).

Third, in assessing whether a reasonable person in Chapman's position would have perceived the July and August 2018 incidents to be severe, this Court should take into account the close relationship between the child who uttered the racial slurs and the individuals who ran Oakland. In *Boyer-Liberto*, this Court explained that "the status of the harasser may be a significant factor" "[i]n measuring the severity of harassing conduct." 786 F.3d at 278. For example, "a supervisor's use of [a racial epithet] impacts the work environment far more severely than use by co-equals." *Id.* Likewise, an individual engaging in harassing conduct may be "deem[ed]" a supervisor "in gauging the severity of [the] conduct" when the victim of the harassment "reasonably" believed that the individual "could make a discharge decision or recommendation that would be rubber-stamped" by a decisionmaker. *Id.* at 279-80.

This case differs from *Boyer-Liberto* in an important way: here it was a very young child, and not an employee with some workplace authority, whose words are at issue. In some circumstances, the young age of the speaker might diminish the severity of the words. But two considerations suggest a reasonable person in Chapman's position could perceive the conduct of the child to be especially severe. First, because the child had a familial relationship with Oakland's managers—Steven, Arlene, and Michael, *see* JA.96; JA.250; JA.262-63—a person in Chapman's shoes could have reasonably perceived, as in *Boyer-Liberto*, that the individual who engaged in harassing conduct "had [the] ear" of decisionmakers. 786 F.3d at 279.

Second, it is significant that the child told Chapman, "My daddy called you a lazy ass black n*****," JA.65-67, and that the child made other references to Chapman's work ethic, JA.76. Given this language, a reasonable person in Chapman's shoes could believe that the child—who, at age six, likely did not understand the meaning of his words—could have heard these words from his father, who supervised the kitchen where Chapman worked, JA.95; JA.228. That reasonable perception could have enhanced the severity of the child's words,

regardless of where the child heard the n-word. Taken together, these facts could heighten the serious nature of the July and August 2018 incidents in the eyes of a reasonable jury.

Fourth, a factfinder could consider events that occurred during Chapman's first period of employment at Oakland as background evidence bolstering the conclusion that Chapman reasonably perceived the July and August 2018 slurs as objectively hostile. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (Title VII plaintiffs may offer evidence of "prior acts as background evidence"). In particular, a reasonable jury could credit Chapman's evidence that Steven and his wife presented Chapman with a cake with a noose image in 2015, JA.55-56, and that Arlene spoke of giving Chapman "slave numbers" in 2009, JA.51-52. A jury could determine that these facts enhanced the severity of the 2018 incidents for at least two reasons. *Cf. Porter v. Erie Foods Int'l, Inc.*, 576 F.3d 629, 635-36 (7th Cir. 2009) (a "noose is a visceral symbol of the deaths of thousands of African-Americans at the hand of lynch mobs" and evokes "terror"); *Miles v. DaVita Rx, LLC*, 962 F. Supp. 2d 825, 831 (D. Md. 2013) (manager's

reference to employees as slaves contributed to hostile work environment).

To begin, a reasonable person in Chapman's position could have perceived past discriminatory incidents involving the child's grandparent and parents as confirmation that challenging the July and August 2018 conduct could lead to unwelcome consequences. *Cf. Boyer-Liberto*, 786 F.3d at 279 (relying on fact that harasser told the plaintiff that she "had [the decisionmaker's] ear and could have [the plaintiff] fired"). In addition, a jury could conclude that viewing the child's conduct through the lens of his family members' prior actions rendered the July and August 2018 incidents more severe. From the perspective of a reasonable person in Chapman's shoes, the more recent conduct could have seemed like a continuation of a pattern of outrageous discrimination, rather than isolated incidents that were unlikely to be repeated.

Under these principles, a reasonable jury could find that Chapman experienced objectively hostile harassment. As explained, the n-word is extremely offensive, particularly to a reasonable African American employee, *Spriggs*, 242 F.3d at 185, and especially when

directed at a specific individual, as was the case here. Chapman was subjected to the n-word on three occasions, JA.65-67; JA.76; JA.79-81, while this Court has said that even a single incident of "extremely serious" harassment can be actionable. *Boyer-Liberto*, 786 F.3d at 278, 280 (two uses of racial slur by individual deemed to be supervisor sufficient to establish hostile work environment, regardless of "whether [slurs were] viewed as a single incident or as a pair of discrete instances of harassment"). And as discussed *supra* pp. 11-17, a reasonable person in Chapman's position could perceive the conduct to be especially severe because (1) she could believe that the child repeated a supervisor's (his father's) slurs; (2) the child was a close relation of the company owners; and (3) Chapman had previously endured other racially hostile incidents involving that same supervisor and one of those owners.

A jury could also rely on additional relevant "circumstances," *Harris*, 510 U.S. at 23, in deeming Chapman's work environment objectively hostile. A reasonable person in Chapman's position could find the conduct especially "humiliating," *id.*, because the child coupled slurs with work-ethic language, including calling Chapman a "lazy ass black n*****" and telling her to "[g]et to work n*****," JA.65-67; JA.76,

and because a *child* directed those offensive phrases at an adult. Chapman also offered evidence that the July and August 2018 incidents "interfere[d] with [her] work performance" and "discouraged [her] from remaining on the job" to the point that she felt compelled to resign. *Harris*, 510 U.S. at 22-23; *see* JA.81. And even though the harassing conduct was limited to three occasions, the child's "constant" presence in the Oakland kitchen, JA.62, could have led a reasonable person in Chapman's position to fear that another incident could occur at any time, bolstering the conclusion that Chapman's "workplace [was] permeated with discriminatory intimidation, ridicule, and insult." *Harris*, 510 U.S. at 21 (quotation marks omitted).

B. A reasonable jury could determine that liability for the harassment should be imputed to Oakland.

As this Court has recognized, an employer is liable in negligence for race-based hostile work environments created by third parties—individuals who are not employees of the company—when the employer (1) "knew or should have known of the harassment"—that is, had actual or constructive knowledge—and (2) "failed to take prompt remedial action reasonably calculated to end the harassment." *Freeman*, 750

F.3d at 422-23 (quotation marks omitted). Here, a reasonable jury could conclude that (1) Oakland had actual knowledge of the first August incident and failed to take appropriate action; and (2) Oakland had constructive knowledge of all incidents and failed to take appropriate action.

1. A jury could conclude that, at the latest, Oakland had actual knowledge of the hostile work environment after the first August incident, and yet it failed to take appropriate remedial measures.

As Oakland did not dispute in district court, a reasonable jury could find that Steven—and therefore Oakland—had actual knowledge of the first August 2018 incident. *See* R.50 at 18 (D. Mem. Supp. Mot. Summ. J.). Evidence that management knew of harassment establishes an employer's actual knowledge. *Freeman*, 750 F.3d at 423. Steven's actual knowledge was attributable to Oakland because he was a manager (as Oakland conceded); in fact, he was in charge of the facility on the day of the August 2018 incidents. JA.95-97; JA.238-39; *see also* R.50 at 3, 19 (D. Mem. Supp. Mot. Summ. J.).

A jury could further reasonably conclude that Steven (and therefore Oakland) failed to take appropriate remedial action after the

first August incident. As this Court has underscored, even where an employer took some remedial measures in response to workplace harassment, a jury may nevertheless impute liability to the employer if those measures were not "reasonably calculated to end the harassment." *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 177-78 (4th Cir. 2009) (quotation marks omitted); *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008) (same); *Paroline v. Unisys Corp.*, 879 F.2d 100, 106-07 (4th Cir. 1989) (same), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc). In assessing Oakland's response, a jury could consider the severity of the harassing conduct because, as this Court has explained, "the reasonableness of a company's actions" in response to harassment "depends, in part, on the seriousness of the underlying conduct." *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 498 (4th Cir. 2015) (citing *Xerxes*, 639 F.3d at 675-76).

To begin, evidence that Steven's response "was ineffectual in stopping the harassing conduct" is one "significant" fact supporting the conclusion that his response was unreasonable. *Pryor*, 791 F.3d at 499; *see Xerxes,* 639 F.3d at 669. After Steven's intervention, the child

immediately repeated the n-word to Chapman. JA.79-81. Although Steven's failure to prevent future harassment is not "dispositive," "the effectiveness of an employer's actions remains a factor in evaluating the reasonableness of the response." *Pryor*, 791 F.3d at 499.

Second, a jury could deem Steven's response "lukewarm," especially given the severity of the harassment. *Id.* After Steven spanked the child, he brought the child into the kitchen and instructed him to apologize to Chapman. JA.273-75. But, as Steven witnessed, the child did not apologize. JA.273-76. A jury could rely on Steven's failure to ensure that the child took the basic step of apologizing to Chapman—and the fact that Steven himself did not apologize for the child's behavior—in finding that Steven's actions were negligent. *See id.*; *cf., e.g.*, *Xerxes*, 639 F.3d at 671-72 (noting, in concluding that employer's response was adequate, that, *inter alia*, harassers apologized to the victim).

Third, a jury could base a negligence finding on the determination that Steven should not have left the young child unattended with Chapman after the child uttered the n-word and Steven did not ensure an apology for this conduct. *See, e.g.*, *Paroline*, 879 F.2d at 106 (fact

that employee was "still exposed" to harassing coworker "cast doubt on the adequacy of [the employer's] remedies"); *cf. Vance*, 570 U.S. at 449 ("[e]vidence that an employer did not monitor the workplace" is relevant to whether it was negligent in preventing harassment); *Xerxes*, 639 F.3d at 670 (explaining that separating the harasser and victim through "scheduling changes and transfers" has been deemed reasonable in certain circumstances). Removal of the harasser may be especially apt in cases of third-party harassment (as compared to coworker harassment) because the company does not have independent obligations to the harasser arising out of the employer-employee relationship. *Cf. Christian v. Umpqua Bank*, 984 F.3d 801, 813 (9th Cir. 2020) (noting that bank ultimately "direct[ed]" customer who harassed plaintiff "not to return," but explaining that a jury could deem response "too little too late").

In reaching a contrary conclusion, the district court reasoned that spanking the child was an action "directed to reasonably stop the harassment." JA.292. The court erred, however, by not giving any weight to the "significant" fact that Steven's intervention was ineffective, *Pryor*, 791 F.3d at 499, and by not taking account of the

"seriousness" of the harassment Chapman endured when assessing "the reasonableness of [Oakland's] actions," *id.* at 498. Moreover, the court usurped the role of the jury in assuming that a reasonable jury would be compelled to agree with its assessment of whether Steven's actions were reasonable on this record. Contrary to the court's conclusion, as explained, a reasonable jury could determine that Steven was negligent in failing to demand an apology by the child (or provide one himself) and by leaving the child unattended with Chapman, especially given the severity of the racial language leveled at Chapman.

2. A jury could conclude that Oakland had constructive knowledge of the hostile work environment, and yet it failed to take appropriate remedial measures.

A reasonable jury could further conclude that Oakland had constructive knowledge of the harassment as early as the July incident. "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 Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (en banc) (quotation marks omitted). "An

employer cannot avoid Title VII liability for [third-party] harassment by adopting a 'see no evil, hear no evil' strategy." *Id.*[4]

Significantly, this Court has held that an employer that "fails to provide reasonable procedures for victims to register complaints" "may be charged with constructive knowledge" of harassment even if the victim did not complain. *Id.* at 334-35 (holding that employer had

[4] Because a reasonable jury could find that Oakland had constructive knowledge as early as July, this Court need not address whether Oakland also had actual knowledge of the July incident based on Chapman's testimony that she reported the incident to Warner, *see* JA.69. We note, however, that the district court applied the wrong legal standard in evaluating that question. The district court appeared to assume that a company has actual knowledge of harassment only if that harassment was reported to someone who qualifies as a "supervisor" under *Vance*. JA.291 n.3. But *Vance* addressed a distinct legal issue: the question who should be deemed a "supervisor" for purposes of applying precedent making employers vicariously liable in certain circumstances for harassment by supervisors. 570 U.S. at 423-24. There is no reason that the definition of "supervisor" *Vance* adopted for that limited purpose has any bearing on the issue here: the question when a report of harassment to a company's agent is sufficient to establish the company's actual knowledge of the harassment. Supporting this conclusion, this Court has evaluated the actual-notice question without looking to *Vance* or related principles. *See, e.g.*, *Freeman*, 750 F.3d at 423-24; *Cent. Wholesalers*, 577 F.3d at 177; *Sunbelt Rentals*, 521 F.3d at 319. Indeed, this Court has held that an employee's report of harassment to a company's agent can be sufficient to give the employer notice even if the agent was not the employee's supervisor under *any* definition of that term. *See, e.g.*, *Howard v. Winter*, 446 F.3d 559, 569 (4th Cir. 2006) (report to senior human resources official sufficient to place employer on notice).

constructive knowledge of harassment about which plaintiff did not complain where it was "debatable whether the company actually ha[d] a sexual harassment policy" and, even if it did, a jury could reasonably find that it failed to provide reasonable avenues of complaint); *see also Vance*, 570 U.S. at 449 (noting that evidence that an employer "failed to provide a system for registering complaints" is relevant to whether it was negligent in preventing harassment).

Here, there is no evidence that Oakland maintained a harassment policy of *any* kind, much less a formal policy specifying reporting procedures for harassment complaints. Although Arlene testified that the company had an employee handbook, she could not remember if the handbook included a harassment policy, and she acknowledged that she never gave Chapman (or any other employee) a copy. JA.246-48. Moreover, even if Oakland had an appropriate harassment policy, it is doubtful that the company could "reasonabl[y]," *Ocheltree*, 335 F.3d at 334, insist that Chapman report the child's harassment to the company's managers, all of whom were family members of the child, especially because some of them had engaged in racist conduct. Oakland

thus should be charged with constructive knowledge of the harassment under *Ocheltree*.

The district court did not evaluate whether Chapman established constructive knowledge, apparently relying instead on a statement in *Xerxes* that "an employer *cannot* be expected to correct harassment unless the employee makes a concerted effort to inform the employer" of the problem "under its reasonable procedures." 639 F.3d at 674 (citation omitted). *See* JA.90. But the issue here is the distinct question whether knowledge of the child's harassment can be imputed to Oakland for purposes of establishing the company's negligence. And, as explained, this Court has squarely held that knowledge of harassment can be imputed to a company in the absence of actual notice, so long as a reasonable employer would have known about it. *Ocheltree*, 335 F.3d at 334. Indeed, this Court has recited these constructive-notice principles at the same time it has recapitulated the proposition on which the district court relied, underscoring that that proposition does not necessarily doom an employee's third-party harassment claim if she did not inform her employer of the harassment. *See, e.g.*, *Howard v. Winter*,

446 F.3d 559, 567 (4th Cir. 2006). Any other reading of *Xerxes* would conflict with *Ocheltree* and other binding decisions of this Court.

In addition to finding that Oakland had constructive notice of the July and August incidents, a reasonable jury could deem inadequate Oakland's response to the racial harassment Chapman experienced. Before the first August incident, Oakland failed to take *any* steps to prevent the child's conduct. Also, as explained *supra* pp. 20-24, even though Oakland, through Steven, took some remedial action after the first August incident, a jury could conclude that Oakland's response was not "reasonably calculated to end the harassment." *Cent. Wholesalers*, 573 F.3d at 177-78.

II. The district court applied the wrong standard in analyzing Chapman's constructive-discharge claim.

The district court applied the wrong legal standard in analyzing Chapman's constructive-discharge claim. According to the court, "[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." JA.293 (citing *Freeman*, 750 F.3d at 425). In particular, the court stated, Chapman was required to "prove (1) the deliberateness of [Oakland's] actions, motivated by [Chapman's] race[]

and (2) [that Chapman's] working conditions were objectively intolerable." JA.293-94 (citing *Freeman*, 750 F.3d at 425). The court rejected Chapman's claim on the sole ground that she offered insufficient evidence to "prove [] the deliberateness of [Oakland's] actions." *Id.*

However, the Supreme Court has clarified—and this Court has held—that Title VII plaintiffs alleging constructive discharge are not required to demonstrate "deliberateness." The district court relied on this Court's decision in *Freeman* for a constructive-discharge standard that included a "deliberateness" requirement. But after *Freeman*, this Court held that "'deliberateness' is no longer a component of a constructive discharge claim" "as a result of intervening Supreme Court case law." *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 144 (4th Cir. 2017). For this proposition, *Consol* cited *Green v. Brennan*, 136 S. Ct. 1769 (2016), which also post-dated *Freeman*.

As *Consol* explained, the Supreme Court "expressly rejected a 'deliberateness' or intent requirement" in *Green. Consol*, 860 F.3d at 144. Instead, *Green* "clearly articulated the standard for constructive discharge, requiring objective intolerability—'circumstances of

discrimination so intolerable that a reasonable person would resign.'" *Id.* (quoting *Green*, 136 S. Ct. at 1779) (some quotation marks and internal citation omitted). *Green* explained that, if an employee establishes intolerability, "[w]e do not also require [the] 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.

Accordingly, *Consol* underscored, *Green* "abrogate[d]" this Court's "prior case law to the extent it is to the contrary" to the Supreme Court's rejection of any deliberateness requirement. 860 F.3d at 144. In other words, *Green* abrogated *Freeman* and other precedents of this Circuit that recite a "deliberateness" requirement. Because the district court erred in applying such a requirement, this Court should reverse the grant of summary judgment on the constructive-discharge claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5,735 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Office 365 ProPlus in Century 14-point font, a proportionally spaced typeface.

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