

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

SANTOS ALBERT; JOHN GUTHRIE,

Plaintiffs,

v.

ALLEGHENY HEALTH NETWORK;
DIANE ALLEN,

Defendants.

Civil Action No. 2:21-CV-01625-MRH

**DEFENDANT ALLEGHENY HEALTH NETWORK'S
CONSOLIDATED MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION OF PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL SUMMARY	2
III. LEGAL ARGUMENT.....	5
A. Plaintiffs’ terminations resulted from their own actions and failures.	6
B. Plaintiffs cannot prove their race discrimination claims.	8
i. Guthrie’s associational race discrimination claim fails because he did not have a “substantial relationship” with Albert.....	9
ii. Guthrie cannot show that he was terminated due to his association with Albert.....	10
iii. Albert’s termination had nothing to do with his race.	12
iv. Albert suffered no adverse employment actions by Diane Allen.....	16
C. Plaintiffs cannot prove their retaliation claims.....	21
i. Guthrie’s employment was not terminated because of his reports to Human Resources several months earlier.	22
ii. Albert’s employment was not terminated because of his reports to Human Resources nearly one year earlier.....	25
D. Plaintiffs cannot prove an actionable claim of race-based hostile work environment.....	26
i. Guthrie cannot bring an actionable racially hostile work environment claim.....	27
ii. The allegations against Diane Allen do not prove an actionable hostile work environment based on race.	28
iii. AHN took prompt and adequate remedial action to address the reports about Diane Allen.....	34
iv. Albert did not suffer a hostile work environment under Melissa Turner.....	35
E. Whether Plaintiffs mitigated their damages is a question for the jury.	36
IV. CLOSING	37

I. INTRODUCTION¹

Pursuant to Fed. R. Civ. P. 56(c) and L. Civ. R. 56, Defendant Allegheny Health Network (“AHN”) submits this Consolidated Memorandum of Law in Support of its Motion for Summary Judgment and in Opposition to Plaintiffs’ Partial Motion for Summary Judgment [*ECF No. 97*].

In this civil action, Plaintiffs Santos Albert and John Guthrie (collectively, “Plaintiffs”) bring claims of race-based hostile work environment, race discrimination, and retaliation arising from their former employment at and separation from AHN.

Plaintiffs’ claims ring hollow. When boiled down, they are based on their own self-serving accounts that should not be credited, even for purposes of summary judgment. Even if their allegations are credited, Plaintiffs’ claims fail as a matter of law.

Indeed, their hostile work environment claims fail because, among other reasons, the alleged conduct did not constitute actionable harassment. Moreover, AHN promptly investigated the concerns that were reported and took appropriate remedial action.

As to their wrongful termination claims, AHN had clear, legitimate business reasons for terminating Plaintiffs’ employment: In Guthrie’s case, he did not carry out a directive by Melissa Turner, Vice President of the Call Center and his direct manager, to prepare formal talking points for Albert and then misrepresented to Turner that he was doing it and had been in communications with Human Resources regarding same. In Albert’s case, he was terminated for unsatisfactory performance after failing to improve under a performance improvement plan.

Contrary to their claims, none of these matters had anything to do with Albert’s race, Guthrie’s association with Albert (which is insufficient to give him standing to bring his claim),

¹ Contemporaneously herewith, AHN files a Concise Statement of Material Facts in Support of Its Motion for Summary Judgment (“Def. CSMF”) and an Appendix in Support of Its Motion for Summary Judgment (“Def. App’x”). This Brief provides only a brief factual summary of this case. A fuller statement of material facts is provided in AHN’s CSMF.

or either of their reports to Human Resources about their former boss nearly one year earlier. For these reasons, which are address more fully below, AHN’s Motion for Summary Judgment should be granted as to all counts and claims in Plaintiffs’ Second Amended Complaint, and Plaintiffs’ Partial Motion for Summary Judgment should be denied.

II. FACTUAL SUMMARY²

Plaintiffs worked in AHN’s Call Center known as “Care Connect.” *See Def. CSMF at ¶1.* Generally, the management group within the Care Connect Call Center is structured such that, with limited exceptions, Supervisors report to Managers, which report to Directors, which report to the Vice President. The Vice President is responsible for overseeing the Care Connect Call Center.

Guthrie was hired as a Manager on July 20, 2015. *Id. at ¶4.* He was promoted to the Director of Operations position on April 1, 2018. *Id. at ¶26.* Guthrie’s race is White. *Id. at ¶6.*

Albert was hired as a Supervisor on January 30, 2017. *Def. CSMF at ¶14.* He was promoted to an Operations Manager position on January 21, 2018. *Id. at ¶19.* Albert’s race is Black. *Id. at ¶15.*

Throughout much of their employment, Albert reported to Guthrie. *Id. at ¶9.* Following their respective promotions, Guthrie was the only Director of Operations at the Call Center, and Albert was the only Operations Manager. *Id. at ¶¶24, 28.*

Prior to May 30, 2019, Diane Allen – against whom Plaintiffs direct the bulk of their allegations – served as the Vice President of Care Connect Operations. *Def. CSMF at ¶¶7-8.* Significantly, Allen made both the hiring and promotion decisions with respect to both Guthrie

² AHN contemporaneously files a Concise Statement of Material Facts (“Def. CSMF”) and an Appendix (“Def. App’x”). A fuller statement of facts is provided in the Concise Statement of Material Facts.

and Albert. *Id.* at ¶¶7, 16, 21, 26. Also significantly, Allen never disciplined, demoted, discharged, or took other negative employment action against either Guthrie or Albert. *Id.* at ¶59.

Plaintiffs' race discrimination and hostile work environment claims are based primarily on myriad allegations about comments and actions by Allen occurring over at least two years. Tellingly, however, Plaintiffs never reported these alleged comments or actions when they occurred. It was not until May 2019³ that Plaintiffs first brought forward complaints to Human Resources. *Id.* at ¶¶30, 41.

To that end, on May 1, 2019, Guthrie reported to Jami Tinney, Human Resources Business Partner, concerns about Allen's interactions with her management team. *Def. CSMF* at ¶30. Tinney promptly interviewed several others over the next few days, including Albert. *Id.* at ¶¶34, 37. Notably, during those interviews, not a single employee reported any concerns about any comments or actions by Allen relating to race. *Id.* at ¶40.

Days later, on May 10, 2019, Guthrie, Albert, and another employee returned to Tinney to report that, at a managers meeting earlier that day, Allen had made a racially charged remark about an colleague in a different department, to the effect of: "Who will they believe? Us or that big nasty black woman?" *Id.* at ¶41. It was only at this time that Guthrie also reported to Tinney that he allegedly witnessed Allen use the "n-word" several months earlier, in mid-2018, in reference to a professional NFL player during a car ride with Guthrie and Janet Constantin, Clinical Director, to Erie, Pennsylvania. *Def. CSMF* at ¶42. According to Tinney, May 10th was the first time that anyone had reported any race-related comments by Allen. *Id.* at ¶42. Even Guthrie has admitted that he did not report Allen's alleged use of the "n-word" for many months. *Id.* at ¶¶42-43.

³ Plaintiffs have alleged that they first made complaints to Tinney in March 2019. However, there is no independent record evidence to support their allegations. By contrast, Tinney has testified that the reports were first made in May 2019, and all documentation supports her recollection. See Defendant's Responses to Plaintiffs' Statement of Facts ("*Def. Response to Plf. SOF*") at 53.

After receiving these reports on May 10, 2019, the matter was referred to Mary Esgro, Director of Employee and Labor Relations, to investigate the allegations of racial comments. *Def. CSMF at ¶¶51-52*. Immediately, Esgro initiated a thorough investigation, which included interviews of Guthrie, Albert, Allen, Constantine, and other Call Center managers. *Id. at ¶¶52-53*. Through her investigation, Esgro concluded that the allegation of Allen’s comment at the May 10 managers’ meeting had been substantiated. *Id. at ¶¶51-54*. By contrast, the allegation about Allen using the “n-word” in the car ride months earlier was not substantiated. *Id. at ¶54*.

On May 30, 2019, Allen’s employment ended as an outcome of the investigation. Senior Vice President Kenyokee Crowell – whose race is Black – was the responsible decision-maker. *Def. CSMF at ¶¶55-58*. Crowell met with Allen to inform her of the outcome of the investigation and that her employment would be terminated effectively immediately if she did not resign. Crowell had a prepared termination letter to give to Allen. *Id. at ¶57*. However, Allen elected to resign. *Id. at ¶58*.

The Vice President position sat vacant until Crowell hired Melissa Turner on November 18, 2019. *Id. at ¶61*. In the weeks following her hiring, Turner observed and learned from others about deficiencies in Plaintiffs’ performance and behavior. *Id. at ¶¶62-65*.

With respect to Albert, Turner felt that he failed to communicate effectively with direct reports, failed to provide clear and concise directions, failed to timely complete a task or follow-up on a task, and missed meetings. *Id. at ¶¶63-65*. On January 22, 2020, Turner directed Guthrie, as Albert’s manager, to draft formal talking points for Albert to address the performance problems. *Def. CSMF at ¶¶70-71*. As their emails make clear, Guthrie never expressed disagreement or opposed her directive. *Id. at ¶¶73-75*. On the contrary, Guthrie expressly misrepresented to Turner that he was drafting the talking points for Albert and consulting with Human Resources

Talent Engagement Partner Colleen Chimel in that effort. *Id. at* ¶¶75-76. However, none of that was true – Guthrie never spoke with Chimel about the talking points, and he never drafted the talking points or counseled Albert. *Id. at* ¶¶ 78, 81. Accordingly, Turner terminated Guthrie’s employment on February 3, 2020, for insubordination, lying to his supervisor, and breaching trust, which goes against AHN’s Core Values of Trust and Integrity. *Def. CSMF at* ¶¶83-84.

In light of Guthrie’s failure to counsel Albert, Turner met with Albert to discuss his unsatisfactory performance and issued Albert a Performance Improvement Plan (“PIP”), which documented the deficiencies, on February 13, 2020. *Id. at* ¶¶85-90. Over the next two months, Turner attempted to coach Albert; nevertheless, she received additional complaints about him and concluded that he was not satisfying the expectations of the PIP. *Id. at* ¶¶ 94-96. As a result, Turner terminated Albert’s employment on April 10, 2020. *Id. at* ¶¶ 97-99.

Importantly with respect to Plaintiffs’ retaliation claims, Turner had no knowledge of any complaints of discrimination by Guthrie or Albert concerning Allen, Turner, or anyone else. *Def. CSMF at* ¶100. And importantly with respect to their race claims, Turner hired Eric Wilds – whose race is Black – on September 28, 2020, for the Operations Director position previously held by Guthrie. *Id. ¶¶102-103.*

III. LEGAL ARGUMENT⁴

Although Plaintiffs have brought their lawsuit as co-plaintiffs, their claims are not identical. Albert brings claims of (i) race discrimination; (ii) retaliation because of his reports

⁴ Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). After the movant has put forth a properly supported motion for summary judgment, the burden shifts to the non-moving party to set forth specific facts establishing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Importantly, the non-moving party cannot rely on “unsupported assertions, conclusory allegations, or mere suspicions.” *Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986). “[A]n inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). Moreover, “[t]he mere existence of a scintilla of evidence,” without more, does not give rise to a genuine dispute of fact. *Anderson*, 477 U.S. at 252. Where the

about Allen; and (iii) race-based hostile work environment under 42 U.S.C. § 1981 (“Section 1981”), Title VII of the Civil Rights Act of 1964 (“Title VII”), and the Pennsylvania Human Relations Act (“PHRA”). Guthrie brings claims of (i) race discrimination because of his association with Albert; (ii) retaliation because of his reports about Allen; and (iii) race-based hostile work environment under Section 1981 only.⁵ As addressed below, AHN is entitled to summary judgment with respect to all claims asserted by Plaintiffs.

A. Plaintiffs’ terminations resulted from their own actions and failures.

As a preliminary matter, AHN had clear, legitimate business reasons for terminating Plaintiffs’ employment. The following is undisputed with respect to Guthrie’s termination:

- Turner, Guthrie’s supervisor, directed Guthrie to confer with Human Resources and prepare formal talking points to address with Albert regarding areas for improvement related to his behavior and work performance. *See Def. CSMF at ¶¶ 67, 70-71*. Specifically, Turner identified several specific examples of Albert’s deficient behavior which Guthrie does not dispute occurred. *See id.*
- Guthrie represented to Turner that he spoke to Human Resources about Albert’s performance, and that he would provide draft talking points to Turner. *See Def. CSMF at ¶¶ 74-75*.
- Despite his representation to Turner, Guthrie never spoke to Human Resources about Albert’s behavior or provided Turner with draft talking points. *See Id. at ¶¶ 76, 78, 81*.
- Guthrie never expressed disagreement to Turner, let alone expressed any protest over race discrimination against Albert. *Id. at ¶ 73*.
- Turner terminated Guthrie’s employment on February 3, 2020, after determining that he had been insubordinate for not following her directive and that he falsely told her that he had been conferring with Human Resources Talent Engagement Partner Colleen Chimel. *Id. at ¶¶ 83-84*.

The following is undisputed with respect to Albert’s termination:

record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

⁵ Discrimination and retaliation claims under Section 1981, Title VII, and the PHRA are analyzed coextensively. *See Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 499 (3d Cir. 1999) (Section 1981 and Title VII); *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 163 (3d Cir. 2013) (Title VII and PHRA); *Chandler v. La-Z-Boy, Inc.*, 621 F. Supp. 3d 568, 573 (E.D. Pa. 2022) (Section 1981 and Title VII). Accordingly, AHN analyzes each distinct claim under the common framework applicable thereto.

- Beginning shortly after joining the Call Center, Turner became aware of team members' complaints about Albert's behavior. *See Def. CSMF at ¶¶64-65.*
- Turner also observed other performance deficiencies, including missed deadlines, missed meetings, failing to deliver feedback to subordinates, and failing to respond timely to questions or understand questions from his direct reports. *Id. at ¶63.*
- Guthrie, as Albert's direct manager, was aware that such performance problems existed. *Id. at ¶67.*
- On February 13, 2020, Turner placed Albert under a 30-day PIP, which identified specific areas for improvement including professionalism and engaging in appropriate conduct with colleagues. *Id. at ¶89.* The PIP also stated that failure to meet the expectations outlined in the PIP and sustain a satisfactory level of performance may result in further disciplinary action up to and including termination of employment. *See Def. CSMF at ¶90.*
- Albert also received an "off-track" rating in his 2019 Performance Evaluation which Turner also discussed during her meeting with Albert. *See Def. CSMF at ¶85-87.*
- Albert had been aware of the concerns regarding his communication and admitted that this was not first time Turner addressed his performance with him. *Id. at ¶¶86-87.*
- Despite that the PIP was scheduled for a 30-day period, Albert was given nearly two months to improve his performance as his employment continued into April. *Id. at ¶94-96.*
- Over those two months, Turner believed that Albert failed to make sufficient gains and that she was spending too much time addressing concerns about his communications with team members and his failure to properly respond to questions from his direct reports and completing other job responsibilities of Albert. *See id.*
- Turner terminated Albert's employment on April 10, 2020, after determining that he had failed to meet expectations as a manager under the PIP. *See Def. CSMF at ¶¶97-99.*

AHN has only a "relatively light" burden of **production** that is satisfied by "introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." *Baron v. Abbott Labs.*, 672 F. App'x 158, 161 (3d Cir. 2016) (internal citations omitted). By contrast, Plaintiffs always carry the burden of **persuasion**. *Baron*, 672 F. App'x at 161. Here, it is clear that AHN had legitimate, non-discriminatory, and non-retaliatory reasons for terminating Plaintiffs' employment, as courts routinely hold that

unsatisfactory performance, insubordination, and misrepresentation are legitimate reasons for employment termination. *See, e.g., Ross v. Gilhuly*, 755 F.3d 185, 193 (3d Cir. 2014) (poor job performance); *Bisbing v. Lehighon Ambulance Ass'n, Inc.*, 142 F. App'x 71, 74 (3d Cir. 2005) (insubordination); *Gress v. Temple Univ. Health Sys.*, No. 13-CV-5414, 2018 U.S. Dist. LEXIS 140516, at *9 (E.D. Pa. Aug. 20, 2018) (insubordination and misrepresentation).

B. Plaintiffs cannot prove their race discrimination claims.

In their Second Amended Complaint, both Albert and Guthrie assert claims of race discrimination. Of note, however, Plaintiffs' Partial Motion for Summary Judgment [*ECF No. 97*] ("Plfs. Motion for Summary Judgment") addresses only Albert's race discrimination claim and not Guthrie's claim. In any event, AHN is entitled to summary judgment as to all race discrimination claims by both Plaintiffs, and Albert's motion should be denied.

To establish a *prima facie* case of race discrimination, Plaintiffs must prove: (1) they are a member of a protected class; (2) they were qualified for their position; (3) they were subject to an adverse employment action; and (4) the adverse employment action occurred "under circumstances that give rise to an inference of unlawful discrimination." *Hernandez v. Wal-Mart*, 844 F. App'x 598, 600 (3d Cir. 2021). Neither Guthrie nor Albert can satisfy this standard.

With respect to the third element, Plaintiffs suffered no adverse employment action other than the termination of their employment. And, as addressed below, their respective terminations had nothing to do with race.

With respect to the fourth element, they must show that either (1) similarly situated persons who are not members of the protected class were treated more favorably, or (2) that the circumstances of the alleged adverse employment actions give rise to an inference of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In doing so,

they must present evidence that “establish[es] some causal nexus between [their] membership in a protected class” and the adverse employment decision, which Plaintiffs cannot do. *Sarullo v. United States Postal Serv.*, 352 F.3d 789, 798 (3d Cir. 2003). As addressed below, Plaintiffs cannot prove the fourth element of the *prima facie* standard for race discrimination claims.

Even if Plaintiffs could prove a *prima facie* case of race discrimination, their claims nevertheless fail because they cannot satisfy their ultimate burden of proving pretext. As addressed in Section A above, AHN had legitimate, non-discriminatory reasons for terminating Plaintiffs’ employment. Thus, Plaintiffs must prove that AHN’s reasons were pretext for race discrimination by presenting “some evidence... from which a factfinder could reasonably either (1) disbelieve the employer’s articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer’s action.” *Ortiz v. Cedar Crest Coll.*, 764 F. App’x 257, 259 (3d Cir. 2019) (*quoting Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)). Plaintiffs cannot satisfy their burden of proving pretext.

i. Guthrie’s associational race discrimination claim fails because he did not have a “substantial relationship” with Albert.

Guthrie’s race discrimination claim is based on a theory that he was discriminated against because of his association with Albert. However, his claim fails because he cannot show that their relationship was sufficiently substantial to support an associational race discrimination claim.

Associational discrimination claims are “limited to causes of action that involve more substantial relationships.” *See Stevens v. Bryn Mawr Tr. Co.*, No. 19-2418, 2022 U.S. Dist. LEXIS 195523, at *14 (E.D. Pa. Oct. 27, 2022); *LaRochelle v. Wilmac Corp.*, 210 F. Supp. 3d 658, 693-94 (E.D. Pa. 2016), *aff’d* 769 F. App’x 57 (3d Cir. 2019). Courts generally have limited the concept of “substantial relationship” to interracial marriage or a parent-child relationship. *See LaRochelle*, 210 F. Supp. 3d at 693-94 (interracial marriage); *Kengerski v. Allegheny Cnty.*, 435

F. Supp. 3d 671, 677-78 (E.D. Pa. 2020) (parent-child). By contrast, courts hold that being a “good friend” or having a “friendly” coworker relationship is insufficient to support an associational discrimination claim. *See, e.g., LaRochelle*, 210 F. Supp. at 693-94 (E.D. Pa. 2016) (merely being “good friends” with a coworker is insufficient); *Stevens*, 2022 U.S. Dist. LEXIS 195523, at *15 (friendly relationships with colleagues not a “substantial relationship.”); *Baker v. Wilmington Tr. Co.*, 320 F. Supp. 2d 196, 203 (D. Del. 2004) (acquaintance with a fellow bank teller insufficient).

Here, Guthrie cannot show that he had a “substantial relationship” with Albert. Guthrie testified that he and Albert were nothing more than “professional peers.” *See Def. CSMF at ¶12*. He expressly denied having any kind of “personal relationship” with Albert. *See id.* Albert similarly testified, describing their relationship as just “okay” and the “same” as his relationships with other managers. *See Def. CSMF at ¶10*. Given Plaintiffs’ respective testimony, Guthrie cannot prove that he had a “substantial relationship” with Albert. For that reason alone, AHN is entitled to summary judgment on his associational race discrimination claim.

ii. Guthrie cannot show that he was terminated due to his association with Albert.

Even if the court’s analysis goes beyond the absence of a “substantial relationship” between Plaintiffs, Guthrie’s associational race discrimination claims fails because he cannot show that he was terminated under circumstances giving rise to an inference of associational race discrimination or that AHN’s reasons for terminating Guthrie’s employment were pretext.

To start, Guthrie has not identified a single similarly situated comparator who purportedly received favorable treatment – because there are none. Next, Guthrie provides absolutely no evidence to support his bald allegations of discrimination by Crowell, Allen, and Turner.

At his deposition, Guthrie claimed that Crowell “partially discriminated” against him and that his claim was based solely on his belief that Crowell was “friends with Diane Allen.” *See*

Def. App'x, Ex. C (Guthrie Depo.) at 246:11-18. Guthrie's mere speculation about their friendship is insufficient to support an inference of discrimination or to show pretext. *Ekhato v. Rite Aid Corp.*, 529 F. App'x 152 (3d Cir. 2013) (collecting cases). Further, even if Guthrie's speculation is credited for summary judgment purposes, merely showing that Crowell and Allen might have been friends does not prove that Crowell discriminated against Guthrie because of his relationship with Albert – particularly given that Guthrie admits that Crowell took no adverse employment action against him. *Def. CSMF at ¶60.*

Guthrie also admitted that Allen took no adverse action against him – because she did not. *Def. CSMF at ¶59.* In fact, there is no record evidence showing that Allen had any animus towards Guthrie, due to his association with Albert or otherwise. By contrast, there is ample record evidence of positive treatment, given that Allen hired Guthrie and later promoted him to the Operations Director position, at a time at which she believed Guthrie and Albert were friends. *Id. at ¶26.* As with Crowell, Guthrie's claim concerning Allen fails in the absence of any adverse employment action.

Guthrie's claim also fails with respect to Turner. Although Turner was responsible for terminating Guthrie's employment, he has offered nothing but speculation that Turner made the decision because of his association with Albert – which she did not. Indeed, Guthrie's own admissions show that he did not follow Turner's instructions to counsel Albert and did not confer with Human Resources as he had misrepresented to her, which only confirm that AHN's reasons for terminating his employment were not pretextual.⁶

⁶ Guthrie's associational discrimination claim also is completely contradicted by Plaintiffs' attempts to use Guthrie as a comparator to Albert by alleging that Guthrie received more favorable treatment than Albert. First, Plaintiffs' argument is unsupported by the facts. Both were hired by Allen into leadership roles, both were promoted by Allen, neither Plaintiff suffered any adverse employment action under Allen at any time, and neither suffered any adverse employment action under Turner prior to their respective terminations. *See Def. CSMF at ¶4, 14, 19, 26, 59.* Next, as a matter of law, Guthrie and Albert are not proper comparators because they were not similarly

iii. Albert’s termination had nothing to do with his race.

Like Guthrie, Albert’s race discrimination claim has no merit. He has contended that he was terminated because of his race, and, in his Partial Motion for Summary Judgment, has contended that he is entitled to summary judgment on that claim. *See Plfs. Moving Brief*. He is wrong in both regards. In truth, Albert cannot show record evidence sufficient to give rise to an inference of race discrimination (under the *prima facie* standard) or that AHN’s stated reason for terminating his employment is pretext for race discrimination.

Indeed, AHN terminated Albert’s employment for unsatisfactory performance in his Operations Manager role. *Def. CSMF at ¶¶97-99*. Albert received repeated notice that his performance and conduct fell short of his leadership’s expectations, including through the PIP, and had ample opportunity to save his job. *Id. at ¶¶85-91*. In the end, after two months under the PIP, Turner concluded that Albert had failed to meet the expectations under the PIP and the best path forward was to separate him. *Id. at ¶¶95-99*. Turner had every right to make such assessments and determinations as the Vice President and leader of the Care Connect Call Center.

Albert cannot prove race discrimination merely by relying on his personal disagreement with Turner’s assessments and decisions – which is what he attempts to do. *See, e.g., Rodriguez v. Nat’l R.R. Passenger Corp.*, 532 F. App’x 152, 153 (3d Cir. 2013) (“A plaintiff’s subjective belief that race played a role in an employment decision is not sufficient to establish an inference of discrimination.”); *Ade v. KidsPeace Corp.*, 401 F. App’x 697, 703 (3d Cir. 2010) (affirming summary judgment for employer and noting that a plaintiff’s “own personal belief that the true

situated. Indeed, Albert, as the only Operations Manager, and Guthrie, as the only Operations Director and Albert’s supervisor, held different positions. By definition, employees in reporting roles are not similarly situated. *See Wilcher v. Postmaster Gen.*, 441 F. App’x 879 (3d Cir. 2011) (holding proffered comparator not comparable “because she held a superior position[.]”). Lastly, the mere fact that Plaintiffs argue that Guthrie received favorable treatment over Albert completely belies Guthrie’s claim that he was subjected to discrimination because of his relationship with Albert. Although ancillary to Guthrie’s claim, AHN calls out these flaws in Plaintiffs’ attempts to use each other as comparators to underscore the appropriateness of summary judgment for AHN.

reason for the discharge was...discrimination is...insufficient to create a genuine issue of material fact”).

Nor can Albert ask this court to second-guess the business judgment of Turner or AHN at large, as neither the court nor a jury can “sit as a super-personnel department” that questions whether the employer acted with good business judgment, wisely, prudently, or too harshly. *See Hennessey v. Dollar Bank*, 833 F. App’x. 961, 966 (3d Cir. 2020); *Capps v. Mondelez Global, LLC*, 847 F.3d 144, 154 (3d Cir. 2017) (“Discrimination statutes allow employers to discharge employees for almost any reason whatsoever (even a mistaken but honest belief) as long as the reason is not illegal discrimination”); *Willis v. UPMC Children’s Hosp. of Pgh.*, 808 F.3d 638, 647 (3d Cir. 2015) (“The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is discrimination.”).

Rather, the proper inquiry is limited to whether Plaintiffs have demonstrated that the “the employer’s articulated reason was... so plainly wrong that it cannot have been the employer’s real reason” and “whether discriminatory [or retaliatory] animus motivated the employer.” *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 413 (3d Cir. 1999); *see also Fuentes*, 32 F.3d at 765. Here, Albert makes no such showing.

Albert has offered no comparator evidence with respect to his termination – because there is none. In fact, the record shows that Turner did not limit performance-based corrective action to only Albert. To that end, Turner also took corrective action against a White employee, Stacy Meeder-Willbur, for unsatisfactory performance. *See Def. Responses to Plfs. SOF at ¶179.* Turner’s treatment of Meeder-Willbur clearly indicates that she did not manage team members’ performance based on race. *See id.*

With no valid evidence to support his claim, Albert has resorted to relying on inadmissible hearsay and fabricated allegations in two anonymous complaints made to AHN's employee hotline alleging that Turner made racially charged remarks, including using the "n-word". *See Plfs. Moving Brief*. Curiously, both reports were made just days after Turner placed Albert on his PIP. *See Def. Responses to Plfs. SOF at ¶¶160, 162*. There were no similar complaints before or after that time. In any event, and more significantly, there is no independent evidence from which to identify the anonymous reporter or to validate/invalidate the substance of the allegations. *See id.*

Consequently, the anonymous complaints should not be considered for summary judgment purposes. In *Pineda v. Phila. Media Holdings LLC*, 542 F. Supp. 2d 419 (E.D. Pa. 2008), the court addressed similar circumstances where a plaintiff relied on an anonymous complaint for which "no one ha[d] identified the alleged purveyor of the statements." There, the court held that such anonymous complaints were inadmissible hearsay that could not support a showing of pretext and, therefore, should not be considered for summary judgment. *Pineda*, 542 F. Supp. at 426, n. 7. So, too, is the case here: The anonymous complaints offered by Albert should not be considered for summary judgment purposes because they are inadmissible hearsay. *See id.* *See also J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (evidence must be admissible in some form at trial to be considered on summary judgment).

Underscoring this point, even Albert testified that he was surprised to learn about the allegations against Turner when questioned by Human Resources in connection with the anonymous complaints. *See Def. Responses to Plfs. SOF at ¶¶160, 162*. Indeed, at that time, Albert told Human Resources that his "interactions with Melissa Turner have been fantastic," "he has never heard any racist comments or felt that she was being discriminatory against him or anyone else," "he has never seen poor interaction with any co-workers," and "he has never heard

anything remotely discriminatory.” *See id.* Thus, Albert’s own reports to Human Resources discredit the anonymous reports.

In an apparent last-ditch effort, Albert now has alleged incredulously that Turner called him a “‘diversity hire’ during a phone call with another individual” – conveniently, after speaking with Human Resources about her. However, his allegation should not be credited even for summary judgment because no reasonable jury would believe it. *See Plaintiffs’ Concise Statement of Material Facts [ECF No. 98] (“Plfs. SOF”) at ¶167 and Def. Response to Plf. SOF at ¶167.*

First, even under Albert’s account, he was uncertain as to what Turner said and to whom she was speaking. At his deposition, Albert testified only that Turner said “something about a diversity hire” and, when asked for details, could provide only his suspicions as to what he thought he had heard. *See Def. App’x, Ex. B (Albert’s Depo.) at 164:5-20.* Albert did not know who Turner was talking to, if anyone, and admitted that “there was a lot of background noise.” *Id. at 164:19-165:2.* In fact, Albert bases his entire allegation on the fact that he “assumes” Turner was talking to someone in her house. *Id. at 164:25-165:2.* Given that Albert’s allegation is based on nothing more than his suspicions and speculation, it should not be credited for summary judgment and does not create a genuine dispute of material fact. *See Boyle*, 931 F. App’x 212 at 215.

Moreover, no reasonable jury would believe Albert’s allegation given that he never reported the matter to Human Resources. *See Def. App’x, Ex. B (Albert’s Depo.) at 166:4-6.* Albert was specifically asked about any concerns he might have about Turner and race after AHN received the aforementioned anonymous complaints. Had Albert truly believed that Turner had been discriminating against him, he had every opportunity at that time to report his concerns. Even if one accepts Albert’s representation that the “diversity hire” comment was made after he spoke with Human Resources (even though it should not be credited), nothing prevented Albert from

reaching out to Human Resources later. The absence of any such report by Albert renders the allegation so implausible that it should not be credited for summary judgment.

Additionally, no reasonable jury would believe Albert's allegation given the undisputed fact that Turner hired Eric Wilds – whose race is Black – to take over the Director position formerly held by Guthrie. *See Def. CSMF at ¶¶102-103*. All the more telling, Tuner hired Wilds as an outside candidate (i.e., he did not work at AHN previously) over White candidates with prior experience working in the Call Center. *See id.* These undisputed facts completely bely Albert's race discrimination claim against Turner. Indeed, courts have emphasized that the replacement of a plaintiff by someone of the same race undermines a claim of racial discrimination. *See Coulton v. Univ. of Pa.*, 2006 U.S. Dist. LEXIS 12459, *19 (E.D. Pa. Mar. 22, 2006), *aff'd* 237 Fed. App'x 741 (3d Cir. 2007); *see also Hess v. Sec. Guards, Inc.*, No. 02-CV-3691, 2003 U.S. Dist. LEXIS 19733 (E.D. Pa. Sep. 30, 2003).⁷ In sum, Albert has not, and cannot, show how his termination had anything to do with race – because it did not. As a result, AHN is entitled to summary judgment with respect to his wrongful termination claim, and Albert's motion for summary judgment on that claim should be denied.

iv. Albert suffered no adverse employment actions by Diane Allen.

Albert also sets forth three additional theories of race discrimination relating to alleged adverse employment actions taken by Diane Allen. Namely, he claims that: (1) Allen denied him a “promised promotion to Operations Manager within 60-90 days of his hire”; (2) Allen gave him

⁷ The same reasoning likewise, should apply to Guthrie's claims. Here, Guthrie contends that Turner committed associational race discrimination because of his association with Albert, a Black man. However, Turner hired Wilds, a Black man, into Guthrie's former position – which clearly demonstrates a lack of any racial animus.

a different assignment than what he was promised when he was hired; and (3) Allen denied him bonuses. *See Plfs. Moving Brief at p. 5.* Each of these claims has no support in fact or law.

a. Allen never denied Albert a “promised promotion” because of his race. On the contrary, Allen promoted Albert.

Contrary to his claim, Allen never denied Albert a promotion. On the contrary, Allen hired Albert in January 2017 and, within one year (in January 2018), promoted him to the very Operations Manager position that he incredulously claims he was denied. *See Def. CSMF at ¶¶14-16, 19.* That is the one and only available promotion opportunity in which Albert sought. *Def. CSMF at ¶20.* And, completely discrediting his claim of race discrimination, Allen selected Albert over White candidates. *Def. CSMF at ¶21.*

Grasping for straws, Albert has contended that his promotion did not come as soon as he wanted. Tellingly, all that Albert has offered to support this theory is personal preference and his own vague recollection that Allen made a “general statement” about a promotion within “possibly 60-90 days.” *See Plfs. SOF at ¶ 14. See also Def. App’x, Ex. B (Albert’s Depo.) at 64:11-65:3.* That, however, is insufficient to prove his denied promotion claim, particularly given that Albert has admitted there was nothing in writing guaranteeing a promotion within 60-90 days after the date of his hire. *See id. at 64:21-65:3.* He also has admitted that there was no available Operations Manager position for any such promotion during the 60-90 day period following his hiring. *See Def. CSMF at ¶20.* Contrary to what Albert now might contend, AHN had no obligation to create a new position to promote Albert at the time he preferred. *See Young v. Temple Univ. Hosp.*, 359 F. App’x 304, 310 (3d Cir. 2009) (failure to create a new position and promote plaintiff to that role is not an actionable discrimination claim). Given there was no actual denial of promotion, there was no adverse employment action.

Moreover, Albert has made no showing that the alleged denied promotion had anything to do with his race. Albert argues that Allen promoted his co-plaintiff Guthrie and Janet Constantine, whose race is White, to Director positions. However, in no way were Guthrie or Constantine similarly situated to Albert because they did not hold the same position as Albert and were promoted into completely different positions – in the case of Guthrie, an Operations Director position, and, in the case of Constantine, a Clinical Director position.⁸ *See e.g., Kidspace Corp.*, 401 Fed App'x. at 705 (finding that employees that hold different positions are not similarly situated); *Hanzer v. Mentor Network*, 610 F. App'x 121 (3d Cir. 2015) (“[T]he Program Manager position is an entirely different position than the Program Support Coordinator position. Thus, they were not similarly situated employees.”).

Indeed, Guthrie’s and Constantine’s promotions to Director positions are entirely immaterial to Albert’s claim because (i) Albert does not claim that he was denied promotion to a Director position – because he was not; and (ii) again, Albert was promoted to the very Operations Manager position that he sought. In sum, a mere desire by Albert to be promoted earlier than he actually was does not support an inference of race discrimination or demonstrate pretext.

b. Allen did not deny Albert “promised” job assignments.

Albert also claims that Allen discriminated against him by giving him “a different assignment than he was promised when he was hired, requiring him to work longer hours and changing his schedule.” *See Plfs. Moving Brief at p. 8*. At its core, this claim is akin to his denied promotion claim because it centers around Albert’s unsupported subjective belief that he should have worked as an Operations Manager sooner. And for similar reasons, this claim fails.

⁸ It bears noting that a Clinical Director position requires advanced experience and qualifications in nursing. Thus, even if Albert had sought the Clinical Director position, he was not qualified for it.

Importantly, Albert does not dispute that, at the time of his hiring, he applied for the Care Connect Elite Supervisor position. *See Def. App'x Ex. B (Albert's Depo.) at 63:7-9.* Thus, it is immaterial that he did not perform the duties or have the work schedule of the Operations Manager position while holding the Supervisor position – no matter how much or quickly he might have wanted the promotion. When Allen ultimately selected Albert for the Operations Manager position (at the only available opportunity, in January 2018), and his job duties and schedule changed following his promotion. *See id. at 36:17-39:25.*

Moreover, even if the premise of Albert's claim is credited, he has offered nothing to show that race had anything to do with the matter. To that end, Albert has alleged that a White employee was given the shift that he "preferred." However, Albert admitted that the White employee had been employed as a Supervisor in the Call Center before his hiring, and he could not provide any plausible explanation as to how it related to his race. *See Def. App'x Ex. B (Albert's Depo.) at 72:20-73:1, 246:16-248:5.* Accordingly, Albert cannot prove this theory of race discrimination.

c. Allen did not deny Albert any bonuses.

Albert also has claimed that Allen "never gave [him] a bonus during his employment at AHN, while white employees, such as Mr. Guthrie and Ms. Constantine did receive bonuses." *See Plfs. Moving Brief at 8.* Once again, his claim has no merit.

As a preliminary matter, Albert falsely contends that he was "consistently denied" bonuses. This is not true. Tellingly, Albert cannot point to a single instance where Allen gave a bonus to managers but denied that bonus to Albert. Rather, the only specific example that he has raised was a bonus paid to Guthrie and Constantine in December 2018.

To that instance, Albert cannot show, that he was entitled to any bonus in December 2018. Specifically, he cannot show any criteria that he supposedly satisfied or amount that he supposedly

was denied – because, factually, he did not earn and was not denied a bonus. Rather, he simply expresses discontent that he did not receive a bonus when Guthrie and Constantine did in December 2018. But, again – and as explained above – Albert’s attempt to use Guthrie and Constantine as comparators is misplaced because they were not similarly situated to him given that Albert was the only Operations Manager, Guthrie was the only Operations Director, and Constantine was the only Clinical Director. Because Albert cannot show that he qualified for a bonus in December 2018 and cannot identify anyone who was actually similarly situated to him who received such a bonus, his claim of being “consistently denied” bonuses fails.

d. In truth, Allen gave only positive treatment to Albert and did not take any adverse employment action against him.

Lastly, the above theories of race discrimination by Allen completely ignores a basic, yet critical truth relating to her interactions with Albert in 2017 and 2018. By all accounts and record evidence, Allen gave only positive treatment to Albert and did not take a single adverse employment action against him.

It is undisputed that Allen hired Albert in the Operations Supervisor position that he wanted in January 2017, over White candidates. It also is undisputed that Allen promoted Albert to the Operations Manager position that he wanted in January 2018, over White candidates. If Allen held an animus against Albert because of his race, it would be entirely illogical to hire him and then promote him within his first year of employment, over White employees. As a matter of law, discrimination claims are ripe for dismissal under such circumstances under the “same actor” doctrine. *See Yue Yu v. McGrath*, 2014 U.S. Dist. LEXIS 40854, at *39 (D.N.J. 2014) (*quoting Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997) (“When the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.”); *see also Ruff v.*

Temple Univ., 122 F. Supp. 3d 212, 219 (E.D. Pa. 2015) (quoting *Bintliff-Ritchie v. Am. Reinsurance Co.*, 2007 U.S. Dist. LEXIS 10469, at *33 (D.N.J. Feb. 15, 2007) (“[I]t seems improbable that a group of individuals responsible for hiring a member of a protected class would then dismiss her shortly thereafter on the basis of gender discrimination”)).

So, too, is the case here: The positive treatment towards Albert, and the absence of any actual adverse employment action (e.g., no discipline, demotion, discharge, or other negative change to employment terms), confirms the absence of any racial discrimination by Allen.

C. Plaintiffs cannot prove their retaliation claims.⁹

Plaintiffs’ retaliation claims suffer the same fate. To make a *prima facie* showing of retaliation, Guthrie and Albert *each* must prove: (1) they engaged in protected activity; (2) they suffered an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse action. *Carvalho-Grievous v. Delaware State Uni.*, 851 F.3d 249, 257 (3d Cir. 2017). Also of critical importance, they *each* must prove, a “heightened” but-for causation standard, that they would not have suffered the adverse action but for his alleged protected activity. *See Carvalho*, 851 F.3d at 258.

Guthrie and Albert each claim that Melissa Turner terminated their employment – respectively, in February and April 2020 – in retaliation for their reports to Human Resources about Diane Allen – in May 2019, several months earlier. Because there is no basis in law or fact for their retaliation claim – particularly with respect to their inability to prove “but for” causation – AHN is entitled to summary judgment.

⁹ Plaintiffs’ Second Amended Complaint suggests that both Guthrie and Albert are asserting retaliation claims in this case. However – which AHN believes is telling – Albert did not seek summary judgment on his retaliation claim in his Partial Motion for Summary Judgment. In any event, AHN is entitled to summary judgment as to all retaliation claims by both Guthrie and Albert.

i. Guthrie’s employment was not terminated because of his reports to Human Resources several months earlier.

Guthrie’s retaliation claim fails because “[no] reasonable jury could link the employer’s conduct to the retaliatory animus.” *Kemp v. Del Monte Foods*, No. 02:04cv1731, 2007 U.S. Dist. LEXIS 57148, at *23 (W.D. Pa. Aug. 6, 2007). Courts consider whether Plaintiff has proven either “(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link.” *Id.* (citing *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503-504 (3d Cir. 1997)).

Here, Guthrie admits that the only claimed protected activity are the reports he made to Human Resources about Allen in May 2019.¹⁰ *See Def. App’x, Ex. C (Guthrie Depo.) at 209:10-13*. Guthrie was terminated on February 3, 2020 – nine months later. *See Def. CSMF at ¶¶83-84*. Courts have long held that such an extensive time gap is too attenuated to prove retaliation based on temporal proximity alone. *See e.g., LeBoon v. Lancaster Jewish Comm. Center Ass’n*, 503 F.3d 217, 233 (3d Cir. 2007) (“[A] gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation and defeat summary judgment.”); *Williams v. Phila. Hous. Auth. Police Dep’t*, 380 F.3d 751, 760 n.4 (3d Cir. 2004), superseded by statute on other grounds (a one-month gap would not qualify as unduly suggestive).

Moreover, Turner – the responsible decision-maker relating to his termination – denied having knowledge of Guthrie’s prior reports to Human Resources – which occurred approximately six months before Turner was even hired in November 2019. *See Def. CSMF at ¶100*. It is well-

¹⁰ Guthrie and Albert each allege that they first made reports to Human Resources about Allen in March 2019. AHN disputes these allegations, and there is no independent record evidence to support Plaintiffs’ allegations. On the contrary, all independent record evidence shows that Guthrie first complained to Human Resources about Allen on May 1, 2019, and Albert first complained just days later. *See Def. Responses to Plf. SOF ¶53*. However, any dispute over the timing of the first complaints is immaterial for summary judgment purposes because AHN analyzes the retaliation claims, particularly the temporal proximity of the protected activity and their terminations, from the time of their most recent complaints to Human Resources in May 2019.

established that a plaintiff must show that the decision-maker has knowledge of the protected activity at the time of the adverse employment action to support a claim of retaliation. See *Bailey v. Commerce Nat'l Ins. Servs.*, 267 F. App'x 167, 170 (3d Cir. 2008) (affirming summary judgment for defendant on plaintiff's retaliation claim because the decision-maker "was unaware of the protected action"); *Jones v. Nat'l R.R. Passenger Corp.*, No. 06-4739, 2008 U.S. Dist. LEXIS 30320, 2008 WL 1722254, at *5 (E.D. Pa. Apr. 10, 2008) ("[E]ven when a close temporal proximity exists, a plaintiff will still be required to show that the defendant decision maker had knowledge of the protected activity" to establish the required causal link); *Matthews v. Mountaire Farms of Del., Inc.*, No. 06-330, 2008 U.S. Dist. LEXIS 32863, 2008 WL 1836692, at *5-6 (D. Del. Apr. 22, 2008) (granting summary judgment because plaintiff "failed to point to any record evidence that [defendant] had knowledge of his [protected activity] when it terminated him").

Even more significantly, no reasonable jury would conclude that Turner would not have terminated Guthrie's employment but for his prior complaints, or that the reasons for Turner's decision to terminate his employment were pretext for retaliation given that the clear and undisputed record evidence that Guthrie did not follow Turner's instructions to counsel Albert and misrepresented to her that he had been preparing the requested talking points and conferring with Human Resources Manager Chmiel. Even Guthrie conceded at his deposition that his retaliation claim is based on nothing more than: "[T]hat's just how I felt." See *Def. App'x, Ex. C (Guthrie Depo.) at 242:6-10*. Again, Guthrie's personal beliefs and feelings alone are insufficient to prove his claim. *Steele v. Pelmor Labs., Inc.*, 725 F. App'x 176, 179 (3d Cir. 2018).

Additionally, Guthrie cites no similarly situated comparators or any evidence indicative of retaliatory animus from Turner – because there is none. In fact, the record is clear that quite the opposite is true. For example, the other individuals who made internal complaints with Human

Resources about Allen – namely, Xander Goldberg, Anthony Morelli, Jessica Johnson – remained employed and were not terminated by Turner. *See Def. CSMF at ¶34-36.*

Tellingly, in an obvious effort to cover the gaping holes in his retaliation claim, Guthrie has submitted a Declaration in support of Plaintiffs’ Partial Motion for Summary Judgment. However, Guthrie’s declaration contradicts his deposition testimony and, therefore, deserves no credit. In his Declaration, Guthrie has claimed that he was retaliated against for “not writing up Albert” in January 2020. *See Plf. App’x, Exhibits 35-42 [ECF No. 105] at Ex. 41.* However, at his deposition, Guthrie was plainly asked to identify all of his alleged protected activities. At that time, he made no mention of “not writing up Albert” and, instead, focused exclusively on his reports to Human Resources in May 2019. *See Def. Responses to Plfs. SOF at ¶107.* The timing and substance of the new allegations, and the absence of any plausible explanation for the inconsistencies with independent record evidence, all make clear that his Declaration is a “sham affidavit” deserving no weight for purposes of summary judgment. *See, Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007) (“A sham affidavit is a contradictory affidavit that indicates only that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of defeating summary judgment... [It] cannot raise a genuine issue of fact because it is merely a variance from earlier deposition testimony, and therefore no reasonable jury could rely on it to find for the nonmovant.”) (internal citations omitted).

Moreover, there is no independent evidence to support Guthrie’s self-serving Declaration statements. At no point did Guthrie complain to Human Resources or anyone about Turner’s directive to issue discipline to Albert. Most notably, Guthrie voiced no objection or opposition when emailing Turner and Chimel about the instruction to counsel Albert. *See Def. CSMF at*

¶¶73-75 On the contrary, Guthrie’s emails to Turner indicated only that he agreed with the directive and intended to follow it (even though, as we know, he did not). *See id.*

Furthermore, even if Guthrie had objected to Turner’s instruction, there is no evidence that he expressed any concerns about race discrimination. It would not be sufficient for Guthrie to have simply voiced disagreement with Turner’s directive to qualify as protected activity under applicable. Rather, to be protected “opposition” activity, Guthrie would have had to expressly voice concerns about race discrimination and/or violation of the applicable laws. Because there was no such protected opposition activity by Guthrie, he cannot prove his retaliation claim.

ii. Albert’s employment was not terminated because of his reports to Human Resources nearly one year earlier.

Albert’s retaliation claim also fails because he cannot prove that Turner would not have terminated his employment in April 2020 had it not been for his reports to Human Resources in May 2019 (*i.e.*, nearly one year earlier). At his deposition, Albert alleged that Crowell and Turner retaliated against him for making complaints to Human Resources about Diane Allen. *See Def. App’x, Ex. B (Albert Depo.) at 217:17-23.* Simply stated, Albert’s retaliation claim defies logic.

First, Albert claims that Crowell – whose race is Black – retaliated against Albert – whose race is Black – for reporting concerns that Allen made racially charged comments about other Black individuals. Unsurprisingly, Albert has no evidence to support this theory and, at his deposition, made clear that his claim was based only on a subjective belief that Crowell and Allen were “close friends.” *See Def. App’x, Ex. B (Albert Depo.) at 219:1-220:19.* However, Albert’s personal beliefs cannot save his retaliation claim, nor can any showing that Crowell and Allen were friends. This is particularly so given that Albert cannot show that Crowell took any adverse employment action against him.

Albert also cannot prove a viable claim of retaliation against Turner, particularly with respect to causation. First, Turner had no knowledge about Albert's prior reports about Allen when terminating his employment. *See Def. CSMF at ¶100*. Moreover, even if he could show that Turner had such knowledge, the extended temporal proximity of nearly one year between Albert's complaints in May 2019 and his termination in April 2020 is too attenuated to infer causation. *See LeBoon*, 503 F.3d 217 at 233; *Williams*, 380 F.3d 751 at n.4.

Additionally, Albert has no evidence from which a reasonable jury could conclude that Turner would not have terminated his employment but for his complaints nearly one year earlier, or that the reasons for his termination were pretext for retaliation, given the undisputed evidence that Turner gave Albert notice of his performance problems, including via a written PIP, and provided him at least two months to make improvements and save his job. *See Def. CSMF at ¶¶85-96*. As discussed above, Albert did not meet Turner's expectations for his performance, and he cannot now ask this court or any jury to second guess her business judgment and decision. For these reasons, Albert cannot prove a viable retaliation claim.¹¹

D. Plaintiffs cannot prove an actionable claim of race-based hostile work environment.

Plaintiffs also claim that they were subjected to a race-based hostile work environment. To prevail, they *each* must prove that: (1) he suffered intentional discrimination; (2) because of his

¹¹ In their Partial Motion for Summary Judgment, Albert made a passing argument that he is entitled to summary judgment under a mixed-motive theory of liability. In so doing, he cited only a single case in which a court held that that a plaintiff's discrimination claim failed under a mixed-motive theory because there was no evidence that race played a motivating factor into the challenged employment action. *See Tomaszewski v. City of Phila.*, 460 F. Supp. 3d 577, 598-599 (E.D. Pa. 2020). Curiously, Albert provided no supporting analysis – he also has provided no evidence to show that race was a “motivating factor” in Turner's decision to terminate him. The record is clear that race played no part, let alone a motivating factor, into the decision to terminate his employment. Consequently, Albert's claim that he is entitled to summary judgment under a mixed-motive theory of liability fails. *See Schroder v. Pleasant Valley Sch. Dist.*, 458 F. App'x 128, 131 (3d Cir. 2012) (mixed-motive theory fails because plaintiff “has not introduced any evidence that race, gender or national origin played any part in her alleged adverse employment action.”); *Thange v. Oxford Glob. Res., LLC*, Civil Action No. 19-5979, 2022 U.S. Dist. LEXIS 101301, at *n.9 (D.N.J. June 7, 2022) (holding plaintiff's subjective beliefs that an employment decision is discriminatory is insufficient to survive summary judgment under a mixed-motive theory of liability.).

race; (3) the discrimination was severe or pervasive, (4) the discrimination detrimentally affected them; (5) the discrimination would detrimentally affect a reasonable person in like circumstances, and (6) a basis for respondent superior liability. *See Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013). Plaintiffs each must show that their “workplace was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.” *Peace-Wickham v. Walls*, 409 F. App’x 512, 519 (3d Cir. 2010) (internal quotations and citation omitted). In determining whether the discrimination was severe or pervasive, courts evaluate all the circumstances, including, “the frequency of the conduct, the severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee’s work performance.” *Exantus v. Harbor Bar & Brasserie Rest.*, 386 F. App’x 352, 354 (3d Cir. 2010).

i. Guthrie cannot bring an actionable racially hostile work environment claim.¹²

As a preliminary matter, Guthrie – whose race is White and who has failed to establish a “substantial relationship” with Albert – cannot assert a claim for a hostile work environment based on race. Courts have held that a White plaintiff who proffers no evidence of harassment “directed toward Plaintiffs themselves or toward others who associated with or advocated on behalf of African-American employees” cannot sustain an actionable hostile work environment. *See Blake v. Penn State Univ.*, No. 09-1182, 2011 U.S. Dist. LEXIS 22928, at n. 8 (W.D. Pa. Mar. 8, 2011) (“[Plaintiff], as a Caucasian male, may not assert such a claim based on the purportedly racially hostile work environment directed against his African-American co-workers”); *see also Barrett v. Whirlpool Corp.*, 556 F.3d 502, 515-516 (6th Cir. 2009) (“We cannot treat all incidents of

¹² It is unclear from Plaintiffs’ Partial Motion for Summary Judgment whether Guthrie is pursuing a hostile work environment claim. Nevertheless, for purposes of AHN’s summary judgment motion, AHN analyzes the hostile work environment claim with respect to both Albert and Guthrie.

harassment of African-Americans as contributing to a hostile work environment; rather, only harassment that was directed toward Plaintiffs themselves or toward others who associated with or advocated on behalf of African-American employees is relevant to our analysis, and only to the extent that Plaintiffs were aware of it”); *Bermudez v. TRC Holdings*, 138 F.3d 1176, 1180 (7th Cir. 1998) (holding in a third-party discrimination case, only acts of discrimination against the third party are actionable – a white plaintiff may not sue simply based on discomfort or “unease at observing wrongs perpetrated against others”); *Maxwell v. City of Columbus*, No. 2:08-cv-264, 2011 U.S. Dist. LEXIS 66855 (S.D. Ohio June 21, 2011), at * 26-28 (“Plaintiffs do not...offer a cogent argument or evidence that those alleged incidents of harassment were based on or motivated by their association with or purported advocacy for their African-American colleagues. Plaintiffs do not, for instance, allege hearing any remarks directed towards them specifically that would suggest they were discriminated against on the basis of association or advocacy”); *Longoria v. New Jersey*, 168 F. Supp. 2d 308, 318 (D.N.J. 2001) (plaintiff’s hostile work environment claim fails because even though he claims that his sergeant said the “n-word” in his presence, plaintiff did not provide any evidence of discrimination against members of his own race).

Here, none of the alleged comments by Allen were directed to Guthrie and he cannot show a “substantial relationship” with Albert sufficient to support an associational hostile work environment claim. Accordingly, Guthrie cannot bring an actionable race-based hostile work environment claim.

ii. The allegations against Diane Allen do not prove an actionable hostile work environment based on race.

Beyond the foregoing, neither Guthrie nor Albert were subjected to a hostile work environment under Diane Allen based on race. Plaintiffs base their claims on various alleged comments by Allen made over approximately two years.

To be clear, AHN views the alleged comments, if credited,¹³ as unprofessional and unacceptable under its employment policies and rules. However, the courts have made clear that a plaintiff cannot prove a hostile work environment claim merely by alleging unprofessional, inappropriate, and unacceptable comments at work. Indeed, courts have long emphasized that “Title VII is ‘not a general civility code’”; rather, it is intended to target conduct so “extreme to amount to a change in the terms and conditions of employment.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal citations and quotations omitted). Further to that end, “Title VII is not violated by mere utterance of an epithet which engenders offensive feelings in an employee or by mere discourtesy or rudeness, unless so severe or pervasive as to constitute an objective change in the conditions of employment.” *Id.* at 788. In simple summary: “The threshold for pervasiveness and regularity of discriminatory conduct is high.” *Greer v. Mondelez Glob., Inc.*, 590 F. App’x 170, 173 (3d Cir. 2014).

Importantly for this case, as AHN explains in its Response to Plaintiff’s Statement of Facts, nearly all of the alleged comments by Allen had nothing to do with race and/or were about White and other non-Black individuals. *See, e.g., Def. Responses to Plf. SOF ¶¶23, 39, 45, 47, 55, 58, 67.* As such, even if such statements were offensive or inappropriate, they have no bearing for purposes of Plaintiffs’ race-based hostile work environment claims. *See e.g., Ullrich v. United States Secy. Of Veterans Affairs*, 457 Fed. Appx. 132, 140 (3d Cir. 2012) (holding that “[m]any may suffer severe or pervasive harassment at work but if the reason for that harassment is one that is not proscribed by Title VII, it follows that Title VII provides no relief.”). If anything, the fact

¹³ Although AHN disputes whether all the alleged comments were made due to the lack of independent supporting evidence, AHN understands that Plaintiffs’ allegations will be viewed in a light most favorable to them for summary judgment purposes. At the same time, AHN must point out that Plaintiffs’ allegations must be viewed in a light most favorable to AHN, as the non-moving party, for purposes of Plaintiffs’ Partial Motion for Summary Judgment. That said, regardless of whether the Court credits all or some of Plaintiffs’ allegations for purposes of the parties’ respective motions, Plaintiffs cannot prove their race-based hostile work environment claim, and AHN is entitled to summary judgment with respect thereto.

that Allen supposedly made such comments primarily about White and other non-Black individuals indicates that, even under Plaintiffs' version of events, Allen's comments were not motivated by racial animus.

When stripped down, there essentially are only two comments alleged by Plaintiffs that relate to race: (i) Allen's alleged use of the "n-word" when talking about Le'Veon Bell during the car ride to Erie with Guthrie and Constantine in late summer/early fall 2018; and (2) Allen's comment about another employee being a "big, nasty, black woman" during the May 10, 2020 managers meeting. These comments, however, do not support an actionable claim of race-based hostile work environment.

Notably, Plaintiffs' allegations that Allen used the "n-word" is based on nothing more than self-serving testimony. There is no independent evidence to support it. In fact, not even Albert can speak to the allegation because he did not hear the alleged comment. He only heard about it from Guthrie – several months after it purportedly occurred. By contrast, all independent evidence indicates that the comment was not made, and that the allegation should not be given any material weight for summary judgment purposes. First, Allen denied ever using the "n-word" as Plaintiffs have alleged, and the only other person in the car, Janet Constantine, denied hearing the comment. *Def. CSMF at ¶¶44-45*. Tellingly, after interviewing Guthrie, Allen, and Constantine, Employee Relations Manager Mary Esgro concluded the allegation about Allen using the "n-word" could not be substantiated. *Id. at ¶54*. Rather, through her thorough investigation, the only allegation that she could substantiate was the allegation concerning the "big, nasty, black woman" comment. *Id.*

Additionally, the deposition testimony of the third-party witnesses, who Plaintiffs identified as having corroborating knowledge, supports AHN's position. Specifically, Xander Goldberg, a former Call Center Supervisor, testified that he was present for the "big, nasty, black

woman” comment on May 10, 2019, but that he had never heard Allen make any other racially charged comments. *Def. CSMF at ¶48*. Similarly, Kristen Donnelly, another former Supervisor, testified that she never heard Allen make any racial comments of any kind during her employment at AHN, only other unprofessional comments having nothing to do with race. *Id. at ¶49*.

Therefore, the only witness in this case who alleges to have heard Allen use the “n-word” is Guthrie and Guthrie’s own conduct discredits his allegation. By his own admission, Guthrie made no report of the alleged “n-word” comment when it was made. Rather, according to Guthrie, he waited several months to bring it to Human Resources’ attention. *Id. at ¶43*.

Further, by way of extension, neither Guthrie nor Albert reported any of the comments that they now allege of Allen in any sort of timely manner. Rather, by their respective accounts, Plaintiffs sat on this critical information about alleged harassment by Allen – despite that she was the head of the Call Center and they continued to work with her on a near daily basis – for several months, only to come forward in May 2019 (or if crediting Plaintiffs’ testimony, March 2019) to bring the allegations to AHN’s attention for the first time. In fact, as evidenced by the Human Resources’ documentation, many of the alleged comments were not reported at all, including, for example:

- “Ms. Allen referred to an employee’s ‘garbage’ and stated, ‘You see this? He’s going to bring her down’”
- “When Ms. Sowards confided in Ms. Allen about her daughter’s pregnancy and concerns about her becoming a single mother, Ms. Allen asked if the baby would be White; upon learning the baby would be mixed race, Ms. Allen responded, ‘there you go, there’s another welfare baby’”
- “Ms. Allen called Waleed Almugahid, an Ibex Global operations manager of Middle Eastern descent, a ‘sand n*gger’”
- “Ms. Allen mocked Mr. Albert for shopping at K-mart and Walmart, referring to these stores as “ghetto””
- “Calling Melissa Kovtun ‘a whore’ who used the ‘casting couch to work her way up in the company’”

- “When Mr. Albert asked Ms. Allen about accusations of Mr. Albert being tardy in front of Mr. Guthrie, Ms. Allen told Mr. Guthrie, ‘You better get your boy in line,’ referring to Mr. Albert.”

See Def. App’x, Ex. A (Documents Produced by AHN) at AHN000702-000705; AHN0002338-002355. Indeed, of all the alleged comments by Allen, the only comment that Plaintiffs timely reported to Human Resources was the alleged “big, nasty, black woman” comment – which, tellingly, was reported to Human Resources on the same day, promptly investigated within a week, and resulted in Allen’s termination. Under these circumstances, none of the alleged comments that were not timely reported to Human Resources, or not reported at all, should be given any material weight even for summary judgment purposes.

Even if the alleged race-related comments are credited, they nevertheless do not rise to the level of creating an actionable race-related hostile work environment. On the contrary, they were isolated remarks and were focused on other people, including a former NFL player and another individual who worked in an entirely separate department. The comments were not about Guthrie, Albert, or their employment. Indeed, courts hold that such indirect and isolated comments – even when involving racial slurs such as the “n-word” –are “not enough for a trier of fact to conclude that discriminatory conduct in the workplace amounted to a change in the terms or conditions of the plaintiff’s employment.” *Woodard v. PHB Die Casting*, 255 F. App’x 608 (3d Cir. 2007) (holding that KKK-related graffiti and allegedly racist comments plaintiff heard through second-hand accounts were not enough for a trier of fact to conclude that discriminatory conduct in the workplace amount to a change in the terms or condition of employment.). Even in instances where a plaintiff alleged his supervisor said the “n-word” directly to him, a court held that a plaintiff “cannot rely upon casual, isolated or sporadic incidents to advance a hostile work environment

claim, even where the acts of harassment alleged are verbal utterances or racial epithets.” *Larochelle*, 210 F. Supp. 3d. at 695.

Additionally, neither Albert nor Guthrie can show that any of the alleged comments by Allen were so severe and pervasive that it altered their working conditions, or that they were detrimentally affected by Allen’s alleged conduct. Guthrie, by his own admission, continued working with Allen as usual and engaging her in personal communications, including wishing her a Happy Birthday, Happy Mother’s Day, and even meeting Allen at a hockey game outside of work. *See Def. CSMF at ¶47; see also Def. App’x, Ex. O (Documents Produced by Diane Allen) at pp. 8-10.* In no way did Guthrie manifest a subjective feeling of being “detrimentally affected,” nor could he be viewed objectively as being “detrimentally affected” by Allen’s alleged conducted. In sum, Guthrie’s delay in reporting such comments to Human Resources, his continued relationship with Allen, and his failure to set forth any facts showing that the alleged conduct altered the terms and conditions of his employment all, when taken in whole, show that he cannot prove an actionable hostile work environment claim.

Likewise, Albert fails to show that he was detrimentally affected by Allen’s conduct and provides absolutely no evidence to illustrate how Allen’s alleged conduct altered his employment. In fact, as with Guthrie, Albert’s lack of reporting any concerns about Allen until May 2019 (or if crediting Plaintiffs’ testimony, March 2019) demonstrates that not even he believed that he was being “detrimentally affected” by any of the alleged conduct by Allen.

Further, neither Guthrie nor Albert can plausibly show that they were detrimentally affected or that their working conditions were materially altered by Allen’s conduct given that, as discussed above, Allen took only positive employment actions towards them. *See Def. CSMF at ¶59.*

iii. AHN took prompt and adequate remedial action to address the reports about Diane Allen.

Lastly, even if Plaintiffs could prove the above elements of a hostile work environment claim, their claim nevertheless fails under the *Faragher/Ellerth* standard because AHN exercised reasonable care when it investigated the reports about Allen in May 2019 and subsequently terminated Allen's employment. Where, as here, an allegedly harassing supervisor does not take a tangible employment action, an employer can mitigate or avoid liability where "(a) the employer exercised reasonable care to prevent and correct promptly any [] harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). The Third Circuit has held "a remedial action is adequate if it reasonably calculated to prevent further harassment." *Huston v. Proctor & Gamble Paper Products Corp.*, 568 F.3d 100, 110 (3d Cir. 2009); *Knabe v. Boury Corp.*, 114 F.3d 407, 415 (3d Cir. 1997). Further to that end, "[t]he question... is not whether the investigation was adequate... but rather whether the remedial action was adequate." *Knabe*, 114 F.3d at 412.

After AHN received the reports against Allen in May 2019, it took prompt action and conducted a thorough investigation. Through the course of the investigation, which involved interviews of six individuals, including Guthrie and Albert, AHN concluded that there was sufficient information to substantiate the allegations that Allen made the "big, nasty, black woman" comment, or words to that effect, during a manager meeting on May 10, 2019. *See Def. CSMF at ¶¶52-54*. Based on Human Resources' investigation, Crowell – Allen's supervisor – decided that Allen should be terminated. *Id. at ¶55*. Allen separated from AHN on May 30, 2019 – less than three weeks after the reported comments were made. *See id. at ¶¶57-58*. Clearly, with Allen having

separated from AHN, its remedial action was effective in eliminating any possibility of continued offending conduct and, therefore, adequate as a matter of law.

Because Plaintiffs cannot prove that they were subjected to an actionable hostile work environment because of race, and further because AHN took adequate remedial action under *Faragher/Ellerth*, AHN is entitled to summary judgment as to Plaintiffs' hostile work environment claim concerning Diane Allen.

iv. Albert did not suffer a hostile work environment under Melissa Turner.

In addition to Allen, Albert (but not Guthrie) also claims that he suffered a hostile work environment under Turner. His claim, however, is based entirely on his own view that Turner was “nitpicking” his performance, with no detail to support that general allegation.

Courts hold that such allegations regarding a supervisor's hyper-vigilance of a plaintiff's job performance, which can include unwarranted nitpicking and/or critiquing, does not constitute “evidence of a workplace permeated with discriminatory intimidation, ridicule and insult.” *Reyes v. Autozone, Inc.*, Civil Action No. 08-847, 2009 U.S. Dist. LEXIS 112086, at *32 (W.D. Pa. Dec. 2, 2009) (“[E]ven characterizing Elliot's hyper-vigilance of [plaintiff's] job performance as unwarranted, it hardly constitutes evidence of a workplace permeated with discriminatory intimidation, ridicule and insult”) (internal citations omitted). As a sister court similarly observed: “[N]ot everything that makes an employee unhappy forms the basis for an actionable hostile work environment claim.” *Jackson v. Gannett Co.*, Civil Action No. 08-6403, 2011 U.S. Dist. LEXIS 85284, at *14 (D.N.J. Aug. 3, 2011) (holding that plaintiff's allegations of “vague reference to disparaging comments, unfounded criticism and a sense of hostility he received from his supervisor fails to establish a hostile work environment claim”).

Moreover, as discussed above, Albert never reported any concerns about discrimination or hostile work environment by Turner. Accordingly, even if Albert could prove a *prima facie* case of harassment by Turner – which he cannot do – AHN nevertheless prevails under the *Faragher-Ellerth* standard because Albert would have unreasonably failed to take advantage of the preventive and corrective opportunities available to him through AHN’s reporting procedures, thereby not providing AHN an opportunity to take any remedial action. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

E. Whether Plaintiffs mitigated their damages is a question for the jury.

As a final matter, Plaintiffs contend in their Partial Motion for Summary Judgment that they should be granted summary judgment as to the question of whether they have mitigated their damages simply because they have generally alleged that they applied for “numerous positions” during their respective unemployment periods. However, contrary to Plaintiffs’ argument, it is well-established that “whether a plaintiff has met the duty to mitigate damages is a question of fact, and therefore properly reserved for the jury where there is a genuine dispute of material over plaintiff’s mitigation efforts.” *Ngai v. Urban Outfitters, Inc.*, No. 19-1480, 2021 U.S. Dist. LEXIS 59211 (E.D. Pa. Mar. 24, 2021) (*citing Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995)).

Here, it is for the jury to determine whether Plaintiffs each have mitigated their damages sufficiently. Indeed, their respective deposition testimony alone raises a genuine issue of material fact that should be left for a jury to decide. For example, Albert has merely contended that he has attempted to apply “to many jobs,” without detail around those efforts. *See Def. App’x, Ex. B (Albert Depo) at 232: 20-22*. Given that Albert claims to have been unemployed for the vast majority of the four years since he separated from AHN, a jury certainly could conclude that Albert

has not exercised reasonable diligence in seeking post-AHN employment to satisfy his legal duty to mitigate their damages. Similarly, although Guthrie has had new employment for a longer period than Albert, Guthrie nevertheless was unemployed for at least eight months after separating from AHN and provided few details regarding his job search during that period. *See Def. App'x, Ex. C (Guthrie Depo) at 248:16-249:8.* Again, a jury could conclude that Guthrie, too, did not exercise reasonable diligence in seeking employment to satisfy his legal duty to mitigate their damages during that eight-month period of unemployment.

Additionally, Plaintiffs' motion relating to the question of damages mitigation is premature. Expert discovery has not taken place in this litigation yet, and damages mitigation is a subject that AHN would expect to be addressed in expert discovery. Therefore, AHN submits that Plaintiffs' argument is premature at the summary judgment phase, and they would have an opportunity to address their motion in any pre-trial practice, such as a motion *in limine*. That said, AHN respectfully submits that it is entitled to summary judgment as to Plaintiff's claims regarding liability and, therefore, there will be no need to address this issue regarding damages. For these reasons, Plaintiff's motion for summary judgment as to the topic of damages mitigation should be denied.

IV. CLOSING

For the reasons stated herein, AHN respectfully requests that this Honorable Court grant its Motion for Summary Judgment in its entirety and enter summary judgment in AHN's favor and against Plaintiffs Santos Albert and John Guthrie with respect to all counts and claims set forth by Plaintiffs in the Second Amended Complaint, and deny Plaintiffs' Partial Motion for Summary Judgment in its entirety.

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Respectfully submitted,

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