IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	Civil Action No. 1:08CV01882-CCB
v.	)	
XERXES CORPORATION,	)	
Defendant.	)	

PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On July 18, 2008, the Equal Employment Opportunity Commission ("EEOC" or "Commission") filed a Complaint alleging Xerxes Corporation ("Defendant") had created, maintained and failed to correct a racially hostile work environment for Albert Bernard Pearson, Keith Wilson, and a class of blacks in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). In its Answer to EEOC's Complaint, Defendant asserted an affirmative defense it "took timely and appropriately responsive action in response to the complaints of Mr. Wilson and Mr. Pearson." *See*, Defendant's Answer and Affirmative Defense to EEOC's Complaint at 3, ¶ 5 (Document 5). As discussed below, however, this affirmative defense lacks factual support, thereby establishing no genuine issue of material fact as to Defendant's failure to exercise reasonable care to prevent racial harassment. Accordingly, EEOC moves for partial summary judgment to prevent Defendant from asserting this defense at trial, and files this

memorandum in support thereof. EEOC also opposes Defendant's Motion for Summary Judgment filed on July 17, 2009. Summary judgment in favor of Defendant is not appropriate because Defendant's actions, undisputed in this litigation, enable EEOC to establish a *prima facie* case of a race-based hostile work environment under Title VII.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Black employees were openly ridiculed and threatened.

Defendant manufactures fiberglass containers for the petroleum, chemical, water and wastewater industries. It is headquartered in Minnesota, with plants in California, Texas, Iowa, and Maryland. The events at issue occurred in Defendant's manufacturing facility in Williamsport, Maryland ("Williamsport Plant"). Defendant employs 84 employees at Williamsport Plant, only two are black, both of whom are production employees.

1. Edward L. Younger, Sr.

Edward L. Younger, Sr., age 45, is a black male who began working for Defendant as a materials handler in September 1995. (*Younger Dep.* 13).[1] He came to his position at Defendant with previous experience, having served in the United States Army and Army Reserve as a Materials Handler Specialist since 1982. (*Id.* 18).

Throughout Younger's employment, Defendant subjected him to racist jokes, comments, and death threats. Racist jokes directed at Younger began during his first weeks of employment. Once while observing Younger coming indoors out of the rain, Floyd Weller, a white co-worker, commented, "[R]ain or soap don't wash the black off." (*Ex. 2,* Todd E. memo, dated November 7, 1995). Another time, Weller approached Younger about the color of a magic marker, and wrote on Younger's skin with the marker and said, "Yeah, It's Black." *Id.*

[1] References to deposition transcripts comprise EEOC Exhibit 1, which is tabbed for each deponent who is cited.

On January 2, 1996, Younger re-enlisted with the U.S. Army to serve active duty in Desert Storm. When he returned to work at Defendant in June, 1997, the racial hostility toward him renewed. (*Younger Dep.* 43-44). Sometime in 1997, Younger encountered a death threat directed at him which was scrawled on the men's bathroom stall door. (*Id.* at 20, 98-99):

> The first incident, I was going back to the restroom from the breakroom and I went to the back stall, which contains the toilet, and closed the door and sat down to do my business and noticed on back of the door, the bathroom stall door, that there was black Magic Marker and scratch marks which read: Deer hunting season. But the deer was scratched out and the word nigger was on top of the deer that was scratched out, which in turn, read: Nigger hunting season.
>
> Right underneath that there was three Ks, that says: KKK rules. And it was scratched in the grey paint, but it was highlighted in black Magic Marker and says: KKK rules. And on the bottom of that, it says: Dead nigger. It said: Ed dead nigger.

(Id. 85-86). Younger immediately sought the assistance of Defendant supervisor Todd Edgerton, white, and showed him the racist graffiti on the bathroom stall door. (*Id.* 88-89). Despite Younger's repeated complaints to Edgerton, the writing remained on the bathroom door stall. (*Id.* 91-92). After two weeks of Defendant's inaction, Younger sought the assistance of his Union Representative, and complained to then-Plant Superintendent John Ngee, who, in turn, notified Plant Manager Wayne Green. (*Ngee Dep.42*). Defendant then painted over the racist graffiti which remained visible because the words had been scratched deep into the surface of the stall door. Both Green and Ngee knew that their attempt to cover the racial slurs with paint had failed. (*Ngee Dep.* 146-147 (threat had been scratched into the painted surface)). Younger and at least one other employee complained that the writing was still visible. (*Ex. 3*, Green Notes (noting that, "Couple days later an individual came to me, told me there was still some writing in Bath Room that wasn't covered.")). Green also noted that Younger was overtly "tracking the days" that it took

management to respond. (*Id*; *Younger Dep.* 91-92 (Younger encountered a dozen or so co-workers, who took notice that management had failed to remove the racist threats, and asked them to sign and date a statement)).

Finally, Defendant covered and riveted a sheet of metal over the racial slurs and death threats. (*Id.* 95-96). A couple weeks later, Younger complained again about another threat to his life. This time, the words, "Kill Ed, dead nigger" were written in black magic marker on a yellow pole near Younger's work station. (*Id.* 98-100).

The harassment Younger experienced was not limited to scrawled racial slurs and death threats, but also involved a hostile encounter with Floyd Weller's wife, Deanna Weller, also a white co-worker. (*Green Dep.* 98-99). On February 25, 1998, Deanna Weller accused Younger of calling her a racist. She engaged Younger by pointing her finger in his face, while screaming at him that that she was not a racist because she had, "several nigger friends." (*Younger Dep.* 48-50). When Younger yelled back at Weller and moved to push her finger out of his face, another white co-worker lunged at Younger and pushed him against a spinning piece of equipment. (*Id.*). Almost immediately, Plant Manager Green summoned Younger and reprimanded him for engaging in "threatening, intimidating. . . . potential physical harm." (*Ex. 4, Employee Warning Notice, dated February 25, 1998*). Green did not discipline Weller for using the N-word or for provoking the incident. (*Younger Dep.* 70). Instead, Green insisted that Younger needed anger management and released him from work with instructions to get medical treatment. (*Id.* 50-51). Younger was not allowed to work for several months. (*Id.* 53-55).

In the meantime, Younger filed a Charge of Discrimination with the State of Maryland Human Relations in March, 1998, alleging that Defendant discriminated and

retaliated against him on the basis of his race. On February 11, 1999, Younger entered into a Settlement with Defendant, agreeing to withdraw the Charge of Discrimination. (*Ex.* 5, *Settlement Agreement and General Release*). Younger has not worked full-time at Defendant since October, 1999. (*Younger Dep*. 13-15).[2]

2. Gradian Graham

Gradian "Roy" Graham, age 29, is a black male who joined Defendant on August 2, 2004 as an assembler working on second shift. (*Graham Dep.* 30). Throughout Graham's employment and in his presence, white coworker Robert Churchey routinely used the terms "nigger," and "nigger-lovers." (*Id.* 97-98). One of Graham's white co-workers confided to him that Churchey addressed her as "nigger-lover" because she was friends with Graham. (*Id*. 101-102). Graham complained to Defendant's Superintendent Greg Carty about Churchey's racial slurs, both orally and in writing, but nothing was done. (*Id*. 104-106; 113-114).

Eventually, Defendant's treatment of Graham included pure intimidation. White coworker Floyd Myers and Supervisor Robert Shifflett stared at Graham while he worked, making him feel very uncomfortable in the workplace. (*Id.* 134-135, 207) In 2005, a group of white co-workers followed him on his way home from work. (*Id*. 54). Consequently, Graham became fearful of his safety while at and away from work. (*Id.* 193).

On January 19, 2007, Graham complained to Superintendent Carty again – this time about Supervisor Shifflett discriminating against him because of his race (*Ex.* 6, *Carty Notes*). Graham then met with Carty and Plant Manager Green and told them that Shifflett "stared at him strangely" and harassed him. (*Id*.). Green determined that Graham's complaints about Shifflett

[2] During the processing of Younger's charge, he experienced a workplace injury which prevented him from returning to Defendant in his previous job. While his worker's compensation status keeps him on Defendant's payroll, he has not returned to work since March, 2000. (*Younger Dep.*14-15).

did "not constitute anything relating to discrimination or harassment." (*Ex. 7, Green Notes).*

On January 30, 2007, Supervisor Shifflett followed Graham to the bathroom and peered under the bathroom stall while Graham was on the toilet. When Graham complained to Plant Manager Green about Shifflett's harassing behavior, Green accused Graham of lying about the incident and disciplined him with a "final" warning that another violation of Xerxes' policies would result in termination. (*Ex. 8*).

By early March, 2007, despite having had an excellent work record,[3] Graham started missing work due to the stress associated with Defendant's racial slurs, staring, and stalking behavior. On April 18, 2007, Defendant mailed Graham a letter, discharging him for missing work. (*Ex. 9, Graham Termination Letter*).

3. Albert Bernard Pearson

Albert "Bernard" Pearson, age 48, is a black male who joined Defendant in early 2005. Initially, he was referred by a temporary service and on June 15, 2005, Defendant hired him as a full-time employee, working as an Assembler, an entry level production position. Several times throughout Pearson's employment, Defendant subjected him to racial slurs. Amber Gatrell, a white female co-worker who trained Pearson, remarked in his presence that she hated niggers. Floyd Myers, white male co-worker, referred to Pearson as "black Pollack" and "boy" often while pantomiming that he was cracking a whip at him. (*Ex. 10; Pearson Dep.* 227). Pearson recalls that these remarks, along with Gatrell's frequent use of the word "nigger" in his presence, were ongoing and occurred multiple times daily. (*Ex. 11*). Within weeks of becoming permanent with Defendant, Pearson reported his co-workers' behavior and remarks to his shift supervisor Shifflett, who said that he would relay his concerns to Carty. (*Pearson Dep.* 93-94).

[3] (*Shifflett Dep.* 113 ("Roy Graham was one of my best employees I ever had a Xerxes."); *Graham Dep.* 143-144).

Nevertheless, the remarks continued. Pearson, frustrated by Defendant's continuing failure to stop the racial comments, enlisted the assistance Union Representative, Kenny Thompkins. Thompkins and Pearson approached Carty about the constant racial harassment, who claimed that Shifflett never had relayed his complaints. Carty advised Pearson to keep quiet about the harassment and that he would handle the matter. (*Id*. 314-315). However, the harassment persisted and intensified after Pearson recruited Keith Wilson, a black male, to work at Xerxes. Gatrell and Floyd Myers referred to and addressed both Pearson and Wilson as "boy" and "nigger." (*Ex. 11*). Floyd Myers also referred to April Acree (a white co-worker) a "nigger-lover" in Pearson's presence, explaining that it was Churchey who actually said it, not him. (*Pearson Dep*. 323-325).

The harassment escalated to pranks. As an example, on about three occasions, while Pearson was on the toilet, someone turned off the lights and threw wet toilet paper at him. He had difficulty turning on the lights because gel had been placed on the bathroom doorknob, making it difficult to open the door to locate the light switches. Twice, he had his tool box hidden, seven times he had resin placed in his lock so it would not open and each time he needed his lock cut off and replaced, and even his diary logging the harassing incidents was stolen from his locker. (*Ex. 11*). His lunch was often stolen and found in the garbage. (*Wilson Dep.* 68-70). Pearson's repeated complaints to his supervisors Shifflett, Carty, and Green remained unaddressed.

In May, 2006, Pearson complained to Plant Manager Green that white coworkers Terry Smith and Brian Bradley were using the terms "jungle music" and "nigger music" in his presence. (*Ex. 11*). In June, 2006, Pearson contacted the Maryland Commission on Human Relations to file a charge of discrimination against Defendant for subjecting him to a racially

hostile work environment. (*Ex. 12*). Around the same time, Pearson, frustrated with Green's failure to address his complaints of racial hostility, informed Green that he had contacted an attorney. Green, in turn, contacted Defendant's General Counsel Craig Peterson about Pearson's complaints. (*Bachmeier Dep. 46 – 49).* In July, 2006, Defendant's Chief Financial Officer and EEO Coordinator, Ronald Bachmeier, visited the Williamsport Plant, conducted interviews with Pearson, Wilson, and the alleged offenders, issued written reprimands to certain offenders, and conducted racial harassment training.

Nevertheless, the racial harassment continued. Pranks and sabotage extended to Pearson's actual work. On several occasions, Pearson had to fill up buckets of resin and catalyst, and bring these heavy buckets to his work station. During his break, the buckets would be taken, causing him to refill and carry other buckets. (*Ex. 11*).

On April 10, 2007, Pearson discovered in his locker a piece of fiberglass on which the following message was glued: "KKK plans could result in death, serious personal injury, NIGGA BENARd." (*Ex. 13*). Pearson immediately went to Green's office to report the threat, but Green indicated that he was busy and asked Pearson to come back the next day. (*Ex. 11* at EEOC – 468). Defendant thereafter queried Pearson as to who he considered possible suspects. Pearson did not know. Defendant then queried Pearson's shift supervisors who also denied knowledge. Defendant then conducted "compliance training" and notified the workforce that they had found "something" and requested that individuals with knowledge come forward and that immediate action would be taken against the perpetrator. No one came forward. (*Green Dep.*177-178; 181-182).

Ten days after this incident, Defendant reported the threat to the county sheriff. (*Id.* 161-162). Green informed the sheriff that no other KKK issues had arisen at the plant and he did not

know any employees with motive to threaten Pearson. (*Id.* 183-187). The sheriff was unable to identify the offender. After the sheriff's investigation, Defendant held a meeting with its employees discussing the prohibitions of racial harassment and posted a notice outlining the same. Pearson's coworkers blamed him for the training and the pranks and racial remarks persisted. (*Pearson Dep.* 388*).* In June, 2007, someone again put resin in Pearson's lock, which had to be replaced. (*Ex.* 13A). In August, 2007, white co-worker Sam Crone, in front of Pearson, mocked black women as being "nappy-headed hos."[4] (*Pearson Dep*. 331). Shortly thereafter, when Pearson was climbing a ladder in his work area, Tammy Smith, a white female co-worker, remarked that Pearson looked like the monkey, Curious George. (*Id.* 334). Pearson left for a better job in February, 2008.

4. Keith Wilson

In October, 2005, Keith Wilson, age 45, a black male, joined Defendant as a temporary laborer. In December, 2005, Wilson became a full-time assembler. White co-worker Tammy Smith addressed Wilson as "boy," "yellow boy," and "Buckwheat." (*Wilson Dep.* 133-134). Smith also referred to Wilson as "Benson," saying that when she hit the lottery, he could be her butler.[5] (*Id.*). Wilson complained to his immediate supervisor, Shifflett, who promised to take his complaints to Green. But the harassment continued. (*Id.* 136-137).

Like Pearson, Wilson was offended by Bradley's use of the terms "jungle music" and "nigger music." (*Id.* 43). Also, like Pearson, Wilson's work tools and lunches were repeatedly stolen. (*Id.* 68-71).

In June, 2007, Wilson discovered in his locker a drawing of a stick figure with a noose

[4] This incident occurred after there had been much publicity over the firing of celebrity Radio Talk Show host Don Imus for making this racial slur about the Rutgers women basketball players in April 2007.
[5] "Benson" is a TV series (1979 to 1986), named after the main character who is a black butler serving a widowed governor and his family. (*Wilson Dep.* 139-140).

around its neck next to a caption which read "IH IH MY NIGGER." (*Ex. 14*). After Wilson complained about racial harassment, Shifflett began to watch him more closely, constantly monitoring and logging Wilson's 10 minute and lunch breaks. Wilson felt that his supervisor was trying to catch him in a mistake in order to fire him. (*Wilson Dep.* 86-87, 92).

During the week of August, 2008, Tammy Smith complained to Wilson about having to clean up her work area and commented that she was "not trying to be nobody's white nigger." (*Id.* 128, 156). Wilson continues to work for Defendant. Currently, Wilson is the only black employee on first shift. His complaints and charge of discrimination, resulting in this lawsuit, have caused him to feel isolated and very uncomfortable at work. (*Id.*175).

II. ARGUMENT

A. Summary Judgment Standards

Summary judgment is appropriate only when there is no dispute as to a material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment is appropriate only if a rational trier of fact could not find for the non-moving party in light of the record as a whole. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In making this assessment, "'plaintiff's version of the facts must be presented where the parties' versions conflict, at least to the degree that [his] allegations have support in affidavits, deposition or other documentary evidence.'" *Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 504 (E.D.Va. 1992)(*quoting Paroline v. Unisys Corp.*, 879 F.2d 100, 102-103 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990). The discussion below and the evidence in support thereof, show conclusively that Defendant did not exercise reasonable care to prevent and correct promptly racial harassment, and no genuine issue of material fact exists which would support the

denial of EEOC's motion for partial summary judgment with respect to Defendant's "timely and appropriate action" affirmative defense. Accordingly, Defendant's motion for summary judgment fails and should be denied.

B. Defendant's Hostile Work Environment is Actionable

Title VII forbids an employer from discriminating on the basis of race with respect to terms, conditions, or privileges of employment. *See*, 42 U.S.C. § 2000e-2(a) (1). The Supreme Court has long recognized that such discrimination includes subjecting an employee, because of a protected characteristic such as the employee's race, to a workplace permeated with unwelcome "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create a[] [hostile or] abusive working environment." *Meritor Sav. Bank, FSB, v. Vinson*, 477 U.S. 57, 65-67 (1986)*; see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality."); *EEOC v. Central Wholesalers, Inc.*, _ F.3d _ (4th Cir. March 21, 2009), 2009 WL 2152348, at * 16 (reversing summary judgment where black female was subjected to blue-colored mop-head dolls hanging by nooses tied around dolls' necks, and daily use of epithets like "nigger" and "bitch"); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008)("Title VII extends the promise that no one should be subject to a discriminatorily hostile work environment."). Here, EEOC has presented sufficient evidence that Defendant violated Title VII by subjecting Pearson, Wilson, and Graham to an environment which was racially abusive and hostile. EEOC can prove its case by demonstrating that the harassment was (1) unwelcome; (2) based on Pearson, Wilson and Graham's race; (3) subjectively and objectively severe or pervasive enough to alter the

conditions of their employment, and (4) imputable to Defendant. *Sunbelt Rentals, Inc.*, 521 F.3d 306, 313-14 (4th Cir. 2008). Each of these elements is established below.

1. The Racial Harassment was Unwelcome.

It is undisputed that the relevant comments and conduct in this case unquestionably were unwelcome. This is most clearly demonstrated through Pearson, Wilson, and Graham's repeated complaints to the perpetrators, co-workers, their supervisors, and even the company's executive officer, Ron Bachmeier. Accordingly, the first factor is satisfied. *Central Wholesalers, Inc.*, _ F.3d _ (4th Cir. July 21, 2009), 2009 WL 2152348, at *13 ("[C]oncluding that a jury could find the harassment 'unwelcome' because the victim 'indicated to both management and his co-workers that he found the … demeaning conduct to be offensive.'")(quoting *Sunbelt Rentals,* 521 F.3d at 314.

2. The Harassment Was Race-Based.

The comments and incidents at issue were racially-based. They included overtly racial slurs, and physical threats directed at Pearson, Wilson, and Graham. The Fourth Circuit recognizes that the negative impact of the N-word in the workplace is so severe, that a single utterance of this racial epithet may be enough to create a hostile work environment. *See Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 182, 185-186 (4th Cir. 2001) ("Far more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African Americans."). Moreover, name-calling incidents like "boy," "Benson," Buckwheat," "Curious George," "Nappy Headed Ho," and references "Jungle Music" and "nigger music" are inherently racially harassing. *Cf. Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (even without any clear racial modifier, the use of a pejorative term like "boy" alone could evince the speaker's racial bias); *See White v. BFI Waste Servs., LLC,* 375 F.3d 288, 297 (4th Cir. 2004) (terms like "boy, jigaboo, nigger, porch

monkey, Mighty Joe Young," and "Zulu warrior" are racial epithets); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1129, 1131 (4th Cir. 1995) (national origin basis evident where Iranian plaintiff was called "the local terrorist," a "camel jockey," "the ayatollah," and "the Emir of Waldorf").

3. Racial Harassment at Defendant's Williamsport Plant Was Severe and Pervasive.

The harassment directed against Pearson, Wilson, and Graham was not isolated incidents, but rather was repeated and ongoing over the course of years. Defendant's actions in this case span the full spectrum of harassment from name calling, to intimidation, to overt death threats. Indeed, it is axiomatic that racially-motivated death threats, alone, amount to severe and pervasive harassment.

Contrary to Defendant's arguments, there exists abundant evidence showing that the harassment in this case was sufficiently "severe or pervasive" to be actionable. This test includes both an objective and subjective component. The Supreme Court has explained that the determination of whether the harassment is sufficiently severe or pervasive,

> is not, and by its nature cannot be, a mathematically precise test. . . . [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . . . [N]o single factor is required.

Harris, 510 U. S. at 22-23; *see also Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75, 81-82 (1998) (similarly stressing the need to look at "all the circumstances" in these cases).

Here, the harassment was subjectively and objectively severe or pervasive. In terms of objectively reasonable, beginning in 1995, Defendant subjected Younger to repeated racially-

based death threats and slurs. Pearson, Wilson, and Graham similarly were subjected to the daily barrage of "nigger," "boy, and other racial slurs. The racial slurs were compounded by race-based death threats – a piece of fiberglass on which the following message was glued: "KKK plans could result in death, serious personal injury, NIGGA BENARd" in Pearson' locker; and just two months later, a drawing of a stick figure with a noose around its neck next to a caption which read "IH IH MY NIGGER," in Wilson's locker. The daily barrage of race-based language and depictions, coupled with intimidating staring, stalking, and death threats from the workforce result in an objectively hostile work environment. *See Jackson v. Flint Ink N. Am. Corp.*, 382 F.3d 869, 870 (8th Cir. 2004)(recognizing that graffiti depicting the letters KKK were sufficiently severe given their threatening and intimidating nature.); *See, e.g., Tademy v. Union Pac. Corp.*, 520 F.3d 1149, 1163 (10th Cir. 2008)(concluding "the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence" and "the noose remains a potent and threatening symbol for African-Americans, in part because the grim specter of racially motivated violence continues to manifest itself in present day hate crimes" (quotation marks and citation omitted)).

In addition to the race-permeated remarks and threats, Defendant's staring and stalking Graham also contributes to the objectively hostile environment.

> [E]ven though a certain action may not have been specifically racial in nature it may contribute to the plaintiff's proof of a hostile work environment if it would not have occurred but for the fact that the plaintiff was African American.
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> [A] court should not examine each alleged incident in a vacuum, as "[w]hat may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."

Jackson v. Quanex Corp., 191 F.3d 647, 660, 662 (6th Cir. 1999) (citations omitted). See *also, EEOC v. Alton Packaging Corp*., 901 F.2d 920, 923 (11th Cir. 1990). Physical threats -- like the unveiled ones made toward Pearson and Wilson in 2007 -- are inherently more severe as well. *See id.* at n.6 (finding the presence of protected trait-based physical threats "undeniably strengthens a hostile work environment claim").

In terms of subjectively reasonable, it is clear that Pearson, Wilson, and Graham believed their work environment to be racially hostile. All considered the harassment extremely stressful. (*Pearson Dep.* 149*; Graham Dep.* 32, 197*; Wilson Dep.* 174-175); *Harris,* 510 U. S. at 23. Gatrell admitted and Supervisor Shifflett noted that both Pearson and Wilson had complained that “they were tired of people saying boy to them and other racial slurs.” (*Ex. 15).* Graham reported that he believed Shifflett was treating him unfavorably because he is black. (*Ex. 6, Carty Notes*). All asked Plant Manager Green to do something about the race discrimination. These complaints are more than sufficient to satisfy the "subjective" prong of the actionable harassment standard. *See EEOC v. R&R Ventures,* 244 F.3d 334, 339 (4th Cir. 2001)("In conducting the subjective inquiry we need only look at the testimony of the complaining witnesses."); *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 185 (4th Cir. 2001) (victim's complaints to supervisors about harassment show he or she believed the environment was hostile or abusive).

The above discussion makes clear that the work environment at Defendant’s Williamsport Plant was both objectively and subjectively hostile. *See White,* 375 F.3d at 297; *Spriggs,* 242 F.3d at 182, 185 (ruling that "frequent and highly repugnant insults were sufficiently severe or pervasive (or both) to cause a person of ordinary sensibilities to perceive

that the work atmosphere . . . was racially hostile").

4. Defendant Failed to Take Prompt and Corrective Action to Remedy Racial Harassment.

An employer will be liable for a hostile work environment created by coworkers[6] if it fails to take "timely and adequate corrective measures after harassing conduct has come to its attention." *Dennis v. County of Fairfax,* 55 F.3d 151, 156 (4th Cir. 1995); *Howard v. Winter*, 446 F.3d 559, 565, 567 (4th Cir. 2006) (citing *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333-34 (4th Cir. 2003) (en banc)("employer cannot avoid Title VII liability for coworker harassment by adopting a 'see no evil, hear no evil' strategy."). The employer must take "prompt remedial action" which is "reasonably calculated to end" the co-worker harassment. *Dennis,* 55 F.3d at 155 (citing *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989)), *rev'd in part on reh'g on other grounds,* 900 F.2d 27 (4th Cir. 1990) *(en banc))*; *see also Katz,* 709 F.2d at 256 (same).

The employer also must take "'corrective action reasonably likely to prevent the offending conduct from reoccurring.'" *See Harris v. L&L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997) (*quoting Knabe v. Boury Corp.*, 114 F.3d 407, 414 (3d Cir. 1997)). In *Howard*, the Court emphasized that Title VII "places significant responsibilities on employers in reasonably responding to employee allegations" of harassment. *Id.* at 571. The Court observed that

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[6] To avoid liability for supervisory harassment, Defendant must meet the burden of proof as set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998):

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

For the reasons discussed in part C., below, there is no dispute that black employees complained about supervisory harassment and that Defendant failed to exercise reasonable care to prevent and correct promptly the racially harassing conduct.

"[w]here, as here, the employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy." *Katz,* 709 F.2d at 256.

Despite the numerous complaints to Defendant, it simply failed to take prompt remedial action. Defendant ignored Pearson's repeated oral complaints about the harassment, until after Pearson advised Green that he would seek the assistance of counsel. Despite knowing about Pearson's and Wilson's complaints as early as February 2, 2006, Green waited until June 30, 2006 to refer the matter to Defendant's Chief Financial Officer and EEO Coordinator Ronald Bachmeier. (*Green Dep.* 197; *Bachmeier Dep. 45-50;* 70-71). Even then, Defendant's response was markedly deficient. Bachmeier failed to conduct a complete and proper investigation. He failed to credit Gradian Graham, who heard Churchey use the N-word many times. Worse, many of the witnesses identified by Pearson and Wilson were not interviewed. For example, both Green and Bachmeier failed to interview Acree, a witness to Floyd Myers' daily use of the N-word. Instead, Bachmeier accepted at face value Floyd Myers' blanket denial of the allegations. *Cf. Howard,* 446 F.3d at 570 n.10 (providing that the adequacy of the "employer's response must always be viewed in light of what it actually knew or should have known at the time of its response").

The Fourth Circuit has held that an employer will be on actual notice of harassment if a victim makes "repeated, specific complaints" to managers. *See L&L Wings, Inc.,* 132 F.3d at 982. Pearson, Wilson, and Graham complained repeatedly to Plant Manager Green about the harassment. Shifflett, Ngee, and Carty -- all Defendant managers -- witnessed, or were told about it. *See Howard,* 446 F.3d at 569 (one conversation with a human resources representative was sufficient to put the employer on actual notice); *Katz v. Dole,* 709 F.2d 251, 255 (4th Cir.

1983) (actual knowledge can be shown by "proving that complaints about the harassment were lodged with the employer"). In addition, given the long history of racial hostility at Defendant Williamsport Plant, and the sheer quantity of racial slurs would have put any reasonable employer on notice that blacks were being harassed.

The above discussion makes clear that all the elements of a coworker created racially hostile work environment, are established.

C. Defendant's Defense and Failure to Establish Affirmative Defense

Defendant's defense and its reasonable care affirmative defense that it "took timely and appropriately responsive action" to prevent harassment from occurring are without merit and no genuine issue of material fact exists under which this Court should allow Defendant's affirmative defense issue to go to a jury. Each of Defendant's defenses is addressed below.

Defendant disputes the severe or pervasive nature of the harassment. In response to the abundant evidence supporting a hostile work environment, Defendant denies that such an environment existed for Graham and Pearson.[7] For example, it disputes the daily use of the term "nigger" and argues that it immediately responded to stop this harassment. Defendant's argument, however, is belied by witness accounts that the term "nigger" was used daily in the workplace. For example, April Acree made the following declaration:

> 1. I am a white female and a former employee of Xerxes Corporation located in Williamsport, Maryland. The following information is based on my personal knowledge.
>
> 2. I was employed by Xerxes Corporation for approximately one and one-half years beginning in 2004 and ending in 2006. While employed at Xerxes, I worked in the man-hole cover production area in the back of the production facility near the testing area where Floyd Myers, a white male, worked.

[7] Defendant does not dispute that Wilson experienced severe or pervasive harassment. (*See*, Defendant Br. At 36-39).

3. I heard Floyd Myers use the word "nigger" on a daily basis and frequently in the presence of Bernard Pearson, a black male co-worker.

4. When I played hip-hop music on my work-area radio and CD player, Bob Churchey, a white male, Lead Production worker, frequently made the comment that I was listening to "nigger music."

5. Mr. Churchey often watched me when I would speak to Mr. Pearson. Once after seeing my child, who is black, Mr. Churchey asked me, "Why do you want to mess with niggers?"

6. Floyd Myers stated that Mr. Churchey often referred to me as a "nigger-lover." Floyd Myers made this statement in the presence of me and Mr. Pearson, who became upset with Mr. Myers because of the way that he was repeating "nigger-lover" while denying that the words were his.

7. Because I felt offended by Floyd Myers and Mr. Churchey's racial comments, I complained to Xerxes Supervisor, Todd Edgerton. Mr. Edgerton said he would report my complaints to Mr. Wayne Green, who was the Plant Manager.

8. Neither Mr. Green, nor anyone else in Xerxes' upper management, spoke to me about my complaints regarding Mr. Myers and Mr. Churchey's racial comments.

(*Ex.16, Declaration of April Acree*). Even Plant Manager Green knew that Gatrell used the term "nigger" in the presence of Pearson. In his handwritten notes of an interview with white employee Dennis Shade, Green wrote,

Worked on 2nd shift for month or so (month & ½?) and worked next to beam where Amber Gatrell and Bernard Pearson working

Heard Amber use "N" word 3 or 4 times did not remember context or if spoken directly to Bernard, But knew he (Bernard) was in area.

(*Ex.17*). Evidence which corroborates the testimony of the claimants only bolsters the fact that a hostile work environment existed.[8]

[8] The case Defendant cites on this issue, Br.38, is easily distinguishable on its facts. In *Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994), this Court faulted the plaintiff for failing to substantiate his discrimination claim with even the barest of details about dates, times, or circumstances. Here, by stark contrast, the specifics about the incidents in question, the precise epithets used, and their effect on Graham, Pearson, and Wilson's working environment, have been well detailed.

While Defendant now prides itself on its written reprimands of Myers and Gatrell (while simultaneously denying that any racially harassing behavior occurred), such written reprimands were nonsensical and ineffective. Both Myers and Gatrell received two-day suspensions and were advised that sexual harassment (not racial harassment) was the reason for their discipline. (*Exs. 18 and 19*). Gatrell did not understand why she was being suspended, but did not care, as she was able to take her two days off at her convenience, (*Gatrell Dep.*109-112). With regard to Bradley who described Wilson's music as "Jungle Music," Defendant issued a written warning advising him not to do it again. (*Ex. 20*). Similarly, Tammy Smith, who used the terms, "Buckwheat," "Benson," "Curious George," and "white nigger" received only a written warning, and thus, was not really disciplined in any other meaningful way. (*Ex. 21).* Defendant's policy provided that any individual found to have engaged in harassment would be subject to disciplinary action. But Defendant never once imposed written discipline on Churchey, despite his frequent use of "nigger," "nigger-lover," and "nigger music."

It is no surprise that Defendant's purported corrective measures were feeble, based on the intensity of the harassment and the undisputed fact that Plant Manager Green, charged with investigating complaints at Defendant's Williamsport Plant, had no training to do so. (*Green Dep.* 423). Indeed, whatever steps Defendant took after Pearson, Wilson, and Graham's complaints were completely ineffective, because the hostile work environment exacerbated each time any one of them complained. Indeed, several co-workers ignored Defendant's company policies and instructions given during Defendant's so-called "compliance training" to refrain from racial harassment and retaliation against blacks in the workplace. Smith, a repeat offender, remarked to Pearson that he looked like "Curious George" and complained in Wilson's presence

that she was not a "white nigger." Sam Crone commented about "Nappy-Headed Hos" in Pearson's presence.

Defendant further argues against liability based on the existence of its anti-harassment policy and that it took action after Pearson and Wilson complained. Defendant's policy alone cannot allow Defendant to escape liability if, as here, there was a failure to effectively implement its policy. *See Central Wholesalers, Inc.*, _ F.3d _ (4th Cir. July 21, 2009), 2009 WL 2152348, at *18 ("This is not a case where employer took no action in response to employee's complaints" such as investigations into the victim's complaints, but because they "failed to respond in a timely manner or failed to respond at all " and "remedial efforts proved completely ineffective" summary judgment was not warranted); *see also USFHolland*, 526 F.3d at 887 (despite numerous examples of corrective action, including conducting employee meetings to respond to plaintiffs' complaints and even disciplining responsible employees, defendant could not escape liability). Here, despite his numerous complaints and the actions Defendant took in response, Pearson testified that it did not stop; indeed, the harassment even escalated. Also, Green was slow to investigate, and admittedly was not even trained to handle or investigate, and therefore was totally ineffective at stopping the harassment, and at best only served to intensify the harassment against blacks. Defendant should not be permitted to proceed with any claim that it exercised reasonable care to prevent racial harassment, when it did not even train the person designated to receive complaints of racial harassment.

Defendant's total ineptness at stopping racial harassment belies any suggestion that Defendant was truly interested in remedying the hostile work environment. Green's failure to appropriately investigate complaints of supervisory racial harassment is evident in the case of Graham. When Graham complained, Green responded by threatening termination of Graham.

Green refused to believe Graham's race was an issue after Graham complained about supervisor Shifflett. He refused to treat seriously supervisor Shifflett's stalking and strange stares at Graham, and instead credited Shifflett's self-serving denial of the incident. Defendant's sustained indifference to racially hostile work environment allowed such environment to thrive.

CONCLUSION

For reasons stated above, EEOC requests that the Court deny Defendant's motion for summary judgment. Also, EEOC should be granted partial summary judgment with respect to Defendant's reasonable care affirmative defense.

Respectfully submitted,

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