No. 24-40058

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LAWRENCE DIKE,
Plaintiff-Appellant,

v.

COLUMBIA HOSPITAL CORPORATION OF BAY AREA, d/b/a CORPUS CHRISTI MEDICAL CENTER; BAY AREA HEALTHCARE GROUP LTD., d/b/a CORPUS CHRISTI MEDICAL CENTER; and HCA HEALTHCARE, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF VACATUR

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal implicates the proper standards for determining whether workplace harassment is sufficiently severe or pervasive to support a hostile work environment claim, and for determining whether an employer has taken prompt remedial action in the face of such harassment. Because the EEOC has a substantial interest in the proper resolution of these questions, the agency offers its views. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

Lawrence Dike brought this employment discrimination action against Columbia Hospital Corporation of Bay Area d/b/a Corpus Christi Medical Center and Bay Area Healthcare Group, Ltd. d/b/a Corpus Christi Medical Center (together, "CCMC"). As relevant here, the district court granted summary judgment to CCMC on Dike's hostile work environment claim under Title VII. The issues presented are:

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

1. Whether a reasonable jury could find that the harassment Dike experienced at CCMC was severe or pervasive.

2. Whether a reasonable jury could find that CCMC failed to take prompt remedial action.

STATEMENT OF THE CASE

A. Statement of the Facts.[2]

Dike, who is Black and Nigerian, began working as a Certified Nursing Assistant at CCMC in June 2016. ROA.272, 623. Dike maintains that CCMC had a practice of honoring its patients' racial preferences in assigning caregivers. Up to two times a week, nurses told Dike that they had switched his room assignments because the patients did not want a Black person caring for them. ROA.628, 631-33. When Dike raised concerns about this practice, managers told him that if a patient did not "want a black person to take care of them," the hospital would "make it happen for the patient." ROA.626; *see also* ROA.634, 661, 749-50. Although Jason Sewell, CCMC's current Assistant Chief Nursing Officer and former

[2] Because this appeal arises from a grant of summary judgment, we present these facts in the light most favorable to Dike. *See Vaughn v. Woodforest Bank*, 665 F.3d 632, 635 (5th Cir. 2011).

Director of Patient Care Services, later denied that the hospital had a "policy or practice of making assignments based on race," he admitted that "[g]enerally speaking, if a patient were to request an assignment change due to race," the hospital "would likely go ahead and make the change" if other staff were available. ROA.445.

On top of that practice, Dike endured other offensive behaviors. Coworkers regularly mocked Dike's accent and told him that his "African food stinks." ROA.639-40, 644-46. One nurse often said that she "prefer[red] Filipinos to blacks because blacks play the race card." ROA.643-44. On multiple occasions, and in Dike's presence, the same nurse told another Black employee that he had "upgraded his status by marrying a Filipino" and was "no longer black." ROA.641-43. Other employees would laugh at these comments, making Dike feel "degrad[ed]." ROA.641. One coworker told Dike to stay twelve feet away from him because the coworker did not "deal with people of [Dike's] culture" or "skin color." ROA.647-48. On at least two occasions, patients called Dike the N-word, with one stating, "I don't want the freaking n[***]er to take care of me." ROA.628-30.

Time and again, Dike reported these incidents to Esther Marissa Zamora, who was the nurse manager for Dike's department and his direct supervisor. ROA.628-30, 633-34, 649-50, 652-54, 804. Time and again, Zamora took no meaningful action. Sometimes, Zamora simply told Dike to "kill [his harassers] with [a] smile." ROA.633, 649, 804. Other times, Zamora told Dike that she would talk to the employees involved, but then never followed up. ROA.650, 652-54. On one occasion, Zamora made a coworker apologize to Dike, but then took no action when the coworker's conduct continued. ROA.649. Given Zamora's inaction, the harassment persisted largely unabated. ROA.649, 652-53, 804.

Dike eventually tried to escalate his concerns to senior management. That too proved ineffective. In May 2017, Dike sent emails to Sewell to report the harassment he had experienced. ROA.444, 470-74, 476-77. Sewell and Vince Goodwine, CCMC's Vice President of Human Resources, conducted an investigation. ROA.444. Sewell and Goodwine concluded that none of the conduct violated CCMC's policies on discrimination and harassment, and aside from telling some employees to watch their language, CCMC took no further corrective action. ROA.444-45.

Dike continued to make complaints, and in December 2017, he filed a charge of discrimination with the EEOC. ROA.271-73. Months later, in March 2018, CCMC fired him for alleged misconduct. ROA.513-15, 580-82. Dike then amended his charge to provide additional details, including about his allegations of harassment. ROA.274-78.

B. District Court's Decision.

Dike filed this action, which included a hostile work environment claim based on race, color, and national origin. ROA.833. After discovery, the district court granted summary judgment to CCMC. ROA.858-59.

As relevant here, the court rejected Dike's hostile work environment claim on two principal grounds. First, the court found that "the 'harassment' about which Dike complained was either unsubstantiated, not related to his race/color/national origin, or otherwise not sufficiently severe and pervasive to support a hostile work environment claim." ROA.843. Second, the court found that Dike had "failed to rebut [CCMC's] evidence that [it] investigated and took prompt remedial action each time he complained." ROA.843.

Dike timely appealed. ROA.860-63.

ARGUMENT

Title VII "prohibits … the creation of a hostile or abusive working environment." *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 163 (5th Cir. 2007). To prove a hostile work environment claim, a plaintiff must show, among other things, that the harassment he suffered was so severe or pervasive that it affected a term, condition, or privilege of employment. *Aryain v. Wal-Mart Stores Tex. LP*, 534 F.3d 473, 479 (5th Cir. 2008). When the claim is based on harassment by someone other than a supervisor (such as coworkers or patients), the plaintiff must also show that his employer knew or should have known of the harassment and failed to take prompt remedial action. *Hudson v. Lincare, Inc.*, 58 F.4th 222, 229-30 (5th Cir. 2023) (coworkers); *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 327 (5th Cir. 2019) (patients).[3]

Viewed in the light most favorable to Dike, the record evidence would permit a reasonable jury to find that he proved both elements. In holding otherwise, the district court applied the wrong legal standards,

[3] The district court and the parties appeared to assume that Dike's claim was not based on supervisor harassment. *See, e.g.*, ROA.308-13, 600-10, 842-52. We follow their lead.

improperly resolved disputed factual issues, and declined to consider relevant evidence. For these reasons, the district court's grant of summary judgment on Dike's hostile work environment claim should be vacated and the case remanded for further appropriate proceedings.

I. A reasonable jury could find that the harassment Dike experienced was severe or pervasive.

In assessing whether harassment was severe or pervasive, "courts consider the totality of the circumstances." *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 399 (5th Cir. 2007); *see also EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 453 (5th Cir. 2013) (en banc) ("Ultimately, whether an environment is hostile or abusive depends on the totality of circumstances."). Relevant considerations 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." *Lauderdale*, 512 F.3d at 163 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

Importantly, "[t]he required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." *WC&M Enters.*, 496 F.3d at 400 (quoting *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1073

(9th Cir. 2005)). Thus, "a regular pattern of frequent verbal ridicule or insults sustained over time can constitute severe or pervasive harassment sufficient to violate Title VII." *Id.* Conversely, "a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim as well as a continuous pattern of much less severe incidents of harassment." *Id.*

A. An employer's policy of honoring patients' racial preferences—combined with a pattern of ridicule and insult—can constitute severe or pervasive harassment.

Here, considering the totality of the circumstances and viewing the facts in the light most favorable to Dike, a reasonable jury could find that the harassment Dike suffered was severe or pervasive. Chief among those facts is Dike's testimony that CCMC had a practice of honoring its patients' racial preferences in making room assignments, which in Dike's case happened multiple times per week. ROA.628, 631-33.

In *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010), the Seventh Circuit had "no trouble" concluding that a healthcare facility's similar "practice of honoring the racial preferences of residents" was sufficiently abusive—especially where, as here, the practice was "accompanied by racially-tinged comments and epithets from co-workers."

Id. at 911-12. As *Chaney* explained, such practices "foster and engender a racially-charged environment," and they inherently affect the terms or conditions of employment by restricting an employee "in the rooms she could enter, the care that she could provide, and the patients she could assist." *Id.* at 912; *see also id.* at 915 (by "excluding [plaintiff] from work areas and residents solely on account of her race," the employer "thereby creat[ed] a racially-charged workplace that poisoned the work environment").

The Seventh Circuit's recent decision in *EEOC v. Village at Hamilton Pointe LLC*, __ F.4th __, 2024 WL 2074326 (7th Cir. May 9, 2024), does not undermine that conclusion. There, the court held that the employees, who were caregivers at a long-term care facility, did not suffer severe or pervasive harassment even though some of them saw assignment sheets that prohibited Black employees from caring for certain patients. *Id.* at *8-28.

At the outset of its analysis, the court reaffirmed *Chaney*'s central holding that a "policy of honoring residents' racial preferences in assigning caregivers" can cause or contribute to a hostile work environment. *Id.* at *6-7. But, the court explained, "the facts of this case are clearly distinguishable

from those in *Chaney*." *Id.* at *10. Generally, for example, the employees saw race-based assignment sheets on only a few occasions, they were not themselves subjected to race-based assignments, and they often did not allege any coworker harassment. *See*, *e.g.*, *id.* (employee "only saw the facially discriminatory assignment sheets for three days," "was never the subject of discriminatory conduct," and "does not allege any comparable harassment from her co-workers"); *id*. at *22 (racially discriminatory assignment sheets "were not a pervasive aspect of [employee's] employment like they were in *Chaney*"); *id*. at *25 (employee "did not allege that she saw race-based assignment sheets for several months in a row, was banned from resident rooms, or experienced co-worker harassment").

The court further noted that some of the alleged harassment came from residents who had Alzheimer's, dementia, or other memory-impairing conditions. *See*, *e.g.*, *id.* at *15-16, *18, *26. Citing this Court's decisions, the Seventh Circuit emphasized that while there is no "categorical bar" against hostile work environment claims based on harassment by patients with such conditions, courts must "tak[e] into consideration the special circumstances necessarily involved when caring for patients with these afflictions." *Id*. at *8 (quoting and citing *Gardner*, 915

F.3d at 326); *see also Cain v. Blackwell*, 246 F.3d 758, 760 (5th Cir. 2001); *EEOC v. Nexion Health at Broadway, Inc.*, 199 F. App'x 351, 352-54 (5th Cir. 2006).

Here, by contrast, nurses told Dike on a weekly basis that they had changed his room assignments because patients did not want a Black caregiver, Dike suffered a continuous pattern of ridicule and insults from his coworkers based on his race and national origin (in addition to patients twice calling him the N-word[4]), and neither party has suggested that the patients whom Dike treated had dementia or other mental conditions that must be taken into account. Taken together with CCMC's practice of subjecting Dike to race-based assignments, the harassment Dike endured was more than enough to create an objectively hostile work environment.

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[4] *See Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392, 401 (5th Cir. 2021) ("Our court has observed that the term 'n*****' is '[t]he most noxious racial epithet in the contemporary American lexicon.' Far from 'a mere offensive utterance,' this slur is inherently and deeply 'humiliating.'" (alterations in original) (citations omitted)); *Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) ("The N-word has been further described as 'a term that sums up ... all the bitter years of insult and struggle in America, [a] pure anathema to African-Americans, [and] probably the most offensive word in English.'" (alterations in original) (citation omitted)); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans.").

B. The district court erred in several critical respects in its analysis of the "severe or pervasive" prong.

1. The district court applied an incorrect legal standard and improperly resolved a key factual issue.

As an initial matter, although the district court initially articulated the correct "severe *or* pervasive" standard, it then erroneously stated that Dike had to show the harassment he experienced was "severe *and* pervasive." ROA.842-43 (emphases added). This Court has repeatedly emphasized that the "severe or pervasive" standard "is stated in the disjunctive," *Wantou v. Wal-Mart Stores Tex., LLC*, 23 F.4th 422, 433 (5th Cir. 2022) (quoting *Lauderdale*, 512 F.3d at 163), and "requiring [a plaintiff] to establish that the conduct was both severe *and* pervasive" applies "the wrong legal standard," *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 434 (5th Cir. 2005).

In addition, the district court improperly resolved a key disputed factual issue: whether CCMC subjected Dike to race-based assignments. While the court appeared to recognize that a practice of making race-based assignments would contribute to a hostile work environment, it reasoned that the only evidence showing that "charge nurses routinely changed

[Dike's] patient assignments based on his race" was "Dike's own testimony," which the court rejected as "[s]elf-serving." ROA.848.

That is not a valid ground on which to grant summary judgment. As this Court has explained, "'self-serving' affidavits and depositions may create fact issues even if not supported by the rest of the record." *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021). Thus, where a witness's testimony is "otherwise competent evidence," it "may not be discounted just because [it] happen[s] to be self-interested." *Id.* at 160-61; *see also Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989) ("[C]haracterizing a party's testimony as 'self serving' is not useful to the court. In a lawsuit, where each party is attempting to advance his own cause and protect his own interests, we are scarcely shocked when a party produces evidence or gives testimony that is 'self-serving.'").[5]

[5] *Accord Boykin v. Fam. Dollar Stores of Mich., LLC*, 3 F.4th 832, 841 (6th Cir. 2021) ("[P]arties should avoid this 'self-serving' label because it does nothing to undermine the other side's evidence under Rule 56."); *Lovett v. Cracker Barrel Old Country Store, Inc.*, 700 F. App'x 209, 212 (4th Cir. 2017) ("[C]ourts have long ago buried—or at least tried to bury—the misconception that uncorroborated testimony from the non-movant cannot prevent summary judgment because it is 'self-serving.'" (cleaned up)); *Hill v. Tangherlini*, 724 F.3d 965, 967 (7th Cir. 2013) ("As we have repeatedly emphasized over the past decade, the term 'self[-]serving' must not be used

Because there is no dispute that Dike's testimony is otherwise competent evidence, the district court "erred in rejecting [Dike's] statements as self-serving." *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 245 (5th Cir. 2016); *see also* Fed. R. Civ. P. 56(c)(4). Moreover, as discussed below (*infra* at p.22), other evidence corroborates Dike's deposition testimony. Indeed, although CCMC resisted characterizing its race-based assignments as policies or practices, it conceded that "the summary-judgment evidence, viewed in the light most favorable to Dike, indicates he was sometimes told that patients did not want him to treat them because of his race and that he was reassigned on a case-by-case basis." ROA.310-11.

In short, based on Dike's testimony and other corroborating evidence, a reasonable jury could find that CCMC had a practice of honoring its patients' racial preferences in assigning caregivers and that it regularly followed that practice in deciding whether to assign Dike to certain patients.

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to denigrate perfectly admissible evidence through which a party tries to present its side of the story at summary judgment.").

2. The district court did not consider the totality of the circumstances.

More fundamentally, the court did not apply the totality-of-the-circumstances test that Supreme Court and Fifth Circuit precedents demand. *See Harris*, 510 U.S. at 23; *WC&M Enters.*, 496 F.3d at 399; *Boh Bros. Constr.*, 731 F.3d at 453. Instead, the court disaggregated Dike's allegations and then separately considered each discrete category of harassment in isolation. *See generally* ROA.843-52.

Courts have consistently rejected this divide-and-conquer approach to assessing hostile work environment claims. *See, e.g.*, *EEOC v. PVNF, LLC*, 487 F.3d 790, 799 (10th Cir. 2007) ("By parsing out the various instances of harassment and characterizing them as gender-neutral, or not pervasive, CDM seeks to eschew the proper 'totality of the circumstances' test, which is the 'touchstone' of our analysis of hostile work environment claims."); *Mack v. ST Mobile Aerospace Eng'g, Inc.*, 195 F. App'x 829, 838 (11th Cir. 2006) (district court improperly "viewed the plaintiffs' allegations in isolation, discounting each, to conclude that the conduct was not sufficiently severe or pervasive"); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999) (district court improperly "divided and categorized

the reported incidents, divorcing them from their context and depriving them of their full force"); *see also Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.").

Here, for instance, the district court discounted evidence of harassment directed toward individuals other than Dike on the ground that "second-hand harassment is insufficient to constitute a hostile work environment." ROA.851. To start, although this Court has said that second-hand harassment is "*less* objectionable than harassment directed at the plaintiff," *Arredondo v. Elwood Staffing Servs., Inc.*, 81 F.4th 419, 433 (5th Cir. 2023) (emphasis added) (citation omitted), that does not mean second-hand harassment is *never* sufficient to create a hostile work environment. *Cf. Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811-12 (11th Cir. 2010) (en banc) (widespread use of gendered epithets in workplace could create hostile work environment even if only "directed at women as a group" rather than plaintiff herself).

In concluding otherwise, the district court relied on this Court's unpublished decision in *Frazier v. Sabine River Authority Louisiana*, 509 F. App'x 370 (5th Cir. 2013). But aside from lacking precedential value, *Frazier* did not suggest, let alone hold, that second-hand harassment is per se insufficient—instead, this Court limited its decision to the specific facts before it in view of the "total record." *Id.* at 374 ("We agree with the district court's well-reasoned conclusion that these instances [of alleged harassment] were isolated and not severe or pervasive enough to support a hostile work environment claim.").[6]

Even if second-hand harassment were insufficient standing alone, it would remain relevant under the totality-of-the-circumstances test because

[6] In *Frazier*, the plaintiff relied on only a handful of incidents, including one in which a coworker used the N-word in his presence, another in which a coworker referred to a nearby town called "Negreet," and another in which a coworker "made a noose and gestured as though he was hanging it around" a white coworker's neck. 509 F. App'x at 371-72. These events, the district court reasoned, were tempered by the "surrounding circumstances," including the fact that the coworker who used the N-word in the plaintiff's presence immediately apologized, there was no evidence that the coworker who referred to the town of Negreet used a racial epithet, and the plaintiff testified that he knew his coworkers involved in the noose incident were "joking with themselves." *Frazier v. Sabine River Auth.*, No. 11-cv-00778, 2012 WL 2120731, at *4-5 (W.D. La. June 11, 2012).

it can *contribute* to a hostile work environment. *See Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 393 (2d Cir. 2020) ("Discriminatory conduct not directly targeted at another employee (*e.g.*, discriminatory remarks made in an employee's presence though addressed to another person) can contribute to the creation of an actionable hostile work environment."); *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999) ("[R]acial epithets need not be hurled at the plaintiff in order to contribute to a work environment that was hostile to her."); *see also Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997) (evidence of harassment directed at other individuals in plaintiff's protected class, "if part of a pervasive or continuing pattern of conduct, was surely *relevant* to show the existence of a hostile environment" (emphasis added)).

In short, the district court should have considered the "second-hand" harassment Dike experienced as part of the totality of the circumstances.

3. The district court declined to consider other relevant evidence.

The court likewise refused to consider evidence that coworkers mocked Dike's accent because Dike did not identify that conduct in his administrative charge or civil complaint. ROA.851-52.

But "a Title VII plaintiff need not allege in an EEOC charge each and every fact that combines to form the basis of each claim in her complaint." *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994); *see also Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465 (5th Cir. 1970) ("[T]he specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow."); *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1098 (D.C. Cir. 1997) ("[E]very detail of the eventual complaint need not be presaged in the EEOC filing….").

Nor must a civil complaint "allege every fact … that is conceivably relevant" to a properly asserted claim. *Guenther v. BP Ret. Accumulation Plan*, 50 F.4th 536, 544 (5th Cir. 2022); *see also Soto-Feliciano v. Villa Cofresi Hotels, Inc.*, 779 F.3d 19, 26 (1st Cir. 2015) (a plaintiff is not obliged "to set forth in the complaint every fact of relevance to an otherwise properly pled claim, let alone every fact of relevance to an as-yet-unfiled summary judgment motion that aims to defeat that same claim"); *Faulconer v. Centra Health, Inc.*, 808 F. App'x 148, 154 (4th Cir. 2020) ("[A] plaintiff does not have to allege in his complaint every fact on which he will rely at summary judgment.").

In short, the court should have considered this conduct as part of the totality of circumstances.

II. A reasonable jury could find that CCMC failed to take prompt remedial action.

In the district court, CCMC did not dispute that it was aware of the harassment Dike experienced—instead, it argued only that it took prompt remedial action. *See generally* ROA.311-13. To qualify as "prompt remedial action," an employer's response "must be reasonably calculated to end the harassment." *Harvill*, 433 F.3d at 437 (quoting *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 615-16 (5th Cir. 1999)). "What constitutes prompt remedial action is a fact-specific inquiry and 'not every response by an employer will be sufficient' to absolve the employer of liability under Title VII." *Williams-Boldware v. Denton Cnty.*, 741 F.3d 635, 640 (5th Cir. 2014) (quoting *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 329 (5th Cir. 2004)).

Here, a reasonable jury could find that CCMC did not adequately respond to Dike's complaints. Most significantly, CCMC points to no evidence that it took any action—let alone prompt remedial action—to investigate or address Dike's complaints about the hospital's practice of

honoring patients' racial preferences. Far from it, in Dike's telling, managers embraced the practice. Dike testified that when he complained to Zamora (his direct supervisor and manager) that nurses were changing his room assignments because of his race, she either simply told him to "kill [the nurses] with [a] smile," or outright endorsed the practice, telling Dike that "[w]e make it happen for the patient." ROA.633-34.[7] Dike further testified that when he later reported this conduct to Sewell, Sewell endorsed the practice in similar terms, saying, "we make it happen for the patient if they don't want a black person to take care of them." ROA.626; *see also* ROA.661.

[7] Dike's complaints to Zamora were sufficient to put CCMC on notice of the harassment. *See Abbt v. City of Houston*, 28 F.4th 601, 607 (5th Cir. 2022) ("An employer can be put on notice of harassment, and therefore be required to take remedial action, if a person within the organization who has the 'authority to address the harassment problem' or an 'affirmative duty' to report harassment learns of the harassment in question." (citation omitted)). Indeed, CCMC's employee handbook directed employees to "promptly report" harassment to their "manager, who will investigate the matter and take appropriate action, including reporting it to Human Resources." ROA.336. The district court did not find otherwise, but instead rejected as "self-serving" Dike's testimony that "Zamora dismissed his complaints about being reassigned." ROA.848. As explained above (*supra* at pp.12-14), that is not a valid ground on which to discount otherwise competent testimony at summary judgment.

Other evidence corroborates Dike's deposition testimony. In a contemporaneous email to human resources, Dike recounted a conversation in which Sewell told him, "if the patient say[s] I don't wanna have someone black take care of me and we have somebody who is not black then we make it happen for the patient." ROA.750. Sewell himself also testified that "if a patient were to request an assignment change due to race," CCMC "would likely go ahead and make the change," ROA.445, explaining that "we try to make … accommodations for … patients," ROA.392.

Tellingly, at summary judgment, CCMC made no effort to show that it acted to stop race-based reassignments. ROA.311-13. To the contrary, CCMC defended the practice, arguing that the hospital changed Dike's patient assignments "for his own safety," and to avoid putting employees "in a situation where they're going to be … caring for somebody" who has "some kind of bias." ROA.311. In essence, CCMC suggests, reassigning staff based on patients' racial preferences was *itself* a form of remedial action meant to prevent racial harassment.

The Seventh Circuit rejected the same argument in *Chaney*. There, as here, the defendant tried to justify its race-based staffing practice in part as

an effort to avoid "exposing black employees to racial harassment from the residents." 612 F.3d at 914. Unpersuaded, the Seventh Circuit explained that a healthcare facility "confronted with a hostile resident has a range of options" short of "imposing an unwanted, race-conscious work limitation on its black employees." *Id.* at 914-15. The facility "can warn residents before admitting them of the facility's nondiscrimination policy, securing the resident's consent in writing; it can attempt to reform the resident's behavior after admission; and it can assign staff based on race-neutral criteria that minimize the risk of conflict." *Id.* at 915. The facility can also "advise[] its employees that they [can] ask for protection from racially harassing residents." *Id.*[8]

But where, as here, a facility "cho[oses] none of these options," and instead unilaterally elects to "exclud[e employees] from work areas and

[8] The "range of options" that the Seventh Circuit identified closely resemble those that Dike himself suggested in his deposition. When asked why it was "improper" for CCMC to change his assignments, Dike answered: "[T]hey should've let the patient know that we don't assign caregivers on the grounds of race. If you don't want [a Black caregiver] to take care of you[,] you're welcome to leave the hospital. It is not our policy for someone to be taken care of based on their race, based on the race of the caregiver. That's what I expect my supervisors should have told … the patient." ROA.629.

residents solely on account of [their] race," it risks liability for "creating a racially-charged workplace." *Id.* Simply put, "a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race." *Id.* at 913.

A reasonable jury could find that CCMC's actions were equally inadequate with respect to Dike's complaints about the pattern of insults based on his race and national origin. Again, Dike testified that he repeatedly reported these incidents to Zamora, and that Zamora repeatedly failed to investigate his complaints or take any apparent action. ROA.628-30, 633-34, 649-50, 652-54, 804.[9] As a result, the harassment persisted largely unabated. ROA.649, 652-53, 804.

[9] The district court noted that Zamora made one coworker apologize to Dike, which the court viewed as adequately "prompt remedial action." ROA.844. But the court overlooked Dike's testimony that the same coworker then "continued with what he[was] doing," Dike again reported the conduct to Zamora, and Zamora took no further action. ROA.649; *cf. Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 234 (4th Cir. 2022) (jury could find that forced apology from supervisor's six-year-old son, who made racist comments in the workplace, was not prompt remedial action when employer otherwise failed to address how it would prevent harassment from recurring).

When Sewell and Goodwine eventually conducted an investigation, even that response was lacking. Despite confirming that a nurse had told a Black employee, "you're not black anymore because you're married to a Filipino," Sewell and Goodwine appeared unconcerned because the Black employee to whom the comment was directed "was not offended by the comment and did not think it was inappropriate." ROA.444. Additionally, when the same nurse admitted that she "had made comments about food 'stinking,'" but denied that her comments were "specific to a type of food or race or anything like that," Sewell and Goodwine appeared to uncritically accept her version of events. ROA.444-45. In the end, Sewell and Goodwin told the nurse to "be mindful of her comments," and "counseled" her and other employees that "such comments should not be made." ROA.444-45.

CCMC took no further corrective action on these complaints: it did not warn or discipline any employees, it did not provide any additional guidance or training on its harassment policies, and it made no attempt to monitor the situation to ensure that the harassment had stopped. In sum, a jury could readily find that CCMC's response fell short of prompt remedial action. *See Johnson*, 7 F.4th at 405 (employer's "cursory and ineffectual

investigation into a plaintiff's complaints does not constitute prompt remedial action" (citing *Boh Bros. Constr.*, 731 F.3d at 466)).

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment on Dike's hostile work environment claim should be vacated and the case remanded for further appropriate proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and Fifth Circuit Rules 29.2, 29.3, and 32.2, because it contains 5,182 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1, 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 365 in Book Antiqua 14 point.

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CERTIFICATE OF SERVICE

I certify that on May 22, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that, with the exception of Charles C. Smith (trial counsel for Plaintiff-Appellant), all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system. A copy of the brief will be served on Mr. Smith by email at ccsmithlaw@aol.com.

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