No. 22-2806

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant

v.

VILLAGE AT HAMILTON POINTE LLC, d/b/a Hamilton Pointe Health & Rehabilitation Center; d/b/a Hamilton Pointe Assisted Living Center; d/b/a The Cottages at Hamilton Pointe, and

TENDER LOVING CARE MANAGEMENT, LLC, d/b/a TLC Management,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
Hon. Richard L. Young, U.S. District Judge
Case No. 3:17-cv-00147-RLY-MPB

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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Statement of Jurisdiction[1]

This case arises under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*. The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. §§ 2000e-5(f)(1), (3). Following trial, the district court entered final judgment on August 11, 2022. R.310. The Equal Employment Opportunity Commission ("EEOC") filed a timely notice of appeal on October 7, 2022. R.317; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

1. Did the district court wrongly ignore this Circuit's precedents in favor of contrary Fifth Circuit law, disregard the uniquely offensive nature of the N-word, and ignore genuine issues of material fact in granting summary judgment to Hamilton Pointe regarding fifteen of the EEOC's claimants?

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[1] Citations to the short appendix attached to this brief are designated "Short.App.__." Citations to the EEOC's supplemental appendix are designated "Supp.App.___." Citations to the district court's docket sheet are designated "R.___."

2. Do the verdict forms require a new trial because they forced the jury to consider supervisory harassment separately from coworker or resident harassment, when the law required it to consider the totality of the circumstances?

3. Did the district court wrongly make inferences in favor of Tender Loving Care Management ("TLC") and overlook genuine issues of material fact in holding that TLC and The Village at Hamilton Pointe ("Hamilton Pointe") were neither joint employers nor a single employer?

Statement of the Case[2]

Defendant Hamilton Pointe is a residential nursing home in Indiana. Supp.App.220. Defendant TLC manages Hamilton Pointe and provides it with financial, human resources, and other services. Supp.App.221. The EEOC's forty-seven claimants worked at Hamilton Pointe as certified nursing assistants ("CNAs"), nurses, qualified medication aides ("QMAs"), and dietary staff. All of the claimants are Black.

[2] For purposes of appealing summary judgment orders, we present the facts in the light most favorable to the EEOC. *See Donaldson v. Johnson & Johnson*, 37 F.4th 400, 405-06 (7th Cir. 2022).

The EEOC alleges, in relevant part,[3] that Defendants violated Title VII by creating a racially hostile work environment. Supp.App.41-42. Claimants testified that Hamilton Pointe routinely catered to the racist demands of its residents by making race-based assignments and instructing Black staff to stay out of certain rooms. *See infra* pp.4-21. Sometimes these instructions were verbal and sometimes in writing. *Id.* One typewritten assignment sheet, posted for all to see, said, "NO AFRICAN AMERICAN MALES TO PROVIDE CARE." Supp.App.46-50. Additionally, the claimants testified, residents, coworkers, and supervisors used the N-word and made other racist slurs to and about them, and otherwise mocked them for being Black. *See infra* pp.4-21.

The district court granted partial summary judgment on the merits to Hamilton Pointe, precluding recovery for forty of the claimants.

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[3] The EEOC also alleged that Defendants engaged in disparate treatment by acceding to residents' racial preferences and making job assignments based upon race. The EEOC does not challenge the adverse rulings on this claim. As the district court recognized, race-based assignments remain relevant to the existence of a hostile work environment. *See* Short.App.20, 25-26 (dismissing disparate treatment claims but considering race-based assignments in context of hostile work environment claims).

Short.App.92. The district court also held that TLC was neither a joint employer nor a single employer and granted summary judgment in its favor. Short.App.14. At trial, the jury found in favor of one of the remaining claimants and against the other six. R.301 at PageID#6387-89; Short.App.93-110.

I. Partial Summary Judgment on the Merits

A. Facts

The EEOC seeks reversal on behalf of fifteen individuals whose claims were rejected at summary judgment.

1. Trent Carter

Carter was a Dietary Aide at Hamilton Pointe for four years. Supp.App.44. When residents chose not to go to the dining room, nurses delivered trays to their rooms. Supp.App.56. When they were too busy, dietary aides delivered the food. Supp.App.56. Despite the usual practice within the facility, two nurses told Carter to stay out of residents' rooms because residents feared theft, and "I guess they thought the blacks had took something out of their room." Supp.App.56-57. Nurse Annette Brown told him twice that he could not enter rooms because "stuff had came up

missing," and she said White CNAs had told her that none of the Black CNAs went into the rooms. Supp.App.56-57. Nurse James told Carter three times that he could not enter rooms because Black CNAs were not allowed to do so. Supp.App.56. Yet Carter saw White aides taking trays into the rooms. Supp.App.59. Carter had avoided residents' rooms even before the nurses instructed him to do so because he feared he would be falsely accused of stealing something. Supp.App.57.

Carter also overheard someone in the kitchen saying, "We didn't want that big-ass n**ger working here no more." Supp.App.58.

2. Sonja Fletcher

Fletcher was a CNA at Hamilton Pointe for seven months. Supp.App.44. She was "livid" when she saw an assignment sheet stating, "NO AFRICAN AMERICAN MALES TO PROVIDE CARE." Supp.App.46, 69. She complained to the scheduler, who "didn't see a problem with that." Supp.App.67-68. Fletcher also complained to Administrator Lauren Hayden and Director of Nursing Paula Lovell, Supp.App.67, and she called TLC's complaint hotline, Supp.App.68. Nonetheless, the statement

remained on the assignment sheet for three more days before someone posted a new sheet in its place. Supp.App.68. Seeing this statement, Fletcher testified, was one reason she left Hamilton Pointe. Supp.App.67.

3. Amber Johnson

Johnson was a CNA at Hamilton Pointe for fifteen months. Supp.App.44. A nurse told her that resident JT[4] did not want Johnson in her room because of Johnson's race, and the nurse instructed Johnson to keep out. Supp.App.91-92. The nurse told her it was "no big deal," Supp.App.102, and explained, "She's from that generation where that was normal, and ... it's still fortunate that that generation is dying off," Supp.App.97.

Another resident suggested that Johnson and a Black coworker get naked and rub Mazola oil on their bodies "because he would love to see our brown bodies oiled up." Supp.App.92. On a different occasion, this same resident made Johnson uncomfortable because he "felt the need to

[4] As the parties did in district court, we refer to residents only by their initials to preserve their privacy.

tell [her] about how much he liked black people and he … wasn't racist … because he grew up with black people, and he told [her] about multiple black people that have worked for him during his life[.]" Supp.App.92-93, 98.

A third resident called Johnson "stupid" and "lazy," and said that she "needed to move [her] butt faster." Supp.App.93. When she subsequently responded to his call light, he said, "Get. You know you are not supposed to be in here. Get." Supp.App.91. He pointed to the door and kept saying "Get" until she left the room. Supp.App.91.

Nurse Jackie Lamp compounded this hostility by telling Johnson she had gone into a room with the lights off and was startled to see CNA Jo Murray. Supp.App.98. Lamp told Johnson she had told Murray, "Oh, my God, you scared me. You're so black. It's dark in here. I didn't even know you were there." Supp.App.98.

Johnson testified that the Rehabilitation Unit had four hallways with approximately eighty patients, and it was "impossible" for two people to staff the unit on their own. Supp.App.100. Nonetheless, when she and

another Black CNA requested assistance, they were always denied. Supp.App.100. CNAs who were "not of color" who worked on that hall requested and received the help of four CNAs. Supp.App.100.

4. LaShawn Johnson

Johnson was a CNA at Hamilton Pointe for two-and-a-half months. Supp.App.44. He testified that on the halls where he worked, three or four residents did not want Black men to care for them. Supp.App.106. For those residents, he had to switch rooms with a White CNA who was caring for residents on a different hall. Supp.App.110. He saw a White male nurse enter a room from which he was barred. Supp.App.108.

Johnson used to talk with one resident "all the time" about sports until the resident's wife learned that Johnson was dating a White woman and told a nurse to stop allowing Johnson in her husband's room. Supp.App.110, 112. The nurse instructed Johnson (who was not assigned to care for the husband) to stay out. Supp.App.107, 109-10, 112. "You're not allowed in that room," the nurse told him, "because she don't want her

husband getting took care of from a Black man, from Blacks." Supp.App.112.

Johnson overheard a different nurse ask his White girlfriend, who was also a Hamilton Pointe CNA, "Why are you with him? Why are you with a black man? Why don't you have a white man?" Supp.App.109.

Johnson saw a typewritten assignment sheet stating "no Black care" or "no African American care" for his assigned hall. Supp.App.104-06, 111. He left Hamilton Pointe after only three months "because I wasn't comfortable after that happened." Supp.App.105.

5. Sara Johnson

Johnson was a CNA at Hamilton Pointe for five-and-a-half months. Supp.App.44. She believed that at least two residents called her a "n**ger" and refused care from her. Supp.App.114-15, 117. When Johnson complained to the nurses, they told her, "Well, you know, that's the era they came from." Supp.App.114-15. Johnson had to find a replacement CNA on her own. Supp.App.114, 117.

Johnson saw one or two assignment sheets stating that certain residents did not want Black caregivers. Supp.App.116. She testified that these racist preferences remained posted on the assignment sheets for the duration of a given resident's stay. Supp.App.116.

6. Raven Langley

Langley was a CNA at Hamilton Pointe for two months in 2015, and one month in 2016. Supp.App.44. One resident called her the N-word three to five times, asked "What is that [n**ger] doing in here," and stated that she "didn't want the [n**ger] taking care of [her]." Supp.App.119, 123.

Langley also cared for a resident on a different hall who called her "the help" five to twenty times. Supp.App.120, 122. When Langley complained to Shana, the charge nurse, Shana told her to bring someone in with her. Supp.App.120, 125. Although that was Langley's preference as well, she told Shana that "sometimes there wasn't always an extra person that was available to come in there with you." Supp.App.120. Shana had no other suggestion. Supp.App.120.

Langley testified that she felt emotional distress when she was called the N-word or "the help," but not afterwards. Supp.App.124. She stated, "I just wouldn't want to go through the whole experience again. I wouldn't want to be subject to that type of atmosphere[.]" Supp.App.125.

7. L'Sheila Lewis

Lewis, a CNA, worked for Hamilton Pointe for seven weeks. Supp.App.44. Twice, she was not allowed to enter a resident's room because of her race. Supp.App.129-30. CNAs told her that the resident did not want any Black people there, and a nurse explained, "We have to respect their rights if they don't want a certain person to care for them, a certain type of person." Supp.App.130. On her last day of work, when Lewis was in another resident's room, the resident called her "a black B" and a "n**ger." Supp.App.127-28. Lewis sometimes considered the work environment to be "racially offensive." Supp.App.131.

8. Tamara McGuire

McGuire, a CNA, has been employed at Hamilton Pointe since 2012. Supp.App.44. She saw a typed assignment sheet stating, "No blacks

allowed." Supp.App.137. She did not provide care for the individual in question because "we couldn't." Supp.App.137.

CNAs told McGuire at shift change what rooms not to go in "because they didn't want the black caregivers." Supp.App.146. "[I]f that light comes on," one CNA said, "you get somebody else." Supp.App.138. McGuire was aware that White men went into rooms where Black men were not allowed, and she sometimes had to substitute for Black men who were prohibited from entering rooms. Supp.App.135-36.

McGuire testified that "certain residents … would scream out racial slurs to us." Supp.App.147. JS yelled at her, "I don't want you [n**gers] in here. Leave me alone." Supp.App.141. Another time, she overheard JS loudly call a CNA "that black [n**ger] bitch." Supp.App.144. She heard a different resident call a CNA a "black bitch" as the CNA was leaving the room, and then witnessed a nurse telling Black employees not to go into that room. Supp.App.142-43. McGuire also heard one resident call another resident a "black bitch." Supp.App.142. Resident CN's daughter told

McGuire that she did not want any Black men taking care of her mother. Supp.App.148.

McGuire testified that QMA Crystal Brown and CNA Cosette Beliles "had problems with the blacks" and "always made it difficult for every black employee that worked evening or night shift." Supp.App.139. She added that Brown "pretty much writes up on any black associate within Assisted Living or Memory Care." Supp.App.139.

9. Charah Milan

Milan, a CNA, worked at Hamilton Pointe for three-and-a-half months. Supp.App.44. In that time, she heard residents use the N-word "in passing by." Supp.App.152. One resident told another, "That [n**ger"] ... was in here." Supp.App.152. Milan testified that it was "a normal term" for residents and staff to describe Black employees as "that colored girl." Supp.App.152-53. Milan heard staff say "that colored girl" approximately ten times and found it offensive. Supp.App.153. Although she did not see it herself, a CNA told Milan about an assignment sheet that said "no colored," "no African American" or "no black" care. Supp.App.154.

10. Vanessa Miles[5]

Miles was a CNA at Hamilton Pointe for two-and-a-half years. Supp.App.44. The assignment sheet stating "NO AFRICAN AMERICAN MALES TO PROVIDE CARE" applied to the hall on which she was working. Supp.App.46, 158.

Although she personally was not subjected to derogatory racial language, Miles witnessed other employees who were. Supp.App.156. She complained to the Director of Nursing that darker-skinned Black workers were treated worse than lighter-skinned ones. Supp.App.156. For example, she testified, a White nurse berated a dark-skinned CNA for a mistake, but said, "Oh, ok," and walked off when Miles, who had lighter skin, said the mistake was hers. Supp.App.160. At Hamilton Pointe, she said, "The darker you were, the more often you would be in the office." Supp.App.160.

[5] Miles testified that her name is spelled "Vanessca" on her birth certificate, although she does not normally use that spelling. R.99-10 at PageID#1438.

One resident told Miles that she smelled like pork. Supp.App.156. Miles understood this to be a racist insult similar to others she had previously heard. Supp.App.156.

Nurses regularly warned CNAs, "Oh, you know, that [resident]... might be a little bit racist, so just a heads up." Supp.App.157. These warnings were "kind of like a joke," Miles testified. Supp.App.157. They made her feel "belittled" and "degraded." Supp.App.161.

11. Naim Muhammad

Muhammad was a CNA at Hamilton Ponte for six months. Supp.App.44. He did not see any written directives prohibiting Black employees from entering certain rooms, but he heard about them. Supp.App.167. QMA Ruth Washington, another claimant in this case, once told him not to enter a room because the resident did not want Black caregivers. Supp.App.166. In addition, Nurse Lamp told a charge nurse, in the presence of many other people, that Muhammed could not work on the service hallway. "That boy can't work down that hall there," she said. Supp.App.163. Muhammed also heard a nurse tell a coworker not to work

on the service hallway because of her race, stating that no Black caregivers were allowed there. Supp.App.164. Despite these comments, the scheduler sometimes assigned Muhammad to rooms on that hall. Supp.App.164-65. Even though everyone was responsible for responding to call lights, "more than a couple" of times nurses, including Lamp, told Muhammad not to enter rooms to which he was not assigned because of his race, even when the call lights came on. Supp.App.165-66.

At times, Muhammad was assigned to care for more than thirty residents in the Rehabilitation Unit, which was impossible to do without help. Supp.App.165. Muhammad never had assistance, he testified, but whenever anyone else was assigned there, they did. Supp.App.165.

12. Taki-a Roberts

Roberts was a Dietary Cook at Hamilton Pointe for eight months. Supp.App.44. Two or three times per day, she heard four or more residents use the N-word. Supp.App.187-88. On multiple occasions, the same residents said, "I don't want to be taken care of by that [n**ger]." Supp.App.189-90. Every few days, she heard a resident call one of her

kitchen coworkers "boy." Supp.App.187-89. Although she testified that she did not experience emotional harm, Supp.App.191, she also testified that the residents' language offended her, Supp.App.188. She did not complain because "nothing really gets done." Supp.App.188.

13. Montoya Smith

Smith was a QMA at Hamilton Pointe for fourteen months. Supp.App.44. She heard several residents use the N-word. Supp.App.198. She heard residents call Black men "boys," and once or twice they called her "boy" as well. Supp.App.198. Several times, residents called Smith "the server" or "the help." Supp.App.200. When Smith complained, nurses told her, "Oh, it's of their era. You know, they just do that. You know, they have their rights. ... [G]o out and smoke a cigarette." Supp.App.198-99. Often, Smith testified, the person to whom she complained would respond with a story about a racist person in their own family rather than trying to help. Supp.App.201. Once, a nurse warned Smith to be careful entering a resident's room because the resident had told another aide he had probably owned her grandmother. Supp.App.202.

Smith heard a White employee say Black people "all look alike … I get you girls mixed up all the time." Supp.App.201. She also heard employees say, "African Americans have funny names," and "Oh, I was expecting a black girl with a name like that. You know, Shakita, Shamika." Supp.App.201. A White QMA said "she didn't understand why the black girls didn't like" her dating a Black man, and "it wasn't her fault that [her boyfriend's] black mother had all of those children and didn't do anything for them." Supp.App.201. White employees said, "I'm not racist. I have four black friends." Supp.App.201.

14. Bianca Toliver

Toliver was a Dietary Cook at Hamilton Pointe for two years and eight months. Supp.App.44. A charge nurse instructed her not to enter one resident's room for any reason and to bring food trays to the nurses' station instead. Supp.App.205. Although the nurse did not mention Toliver's race, several CNAs had told Toliver that this resident did not want Black individuals in her room. Supp.App.209-10. A CNA also told Toliver that

she had personally been barred from a room on that unit because of her race. Supp.App.204-05.

On Toliver's first day of work, Belinda, the cook who was training her, spotted a mess in the back of the kitchen and told Toliver, "she was not cleaning up after these [n**gers]." Supp.App.206. After Toliver complained to Chef Calvin, Belinda apologized. Supp.App.206. When Toliver said an apology was inadequate, Calvin said, "Belinda didn't mean it that way," Supp.App.206, and then "he kind of just swept it under the rug," Supp.App.208.

A couple of months later, Belinda rubbed her hands through Toliver's hair without permission and compared the texture of Toliver's hair to her own. Supp.App.206, 208. Given the lack of response to her previous complaint, Toliver did not complain about this incident. Supp.App.206-08. However, she tried to get different shifts from Belinda and started looking for a new job. Supp.App.206, 208. "I shouldn't have to feel uncomfortable when I'm coming to work," Toliver testified. "[W]ho

wants to work with someone when you really know they don't like you ... because of the color of [your] skin." Supp.App.208.

15. Ruth Washington

Washington was a QMA at Hamilton Pointe for one-and-a-half years. Supp.App.44. Nurse Jackie Lamp prohibited her from entering resident LE's room, explaining that LE "didn't want colored people." Supp.App.216. When Washington did enter the room, LE told her, "You're not supposed to be in here." Supp.App.216.

Washington testified that multiple nurses made racist comments to her. Three or four times, Lamp told Washington, "Oh, I didn't see you in the dark." Supp.App.215-16. Nurse Cindy Rector frequently referred to Black individuals as "you people," especially when commenting on Black skin tone and hair and said she did not believe biracial couples should have children. Supp.App.215. She also questioned the legitimacy of Washington's requests on behalf of patients but did not question White CNAs' similar requests. Supp.App.218. Nurse Laura Williams told

Washington that if Williams's daughter came home with a Black man, Williams would disown her. Supp.App.217.

B. District Court's Decision

The district court held that, as a matter of law, forty claimants had not been subjected to a hostile work environment. Short.App.92. Its reasoning was similar with respect to each individual.

Notwithstanding testimony to the contrary, the court rejected numerous claimants' contentions that they had been subjected to race-based assignments. Short.App.42, 44-45, 61, 67, 73. The court held that the assignment sheet stating "NO AFRICAN AMERICAN MALES TO PROVIDE CARE" did not apply to various claimants because they were female, because they provided care to the particular residents anyway, and/or because they were not assigned to those residents. Short.App.32, 37, 40, 44. 80. In any event, the court said, Hamilton Pointe took down the assignment sheet after three days. Short.App.32.

The court also discounted the impact of racist slurs. Often, the court said, racist insults were not directed at the claimants. Short.App.42, 56-57,

61-62. Even when they were, it said, not all of the insults were connected to race. Short.App.39, 78.

Use of the N-word and other racist slurs, the court said, "came not so much from co-workers but from residents who suffered from mental decline." Short.App.23. Looking to the Fifth Circuit for guidance, the court reasoned that some resident harassment is unavoidable in a nursing home. Short.App.23. Such harassment weighs less in the hostile-work-environment analysis, the court concluded. *See, e.g.*, Short.App.59 ("Given the unique circumstances of her employment, the court finds Smith was not subjected to a racially hostile work environment."); Short.App.47 ("In the context of caring for an individual with dementia, the phrase ['the help'] is not the type of comment which is so severe as to alter the conditions of her work environment.").

As to two claimants – Fletcher and Toliver – the court also said that even if they had endured a hostile work environment, there was no basis for employer liability. Short.App.33 (Fletcher); Short.App.62 (Toliver). On this point, the court did not explain its reasoning.

Finally, the court discounted certain evidence as inadmissible hearsay. Short.App.41, 80. In so doing, it did not distinguish between evidence being offered for the truth of the matter and evidence being offered to show that individuals experienced their work environment as racially hostile.

II. Summary Judgment on TLC's Liability

A. Facts

The EEOC alleged that management company TLC was liable for the discrimination at Hamilton Pointe either because it and Hamilton Pointe were joint employers, or because they were a single employer. R.1 at PageID#4. The same individuals owned and operated both TLC and Hamilton Pointe, and a single family controlled both companies. Supp.App.170-72, 243-50. They shared the same corporate officers and principal office address in Marion, Indiana. Supp.App.243-50.

TLC performed a substantial portion of the human resources functions that applied to claimants, including authoring and administering numerous policies (such as the anti-discrimination policies), drafting job

descriptions and interviewing candidates, operating the complaint hotline, and investigating and acting on discrimination complaints. Supp.App.72, 76-77, 169, 175, 178-79, 184, 224, 234, 238, 252-57. TLC's Vice President of Human Resources, Steven Ronilo, testified that "we do not allow anyone to [provide racist staffing instructions] in facilities … if we knew it was happening, we'd stop it immediately." Supp.App.194.

TLC hired, supervised, and fired Hamilton Pointe's administrators who, in turn, supervised claimants. Supp.App.52, 73, 87, 173, 183, 212-13. Administrators described TLC's management as hands-on, requiring regular reporting and approval of everything from budgeting to pay scales. Supp.App.84, 223.

TLC retained ultimate authority over many employment decisions affecting claimants. Hamilton Pointe's disciplinary forms—which TLC drafted—provided that final warning, discharge, and termination decisions "*must* be reviewed by" TLC's regional directors of operation and its vice presidents of human resources. Supp.App.75 (emphasis added); *see also*

Supp.App.224. In practice, this required not mere consultation, but approval. Supp.App.75, 89, 224.

TLC also provided Hamilton Pointe's accounting, payroll, and IT services, and sometimes filled Hamilton Pointe's temporary vacancies with its own employees. Supp.App.61, 74, 85, 169, 176, 180-82, 224. TLC offered a group health-benefits plan to Hamilton Pointe employees, paid their college expenses, and offered them vendor discounts. Supp.App.88, 177, 185, 224, 229.

Finally, Hamilton Pointe employees were told that they worked for TLC, TLC's name appeared on employee paystubs, and TLC referred to Hamilton Pointe as a TLC facility. Supp.App.79, 88, 150. As a result, former and current Hamilton Pointe employees testified either that they thought they worked for TLC or that TLC owned Hamilton Pointe. Supp.App.54, 63, 79-80, 82, 133, 193, 196.

B. District Court's Decision

The district court held that TLC was not a joint employer because TLC merely offered "recommendations" and did not exercise sufficient

control and supervision over claimants, Short.App.8-10; Hamilton Pointe was responsible for its own costs of operations, Short.App.10-11; and Hamilton Pointe paid for employee benefits, whereas TLC merely offered a scholarship program, Short.App.11. The court determined that the EEOC could not pierce the corporate veil because Hamilton Pointe and TLC were separate legal entities with separate locations, bank accounts, and managers; TLC did not have an ownership interest in Hamilton Pointe; and integration between TLC and Hamilton Pointe was legally insufficient. Short.App.14. Thus, the court granted summary judgment to TLC. Short.App.14.

III. Trial

The seven claimants who remained at trial (DeLoris Cook, Amber Cottrell, Angela Gilbert, Donna Grissett, Roshaun Middleton, Yana Shelby, and Aleshia Smith) testified that nurses regularly gave them written and verbal instructions to stay out of certain rooms and not to care for residents who did not like Black people. *See, e.g.*, Supp.App.46-50, 262-63, 280. These instructions were sometimes verbal and sometimes written. *E.g.*,

Supp.App.262-63, 279. Several claimants observed an assignment sheet with the typewritten notation "NO AFRICAN AMERICAN MALES TO PROVIDE CARE" or other similar assignment sheets. *E.g.*, Supp.App.46-50, 262, 278, 284. Residents, both with and without dementia, Supp.App.270, called the claimants "n**gers" and other racial slurs. *E.g.*, Supp.App.265-66, 268-69, 271, 275. Nurses also used the N-word and mocked the claimants because of their race. *E.g.*, Supp.App.264-65, 267, 272, 276-77.

Hamilton Pointe acknowledged that residents sometimes used racial slurs but asserted that the only ones who did so had dementia and no impulse control. R.327, Closing Arg. at 891-92. For its own part, Hamilton Pointe argued, it did not make race-based assignments, condone residents' racist behavior, permit employees to racially harass colleagues or subordinates, or post the assignment sheet saying "NO AFRICAN AMERICAN MALES TO PROVIDE CARE" for more than a few days. *Id.* at 888-89, 892.

The parties vigorously disputed the role of nurses vis-à-vis CNAs, with the EEOC introducing evidence that they were supervisors,

Supp.App.272-74, 280, 285-86, and Hamilton Pointe introducing evidence that they were not, Supp.App.281-83. During closing arguments, both parties asked the jury to find in their favor on this point. Supp.App.288-89 (EEOC); 290-91 (Hamilton Pointe).

A. Jury Instructions on Hostile Work Environment

The district court issued one pattern instruction regarding harassment by coworkers or residents and another regarding harassment by supervisors. Supp.App.295-99. Each instruction referred to separate "claims," without indicating that the jury should consider all harassment by all individuals when assessing the existence of a hostile work environment. Supp.App.295, 298. The EEOC had proposed including the coworker/resident and supervisor instructions, R.218, PageID#4645-46, but had also proposed an instruction that "the entire context of the workplace must be taken into account to determine whether a hostile work environment existed," Supp.App.293. The district court rejected this proposal without explanation and did not tell the jury what to do if a claimant was harassed by both coworkers/residents and supervisors.

B. Verdict Forms

The EEOC proposed a verdict form asking, "Do you find that the [EEOC] has established by a preponderance of the evidence that Defendant Hamilton Pointe subjected the claimants to a racially hostile or offensive work environment?" Supp.App.301. Hamilton Pointe proposed asking, instead, whether a claimant had been subjected to a hostile work environment from supervisors or, separately, from coworkers or residents. Supp.App.304. The EEOC objected, stating:

> [T]he verdict forms divide "supervisor harassment" from "co-worker or resident harassment" as if the jury is supposed to consider one piece of harassment separately from another. But the jury is to consider whether Defendant subjected the class member to racial harassment; the evidence is to be considered as a whole, not piece by piece. *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) ("[e]vidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself").
>
> The verdict forms do not tell the jurors what to do when both supervisor and co-worker harassment is present.

Supp.App.307-08. The district court agreed with Hamilton Pointe without providing any explanation. The verdict forms submitted to

the jury separated out supervisor harassment from coworker/resident harassment. Short.App.93-110.

C. Jury Verdicts

The jury found that claimant Roshaun Middleton experienced discriminatory job assignments and a hostile work environment from residents and/or coworkers and awarded him $45,000. R.301, PageID#6387-89. The jury also found that claimants Yana Shelby and Aleshia Smith experienced a hostile work environment from residents and/or co-workers but did not award them any damages. Short.App.105-10. It found that claimants DeLoris Cook, Amber Cottrell, Angela Gilbert, and Donna Grissett had not been subjected to discrimination. Short.App.93-104.

Summary of Argument

The district court erred in granting partial summary judgment to Hamilton Pointe and rejecting the EEOC's claims for the fifteen individuals identified above. First, the court wrongly incorporated Fifth Circuit precedent that does not apply in this Circuit. The Fifth Circuit instructs that nursing-home employees must expect some resident harassment, and that

such harassment is generally insufficient to create a hostile work environment. This Court, in contrast, has held that there is no assumption-of-the-risk defense to a hostile-work-environment claim, and that resident harassment can contribute to a hostile work environment. Nothing in this Court's precedent suggests that harassment is inherently less offensive when it comes from residents. Applying the proper standards and considering all the evidence in the light most favorable to the EEOC, a reasonable jury could find that the fifteen claimants endured a hostile work environment in violation of Title VII.

The court also committed reversible error in submitting verdict forms that required the jury to analyze supervisor harassment separately from coworker/resident harassment. A hostile work environment must be assessed based on the "totality of the circumstances," which, for claimants here, included race-based assignments as well as harassment from nurses, coworkers, and residents. Contrary to binding precedent, the verdict forms required the jury to disaggregate this evidence, potentially changing the trial's outcome.

Finally, the court erred by granting summary judgment in favor of TLC. Whether analyzed under the joint-employer standard or the veil-piercing standard, TLC is liable for the harassment at Hamilton Pointe.

Standard of Review

This Court reviews an award of summary judgment de novo, viewing all facts in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor. *See Donaldson v. Johnson & Johnson*, 37 F.4th 400, 405-06 (7th Cir. 2022).

The Court reviews a district court's formulation of questions on verdict forms for abuse of discretion. *Malone v. Reliastar Life Ins. Co.*, 558 F.3d 683, 692 (7th Cir. 2009). A court abuses its discretion by stating the law inaccurately. *Id.* at 693. Unless the error is harmless, this Court must reverse and remand for a new trial. *Id.* at 694.

Argument

I. The partial summary judgment award on the merits is legally and factually erroneous.

Title VII bars discrimination because of race in the "terms [or] conditions ... of employment." 42 U.S.C. § 2000e-2(a)(1). Because it is

intended "to strike at the entire spectrum of disparate treatment ... in employment," the statute prohibits "requiring people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation omitted). Title VII is violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Id.* (citations omitted).

Whether harassment is sufficiently severe or pervasive to create a hostile work environment "is generally a question of fact for the jury." *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir. 2018). The answer turns on the "totality of the circumstances." *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 815 (7th Cir. 2022). Relevant considerations may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. "[N]o single factor is required." *Id.*

A. The district court applied out-of-Circuit precedent that is contrary to Circuit law.

The district court wrongly looked to Fifth Circuit precedent to discount the impact of residents' racist statements and behavior. *See* Short.App.23-25 (citing *Cain v. Blackwell*, 246 F.3d 758 (5th Cir. 2001); *EEOC v. Nexion Health at Broadway, Inc.*, 199 F. App'x 351 (5th Cir. 2006)). In those cases, the Fifth Circuit held that resident harassment was not severe or pervasive because the harassers' conduct was "unacceptable but pitiable," *Cain*, 246 F.3d at 760-61, and "[a]bsorbing occasional verbal abuse from such patients was . . . an important part of the [plaintiff's] job." *Nexion Health*, 199 F. App'x at 354.

The Fifth Circuit's approach runs afoul of this Court's precedent, which has never suggested that harassment is inherently less serious when it comes from individuals with cognitive disabilities. Indeed, in *Chaney v. Plainfield Healthcare Center*, this Court rejected a nursing home's concern about liability for residents' racially harassing behavior not by downplaying such behavior's seriousness, but by suggesting reasonable steps the facility could take to "allow[] all employees to work in a race-

neutral, non-harassing work environment." 612 F.3d 908, 914-15 (7th Cir. 2010). Thus, under this Court's precedent, an employer's ability to prevent or correct harassment may differ depending on the harasser's ability to self-regulate, but this is relevant only to liability, not to severity or pervasiveness. *See id.* at 915. And this Court has also rejected the Fifth Circuit's suggestion that employees can somehow assume the risk of harassment due to their chosen profession. *See Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) ("There is no assumption-of-risk defense to charges of workplace discrimination.").

In any event, unlike the cases relied on by the district court, where the plaintiffs alleged a hostile work environment based *entirely* on the statements and conduct of individuals with cognitive impairments, the claimants here allege not only resident harassment, but also race-based assignments, coworker harassment, and supervisor harassment. As the district court observed, "[c]ontext matters." Short.App.23.

B. The district court wrongly minimized evidence of a hostile work environment.

Adding to the racial hostility was the typewritten assignment sheet stating "NO AFRICAN AMERICAN MALES TO PROVIDE CARE," posted for all to see. Supp.App.46-50. Addressing a similar assignment sheet distributed in another nursing home, this Court explained that such an assignment sheet "unambiguously, and daily, remind[s] [Black employees] that certain residents preferred no black CNAs." *Chaney*, 612 F.3d at 912 (quoting assignment sheet: "Prefers No Black CNAs"). As in *Chaney*, where this Court found a jury question on the issue, a jury could find that the assignment sheet at Hamilton Pointe created "a racially-charged workplace that poisoned the work environment." *See id.* at 915.

Significantly, many claimants repeatedly heard the N-word, "perhaps the most offensive and inflammatory racial slur in English," *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 543 n.7 (6th Cir. 2020) (citation omitted). Because that word is "egregious," its one-time use "can in some circumstances warrant Title VII liability." *Scaife v. U.S. Dep't of Veterans Affairs*, 49 F.4th 1109, 1116 (7th Cir. 2022) (citations

omitted). The word's impact is more severe coming from a supervisor than from a coworker or resident, *Paschall*, 28 F.4th at 814-15, but "a plaintiff's repeated subjection to hearing that word could lead a reasonable factfinder to conclude that a working environment was objectively hostile," *Johnson*, 892 F.3d at 903 (citation omitted).

The district court also wrongly discounted racist comments that were not directed at an individual claimant. As long as an individual is aware of such comments, they may contribute to a hostile work environment. *Johnson*, 892 F.3d at 902; *Mason v. S. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1046 (7th Cir. 2000). What matters is whether the individual is within their "target area," as when, for example, "a group of which one was a member was being vilified." *Yuknis v. First Student, Inc.*, 481 F.3d 552, 554 (7th Cir. 2007).

C. A reasonable jury could find in favor of fifteen claimants rejected at summary judgment.

1. Trent Carter

Carter testified that he was prohibited from entering resident rooms. Supp.App.56-57. Although the officially stated reason was that residents

feared theft, Nurse Brown informed Carter twice that, according to White CNAs, none of the Black CNAs went into the rooms either. Supp.App.56-57. Nurse James told him three times that because the Black CNAs were not allowed to enter the rooms, neither was he. Supp.App.56.

The district court wrongly rejected this evidence as inadmissible hearsay. Short.App.41-42. James expressly directed Carter to stay out of the rooms because of his race. Supp.App.56. Nothing about this order implicates the hearsay rule. *See* Fed. R. Evid. 801(c) (defining "hearsay"). With respect to the rest of James's and Brown's statements, what mattered for purposes of the hostile environment claim was that their statements about Black CNAs contributed to Carter's perception that his work environment was racist. *See Johnson*, 892 F.3d at 903 (third-party statements not hearsay because they were offered not for their truth, but to prove that plaintiff "understood [his] environment to be one in which derogatory statements were pervasive").

The district court also gave short shrift to Carter's experience of hearing the N-word. Although he heard the word only once, and it was not

directed at him, Short.App.42, the N-word is uniquely offensive, *Scaife*, 49 F.4th at 1116. A reasonable jury could find that Carter experienced a hostile work environment from hearing the N-word, being told to stay out of rooms because of his race, and having nurses tell him five times that Black CNAs were also not allowed to enter the rooms. *See* Supp.App.56-57.

2. Sonja Fletcher

The district court stated that because the assignment sheet saying, "NO AFRICAN AMERICAN MALES TO PROVIDE CARE" was not directed at Fletcher, this "lessen[ed] its impact." Short.App.32. However, Fletcher testified that she was "livid" when she saw it and that it was one of the reasons she left Hamilton Pointe. Supp.App.67, 69. She complained to the scheduler, the Administrator, the Director of Nursing, and TLC's complaint hotline. Supp.App.67-68. Still, Hamilton Pointe left the assignment sheet up for three more days, which added to her distress. Supp.App.68. The district court suggested that this three-day delay was reasonable. Short.App.32. A jury could find otherwise. *Cf. Daniels v. Essex Grp., Inc.*, 937 F.2d 1264, 1275 (7th Cir. 1991) (employer was "less than

diligent in taking remedial action" where it left dummy hanging in doorway for at least eighteen hours).

The district court also stated, without explanation, that even if Fletcher was subjected to a hostile work environment, "there is no basis for employer liability." Short.App.33. The court's failure to explain this statement violates Circuit Rule 50, which requires judges to provide reasons for their rulings. As this Court has explained, "[c]onclusory rulings are inadequate material for the tools of the appellate bench," even when review is de novo. *Pasquino v. Prather*, 13 F.3d 1049, 1051 (7th Cir. 1994).

3. Amber Johnson

A nurse prohibited Johnson from entering a resident's room because of her race. Supp.App.91-92. The district court wrongly focused on the resident's dementia, relying on Fifth Circuit precedent deeming harassment less severe when coming from individuals with dementia, rather than on the law of this Circuit, which does not consider dementia relevant to the severe-or-pervasive analysis. Short.App.23-25, 78-79; *see supra* pp.34-35. Nor did the court mention that, when Johnson complained,

a nurse told her it was "no big deal," Supp.App.102, and that the resident was "from that generation where that was normal," Supp.App.97.

Johnson also testified that a resident suggested that she and another Black CNA get naked and rub Mazola oil on their bodies "because he would love to see our brown bodies oiled up." Supp.App.92. The district court characterized this incident as being "sexually inappropriate," Short.App.78, completely ignoring the emphasis on Johnson's "brown bod[y]." Moreover, the court suggested that by telling Johnson he was not racist, the resident mitigated any harm. Short.App.79. Johnson testified, in contrast, that this statement itself felt "very odd and uncomfortable." Supp.App.98.

The district court stated as fact that when another resident called Johnson "lazy" and "stupid," it was not based on race. Short.App.78. A jury could disagree and find that this dim view of Johnson's drive and intelligence arose from racial stereotypes. *See, e.g.*, *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1109 (9th Cir. 2004) (racially demeaning comments included calling Black man "stupid"); *Whidbee v. Garzarelli Food Specialties,*

Inc., 223 F.3d 62, 66 (2d Cir. 2000) (coworker told plaintiff, "Blacks … are lazy and don't want to work.").

The court also made light of Johnson's testimony that nurse Jackie Lamp told her an offensive joke about not being able to see another Black CNA in the dark. Short.App.78-79. A jury could find it reasonable that such casual racism by one's supervisor would contribute to a hostile work environment. *See Gates v. Bd. of Educ.*, 916 F.3d 631, 637-38 (7th Cir. 2019) (racist joke by supervisor carries more weight than racist joke by coworker).

Finally, the court did not mention Johnson's testimony that she was assigned to a hall with an overwhelming number of patients but, unlike White CNAs, was never able to obtain assistance when she requested it. Supp.App.100. Under the totality of the circumstances, a jury could find that this difference in treatment was race-based. *See Cole v. Bd. of Trs.*, 838 F.3d 888, 896 (7th Cir. 2016) ("[F]orms of harassment that might seem neutral in terms of race … can contribute to a hostile work environment

claim if other evidence supports a reasonable inference tying the harassment to the plaintiff's protected status.").

4. LaShawn Johnson

The court failed to acknowledge the impact on Johnson of seeing the assignment sheet saying "NO AFRICAN AMERICAN MALES TO PROVIDE CARE." *See* Supp.App.46, 104-06, 111. Johnson testified that he left Hamilton Pointe three months after seeing this sheet "because I wasn't comfortable after that happened." Supp.App.105; *see Chaney*, 612 F.3d at 912 (discussing humiliation of seeing race-based assignment sheet). Additionally, the district court stated that, notwithstanding the assignment sheet, Johnson did provide care to one of the residents to whom the statement applied; one of the residents only objected to male care; and one of the residents was on a unit to which Johnson was not assigned. Short.App.44-45. This analysis failed to acknowledge Johnson's testimony that the patient who allegedly objected only to male care allowed a White male nurse to enter her room "with no problem." Supp.App.108.

Moreover, the court mischaracterized Johnson's testimony regarding the resident to whom he was not assigned. Prior to being instructed not to enter that resident's room, Johnson had talked with the resident "all the time." Supp.App.110. Once the resident's wife learned that Johnson was dating a White woman, however, she told the nurse not to allow Johnson into her husband's room, and the nurse complied. Supp.App.110, 112. A jury could find that when another nurse subsequently questioned his White girlfriend about why she was dating a Black man, Supp.App.109, this also reinforced to Johnson the racial hostility of his work environment.

5. Sara Johnson

Johnson believed that at least two residents called her the N-word and refused care from her. Supp.App.114-15, 117. The district court ignored that when Johnson complained to the nurses, they told her, "Well, you know, that's the era they come from," and took no action. Supp.App.114-15. A jury could find that the nurses amplified the effect of the N-word by telling Johnson that, regardless of how offensive it was, she should excuse it from older individuals.

Moreover, the district court was wrong that Johnson "did not allege that she was banned from residents' rooms." Short.App.71. Johnson testified that residents *did* refuse care from her, and she had to find her own substitutes. Supp.App.114, 117.

The district court also downplayed the assignment sheets that Johnson saw stating that certain residents did not want Black caregivers. Short.App.71. Johnson testified that the assignment sheets remained posted for as long as a racist patient remained in the room. Supp.App.116. The court discounted this evidence because Johnson "could not remember any details …, including how many she saw, when they were posted, what they said, and what resident(s) they applied to." Short.App.71. The law does not require that level of specificity. *See Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994) ("Although Dey's case would certainly be stronger if she could remember more about these and other incidents, what she does recall supports her charge that Chernoff's conduct was consistently offensive and abusive.").

6. Raven Langley

The district court mentioned that Langley was subjected to "inappropriate language," Short.App.47, without recognizing that, in the span of only three months, one resident called her the N-word three to five times, asked "What is that [n**ger] doing in here," and stated that she "did not want the [n**ger] taking care of her, Supp.App.119, 123. Another resident called her "the help" five to twenty times. Supp.App.120, 122. A jury could find that these incidents were far more severe than the court suggested.

The court also failed to view the evidence in the light most favorable to the EEOC in stating that Langley "did not consider the work environment to be offensive." Short.App.47. To the contrary, Langley testified, "I just wouldn't want to go through the whole experience again. I wouldn't want to be subject to that type of atmosphere[.]" Supp.App.125.

7. L'Sheila Lewis

In seven weeks, Lewis was twice forbidden from entering a resident's room because of her race. Supp.App.129-30. Other CNAs told her that the resident did not want Black people in his room, and a nurse told her, "We

have to respect their rights if they don't want a certain person to care for them, *a certain type of person*." Supp.App.130 (emphasis added). The district court quoted only a portion of this statement, stating that "the resident had refused care from 'a person.'" Short.App.52. A jury could find, however, that telling Lewis the resident did not want "a certain type of person" was the same as telling her that she could not enter the room because she was Black.

The court acknowledged that a resident called Lewis "racial epithets," Short.App.52, but did not specify that one of these epithets was the deeply offensive N-word, Supp.App.127-28. The district court thought it was relevant that Lewis was suspended that same day and never saw the resident again, Short.App.52, but a jury could find that this coincidence did not make the experience any less hostile.

8. Tamara McGuire

The district court did not mention that CNAs told McGuire she could not enter certain rooms because of her race, even if a resident's call light went off. Supp.App.138, 146. Nor did the court mention McGuire's

knowledge that White men, but not Black men, were welcome in certain rooms. Supp.App.135-36. The difference was race, not sex—putting McGuire within the "target area" of the discrimination. *See Yuknis*, 481 F.3d at 554.

McGuire saw an assignment sheet saying "no Blacks allowed." Supp.App.137. The district court treated this as insignificant because McGuire saw it "only once … and it did not affect her assignment." Short.App.37. However, McGuire testified that she did not care for that resident because "we couldn't." Supp.App.137. A reasonable jury could infer that the assignment sheet did, therefore, affect her assignments. Moreover, downplaying her experience because she saw the sheet only once ignores *Chaney*'s observation that such a sheet is an "unambiguous[]" and devastating reminder "that certain residents preferred no black CNAs." *Chaney*, 612 F.3d at 912.

The district court asserted, contrary to evidence, that McGuire heard "inappropriate racial language" only four times during her more than six-year tenure. Short.App.37. In fact, McGuire testified that some residents

"would scream out racial slurs to us," including JS, who repeatedly said things including "I don't want you [n**gers] in here." Supp.App.141, 147. McGuire also overheard JS loudly call a CNA "that black [n**ger] bitch," and heard a different resident call a CNA a "black bitch." Supp.App.143-44.

McGuire also testified that a White QMA and a White CNA made it harder for Black employees on their shifts, including herself, by always writing them up for things not getting done. Supp.App.139. The district court said that this testimony was "vague and speculative," and did not establish that their conduct was based on race. Short.App.37. However, a reasonable jury could find that issuing written reprimands for Black employees but not for White employees is race-based.

9. Charah Milan

The district court ignored that Milan heard residents use the N-word. *See* Supp.App.152 **(**"That [n**ger] … was in here."). The court did acknowledge that residents and staff described Black employees as "that colored girl," but did not acknowledge how frequently this happened.

Short.App.80. Nor did the court acknowledge how offensive the term was. The court likened "that colored girl" to "that white girl," which residents also said, Short.App.80, but overlooked widespread recognition that the word "colored" is a "racist slur." *Jackson v. Quanex Corp.*, 191 F.3d 647, 651 (6th Cir. 1999).

The court also said that calling a Black woman "that colored girl" "does not rise to the level of severe or pervasive conduct." Short.App.80. "[C]onduct that is not particularly severe but that is an incessant part of the workplace environment may, in the end, be pervasive enough and corrosive enough that it meets the standard for liability." *Jackson v. Cnty. of Racine*, 474 F.3d 493, 499 (7th Cir. 2007). In any event, the court should not have addressed this derogatory language in isolation. "[C]ourts should not carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive." *Hall v. City of Chi.*, 713 F.3d 325, 331 (7th Cir. 2013) (citation omitted).

Milan heard about an assignment sheet stating "no colored," "no African American," or "no black" care. Supp.App.154. The district court declined to consider this evidence, wrongly calling it "inadmissible hearsay." Short.App.80. Such evidence is not hearsay when offered to show only that the plaintiff "understood their environment to be one in which derogatory statements were pervasive." *Johnson*, 892 F.3d at 903.

10. Vanessa Miles

The district court downplayed the effect on Miles of the assignment sheet stating "NO AFRICAN AMERICAN MALES TO PROVIDE CARE." The court overlooked that, even though it was not directed at her, the sheet singled out Black employees, and was posted on the hall where Miles worked. Supp.App.158.

The court also ignored that Miles witnessed other employees being called racial slurs. Supp.App.156. Racist comments to Miles would have carried more weight, but a jury could find that the comments she heard about others contributed to her assessment that racism "was just … a way

of life at work." Supp.App.159; *see Johnson*, 892 F.3d at 902 (comments to and about others may be relevant to hostile work environment).

A jury could also credit Miles's testimony that she witnessed lighter-skinned Black employees being treated more favorably than darker-skinned ones. Supp.App.156, 160. In that context, a jury could find that Miles was not "simply speculat[ing]" about the nurse's motives, but was observing their effects directly. Supp.App.160.

The court also erred in trivializing the comment, "You smell like pork." Supp.App.156. Even though the comment is not "facially racial," Short.App.39, a jury familiar with racist stereotypes could find that Miles's interpretation was reasonable. *See Wallace v. DM Customs, Inc.*, No. 8:04-cv-115-T-23TBM, 2006 WL 2882715, at *2 n.7 (M.D. Fla. Oct. 6. 2006) (coworker told plaintiff, "black people always smell"). It is irrelevant that the comment by itself was not "so offensive as to alter the terms and conditions of [Miles's] employment." Short.App.39. Whether harassment is sufficiently severe or pervasive to create a hostile work environment turns on "the totality of the circumstances." *Paschall*, 28 F.4th at 815.

Finally, the district court stated that the nurses warned Miles about racist patients but did not prohibit her from caring for them. Short.App.39. While true, the court ignored Miles's testimony that the nurses gave these warnings as "kind of a joke." Supp.App.157. Their behavior made Miles feel "belittled … or degraded." Supp.App.161; *see Harris*, 510 U.S. at 23 (humiliation can contribute to hostile work environment).

11. Naim Muhammad

The district court erroneously stated that Muhammad was never subjected to race-based assignments. Short.App.73. To the contrary, QMA Ruth Washington once told him not to enter a room because the resident did not want Black caregivers. Supp.App.166. Also, he heard nurse Lamp tell the charge nurse in front of multiple people, "That boy can't work down that hall there," specifically referring to him. Supp.App.163. A jury could find that this statement not only revealed a race-based assignment policy, but also described Muhammad in a racist, offensive manner. *See Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 46 (2006) (depending on context, the word "boy" may be "probative of bias"); *Hawkins v. Groot Indus., Inc.*, No. 01- C-

1731, 2003 WL 1720069, at *3 (N.D. Ill. Mar. 31, 2003) ("Calling an adult black man 'boy' strikes the court as an objectively, inherently offensive comment.").

A jury could further find that the insult was especially egregious because a supervisor said it in front of witnesses. *See Gates*, 916 F.3d at 638 ("We have repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a coworker's"); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1277 (11th Cir. 2002) (comments are especially "humiliating and degrading" when they are made in front of others).

The court asserted that "the prohibition [from working on the service hallway] did not affect [Muhammad's] job assignments at any time," Short.App.73, but a jury could disagree. Even when the scheduler assigned Muhammad to work on the service hallway, the nurses banned him from entering particular rooms because of his race. Supp.App.164-66. Their directive applied even when the residents turned on their call lights, notwithstanding the general rule that everyone was responsible for

responding to call lights, no matter which room they belonged to. Supp.App.165-66.

The court also ignored that, even though Muhammad did not personally see any written directives prohibiting Black employees from entering certain rooms, he did hear about notes to that effect. Supp.App.167. Such evidence is not hearsay, because it is relevant to his perception of racism in his work environment. *See Johnson*, 892 F.3d at 902.

12. Taki-a Roberts

Roberts heard the N-word from residents "daily," and "multiple times" she heard residents say, "I don't want to be taken care of by that [n**ger]." Supp.App.187-90. "Every few days" she heard one resident refer to her coworker as "boy," Supp.App.187-89, and residents called her "boy" once or twice as well, Supp.App.198. Roberts testified that she was offended. Supp.App.188. The court stated that neither the N-word nor the word "boy" were directed at Roberts and concluded that therefore the derogatory statements were not severe. Short.App.57. This analysis was factually and legally incorrect: Residents called Roberts herself "boy," and

this Court has recognized that "repeated subjection to hearing [the N-word] could lead a reasonable factfinder to conclude that a working environment was objectively hostile," *Johnson*, 892 F.3d at 903 (citation omitted).

The district court also considered it significant that Roberts did not complain to management, Short.App.57, but Roberts testified that she did not do so because "nothing really gets done," Supp.App.188. A jury could find that, regardless of whether this belief was correct, her failure to complain did not negate the hostility of her work environment.

Finally, the court read too much into Roberts's statement regarding emotional harm. *See* Short.App.57. When asked, "Do you feel like you had any emotional or physical harm that happened to you while you were at Hamilton Pointe?" Roberts responded, "No." Supp.App.191. Considered in juxtaposition with her testimony about feeling offended, Supp.App.188, a jury could conclude that Roberts was understanding the term "emotional harm" to mean something more than the law requires. *See Harris*, 510 U.S. at 22 (Title VII does not require "concrete psychological harm").

13. Montoya Smith

Smith heard residents use the N-word and call Black men "boys." Supp.App.198. The district court discounted these slurs on the ground that the residents had dementia. Short.App.23-25, 45. As discussed *supra* pp.34-35, however, residents' cognitive impairments are irrelevant to the severity or pervasiveness of harassment. Moreover, the court ignored that when Smith complained about being exposed to the N-word, the nurses trivialized the problem and told her to "[G]o out and smoke a cigarette." Supp.App.198-99. The court further ignored Smith's testimony that often, the person to whom she complained would respond with a story about a racist person in their own family, adding to her negative experiences. Supp.App.201. A jury could find that the nurses' dismissive attitude towards Smith's complaints about hearing the N-word increased the hostility of her work environment.

Viewing the remainder of the evidence separately, and not as part of "the totality of the circumstances" as required, *see Paschall*, 28 F.4th at 815, the court said it was insufficient that residents called Smith "the server"

and "the help," or that coworkers made "insensitive" comments such as joking about Black names or stating, "all Black people look alike." Short.App.59. A jury could find the cumulative effect of these comments to be significant. Also, a jury could disagree with the court's assessment that coworker statements such as "I'm not racist" are "not objectively hostile." Short.App.59. The court omitted that the employees who said, "I'm not racist," followed up that statement by explaining, "I have four black friends." Supp.App.201. That comment is offensive, Smith testified, "because you don't hear African Americans say, 'I got three white friends.'" Smith.App.201.

The court placed undue emphasis on the fact that Smith was not physically threatened. Short.App.59. Although physical threats certainly contribute to a hostile work environment, "no single factor is required." *Harris*, 510 U.S. at 23; *see also Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (physical threats unnecessary).

14. Bianca Toliver

The charge nurse who instructed Dietary Cook Toliver not to enter a particular resident's room did not mention Toliver's race, but several CNAs had told her that this resident did not want Black people in her room. Supp.App.209-10. Moreover, a CNA had told her that she personally had been barred from a room on that unit because of her race. Supp.App.204-05. Thus, Toliver had reason to believe that the charge nurse's directive was race-based. The district court had no basis for concluding that she was wrong. *See* Short.App.61.

The district court acknowledged that the cook who was training Toliver said the N-word to her but emphasized that it was not directed at her and she heard it only once. Short.App.71. The fact that the word was directed elsewhere is of little import; as this Court explained in the context of sex discrimination, "[T]he line that runs between 'you are a bitch' and 'all women are bitches [and you are a woman (understood)]' is quite a fine one[.]" *Yuknis*, 481 F.3d at 554. Moreover, the court ignored that when Toliver complained about this statement, her supervisor told her, "Belinda

didn't mean it that way," and then "he kind of just swept it under the rug." Supp.App.206, 208.

Additionally, the court made light of the incident when Belinda ran her fingers through Toliver's hair without permission and compared the texture of Toliver's hair to her own. Supp.App.206, 208. The district court criticized Toliver for not complaining about Belinda's conduct, Short.App.62, but ignored that she did not do so because of the dismissive response she had received when she complained about the N-word, Supp.App.206-08. Moreover, the court did not mention that the incident made Toliver so uncomfortable that she tried to get different shifts from Belinda and started to look for a new job. Supp.App.206, 208.

The district court also stated, without explanation, "nor is there a basis for employer liability." Short.App.62. Such "[c]onclusory rulings are inadequate material for the tools of the appellate bench," even when review is de novo. *Pasquino*, 13 F.3d at 1051; *see also* 7th Cir. R. 50.

15. Ruth Washington

Washington testified that Nurse Lamp prohibited her from entering resident LE's room, expressly stating that LE "didn't want colored people." Supp.App.216. The district court said that no reasonable jury could find that Washington was barred from the room because of her race because other Black employees did care for LE. Short.App.66-67. The district court was wrong.

First, a jury could credit Washington's testimony that Lamp told her she could not enter LE's room because of her race, regardless of whether other Black employees were sometimes assigned to LE's room. *See Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) (Title VII protects individuals, not groups as a whole). Second, the district court did not consider that there may have been other reasons Black caregivers were sometimes assigned to LE, including a shortage of White staff.

The district court also cited a nurse's single reference to "you people," holding that this statement was insufficient to create a hostile work environment. Short.App.67. In fact, Washington testified that

multiple nurses made racist comments to her on multiple occasions. Supp.App.215-17. Among these comments, Nurse Cindy Rector said she did not believe biracial couples should have children, and Nurse Laura Williams told her that if her daughter came home with a Black man, Williams would disown her. Supp.App.215, 217; *cf. Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (prohibition on interracial marriage rests on "invidious racial discrimination," and its sole purpose is to "maintain White Supremacy").

Finally, the court ignored that Rector treated Washington differently from White CNAs. When Washington told Rector that a patient wanted Tylenol, Rector expressed doubt and walked down the hall to confirm. Supp.App.218. But whenever a White CNA said a patient needed medicine, Rector would provide it without question. Supp.App.218. In light of Rector's racist remarks, a jury could find that Rector routinely second-guessed Washington because of Washington's race. *See Cole*, 838 F.3d at 896 ("[F]orms of harassment that might seem neutral in terms of race … can contribute to a hostile work environment claim if other

evidence supports a reasonable inference tying the harassment to the plaintiff's protected status.").

II. The verdict forms wrongly precluded the jury from considering the "totality of the circumstances" by requiring it to evaluate supervisor harassment separately from coworker/resident harassment.

The EEOC advised the court that it was raising a single claim for a hostile work environment. Supp.App.259-60. Nonetheless, the court misunderstood the EEOC to be raising one claim for coworker/resident harassment and a separate claim for supervisor harassment. Consistent with its misunderstanding, the court instructed the jury on two separate harassment "claims"—one for coworker/resident harassment, and another for supervisor harassment. Supp.App.295, 298. Then, over the EEOC's objection, Supp.App.307-08, the court submitted verdict forms asking, first, whether a claimant had been subjected to supervisory harassment, and then separately whether the claimant had been subjected to coworker or resident harassment. Short.App.93-110. The verdict forms were silent about what to do if a claimant had been subjected to both. *Id.*

This Court has explained that although the identity of the harasser may be relevant to liability, it does not matter for purposes of determining the existence of a hostile work environment. "If a plaintiff claims that he is suffering a hostile work environment based on the conduct of coworkers *and* supervisors, then under the Supreme Court's totality of circumstances approach, all instances of harassment by all parties are relevant to proving that his environment is sufficiently severe or pervasive." *Mason*, 233 F.3d at 1044-45 (cleaned up).

By requiring the jury to disaggregate the evidence of a hostile work environment based on the harasser's identity, the verdict forms instructed it to do the opposite of what the law requires. *See Paschall*, 28 F.4th at 815 (hostile work environment turns on "the totality of the circumstances"). Necessarily, the court's decision to submit these forms to the jury was an abuse of discretion. *See Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 315 (7th Cir. 2010) ("[I]t's the judge's responsibility to get the verdict form right[.]").

The court's error was prejudicial. The claimants testified that they were harassed by residents, coworkers, and nurses. The jury heard conflicting evidence about whether nurses were supervisors, *compare* Supp.App.272-74, 280, 285-86 *with* Supp.App.281-83, and each side urged the jury to reach a different conclusion. *Compare* Supp.App.288-89 (EEOC) *with* Supp.App.290-91 (Hamilton Pointe). If the jury concluded that the nurses were supervisors, then it necessarily failed to consider evidence of harassment as a unified whole. Such an error could be outcome-determinative and requires remand. *See Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 828 (7th Cir. 2010) (reversing and remanding for new trial on damages where plaintiffs "were prejudiced by the use of a verdict form that may have resulted in a lower damage award").

III. TLC is liable for the discrimination at Hamilton Pointe.

A. TLC and Hamilton Pointe are joint employers.

To determine whether an entity is a joint employer, this Court applies an "economic realities" test, which considers five factors: (1) the extent to which the putative employer controlled or supervised the alleged

employee; (2) the kind of occupation and nature of skill required; (3) responsibility for the costs of operation; (4) method and form of payment and benefits; and (5) the length of job commitment and/or expectations. *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378-79 (7th Cir. 1991). "[T]he employer's right to control is the most important" and courts "must give it the most weight." *Frey v. Hotel Coleman*, 903 F.3d 671, 676 (7th Cir. 2018) (cleaned up). A plaintiff "can survive summary judgment even when not all factors support him." *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 705 (7th Cir. 2015). The inquiry is "fact-bound" and "necessarily is best addressed by the [factfinder] in the first instance." *Robinson v. Sappington*, 351 F.3d 317, 338 (7th Cir. 2003).

In holding that TLC and Hamilton Pointe are not joint employers, the district court improperly credited TLC's evidence, did not address all relevant evidence to the contrary, and resolved factual disputes in TLC's favor. Viewing the evidence in the light most favorable to the EEOC, as required at summary judgment, *Donaldson*, 37 F.4th at 405-06, a reasonable jury could find that the first, third, and fourth factors of the economic-

realities test support a finding that Hamilton Pointe and TLC are joint employers.

As to the first factor, TLC wielded substantial direct and indirect control over the claimants. First, TLC retained ultimate authority over a wide range of employment decisions affecting claimants. Hamilton Pointe's disciplinary forms—which TLC drafted—provided that final warning, discharge, and termination decisions "*must* be reviewed by" TLC's regional directors of operation and its vice presidents of human resources." Supp.App.75 (emphasis added). A Hamilton Pointe administrator, Christina Malvern, also testified that she could not fire, lay off, or suspend employees without TLC's prior approval, and that decisions regarding promotions and raises had to "go through" TLC as well. Supp.App.224; *see Johnson*, 892 F.3d at 905 (company was joint employer where it "maintained ultimate control over" hiring and firing decisions and direct employer could not take such action without "prior approval").

Second, TLC drafted the job descriptions for claimants, participated in hiring interviews, and consulted on hiring decisions. Supp.App.65, 176, 213, 224. It also hired, supervised, evaluated, and fired Hamilton Pointe administrators, who, in turn, supervised claimants. Supp.App.52, 73, 87, 173, 183, 212-13. Thus, TLC exercised indirect control over claimants. *See Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB*, 45 F.4th 38, 42 (D.C. Cir. 2022) ("[C]ontrol exercised indirectly—such as through an intermediary—may be sufficient to establish joint-employer status.") (citation omitted).

Third, TLC wrote and often implemented Hamilton Pointe's employment policies under which administrators and claimants operated. Supp.App.72, 76-77, 175, 178-79, 184, 224, 252-57. When asked about racist staffing instructions, for example, TLC Vice President of Human Resources Ronilo testified: "[W]e do not *allow* anyone to do that in facilities. . . . TLC doesn't endorse it. If we knew it was happening, *we'd stop it immediately*." Supp.App.194 (emphasis added).

In holding that these facts did not indicate sufficient control or supervision to support joint-employer status, the district court erred in

several critical respects. The court incorrectly concluded, for instance, that TLC's ability to control *administrators* was "immaterial" because they are not *claimants* in this case. Short.App.8. As explained above, however, TLC's supervision of and control over administrators allowed the company to exercise indirect control over claimants, which "may be sufficient to establish joint-employer status." *Sanitary Truck Drivers*, 45 F.4th at 42; *see also Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1216 (D.C. Cir. 2018) ("Traditional common-law principles of agency do not require that control be exercised directly and immediately to be relevant to the joint-employer inquiry.") (cleaned up).

Compounding this error, the court found that TLC merely offered "its input and recommendation on [Hamilton Pointe's] employment decisions," and reasoned that "providing only input and recommendations does not establish the right to control an employee." Short.App.9 (citing *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 929 (7th Cir. 2017)). In reaching these findings, the court improperly credited the testimony of TLC witnesses, going so far as to say that "[t]he relationship between TLC

and Hamilton Pointe on this issue is *best addressed* by the testimony of Gary Ott," an owner and executive of both companies. Short.App.8 (emphasis added). Such "credibility determination[s] may not be resolved at summary judgment." *Deets v. Massman Constr. Co.*, 811 F.3d 978, 982 (7th Cir. 2016). Moreover, as the EEOC explained below, TLC's affidavits were inadmissible to the extent they made impermissible legal conclusions or conflicted with earlier deposition testimony. R.109 at PageID#1897-99; Fed. R. Civ. P. 56(c)(2); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 759 (7th Cir. 2006) (court must disregard affidavit where "a conflict arises between a [witness's] sworn testimony and a later affidavit or declaration").

Contrary evidence showed that TLC had the final say on many employment matters. The same individuals owned and operated both companies, and what the district court characterized as "input and recommendation," Short.App.9, came from the same TLC employees who supervised and evaluated Hamilton Pointe administrators. *See supra* pp.23-25. Given those dynamics, a reasonable jury could infer that administrators were not free to depart from TLC's guidance. Indeed, when Gary Ott was

asked whether TLC regional directors had "authority to terminate someone at the facility," he answered: "I would say the regional director has more authority, probably, than anybody, because the administrator works for them. *So the administrator is going to listen to them*." Supp.App.174 (emphasis added).

As to "whether the putative employer was responsible for the costs of operation," *Love*, 779 F.3d at 704, the district court acknowledged that TLC "assumed responsibility" for many such costs, including accounting, payroll, and IT services. Short.App.10. The court held that this fact did not support joint-employer status because "Hamilton Pointe paid TLC for those services." Short.App.10. But the management agreement between the parties provided that Hamilton Pointe would pay TLC a percentage of its revenue, regardless of TLC's out-of-pocket costs. Supp.App.234-35, 238-39. Thus, the terms of the management agreement suggest TLC would ultimately bear those costs if Hamilton Pointe's revenues fell short. Supp.App.180-81. The district court also ignored that TLC occasionally transferred employees to Hamilton Pointe to temporarily fill vacancies,

thereby reducing Hamilton Pointe's expenses. Short.App.10-11; Supp.App.74, 85, 176.

As to "whether the putative employer was responsible for providing payment and benefits," *Love*, 779 F.3d at 704, TLC paid for Hamilton Pointe's employees to attend college and offered them vendor discounts. Supp.App.88, 185. The district court's characterization of the educational benefits as merely a "scholarship program" rather "education[al] funding," Short.App.11, inappropriately answers a question of fact best left to a jury. TLC also offered group health insurance benefits to Hamilton Pointe employees. Supp.App.177, 224, 229. Even if the district court were correct that Hamilton Pointe paid for those benefits, a jury would nonetheless be entitled to give some weight to TLC's administration of Hamilton Pointe's benefits. *See Laurin v. Pokoik*, No. 02-cv-1938, 2004 WL 513999, at *9 (S.D.N.Y. Mar. 15, 2004) ("[C]oordinating benefits packages can provide indication of interrelatedness.").

B. In the alternative, TLC and Hamilton Pointe are a single employer.

The district court also determined that TLC had not forfeited its limited liability through corporate veil-piercing. Short.App.12-14. In so holding, the court improperly credited TLC's evidence, did not address all relevant evidence to the contrary, and resolved factual disputes in TLC's favor.

Under Indiana law, which governs here, *see* Supp.App.243-50, the party seeking to pierce the corporate veil must show (1) that "the corporate form was so ignored, controlled or manipulated that [one company] was merely the instrumentality of another," and (2) that "the misuse of the corporate form would constitute a fraud or promote injustice," *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 364 (7th Cir. 2016) (quoting *Reed v. Reid*, 980 N.E.2d 277, 301 (Ind. 2012)). Stated differently, (1) "there must be such unity of interest and ownership [between the corporations] that the separate personalities no longer exist," and (2) "circumstances must be such that adherence to the fiction of separate corporate existence would

sanction a fraud or promote injustice." *Worth v. Tyer*, 276 F.3d 249, 260 (7th Cir. 2001) (alterations added and omitted).[6]

In deciding whether to treat two companies as a single entity, Indiana courts consider many factors, including whether the companies use similar corporate names; have common officers, directors, and employees; share similar business purposes; or use the same office locations or contact information. *Cont'l Cas. Co. v. Symons*, 817 F.3d 979, 993-94 (7th Cir. 2016) (citing *Smith v. McLeod Distrib., Inc.*, 744 N.E.2d 459, 463 (Ind. Ct. App. 2000)). Although "veil-piercing is a highly fact-intensive inquiry," *id.* at 993, the "key factor" is "the element of control or influence exercised by the entity sought to be held liable for the [other] corporation's affairs," *Eden United, Inc. v. Short*, 573 N.E.2d 920, 932 (Ind. Ct. App. 1991).

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[6] Although *Worth* appeared to apply Illinois law, 276 F.3d at 260, this Court has recognized that the veil-piercing standards under Illinois and Indiana law are "virtually the same," *Koch Refin. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1345 (7th Cir. 1987). Here, the district court acknowledged that Indiana law governs, Short.App.12, but it did not articulate any of the specific factors outlined above and instead relied almost entirely on *Papa v. Katy Industries, Inc.*, 166 F.3d 937 (7th Cir. 1999), which applied federal common law, Short.App.12-14. Nonetheless, the parties agree that Indiana law governs. *See* R.93 at PageID#753.

For the same reasons a jury could find "control" in the joint employer analysis, *see supra* pp.65-72, a reasonable jury could find that Hamilton Pointe was merely an instrumentality of TLC.

Further, TLC and Hamilton Pointe shared owners, corporate officers, and a principal office address. Supp.App.170-72, 243-50. TLC was paid a percentage of Hamilton Pointe's revenue, directly tying TLC's economic wellbeing to Hamilton Pointe's success. Supp.App.234-35, 238-39; *cf. Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1135 (3d Cir. 1995) (in antitrust case, two companies were "one economic unit" where, among other things, one received fee as percentage of other's revenue). TLC and Hamilton Pointe also share the same attorneys in this litigation, further confirming their unity of interest. *See Howard Indus., Inc. v. BADW Grp., LLC*, No. 20-5596, 2021 WL 2328477, at *3 (6th Cir. Mar. 2, 2021) (considering fact that two companies were "represented by the same attorneys" in concluding that veil-piercing was justified).

TLC and Hamilton Pointe also "conducted their various business entities in such a way so as to cause confusion in the mind of any person

attempting to deal with any one of [them]." *Stacey-Rand, Inc. v. J.J. Holman, Inc.*, 527 N.E.2d 726, 729 (Ind. Ct. App. 1988). Notably, former and current Hamilton Pointe administrators and employees testified either that they thought they worked for TLC or that TLC owned Hamilton Pointe. Supp.App.54, 63, 79-80, 82, 133, 193, 196.

A reasonable jury could also find that honoring TLC's and Hamilton Pointe's corporate separateness would promote injustice. The principal purpose of veil-piercing is to prevent a business entity from using its incorporation "as a cloak to avoid the consequences of" its own illegality or wrongdoing. *State v. McKinney*, 508 N.E.2d 1319, 1321 (Ind. Ct. App. 1987). Given TLC's control over the policies and actions at issue in this case, honoring TLC's corporate separateness would allow it to escape responsibility for its role in creating and failing to remedy a racially hostile work environment.

Conclusion

For the foregoing reasons, the EEOC respectfully urges this Court to reverse the award of partial summary judgment with respect to the fifteen

claimants identified above, reverse the jury's verdict and remand for a new trial regarding the six claimants who received no damages at trial, and reverse the award of summary judgment in favor of TLC.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of 7th Circuit Rule 32(c) because it contains 12,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Palatino Linotype 14 point.

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SHORT APPENDIX

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SEVENTH CIRCUIT RULE 30(d) CERTIFICATE

I certify that this Short Appendix and the EEOC's Supplemental Appendix together contain all of the materials required by parts (a) and (b) of Seventh Circuit Rule 30.

s/ *Gail S. Coleman*
GAIL S. COLEMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, and TENDER LOVING CARE MANAGEMENT INC., d/b/a TLC MANAGEMENT, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

ENTRY ON TENDER LOVING CARE MANAGEMENT, INC.'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Equal Employment Opportunity Commission ("EEOC"), filed a Complaint alleging the Defendants herein, The Village at Hamilton Pointe, LLC d/b/a Hamilton Pointe Health and Rehabilitation Center, d/b/a Hamilton Pointe Assisted Living Center, d/b/a The Cottages at Hamilton Pointe, and Tender Loving Care Management, Inc., d/b/a TLC Management ("TLC"), violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 by discriminating against African American employees ("Class Members"). TLC now moves for summary judgment, arguing it

cannot be liable under Title VII because it is not the Class Members' joint employer. The court agrees. TCL's motion is therefore **GRANTED**.

I. Background

A. The Village at Hamilton Pointe

The Village at Hamilton Pointe is an Indiana limited liability company that operates a long-term care facility in Newburgh, Indiana. (Filing No. 94-2, Affirmation of Shawn Cates ("Cates Aff." ¶ 6)). Hamilton Pointe is privately held, and no corporations, including TLC, own a membership interest in Hamilton Pointe. (Filing No. 94-1, Affirmation of Gary Ott a Managing Member of Hamilton Pointe ("Hamilton Pointe Aff.") ¶ 6 & Ex. A at 6). Its managing members are Gary Ott, Ryan Ott, Dwight Ott, Cullen Gibson, and Shawn Cates. (Filing No. 110-1 Deposition of Gary Ott ("Ott Dep.") at 50-51, 54-55 & Dep. Ex. 4). Gary Ott testified there are other members of Hamilton Pointe, but he could not remember their names. (Ott Dep. at 179).

The administrator is employed by Hamilton Pointe and has hiring authority for and supervises several departmental managers, also employed by Hamilton Pointe. (Cates Aff. ¶¶ 4, 7). Departmental managers—including a dietary manager, director of nursing, and housekeeping supervisor—have hiring authority for and supervise their respective staff members. (*Id.* ¶ 7). Dietary aides, dietary cooks, and the assistant dietary managers report to the dietary manager. Certified nursing assistants (CNAs), qualified medical assistants (QMAs), and nurses (LPNs and RNs) ultimately report to the director of nursing. (*Id.* ¶¶ 8-9).

Hamilton Pointe's administrator is responsible for the management decisions at Hamilton Pointe, and oversees expenditures, accounting and budgeting, and human resources. (*Id.* ¶ 7). Hamilton Pointe's department managers supervise and control the day-to-day tasks of providing direct patient care to Hamilton Pointe's residents, including scheduling, assigning tasks, and evaluating the performance of CNAs, QMAs, LPNs, RNs, dietary aides, dietary cooks, assistant dietary managers, housekeepers, and laundry aides. (*Id.* ¶¶ 7-9).

The Class Members all work or have worked for Hamilton Pointe and were on its payroll. (*Id.* ¶ 6). Thirty (30) Class Members are or were CNAs; four (4) Class Members were QMAs; five (5) Class Members were staff nurses - LPNs; one (1) Class Member was a staff nurse - RN; seven (7) Class Members worked in the dietary department; four (4) Class Members worked in housekeeping; one (1) Class Member was a laundry aide. None of these positions, and thus none of the individual Class Members, report to anyone outside of Hamilton Pointe, and all these positions are based in Hamilton Pointe's Newburgh, Indiana facility. (*Id.* ¶ 6-7, 9).

B. TLC

TLC is an Indiana corporation with its principal office located in Marion, Indiana. (Filing No. 94-3, Affirmation of Gary Ott as President of TLC ("TLC Aff."), Ex. B at 5). TLC, like Hamilton Pointe, is owned and operated by Gary Ott, Ryan Ott, Dwight Ott, and Cullen Gibson. (Ott Dep. at 13-15, 33, 50-55, 87 & Dep. Exs. 3, 5).

TLC provides management consulting and outsourcing solutions to client health care facilities like Hamilton Pointe. (TLC Aff. ¶¶ 7, 8, 14-20, 24-26; Cates Aff., Ex. J).

TLC's services include accounting, budgeting, information technology, state and federal regulatory compliance, and human resource services. (TLC Aff. ¶¶ 24-26; Cates Aff., Ex. J). Outsourcing solutions include information technology, payroll and benefit processing, policy forms and samples, and a hotline service. (TLC Aff. ¶¶ 15-18). TLC's services are offered pursuant to contract at a predetermined rate. (Cates Aff. ¶ 12 & Ex. J; TLC Aff. ¶ 22).

C. TLC's Relationship with Hamilton Pointe

1. Management Agreement

Pursuant to the Management Agreement signed by TLC and Hamilton Pointe on September 14, 2012, TLC agreed to provide the services set forth above to Hamilton Pointe as an independent contractor. (Cates Aff., Ex. J, ¶¶ 1, 6). Specifically, TLC agreed to provide:

> Management support which includes monthly management meetings with the Administrator and providing financial controller support, computer support, and accounting support for accounts receivable, accounts payable, and payroll. Monthly budgets, in addition to the profit and loss statements, will be generated.

(*Id.* ¶ 1). TLC's outsourcing solutions include IT services, such as online applications and an intranet system, and a centralized hotline service which processes, investigates, and disseminates complaints to Hamilton Pointe. (Ott Dep. at 169 (stating TLC investigates complaints called into the hotline or called to their attention by letter); TLC Aff. ¶ 26; Cates Aff., Ex. J). TLC also offers payroll processing and a group-benefits plan. (TLC Aff. ¶¶ 16, 20). Hamilton Pointe participates in these programs but is solely

responsible for the costs of payroll and any employee benefits expenses. (Cates Aff. ¶¶ 6, 11; TLC Aff. ¶¶ 8, 20, 27).

2. Interaction Between TLC and Hamilton Pointe

TLC assigned Regional Director of Operations, Phil Heer, to work with Hamilton Pointe. (TLC Aff. ¶ 25). Heer supports Cates on operations, budgeting, accounting services, and provides management advice such as financial best practices and risk assessment. (*Id.* ¶ 24; *see also* Cates Aff., Ex. J).

As for salaries, TLC sets the wage scale for Hamilton Pointe employees based on market research and market surveys. (Filing No. 110-5, Deposition of Cullen Gibson at 90-91). Cates and former Hamilton Pointe administrator, Christina Malvern, testified they were given the latitude to pay within the pay scale. (Filing No. 110-13, Deposition of Shawn Cates ("Cates Dep.") at 84-85; Filing No. 110-14, Declaration of Christina Malvern ("Malvern Decl.") ¶ 9). Cates testified he went outside the range to hire a director of sales and marketing, and that Heer gave him "the autonomy to do what [he] wanted to do." (Cates Dep. at 85).

TLC's Director of Human Resources, Matt Doss, consults with Hamilton Pointe on decisions such as hiring and firing Hamilton Pointe employees. (Filing No. 110-17, Deposition of Matthew Doss ("Doss Dep.") at 14; TLC Aff. ¶ 15). He does not make the ultimate decision whether to hire or fire Hamilton Pointe employees, however. (Doss Dep. at 14).

TLC's Chief Nursing Officer, Teresa Wallace, provides health care compliance advice and consulting to Hamilton Pointe. (TLC Aff. ¶ 27; Gibson Dep. at 54-55). She

"oversees nursing care operations," including medical supplies, trainings, and staffing level, which are subject to federal regulation. (Gibson Dep. at 56). She does not supervise or evaluate Hamilton Pointe's director of nursing; the administrator performs those functions. (*Id.* at 55).

TLC does not have the authority to hire, fire, or discipline any of the Class Members. (Cates Aff. ¶ 14; TLC Aff. ¶¶ 14, 26). TLC does not manage or control the scheduling or assignment of Class Members. (Cates Aff. ¶¶ 6, 9, 12; TLC Aff. ¶¶ 9, 12, 14). Class Members are not and never were on TLC's payroll. (Cates Aff. ¶ 6; TLC Aff. ¶ 28).

None of TLC's consultants maintain an office at Hamilton Pointe; they are based in Marion, Indiana. (TLC Aff. ¶ 8). They visit Hamilton Pointe's facility on a monthly or as-needed basis. (*Id.*; Cates Aff., Ex. J).

All other facts necessary to a resolution of this motion will be addressed in the Discussion Section.

II. Discussion

Under Title VII, an employer[1] may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" 42 U.S.C. § 2000e-2(a)(1). Thus, in order to bring a Title VII

[1] Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]" 42 U.S.C. § 2000e(b). And an "employee" is "an individual employed by an employer." 42 U.S.C. § 2000e(f). It is undisputed that Hamilton Pointe and TLC are "employers" and the Class Members are "employees."

claim against TLC, the EEOC must establish the existence of an employer-employee relationship between TLC and the Class Members. *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380 (7th Cir. 1991).

It is undisputed that TLC was not the Class Members' direct employer. "For Title VII purposes, however, a plaintiff can have more than one employer." *Frey v. Coleman*, 903 F.3d 671, 676 (7th Cir. 2018) (citing *Love v. JP Cullen & Sons, Inc.*, 779 F.3d 697, 701 (7th Cir. 2015)). The EEOC contends that TLC had sufficient control over the Class Members to be considered their "joint employer." In the alternative, the EEOC contends that TLC has forfeited its corporate status and is, therefore, a proper defendant. *Worth v. Tyler*, 276 F.3d 249, 259-60 (7th Cir. 2001).

A. Joint Employment

In determining whether an entity is an indirect or joint employer, the Seventh Circuit employs a five-factor test:

> (1) the extent of the [purported] employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

Knight, 950 F.2d at 378-79 (7th Cir. 1991). In determining the existence of an employer-employee relationship, "the employer's right to control is the 'most important' consideration." *Love*, 779 F.3d at 703. Within this factor, the power to hire and fire is a "key power." *Nischan v. Stratosphere Quality, LLC*, 885 F.3d 922 (7th Cir. 2017). The

EEOC did not address factors (2) and (5); therefore, only factors (1), (3), and (4) will be addressed.

1. Control and Supervision

The evidence establishes that Hamilton Pointe—not TLC—had the authority to hire, fire, and discipline Hamilton Pointe employees, including the Class Members. (Cates Aff. ¶ 14; TLC Aff. ¶¶ 14, 26). The EEOC attempts to create an issue of fact by arguing that Hamilton Pointe's administrator, Shawn Cates, was hired by TLC's Cullen Gibson. To the extent this is true, the fact is immaterial. The *Knight* test centers on the employee who is the victim of the employer's alleged discriminatory conduct. The alleged victims here are the Class Members and Cates is not one of them.

As to other avenues of "control" over Hamilton Pointe's employees, the EEOC posits that Hamilton Pointe's administrators needed TLC's "approval" to fire or lay off employees. (*See* Malvern Decl. ¶ 11 ("I could not terminate any employee without approval from TLC's Human Resources department. . . . I also needed TLC approval to lay-off employees.")). The relationship between TLC and Hamilton Pointe on this issue is best addressed by the testimony of Gary Ott:

> [Vice President of HR], Steve Ronilo, I don't think, has the authority [to stop a termination]. But Steven Ronilo would be giving his advice on, "Have you done everything by the book as far as all the disciplinary procedures?" And he would kind of consult with the administrator and say, "Listen, you haven't given the first warning, the second warning, the third warning," you know, whatever it is. So he would tell them that, "You do not have a very good case to be terminating this person at this point." So he would advise them not to, "until you get all that documentation right." But it's still the administrator's decision because the Administrator is the one that's finally responsible and runs the show.

(Ott Dep. at 100). In other words, TLC gave Hamilton Pointe administrators its input and recommendation on these types of employment decisions; it did not make them or otherwise control their outcome. (*See* Doss Dep. at 14 (noting he did not make hiring and firing decisions; he just gave his "general impression" and "consultation")). Under Seventh Circuit law, providing only input and recommendations does not establish the right to control an employee. *Nischan*, 865 F.3d at 929 (holding Chrysler employee did not have the power to fire plaintiff, who worked for Stratosphere, because he "could provide only input and recommendations regarding Stratosphere's employees").

The EEOC's arguments regarding TLC's control over Hamilton Pointe's salaries and budget are similarly misplaced. As part of the budget process, TLC conducted market research and wage surveys to assist the administrators at Hamilton Pointe to determine an appropriate pay rate. (Gibson Dep. at 90-91). Administrators can deviate from the budget and wage scale, but TLC reviews the deviation to help Hamilton stay on budget. (Gibson Dep. at 94-95; Ott Dep. at 176-77).

Regarding regulatory compliance, the EEOC maintains TLC "controlled employee complaints and dispute resolution." (Filing No. 109, Response at 19). But the testimony on this issue does not support that conclusion. According to TLC's Steve Ronilo:

> So if [Hamilton] jump[s] too soon, and they take action against an employee that they shouldn't take, we're polite and respectful about it, but we certainly let them know that they did the wrong thing. Don't do this again. This is serious stuff and we're going to fix it.

(Deposition of Steven Ronilo at 40). This service, as well as the other services TLC performed—auditing, accounting, hotline service, compliance, and the like—are part of

the consulting services it provides to Hamilton Pointe pursuant to contract. The provision of these services does not create joint employment. *See Papa v. Katy Indus., Inc.*, 166 F.3d 937, 942 (7th Cir. 1999) (hiring other firms to perform services such as payroll does not subject those firms "to the antidiscrimination laws").

As demonstrated by the record, the consulting services performed by TLC were on an organizational level. TLC had little interaction with Class Members; it did not set their schedules, control their day-to-day activities, or have the power to hire or fire them. TLC's lack of workforce control weighs in TLC's favor.

2. Costs of Operation

Hamilton Pointe is responsible for funding its employees' paychecks. (Cates Aff. ¶ 6). The EEOC does not dispute that fact; rather, it argues that TLC assumed responsibility for other costs of operation, including accounting and payroll services, IT services, and maintenance services for the facilities it manages. (Filing No. 128-2, Sworn Administrative Testimony of Gary Ott ("Ott Sworn Admin. Test.") at 18-19; Ott Dep. at 179-80, 188; Gibson Dep. at 127-28). But the parties' contract provides for accounting and IT services, and Hamilton Pointe pays TLC for those services. (Cates Aff. ¶ 12 & Ex. J). TLC also bills Hamilton Pointe for the building maintenance services it provides. (Ott Dep. at 175).

Regarding the EEOC's arguments concerning budgetary control over Hamilton Pointe's finances, the parties' contract includes budgetary advice. (TLC Aff. ¶ 25). Thus, TLC consults with Hamilton Pointe if, for example, operational costs exceed revenues. (Ott Dep. at 176-77; Hayden Dep. at 39-40). Hamilton Pointe's members are

responsible for recapitalizing Hamilton Pointe; TLC is not. (Ott Dep. at 177-78 (explaining that when there is a capital call, the members have to "kick in the money" or get a loan)).

Because the costs of operation are born by Hamilton Pointe, this factor weighs against finding TLC is the Class Members' joint employer.

3. Method and Form of Payment and Benefits

Lastly, the EEOC argues that employee health benefits are "run through TLC" and that open enrollment "is done through" TLC's corporate office. (Response at 13 (citing Malvern Decl. ¶ 9)). TLC does offer a group benefit plan to Hamilton Pointe. (TLC Aff. ¶ 21). Hamilton Pointe—not TLC—pays for those benefits. (*Id.*). And as for the EEOC's suggestion that TLC pays for the college expenses of certain Hamilton Pointe employees, Gary Ott clarified that Hamilton Pointe offers and funds a scholarship program for employees to further their education. TLC does not provide education funding for Hamilton Pointe employees. (Filing No. 128-1, Affirmation of Gary Ott ¶ 4). Accordingly, this factor also favors TLC.

4. Conclusion

Based on the five-factor test set forth in *Knight*, the court finds the EEOC has failed to raise a genuine issue of material fact on whether TLC is the Class Members' joint employer. TLC does not have the power to hire or fire the Class Members, supervise their work, create schedules, or otherwise affect the Class Members' employment. Hamilton Pointe is solely responsible for paying the Class Members'

salary, benefits, and other expenses. As such, all three contested *Knight* factors weigh against a finding that TLC is the Class Members' joint employer.

B. Veil Piercing

Next, the EEOC contends TLC forfeited its limited liability under a veil-piercing theory, "whereby corporate formalities are ignored and the actions of one company can accrue to another." *Worth*, 276 F.3d at 260. Veil-piercing is governed by the law of the state in which the companies were incorporated; here, Indiana law. *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 364 (7th Cir. 2016). The party seeking to pierce the corporate veil has the burden to prove that "the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice." *Reed v. Reid*, 980 N.E.2d 277, 301 (Ind. 2012) (quoting *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994)).

The EEOC argues that "[i]t is nearly impossible to separate TLC's ownership from Hamilton's." (Response at 26). It also notes that: (1) Hamilton Pointe's administrators are trained at other TLC-managed facilities, (Ott Dep. at 106); (2) Hamilton Pointe adopted employment policies provided[2] by TLC, (Malvern Decl. ¶ 13); and (3) Hamilton Pointe occasionally uses TLC employees when short-staffed, (Ott Dep. at 137; Gibson Dep. at 71-72).

[2] This fact is disputed. (Ott Dep. at 118-19 ("I know for a fact that the administrator is involved with [drafting human resource policies for Hamilton Pointe]")).

In *Papa*, the Seventh Circuit examined two cases where the employee plaintiffs of the subsidiary corporations argued the parent corporation was a joint employer under Title VII because of the degree of integration between the two companies. 166 F.3d at 939. The parent companies complied with corporate formalities, but fixed the subsidiaries' salaries, centralized payroll, benefits, and pension plans, and integrated computer systems. *Id.* One of the parent companies moved employees back and forth among affiliates while the other forced its subsidiary to shut down a production line, causing layoffs. *Id.* The Court found such integration did not combine employers for purposes of Title VII. *Id.* at 942. It noted that small firms may join a multiemployer pension plan, consult with an outside law firm, and hire an accounting firm to do its payroll. *Id.* And it observed:

> None of these forms of contractual integration would subject tiny employers to the antidiscrimination laws, because the integration is not of affiliated firms. Why should it make a difference if the integration takes the form instead of common ownership, so that the tiny employer gets his pension plan, his legal and financial advice, and his payroll function from his parent corporation . . . rather than from independent contractors?

Id. Instead, the Seventh Circuit noted three ways the parent corporation could be found to be jointly liable: (1) where conditions were present to pierce the veil by a creditor; (2) the corporate structure was created for the express purpose of avoiding liability under the antidiscrimination laws; or (3) the parent company directed the discriminatory act, practice, or policy of which the employee of its subsidiary was complaining. *Id.* The Court concluded that there was no suggestion that the companies purposefully attempted to defeat the antidiscrimination laws; there was "no showing that an ordinary creditor of

one of the subsidiaries could pierce the corporate veil"; there was "not suggestion that the parent company "administered the specific personnel policies, or directed, commanded, or undertook the specific personnel actions, of which the plaintiffs are complaining." *Id.*

Here, Hamilton Pointe and TLC are separate legal entities, with separate locations, separate bank accounts, and separate managers. (TLC Aff. ¶ 7; Cates Aff. ¶ 5). TLC does not hold an ownership interest in Hamilton Pointe. (TLC Aff. ¶ 6; Hamilton Pointe Aff. ¶ 6). The integration between TLC and Hamilton Pointe—centralized payroll processing and benefits, budgetary advice, training, and short-term staffing—shows no more integration than in *Papa.* Accordingly, the court finds TLC is not the Class Member's joint employer under a veil-piercing theory.

III. Conclusion

Based on the designated evidence, TLC is entitled to summary judgment. TLC is not the Class Members' employer and is not a joint employer. Therefore, TLC's Motion for Summary Judgment (Filing No. 92) is **GRANTED**.

SO ORDERED this 31st day of March 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

ENTRY ON DEFENDANT HAMILTON POINTE, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In September 2017, the Equal Employment Opportunity Commission ("EEOC") filed suit against Defendants Hamilton Pointe and Tender Loving Care Management, Inc. ("TLC")[1] alleging that Defendants subjected seven (7) Charging Parties—Vanessa Miles, Sonja Fletcher, Angela Gilbert, Donna Grissett, Adrien Chamberlain, Tamara McGuire, and Yana Shelby—and "a class of current and former African American employees" to disparate terms and conditions of employment and to harassment because of their race, in

[1] TLC is no longer a party to this action.

violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

On June 19, 2018, the EEOC filed a Notice of Identification of Class, where it identified 52 Class Members, including the Charging Parties.[2] (Filing No. 50). Since that identification, the EEOC has agreed to remove the following five Class Members: No. 8[3] Fallon Brown, No. 25 Savannah Brogden, No. 30 Kimberly Thompson, No. 31 Mia Van Dyke, and No. 34 LaShonda Cooper. The EEOC seeks injunctive relief, and compensatory and punitive damages for each of the allegedly aggrieved individuals.

Hamilton Pointe now moves for partial summary judgment with respect to 40 of the remaining 47 Class Members:

No. 1 Adrien Chamberlain	No. 2 Sonja Fletcher	No. 5 Tamara McGuire
No. 6 Vanessa Miles	No. 9 Trent Carter	No. 11 An'Yel Crawford
No. 12 LaShawn Johnson	No. 13 Raven Langley	No. 14 Sheila Langley
No. 15 L'Sheila Lewis	No. 17 Edward Partee	No. 18 Takia Roberts
No. 20 Montoya Smith	No. 21 Bianca Toliver	No. 22 David Ussery,
No. 23 Ruth Washington	No. 24 Carmen Baker	No. 27 Lydia Green
No. 28 Sara Johnson	No. 29 Naim Muhammad	No. 32 Kathy Butler
No. 33 Kyran Byrd	No. 35 LaKisha Faulk	No. 36 Amber Johnson,
No. 37 Latiana Merriweather	No. 38 Charah Milan	No. 39 Tamara Moredock

[2] Charging parties and class members will be referred to collectively as "Class Members."
[3] Class members are identified by their number in the EEOC's Notice of Identification of Class. (Filing No. 50).

No. 40 Mateena Powell	No. 41 Ophelia Stone	No. 42 Katrice Moody
No. 43 Sherrlynn Lester	No. 44 Nicole Powell	No. 45 Ronetta Goodloe
No. 46 Jennifer Stanley	No. 47 Arletha Cayson	No. 48 Tommy Buggs
No. 49 Cynthia Erife	No. 50 Andrea Trask	No. 51 Jacquetta Tyus

No. 52 Lenae Watkins.

In addition, Hamilton Pointe seeks summary judgment on the fact that it had fewer than 200 employees at all relevant times, for purposes of application of the damage caps under Title VII.

The court, having read and reviewed the parties' submissions, the designated evidence, and the applicable law, now **GRANTS** Hamilton Pointe's Motion for Partial Summary Judgment.

I. Background

Hamilton Pointe is a long-term care facility which provides skilled nursing, rehabilitation, and assisted living services. (Filing No. 99-6, Affirmation of Hamilton Pointe Administrator Shawn Cates ("Cates Aff.") ¶ 4; *see also* Filing Nos. 99-7 & 112-9, Deposition of Adrien Chamberlain ("Chamberlain Dep.") at 156:19-23).

Hamilton Pointe has a contract with TLC for certain support services including accounting functions, certain aspects of human resources, and access to subject-matter experts/consultants in various areas (e.g. nursing, dietary, social services) to assist the facility in its efforts to comply with the laws and regulations applicable to long term care facilities. (*Id.* ¶ 6). Hamilton Pointe employs or formally employed all the Class Members identified by the EEOC. (*Id.* ¶ 7; Filing No. 100-18, Affirmation of Hamilton

Pointe Payroll Record Keeper ("Payroll Aff."), Ex. A). They include certified nursing assistants (CNAs), qualified medication assistants (QMAs), nurses (LPNs and RNs), dietary aides, and dietary cooks.

The employee handbook given to all new employees upon hire contains policies which prohibit harassment and discrimination in the workplace. (Cates Aff., Ex. A at EEOC2288, EEOC2289, EEOC2324; *id.*, Ex. B at HP00000444-45). Employees who experience or witness harassment are directed to contact the administrator, his or her supervisor, or use the TLC Hotline to report the matter. (*Id.*, Ex. A at EEOC2324, Ex. B at HP00000445).

Hamilton Pointe has on-site a human resources director and management staff, including department directors and a facility administrator who are available for reporting any concerns. (Cates Aff. ¶ 10). Hamilton Pointe employees are also provided with a hotline number in the employee handbook, which is posted in various locations in the facility. (*Id.*).

Since at least February 2015, the Class Members[4] allege that Hamilton Pointe has made job assignments based on race and/or instructs employees not to provide care to certain residents based on the employees' race, (Filing No. 1, Compl. ¶ 19(a)), has prohibited black employees from entering certain resident rooms or providing care to certain residents because of the employees' race, (*id.* ¶¶ 19(b), (c)), maintains work assignment sheets stating, "NO AFRICAN AMERICAN MALES TO PROVIDE

[4] At the risk of stating the obvious, the Class Members filed timely charges of discrimination with the EEOC.

CARE," (*id.* ¶ 19(d)), and has subjected employees to a hostile work environment, (*id.* ¶ 19(e)).

II. Applicable Law

A. Title VII, Section 706

The EEOC brings this suit under Section 706 of Title VII for the purpose of recovering individual relief, including compensatory and punitive damages, on behalf of aggrieved individuals. The EEOC must prove that Hamilton Pointe violated Title VII with respect to each claimant. In other words, there must be individualized proof for every element of each claim. *EEOC v. IPS Indus., Inc.*, 899 F.Supp.2d 507, 517 (N.D. Miss. 2012) (sex harassment) ("'Each claimant will be required to satisfy each element of the [hostile work environment] claim, including severity or pervasiveness, based on their individualized experience.'") (quoting *EEOC v. O'Reilly Auto. Ind.*, No. H-08-2429, 2010 WL 5391183, at *5 (S.D. Tex. 2010) (race-based hostile work environment)); *EEOC v. CRST Van Expedited, Inc.*, 611 F.Supp.2d 918, 929 (N.D. Iowa 2009) ("[T]he EEOC stands in the shoes of those aggrieved persons in the sense that it must prove all of the elements of their sexual harassment claims to obtain individual relief for them.").

B. Disparate Treatment Claims

The EEOC did not address the Class Members' disparate treatment claims because, it argues, Hamilton Pointe did not address those claims in its opening brief. (*See* Filing No. 158, EEOC's Am. Resp. at 1 n.1 ("Because Defendant's supporting brief only discussed the harassment issue the Commission is not addressing the disparate terms and conditions issue.")). The court disagrees. Hamilton Pointe addressed the Class Members'

disparate treatment claims in the applicable legal standard section of its brief in support and applied that legal standard to the ten specific Class Members who raised the claim. (*See* Filing No. 98, Hamilton Pointe's Brief in Support at 15 and n.8, 27-30 (arguing that scheduling and assignment changes do not constitute adverse employment actions), 38-40 (Chamberlain), 43-45 (Fletcher), 61-62 (R. Langley), 73-74 (Roberts), 83-85 (Washington), 95-96 (Muhammad), 99 (Faulk), 101-02 (A. Johnson), 109-10 (Lester), 113-14 (Standley)). The EEOC's failure to respond to Hamilton Pointe's arguments results in waiver of those claims. *Wojtas v. Capital Guardian Trust Co.*, 477 F.3d 924, 926 (7th Cir. 2007). Accordingly, Hamilton Pointe is entitled to summary judgment on the Class Members' disparate treatment claims.

C. Racial Harassment

An employer violates Title VII if it is responsible for racial harassment that creates a hostile work environment. *Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004). A hostile work environment is one that is "'permeated with discriminatory intimidation, ridicule, and insult.'" *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 426 (7th Cir. 2004) (quoting *Shanoff v. Ill. Dep't of Human Servs.*, 258 F.3d 696, 704 (7th Cir. 2001)). To succeed on a hostile work environment claim based on race, a plaintiff must establish that: (1) the work environment was both subjectively and objectively offensive; (2) the harassment was based on race (or another protected class); (3) the conduct was severe or pervasive so as to alter the conditions of employment and create a hostile working environment; and (4) there is a basis for employer liability. *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018). In other words, the environment must be "'one that a

reasonable person would find hostile or abusive and one that the victim in fact did perceive to be so.'" *McPherson v. City of Waukegan*, 379 F.3d 430, 438 (7th Cir. 2004) (quoting *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 462-63 (7th Cir. 2002)).

In determining whether a plaintiff's work environment is objectively hostile, the court must consider all the circumstances, including "the severity of the alleged conduct, its frequency, whether it [was] physically threatening or humiliating (or merely offensive), and whether it unreasonably interfere[d] with the employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). "'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Adusumilli v. City of Chicago*, 164 F.3d 353, 361 (7th Cir. 1998) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1993)). The Seventh Circuit has recognized "that harassment need not be both severe and pervasive—one extremely serious act of harassment could rise to an actionable level as could a series of less severe acts." *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir. 2001); *see also Faragher*, 524 U.S. at 788 ("We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment[.]").

Employer liability for a hostile work environment is evaluated on two levels. First, an employer is strictly liable if the harassment is from a supervisor. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998); *Faragher*, 524 U.S. at 807-08. When no tangible employment action is taken against the employee, the employer is entitled to assert an affirmative defense consisting of two elements: (a) the employer exercised

reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Indus.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Second, an employer is liable for co-worker harassment "only if the employer knew or should have known about [the co-worker]'s acts of harassment and fails to take appropriate remedial action." *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001) (quoting *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996)).

1. Racially Offensive Language

This case concerns, among other things, the use of racial epithets by co-workers and residents. While there is "no magic number of slurs" that indicates a hostile work environment, an "unambiguous racial epithet falls on the 'more severe' end of the spectrum." *Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477 (7th Cir. 2004) ("Given American history, we recognize that the word 'n****r' can have a highly disturbing impact on the listener."). The Seventh Circuit has held that "one utterance of the n-word" is generally not severe enough to impose liability. *Nichols v. Michigan City Plan Planning Dep't*, 755 F.3d 594, 601 (7th Cir. 2014) (holding one use of racial epithet coupled with other incidents of harassment by other co-workers were not severe or pervasive enough to establish hostile work environment). But "a plaintiff's repeated subjection to hearing that word could lead a reasonable factfinder to conclude that a working environment was objectively hostile." *Hrobowski*, 358 F.3d at 477.

Context matters. A racially offensive term directed at the plaintiff has more impact than if the offensive term was directed at someone else. *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559, 562 n. 2 (7th Cir. 2004) (holding plaintiff failed to establish a hostile work environment where she heard a racial epithet directed at someone else and learned from others about other offensive comments directed at someone else); *see also Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) ("'[T]he impact of second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff."). It also matters who uses the offensive term. Use of a racial epithet from a supervisor "is much more serious than a co-worker's use" of such a term. *See Gates v. Bd. of Educ. of the City of Chicago*, 916 F.3d 631, 638 (7th Cir. 2019) ("We have repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a co-worker's.").

The alleged use of racially offensive language at Hamilton Pointe came not so much from co-workers but from residents who suffered from mental decline. Two Fifth Circuit cases help guide the court's analysis. The first is *Cain v. Blackwell*, 246 F.3d 758 (5th Cir. 2001). There, a nurse provided home health services to an elderly man named Marcus suffering from Alzheimer's and Parkinson's disease. *Id.* at 759. During her seven months of employment at his residence, Cain alleged Marcus repeatedly propositioned her for sex and called her disparaging names, including racial epithets, after she told him she had once dated a black man. *Id.* Cain told her supervisor, who told Cain not to take it seriously and to consider the source. *Id.* The Fifth Circuit affirmed the district court's grant of summary judgment for the employer on Cain's claim of hostile work

environment. Although what she experienced was "clearly crude, humiliating, and insensitive," the court found "the unique circumstances of this case make the elderly and obviously impaired Marcus's commentary insufficient to establish sexual harassment." *Id.* The court noted that caring for individuals with diseases like Marcus's was part of Cain's daily routine, that Cain did not allege physical conduct that made her feel threatened and did not accept an offer of reassignment. *Id.* In these circumstances, Marcus's "unacceptable but pitiable conduct was not so severe or pervasive as to interfere unreasonably with Cain's work performance or . . . create an abusive working environment." *Id.* at 760-61.

In *EEOC v. Nexion Health*, 199 Fed. App'x 351 (5th Cir. 2006), Johnson, an African American CNA, worked in a nursing home facility that housed elderly persons with mental conditions such as dementia, schizophrenia, and Alzheimer's disease. *Id.* at 352. One of the residents he cared for made offensive racial comments, including frequent use of the word "n****r," approximately three to four times a week. *Id.* Relying on *Cain*, the Fifth Circuit affirmed the district court's grant of summary judgment on Johnson's hostile work environment claim, holding that "the harassment Johnson suffered did not objectively interfere with his work performance or undermine his workplace competence." *Id.* at 354. The court emphasized the "unique aspect of Johnson's employment" where "most of the people around him were often unable to control what they said or did." *Id.* "Absorbing occasional verbal abuse from such patients was not merely an inconvenience associated with his job; it was an important part of his job." *Id.* It was thus "objectively unreasonable for an employee in such a

workplace to perceive a racially hostile work environment based solely on statements by those who are mentally impaired." *Id.* *See also Pickett v. Sheridan Health Care Ctr.*, No. 07 C 1722, 2008 WL 719224, at *4 (N.D. Ill. Mar. 14, 2008) (three instances of inappropriate resident conduct including verbal threats, humiliation, and unwanted touching over eight months were insufficient in the context of nursing home providing care for residents with mental illnesses to establish severe and pervasive conduct). The court held that because Johnson's work environment was not hostile or abusive given the totality of the circumstances, no rational trier of fact could have held Nexion liable for subjecting Johnson to a hostile work environment. *Id.* at 354.

2. Race-Based Preferences

Some Class Members also alleged certain residents and/or the residents' family members requested "no black care" or "no African American male care." These preferences were conveyed orally or in writing and allegedly were honored or enforced by Hamilton Pointe.

The Seventh Circuit addressed race-based preferences in *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010). Plainfield Healthcare Center, a nursing home, had a policy of honoring residents' racial preferences in assigning health-care providers. *Id.* at 910. On an assignment sheet that Chaney received daily, it noted that one of the residents "Prefers No Black CNAs." *Id.* Chaney was therefore banned from the resident's room. *Id.* Chaney's co-workers also used racial epithets in her presence; one called her a "black b*tch" and another asked Chaney why Plainfield hired "black n****rs." *Id.* at 911. After Chaney complained, the epithets stopped; however, one of

her co-workers continued to remind her that she could not care for certain residents because of her race. *Id.* Chaney was terminated after three months of employment. *Id.* The Seventh Circuit reversed the district court's grant of summary judgment, finding a material issue of fact existed on whether plaintiff was subjected to a racially hostile work environment. *Id.* at 915. The court found that Chaney was subjected to a racially charged work environment by her co-workers which Plainfield "acted to foster and engender . . . through its assignment sheet that unambiguously, and daily, reminded Chaney and her co-workers that certain residents preferred no black CNAs." *Id.* at 912.

While a healthcare facility may not accede to the racial preferences of its residents, the *Chaney* court recognized that gender may be a bona fide occupational qualification in health care to accommodate patients' privacy interests. *Id.* at 913 (citing *Jennings v. N.Y. State Office of Mental Health*, 786 F. Supp. 376, 383 (S.D.N.Y.1992); *Local 567 Am. Fed'n of State, County, and Mun. Employees v. Michigan*, 635 F. Supp. 1010, 1013 (E.D. Mich. 1986); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1193 (E.D. Ark. 1981); *Fesel v. Masonic Home of Del.*, Inc., 447 F.Supp.1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979). "Just as the law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers." *Chaney*, 612 F.3d at 913.

III. Class Member Facts and Discussion[5]

[5] Much of the Class Members' testimony cited herein is speculative and contains hearsay. For purposes of this motion only, Hamilton Pointe has rarely posed an objection. (*See* Filing No. 98,

1. Class Member No. 1, Adrien Chamberlain

Adrien Chamberlain was a CNA at Hamilton Pointe from May 7, 2015 through April 15, 2018 when she was removed from Hamilton Pointe's PRN[6] list for inactivity. (Payroll Aff. Ex. A). While employed there, she worked "all over the facility." (Chamberlain Dep. at 156:19-23).

Chamberlain does not remember an assignment sheet referring to the race of caregivers during her employment. (*Id.* at 158:10-16, 191:20-24). An EEOC interviewer specifically asked Chamberlain if she saw any such assignment sheet, and she told the EEOC interviewer she had not. (*Id.* at 157:19, 158:10-16). Still, at her deposition, she insisted she was "not saying she ha[s]n't seen it." (*Id.* at 192:2).

Chamberlain believed some residents had "issues with race" but said this dislike was never directed at her because she was lighter skinned. (*Id.* at 197:12-198:9). She could not recall any instance of being told to switch patients because of a resident who had issues with race. (*Id.* at 199:10-13). She described instead a Caucasian CNA who would not go in a specific resident's room, requiring Chamberlain to care for that resident instead. (*Id.* at 198:5-199:2). Chamberlain said caregiver switches occurred for both white and black caregivers, and that there were circumstances when white caregivers could not go in specific rooms, as well as circumstances when black caregivers could not go in specific rooms. (*Id.* at 201:1-15). When asked why she believed any switch had anything to do with her race, she said only that there were times she "knew" it was race

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Def.'s Brief in Support at 36 n.15). It explains that the court need not resolve such evidentiary issues to find it is entitled to summary judgment.

[6] A PRN works on an "as needed" basis.

and did not recall any additional information about those instances. (*Id.* at 201:16-202-2, 203:4-9).

Chamberlain does not recall any instance when she was told she could not provide care to a specific resident for any reason. (*Id.* at 203:10-15). She was told that other African Americas were not allowed to care for certain residents but does not remember any details or why she believed that any staffing changes were race related. (*Id.* at 205:19-206:17). Chamberlain never complained to anyone at Hamilton Pointe (or TLC) regarding an alleged practice of honoring residents' preferences for caregivers of a certain race. (*Id.* at 143:4-13).

Chamberlain alleged that on a single occasion a disruptive new resident in his first few hours in the facility was using harassing language including use of a racial slur, the "n-word." (*Id.* at 62:23-64:13). The resident's words were directed generally toward several caregivers including both Caucasians and African Americans. (*Id.*). Paramedics were called, and this resident did not return to the facility. (*Id.* 62:23-64:13). She recalls no other incident when a resident used any racial language. (*Id.* 204:15-205:18). She recalls no other racial comments of any sort while at Hamilton Pointe. (*Id.* 64:3-13).

Discussion

The court finds Chamberlain was not subject to a racially hostile work environment. There is no evidence that she ever saw an assignment sheet referring to race during her employment. Her evasive answer that she was "not saying [she] ha[sn't] seen it," is insufficient to create a genuine issue of material fact. (Chamberlain Dep. at 191:20-192:2). Indeed, she admitted she had no recollection of ever seeing one. (*Id.* at

192:3-4 ("Q: But you have no recollection of seeing any [assignment sheet]? A: I don't – correct.")). Moreover, the EEOC's own investigator confirmed in writing that Chamberlain had not seen any such statement during her employment. (*Id.* at 156:2-157:19, 158:10-16).

Chamberlain testified that resident issues with race were not directed at her. (*Id.* at 197:24-198:9). Chamberlain described only a single instance of having to switch with a CNA and confirmed that the switch was not attributable to any resident racial preference, but to the fact that the other [white] CNA was not allowed in that particular resident's room. (*Id.* at 198:16-204:14). Her testimony confirms that she has no evidentiary basis—only her own subjective belief—that she was ever switched or assigned residents based on her race. *Vissar v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 659-60 (7th Cir. 1992) ("Discrimination law would be unmanageable if disgruntled employees . . . could defeat summary judgment by affidavits speculating about the defendant's motives."). She testified that some staffing changes occurred for race-neutral reasons. (*Id.* at 201:1-15).

The only occasion Chamberlain heard racially inappropriate language at Hamilton Pointe during the more than two years of her employment was from a combative resident who was in the facility for only a few hours, and the resident's behavior was immediately addressed by the facility. Therefore, Hamilton Point is entitled to summary judgment as to Class Member No. 1, Adrien Chamberlain.

2. Class Member No. 2, Sonja Fletcher

Sonja Fletcher was employed as a CNA at Hamilton Pointe from March 19, 2015 to October 2, 2015. (Payroll Aff. Ex. A).

During her employment Fletcher was told at the start of her day shift by a third shift nurse that a female resident on the rehabilitation ("rehab") unit wanted no male care. (Filing Nos. 99-8 & 112-7, Deposition of Sonja Fletcher ("Fletcher Dep.") at 157:14-20). Fletcher then reviewed the CNA assignment sheet; in the row listing the resident's "special needs," she noticed it stated, "No African American Male Care." (*Id.* at 158:22-159:2; Filing No. 112-1, assignment sheet). That made her "livid." (Fletcher Dep. at 158:15).

The resident at issue, PT, was admitted to the rehab unit from March 26, 2015 and discharged on April 18, 2015. (Filing No. 99-2, Affirmation of Hamilton Pointe Medical Record Keeper ("Med. Rec. Aff") ¶ 4; Fletcher Dep. Exs. 45 & 46). The only male CNA regularly assigned to the rehab unit at the time of PT's stay was Roshaun Middleton, who is African American. (Cates Aff., Ex. C; Payroll Aff., Ex. C).

Fletcher reported a concern about the reference to race on the worksheet to "Sara," Administrator Lauren Hayden, and Director of Nursing Paula Loveall. (Fletcher Dep. 90:10-15; 92:19-93). According to Fletcher, Sara did not see a problem with it because the resident had requested no male care. (*Id.* at 92:10-15, 155:7-25). Fletcher reported the reference to race to Hayden and Loveall. (*Id.* at 92:25-93:2). The statement appeared on the assignment sheet for approximately three more days. (*Id.* at 153:17-25; *see also id.* at 247:18-248-3 (testifying she saw the reference to race on "at least two" assignment sheets)). Fletcher did not see any other statement on an assignment sheet that referred to the race of a caregiver at any time during her employment. (*Id.* at 163:11-16 ("Q: After your hotline call, at any other time during your employment at Hamilton Pointe did you

see a statement on an assignment sheet that referenced the race of a caregiver, like no African American care? A: No.")).

Fletcher personally provided care to resident PT and did not observe her to have any racist tendencies during Fletcher's shifts. (*Id.* at 171:15-172:2). Fletcher does not know whether any African American males provided care to PT while the statement was on the assignment sheet. (*Id.* at 170:11-23). Fletcher was not prohibited from going in any resident's room. (*Id.* at 227). Fletcher testified that Middleton was "not really banned" from going in PT's room, it was just that the resident's family wanted no male care. (*Id.* at 242:5-23). Middleton, who worked third shift when fewer CNAs were present, provided care for PT if no one else was available to help her. (Filing No. 112-10, Deposition of Rashaun Middleton ("Middleton Dep.") at 135:19-137:11; Fletcher Dep. Exs. 45 and 46; Med. Rec. Aff. ¶ 4).

On May 21, 2015, approximately one month after PT's discharge, Fletcher called the hotline number available to Hamilton Pointe employees. (Fletcher Dep. at 145:25-147:23 & Ex. 42). She reported the assignment sheet that had previously referred to "no African American male care," her belief that there were "prejudices" at Hamilton Pointe, and that Lauren Hayden and Paula Loveall were "rude." (*Id.*, Ex. 42). The hotline is answered by TLC. (Cates Aff. ¶ 6). TLC sent Regional Director of Operations Tammy Bledsoe to Hamilton Pointe to follow up on the call. (Filing No. 100-41, Deposition of Tammy Bledsoe ("Bledsoe Dep") at 74:23-75:19). Bledsoe spoke with Fletcher, Hayden, and Loveall. (*Id.*). Both Hayden and Loveall testified Bledsoe's conversation with them concerned Fletcher's complaint that they were rude. Race was not raised in either

conversation. (Filing No. 112-5, Deposition of Lauren Hayden ("Hayden Dep.") at 115:10-116:20; Filing No. 112-17, Deposition of Paula Loveall ("Loveall Dep.") at 95:17-97:7; *see also id.* at 98:10-17 ("Q: Did Ms. Bledsoe tell you that Ms. Fletcher referred to a worksheet that states, "No African American male care'? A: I don't recall us having any conversation about that."). Fletcher does not recall Bledsoe speaking to her about the hotline call. (Fletcher Dep. at 159:5-17).

Discussion

Fletcher's case is distinguishable from *Chaney* for several reasons. First, the statement on the assignment sheet was not directed at her. When harassment is "directed at someone other than the plaintiff, the 'impact of [such] 'second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff.'" *Smith v. Ne. Ill. Univ.*, 388 F.3d 559, 567 (7th Cir. 2004) (quoting *Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997)). Second, the assignment sheet was taken down three days after she complained about it to Hayden and Loveall, and she never saw another statement like that during her employment at Hamilton Pointe. (Fletcher Dep. at 153:17-25, 163:11-16). Fletcher and other African American employees, both male and female, continued to care for PT, including while the statement appeared on the assignment sheet. (Fletcher Dep. Exs. 45, 46). Lastly, Fletcher alleges no co-worker or resident harassment.

Fletcher argues that after she called the hotline, no action was taken. She admits, however, that other than the statement regarding PT, she did not see any other statement

on an assignment sheet that related to race of a caregiver at any time during her employment. (Fletcher Dep. at 163:11-16).

On this record, the court finds Fletcher was not subjected to an objectively hostile environment, but even if she was, there is no basis for employer liability. Therefore, Hamilton Point is entitled to summary judgment as to Class Member No. 2, Sonja Fletcher.

3. Class Member No. 5, Tamara McGuire

Tamara McGuire started work at Hamilton Pointe on September 20, 2012 and remains an active employee. (Payroll Aff. Ex. A). She started work as a CNA. She currently works as an assistant activities director and picks up CNA shifts. (*Id.*; Filing Nos. 99-9 & 112-12, Deposition of Tamara McGuire ("McQuire Dep.") at 64:23-66:8). McGuire testified that she is not seeking monetary damages from Hamilton Pointe, and that she generally enjoys working there. (*Id.* 226:17-19).

McGuire alleges that on one occasion between June 2016 and December 2016, she was shown a copy of an assignment sheet by an African American CNA that said "no blacks allowed"; she believed the statement referred to a resident on the 800 or 900 hall. (*Id.* at 153:22-156:23, 158-59). She testified the CNA told her, "Don't go in this room . . . We're not even allowed to go in that room. So if that light comes on, you get somebody else." (*Id.* at 159:15-160:2). McGuire does not remember the name of the CNA who showed her the copy of the assignment sheet, (*id.* at 158:21-23), or the name of the resident about whom the statement was made, (*id.* at 155:2-12).

McGuire asserts CNA Roshaun Middleton was unable to care for several residents because he was a "black male … or because he had dreads." (*Id.* at 98:23-99:13). McGuire provided care to the residents when Middleton could not. (*Id.*). She identified two female residents on the skilled nursing unit, CN and OJ, who did not want black men taking care of them but allowed white men to take care of them. (*Id.* at 126:13-130:13). McGuire confirmed, however, that she and other African American females regularly provided care for CN and OJ. (*Id.* 130:8-15). McGuire does not remember hearing either Middleton or any nurse refer to race as the reason for any staffing change around Middleton. (*Id.* at 130:16-131:15).

McQuire asserts that two residents, AG[7] (female) and AM (male), preferred no African American caregivers.

- As to why she believes this regarding AG, McGuire testified she never saw African Americans provide care to her. (*Id.* at 219:2-20). McGuire has interacted with AG as part of her activity director duties and has never witnessed AG say that she did not want African Americans in her room. (*Id.* at 218:8-23). AG never made racial comments to McGuire. (*Id.* at 219:21-220:4). Hamilton Pointe records indicate that AG regularly had African American caregivers, including 20 other Class Members. (Filing No. 99-4, Flow Sheet Summary; Filing No. 99-5, Medication Administration Record ("MAR") Summary).

[7] There is evidence in the record that AG suffers from mental decline. (*See, e.g.,* Filing Nos. 99-14, Deposition of Shelia Langley at 76:13-77:3).

- As to AM, McGuire testified she was told by another CNA at shift change that AM did not want black caregivers. (*Id.* at 222:4-20). McGuire never heard AM say he did not want African American caregivers and never complained about the verbal statements from other aides. (*Id.* at 222:21-223:11). The last time she heard such verbal statements from other aides was in 2014 or 2015. (*Id.* at 224:13-225:4). Hamilton Pointe's records confirm that African American employees did provide care to AM. (Flow Sheet Summary, MAR Summary). McGuire also testified she heard race-based comments by three residents. (*Id.* at 122:23-123:9).
- She heard male resident JS say, "I don't want you n*****s in here. Leave me alone." (*Id.* at 190:10-198:20). A nurse, Cindy Rector, told McGuire she would take care of JS for the rest of the shift. (*Id.* at 191:22-24). McGuire assisted JS with activities after this shift. And African Americans regularly provided care to JS throughout his residence, including McGuire and 22 other Class Members identified by the EEOC. (Flow Chart Summary; MAR Summary).
- McGuire heard a resident, whom she was unable to identify, call another African American CNA a "black b*tch." (*Id.* at 200:23-201:5). The nurse said to her CNA, "Don't go back in there. We'll have somebody else go in there." (*Id.* at 212:8-20). McGuire does not know if African Americans provided care to this resident after the incident. (*Id.* at 213:5-213:13). McGuire did not report the slur because everyone heard it. (*Id.*).

- In February 2018, McGuire heard resident CS, who was in assisted living, call another aide, "that black N b*tch." (*Id.* at 214:12-17). McGuire has interacted with this resident in her capacity as activities assistant. (*Id.* at 215:7-9). The resident's behavior is documented on a behavior sheet, noting that he had used a racial slur and was refusing care from a black CNA. (*Id.* at 214:16-24). African American caregivers, including at least four other Class Members, cared for CS during his residence. (Flow Sheet Summary; MAR Summary).
- McGuire heard resident AG call a biracial resident a "black b*tch." (*Id.* at 201:1-202:22).

McGuire agrees that if a resident is hostile and aggressive toward a caregiver and refuses care, then it is proper intervention to have an alternate caregiver provide care. (*Id.* at 49:19-23). McGuire also agrees it is appropriate to have an alternate caregiver provide care after a resident refuses care and uses a racial slur. (*Id.* at 216: 4-7).

In October or November 2017, as McGuire was performing her activity director duties, she noticed that the wife of Administrator Shawn Cates was following her up the stairs. (*Id.* at 175:21-176:6). While in the bathroom, she overheard Cates and his wife talking. She testified Cates' wife said, "There was a black girl who just walked up here, and I have no idea where she went." (*Id.* at 176:11-13). Cates responded, "Well, you know all of the employees have uniforms on." (*Id.* at 177:20-21). His wife responded she did not have on a uniform. (*Id.* at 177:21). McGuire was offended by her statement. (*Id.* at 180:14-181:9).

McGuire states that two co-workers, Crystal Brown and Cosette Beliles, made work difficult for every black employee that worked the evening shift. (*Id.* at 183:1-184:5). They were always complaining about work not getting done and making allegations against the African American employees. (*Id.* at 184:2-3). McGuire complained to all her unit managers and nurses about them. (*Id.* at 185:13-23).

Discussion

McGuire's evidence is insufficient to establish a hostile work environment. As for the race-based assignment sheet, she saw it only once from an unidentified CNA and it did not affect her job assignment.

McGuire alleges four instances she heard residents use inappropriate racial language during her more than six-year tenure with Hamilton Pointe. African Americans routinely cared for the three residents involved who McGuire could identify. McGuire agrees that the facility's responses to the residents' behaviors in each instance involving CNAs was appropriate. (*Id.* at 216: 4-7).

McGuire complains two co-workers made things "difficult" on the evening shift for African American employees. Her testimony is problematic for two reasons. First, it is too vague and speculative to establish actionable severe or pervasive harassment, and second, it does not establish that the employees' conduct toward African Americans was "based on race."

McGuire argues she was offended by the administrator's wife who stated, "There was a black girl who just came up here, and I don't know where she went." But the statement does not, as she argues, establish the administrator's wife was following her

because she is black. But even if it did, the administrator's wife is a third party, and there is no evidence she ever complained about the incident. Consequently, the EEOC does not establish a basis for employer liability.

Collectively, the above circumstances do not establish severe or pervasive conduct based on race which are objectively hostile enough to have modified the terms and conditions of McGuire's employment. Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 3, Tamara McGuire.

4. Class Member No. 6, Vanessca Miles

Vanessca Miles was a CNA for Hamilton Pointe from January 18, 2013 through June 26, 2015. (Payroll Aff. Ex. A).

On one occasion a resident told Miles "[you] smell like pork," which Miles interpreted as a racial statement. (Filing Nos. 99-10 & 113-4, Deposition of Vanessca Miles ("Miles Dep.") at 75:15-76:12). She also believed a CNA from Nigeria with "darker skin," Cynthia, was treated unfairly. (*Id.* 74:24-75:25, 78:22-79:80:1). Miles saw a nurse yelling at Cynthia, but when Miles told that nurse it had been Miles's mistake, the nurse was "completely fine with it" and walked off. (*Id.* 126:4-127:128:19). Miles did not recall anything the nurse said or did specific to race, but thought the nurse was harsh with Cynthia because of her darker skin. (*Id.* 127:17-128:19). Miles complained about this to Director of Nursing Paula Loveall. (*Id*).

Miles testified it was a common occurrence for a nurse to verbally warn CNAs if a resident had racist tendencies or asked how it went after caring for such a resident. (*Id.* at

81:3-83:2). Miles still cared for those residents, and her job assignment was not affected. (*Id.* at 82:24-83:2).

Miles saw the 2015 assignment sheet for the Rehab Unit that indicated "NO AFRICAN AMERICAN MALE CARE" for resident PT. (*Id.* at 104:16-105:6, 106:16-107:7). Miles had not seen any indication regarding race on an assignment sheet before or after this occasion. (*Id.* at 111:9-111:22). Miles does not recall complaining about the assignment sheet. (*Id.* at 110:8-110:22).

Miles worked with PT. (*Id.* at 108:5-6; Med Rec Aff. ¶ 4; Fletcher Dep. Exs. 45 and 46). Miles was concerned that PT had Miles "fluff her pillows for about ten minutes one day," but Miles did not remember any behavior from PT that she considered racially inappropriate. (Miles Dep. at 108:5-109:6).

Discussion

These facts do not establish that Miles was subjected to severe or pervasive conduct based on race. The single comment she alleges, "you smell like pork," from a resident is not facially racial or so offensive as to alter the terms and conditions of her employment. She offers nothing other than speculation as to why a nurse was frustrated with another African American CNA, but the same nurse was "ok" when Miles stated the issue was her mistake.

Miles was sometimes "warned" if a resident displayed racist behaviors. A warning from nurses that certain patients had racist tendencies is simply that—a warning. She was not prohibited from caring for any resident and her job assignment was not affected. (*Id.* at 81:3-83:2).

The EEOC argues the assignment sheet stating, "No African American Male Care" by PT's name "is highly offensive" and "brings to mind the days of segregated lunch counters and bus seats." (Am. Resp. at 43). The assignment sheet may have been offensive, but the statement was not directed at her and did not affect the terms and conditions of her employment. She never saw an assignment sheet like that again during her employment. (*Id.* at 111:9-22). Furthermore, Miles does not recall ever complaining about the assignment sheet. (*Id.* at 110:8-110:22). Miles cared for PT and does not recall PT exhibiting racially inappropriate behavior in her presence. (*Id.* at 109:2-6).

Miles' experience is distinguishable from the plaintiff in *Chaney*. She saw the assignment sheet only once, it was directed at African American males, and it was taken down within three days. It did not affect her job assignment. And she was not called racial slurs by her co-workers. On this evidence, Hamilton Pointe is entitled to summary judgment as to Class Member No. 6, Vanessca Miles.

5. Class Member No. 9, Trent Carter

Trent Carter was a dietary aide at Hamilton Pointe from April 15, 2013 through June 8, 2017. (Payroll Aff. Ex. A). Carter was terminated for non-race-related reasons. (Filing No. 99-2, Affirmation of Hamilton Pointe HR Record Keeper ("HR Aff.") ¶ 4(b)).

Carter testified that his supervisors told him on several occasions not to take trays into resident rooms. (Filing Nos. 99-11 & 112-15, Deposition of Trent Carter ("Carter Dep.") 46:1-48:2). He understood this to mean any resident's room, regardless of the race of the resident. (*Id.* at 47:19-48:2). Dietary Manager Annette Brown told Carter on two occasions not to take trays into resident rooms in approximately May 2017, about a

month before his termination. (*Id.* at 47:16-18, 49:21-50:6). Brown said that a man's watch had come up missing, and that "the white CNAs told her that none of the black CNAs could go into the rooms either." (*Id.* at 48:3-49:6).

Carter's next manager "James" told Carter on three occasions that he should not go in resident's rooms because James didn't want Carter to get accused of taking things out of the rooms. (*Id.* at 51:8-18). James said he had heard black CNAs could not go in resident's rooms. (*Id.* at 51:20-52:18). In general, Carter was to deliver meals to halls, and nurses were to deliver meals to residents' rooms. (*Id.* at 46:11-25). Carter said that he was supposed to help if nurses were not available, but even before the discussions about not going in residents' rooms came up with his supervisor James, he had never been in a resident's room. (*Id.* at 47:1-7, 51:23-52:10).

Carter heard the "n-word" used at Hamilton Pointe on one occasion. (*Id.* 53:16-17; 54:21-23; 55:5-7). He was in the hall outside the kitchen and heard an unknown female speaker behind the closed kitchen door say, "We didn't want that big-ass nigger working here no more." (*Id.* 53:20-54:10). He does not know who the speaker was or who the speaker was talking about. (*Id.* 54:19-20). He did not report this or raise any complaint. (*Id.* 54:11-15).

Discussion

These facts fail to establish Carter was subjected to a racially hostile work environment. Carter testified that instructions from management about dietary staff not entering resident rooms was based on a concern about avoiding theft allegations. Carter's evidence that black CNA's could not go into residents' rooms is hearsay and is thus,

inadmissible. Regardless, the alleged instruction not to enter residents' rooms around the time of the alleged thefts at the facility did not change his duties in any way.

Carter heard the "n-word" used once during his employment. He did not know who said it or to whom it was directed, but the epithet was not directed at him. Accordingly, there is no basis for employer liability here. Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 9, Trent Carter.

6. Class Member No. 11, An'Yel Crawford

An'Yel Crawford was a CNA at Hamilton Pointe from December 18, 2015 through April 7, 2017, when she resigned to take another position. (Payroll Aff. Ex. A). Crawford was not restricted from caring for any resident because of her race or because of any resident or resident's family member's alleged racial preference. (Filing No. 100-17, Crawford Records at EEOC 3134). She never witnessed any CNA or nurse reassigned or restricted from caring for a resident because of alleged racial preference but heard a co-worker say they believed this had occurred. (*Id.* at EEOC 3135). She never saw any race reference on an assignment sheet. (*Id.* at EEOC 3136).

On one occasion a nurse told her that she thought a resident was a racist and suggested that she not go in the resident's room by herself. (*Id.* at EEOC 3135). On another occasion, she alleges that her charge nurse told her not to enter a resident's room because of an alleged racial preference of the resident. (*Id.*).

Discussion

Over the course of her 18-month tenure, Crawford alleges (1) that she was told a co-worker thought a resident was racist and to avoid her room and (2) that a charge nurse

told her not to enter a resident's room due to the resident's racial preference. The co-worker's statement is inadmissible hearsay. But even assuming the veracity of both incidents, this evidence does not establish severe or pervasive harassment because of Crawford's race. Hamilton Pointe is therefore entitled to summary judgment as Class Member No. 11, An'Yel Crawford.

7. Class Member No. 12, LaShawn Johnson

LaShawn Johnson was a CNA at Hamilton Pointe for just under three months from February 17, 2016 through May 5, 2016. (Payroll Aff. Ex. A).

LaShawn once saw a schedule or assignment sheet that referred to race. (Filing Nos. 99-12 & 113-11, Deposition of LaShawn Johnson ("Johnson Dep.") at 27:2-29:16). He took a picture of it because it made him feel "uncomfortable," but he lost it. (*Id.* at 19:2-4, 31:15-32:16). He was unclear on what type of sheet it was or what it stated, but said it indicated that no African Americans, either male or female, could go in specific rooms. (*Id.* at 27:2-29:16). This was the only time he saw anything in writing about the race of a caregiver at Hamilton Pointe. (*Id.* at 29:1-16).

For him personally, three or four residents on the skilled nursing unit to which he was assigned, including two females (LK and BG), did not want male care from blacks. (*Id.* at 33:4-41:2). LK was fine, however, with LaShawn bringing her treats and answering her call light. (*Id.* at 120:3-4). If LK needed cleaning, toileting, or care of a more private nature, she preferred a female, although LaShawn thinks she allowed a white male nurse to change her. (*Id.* at 119:5-120:22). LaShawn testified Khaliah Price or An'Yel Crawford took care of BG when he was unable to. (*Id.* at 122:3-123:8). Both

Price and Crawford are African American, and LaShawn agreed that BG's concern was with male care, not African American care generally. (*Id.*; Payroll Aff., Ex. C).

LaShawn did not hear any words used that he considered racially derogatory while he worked at Hamilton Pointe. (*Id.* at 127:3-15). However, on one occasion he left his assigned workstation to assist his then-girlfriend, now-wife Amanda, lift a male patient. (*Id.* at 115:7-15). Amanda's nurse (supervisor) told him not to go back to that room and to stay where he belonged. (*Id.* at 114:20-115:6). As he left, he overheard the nurse on that floor ask Amanda, who is Caucasian, "Why are you with a black man? Why don't you have a white man?" (*Id.* at 115:25-116:15).

Following the incident described above, LaShawn testified the wife of the male patient did not want African Americans taking care of her husband. (*Id.* at 111:4-10). This did not change LaShawn's work assignment because he was not assigned to that unit. (*Id.* at 116:22-117:5). He did not complain about this instruction or the resident's alleged request. (*Id.* at 112:6-17).

Discussion

Over the course of his three-month employment at Hamilton Pointe, Johnson encountered one assignment sheet that said something like "no African American care." (Johnson Dep. at 27:2-29:16). Of the three or four residents LaShawn believed this applied to, he admits he provided care for LK, just not care of a personal nature. (*Id.* at 119:5-120:22). The other resident, BG, only had an issue with male care, and African American female CNAs provided care for her when Johnson was not available. (*Id.* at 122:3-123:8). Johnson was told not to care for a male resident because of his race, but

Johnson was not assigned to that unit and he did not complain. (*Id.* at 111:4-10, 112:6-17, 116:22-117:5).

Assuming all of this to be true, coupled with the co-worker's question as to why his girlfriend was dating a black man, (*id.* at 115:25-116:15), the court finds Johnson's work environment was not objectively hostile or abusive such that his working conditions were materially altered. Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 12, LaShawn Johnson.

8. Class Member No. 13, Raven Langley

Raven Langley was a CNA at Hamilton Pointe from June 30, 2015 to September 2, 2015; she was rehired from June 15, 2016 through July 22, 2016. (Payroll Aff. Ex. A). Her race-related concerns arose during her 2016 employment with Hamilton Pointe, which lasted just over one month. (Filing Nos. 99-13 & 113-1, Deposition of Raven Langley ("Langley Dep.") at 45:13-17).

Raven heard two female residents use language she considered racially inappropriate after her two-week training period. The first resident called her "the help" repeatedly—more than five times but less than 20 times. (*Id.* at 59:25-60:13, 69:25-70:22, 74:17-24). Raven's assignment sheet noted this patient had dementia. (*Id.* at 74:17-24). The resident did not use any other language Raven considered harassing. (*Id.* at 62:23-25). Raven reported the resident's use of the phrase "the help" to her charge nurse and asked that she be reassigned. (*Id.* 63:1-64:1). The charge nurse told Raven to bring someone else in resident's room with her. (*Id.* at 63:1-12). Raven preferred to

bring someone else in the room with her and was comfortable continuing to provide care to the resident. (*Id.* at 63:11-18).

The second resident said she did not want the "n-word" taking care of her. (*Id.* at 59:25-60:3; 64:6-11). Raven reported this resident's behavior to her charge nurse. (*Id.* at 67:1-5). The charge nurse said this behavior was normal for that resident. (*Id.*). Raven was still comfortable taking care of this resident, and, at her preference, took another caregiver in with her while she cared for the resident. (*Id.* at 67:15-23). This resident used the n-word three to five times during Raven's employment. (*Id.* at 65:25-66:7; 71:1-7). Raven did not ask to be reassigned away from this resident at any time. (*Id.* at 68:3-5). Raven agrees that bringing in a second caregiver during care is an approach used in multiple situations in long term care, and that the practice is protective for both the employee and the resident. (*Id.* at 88:19-89:8).

Raven's assignment was never changed because of race and she does not contend she was prohibited from any room because of race. (*Id.* at 78:19-24). Raven never heard a resident say they did not want black or African American caregivers, and never documented any request like that. (*Id.* at 78:25-79:7). Raven saw notes on assignment sheets if a resident displayed behavior toward caregivers of a particular race, but never saw an assignment sheet stating "No African American care" or anything similar. (*Id.* at 76:5-77:6). During orientation Raven was told a resident "preferred to be taken care of by a certain person." (*Id.* at 77:10-14). She observed care for that resident during orientation but was not assigned to that hall during her employment and does not know if

the facility accommodated the resident's preference or who cared for that resident. (*Id.* at 77:15-78:3).

Raven did not consider the work environment to be offensive at Hamilton Pointe. (*Id.* at 84:14-16 ("Q: And did you consider the work environment to be offensive? A: No, as far as on a day – no.")). The racial slurs caused her emotional harm "in the moment" but did not bother her long-term. (*Id.* at 84:17-20 (Q: "Did you experience any emotional harm or distress during your employment at Hamilton Pointe? A: In the moment, yes, just from the slurs, but after, no. Q: And as soon as your employment with Hamilton Pointe ended, you're saying you did not feel any continuing distress at that point? A: Correct.")).

Discussion

Raven testified that two different residents, one of whom she believes had dementia, used inappropriate language over an approximately three-week period after her training and before she voluntarily resigned her employment. The resident with dementia called her "the help." In the context of caring for an individual with dementia, the phrase is not the type of comment which is so severe as to alter the conditions of her work environment. Regardless, in both instances Raven reported the residents' behavior, brought in another CNA to assist her, was comfortable continuing to care for the residents, and did not ask to be reassigned at any point. Raven did not find the work environment at Hamilton Pointe to be offensive. Consequently, no reasonable jury could find Raven was subjected to a racially hostile work environment. Accordingly, Hamilton Pointe is entitled to summary judgment as to Class Member No. 13, Raven Langley.

9. Class Member No. 14, Shelia Langley

Shelia Langley is an LPN currently employed at Hamilton Pointe. She began her employment at Hamilton Pointe on May 24, 2016. (Payroll Aff. Ex. A).

Shelia's race-related concerns while at Hamilton Pointe relate to one resident, AG. (Filing Nos. 99-14 & 113-13, Deposition of Shelia Langley ("S. Langley Dep.") at 75:10-14, 80:14-18). She never saw any assignment sheets or other written document indicating any racial preferences. (*Id.* at 80:19-81:1). She never heard inappropriate racial comments from any staff or coworkers. (*Id.* at 80:2-6). Shelia understood AG to have various diagnoses including dementia and a personality disorder. (*Id.* at 76:13-77:3). Shelia observed AG engage in various "attention-seeking" behaviors and agreed she was difficult in ways other patients were not. (*Id.* at 102:8-103:9, 105:4-107:2).

AG used the phrase, "you people" frequently, more than ten times during Shelia's work with AG. (*Id.* at 81-82). In reference to AG's work with an African American pastor in Henderson, Kentucky, AG said, "I was always good to those black kids," and, "I would buy Anthony this for…Christmas, and I never made a difference in you all people." (*Id.* at 82:8-12). When news of the EEOC suit against Hamilton Pointe appeared in the newspaper, AG said, "The blacks will probably be out here protesting." (*Id.* at 82:14-18). AG offered Shelia coupons for Meals on Wheels for people at Shelia's church, and said, "I like all of you people, you blacks," and, "we're going to be friends, and I just love you." (*Id.* at 82:24-83:19). Shelia heard from co-workers that AG used other racial language but did not personally hear any other racial statements from AG. (*Id.* at 107:3-107:25). Other nurses had told Shelia that AG "has trouble with blacks,"

that Shelia "will have trouble with her," and that AG "had gotten black people fired and taken off [another] hall[.]" (*Id.* at 114:16-115:14).

Shelia was not offended by AG referring to people as "black," but was offended if AG used the phrase "you people" or "you all people." (*Id.* at 84:1-21).

Shelia reported AG's use of the phrase "you people" to Hamilton Pointe Social Services.[8] (*Id.* at 85:10-24). Shelia also told a co-worker, Sherry Warninger, about AG's use of the phrase "you people" in case Sherry needed to be a witness if AG made an accusation against Shelia. (*Id.* at 85:25-87:6).

In October or November of 2017, AG accused Shelia of stealing two of her medications. (*Id.* at 83:16-19, 92:3-15). Another nurse, Jackie Lamp, was in the room when AG accused Shelia; both Shelia and Jackie wrote a statement confirming that the medication had been given. (*Id.* at 88:18-89:12).

Shelia was asked not to care for AG from approximately December 2017 to June 1, 2018. (*Id.* at 83:16-19; 97:15-98:25). Shelia was told by Director of Nursing Lynn Jones that AG did not want Shelia caring for her or giving her medications, that Shelia would need to find someone else to give AG her medications, and that Shelia should take someone else in the room with her if she did need to go in. (*Id.* at 94:7-23). Shelia did not hear anything AG said that led to this change. (*Id.* at 94:1-8). Shelia was hurt by AG's request, but told Jones, "That's good." (*Id.* at 94:24-95:9). Shelia does not know

[8] Among other things, Social Services conducts assessments of residents (1) upon admission and (2) if there is a change in their behaviors or condition. A change in a resident's behaviors or condition could signal a health concern or require a change to the resident's care plan. (Cates Aff. ¶ 12).

why AG made the request, and Jones did not say why. (*Id.* at 95:12-16). No one told Shelia AG's request was race-based. (*Id.* at 103:22-2).

Between December 2017 and June 1, 2018, Shelia could go in the room to care for AG's roommate but had to find someone else to give AG her medication. (*Id.* at 93:16-23). Shelia believed AG's request was race-based because, although AG said she loved Shelia, Shelia thought AG did not really like her. (*Id.* at 103:22-104:21). During the time Shelia was not taking care of AG, Shelia saw other African American CNAs or nurses taking care of AG. (*Id.* at 99:25-100:5).

As of June 1, 2018, AG told Shelia she wanted her to be her regular nurse again, and Shelia's relationship with AG "was good" again after that. (*Id.* 98:14-25).

Discussion

Shelia's evidence is insufficient to establish a hostile work environment. She reports several uses of the phrase "you people" by AG, a woman she understood to be suffering from dementia and a personality disorder. She also reports AG accused Shelia of not giving her medications, and within a month or two of those accusations, asked that Shelia not take care of her. (S. Langley Dep. at 83:16-19, 92:3-15, 97:15-98:25). While Shelia subjectively believes AG's request was race-based, there no evidence to support her supposition. Shelia did not complain about AG's request at any time and responded, "That's good" when she was told by the director of nursing that she was no longer AG's caregiver. (Shelia Dep. at 94:25-95:9). In addition, other African American CNAs or nurses took care of AG during the period Shelia did not. (*Id.* at 99:25-100:5). Shelia's current work relationship with AG appears to be back on track. These facts fail to

establish severe or pervasive conduct or, for that matter, objectively hostile conduct in the context of a long-term care facility. Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 14, Shelia Langley.

10. Class Member No. 15, L'Sheila Lewis

L'Sheila Lewis was a CNA at Hamilton Pointe for less than two months from April 5, 2016 through May 27, 2016. (Payroll Aff. Ex. A).

Lewis considered the work environment at Hamilton Pointe to be racially offensive "at times." (Filing Nos. 99-15 & 113-9, Deposition of L'Sheila Lewis at 105:7-11). On Lewis's last day of employment, while she was providing care for a white female resident, the resident called Lewis a "black B" and the "n-word." (*Id.* at 59:4-60:20). The resident was not combative and did not try to hit Lewis. (*Id.* at 64:9-65:5). Lewis reported the resident's behavior to fellow class member Ruth Washington, who told Lewis she would document it. (*Id.*). Lewis was suspended pending investigation at the end of her shift because of a complaint against her, which Lewis believes was made by the same resident who used the inappropriate language. (*Id.* at 83:9-85:6). Following an investigation, Lewis was terminated. (*Id.* at 84:10-85:6). Lewis did not encounter this resident again because of her termination. Lewis never heard any other racial language from any other resident during her time at Hamilton Pointe. (*Id.* at 65:6-11).

Lewis testified she was told on two consecutive shifts, about a month into her employment, not to go into a particular resident's room on the rehab unit by a CNA at shift change. (*Id.* at 90:22-97: 20). On the first occasion, the CNA told her, "Hey, you know, you can't go into such and such's room. . . You can't go in her room because she

doesn't want any African American … she doesn't want any black people in her room." (*Id.* at 90:22-91:9). When Lewis spoke with a nurse about the first situation, the nurse told her that the resident had refused care. (*Id.* at 93:16-94:14). Lewis felt the nurse was trying to "sugarcoat it" but "made it known that it was a black person that couldn't go into the room and care for this person." (*Id.* at 93:16-95:6). On the second occasion, the departing CNA asked if she knew she could not go in the room "because they've already requested no black people," and Lewis said she knew this. (*Id.* 93:2-15; 96:8-20). Lewis did not speak with a nurse on this second occasion. (*Id.*). Lewis did not complain about what the departing CNAs had told her or about the resident's alleged request. (*Id.* at 102:7-104:1).

Discussion

The court finds Lewis was not subjected to a racially hostile work environment. During her employment at Hamilton Pointe, Lewis alleges she was told on two occasions by a departing CNA not to go in a resident's room because the resident did not want black people in her room. (Lewis Dep. at 90:22-91:9, 93:2-15; 96:8-20). The only time Lewis spoke with a nurse about this, the nurse said the resident had refused care from "a person." (*Id.* at 93:16-94:14). Lewis admits she did not complain about what the CNA told her. (*Id.* at 102:7-104:1).

On her last day of employment, Lewis testified a resident called her racial epithets. (*Id.* at 59:4-60:20). Lewis complained to Washington, who told her she would document the incident. (*Id.*). Lewis was suspended that same day for other reasons. (*Id.* at 84:10-85:6). She never encountered the resident again.

Based on the totality of the circumstances, no reasonable jury could find Lewis was subjected to a racially hostile work environment during her seven-week employment at Hamilton Pointe. Therefore, Hamilton Pointe is entitled to summary judgment as to Class Member No. 15, L'Sheila Lewis.

11. Class Member No. 17, Edward Partee

Edward Partee ("Partee") was employed as an LPN at Hamilton Pointe from March 19, 2015 through July 29, 2015. (Payroll Aff. Ex. A).

Partee alleges on one occasion in May 2015 he saw an assignment sheet that said no black male employees could work on the 800/900 hall. (Filing No. 99-16, 113-10, Deposition of Edward Partee ("Partee Dep.") at 78:23-79:22). He complained about the statement to the director of nursing at that time, Paula Loveall, and the statement was removed the next time he was back at work. (*Id.* at 79:23-80:11). He complained about the assignment sheet to Administrator Lauren Hayden and complained through a hotline call. (*Id.* at 81:9-25, 89:23-90:17). This was the only instance he saw reference to race on an assignment sheet or schedule sheet at Hamilton Pointe. (*Id.* at 80:12-16). Partee was not assigned to the 800/900 hall at the time he saw this statement. (*Id.* at 80:23-81:4). Partee testified that he did not feel humiliated by the statement on the assignment sheet but did feel angry and disappointed. (*Id.* at 104:17-105:1)

Discussion

Partee's case rests on the assignment sheet stating no black men could work on the rehabilitation unit. The EEOC contends, without citation to authority, that the "instruction [on the assignment sheet] alone is severe enough to create a hostile work

environment." (Am. Resp. at 52). The EEOC's contention is mistaken. The case which has the closest set of facts—*Chaney*—involved an assignment sheet that the plaintiff CNA viewed daily for three months. *Chaney*, 612 F.3d at 912. Moreover, she was banned for caring for a resident based on the facility's acknowledged policy of accommodating such requests and was subjected to multiple racial epithets from co-workers in a matter of months. *Id.* at 912-13.

Partee's experience is easily distinguishable from *Chaney*. Partee saw a reference to "no black male" care on an assignment sheet during one of his shifts. He complained to Loveall about the race-based directive and the directive was taken off the assignment sheet by the time he came back for his next shift. (Partee Dep. at 80:5-11). The assignment sheet did not pertain to Partee because he did not work in the 800/900 hall. (*Id.* at 80:23-81:4). And Partee was not the victim of racial slurs from his co-workers. Based on these facts, the court finds Partee was not subjected to an actionable hostile work environment. Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 17, Edward Partee.

12. Class Member No. 18, Takia Roberts

Takia Roberts was employed as a dietary aide and dietary cook at Hamilton Pointe between November 5, 2015 and July 22, 2016. (Payroll Aff. Ex. A).

About a month into Roberts' employment, female resident JH accused Roberts of verbally abusing her, resulting in a state reportable incident on December 18, 2015. (Filing No. 99-17, Filing No. 113-2, Deposition of Takia Roberts ("Roberts Dep.") at 27:8-28:25 & Ex. 308). After an investigation, verbal abuse was not substantiated, and

by December 23, 2015, Roberts was returned to the schedule with counseling and training. (Roberts Dep. at 59:1-62:1 & Ex. 308). Roberts was advised to "stay away from [JH] due to the allegations." (Roberts Dep. at 71:10-20).

Following JH's allegations, Roberts felt "harassed" by Administrator Lauren Hayden. (*Id.* at 75:11-77:21). Roberts testified that if her boss asked her to pass out ice trays for the residents, Hayden "made it where I had to stay in the kitchen." (*Id.* at 76:6-24). Roberts testified Hayden's response after the allegations "could have been" because of Roberts' race, because Roberts was the only one Hayden was "picking on." (*Id.* at 77:4-25).

Roberts heard residents use language she considered racially charged. For example, she heard female resident JH call an African American male co-worker a "boy" "every few days." (*Id.* at 67:13-68:5). She did not complain about JH's use of this phrase to anyone in management at Hamilton Pointe and does not believe any of her co-workers did. (*Id.* at 68:13-15). Roberts was offended by the resident's use of the word "boy" and thought the resident intended it to have a racial connotation. (*Id.* at 68:22-69:9).

While Roberts was in the dining room, she also heard four or more female residents from the skilled nursing unit use the "n-word" two or three times a day. (*Id.* at 63:1-65:20, 67:5-7). She doesn't remember their names. (*Id.* at 65:2-3). She found this language offensive but has heard this language used at other long-term care facilities she has worked for. (*Id.* at 66:4-5). She did not complain to anyone in management because "a lot of places they would just sweep it under the rug." (*Id.* at 66:21-67:1). Roberts also testified those same four female residents said they did not want to be taken care of

by an "n-word." (*Id.* at 72:1-16). She did not think these residents were referring to her because, as a dietary aide, she was not allowed to go in their rooms. (*Id.* at 73:9-11). Roberts said that many African American staff members continued to care for these residents. (*Id.* at 73:19).

Effective March 20, 2016, Roberts's position was changed by her supervisor, Annette Brown, from dietary aide to dietary cook, with an accompanying $1 per hour pay increase. (*Id.* at 44:18-45:24 & Ex. 307 at HP2649 and 2651; HR Aff. ¶ 4e). Roberts perceived this change as related to Hayden's alleged preference that Roberts not come out of the kitchen after JH's December 2015 allegations. (Roberts Dep. at 76:6-29).

Roberts does not feel she experienced any physical or emotional harm while working at Hamilton Pointe. (*Id.* at 78:1-4).

Discussion

The EEOC suggests that Roberts heard racially offensive language from staff members. In her deposition, Roberts initially stated there were both resident and co-worker comments she considered harassing, but she clarified in subsequent testimony that there were no co-worker/staff comments she considered harassing. (Roberts Dep. at 63:1-18, 69:17-70:13). When asked about co-worker comments specifically, Roberts described the use of racial language used between African American co-workers in the kitchen at Hamilton Pointe, which she did not consider discriminatory or harassing, and which she did not find offensive. (*Id.* at 69:14-70:25).

Roberts heard JH use of the word "boy" and other residents use the "n-word" daily. Understandably, she found this language offensive. But this language was not

directed at her and she never complained about this behavior to anyone in management. Furthermore, she disclaims any emotional harm. (Roberts Dep. at 78:1-4 ("Q: Do you feel like you had any emotional or physical harm that happened to you while you were at Hamilton Pointe? A: No, ma'am.")).

The EEOC asserts that Hamilton Pointe acted on JH's complaint and suspended Roberts, even though JH used racially offensive language. This is not evidence of a hostile work environment. Federal and state regulations require long-term care facilities to investigate residents' allegations of abuse, neglect, exploitation, or mistreatment. 42 C.F.R. § 483.12(b), (c). Based on this evidence, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 18, Takia Roberts.

13. Class Member 20, Montoya Smith

Montoya Smith was a QMA at Hamilton Pointe from March 16, 2015 through May 31, 2016. (Payroll Aff. Ex. A).

Smith alleges she heard inappropriate racial language from residents.

- She heard the "n-word" used by some residents which she reported several times. (Filing No. 99-18 & Filing No. 112-22, Deposition of Montoya Smith ("Smith Dep.") at 110:7-111:22, 112:1-113:2). When asked to reiterate what she told her supervisors, she described residents with Alzheimer's who used the slur when they became upset. (*Id.* at 112:8-21 (stating the "Alzheimer's residents, the ones who have memory issues," remember enough to use the slur when they are upset because to them, "it's just like a regular old day in 1912"); *but see id.* at 118:13-25 (stating she did not know their "state of being or mind")). Her supervisors

responded by saying something like, "Oh, it's of their era. You know, they just do that. You know, they have their rights. Well, that's you know, go out and smoke a cigarette." (*Id.* at 112:7-113:2). She did not ask to be reassigned at any time. (*Id.* at 119:2-120:1).

- She also heard the phrase "server" or "the help" used in the dining room and hallway. (*Id.* at 120:2-17). Sometimes she reported this, other times she believes supervisors witnessed the residents using these phrases. (*Id.* at 120:18-22). When she reported, she was told, "That's of their era. Don't pay it any attention. Brush it off. You know, that's how they were raised." (*Id.* at 120:23-121:14). She did no further reporting because she believed it wouldn't get any different result. (*Id.* at 121:15-19).

Smith heard co-workers say things like, "I'm not racist," they have a certain number of black friends, they "hang out with black people," or "I don't see color." (*Id.* at 122:6-123:21). She testified someone told her, "[You] all look alike," "I get you girls mixed up all the time," and, "Oh, I was expecting a black girl with a name like that," in reference to a name like "Shakita, Shamika." (*Id.* at 123:5-13). Smith testified that a co-worker named Becky dated an African American. Becky told Smith that she did not understand why "the black girls" didn't like it and said it "wasn't her fault that his black mother had all of those children and didn't do anything for them." (*Id.* 124:16-125:2).

Smith did not complain to management about any of these co-worker statements. (*Id.* 125:3-7). Smith did not tell any of these co-workers that she found their statements offensive. (*Id.* 127:9-128:1).

Discussion

The evidence is insufficient to establish a hostile work environment based on race. The statements from co-workers, such as "I'm not racist," are not objectively hostile. The references to what one co-worker expected to be a black name, that black people "look alike," etc. are insensitive and show racial stereotypes, but they are not sufficiently severe or pervasive as to alter the conditions of her work environment.

Smith also heard racial slurs from residents who suffered from Alzheimer's disease and other "memory issues," (Smith Dep. at 112:8-21), and heard other residents use the terms "server" and "the help," (*id.* at 120:2-17). There is no evidence that she was physically threatened or that the terms and conditions of her employment were altered. She did not ask to be reassigned. Given the unique circumstances of her employment, the court finds Smith was not subjected to a racially hostile work environment. Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 20, Montoya Smith.

14. Class Member No. 21, Bianca Toliver

Bianca Toliver was a dietary cook employed at Hamilton Pointe from May 28, 2015 through January 19, 2018. (Payroll Aff. Ex. A). Toliver testified that dietary employees were generally responsible for delivering meals to the proper hall, and that CNAs or nurses would deliver to the specific resident's room, but dietary employees would sometimes take trays to rooms if a CNA was not available. (Filing Nos. 99-19 & 112-16, Deposition of Bianca Toliver ("Toliver Dep.") 40:6-41:13).

Toliver was told by a charge nurse on the rehab unit, and considered it to be a standing instruction, that if she had meals to deliver to the rehab unit, she should deliver them to the nurses' station because a particular resident didn't want African Americans in their room. (*Id.* at 18:9-19:24). When questioned in more detail about what Toliver had been instructed by the nurse, she admitted that the nurse had never said anything about racial preference or Toliver's race as the reason for the request to deliver trays to the nurses' station. (*Id.* at 87:14-88:21). Toliver thought this was race-related because of rumors that had spread in the building that this resident refused to deal with any African Americans. (*Id.*). Toliver does not know how rumors of the resident's preference "got out there" but she thinks CNAs, including class member Yana Shelby, told her about the resident's preference. (*Id.* at 88:22-90:4). She also heard the rumor from dietary aide and class member David Ussery. (*Id.* at 91:1-8). Toliver did not complain to any supervisors about the occurrence. (*Id.* at 92:23-93:5).

In June 2015, on Toliver's first day of work, Toliver heard a co-worker named Belinda say on the floor at Hamilton Pointe that she [Belinda] "was not cleaning up after these [N-word]s." (*Id.* at 73:9-76:10). Toliver understood Belinda to be referring to Ussery, who had left dishes in the sink, but took the reference personally. (*Id.* at 76:20-77:11). Toliver left and immediately told her supervisor Chef Calvin, who said he would take care of it. (*Id.*). Calvin spoke to Belinda that same day. Belinda came back and apologized to Toliver, and Toliver never heard Belinda use the word again. (*Id.*). Toliver did not consider Calvin's response or Belinda's apology sufficient and returned to Calvin, who told her that Belinda "didn't mean it that way." (*Id.*). Toliver did not go to

HR or further elevate her concern about Belinda after she was unsatisfied with Calvin's second response. (*Id.* at 81:22-82:1).

Sometime after 2015, Belinda told Toliver she was from Boonville and rarely saw African Americans and touched Belinda's hair without asking. (*Id.* at 82:2-86:20). Toliver pushed Belinda's hand away and said, "Get your hands out of my hair." (*Id.*). Toliver said Belinda tried to start a conversation about the different texture of African American hair, which she described as "coarse" and Belinda described her hair as "thin." (*Id.*). The two then had a conversation about race not defining the texture of one's hair, and then both went back to doing their duties. (*Id.*). Toliver did not report this exchange to anyone. (*Id.* at 86:18-20).

Discussion

Contrary to the EEOC's argument, the court finds Toliver was not subjected to race-based job assignments. She was once told to deliver meals for a specific rehab unit resident to the nurse's station, which did not change Toliver's standard procedure. (Toliver Dep. at 92:16-22). Toliver assumed the request was race-related because of rumors that had spread in the building that a resident refused to deal with African Americans. (*Id.* at 87:14-88:21). Toliver did not complain to any supervisor about the nurse's instruction or the rumors she heard. (*Id.* at 92:23-93:5).

Toliver experienced two racial comments from Belinda, her co-worker, over the course of nearly three years of employment. Belinda's use of the "n-word" was certainly offensive, but it was directed to another Hamilton Pointe employee. Moreover, after Toliver reported the incident to her supervisor, Belinda apologized to Toliver and Toliver

did not hear Belinda use that word again. (*Id.* at 76:20-77:11). Belinda also touched Toliver's hair without permission and initiated a brief conversation in which Toliver participated about differences in hair texture. (*Id.* at 82:2-86:20). Toliver did not report this exchange. (*Id.* at 86:18-20).

Toliver's encounters with Belinda and instruction to deliver trays to the nurse's station do not constitute severe or pervasive harassment. Nor is there a basis for employer liability. Consequently, Hamilton Pointe is entitled to summary judgment as to Class Member No. 21, Bianca Toliver.

15. Class Member No. 22, David Ussery

David Ussery was a dietary cook at Hamilton Pointe from February 6, 2013 through January 18, 2018. (Payroll Aff. Ex. A).

Ussery heard three co-workers use the word "boy" at Hamilton Pointe.

- The first such instance was in October 2014. Ussery testified he and a co-worker named Samantha were laughing and joking. (Filing Nos. 99-20 & 112-27, Deposition of David Ussery ("Ussery Dep.") at 59:20-60:12). Samantha responded saying, "Watch it, boy." (*Id.* at 75:1-3). Ussery became upset and said he would "bite[ ] her head off." (*Id.* at 60:25-62:9). Samantha said she didn't understand why Ussery was upset and said "boy" was a "young child of male origin." (*Id.* at 75:17-19). Another African American female co-worker, Tisha, whom Ussery was dating at the time, told Ussery he should leave the assisted living unit. (*Id.* at 75:24-25). Ussery admits the conversation became heated. (*Id.* at 76:3-5). Ussery was suspended for three days and provided a written statement

about the incident. (*Id.* at 59:24). Samantha did not use the word "boy" to Ussery again after this incident. (*Id.* at 76:22-24).

- Ussery testified a Caucasian nurse named Rebecca called him "boy" on two occasions later in his employment. (*Id.* at 100:25-101:5). On the first occasion, Rebecca saw Ussery and a co-worker, Robert ("JJ") Wilson in the hall and said to JJ, "You'd better get your boy." (*Id.* at 104:21-105:6). Ussery told JJ he was offended, and JJ told Rebecca that is an offensive thing to say to a black man and that she should not say it and it was wrong, and Rebecca apologized. (*Id.* at 102:14-104:14, 105:11-16). Ussery testified Rebecca used the word "boy" again during a discussion with Ussery and some nurses about whether they could get food out of the kitchen. He does not remember the exact words Rebecca used on this occasion. (*Id.* at 106:2-18). He reported Rebecca's second use of the word "boy" to his supervisor Annette Brown, who said she would look into it. Rebecca did not use the word "boy" again in Ussery's presence. (*Id.* at 106:19-25).
- Ussery testified a dietary aide named Hanna, with whom he'd been friends, tried to scare him one day and said, "Ooh I got you boy." (*Id.* at 107:11-108). He admitted they'd played around and that he'd sneak up on her previously. He does not know if Hanna intended the word "boy" to have any racial connotation in that sentence. (*Id.* at 108:6-8). He texted Annette saying he would not tolerate her calling him "boy." (*Id.* at 108:9-109:6 & Ex. 231). Annette responded via text saying, "David just polity (sic) tell her not call you that (sic) she probably didn't even know what she was saying[.]" (*Id.*). Ussery did not address the issue with

Hanna. He told the assistant dietary manager, David Gresham, that was not acceptable and says that the next morning Annette told him he needed to get over it. (*Id.* at 109:8-110:13). Hanna did not say "boy" in front of him again after that occasion. (*Id.* at 110:14-15).

Ussery was also told by class member Bianca Toliver about Belinda's use of the "n-word." Ussery did not think an apology was enough; he thought Belinda should have been fired. (*Id.* at 95:15-96:10).

Ussery had no other race-related concerns regarding his Hamilton Pointe employment. (*Id.* at 110:16-19).

Discussion

Ussery's claims regarding three co-workers using the term "boy" in different contexts approximately four times during his five-year employment is insufficient to establish a hostile work environment. Although the word "boy" is not "always benign," the word is not always evidence of racial animus. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (stating the meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage). The three usages which Ussery can recall do not suggest any intended racial connotation and are not objectively derogatory. Ussery admits that on two occasions, the term "boy" was used in a joking manner. On this record, the court finds Ussery was not subjected to severe or pervasive harassment which altered the conditions of his employment. Accordingly, Hamilton Pointe is entitled to summary judgment as to Class Member No. 22, David Ussery.

16. Class Member No. 23, Ruth Washington

Ruth Washington was a QMA at Hamilton Pointe from December 2, 2015 through May 27, 2017. (Payroll Aff. Ex. A). Washington was terminated after slamming her fist down and yelling in front of a resident while administering or preparing to administer medication to a resident. (Filing Nos. 100-1 & 112-25, Deposition of Ruth Washington ("Washington Dep.") at 69:11-76:24 & Ex. 192 at HP2125). Washington testified she did not suffer emotional distress while working at Hamilton Pointe. (Washington Dep. at 145:18:20).

Washington alleges she was not allowed in female resident LE's room because of race. (*Id.* at 129:20-133:6). When Washington went in LE's room, she said, "You're not supposed to be in here," or "You're not supposed to be in my room." (*Id.* at 130-20-24). Washington also testified Nurse Jackie Lamp told her, "She doesn't want you in her room," and thought Lamp referred to race as the reason. (*Id.* at 130:25-131:25). Resident LE had filed a grievance against Washington which resulted in a state reportable incident on or about April 18, 2017. (Cates Aff. ¶ 13, Washington Dep. Ex. 196). Washington did not report a concern about not being allowed in LE's room. (Washington Dep. at 132:19-25). Other African American caregivers continued to care for LE after April 17, including class member Amber Cottrell. (Filing No. 131, Hamilton Pointe's Appendix of Evidence on Reply, Second Med. Rec. Aff. & Ex. A; Payroll Aff. Exs A, C).

Washington also alleges her co-workers used racially insensitive language. Caucasian nurse Cindy Rector used the phrase "you people" five or six times. (*Id.* at 122:8-124:7). Washington believes this was in reference to race because she was the only black person in the room when the statement was made, and it was directed to her.

(*Id.*). Washington recalled Rector using the phrase in reference to hair color or skin color, e.g. "you people wash your hair every day?" or "you people change your hair style," or "[A]ll of you got different color skin." (*Id.*). Washington says the skin color reference came after Washington brought up biracial couples in a conversation during an overnight shift. (*Id.* at 125:19-128:2). Washington did not report any concern about this conversation or Rector's use of the phrase "you people." (*Id.* at 127:23-128:2).

According to Washington, Rector would verify with the resident if Washington told her the resident asked for medication, or ask Washington, "did they really ask for it?" (*Id.* at 146:16-149:2). Washington observed that "when someone white asked the same thing, told her the same thing, there was no question about if you truly – if you asked them if they needed a pain pill." (*Id.* at 148:23-149:1). But Washington also says Rector would have Washington take medication to a resident herself on occasion, which Washington was authorized to do as a QMA. (*Id.* at 148:5-149:2).

Lamp told Washington several times as she was walking up the hallway, "Oh I didn't see you in the dark." (*Id.* at 128:3-129:19). This was said during the night shift, but Washington says there was plenty of light. (*Id.*). Washington did not report Lamp's statements. (*Id.*).

Discussion

Washington testified Lamp told her LE did not want her in her room because she was black. Hamilton Pointe's records reflect that, due to LE's grievance, Washington did not care for LE after April 17, 2017. But other African American caregivers like Amber Cottrell did care for LE. (Filing No. 131, Hamilton Pointe's Appendix of Evidence on

Reply, Second Med. Rec. Aff. & Ex. A; Payroll Aff. Exs A, C). No reasonable jury could infer that Washington was removed from LE's care "because of race."

A jury could infer that Rector's references to "you people" in the context of hair and skin color were racially charged, but they do not rise to the level of severe or pervasive harassment. Accordingly, Hamilton Pointe is entitled to summary judgment as to Class Member No. 23, Ruth Washington.

17. Class Member No. 27, Lydia Green

Lydia Green was a RN at Hamilton Pointe from May 10, 2016 through February 24, 2017. (Payroll Aff. Ex. A).

According to Green, Nurse Jackie Lamp had a habit of greeting her by saying, "Hello Midnight," as Green was leaving her second shift around 10:00 p.m. or 11:00 p.m., and Lamp was starting third shift. (Filing Nos. 100-2 & 113-15, Deposition of Lydia Green ("Green Dep.") at 98:25-103:24). Green told Lamp that someone could take her statement the wrong way, and Lamp said, "Well, you are here. You're here to almost midnight every night." (*Id.* at 103:6-16). Green told Assistant Director of Nursing Sherri Warren that she thought Lamp's statement had racial undertones. (*Id.* at 101:21-23). Warren tried to "soothe" her and told her to "let that go." (*Id.* at 102:13-17). Lamp continued to greet her that way after the end of Green's shift. (*Id.* at 102:23-24).

Warren told Green three or four times that certain residents were prejudiced, and to "make her time short" in those rooms. (*Id.* at 104:4-107:16). Green believes resident AG "insinuated" racial prejudice and used derogatory language during Green's care. (*Id.*). Green understood AG had behavioral issues and was difficult to care for. (*Id.* at

106:5-107:16; *see also* S. Langley Dep. at 76:13-77:3 (testifying she understood AG to have various diagnoses including dementia and a personality disorder)). She does not recall observing any racial behaviors from other residents but heard "hearsay" at the nurses' station. (*Id.* at 107:17-108:1). Green did not complain about being asked to "make her time short" and was not offended by the directive. (*Id.* at 108:2-4, 108:25-109:4).

Green testified she never instructed anyone not to provide care for any resident because of race. (*Id.* at 109:6-10). She recalls times, however, when she passed on instructions for specific caregivers not to go in specific rooms. (*Id.* at 109:11-25). Green recalls that African American CNAs could not go in AG's room. (*Id.* at 111:6-112:18). She also testified, however, that African American CNAs provided care to AG on an "off and on" basis and that she, as an RN, regularly provided care for AG throughout her stay at Hamilton Pointe. (*Id.* at 112:19-113:20).

Discussion

Green's evidence, viewed in the light most favorable to her, is insufficient to establish a hostile work environment. Green admits she was not offended by Warren's warning to stay out of certain residents' rooms on three or four occasions and she never complained.

Green argues Lamp's "Hello Midnight" greeting had racial undertones. (Green Dep. at 101:3-13 ("I think that's the way that this was presented as a – as a coverup. . .")). But even if it did, Lamp's greeting does not constitute the type of severe or pervasive harassment which would subject Hamilton Pointe to liability.

As for caregiver scheduling changes, Green's testimony supports only that there were schedule changes at Hamilton Pointe that affected specific caregivers. Her testimony—and the EEOC's argument—is entirely speculative that such changes were because of resident racial preferences or because of a caregivers' race.

> Q: . . . So to the extent that you ever instructed someone not to go in a room, it was because that specific person was not supposed to go in the room?
> A Right.
> Q: It was not that there was a Post-It note that said "No African Americans are to go in this room"?
> A: Correct. But that doesn't mean that the conversation behind the sticky note was not because something had happened at the level of upper management regarding race and so don't let so and so go back into that room. That culture again.

(*Id.* at 110:17-111:4).

Green's belief that Hamilton Pointe honored any racial preference of AG is insufficient to create a question of fact in light of undisputed documentation—and Green's own acknowledgement—that AG was routinely cared for by both Caucasian and African American caregivers, including Green herself. (Flowsheet Summary; MAR Summary). Hamilton Pointe is therefore entitled to summary judgment as to Class Member No. 27, Lydia Green.

18. Class Member No. 27, Sara Johnson

Sara Johnson was a CNA at Hamilton Pointe for a time in 2014 during which she was a PRN, and then was rehired from November 4, 2016 through April 23, 2017. (Payroll Aff. Ex. A; Filing No. 100-3 & 112-28, Deposition of Sara Johnson ("S. Johnson Dep.") at 36:5-7).

Sara testified she was called the "n-word" by a resident—or possibly two residents—at Hamilton Pointe. (*Id.* at 65:8-25, 77:16-21). She thinks this occurred twice but does not remember when it occurred or who said it. (*Id.* at 67:4-23). When she informed the other nurses that worked on her shift, they said, "Well, you know, that's the era they came from." (*Id.* at 68:17-69:7). Sara did not document these occurrences or report them. (*Id.* at 67:24-68:4). The residents who directed the slur to Johnson also refused care from her. (*Id.* at 69:19-22). She did not care for the residents again after the refusals but had to find a replacement CNA. (*Id.* at 68:8-16). Sara agrees that when residents refuse care, utilizing an alternate caregiver is an appropriate intervention. (*Id.* at 28:22-30:15). She does not know if the residents at issue had any cognitive or behavioral impairment. (*Id.* at 70:13-25).

Johnson saw assignment sheets that referred to resident preferences, but she could not remember if the notation said "no black caregivers" or if it also referred to no male care. (*Id.* at 72:21-77:2). She does not remember how many assignment sheets had the notation and does not remember when she saw the assignment sheet; it could have been in 2014, 2016, or 2017. (*Id.* at 73:8-74:1). She thinks it may have been "a couple" residents with this notation; she does not remember the residents' names or the halls where they resided. (*Id.* at 74:8-24). She thinks this notation could have been for the two residents that had used the "n-word" toward her and refused care. (*Id.* at 77:22-78:3). She did not complain about this to anyone at Hamilton Pointe. (*Id.* at 76:23-77:2).

Discussion

Sara's case rests on assignment sheets that said "no black caregivers" or no African American male care. But could not remember any details germane to her claim. Sara could not remember how many assignment sheets she saw, when they were posted,[9] what they said, and what resident(s) they applied to. (S. Johnson Dep. at 72:21-74:24). The assignment sheets may have been related to residents who called her the "n-word" and refused care. (*Id.* at 77:3-78:3). Sara remembers, however, that she did not care for those residents again. (*Id.* at 68:8-16).

Sara's case is distinguishable from *Chaney*. Sara does not allege she saw race-based assignment sheets daily for months straight, that she was banned from residents' rooms, or that she experienced racial hostility from her co-workers. On this record, the court finds Sara was not subjected to an objectively hostile work environment. Hamilton Pointe's motion for summary judgment is granted as to Class Member No. 27, Sara Johnson.

19. Class Member No. 29, Naim Muhammad

Naim Muhammad was a CNA at Hamilton Pointe from August 17, 2016 through February 24, 2017. (Payroll Aff. Ex. A).

At the beginning of his employment, Muhammad testified that Nurse Jackie Lamp was "extremely rude" to him and would not let him leave before his replacement arrived at shift change, even though his replacement was late. (Filing Nos. 100-4 & 112-20,

[9] If this occurred prior to 2015, it is outside the scope of actionable claims in this suit. (*See* Compl. ¶ 19; Filing No. 74-12 (noting applicable timeframe for actionable claims starting February 2015)).

Deposition of Naim Muhammad ("Muhammad Dep.") at 57:21-59:17, 60:25-61:1). Muhammad told his unit manager about this the next day and he assumes the unit manager addressed it because it did not happen again. (*Id.* at 61:11-15).

Lamp also "would say certain things, like, 'That boy can't work down that hall there,'" referring to the "service hallway." (*Id.* at 61:24-62:10). In addition, Muhammad heard a nurse tell another CNA that there were to be no black caregivers down the service hallway. (*Id.* at 65:23-67:13). He could not remember the nurse's name or the CNA's name. (*Id.* at 65:23-66:10). He was not prohibited from caring for any resident on his assignment and was not prohibited from entering the service hallway to enter those assigned rooms. (*Id.* at 68:21-69:18 (testifying he cared for residents in the service hallway when he worked a split assignment)). He did not complain to management about the nurse's directive. (*Id.* at 67:18-22).

Lamp also told Muhammad not to go in certain rooms "more than a couple" of times. (*Id.* at 72:3-73:2). Class member Ruth Washington, a QMA, once told him "they don't want black caregivers in that room." (*Id.* at 73:20-74:4). Muhammad was not assigned to those rooms. (*Id.* at 73:3-4).

Muhammad was assigned by himself on the rehab unit, which typically housed thirty residents. (*Id.* at 70:16-71:18). He said there was "no way one person can take care of thirty residents, but from [his] knowledge, it only happened to [him]." (*Id.* at 71:2-4). He complained to the unit manager, Sherri Warren, but did not tell her he thought the schedule was related to his race. (*Id.* at 77:13-78:5). She "always promised

to get more help. [He] felt like it was sincere, but [he] never received help." (*Id.* at 78:3-5).

Discussion

Collectively, Muhammad's evidence is insufficient to establish a hostile work environment. He alleges Lamp said things like, "That boy can't work down that hall there." (Muhammad Dep. at 61:24-62:10). Lamp's reference was, at most, an isolated offensive utterance. He alleges he was told not to go in certain rooms by Lamp and Washington; Washington told him the residents did not want black caregivers. (*Id.* at 72:20-73:4). But the prohibition did not affect his job assignments at any time. (*Id.* at 68:21-69:18). And there is no evidence that Muhammad was assigned to work on the rehab unit because of his race. On this record, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 29, Naim Muhammad.

20. Class Member No. 33, Kyran Byrd

Kyran Byrd was a dietary manager assistant at Hamilton Pointe from November 29, 2017 through February 24, 2018. (Payroll Aff. Ex. A). He is a certified dietary manager and had significant dietary management experience before starting at Hamilton Pointe. (Filing Nos. 100-5 & 112-14, Deposition of Kyran Byrd ("Byrd Dep.") at 23:15-24:2, 28:3-29:21).

On one occasion, dietary employee and fellow class member David Ussery "walked out or left without permission." (*Id.* at 62:3-17). Administrator Shawn Cates asked Byrd to write a statement so he could terminate Ussery's employment. (*Id.* at 62:1-64:1). Byrd did not want to terminate Ussery because he was already short staffed in the

kitchen. (*Id.* at 65:25-67:7). Byrd testified Cates asked him to write the statement because of the pending lawsuit and said that "it would help that [Byrd] was black" or that "it would look good for me being black to write a statement." (*Id.* at 101:2-104:22). Byrd said he lied in his statement about Ussery, but does not recall what he lied about, and admits that Cates did not ask him to lie. (*Id.* at 62:25-64:1).

On a different occasion, Cates told Byrd he was happy to have someone with "street smarts" in the kitchen. (*Id.* at 82:6-13, 83:11-86:6). On yet another occasion, Cates told Byrd he was very professional in the kitchen, even though Byrd "may be committing crimes at night." (*Id.* at 82:2-83:10). Byrd says Cates may have been joking around, but Byrd took offense. (*Id.*). Byrd did not tell Cates or anyone else he was offended by the comment because he was afraid he would get fired or written up. (*Id.* at 101:20-22).

Discussion

Byrd alleges Cates' comments about him having "street smarts" and "committing crimes at night" constitute impermissible racial stereotyping. It is important to examine the context in which these comments were made. In the first, Cates told Byrd he was glad to have him as an employee—someone with "street smarts." (Byrd Dep. at 82:6-13, 83:11-86:6). In the second, Cates complimented Byrd's professionalism at work but added he "may be committing crimes at night." (*Id.* at 82:21-24). Viewing these comments in the light most favorable to Byrd, no reasonable juror could conclude the comments were severe or pervasive as to alter the conditions of Byrd's working environment.

Byrd also takes issue with Cates' request that Byrd write up Ussery because, for purposes of this lawsuit, it would look good because he [Byrd] is black. (*Id.* at 101:2-104:22). While Cates' request was inappropriate, the evidence in its totality fails to establish that Byrd was subjected to an objectively hostile work environment during his three-month employment at Hamilton Pointe. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 33, Kyran Byrd.

21. Class Member No. 35, LaKeisha Faulk

LaKeisha Faulk was a CNA who initially worked at Hamilton Pointe from May 6, 2014 through August 8, 2014, then was rehired from March 23, 2016 through June 11, 2016. (Payroll Aff. Ex. A; Filing Nos. 100-6 & 113-16, Deposition of LaKeisha Faulk ("Faulk Dep.") at 50:10-19).

Faulk testified she felt people were snickering her at work if she wore her hair up, wore a scarf, or threw on a bonnet. (Faulk Dep. at 89:3-8). She heard the words "ghetto" and "ratchet" three or four times. (*Id.* at 94:4-17). The words were not directed at Faulk, but she could hear them. (*Id.* at 94:20-95:2). There was one time she overheard two Caucasian ladies use the word "ghetto" on a day she was wearing a scarf and remembers thinking they were talking about her. (*Id.* at 96:21-97:13).

Faulk believes she was "given harder residents on a routine basis or on a regular basis" because of her race. (*Id.* at 101:24-102:6). But she admits this is just her assumption. (*Id.* at 101:14-102:15; 91:11-92:24).

Discussion

Faulk's evidence is insufficient to show she was subjected to severe or pervasive harassment. Faulk overheard the words "ghetto" and "ratchet," but those words were not directed at her. Her scheduling concerns were admittedly based on an assumption and she offered no other reason to believe there was a racial component. The same can be said for the snickering she feels occurred. No reasonable juror could find Hamilton Pointe subjected Faulk to a racially hostile work environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 35, LaKeisha Faulk.

22. Class Member No. 36, Amber Johnson

Amber Johnson was a CNA at Hamilton Pointe from April 5, 2017 through July 31, 2018. (Payroll Aff. Ex. A).

Johnson testified that a male resident, RG, was very rude to her and told her to "Get. You know you are not supposed to be in here. Get." (Filing Nos. 100-7 & 113-21, Deposition of Amber Johnson ("Johnson Dep.") at 88:7-12; 103:10-24). He also called her "lazy" and "stupid." (*Id.* at 97:7-13). She was eventually told not to care for him anymore. (*Id.* at 88:21-89:7, 97:14-17).

A nurse told Johnson not to go in female resident JT's room. (*Id.* at 88:23-25). The nurse told Johnson that the resident was "a bigot" and "basically didn't like the color of my skin." (*Id.* at 88:21-89:4). The nurse "brushed it off to her having dementia." (*Id.* at 89:5). The nurse also said, "She's from that generation where that was normal, and that generation – it's … fortunate that that generation is dying off." (*Id.* at 109:18-20).

Johnson described a situation with JL, a male resident on the rehab unit, in which he "suggested that we get naked and rub Mazola oil on our bodies and see what happens because he would love to see our brown bodies oiled up." (*Id.* at 92:11-19). She reported the incident but does not think anything came of it. (*Id.* at 92:20-21). According to Johnson, this same resident was inappropriate to both white and black caregivers. (*Id.* at 112:7-24). He also told her "he wasn't racist or anything like that because he grew up with black people" and many "worked for him during his life and all that kind of stuff." (*Id.* at 92:24-93:3).

Nurse Jackie Lamp relayed a story to Johnson, stating she [Lamp] went into the break room with the lights off and saw Jo Murray, an African American CNA. She said, "Oh, my God, you scared me. You're so black. It's dark in here. I didn't even know you were there." (*Id.* at 115:24-116:25). Johnson has no idea why Lamp told her that, but she thinks it was because Lamp thought it was funny. (*Id.* at 117:1-3 ("I really think [Lamp] thought that was funny, and I – I didn't.")).

Johnson was originally assigned to the skilled unit but was pulled to the rehab unit, which she believes is substantially harder. It is "understaffed with a super high demand unit." (*Id.* at 123:1-19). She was told she worked that unit because she had 12-hour shifts, yet other CNAs did not have to work the rehab unit. (*Id.* at 124:4-12). When she asked for help, nothing was ever done. (*Id.* at 135:15-18). She felt that if she was white, Hamilton Pointe would have given her some help. (*Id.* at 140:1-3).

Johnson called Administrator Shawn Cates on a Saturday to voice work-related concerns about another employee. (*Id.* at 77:18-79-13). Cates, who was at a wedding at

the time of Johnson's call, stated, "We have been on the phone for nine minutes, Amber. I can't get those nine minutes back." (*Id.* at 78:24-79:13).

Discussion

Some of the incidents of which Johnson complains are not based on race. She alleges a male resident made sexually inappropriate comments to both black and white caregivers and another male resident called her "lazy" and "stupid." She claims Cates was rude to her during a call, but her testimony does not support the EEOC's conclusory suggestion that this call was about "racially disparate treatment." (Johnson Dep. at 77:18-80:7). And Johnson's subjective belief that she had a tougher assignment than others is insufficient to show her assignment was "based on race." *See Hanners v. Trent*, 674 F.3d 683, 694 (7th Cir. 2012) ("Although Mr. Hanners may believe that the defendants' statements are evidence of racial animus, the subjective beliefs of the plaintiff ... are insufficient to create a genuine issue of material fact.") (internal quotation marks omitted)); *Yancick v. Hanna Steel Corp.*, 653 F.3d 532, 548 (7th Cir. 2011) ("If the subjective beliefs of plaintiffs in employment discrimination cases could, by themselves, create genuine issues of material fact, then virtually all defense motions for summary judgment in such cases would be doomed.") (internal quotation marks omitted). Both African American and Caucasian employees were assigned to all halls at Hamilton Pointe. (Cates Aff., Ex. C).

As far as race-related incidents, Johnson recalls Lamp joking with her about it being so dark in the break room she did not see an African American CNA. Johnson also recalls an incident where a nurse told her not to go to a resident's room because the

resident, who suffered from dementia, was "bigoted," as well as an incident regarding the sexually inappropriate resident who assured her he was not racist.

Considered as a whole, Johnson fails to establish she was subjected to severe or pervasive harassment that altered the conditions of her employment and created a hostile or abusive working environment.

23. Class Member No. 38, Charah Milan

Charah Milan was a CNA at Hamilton Pointe for approximately four months from May 10, 2017 through August 31, 2017. (Payroll Aff. Ex. A).

Milan never saw any reference to resident racial preference on assignment sheets at Hamilton Pointe, but she was told about one from another CNA. (Filing Nos. 100-8 & 113-3, Deposition of Charah Milan ("Milan Dep.") at 57:13-58:14, 58:8-21). Milan has no reason to believe her assignment was ever changed based on race, and she was never prohibited from entering any room based on race. (*Id.* at 59:19-23, 62:6-9). She did not complain to anyone about what the other CNA had told her. (*Id.* at 61:24-62:1).

Milan heard the phrase "that colored girl" used "a lot" by "multiple" residents and the "n-word" used by one resident who said, "That [n-word] . . . was in here." (*Id.* at 51:23-53:12). She explained that staff used the phrase "colored girl" if they were repeating what a resident had said, e.g., "she said she was looking for that colored girl." (*Id.* at 52:13-25). She never reported a concern about hearing the phrase used or repeated. (*Id.* at 54:24-55:1). Milan heard residents refer to Caucasian employees in reference to skin color as well, e.g., "That white girl." (*Id.* at 55:2-7).

Discussion

During Milan's brief employment, she heard residents identify caregivers by descriptors like "that colored girl" or "that white girl" and reported that staff would sometimes say, in the context of repeating what a resident had said, e.g., "she said she was looking for that colored girl." The residents' use of racial descriptors to identify caregivers may be insensitive and offensive, but they do not rise to the level of severe or pervasive conduct. Milan's testimony that she heard from another CNA about race-based assignment sheets is inadmissible hearsay. Regardless, Milan never experienced a race-based assignment herself. On this record, the court finds Milan fails to establish a legally actionable hostile work environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 38, Charah Milan.

24. Class Member No. 40, Mateena Powell

Mateena Powell was a CNA for less than a week at Hamilton Pointe, from May 31, 2017 to June 3, 2017. (Payroll Aff. Ex. A). She did not complete orientation and worked no more than three days before she was a No Call No Show. (*Id.*; Filing Nos. 100-9 & 113-20, Deposition of Mateena Powell ("Powell Dep.") at 70:1-13). Powell left her employment at Hamilton Pointe because of a "family issue." (Powell Dep. at 65:14-16).

Powell testified she was aware that certain residents did not want African American employees in their rooms. (*Id.* at 90:13-16). She does not know whether Hamilton Pointe honored those preferences. (*Id.* at 90:17-23).

Discussion

Powell's claim is based entirely on hearsay and rumors heard during her few shifts with Hamilton Pointe, about which she did not complain during her employment. On this record, Powell fails to establish her hostile work environment claim. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 40, Mateena Powell.

25. Class Member No. 41, Ophelia Stone (Filing No. 100-10, 113-17)

Ophelia Stone was a CNA at Hamilton Pointe from January 4, 2018 through April 1, 2018. (Payroll Aff. Ex. A).

Stone testified that a nurse named Judy was pushy and demanding and required her to switch from the 800 hall to the 300 hall, which Stone said was harder. (Filing No. 100-10, Deposition of Ophelia Stone ("Stone Dep.") at 70:13-78:9). Judy would not give Stone help when asked, checked her work, and picked on her. (*Id.*). Judy never referred to Stone's race or used racially inappropriate words. (*Id.* at 71:7-9). Stone provided two weeks notice to the administrator and director of nursing but did not mention any race-related concerns in her notice. (*Id.* at 74:19-25, 78:5-9 & Ex. 289).

Stone heard three residents use racially inappropriate language. On one occasion, she heard male resident JS say, "get out [n-word]." (Stone Dep. at 53:24-55:4). Stone was not offended by the statement because "we're trained not to take what residents say personally." (*Id.* at 55:5-11). She continued to care for JS and did not hear him use such language again. (*Id.* at 56:4-10).

Stone heard a female resident with Alzheimer's on the 900 hall say the "n-word" and call her black. (*Id.* at 56:25-57:2-4). She kicked Stone in the face, but Stone was not

offended because of the resident's Alzheimer's diagnosis. (*Id.* at 56:25-59:7). Stone went to get help and two white co-workers came to assist. (*Id.* at 57:25-58-15). The resident continued to use the "n-word" toward the co-workers. (*Id.* at 58:16-24). This same resident on another occasion used the "n-word" and said "get out." (*Id.* at 59:14-61:1). Stone went to get help and when a co-worker came to assist the resident, the resident called the co-worker a bitch. (*Id.*). Stone does not believe the resident was cognitively aware of her behavior and was not offended by the resident's behavior. (*Id.* at 60:22-61:1).

Stone heard a third resident refer to an African American resident as a "n-word." (*Id.* at 62:17-69:9). The resident was talking to a family member on the phone and was referring to a resident who was across the hall. (*Id.* at 63:1-11). The African American resident was on the unit temporarily awaiting a room on the rehab unit. After this incident, a room on the rehab unit was prepared and the African American resident was moved there. (*Id.* at 67:6-68:14).

Discussion

The EEOC maintains Stone was harassed by a nurse named Judy but provides no basis on which a reasonable jury could conclude this was because of Stone's race. Stone's resignation note does not refer to either Judy or any alleged racial concerns. (Stone Dep. Ex. 289 (stating "I can't work with confusion. I can't be letting people run over me.")).

Stone testified she was not offended when she heard racially inappropriate language from two residents, one of whom was on the Alzheimer's unit. Stone was offended when a third resident referred to an African American resident using the "n-

word" but agrees the facility promptly utilized recognized interventions to separate the residents, which resulted in the African American resident being moved to the rebab unit where she was scheduled to be. (*Id.* at 68:7-69:9). Collectively, Stone's evidence does not establish severe or pervasive conduct based on race which was so offensive as to alter the conditions of her working environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 41, Ophelia Stone.

26. Class Member 43, Sherrlynn Lester (Filing No. 100-11, 113-22)

Sherrlynn Lester was a housekeeper at Hamilton Pointe for approximately two months from December 14, 2016 through February 11, 2017. (Payroll Aff. Ex. A). She resigned without notice. (*Id.*).

Lester thought there were "gaps" in the schedule indicating residents did not want her to care for them because of her race. (Filing Nos. 100-11 & 113-22, Deposition of Sherrlynn Lester at 69:17-70:10). Lester asked her supervisor, April Wall, why she wasn't assigned a full hallway because "whoever was available should be able to do the job." (*Id.* at 72:10-20). Wall told her "certain residents asked for certain people." (*Id.* at 71:13-73:6). Neither Lester nor Wall mentioned race in the conversation, but Lester testified Wall "knew what I was talking about. She kind of danced around it." (*Id.* at 73:3-6).

Discussion

The EEOC offers no admissible evidence of actual "gaps" in Lester's schedules, or that any such gaps were "based on race." Lester resigned her employment without notice. On this record, no reasonable jury could find Lester was subjected to a racially hostile

and abusive work environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 43, Sherrlynn Lester.

27. Class Member No. 45, Ronetta Goodloe

Ronetta Goodloe was a QMA at Hamilton Pointe for approximately two and a half months between February 1, 2017 and April 16, 2017. (Payroll Aff. Ex. A).

Goodloe was warned about racist residents by nurses or aides who would say, "Don't go in there, or take someone with you, because he's a racist, and he will lie to you." (Filing Nos. 100-12 & 113-18, Deposition of Ronetta Goodloe ("Goodloe Dep.") at 91:4-92:18). Goodloe was never told by management "don't go in that room"; her co-workers instead said, "Hey, you might want to watch your back. He's racist. You know, take two persons in there—two people in there with you[.]" (*Id.* at 93:9-94:7). Goodloe did not complain about this and would thank the nurses or aides who warned her. (*Id.* at 92:19-93:8).

A male resident told Goodloe his son was a hotshot attorney in Michigan and that he was going to be working for Trump. (*Id.* at 69:9-70:23, 82:20-88:17). The resident said something about her race, but she could not remember what it was. (*Id.* at 70:8-17). Goodloe remembers he used the terms "'n[-word]' or 'colored' or . . . stuff like that[.]." (*Id.* at 85:9-20). She complained to a nurse on her unit and said she did not want to provide care for the resident again that shift. (*Id.* at 86:3-87:17). She did care for him after that shift because "they forget when they're old . . . They forget what they say." (*Id.* at 85:21-86:2).

Another resident complained that a CNA did not help him put his pants on. (*Id.* at 70:24-71:1). The resident "said it was me, because I was . . . the only black girl over there at the time." (*Id.* at 71:14-16).

Discussion

Goodloe claims a resident used racist language on one occasion. She was not required to care for that resident the remainder of the shift but did in later shifts because residents like him "forget what they say." (Goodloe Dep. at 85:21-86:2). She testified she was not prohibited from entering any resident's room because of race; instead, she was warned if residents had racist tendencies and advised to take a second caregiver in with her. (*Id.* at 92:19-94:7). She appreciated these warnings at the time. Goodloe's subjective belief that she was singled out by a resident for failing to help him is insufficient to show she was singled out because of her race. On this record, no reasonable jury could conclude Goodloe was subjected to a racially hostile work environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 45, Ronetta Goodloe.

28. Class Member 46, Jennifer Stanley

Jennifer Stanley was PRN CNA for two months at Hamilton Pointe between June 28, 2017 and August 28, 2017. (Payroll Aff. Ex. A).

She testified she heard a resident say "Hey, boy. Hey, boy. Come here, boy" to co-worker Ronrico ("Rico") Hassell. (Filing Nos. 100-13 & 113-19, Deposition of Jennifer Stanley at 64:25-67:8). Stanley saw Rico smile and respond to the resident. (*Id.*

at 66:13-17). She did not talk to Rico about the incident or report the incident to management. (*Id.* at 66:23-67:3).

Stanley also testified that a nurse named Sally said Stanley was the "nicer black girl" approximately two weeks into her employment. (*Id.* at 62:7-64:24). Stanley rolled her eyes and walked away, and she did not report the exchange to anyone. (*Id.*). Sally did not say anything else that Stanley considered to be racially harassing and discriminatory during Stanley's employment. (*Id.*).

On one occasion when Stanley tried to answer a call light on the 900 hall a nurse told her, "Do not go down that hall . . . They don't like black people." (*Id.* at 67:16-69:8). Stanley did not respond to the nurse and did not complain about the incident. (*Id.* at 69:7-8).

Stanley thought her assignment to the rehab unit was race-related because there was a black resident on that unit. (*Id.* at 69:15-22, 67:16-68:10). She agreed, however, that her assignment to the rehab unit was consistent with her preference for 12-hour shifts. (*Id.* at 69:23-70:9 ("Rehab was the only one that did 12 hours.")). She also thought she "was the only one to do certain things" like picking up lunch or dinner trays. (*Id.* at 72:7-14). Stanley perceived her co-workers as having a "let the black girl do it" attitude. (*Id.* at 72:22-23).

Discussion

Stanley alleges (1) she overheard a resident refer to a co-worker as "boy"; (2) a nurse once told her she was the "nicer black girl"; and (3) a nurse once told her to refrain from answering a call light from a particular hall because those residents "did not like

black people." Stanley did not complain about any of these comments. And Stanley's concern regarding her schedule on the rehab unit and her belief her co-workers had a "let the black girl do it" attitude is based on nothing more than her subjective belief. On this record, the court finds Stanley's evidence does not rise to the level of severe or pervasive conduct based on race. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 46, Jennifer Stanley.

29. Class Member No. 48, Tommy Buggs

Tommy Buggs was a dietary cook at Hamilton Pointe from June 17, 2013 to December 25, 2016. (Payroll Aff. Ex. A).

Buggs states that a co-worker, Belinda, said "boy" or "this boy" five or six times in reference to Robert "JJ" Wilson and once said, "I'm not going to work behind these slow-ass [n-words]." (Filing Nos. 100-14 & 112-26, Deposition of Tommy Buggs at 57:23-61:4). Buggs told Belinda that the "n-word" and "boy" were inappropriate. (*Id.* at 69:15-70:4). He also reported Belinda's use of the "n-word" to the outgoing dietary manager Susie Jorgans, the incoming dietary manager Annette Brown, and the assistant dietary manager Arnold Farrell, and says nothing was done. (*Id.* at 61:21-64:16). He also submitted a written complaint to Brown. (*Id.* at 73:8-75:25). In response to his complaint, Brown replied by stating "it was the era that she was raised in." (*Id.* at 64:25-65:1). Buggs agrees Belinda did not use the "n-word" again. (*Id.* at 66:9-11).

Buggs does not believe he was harmed physically or emotionally while he worked at Hamilton Pointe. (*Id.* at 72:6-9).

Discussion

Buggs heard Belinda use the "n-word" once in reference to other co-workers. She did not use the word again after he complained. Buggs also heard Belinda use the word "boy" five or six times over the course of his three and-a-half year employment and he disclaims emotional harm. On this record, Buggs' evidence is insufficient to establish a triable claim for hostile work environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 49, Tommy Buggs.

30. Class Member No. 50, Andrea Trask

Andrea Trask was an LPN for Hamilton Pointe from March 29, 2016 through June 22, 2016. (Payroll Aff. Ex. A).

Trask complains that she was referred to as a "gal" by long-term care residents during her employment. (Filing No. 100-15, EEOC's 4th Suppl. Resp. to Hamilton Pointe's Interrog. No. 10 re: Trask).

Discussion

The term "gal" is a race-neutral term. Trask fails to provide any context for the residents' use of the term from which a racial connotation could be inferred. On this record, no reasonable juror could find Trask was subjected to a hostile work environment while employed at Hamilton Pointe. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 50, Andrea Trask.

31. Class Member No. 51, Jaquetta Tyus

Jaquetta Tyus was a QMA at Hamilton Pointe from July 30, 2013 through May 27, 2016. (Payroll Aff. Ex. A). She served as a scheduler for part of this time. (Filing Nos. 100-16 & 113-23, Deposition of Jaquetta Tyus ("Tyus Dep.") at 33:18-24).

Tyus was told that a co-worker, Donna Grissett, was not allowed to go in a specific room, which she later identified to be AG's room. (*Id.* at 29:20-30:12, 48:5-51:2). Tyus and others were called into a meeting in the nursing staff office for a meeting with Administrator Lauren Hayden. (*Id.* at 49:4-50:17). Tyus does not remember what she said, but her impression was that "it boils down to . . . that person didn't want any blacks to take care of her, and that's it." (*Id.* at 49:16-21). Tyus never complained or called the hotline to report this. (*Id.* at 54:21-55:10). Tyus and other African American caregivers regularly provided care to AG. (*Id.* at 50:24-51:1; *see also* Flow Chart).

Discussion

Tyus's case centers on her belief that AG did not want black people to take care of her. Per AG's long-term care plan, AG has behavioral issues and was diagnosed with a personality disorder. (Tyus Dep. at 52:11-23). At any rate, Tyus and other African American caregivers regularly provided care to AG, refuting any permissible inference that Hamilton Pointe acceded to any such preference. On this record, the court finds Tyus fails to establish a hostile work environment. Accordingly, the court must grant Hamilton Pointe's motion for summary judgment as to Class Member No. 51, Jaquetta Tyus.

Class Members 24, 32, 37, 39, 42, 44, 47, 49, 52

The following Class Members offered no evidence in support of their hostile work environment claims:

No. 24 Carmen Baker	No. 39 Tamara Moredock	No. 47 Arletha Cayson
No. 32 Kathy Butler	No. 42 Katrice Moody	No. 49 Cynthia Erife

No. 37 Latiana Merriweather No. 44 Nicole Powell No. 52 Lenae Watkins

In the absence of any evidence to support their claims, the court must grant Hamilton Pointe's motion for summary judgment on their claims for hostile work environment.

IV. Damage Cap

As to the individuals addressed in this motion, Hamilton Pointe also moves for summary judgment on the issue of whether it had fewer than 200 employees at all relevant times, for purposes of the application of Title VII's damages cap. The court will address this argument even though it grants partial summary judgment in favor of Hamilton Pointe.

Under Title VII, compensatory and punitive damages are subject to damage caps.

> The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> ...
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current preceding calendar year, $100,000[.]

42 U.S.C. §1981a(b)(3). "[C]urrent or preceding calendar year" has been construed to mean the year in which the discrimination occurred. *Hernandez-Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 175 (1st Cir. 2011); *see also Smith v. Castaways Family Diner*, 453 F.3d 971, 973-74 (7th Cir. 2006) (for purposes of a different section, § 2000e(b), "'current calendar year' means the year in which the alleged discrimination occurred"). In determining the number of employees an employer has, the court utilizes the "payroll method." *Walters v. Metro. Educ. Enter., Inc.*, 519 U.S. 202, 207 (1997).

This standard looks at number of individuals with whom the employer has an employment relationship and who are on the payroll for each day for a given week regardless of whether they were present at work each day. *Id.* at 211-12.

Hamilton Pointe submitted a spreadsheet with data pulled directly from its payroll system confirming the number of employees paid on each pay period in calendar years 2014, 2015, 2016, 2017, 2018, and through February 12, 2019. The number of employees was always fewer than 200. (*See* Payroll Aff. ¶ 5 & Ex. B). The EEOC counters with two of Hamilton Pointe's position statements submitted during the EEOC's investigation dated September 21, 2016 and October 27, 2016. In response to the EEOC's inquiry: "State the number of persons employed by the Village at Hamilton Pointe as a whole on the most recent payroll date," Hamilton Pointe responded: "The total number of employees is 205 . . . " (Filing Nos. 112-3 at 2, 112-4 at 2, EEOC position statements). The EEOC also relies on the testimony of Hamilton Pointe's former administrator, Lauren Hayden, who stated that Hamilton Pointe employed "over 200" employees during her tenure. (Hayden Dep. at 35:24-36:9). This evidence is insufficient to raise a genuine issue of material fact. Hamilton Pointe's position statements do not purport to state the number of employees at Hamilton Pointe for each pay period from 2014 through February 12, 2019. And they do not show for the year 2016 that Hamilton Pointe had more than 200 employees "in each of 20 or more calendar weeks" pursuant to the payroll method. Hayden's answer is just her educated opinion and does not appear to be based on Hamilton Pointe's payroll for any given week. Therefore, the court finds

Hamilton Pointe had fewer than 200 employees during the relevant time period for purposes of Title VII's damages cap.

V. Conclusion

The court finds the EEOC failed to raise a genuine issue of material fact with respect to the disparate impact and hostile work environment claims brought by the 40 Class Members subject to Hamilton Pointe's motion. Accordingly, the court **GRANTS** Hamilton Pointe's Motion for Partial Summary Judgment (Filing No. 97). The court further finds that at all relevant times, Hamilton Pointe had fewer than 200 employees.

The claims brought by Angela D. Gilbert, Donna M. Grissett, Yana Shelby, Roshaun Middleton, and Aleshia Smith remain.

SO ORDERED this 29 day of September 2020.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

VERDICT FORM – DeLoris Cook

I. Race Discrimination

1. Has the EEOC proven, by a preponderance of the evidence, that Hamilton Pointe made job assignments based on the race of DeLoris Cook?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section II.

2. Has the EEOC proven, by a preponderance of the evidence, that the race-based assignments significantly changed the terms and conditions of DeLoris Cook's employment in an unfavorable way?

Yes ____ No ✓

II. Supervisor Harassment

1. Has the EEOC proven, by a preponderance of the evidence, that DeLoris Cook was subjected to a hostile work environment by Hamilton Pointe through supervisor harassment?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section III.

2. Has Hamilton Pointe proven, by a preponderance of the evidence, that Hamilton Pointe exercised reasonable care to prevent and correct any harassing conduct of a supervisor in the workplace and DeLoris Cook unreasonably failed to take advantage of opportunities provided by Hamilton Pointe to prevent or correct harassment or otherwise avoid harm?

Yes ✓ No ____

III. Co-Worker/Resident Harassment

Has the EEOC proven, by a preponderance of the evidence, that DeLoris Cook was subjected to a hostile work environment by Hamilton Pointe through co-worker or resident harassment?

Yes ____ No ✓

IV. Damages

If you found Hamilton Pointe is liable to DeLoris Cook for race discrimination and/or racial harassment, has the EEOC proven, by a preponderance of the evidence, that DeLoris Cook is entitled to compensatory damages for emotional pain and suffering?

Yes ____ No ✓

If your answer is "yes," please write the amount of damages below.

$ 0

The Foreperson should sign and date this Verdict Form.

Foreperson's Signature _____ Dated: 8-5-2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

VERDICT FORM – Amber Cottrell

I. Race Discrimination

1. Has the EEOC proven, by a preponderance of the evidence, that Hamilton Pointe made job assignments based on the race of Amber Cottrell

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section II.

2. Has the EEOC proven, by a preponderance of the evidence, that the race-based assignments significantly changed the terms and conditions of Amber Cottrell's employment in an unfavorable way?

Yes ____ No ✓

II. Supervisor Harassment

1. Has the EEOC proven, by a preponderance of the evidence, that Amber Cottrell was subjected to a hostile work environment by Hamilton Pointe through supervisor harassment?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section III.

2. Has Hamilton Pointe proven, by a preponderance of the evidence, that Hamilton Pointe exercised reasonable care to prevent and correct any harassing conduct of a supervisor in the workplace and Amber Cottrell unreasonably failed to take advantage of opportunities provided by Hamilton Pointe to prevent or correct harassment or otherwise avoid harm?

Yes ✓ No ____

III. Co-Worker/Resident Harassment

Has the EEOC proven, by a preponderance of the evidence, that Amber Cottrell was subjected to a hostile work environment by Hamilton Pointe through co-worker or resident harassment?

Yes ____ No ✓

IV. Damages

If you found Hamilton Pointe is liable to Amber Cottrell for race discrimination and/or racial harassment, has the EEOC proven, by a preponderance of the evidence, that Amber Cottrell is entitled to compensatory damages for emotional pain and suffering?

Yes ____ No ✓

If your answer is "yes," please write the amount of damages below.

$ 0

The Foreperson should sign and date this Verdict Form.

_____ Dated: 8-5-2022

Foreperson's Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

VERDICT FORM – Angela Gilbert

I. Race Discrimination

1. Has the EEOC proven, by a preponderance of the evidence, that Hamilton Pointe made job assignments based on the race of Angela Gilbert?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section II.

2. Has the EEOC proven, by a preponderance of the evidence, that the race-based assignments significantly changed the terms and conditions of Angela Gilbert's employment in an unfavorable way?

Yes ____ No ✓

II. Supervisor Harassment

1. Has the EEOC proven, by a preponderance of the evidence, that Angela Gilbert was subjected to a hostile work environment by Hamilton Pointe through supervisor harassment?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section III.

2. Has Hamilton Pointe proven, by a preponderance of the evidence, that Hamilton Pointe exercised reasonable care to prevent and correct any harassing conduct of a supervisor in the workplace and Angela Gilbert unreasonably failed to take advantage of opportunities provided by Hamilton Pointe to prevent or correct harassment or otherwise avoid harm?

Yes ✓ No ____

III. Co-Worker/Resident Harassment

Has the EEOC proven, by a preponderance of the evidence, that Angela Gilbert was subjected to a hostile work environment by Hamilton Pointe through co-worker or resident harassment?

Yes ____ No ✓

IV. Damages

If you found Hamilton Pointe is liable to Angela Gilbert for race discrimination and/or racial harassment, has the EEOC proven, by a preponderance of the evidence, that Angela Gilbert is entitled to compensatory damages for emotional pain and suffering?

Yes ____ No ✓

If your answer is "yes," please write the amount of damages below.

$ 0

The Foreperson should sign and date this Verdict Form.

_____ Dated: 8-5-2022
Foreperson's Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

VERDICT FORM – Donna Grissett

I. Race Discrimination

1. Has the EEOC proven, by a preponderance of the evidence, that Hamilton Pointe made job assignments based on the race of Donna Grissett?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section II.

2. Has the EEOC proven, by a preponderance of the evidence, that the race-based assignments significantly changed the terms and conditions of Donna Grissett's employment in an unfavorable way?

Yes ____ No ✓

II. Supervisor Harassment

1. Has the EEOC proven, by a preponderance of the evidence, that Donna Grissett was subjected to a hostile work environment by Hamilton Pointe through supervisor harassment?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section III.

2. Has Hamilton Pointe proven, by a preponderance of the evidence, that Hamilton Pointe exercised reasonable care to prevent and correct any harassing conduct of a supervisor in the workplace and Donna Grissett unreasonably failed to take advantage of opportunities provided by Hamilton Pointe to prevent or correct harassment or otherwise avoid harm?

Yes ✓ No ____

III. Co-Worker/Resident Harassment

Has the EEOC proven, by a preponderance of the evidence, that Donna Grissett was subjected to a hostile work environment by Hamilton Pointe through co-worker or resident harassment?

Yes ____ No ✓

IV. Damages

If you found Hamilton Pointe is liable to Donna Grissett for race discrimination and/or racial harassment, has the EEOC proven, by a preponderance of the evidence, that Donna Grissett is entitled to compensatory damages for emotional pain and suffering?

Yes ____ No ✓

If your answer is "yes," please write the amount of damages below.

$_____

The Foreperson should sign and date this Verdict Form.

_____ Dated: 8-5-2022
Foreperson's Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

VERDICT FORM –Yana Shelby

I. Race Discrimination

1. Has the EEOC proven, by a preponderance of the evidence, that Hamilton Pointe made job assignments based on the race of Yana Shelby?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section II.

2. Has the EEOC proven, by a preponderance of the evidence, that the race-based assignments significantly changed the terms and conditions of Yana Shelby's employment in an unfavorable way?

Yes ____ No ✓

II. Supervisor Harassment

1. Has the EEOC proven, by a preponderance of the evidence, that Yana Shelby was subjected to a hostile work environment by Hamilton Pointe through supervisor harassment?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section III.

2. Has Hamilton Pointe proven, by a preponderance of the evidence, that Hamilton Pointe exercised reasonable care to prevent and correct any harassing conduct of a supervisor in the workplace and Yana Shelby unreasonably failed to take advantage of opportunities provided by Hamilton Pointe to prevent or correct harassment or otherwise avoid harm?

Yes ____ No ✓

III. Co-Worker/Resident Harassment

Has the EEOC proven, by a preponderance of the evidence, that Yana Shelby was subjected to a hostile work environment by Hamilton Pointe through co-worker or resident harassment?

Yes ✓ No ____

IV. Damages

If you found Hamilton Pointe is liable to Yana Shelby for race discrimination and/or racial harassment, has the EEOC proven, by a preponderance of the evidence, that Yana Shelby is entitled to compensatory damages for emotional pain and suffering?

Yes ____ No ✓

If your answer is "yes," please write the amount of damages below.

$_____

The Foreperson should sign and date this Verdict Form.

_____ Dated: 8-5-2022
Foreperson's Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

VERDICT FORM – Aleshia Smith

I. Race Discrimination

1. Has the EEOC proven, by a preponderance of the evidence, that Hamilton Pointe made job assignments based on the race of Aleshia Smith?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section II.

2. Has the EEOC proven, by a preponderance of the evidence, that the race-based assignments significantly changed the terms and conditions of Aleshia Smith's employment in an unfavorable way?

Yes ____ No ✓

II. Supervisor Harassment

1. Has the EEOC proven, by a preponderance of the evidence, that Aleshia Smith was subjected to a hostile work environment by Hamilton Pointe through supervisor harassment?

Yes ____ No ✓

If your answer to Question 1 is "yes," then go to Question 2. If your answer to Question 1 is "no," then go to Section III.

2. Has Hamilton Pointe proven, by a preponderance of the evidence, that Hamilton Pointe exercised reasonable care to prevent and correct any harassing conduct of a supervisor in the workplace and Aleshia Smith unreasonably failed to take advantage of opportunities provided by Hamilton Pointe to prevent or correct harassment or otherwise avoid harm?

Yes ✓ No ____

III. Co-Worker/Resident Harassment

Has the EEOC proven, by a preponderance of the evidence, that Aleshia Smith was subjected to a hostile work environment by Hamilton Pointe through co-worker or resident harassment?

Yes ✓ No ____

IV. Damages

If you found Hamilton Pointe is liable to Aleshia Smith for race discrimination and/or racial harassment, has the EEOC proven, by a preponderance of the evidence, that Aleshia Smith is entitled to compensatory damages for emotional pain and suffering?

Yes ____ No ✓

If your answer is "yes," please write the amount of damages below.

$ 0

The Foreperson should sign and date this Verdict Form.

[redacted]
Foreperson's Signature

Dated: 8-5-2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. THE VILLAGE AT HAMILTON POINTE LLC, d/b/a HAMILTON POINTE HEALTH AND REHABILITATION CENTER, d/b/a HAMILTON POINTE ASSISTED LIVING CENTER d/b/a THE COTTAGES AT HAMILTON POINTE, Defendants.	)	No. 3:17-cv-00147-RLY-MPB

JUDGMENT

Prior to trial, the court granted Defendant Tender Loving Care Management, Inc.'s Motion for Summary Judgment and granted Defendant The Village at Hamilton Pointe's Motion for Summary Judgment as to 47 Claimants[1]:

No. 1 Adrien Chamberlain	No. 2 Sonja Fletcher	No. 5 Tamara McGuire
No. 6 Vanessa Miles	No. 9 Trent Carter	No. 11 An'Yel Crawford
No. 12 LaShawn Johnson	No. 13 Raven Langley	No. 14 Sheila Langley
No. 15 L'Sheila Lewis	No. 17 Edward Partee	No. 18 Takia Roberts
No. 20 Montoya Smith	No. 21 Bianca Toliver	No. 22 David Ussery

[1] Class members are identified by their number in the EEOC's Notice of Identification of Class. (Filing No. 50).

No. 23 Ruth Washington | No. 24 Carmen Baker | No. 27 Lydia Green

No. 28 Sara Johnson | No. 29 Naim Muhammad | No. 32 Kathy Butler

No. 33 Kyran Byrd | No. 35 LaKisha Faulk | No. 36 Amber Johnson

No. 37 Latiana Merriweather | No. 38 Charah Milan | No. 39 Tamara Moredock

No. 40 Mateena Powell | No. 41 Ophelia Stone | No. 42 Katrice Moody

No. 43 Sherrlynn Lester | No. 44 Nicole Powell | No. 45 Ronetta Goodloe

No. 46 Jennifer Stanley | No. 47 Arletha Cayson | No. 48 Tommy Buggs

No. 49 Cynthia Erife | No. 50 Andrea Trask | No. 51 Jacquetta Tyus

No. 52 Lenae Watkins

(Filing Nos. 166, 170). The EEOC also agreed to remove the following five Class Members: No. 8 Fallon Brown, No. 25 Savannah Brogden, No. 30 Kimberly Thompson, No. 31 Mia Van Dyke, and No. 34 LaShonda Cooper. (*See* Filing No. 84-14).

On August 1, 2022, the case went to trial with respect to the remaining seven Claimants— Deloris Cook, Amber Cottrell, Angela Gilbert, Donna Grissett, RoShaun Middleton, Yana Shelby, and Aleshia Smith. On August 5, 2022, the jury returned verdicts as to each individual Claimant. Consistent with the jury's verdicts, the court enters judgment in favor of Defendant The Village at Hamilton Pointe and against Plaintiff Equal Employment Opportunity Commission as to Claimants Deloris Cook, Amber Cottrell, Angela Gilbert, Donna Grissett, Yana Shelby, and Aleshia Smith. Plaintiff shall take nothing from the Complaint as to those Claimants. The court also enters judgment in favor of Plaintiff Equal Employment Opportunity Commission and against Defendant The Village at Hamilton Pointe as to Claimant RoShaun Middleton on

his claim for co-worker/resident racial harassment. On Mr. Middleton's behalf, Plaintiff Equal Employment Opportunity Commission shall recover from Defendant The Village of Hamilton Pointe $45,000.

SO ORDERED this 11th day of August 2022.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Roger Sharpe, Clerk
United States District Court

By: Deputy Clerk

Distributed Electronically to Registered Counsel of Record.

Certificate of Service

I certify that on this 28th day of February, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of the Court via the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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