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

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

GAIL S. COLEMAN
STEVEN WINKELMAN
Attorneys
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

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INTRODUCTION

In its opening brief, the Equal Employment Opportunity Commission ("EEOC") urged this Court to reverse: (1) the award of partial summary judgment to Village at Hamilton Pointe, LLC ("Hamilton Pointe") as to fifteen individuals whose hostile-work-environment claims the district court rejected; (2) the jury's verdict for Hamilton Pointe as to the six individuals who received no damages at trial; and (3) the award of summary judgment in favor of Tender Loving Care Management, LLC ("TLC"). Appellees now misstate the applicable law, misrepresent the record, and fail to draw all reasonable inferences in the EEOC's favor on review of summary judgment. This Court should reject Appellees' arguments.

ARGUMENT

I. A reasonable jury could find in favor of fifteen claimants dismissed at summary judgment.

A. Hamilton Pointe relies on out-of-Circuit precedent that is contrary to Circuit law.

Like the district court, Hamilton Pointe relies heavily on Fifth Circuit law rather than on this Court's binding precedent to argue that the claimants did not experience an actionable hostile work environment.

HP.Br.47-49.[1] In asserting that Fifth Circuit law does not apply, Hamilton Pointe says, the EEOC is erroneously suggesting that context does not matter. HP.Br.49-51. Of course context matters. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (severity decreases when a football coach smacks a player on the buttocks); *Alamo v. Bliss*, 864 F.3d 541, 551 (7th Cir. 2017) (severity increases where firefighters depend on each other for survival). However, in this Circuit, a long-term care facility is not the type of context that lessens harassment's severity.

In *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908 (7th Cir. 2010), a long-term care facility argued that its race-based assignments protected Black employees from resident racial harassment. *Id.* at 914. This Court acknowledged the importance of context, *id.*at 912, and did not deny that the facility had a valid concern about its residents' conduct. However, unlike the Fifth Circuit in *Cain v. Blackwell*, 246 F.3d 758 (5th Cir. 2001), this Court did not suggest that resident harassment could be expected and

[1] Citations take the following form: EEOC.Br.__ (EEOC's opening brief); Short.App.__ (short appendix attached to EEOC's opening brief); EEOC.Supp.App.__ (EEOC's supplemental appendix); HP.Br.__ (Hamilton Pointe's brief); TLC.Br.__ (TLC's brief); HP.Supp.App.__ (Hamilton Pointe's supplemental appendix); R.__ (district court docket entries).

would not generally give rise to employer liability. Instead, it noted that "a long-term care facility confronted with a hostile resident has a range of options" to protect its employees. *Chaney*, 612 F.3d at 915.

Among those options, the Court said, are "warn[ing] residents before admitting them of the facility's nondiscrimination policy [and] securing the resident's consent in writing," "attempt[ing] to reform the resident's behavior after admission," and "assign[ing] staff based on race-neutral criteria that minimize[s] the risk of conflict." *Id.* Such an approach allows "all employees to work in a race-neutral, non-harassing work environment, as is commonly expected of employers." *Id.*

This Court has rejected the premise that employees working in frequently hostile settings "assume the risk of some abuse and cannot complain to the courts unless the abuse is out of line with the subculture of that particular work setting." *Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 1999). Thus, even if it is predictable that some residents of long-term care facilities might engage in racial harassment, that is no basis for "discount[ing] the seriousness of [the] misconduct." *Id.*

Accordingly, in this Circuit, context does not require caregivers to check their sensibilities at the facility door. Rather, it requires employers to take context-specific steps to protect them.

To the extent Hamilton Pointe addresses this Court's law, it argues that *Chaney* and other Seventh Circuit precedents are based on especially egregious facts. HP.Br.51-52, 53-54. The fact pattern of previous cases, however, does not set the floor by which to judge subsequent cases. As the Supreme Court explained in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), "The appalling conduct alleged in *Meritor* [*Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)], and the reference in that case to environments 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,' merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." *Harris*, 510 U.S. at 22 (cleaned up). Thus, the facts in this case need not measure up to those in *Chaney* for a reasonable jury to find a hostile work environment.

B. Some of Hamilton Pointe's errors apply to multiple claimants.[2]

Hamilton Pointe discounts the race-based assignment sheet on various grounds, none of which has merit. First, Hamilton Pointe argues that it cannot be held responsible for the assignment sheet because "it is unknown how, why, or who wrote 'No African American Male Care.'" HP.Br.57; *see also* HP.Br.63, 71-72 (similar). Regardless of who created the assignment sheet, Hamilton Pointe posted it, relied upon it, and then took three days to remove it even after receiving complaints.[3] EEOC.Supp.App.68. The assignment sheet's genesis is irrelevant, because the EEOC seeks to hold Hamilton Pointe responsible for its own actions.

Second, Hamilton Pointe argues that the race-based assignment sheet is hearsay as to any alleged resident preference. HP.Br.57, 63, 66, 71, 74. But

[2] Hamilton Pointe contends that the EEOC seeks to apply facts relevant to one claimant to the group as a whole. HP.Br.47-48. To the contrary, the EEOC argued that each of the fifteen claimants dismissed at summary judgment can individually satisfy the elements of a hostile work environment claim, without reference to the experiences of others. For that reason, the EEOC's opening brief contains subheadings describing each person's individual experiences. The EEOC's introductory overviews of the experiences that claimants encountered are just that. *See* EEOC.Br.3, 35.

[3] Hamilton Pointe's reference to three "shifts," HP.Br.58, is incorrect. *See* R.112-7 at 8, Fletcher Dep., PageID#2335 ("I don't know when they changed it, because it was on there … three days still.").

the EEOC did not introduce the assignment sheet to prove the racial animus of any given resident, *see* Fed. R. Evid. 801(c)(2); the Commission introduced it to show that Hamilton Pointe engaged in race-based assignments and to show the "racially-charged environment" the assignment sheet helped foster for those who saw or knew of it. *See Chaney*, 612 F.3d at 912. At issue here is not the residents' intent; it is Appellees' failure to prevent or correct a racially hostile work environment. *See* 42 U.S.C. § 2000e-2(a) (imposing liability on "employers").

Third, Hamilton Pointe argues that because the assignment sheet referred only to "African-American males," it could not have affected the working conditions of Black women. HP.Br.57-58. But this Court has explained that when a claimant is of the same race as the target of racial hostility, her knowledge of that harassment can contribute to her own hostile work environment. *Yuknis v. First Student, Inc.*, 481 F.3d 552, 554 (7th Cir. 2007).

Finally, Hamilton Pointe argues that the assignment sheet is inadmissible hearsay as to **Milan** and **Muhammad**, who did not personally

see it but learned about it from others.[4] HP.Br.74, 77. That evidence, too, is admissible. This Court has observed that although "workplace rumors" have limited evidentiary utility, "coupled with other evidence this testimony might have relevance in a hostile work environment case." *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 903 (7th Cir. 2018).

Not disputing that some employees were, indeed, subjected to race-based assignments,[5] Hamilton Pointe defends such assignments as legitimate. First, it draws a parallel between a resident's refusal of care from a Black employee and the refusal to take a shower. HP.Br.13-14. In both situations, Hamilton Pointe argues, the resident's rights must be

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[4] Muhammad testified that he heard about written directives prohibiting Black employees from entering certain rooms, EEOC.Supp.App.167, but it is unclear whether he was referring to the same assignment sheet that is part of this record. EEOC.Supp.App.46-50.

[5] **Carter, A. Johnson, L. Johnson, S. Johnson, Lewis, McGuire, Muhammad,** and **Washington** each testified that Hamilton Pointe barred them from resident rooms because of their race. EEOC.Supp.App.56-57, 91-92, 110, 112, 114, 117, 129-30, 138, 137, 146, 163, 166, 209-10, 216. Hamilton Pointe disputes the truth of Carter's, L. Johnson's, Lewis's, Muhammad's, and Washington's testimony, HP.Br.53, 69, 77, 83-84, but the truth of their testimony is for the jury to decide. Hamilton Pointe does not dispute that A. Johnson, S. Johnson, and McGuire were not allowed to care for certain residents because of their race. *Id.* at 61, 65-66, 70-71.

respected. HP.Br.13-14. But allowing a resident not to shower does not implicate Title VII. Acceding to racism does.

Hamilton Pointe also argues that race-based assignments protect employees from racial harassment. HP.Br.65-66. This Court expressly rejected that argument in *Chaney*, 612 F.3d at 915 (long-term care facility must use "race-neutral" options and not "impose[]an unwanted, race-conscious work limitation on its black employees").

Moreover, Hamilton Pointe downplays the effect of hearing the N-word on **Carter, Langley, Lewis, Milan,** and **Roberts**. HP.Br.55, 68, 70, 74, 80. As explained in the opening brief, this Court has recognized that the N-word is a uniquely "egregious" slur. EEOC.Br.36 (citing *Scaife v. U.S. Dep't of Veterans Affs.*, 49 F.4th 1109, 1116 (7th Cir. 2022)). And, as Black individuals, these claimants were within the "target area" of the racist abuse. *Yuknis*, 481 F.3d at 554; *see also Mason v. S. Ill. Univ. at Carbondale*, 233 F.3d 1036, 1046 (7th Cir. 2000) (comments to others can contribute to a hostile work environment if individual is aware of them).

In another error affecting multiple claimants, Hamilton Pointe disaggregates the incidents of harassment to which **L. Johnson**, **S. Johnson**, **Lewis**, and **Washington** were subjected, arguing that none of the incidents

is severe or pervasive when considered on its own. HP.Br.64, 66, 70, 86. However, the existence of a hostile work environment turns on the "totality of the circumstances" affecting each claimant, *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 815 (7th Cir. 2022), not on whether each incident that a claimant experienced is independently enough to create a hostile work environment.

Finally, Hamilton Pointe criticizes **Carter, L. Johnson, S. Johnson, Lewis, Milan, Miles, Muhammad, Roberts,** and **Smith** for not reporting incidents of harassment, HP.Br.56, 64, 67, 70, 75, 76, 79, 81, 83, but fails to acknowledge that the district court did not dismiss them on that basis. Rather, the court focused on whether their harassment was severe or pervasive.[6] Short.App.39-40, 41-42, 44-45, 52-53, 56-57, 59, 71, 73, 80. Genuine issues of material fact remain regarding Hamilton Pointe's actual or constructive knowledge of the harassment, particularly given the

[6] The court did state that even if **Fletcher** or **Toliver** was subjected to severe or pervasive harassment, there was no basis for employer liability. Short.App.33, 62. However, the court did not explain its reasoning. EEOC.Br.40, 60 (citing 7th Cir. R. 50).

existence of other complaints. *See* R.113-6 (summary of Fletcher complaint); R.113-8 (summary of anonymous complaint).

C. Hamilton Pointe makes additional errors specific to individual claimants.

Trent Carter

Hamilton Pointe states that Carter's supervisor, James, told him not to go into resident rooms only because of reported thefts, and that his reference to Black CNAs not being allowed to enter the rooms was hearsay. HP.Br.52-53. Thus, Hamilton Pointe says, "The EEOC's claim that Carter was 'prohibited' from entering rooms 'because of race' is not supported." HP.Br.53. Carter testified, however, that on three occasions, James told him that "*because* the black CNAs wasn't allowed to go in there, *so I wasn't allowed to go in there either*." EEOC.Supp.App.57 (emphasis added).[7] Regardless of any policy or resident preference, James personally told Carter to stay out of the rooms *because of his race.* James' statement is a non-hearsay admission of an opposing party acting in the course of his employment. *See* Fed. R. Evid. 801(d)(2). It is also non-hearsay because the

[7] The EEOC's opening brief incorrectly cited to page 56 of the Supplemental Appendix.

EEOC offered it to show its effect on Carter. *See* Fed. R. Evid. 801(c). A jury could conclude that being barred from residents' rooms because of his race, coupled with overhearing the N-word, created a severe or pervasive hostile work environment.

Sonja Fletcher

Hamilton Pointe suggests that Fletcher overreacted to seeing the assignment sheet stating "NO AFRICAN MALES TO PROVIDE CARE," dismissing her outrage as "subjective discomfort." HP.Br.57. A jury could find, however, that this public, written confirmation of race-based assignments was objectively offensive. *See Chaney*, 612 F.3d at 912, 915. Because the assignment sheet affected members of Fletcher's own race, a jury could agree with Fletcher that it was a "source of humiliation." *Id.* at 915. A jury could further find that Hamilton Pointe amplified the severity of the humiliation by leaving the assignment sheet posted for three days after Fletcher complained, prompting her to resign.[8]

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[8] The EEOC notes Fletcher's resignation to demonstrate the severity of her hostile work environment, not to show constructive discharge. *See* HP.Br.56 n.12.

Amber Johnson

Hamilton Pointe depicts a resident's calling Johnson "lazy" and "stupid" (EEOC.Supp.App.93) as "non-racial comments from a hostile male resident," arguing that "non-race related conduct does not establish a hostile work environment." HP.Br.60. As explained in the EEOC's opening brief, EEOC.Br.41-42, a jury could find that these comments reflected racist stereotypes and were, indeed, race-related.

Likewise, a jury need not agree with Hamilton Pointe that, by later announcing he was not a racist, another resident negated the effect of his highly offensive suggestion that Johnson and another Black CNA get naked and rub Mazola oil on their bodies "because he would love to see our brown bodies oiled up." HP.Br.60; *see* EEOC.Supp.App.92. Indeed, a jury could credit Johnson's testimony that the resident's subsequent assertion that he was not racist felt "very odd and uncomfortable," EEOC.Supp.App.98, intensifying rather than mitigating the effect of his prior comments.

Hamilton Pointe characterizes Johnson's testimony about the difficulty of working on the Rehabilitation Unit as "subjective," HP.Br.61, but ignores the essence of her complaint. Johnson testified not that she was

assigned to the Rehabilitation Unit because of her race, but that she, unlike White CNAs, was never able to obtain assistance when she requested it. EEOC.Supp.App.100. A jury could find that this differential treatment was race-based and, thus, contributed to the hostility of Johnson's work environment.

LaShawn Johnson

Hamilton Pointe contends that Johnson's testimony that he saw an assignment sheet barring Black employees from certain rooms "is too contradictory to create any question of fact." HP.Br.63. It is, of course, "the jury's job to weigh conflicting evidence." *Stragapede v. City of Evanston*, 865 F.3d 861, 866 (7th Cir. 2017).

Hamilton Pointe misrepresents other portions of Johnson's testimony, stating that Johnson "believed" he saw a White male nurse enter the room of a resident who allegedly objected only to male care. HP.Br.63. In fact, Johnson testified unequivocally that he saw this happen. EEOC.Supp.App.108. A jury could credit this testimony and thus conclude that Black men, rather than men in general, were barred from the room.

Hamilton Pointe also inappropriately draws inferences in its own favor regarding Johnson's testimony that a nurse barred him from entering

a resident's room after the resident's wife learned that he was dating a White woman and complained. EEOC.Supp.App.110, 112. Hamilton Pointe states as fact that the directive "was reasonable and not race-related." HP.Br.64. A jury could disagree.

Sara Johnson

Hamilton Pointe acknowledges that Johnson heard residents call her the N-word and refuse care from her, but argues that these facts are irrelevant because "the EEOC lacks evidence that this occurred in any actionable time period." HP.Br.65. Hamilton Pointe never raised this as a basis for summary judgment, R.98, Sum.J.Br. at 93, PageID#1056, and thus cannot raise it now. *See Hovde v. ISLA Dev. LLC*, 51 F.4th 771, 775 (7th Cir. 2022) (holding that argument that was never presented to district court may not be raised on appeal). In any event, a reasonable jury could find that these incidents occurred within the actionable time frame. *See* EEOC.Supp.App.114 (Johnson testifying in response to question about whether she was called the N-word during her 2016-2017 employment, "I think that's when it was.").

Hamilton Pointe also criticizes Johnson's testimony about seeing race-based assignment sheets as insufficiently specific. HP.Br.66. The

absence of details goes to the weight of the evidence, *see Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994), not to its admissibility. Hamilton Pointe distinguishes *Dey* on the ground that, even though Dey did not provide details about other, "almost daily," incidents, she did testify "in detail about five specific incidents of harassment." HP.Br.66-67. Johnson, it says, "lacks any comparable evidence of other incidents [of] harassment sufficient to establish severity or pervasiveness, or an objectively hostile workplace." HP.Br.67. This is not the standard, as incidents of harassment must not be viewed in isolation. *See supra* pp.8-9. In any event, a jury could find that Johnson's testimony about residents calling her the N-word and refusing care from her was specific enough for it also to credit her testimony about the race-based assignment sheets.

Raven Langley

Hamilton Pointe minimizes Langley's experience of being called the N-word by erroneously stating that Langley did not consider her work environment to be offensive. HP.Br.68. 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[.]" EEOC.Supp.App.125. A jury could interpret this to mean that she was, in fact, offended.

Hamilton Pointe similarly minimizes the severity of a resident's repeatedly calling Langley "the help," a phrase that invokes slavery's legacy of Black women serving White families. *See* Joan C. Williams et al., *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 Hastings L.J. 337, 441 (2020) (discussing "depictions of African Americans as 'the help'" that "represent[] enslaved Black people in accordance with long-standing stereotypes: as servants, notable for their devotion to their white masters, or for their ineptitude" (citation omitted)); *Hill v. Corinthian Condo. Ass'n Inc.*, No. 20-cv-2242, 2021 WL 1124782, at *1, *5 (E.D. Pa. Mar. 24, 2021) (referring to Black woman "as 'the help' in front of her co-workers" had "at least racial … undertones"). Hamilton Pointe chalks up the resident's use of this race-laden phrase to "elderly individuals" and "dementia." HP.Br.68. A jury could be less dismissive.

L'Sheila Lewis

Like the district court, Hamilton Pointe misquotes Lewis's testimony. Lewis did not testify that a nurse told her only that "a resident had a right to refuse care from a *particular person*." HP.Br.69 (emphasis added). Rather, she testified that 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*." EEOC.Supp.App.130 (emphasis added). A jury could conclude from this language that the nurse was referring to Black employees generally, not to one employee in particular.

Tamara McGuire

Like the district court, Hamilton Pointe erroneously contends that McGuire heard residents use racial slurs on only three occasions. HP.Br.70. In fact, McGuire testified that residents "would scream out racial slurs to us," EEOC.Supp.App.147, from which a jury could reasonably infer that this happened on a regular basis.

Hamilton Pointe points to cryptic records of its own creation to assert that "[r]esident records refute every circumstance in which McGuire claimed African Americans were prohibited from caring for identified residents." HP.Br.71. A jury could find these records to be inaccurate, and credit McGuire's testimony that she did not care for a particular resident because "we couldn't." EEOC.Supp.App.137.

Hamilton Pointe misstates McGuire's testimony regarding her experience on the evening shifts. According to Hamilton Pointe, McGuire testified in a "vague and speculative" way that coworkers made things

"difficult." HP.Br.72. In fact, she gave concrete, specific testimony that a White qualified medication aide and a White certified nursing assistant always wrote up Black employees for not getting things done. EEOC.Supp.App.139.

Charah Milan

Hamilton Pointe states that Milan heard the N-word only once, HP.Br.74, but Milan testified that she heard residents use it "in passing by." EEOC.Supp.App.152. A jury could interpret that to mean that she heard the word more frequently. She also heard staff and "a lot" of residents say "that colored girl" as a "normal term" to describe Black employees. EEOC.Supp.App.152-53. Hamilton Pointe asserts that residents and staff used the phrase only "occasional[ly]," HP.Br.74, but Milan testified that staff used it approximately ten times in her three-and-a-half months of employment, and that residents used it twice that amount. EEOC.Supp.App.153. A jury could find that this usage was more than "occasional."

Vanessa Miles

Hamilton Pointe accuses the EEOC of "inaccurately suggest[ing] that Miles heard 'other employees being called racial slurs.'" HP.Br.75. But the

EEOC was correct. When asked, "Did you witness anyone else at Hamilton Pointe being subject to any derogatory racial language?" Miles responded, "Yes." EEOC.Supp.App.156.

Hamilton Pointe deems inconsequential Miles's testimony that she witnessed a White nurse yelling at a dark-skinned certified nursing assistant over a perceived mistake. HP.Br.76. Miles testified about this incident, "I mean, I've never seen anybody treated that bad." EEOC.Supp.App.160. The same nurse reacted calmly when Miles, who has lighter skin, then took responsibility for the mistake. EEOC.Supp.App.160. Hamilton Pointe asserts that no jury could find that this incident was because of race, HP.Br.76, but ignores Miles's testimony that, "the darker you were, the more you were in the office," EEOC.Supp.App.160. From this, a jury could infer that race and color motivated the nurse's behavior. Combined with Miles's other evidence (seeing the race-based assignment sheet, witnessing racist comments, being told she smelled like pork, and having nurses warn her as "kind of a joke" about racist patients, EEOC.Supp.App.156-60), there is sufficient grounds for a jury to find severe or pervasive harassment.

Naim Muhammad

Hamilton Pointe draws inferences in its own favor and attacks Muhammad's credibility in asserting that he was never barred from entering residents' rooms because of his race. HP.Br.77-78. Muhammad testified to the contrary, pointing to (1) warnings from a qualified medication assistant to stay out of one room because the resident did not want Black caregivers, (2) a nurse's statement about him that "that boy can't work down that hall there," (3) a nurse's statement to a coworker that no Black employees were allowed on that hall, and (4) nurses' directives that he not enter certain rooms because of his race even when call lights came on. EEOC.Supp.App.163-66. A jury could conclude from this that Hamilton Pointe subjected Muhammad to race-based assignments, and that he thus experienced a racially hostile work environment.

Taki-a Roberts

Hamilton Pointe ignores the frequency with which Roberts heard racist slurs, including the N-word. HP.Br.80-81. She testified that she heard residents use the N-word "[a]t least two or three times a day," EEOC.Supp.App.188, and "multiple times" she heard residents say, "I don't want to be taken care of by that [n**ger]," EEOC.Supp.App.189.

Contrary to Hamilton Pointe's argument, HP.Br.80-81, a supervisor need not say the N-word directly to a subordinate for it to have a "highly disturbing impact on the listener." *Johnson*, 892 F.3d at 903. "[A] plaintiff's repeated subjection to hearing that word could lead a reasonable factfinder to conclude that a working environment was objectively hostile." *Id.* Moreover, Roberts also heard one resident refer to her coworker as "boy" "every few days." EEOC.Supp.App.187-89. Although this frequent racist remark was not directed at her, a jury could find that hearing it spoken to someone of her own race helped to poison her work environment. *Cf. Yuknis*, 481 F.3d at 554 ("[O]ne could be in the target *area* because a group of which one was a member was being vilified, although one was not singled out." (emphasis in original)).

A reasonable jury could also reject Hamilton Pointe's contention that Roberts "disclaim[ed] any emotional harm" as failing to account for the remainder of her testimony. *See* HP.Br.80. Roberts denied that "any emotional or physical harm … happened to [her]" while at Hamilton Pointe, EEOC.Supp.App.191, but also testified that she was offended by the work environment, EEOC.Supp.App.188. A jury could conclude that Roberts interpreted "emotional harm" to mean something other than being

offended and find that she satisfied the subjective requirement of Title VII. *See Mahran v. Advoc. Christ Med. Ctr.*, 12 F.4th 708, 714 (7th Cir. 2021) (Title VII requires that harassment be "objectively and subjectively offensive"); *see also Harris*, 510 U.S. at 22 (Title VII does not require "concrete psychological harm").

Montoya Smith

Smith testified that when she complained to nurses about being exposed to the N-word, the nurses told her to "go out and smoke a cigarette," or related a story of a racist in their own family. EEOC.Supp.App.198-99, 201. Hamilton Pointe acknowledges that "context … informs whether the nurse responses to resident behaviors was 'dismissive' or unreasonable," arguing that in the context of a long-term care facility, employees are themselves responsible for "abuse avoidance" and should "brush off" harassment.[9] HP.Br.82. Yet context must be assessed in light of the governing law. Under *Chaney*, a long-term care

[9] Simultaneously, Hamilton Pointe faults numerous claimants, including Smith, for never having reported harassment. *See supra* pp.9-10. It also faults Smith for not having complained to coworkers, even though she complained to supervisors. HP.Br.83.

facility must protect its employees from resident harassment. 612 F.3d at 914-15. A jury could find that the nurses, instead, added insult to injury.

Bianca Toliver

A jury could disagree with Hamilton Pointe that Toliver's supervisor responded appropriately when Toliver complained that the cook who had been training her had used the N-word. Hamilton Pointe states only that the supervisor told the cook to apologize and that the conduct did not recur. HP.Br.84. Toliver, however, testified that when she stated that an apology was insufficient, the supervisor told her, "Belinda didn't mean it that way," and then "he just kind of swept it under the rug." EEOC.Supp.App.206, 208. As Toliver said, "I don't understand how you can call someone a [n**ger] and then say you didn't mean it like that." EEOC.Supp.App.207. A jury could find that, rather than handling the situation appropriately, Toliver's supervisor added to the hostile work environment by suggesting that there might be a non-racist reason the cook had used the N-word.

Hamilton Pointe also characterizes as inadmissible hearsay the statements of several certified nursing assistants that the reason a nurse told Toliver not to enter a resident's room was her race. HP.Br.83-84. Yet,

whether or not these certified nursing assistants were correct, their comments contributed to Toliver's perception of an unchecked racially hostile work environment. *See Johnson*, 892 F.3d at 903. Thus, the statements were offered not only for their truth in the context of Toliver's disparate treatment claim (which is not at issue on appeal), but also for the non-hearsay reason of showing the effect on Toliver's state of mind in the context of her hostile-work-environment claim. *See* Fed. R. Evid. 801(c); *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 430 (7th Cir. 2004) (employee's out-of-court statement relating to existence of hostile work environment admissible "for the effect that it had on its listener").

Ruth Washington

Hamilton Pointe states that Washington did not recall anyone telling her that the reason she could not enter a resident's room was because of her race. HP.Br.85. In fact, Washington testified, "We were told by the nurses that she didn't want colored people in her room." EEOC.Supp.App.216. Whether or not other Black caregivers took care of this resident on other occasions, HP.Br.85, a reasonable jury could conclude that, at least once, Washington was not allowed to do so because of her

race. *See Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) (Title VII protects individuals, not groups as a whole).

Hamilton Pointe excuses the repeated racist comments of multiple nurses, EEOC.Supp.App.215-17, on the ground that "[w]hen Washington did not want to participate in personal conversations, she chose to separate herself," HP.Br.86. That the victim of racist remarks can extricate herself from a situation does not negate those remarks' severity.

Nor is it determinative that racial harassment "did not affect Washington's ability to perform her job duties." HP.Br.86. "[E]ven without regard to … tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race … offends Title VII's broad rule of workplace equality." *Harris*, 510 U.S. at 22.

Hamilton Pointe wrongly asserts that there is no evidence that, when a nurse double-checked Washington's medication orders, she did so because of Washington's race. HP.Br.87. To the contrary, Washington testified that when she placed a medication order, Nurse Rector would routinely walk down the hall to confirm that the patient had requested it, but that "when someone white asked the same thing, … there was no

question about [it].” EEOC.Supp.App.218. A jury could infer from this that Rector treated Washington differently because of her race.

Finally, although Hamilton Pointe is correct that Washington disclaimed “emotional distress,” EEOC.Supp.App.218; HP.Br.87, she did testify that she was offended by racist comments. EEOC.Supp.App.215. She explained, “you get tired of hearing the same thing over and over and over when they know it probably was getting to you.” EEOC.Supp.App.216. A jury could infer that Washington found the conduct subjectively offensive. *See Mahran*, 12 F.4th at 714 (prima facie case requires proof that conduct was “both objectively and subjectively offensive”). Viewing the evidence as a whole, *see Paschall*, 28 F.4th at 815, a jury could find that the conduct was objectively offensive as well.

II. The district court abused its discretion by submitting erroneous and prejudicial verdict forms to the jury.

A. The verdict forms wrongly prevented the jury from considering the “totality of the circumstances” when assessing the existence of a hostile work environment.

As the EEOC explained in its opening brief, a hostile work environment turns on the “totality of the circumstances.” *Paschall*, 28 F.4th at 815. The verdict forms prevented the jury from assessing the totality of

the circumstances here. They asked only whether the claimants had been subjected to supervisory harassment, or, separately, whether they had been subjected to coworker/resident harassment. EEOC.Supp.App.93-110. Thus, they gave the jury no opportunity to consider whether supervisors and coworkers/residents together had created a hostile work environment.

Equally important, the verdict forms precluded the jury from considering the race-based assignment sheet, a critical piece of evidence. Contrary to Hamilton Pointe's suggestion that the assignment sheet must be attributable to a supervisor to be actionable, HP.Br.57, 63, 71, a jury could find that seeing it affected the claimants adversely regardless of who created it. By leaving the assignment sheet posted for three days after receiving complaints, a jury could find, Hamilton Pointe made it part of the claimants' work environment.

Hamilton Pointe argues that the verdict forms were correct because "supervisor harassment claims" must be analyzed differently from "coworker/resident harassment claims." HP.Br.90. But the EEOC did not bring a "supervisor harassment claim" or a "coworker/resident harassment claim." The Commission consistently alleged that the claimants

endured a "hostile work environment," which encompasses any and all sources of harassment. *See* R.1 at 5, PageID#5.

Regardless of the harasser's identity, the first three elements of proof are: "(1) the work environment was both objectively and subjectively offensive; (2) the harassment was based on membership in a protected class …; (3) the conduct was severe or pervasive." *Mahran*, 12 F.4th at 714 (citation omitted). These three factors must be assessed with reference to all conduct by all actors. *Mason*, 233 F.3d at 1044-45 ("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.") (cleaned up) (emphasis in original).

The final factor ("there is a basis for employer liability," *Mahran*, 12 F.4th at 714) determines whether a hostile work environment is actionable; only at this point does the identity of the harasser matter. An employer is "essentially strictly liable" for supervisory harassment, subject to an affirmative defense, but is liable only for negligence if the harasser was a coworker. *Mason*, 233 F.3d at 1043.

Hamilton Pointe highlights language in *Mason* stating that a plaintiff may not "use[] coworker conduct to prove a claim of supervisor harassment," HP.Br.93, but that language arose from factual circumstances not present here. In *Mason*, the plaintiff expressly stated in his complaint and repeatedly reaffirmed throughout the litigation that his claim rested solely on the conduct of his supervisor. 233 F.3d at 1039-41, 1044. Nonetheless, he sought to introduce evidence of racial epithets from his coworkers that neither he nor his supervisor ever heard. *Id.* at 1039. The district court excluded the evidence, and this Court affirmed because allowing him to introduce evidence of coworker harassment would be tantamount to allowing him to amend his complaint. *Id.* at 1041-42, 44. The language that Hamilton Pointe quotes does not apply here, where the EEOC has alleged harassment from more than one source. Nor does it negate *Mason*'s articulation of the "totality of the circumstances" analysis as including "all instances of harassment by all parties." *Id.* at 1044-45.

Hamilton Pointe also cites dicta in *Ammons-Lewis v. Metropolitan Water Reclamation District*, 488 F.3d 739 (7th Cir. 2007), without acknowledging its context. HP.Br.91. *Ammons-Lewis* refers to supervisor and coworker harassment as "two related but distinct claims," but explains

that this is because "the standard for employer liability differs depending on whether the perpetrator of the harassment was a co-worker or a supervisor." *Id.* at 749. Consistent with *Mason*, this Court affirmed instructions "admonish[ing] the jury to consider the conduct of Ammons-Lewis's supervisors *as well as* her coworkers in deciding whether she had met [the first several] elements [of a hostile work environment claim]." *Id.* (emphasis added). Only if she had done so, the instructions continued, should the jury consider the different liability standards for supervisors and coworkers. *Id.* at 750.

The EEOC agrees with Hamilton Pointe that, because the identity of the harasser is relevant to employer liability, separate jury instructions regarding supervisors and coworkers/residents were appropriate. However, the verdict forms should have limited the supervisor/coworker/resident distinction to questions of employer liability. Instead, they forced the jury to view the evidence in a piecemeal fashion. The jury could not indicate that, even if supervisor harassment or coworker/resident harassment alone was not enough to create a hostile work environment, the EEOC had proved severe or pervasive harassment when viewed together. Likewise, there was no way for the jury to

incorporate the race-based assignment sheet into its analysis of supervisor or coworker/resident harassment, as the assignment sheet did not fall into either category.

B. The EEOC preserved its objection to the verdict forms.

Hamilton Pointe does not dispute that the EEOC's pre-trial objection to the proposed verdict forms was identical to the argument the Commission raises on appeal. HP.Br.40; *see* EEOC.Supp.App.307-08. Nonetheless, Hamilton Pointe argues that the EEOC waived its objection by not renewing it post-trial. HP.Br.87-89. Admittedly, renewing such an objection is the more cautious course. However, in these circumstances, failure to renew the objection did not constitute waiver.

This Court is "not overly formalistic about the proper way to preserve issues for appeal." *Orix Credit All., Inc. v. Taylor Mach. Works, Inc.*, 125 F.3d 468, 478 (7th Cir. 1997). Objections enable the court to "resolve legal disputes with full information and avoid all errors that are avoidable." *Id.* (citation omitted). Thus, "an argument describing the district court's alleged error … is generally required." *Shirkey v. Eli Lilly & Co.*, 852 F.2d 227, 230 (7th Cir. 1988). So long as this condition is satisfied, this Court does not hold strictly to the requirement of formal objections. *See*

Orix Credit All., 125 F.3d at 477-78 (holding that plaintiff's submission of proposed instructions was sufficient to preserve objections); *Hebron v. Touhy*, 18 F.3d 421, 424 (7th Cir. 1994) (assuming that proposed instruction served as an objection, but finding waiver because party did not state its grounds).

Other Circuits agree that it is not always necessary to renew an objection if a party has previously made its grounds clear. *See Kaufman v. Microsoft Corp.*, 34 F.4th 1360, 1370 (Fed. Cir. 2022) ("An issue sometimes need not be re-raised in the specific setting of … airing objections to jury instructions if it was sufficiently raised and settled earlier."); *Emamian v. Rockefeller Univ.*, 971 F.3d 380, 387 (2d Cir. 2020) ("This Court may excuse a failure to object 'where the party's position has previously been made clear to the trial court and it was apparent that further efforts to object would be unavailing.") (citation omitted); *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284, 1289 (9th Cir. 2014) ("[W]hen the trial court has rejected plaintiff's posted objection and is aware of the plaintiff's position, further objection by the plaintiff is unnecessary.") (citation omitted).

Here, the EEOC explained prior to trial why Hamilton Point's proposed verdict forms were legally erroneous. EEOC.Supp.App.307-08.

The Commission argued that the jury should consider *all* evidence in assessing the existence of a hostile work environment, and that by "divid[ing] 'supervisor harassment' from 'co-worker or resident harassment,' … [t]he verdict forms do not tell the jurors what to do when both supervisor and co-worker harassment is present." EEOC.Supp.App.307-08.

At the end of trial, the district court held an off-the-record conference, following which it stated that the verdict forms were "final." HP.Supp.App.99. These final forms were identical in all relevant respects to Hamilton Pointe's earlier proposal. *Compare* R.293 (final verdict form) *with* EEOC.Supp.App.303-05 (Hamilton Pointe's proposed verdict form). The EEOC had already explained the basis for its opposition in writing, and the court had rejected it. An "overly formalistic" objection at that point, *Orix Credit All.*, 125 F.3d at 478, would not have made a difference. *See Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999) (en banc) (purpose of objections is to "alert the judge at critical junctures so that errors may be averted").

C. In any event, the verdict forms were so defective that their submission to the jury constitutes plain error.

Even if this Court deems the EEOC to have waived its objection to the verdict forms, it may still reverse for plain error. *See* Fed. R. Civ. P. 51(d) (authorizing plain-error review of jury instructions); *Fox v. Hayes*, 600 F.3d 819, 843 (7th Cir. 2010) (applying Fed. R. Civ. P. 51(d) to verdict forms). Reversal is appropriate under this standard when "exceptional circumstances" explain the failure to object, the error affects substantial rights, and "a miscarriage of justice will occur if plain error review is not applied." *Perry v. City of Chi.*, 733 F.3d 248, 253 (7th Cir. 2013). All three factors demand reversal here.

As described above, the EEOC did object to the substance of the verdict form—it simply did not renew its objection after the district court had already stated that the verdict form was final. *See supra* pp.32-33. The EEOC's written objection spelled out the basis for its claim of error, EEOC.Supp.App.307-08, and the district court was fully apprised of the governing law. The EEOC's belief that further objection would be futile was not unreasonable. These are "exceptional circumstances" justifying plain error review.

The legal errors on the verdict form also affected substantial rights. They prevented the jury from considering the "totality of the circumstances," as required to find a hostile work environment under Title VII. *See Paschall*, 28 F.4th at 815; *see also supra* pp.8-9.

Finally, failure to review for plain error would result in a "miscarriage of justice." The EEOC produced copious evidence from which a reasonable jury could have found in its favor had it been able to consider the work environment as a whole. Without remand for a new trial, the claimants will have been "for all practical purposes … deprived of [their] day in court." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972); *see also Henry v. Hulett*, 969 F.3d 769, 787 (7th Cir. 2020) (no miscarriage of justice where party may still present argument before district court).

III. Genuine issues of material fact preclude summary judgment on TLC's joint-employer status and veil-piercing.

A. TLC is a joint employer.

1. TLC exercised direct and indirect control over claimants.

TLC agrees that control over the claimants' employment "is the most important consideration" in the joint-employer analysis and that firing is among the "'key powers' when analyzing control." TLC.Br.24. In its telling

though, TLC merely provided "input" or "recommendations," leaving employment matters to Hamilton Pointe's administrators. That argument fails for a variety of reasons.

First, although TLC denies it, the record contains ample evidence that TLC "maintained ultimate control" over decisions to fire, suspend, or lay off claimants by requiring "prior approval." *Johnson*, 892 F.3d at 905; *see* EEOC.Supp.App.224 (Hamilton Pointe administrator could not fire "*any* employee without approval from TLC's Human Resources Department" (emphasis added)). TLC's own witness, Gary Ott, agreed that TLC regional directors "ha[d] more authority, probably, than anybody" to "terminate someone at a facility" like Hamilton Pointe. EEOC.Supp.App.174. TLC also maintained control over other significant employment decisions (e.g., promotions, raises), which had to "go through" TLC. EEOC.Supp.App.224. Thus, "because significant control remained in the hands of [TLC] it was (at least one of) [claimants'] employers for purposes of Title VII liability." *Johnson*, 892 F.3d at 905. TLC merely quibbles with this evidence and offers competing testimony, inviting impermissible credibility determinations.

Second, TLC irrefutably hired, supervised, evaluated, and fired Hamilton Pointe administrators who, in turn, supervised claimants.

EEOC.Br.68. Contrary to TLC's denials, these powers gave TLC indirect control over the terms and conditions of claimants' employment, and TLC exercised that control. While TLC contends that the EEOC forfeited this argument and that indirect control is irrelevant, TLC.Br.32-35, neither contention is persuasive.

To start, the EEOC preserved this issue in the district court, repeatedly citing TLC's control over Hamilton Pointe administrators as a relevant consideration in the joint-employer analysis. *See, e.g.*, R.109 at PageID#1901, 1909-10, 1915-16. At best for TLC, the EEOC offers "appellate amplification of a properly preserved issue," *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015), "based upon additional authority," *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008).[10]

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[10] Moreover, "[a]s the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Bew v. City of Chi.*, 252 F.3d 891, 895 (7th Cir. 2001) ("[W]hen a new argument supports a claim made before the district court, we will usually address it.").

TLC is also incorrect that indirect control is irrelevant. The joint-employer analysis draws on "general principles of agency," *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1991), and "is based on the 'economic realities of the situation viewed in light of the common law principles of agency….'" *Porter v. Erie Foods Int'l, Inc.*, 576 F.3d 629, 634 n.5 (7th Cir. 2009) (citation omitted). As the D.C. Circuit decisions cited in the EEOC's opening brief recognized, under "[t]raditional common-law principles of agency," indirect control is, at a minimum, "*relevant* to the joint-employer inquiry." *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1216 (D.C. Cir. 2018) (citation omitted); *see also Sanitary Truck Drivers & Helpers Loc. 350 v. NLRB*, 45 F.4th 38, 42 (D.C. Cir. 2022).[11] The fact that those decisions arose under federal labor law makes no difference. Indeed, "[t]he joint employer concept derives from labor law," *Whitaker v. Milwaukee Cnty.*, 772 F.3d 802, 810 (7th Cir. 2014), and "the legal principles governing affiliate liability 'should [not] vary

[11] TLC contests whether indirect control *alone* is dispositive in the joint-employer analysis. TLC.Br.33-34. But that question is simply not at issue here, and this Court need not address it, because "TLC wielded substantial direct *and* indirect control over the claimants," EEOC.Br.67 (emphasis added), and other factors favor a joint-employer finding as well.

from statute to statute, unless the statute, or the particular policy that animates the statute, ordains a particular test,'" *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 366 (7th Cir. 2016) (alteration in original) (quoting *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 941 (7th Cir. 1999)). TLC offers no reason—nor is one apparent—why indirect control should factor into the joint-employer analysis under labor law, but not under Title VII.

Third, TLC does not dispute that it authored Hamilton Pointe's employment policies—under which claimants operated—but suggests that Hamilton Pointe administrators were free to adopt or reject those policies. TLC.Br.25, 31. That portrayal ignores the economic realities of the relationship between TLC and Hamilton Pointe administrators. A jury could reasonably infer that Hamilton Pointe administrators were not free to reject policies written by the same entity empowered to evaluate, supervise, and fire them. EEOC.Br.23-24, 68-70. Indeed, it is no coincidence that Hamilton Pointe's TLC-authored policies—which governed everything from workplace harassment, employee relations, and codes of conduct to attendance, discipline, benefits, and the like—were virtually identical to TLC's own policies. R.110-1 at PageID#1950-52; *compare* R.110-1

at PageID#1978-91 (TLC employee handbook), *with* R.110-1 at PageID#1992-2014 (Hamilton Pointe employee handbook).

Another TLC witness, Steven Ronillo, tacitly admitted that TLC had the power to control Hamilton Pointe's employment practices, claiming that TLC "do[es] not allow" and could "stop" racist staffing instructions if it were aware of them. EEOC.Supp.App.194. Additionally, TLC admits that it operated Hamilton Pointe's "compliance/complaint Hotline Service," TLC.Br.14, further demonstrating its direct control over policies and practices affecting claimants.

2. TLC paid some of Hamilton Pointe's costs of operation.

TLC's arguments that it was not responsible for *any* of Hamilton Pointe's costs of operation, TLC.Br.35-39, are equally unavailing.

TLC undisputedly provided various services to Hamilton Pointe, including payroll processing, accounting, and IT services. TLC.Br.16 n.3, 36.[12] TLC thus assumed responsibility for the upfront costs of these services, and the "fee" it charged for them was only a percentage of

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[12] The EEOC did not, as TLC claims, suggest that TLC paid Hamilton Pointe's payroll. TLC.Br.36 n.5. The EEOC stated that TLC "provided Hamilton Pointe's accounting, payroll, and IT *services*." EEOC.Br.25 (emphasis added).

Hamilton Pointe's revenues. EEOC.Supp.App.234-35, 238-39. The inescapable conclusion is that TLC would ultimately bear the costs of those services if Hamilton Pointe's revenues fell short. Indeed, the relevant management agreement provided that "[TLC] shall pay all 'out-of-pocket' expenses, and shall not be entitled to reimbursement from [Hamilton Pointe]." EEOC.Supp.App.235, 239. TLC itself admits, "[i]f TLC's percentage of Hamilton Pointe's revenues did not cover TLC's expenses, *TLC was still responsible for those expenses*." TLC.Br.38 (emphasis added).[13]

Similarly, while the record shows that TLC sometimes transferred its own employees to work at Hamilton Pointe, TLC asserts that "this [fact] is immaterial" and questions whether transfers would have reduced Hamilton Pointe's expenses. TLC.Br.38-39. Cullen Gibson, however, testified that a TLC employee once served as Hamilton Pointe's director of nursing for "maybe" one to three months. EEOC.Supp.App.74. And Gary Ott testified that, when "a TLC employee goes down and works at a

[13] TLC incorrectly asserts that the EEOC forfeited this argument. TLC.Br.38. The EEOC squarely argued that TLC was responsible for some of Hamilton Pointe's costs of operation, including for many of the services TLC provided. R.109 at PageID#1908, 1911, 1918-19.

facility," "we don't change the W-2 on that person." EEOC.Supp.App.176. Taken together, that testimony confirms that transferred employees remained on TLC's payroll, which would necessarily reduce Hamilton Pointe's expenses.

3. TLC was responsible for the method and form of some payments and benefits.

TLC's arguments regarding the method and form of payment and benefits, TLC.Br.39-41, falter for similar reasons.

TLC disputes that it paid college expenses for Hamilton Pointe employees. The relevant evidence here consists entirely of Gary Ott's testimony. In an earlier sworn interview, Ott's (admittedly imprecise) testimony suggested that TLC provided college benefits to Hamilton Pointe employees. EEOC.Supp.App.185. The only competing evidence TLC offers is Ott's later declaration, submitted with TLC's summary judgment reply, in which Ott claimed for the first time that "TLC does not provide any education funding for Hamilton Pointe employees." R.128-1 at PageID#2889-90. TLC's eleventh-hour attempt to rehabilitate Ott's earlier testimony is insufficient to resolve a disputed fact question. *See McAllister v. Innovation Ventures, LLC*, 983 F.3d 963, 969 (7th Cir. 2020) ("Where

deposition testimony and an affidavit conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken.") (cleaned up).

TLC admits that it offered group health benefits to Hamilton Pointe employees, though it disputes the relevancy of that fact. TLC.Br.39-40. To be sure, participation in a group plan alone is not enough to tilt this factor in favor of a joint-employer finding. *See Bridge*, 815 F.3d at 362. Here, however, TLC was also involved in administering Hamilton Pointe's benefits, EEOC.Supp.App.177, 224, which goes to the "method and form" of distributing benefits, *see Knight*, 950 F.2d at 378-79. *See also* TLC.Br.45 (TLC provided "some benefit program administration").

In short, TLC fails to carry its "burden of establishing the absence of a genuine issue of material fact," *Rose v. Bridgeport Brass Co.*, 487 F.2d 804, 808 (7th Cir. 1973), as to whether it was a joint employer with Hamilton Pointe.

B. Veil-piercing is warranted.

TLC concedes that Indiana law governs the veil-piercing analysis here. TLC.Br.41. But TLC misstates and misapplies the applicable standard in critical respects.

First, although TLC asserts that control is not the "key factor" in the veil-piercing analysis, TLC.Br.41, the Indiana Court of Appeals has said otherwise, stating: "[T]he *key factor* in any decision to disregard the corporate status of a tortfeasor is the element of control or influence exercised by the entity sought to be held liable for the corporation's affairs." *Eden United, Inc. v. Short*, 573 N.E.2d 920, 932 (Ind. Ct. App. 1991) (emphasis added). That focus makes sense because the overarching inquiry asks whether "one corporation is so organized *and controlled* and its affairs so conducted that it is a *mere instrumentality* or adjunct of another corporation." *Smith v. McLeod Distrib., Inc.*, 744 N.E.2d 459, 462 (Ind. Ct. App. 2000) (emphases added).

Second, TLC accuses the EEOC of using a forbidden "integrated enterprise" standard. TLC.Br.42-43. Not so. The EEOC relies on the same veil-piercing factors that Indiana courts consider, as recognized by this Court. *See Cont'l Cas. Co. v. Symons*, 817 F.3d 979, 993 (7th Cir. 2016) (articulating relevant factors under Indiana law).

Third, in asserting that *some* factors do not favor veil-piercing, TLC.Br.42-43, TLC simply fails to grapple with the factors that do. Among other things, TLC ignores the significant control it exercised over Hamilton

Pointe's employment practices and policies, and the fact that the companies shared owners and officers. EEOC.Br.65-72, 75-76. It also overstates the extent to which the companies maintained their separateness. For instance, while TLC asserts that the companies "cover their own expenses," TLC.Br.42, TLC paid some of Hamilton Pointe's costs of operation as discussed above, *supra* pp.40-42. Similarly, while TLC asserts that it and Hamilton Pointe "operate out of separate locations," TLC.Br.42, Indiana Secretary of State records reflect that both companies shared the same principal corporate office address in Marion, Indiana, EEOC.Supp.App.242-50.

Fourth, TLC claims that the circumstances here are comparable to those in other cases where the Seventh Circuit rejected veil-piercing. TLC.Br.44-45. But unlike the companies in those cases, TLC exercised direct hiring, supervising, and firing authority over Hamilton Pointe administrators; TLC authored and often implemented Hamilton Pointe's employment policies; and TLC retained ultimate control over many of employment decisions affecting claimants. Those facts set this case apart. TLC's reliance on *Papa* is also misplaced because that decision did not

apply Indiana veil-piercing law and did not consider all the factors that Indiana law considers relevant. 166 F.3d at 940-43.

Fifth, TLC incorrectly disregards as irrelevant its and Hamilton Pointe's percentage-of-revenue arrangement and their shared litigation counsel. TLC.Br.45-46. True, Indiana law does not specifically list these facts among relevant veil-piercing factors. But those factors are "not necessarily exhaustive." *Symons*, 817 F.3d at 995 (citation omitted). After all, "veil-piercing is a highly fact-intensive inquiry," *id.* at 993, and requires "a careful review of the entire relationship between various corporate entities, their directors and officers," *id.* at 995 (citation omitted). These facts are plainly probative of the "unity of interest" between TLC and Hamilton Pointe, and thus relevant to the veil-piercing analysis. *Worth v. Tyer*, 276 F.3d 249, 260 (7th Cir. 2001); *see also* EEOC.Br.73-74 & n.6.

Sixth, the EEOC does not argue that veil-piercing is justified merely because some employees believed that they worked for TLC. TLC.Br.47. Rather, these employees' apparent confusion about which entity they worked for or the relation between them simply confirms that TLC and Hamilton "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 these entities." *Stacey-Rand, Inc. v. J.J. Holman, Inc.*, 527 N.E.2d 726, 729 (Ind. Ct. App. 1988).[14]

Given these myriad factual disputes and the fact-intensive nature of the veil-piercing inquiry, "[i]t is for the fact finder to determine whether the separate corporate identities of [TLC and Hamilton Pointe] may be disregarded." *Reed v. Reid*, 980 N.E.2d 277, 303 (Ind. 2012).

CONCLUSION

For the foregoing reasons and the reasons in the EEOC's opening brief, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

GWENDOLYN YOUNG REAMS
Acting General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

DARA S. SMITH
Assistant General Counsel

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[14] TLC argues that certain testimony was inadmissible under Federal Rule of Evidence 102. TLC.Br.16 n.3. TLC raised no such evidentiary objection below and thus forfeited it. *Cehovic-Dixneuf v. Wong*, 895 F.3d 927, 932 (7th Cir. 2018).

s/ *Gail S. Coleman*
GAIL S. COLEMAN
STEVEN WINKELMAN
Attorneys
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) as modified by the Court's May 26, 2023, Order granting EEOC's Motion for Leave to File Oversized Brief, because it contains 8,955 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 365 in Book Antiqua 14 point.

s/ *Gail S. Coleman*
GAIL S. COLEMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov

June 9, 2023

CERTIFICATE OF SERVICE

I certify that on this 9th day of June, 2023, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

s/ *Gail S. Coleman*
GAIL S. COLEMAN
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
(202) 921-2920
gail.coleman@eeoc.gov