

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION**

AnnSharee Webb-Harrison,

Plaintiff,

vs.

Associates Asset Recovery, LLC, Tony
Cooper, and Michelle Rogers,

Defendants.

C.A. No.: 4:23-cv-3812-JD

**DEFENDANT’S MOTION
FOR NEW TRIAL, TO ALTER OR
AMEND, OR FOR REMITTITUR**

INTRODUCTION

Defendant Associates Asset Recovery (AAR) hereby moves the District Court to grant a new trial absolute pursuant to Fed. R. Civ. P. 59(a)(1)(A) or, in the alternative, a new trial *nisi remittitur* and to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). The grounds for Defendant’s Motions are: 1) the verdict against Defendant AAR for hostile work environment, and the compensatory and punitive damages awards are against the clear weight of the evidence; 2) to remedy a clear error of law in permitting Plaintiff’s counsel to question Cooper on the Joyner case after ruling it was inadmissible, permitting Plaintiff to proceed with the questioning as to whether Tony Cooper was aware of other four other named race complaints made by employees, and denying Defendant’s Motion to bifurcate liability and damages; 3) denying Defendant’s Motion for a Mistrial when Plaintiff’s counsel asked Mr. Cooper if he recalls meeting him in the Courtney Mack case because he represented her and when Plaintiff’s counsel asked Howard Williamson if Defendant AAR received other race complaints without proffering this testimony per the Court’s orders before and during the case and after he indicated he would do so; and 4) to address the excessiveness of the jury’s compensatory and punitive damages award.

STANDARDS OF REVIEW

New Trial Absolute or Nisi Remittitur

“[T]he district court must ‘set aside the verdict and grant a new trial, if it is of the opinion that (1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.’” The Ockers Co. v. Clear Touch Interactive Inc., 2025 WL 4670542, *5 (D.S.C., March 25, 2025)(citing Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir.1996)). “[A] trial judge may weigh the evidence and consider the credibility of the witnesses.” Poynter by Poynter v. Ratliff, 874 F.2d 219, 233 (4th Cir. 1989).

A remittitur, used in connection with Rule 59(a), is the established method by which a trial judge can review a jury award for excessiveness. Atlas Food Sys. & Servs., 99 F.3d at 593. “Remittitur is a process...by which the trial judge orders a new trial unless the plaintiff accepts a reduction in an excessive jury award.” Id. If a court finds a jury award excessive, it is the court's duty to require a remittitur or order a new trial. Id.

Alter or Amend

“[T]here are three circumstances in which the district court can grant a Rule 59(e) motion: ‘(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.’ ” Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (quoting Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998)).

THE DEFENDANT IS ENTITLED TO A NEW TRIAL ABSOLUTE

1. The Verdict finding Defendant AAR liable for a racially hostile work environment is against the clear weight of the evidence and the law in this jurisdiction.

A plaintiff must show the environment was “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that [the plaintiff] in fact did perceive to be so.” Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998). “[W]hen determining whether the harassing conduct was objectively ‘severe or pervasive,’ [the jury] must look ‘at all the circumstances,’ including 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.” E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). “A hostile-work-environment claim will only succeed when ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” McIver v. Bridgestone Americans, Inc., 42 F.4th 398, 407-8 (4th Cir. 2022)(citations omitted). “[T]he ultimate inquiry is whether the conduct is so ‘extreme’ that it ‘amounts to a change in the terms and conditions of employment.’ ... Even conduct that would objectively cause hurt feelings or offense is not enough to be severe or pervasive.” Id. at 407-8. “[P]laintiffs must clear a high bar ... to satisfy the severe or pervasive test. Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard.” Sunbelt Rentals, Inc., 521 F.3d at 315.

The evidence in the record contains two instances of racial slurs Plaintiff reported while employed and two additional racial slurs Plaintiff offered into evidence that were not reported or pled in her Complaint, and are supported by scant evidence. Of the two reported instances, the first

was a racial slur in a text message from a co-worker to Plaintiff's supervisor about another co-worker that Plaintiff's supervisor showed to Plaintiff ("Andrews slur") and the second racial slur referred to Plaintiff's allegations Michelle Rogers called her supervisor an "n-lover" ("Rogers slur"). Defendant AAR witnesses confirmed these two reports were made and investigated. Documentation of the Andrews investigation and discipline was admitted into evidence. Plaintiff and Defendant offered testimony from two former employees who worked in the same office as Plaintiff during the time Ms. Rogers allegedly made the racial slur; one testified she heard the slur and the other testified she did not. The "Andrews slur" occurred in October 2020. Plaintiff did not offer any evidence of the date the "Rogers slur" occurred, but Plaintiff ceased working in the office where Plaintiff contends the slur occurred after late spring / early summer of 2020. Plaintiff continued in her employment until June 4, 2021.

The record reflects Plaintiff alleged in her Complaint Rogers referred to her supervisor Debbie Hardee as an "n-lover" but Hardee denied that in her testimony, as did Rogers. *See* Rough Draft Trial Tr. 951:25-952:6; *see also* Rough Draft Trial Tr. 310:9-12. Plaintiff also testified Rogers referred to her supervisor Lisa Frazier as an "n-lover" but admitted she did not assert this allegation in her Complaint. *See* Rough Draft Trial Tr. 857:1-3. Ms. Frazier, a friend of Plaintiff's and a former disgruntled employee based on testimony from witness Shane Foster, testified to the same racial slur though she did not report it to AAR and there is no evidence Plaintiff heard it. The record is devoid of dates for these alleged slurs from either Plaintiff or Ms. Frazier. As the case progressed, Plaintiff testified Rogers also called her "n*****" though that was not reported and the only evidence in the record is Plaintiff's testimony.¹ Defendant offered 4 witnesses who testified they

¹ Mackey v. Shalala, 360 F.3d 463, 469–70 (4th Cir. 2004) ("A plaintiff's own self-serving opinions, absent anything more, are insufficient to establish a *prima facie* case of discrimination.").

had never heard Rogers make any racial slurs or comments and that racial comments were not made in the workplace at AAR in lieu of the three Plaintiff offered, including herself. *See* Rough Draft Trial Tr. 894:4-9; 959:20-23; 1028:5-8; 1065:23-1066:11.

There is insufficient evidence to establish Plaintiff was subjected to a racially hostile work environment. As to the Andrews slur, Plaintiff did not receive the text message containing the slur but was shown it by her supervisor, there was no evidence except Plaintiff's testimony that the racial slur referred to her and the recipient of the text testified it did not pertain to Plaintiff. *See* Rough Draft Trial Tr. 837:5-12. The fact the text was not sent to Plaintiff and that it did not pertain to her informs the element of whether the harassment was subjectively and objectively so pervasive or severe to interfere with her ability to perform her duties. Defendant AAR investigated the "Andrews slur" and punished the employee. Defendant AAR also investigated the Rogers slur and determined it did not occur. Evidence existed to dispute it occurred.

The record contains several copies of the same three anonymous text messages containing racial slurs dated from November 2020, January 24, 2021 and February 12, 2021.² Plaintiff and other witnesses testified about the ability to send text messages anonymously from a "Text Now" application that they used when communicating with AAR drivers so they would not have to reveal their cellphone numbers. *See* Rough Draft Trial Tr. 126:5-15; *See also* 299:9-19; 838:10-15; 1066:15-18. Witnesses testified they could use the Text Now application to send anonymous text messages using their personal cellular telephones. *Id.* There is no evidence or testimony in the record that the anonymous text messages containing racial slurs can be attributed to any of the Defendant or any employee of AAR. There is no evidence that the specific text messages containing racial slurs were sent or received by AAR employees or anyone known to the Defendant

² Plaintiff's Trial Exhibit 12.

other than what Plaintiff contends she received. Plaintiff implied the racial text messages were sent by AAR employees because a text message in the group of text messages she provided included a text to Shane Foster, a consultant assisting with operations at the time. This text communication contained no racial slur and was from Plaintiff to a group including Mr. Foster's number.³ Plaintiff also combined text communications she had from AAR employees using their cellphones in the group of anonymous text messages but, again, none of those text messages contained anything racial.

Evidence in the record established Cooper and Shane Foster received anonymous text messages during this time as well though they did not recall any racial content in theirs. *See* Rough Draft Trial Tr. 303:23-303:12; *See also* 491:22-494:12. Mr. Cooper and Mr. Foster recall Plaintiff advising she was also receiving these text messages, though Mr. Cooper did not recall the ones she showed him contained any racial slurs while Mr. Foster thought they might have. *See* Rough Draft Trial Tr. 493:24-494:14. Cooper testified the text messages could not have been sent from AAR equipment because he required everyone to remove the Text Now application from the computers in 2019 when he discovered it was being used due to regulations application to repossession businesses. *See* Rough Draft Trial Tr. 484:18-485:8. The record reflects Cooper and Foster undertook to investigate who sent them and consulted with the police who advised tracing them and determining who sent them was impossible. *See* Foster Dep.104:18-105:10, May 8, 2026. The evidence in the record does not suggest Defendant AAR could have done anything more to correct or remedy the text messages than it did.

It is clear the jury considered evidence of the anonymous text messages in conjunction with the other evidence in the record regarding racial slurs to determine Plaintiff was subjected to a

³ *Id.*, Bates Stamp No. Plaintiff 36.

racially hostile work environment and to award compensatory and punitive damages in excessive amounts. Without the anonymous text messages, the evidence in the record of racial slurs as they pertained to Plaintiff standing alone does not justify the verdict finding Plaintiff was subject to a hostile work environment or the damages awards. Just as in Bennett, “only sheer speculation on the jury’s part could allow it” to consider the anonymous text messages as evidence of a racially hostile work environment because there is no evidence that these were sent by employees of AAR or any evidence that Defendant AAR could have done more than it did to determine who sent them or prevent them. The verdict finding Plaintiff was subjected to a hostile work environment is against the clear weight of the evidence because it was based predominantly on speculative evidence. “Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.” Bennett, 552 Fed. Appx. at 227 (citing Lovelace v. Sherwin–Williams Co., 681 F.2d 230, 241 (4th Cir.1982) (internal quotation marks omitted). “[E]vidence which shows a ‘probability’ and not a mere ‘possibility’ would suffice to allow jury consideration.” Id. (quoting Ralston Purina Co. v. Edmunds, 241 F.2d 164, 168 (4th Cir.1957).

Nor does two (or four) instances of racial slurs under the circumstances of the evidence in this case establish a hostile work environment on the basis of race as a matter of law. Green v. Martin Marietta Materials, Inc., 2024 WL 3219185 *2 (D.S.C., June 27, 2024)(five comments made by his supervisor and two by his co-workers over a two-year period were not sufficient to survive summary judgment as to the hostile work environment claim); Belton v. City of Charlotte, 175 Fed. Appx. 641, 655 (4th Cir. 2006)(summary judgment dismissing racially hostile work environment cause; one instance of co-worker using the “n-word” in plaintiff’s presence was

insufficient to establish a racially hostile work environment); Addison v. CMH Homes, Inc., 47 F.Supp.3d 404, 425 (D.S.C. 2014)(race discrimination and retaliation dismissed at summary judgment because eleven racial slurs made by an employee who “used the term ‘nigger’ seven times, ‘black monkey’ three times, and ‘stupid black mother-fucker’ on one occasion,” in a two year period did not rise to level of hostile work environment or discrimination); Boyer-Liberto v. Fountainebleau Corp., 752 F.3d 350 (4th Cir. 2014)(use of the word “porch monkey” two days in a row was not so severe or pervasive to establish a racially hostile work environment).

Further, the gap in time between the racial slurs and anonymous text messages occurred months prior to the Plaintiff’s departure from employment, more proof the slurs were not subjectively hostile to Plaintiff. The evidence revealed Plaintiff departed her employment over a pay dispute she had with Cooper, more proof that the slurs were not subjectively hostile to her. *See* Rough Draft Trial Tr. 138:9-13; *See also* Rough Draft Trial Tr. 631:6-13; 954:13-18. The evidence showed Plaintiff not only continued to perform her job duties well but was on the track for management and very successful in her next role, proof the workplace environment did not interfere with her ability to perform her duties and thus, did not amount to a hostile work environment. *See* Rough Draft Trial Tr. 1110:25-1111:14. Plaintiff had no change in the terms and conditions of her employment as a result of the racial slurs. Plaintiff thrived for months in her employment after the second alleged racial slur occurred. Testimony in the record from two eyewitnesses indicated it was Plaintiff who was the aggressor. *See* Rough Draft Trial Tr. 954: 5-25 – 955:1; Foster Trial Dep.18:3-19:21, May 8, 2026. Plaintiff’s confrontation with Cooper over her raise and her continued employment, thriving in it, are both proof she was not so intimidated or threatened she could not perform her duties or that she was subjected to a racially hostile work environment.

Defendant is entitled to a new trial for all three reasons new trials are granted: the verdict is against the weight of the evidence, is based on false evidence (the anonymous text messages containing racial slurs), and failure to set aside the verdict will result in a miscarriage of justice. Absent Plaintiff's evidence of anonymous text messages and improper questioning about other race complaints, Plaintiff offered into evidence four alleged racial slurs, only two of which were reported during her employment, all occurring months before she quit her employment because she was dissatisfied with her raise. Under the law, the evidence was insufficient to establish Plaintiff was subjected to a hostile work environment that she perceived was so severe or pervasive to interfere with her ability to perform her duties.

2. The District Court should grant Defendant a new trial as a result of Plaintiff's counsel offered testimony from Plaintiff's witness, Howard Williamson, that Defendant AAR received complaints of race harassment from other employees.

Defendant moved to exclude evidence of race complaints, specifically the Joiner complaint, two former employee EEOC complaints (Courtney Mack and Joiner) and/or other unrelated bad acts evidence in their Motion in Limine under F.R.E. 404(b), 403 and 608. [EF 673, p. 1-2]. The District Court granted Defendant's Motion to exclude evidence of the Joiner complaint, two former-employee EEOC Charges, and other unrelated bad acts for propensity purposes. The Court further excluded evidence of the Joiner/Huguley complaint, two former-employee EEOC Charges, and other unrelated bad acts identified in the motion unless Plaintiff first sought leave outside of the presence of the jury and made a specific showing of relevant, similarity, and a permissible non-propensity purpose. [EF 82, p. 7]

Despite this ruling, Plaintiff's counsel elicited other bad act testimony from witness Howard Williamson before the jury prior to proffering any testimony. Specifically, Plaintiff's counsel asked, "[a]s a compliance officer at AAR around the time [Plaintiff] was working there,

are you aware of other race complaints about a racially hostile work environment at AAR? Mr. Dickey objected at the same time the Williamson answered the question “yes.” See Rough Draft Trial Tr. 399:18 -25.⁴ The Court admonished Plaintiff’s counsel to “focus on the claim that’s present here which is the hostile work environment.” See Rough Draft Trial Tr. 400:2-3. Plaintiff’s counsel elicited this testimony without proffering that evidence per the Court’s Order. Counsel’s conduct violated the Court’s Order to proffer such evidence and make “a specific showing of relevance, similarity and a permissible non-propensity purpose.” [EF 82, p. 7] The Defendant was given no opportunity to explore the specific instances Mr. Williamson was referring to determine if his testimony should be excluded. Further, the testimony came from Defendant AAR’s Compliance Officer at the time of Plaintiff’s employment and Mr. Cooper’s second in command at AAR., giving the testimony even greater import before the jury. Mr. Williamson’s response was heard by the jury and it was highly prejudicial to Defendant.

Plaintiff counsel’s conduct in failing to proffer this testimony before presenting it to the jury was in direct contravention of the Court’s orders and prejudicial to Defendant. Although the Court provided a limiting instruction to the jury as to this instance and other instances of the same evidence offered by Plaintiff, that was insufficient to remove the prejudice to Defendant from that testimony. In fact, there is no means by which to remove the prejudice of such testimony with a limiting instruction particularly when the prior claims involve race harassment. Failure to grant mistrial as a result of this testimony was error.

⁴ All three counsel for Defendants heard Mr. Williamson answer “yes” to Plaintiff counsel’s questions. The Rough Draft Transcript does not contain his answer however Defendant is certain the final transcript will reflect Mr. Williamson’s’ answer and a review of the recorded testimony would verify it.

3. **The District Court should grant Defendant a new trial as a result of Plaintiff counsel's questioning to Mr. Cooper if Mr. Cooper met him before, reference to his representation of Courtney Mack in her race complaint against Defendant AAR and for failure to proffer the testimony to the Court outside of the presence of the jury per the Court's prior Orders.**

Plaintiff's counsel asked Mr. Cooper: "In your 30 years of running AAR as the owner of AAR, do you have any memory of any complaints of racial harassment?" to which Mr. Cooper responded, "I have." Rough Draft Trial Tr. 447:11-14. Mr. Cooper answered the question truthfully. Despite that, Plaintiff's counsel continued, asking if Mr. Cooper was aware of any other race complaints other than associated with Plaintiff. Mr. Cooper answered "No, sir" at which point Plaintiff's counsel proceeded to ask Mr. Cooper "Well, in that case, I'll ask you do you remember having met me before?" See Rough Draft Trial Tr. 448:6-452:17. Plaintiff's counsel then asked, "Do you remember an AAR employee named Courtney Mack?" implying to the jury he represented Ms. Mack in a race-related complaint or lawsuit against Defendant AAR which was highly prejudicial to Defendant causing irrevocable damage to the defense.

Plaintiff counsel's question was highly improper, violated the ABA Professional Conduct Model Rules 3.4 (c) and (e), was an improper insinuation, was irrelevant to the issues involved in the case, any probative value of the query was outweighed by its prejudice to the Defendant because of the context of the meeting in a prior case, and the question improperly placed the attorney's own credibility before the jury. Rule 3.4, Fairness to Opposing Counsel, prohibits attorneys from "knowingly disobeying an obligation under the rules of a tribunal," "allude to any matter the lawyer does not reasonably believe is relevant to that will not be supported by admissible evidence," "assert personal knowledge of facts in issue except when testifying as a witness," or "state a personal opinion as to the ...culpability of a civil litigant." Rule 3.4 (c) and (e), ABA Model Rules of Professional Conduct. Plaintiff counsel's question was in direct contravention of

the Court's orders requiring proffering of any such testimony. The question which conveyed facts not in evidence and evidence itself, was known to Plaintiff's counsel to be irrelevant and inadmissible evidence in the case, was an assertion of his own personal knowledge of facts at issue, was designed to gain an improper advantage and was used to introduce inadmissible character evidence against Mr. Cooper through a back door.

The day before Plaintiff's counsel posed these questions to Mr. Cooper, Defendant asked the Court again to prohibit any questions about other race complaints without first proffering them to the Court outside of the presence of the jury because the harm to Defendant would be done once the testimony is elicited. The Court responded "Understood. I think Mr. Nauheim knows that we not ought to get into those things." Rough Draft Trial Tr. 403:22-25. Mr. Dickey raised the same concern the following day before Mr. Cooper's testimony. *See* Rough Draft Trial Tr. 412:23-413:5. Despite that, Plaintiff's counsel proceeded to ask this question without proffering the evidence pursuant to the Court's Order in the Motion in Limine and the Court's Order he do so during trial.

Plaintiff's counsel also blatantly disregarded the Court's prior Orders requiring he proffer any testimony of other race complaints before doing so before the jury. In fact, Mr. Dickey raised concerns to the Court before Mr. Cooper testified, to which the Court replied,

THE COURT: All right. Well, to the extent there's an issue we need to address, I'd be happy to entertain anything from the defense at the appropriate time. Obviously Mr. Nauheim has already said to the extent there are issues about prior lawsuits, we're going to have those discussions before you make any inquiry of Mr. Cooper. And so I think everybody understands the ground rules. If we have a problem, we'll call timeout, we'll stop, and we'll address it.

See Rough Draft Trial Tr. 412:13-21.

And yet, Plaintiff's counsel proceeded to not only ask about the Courtney Mack case but also if Mr. Cooper met him as a result of his representation of Courtney Mack, all without proffering this line of questioning and the testimony.

It was improper for Plaintiff's counsel to insinuate facts not in evidence or that he had knowledge of prior instances of race complaints against Defendant AAR for the impermissible purpose of insinuating to the jury Defendant AAR previously violated Title VII due to a racially hostile work environment and that he knew of other race complaints brought against Defendant AAR because of its racially hostile work environment. Reference to other cases and implications of culpability for the same conduct before the jury is grounds for a new trial. The Eighth Circuit reversed a sex harassment verdict in favor of the plaintiff and remanded the case for a new trial, finding plaintiff counsel's reference to her other sex harassment clients in her closing argument and the difficulty of proving those cases were improper comments and sufficiently prejudicial to the defendant employer to require a new trial. Gilster v. Primebank, 747 F.3d 1007, 1010-1012 (8th Cir. 2014). The court held plaintiff counsel's comments improperly vouched for the credibility of plaintiff and made herself an expert witness in the matter as well by referencing the difficulty of proving such cases. *See also* U.S. v. Foster, 982 F.2d 551, 555 (D.C. Cir. 1993)(remanding for new trial, court held prosecutor's reference to prior drug deals in closing "improperly conveyed to the jury that the prosecution knew of crimes other than the one charged" when nothing in the record supported the insinuation); U.S. v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982)(conviction reversed where prosecutor claimed, without evidence in the record, that a particular witness knew the defendant, on the grounds that this statement contained "improper insinuations and assertions calculated to mislead the jury".)

Nor was it evidence of any race complaint, but instead of Plaintiff's counsel's representation of some matter involving Mr. Cooper. Defendant objected to this line of questioning. *See* Rough Draft Trial Tr. 448:8-9. The Court also ruled Defendant preserved their objections to these question having made them continuing earlier in the trial following Plaintiff's counsel asserting Defendant failed to timely object. *See* Rough Draft Trial Tr. 524:1-3. Plaintiff counsel's questions were asked without proffering this testimony to the Court despite the Court's Motion in Limine Order [EF 82, p. 7] and repeated requests from defense counsel to do so. *See* Rough Draft Trial Tr. 412:23-413:5; 456:21-457:2; 520:16-22; 520:16-21; 684:13-18

Failure to enter judgment notwithstanding the verdict finding Defendant AAR liable for hostile work environment or grant Defendant a new trial in light of Plaintiff counsel's improper highly prejudicial insinuation is a miscarriage of justice.

4. The District Court erred in permitting Plaintiff to pose questions about unrelated race complaints to Mr. Cooper because no similarity context was provided and the prejudice to Defendant was outweighed by the evidence's probative value.

The District Court, without requiring the Plaintiff establish any context to show similarity, permitted Plaintiff to question Mr. Cooper about whether he was aware of four other race complaints received by Defendant AAR over the objection of Defendant. Admission of other instances of race complaints without context as to circumstances, time, alleged offender or other pertinent information was clear error of law and a miscarriage of justice so serious that it left Defendants unable to succeed.

The four complaints Plaintiff's counsel peppered into his question to Mr. Cooper were inadmissible because Plaintiff was not required to nor did Plaintiff offer any similarity context for the admission of such evidence nor did the Court require Plaintiff to do so. Evidence of prior race harassment is inadmissible in a subsequent suit for race harassment when the party offering such

testimony does not establish similarity of the prior instances to the allegations in the case at hand. Patterson v. Mclean Credit Union, 805 F.2d 1143 (4th Cir. 1986). In Patterson, the plaintiff brought a suit against her former employer alleging racially hostile work environment under 42. U.S.C. §1981, alleging she experienced race harassment by her supervisor during her employment from 1972 to 1982. The plaintiff in Patterson offered testimony from a former employee who would testify she experienced race harassment from the same supervisor in 1972. The Fourth Circuit affirmed the district court's ordering excluding the testimony from a former employee who experienced race harassment finding the harassment did not occur during the time the plaintiff was employed. In so holding, the Fourth Circuit stated "probative value of prior harassment instances outside of time period plaintiff was employed is outweighed by remoteness in time, and has the potential to confuse and mislead the jury."

Similarly, the Fourth Circuit affirmed the district court's exclusion of testimony of another sex harassment incident involving same defendant and different plaintiffs who were both graduate students, finding the evidence "is the type of evidence [F.R.E.] 404(b) clearly proscribes." Parks v. Wilson, 1995 WL 610341, *2 (4th Cir. 1995), 68 F.3d 461 (table). The threshold requirements for admitting evidence under Rule 404(b) are (1) whether the evidence is relevant to an issue other than character and (2) whether the probative value of the evidence is substantially outweighed by its prejudicial effect. Id., (citing Morgan v. Foretich, 846 F.2d 941, 944 (4th Cir.1988)). The Fourth Circuit observed, "[c]learly, the only relevance this evidence had was to show that Wilson was a bad person and, therefore, was more likely to commit bad acts." Id.cf. King v. McMillan, 594 F.3d 301 (4th Cir. 2010)(testimony of other employees' experience of hostile work environment that occurred in the same timeframe of plaintiff's employment was not unfair prejudice); Kozlowski v. Hampton School Board, 77 Fed. Appx. 133 (4th Cir. 2003) (prior acts of age discrimination by

the same school principal in an age discrimination suit was probative as to employee's motivation in the case at issue and exclusion of the evidence was error).

The Fourth Circuit outlined the test for admission of other-employee evidence: 1) whether the other discriminatory behavior described is close in time to the events at issue; 2) whether the same decisionmakers were involved; 3) whether the witness and the plaintiff were treated in a similar manner; and 4) whether the witness and the plaintiff were otherwise similarly situated. Calobrisi v. Booz Allen Hamilton, Inc., 660 Fed.Appx. 207, 209 (4th Cir. 2016) (district court erred in excluding testimony of other -employee evidence because it ignored the similar treatment experienced by plaintiff and other witnesses by the same decision makers) (citing Griffin v. Finkbeiner, 689 F.3d 584, 599 (6th Cir. 2012)).

The District Court did not require Plaintiff to establish any similarity, whether the race complaints occurred while Plaintiff was employed, pursuant to the holdings in Patterson, Parks, and King, were at the same location where Plaintiff worked, or were made by the same person as in Kozlowski, before permitting the inquiry. None of the factors listed in Calobrisi were offered by the Plaintiff as to any of the four other race complaints. Without any similarity information the probative value of the evidence could not be considered. Without a doubt, this evidence prejudiced Defendant immensely. Defendant moved for a mistrial and, in lieu of granting the mistrial, the Court issued a limiting instruction. The use of the evidence to show knowledge of the race complaints rather than propensity is a distinction without a difference before the jury despite the limiting instruction. The impact of this evidence was too great to be remedied by a limiting instruction because race is the most egregious and offensive form of harassment and, thus, extra care should be given to a Defendant to insure a fair trial when admitting evidence of other race complaints.

Defendant were left with the decision to explain whether they were actually reported to Defendant AAR or Mr. Cooper or, if so, the circumstances of each, which would have resulted in mini-trials resulting in juror confusion, additional time for a trial already exceeding the initial length anticipated by the Court and the jury, and would have been ineffective to refute the harm done by the admission of these instances. The Court should grant Defendant a new trial as to the hostile work environment cause of action as a result of the clear error in permitting Plaintiff's counsel to name the four instances of other race reports.

- 5. The District Court erred in denying bifurcation of liability and damages resulting in admission into evidence of Defendant AAR's financial records during the liability phase of trial so as to prejudice Defendant, resulting in excessive compensatory and punitive damages awards and, therefore, should grant Defendant a new trial as to liability and damages.**

The District Court ruled "evidence of Defendant's financial condition...[including] tax records.. is not relevant to the jury's determination of the remaining hostile work environment, assault and battery claims and carries a substantial risk of unfair prejudice" in its Order on Defendant's Motion in Limine. [EF, p. 8] The District Court left open Plaintiff's desire to use this information to impeach Defendant. The District Court otherwise ruled any evidence of financial information "should not become a vehicle for presenting otherwise inadmissible wealth evidence to the jury without a more specific proffer and argument outside the jury's presence." *Id.* at 9. The District Court reserved ruling on any issue of the financial condition evidence for impeachment, rebuttal, or the amount of punitive damages until the issue is raised outside the jury's presence upon a specific proffer." *Id.*

A defendant's financial information is irrelevant and inadmissible, except in the context of assessing punitive damages. Equal Emp. Opportunity Comm'n v. Cmty. Loans of Am., Inc., No. 622CV01000DCCJDA, 2023 WL 8114618, at *13 (D.S.C. May 9, 2023). Relevance requires that

evidence have a tendency to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.” FRE 401. Evidence that does not meet this test for relevance is not admissible. FRE 402. (*See, e.g., Robinson v. Quicken Loans Inc.*, 2013 WL 1704839, at 4 (S.D. W. Va. Apr. 19, 2013) (“This Court agrees with those authorities requiring plaintiffs to make a prima facie claim for punitive damages before being entitled to discovery of a defendant’s financial records.”); *E.E.O.C. v. Maha Prabhu, Inc.*, 2008 WL 4126681, at 4 (W.D.N.C. July 18, 2008) (holding that tax returns are relevant to a punitive damages claim only after a plaintiff makes a prima facie showing that it is entitled to punitive damages)).

The Fourth Circuit remanded a punitive damage verdict for considering proper punitive damages without evidence of a parent corporation’s financial information in *McKiver v. Murphy-Brown LLC* 980 F.3d 937 (4th Cir. 2020). The Fourth Circuit considered the district court’s denial of the Defendant’s motion to bifurcate, noting “financial prejudice has a unique ability to do harm to a defendant” in the context of punitive damages. *Id.* at 977. “As the Supreme Court has recognized, inflammatory financial evidence can be especially destructive in the context of punitive damages because of the leeway given to juries in selecting the appropriate amount necessary to punish and deter. *Id.* at 975 (citing *State Farm Mut. Auto Ins.*, 538 U.S. at 417 (1994) (explaining how punitive damages pose an acute danger of arbitrary deprivation of property because of the wide discretion given to juries in choosing amounts)).

In the instant case, admission of the Defendant AAR’s financial information harmed Defendant AAR significantly as to the jury’s compensatory damage award as well as the punitive damage award. Both awards go against the great weight of the evidence. Admission of Defendant AAR’s financial records into evidence before the jury at the time it rendered its verdict finding Plaintiff was subject to a hostile work environment and awarding her two million dollars in

compensatory damages was highly prejudicial to the Defendant resulting in an excessive compensatory and punitive damage awards and, thus, Defendant are entitled to a new trial.

6. The verdict awarding compensatory and punitive damages is against the clear weight of the evidence.

“A jury's award of damages stands unless it is grossly excessive or shocking to the conscience.” Fox v. Gen. Motors Corp., 247 F.3d 169, 180 (4th Cir. 2001). A jury's award of compensatory damages will be set aside on the grounds of excessiveness only if the verdict is against the clear weight of the evidence or will result in a miscarriage of justice. Hetzel v. County of Prince William, 89 F.3d 169 (4th Cir. 1996). The jury’s verdict awarding Two Million (\$2,000,000) Dollars in compensatory damages and One Million (\$1,000,000) Dollars in punitive damages is grossly excessive and shocking to the conscience, against the clear weight of the evidence and its imposition will result in a miscarriage of justice.

a. Compensatory Damage Verdict.

Compensatory damages may be awarded in cases finding liability for intentional discrimination for “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. §1981a(b)(3). The evidence in the record does not support Plaintiff was subject to emotional pain, suffering, inconvenience, loss of employment of life. The only evidence offered was Plaintiff’s own testimony that she suffered emotional distress. Plaintiff did not testify she sought any medical or other treatment because she was subjected to a racially hostile work environment. Plaintiff admitted in trial that she did not mention trauma of her work experience at AAR when she visited the doctor two months after she left her employment when reciting her history of trauma per the doctor’s request. *See* Rough Draft Trial Tr. 871:24-872:6. Plaintiff was able to work months after the alleged anonymous text messages and many months after the “Andrews and Rogers slurs.” She also excelled in her work those many

months. The evidence showed she left because of a pay dispute. *See* Rough Draft Trial Tr. 772:4-773:25. The evidence further shows she aggressively confronted Cooper and, had she been so intimidated or threatened by her workplace, this would not have been possible. *See* Foster Dep.18:3-19:21, May 8, 2026. Compensatory damages are award to address pain and suffering and emotional distress. The evidence in the record does not support Plaintiff was subject to either. Plaintiff was not an employee who was intimidated or threatened in her workplace nor one who suffered such emotional distress, pain and suffering or inconvenience as to justify the compensatory damage award.

Further, the amount of the compensatory damage award is so grossly excessive as to shock the conscience. Two Million Dollars under the circumstances is wildly disproportionate to the evidence in the record as to Plaintiff's emotional suffering. Plaintiff's testimony regarding her distress without any other evidence to support it and her admission she attended a medical appointment three months later where she did not even mention her workplace as a source of trauma when recounting her traumatic history to her provider. Additionally, the evidence of her length of employment following the alleged incidents giving rise to the racially hostile work environment and the nature of her departure from employment refute the excessive compensatory damage award. Compensatory damage awards in hostile work environment judgments in this jurisdiction reflect much lower damage amounts for conduct that is significantly more egregious than what the record reflects in the instant case. *cf.*, Ward v. Auto Zoners LLC, 958 F.3d 254 (4th Cir. 2019)(\$600,000 compensatory damage award not excessive in case where co-worker began groping employee and engaging in sexually explicit language at work, employee reported the conduct to his supervisor and she did not respond; was told to "give her what she wants" when he complained he was tired of her groping him; and store manager simply told offender to "knock it

off”); Homesley v. Freightliner Corp., 61 Fed.Appx. 105 (4th Cir. 2003)(\$200,000 compensatory damage award was not excessive where employee offered evidence from her psychiatrist that she was depressed and had post-traumatic stress from sex harassment causing her illness over several years that was debilitating); Ocheltree v. Scollon Productions, Inc., 308 F.3d 351 (4th Cir. 2002)(jury awarded \$7,280 in compensatory damages and \$400,000 in punitive damages; district court reduced to a combined total of \$50,000 for both compensatory and punitive); Fox., 247 F.3d 169 (4th Cir. 2001)(award of \$200,000 compensatory damages in ADA hostile work environment claim was not excessive for employee who was constantly harassed by his supervisors and his treatment providers testified his physical conditioned worsened, he suffered from anxiety and depression; court ruled punitive damages were improper applying state law); Conner v. Schrader-Bridgeport Intern., Inc., 227 F.3d 179 (4th Cir. 2000)(\$20,0000 compensatory damage award in hostile work environment verdict was reasonable but \$500,000 punitive damage award was excessive resulting in case being reversed and remanded; supervisor required employee to display her bloodied pants to her to verify her uterine hemorrhaging condition, was asked “are you on the rag,” “didn’t you get any last night,” and the plant manager slammed his fist on the desk and screamed he would fire her if she mentioned sex harassment again); Washington v. Hilton Hotels Corp., 2010 WL 11646549 (D.S.C., Sept. 7, 2010)(finding liability for sex assault harassment against employer, jury awarded \$10,000 for compensatory damages to plaintiff who had numerous treatment visits with MUSC as a result of the assault, and \$10,000 award for past pecuniary losses; trial court reduced the verdict to \$10,000 because plaintiff presented no evidence of past pecuniary losses).

The jury’s Two Million Dollar compensatory damages award was unreasonable in light of the evidence in the record. Plaintiff did not seek treatment, did not offer any evidence of distress,

and continued her employment for months following the racial slurs, leaving over a pay dispute and aggressively confronting Mr. Cooper on the way out. The verdict was an impassioned verdict based on emotion and the emotionally compelling closing argument of her counsel, not the evidence. Further, the amount indicates it was not to compensate Plaintiff for her emotional distress but, instead intended to punish Defendant AAR.

b. Punitive Damages

“Punitive damages are an extraordinary remedy.” Harris v. L. & L. Wings, Inc., 132 F.3d 978 (4th Cir. 1997). The evidence in the record does not show Defendant AAR engaged in intentional discrimination with malice or with reckless indifference to Plaintiff’s federally protected rights as required by 42 U.S.C. § 1981a(b), nor has Plaintiff presented evidence to impute vicarious liability to Defendant AAR. “The very structure of §1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while §1981a(b)(1) requires plaintiffs to make an additional demonstration of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.” Kolstad v. American Dental Ass’n, 527 U.S. 526, 534 (1999). “This standard does not require ‘a showing of egregious or outrageous discrimination,’ but rather proof that the employer retaliated “in the face of a perceived risk that its actions will violate federal law.” Id. at 536.

“Where an employer has undertaken such good faith efforts at Title VII compliance, it demonstrates that it never acted in reckless disregard of federally protected rights.” Id. at 544. “In the punitive damages context, an employer may not be vicariously liable for the discriminatory

employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.” Id. at 545.

If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions. Vance v. Ball, 570 U.S. 421 (2013); Ocheltree v. Scollon Prods. Inc., 335 F.3d 325 (4th Cir. 2003). The employer is strictly liable for the supervisor’s harassing behavior if it ‘culminates in a tangible employment action’ but otherwise ‘may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.’” Vance, 570 U.S. at 424. “Prompt and adequate remedial action to correct the harassing conduct [] exonerates the employer from liability for the conduct. Mikels v. Durham, 183 F.3d 323, 332 (4th Cir. 1999)(hostile work environment on the basis of sex).

A punitive damages award is subject to review for compliance with the procedural and substantive constitutional limitations of the Due Process Clause of the Fifth Amendment, lest a grossly excessive award of such damages effect an arbitrary deprivation of property. EEOC v. Federal Express Corp., 513 F.3d 360, 376 (4th Cir. 2008).”In assessing the constitutionality of a punitive damages award, we are obliged to adhere to three “guideposts” identified by the Supreme Court: (1) the degree of reprehensibility of the defendant's conduct; (2) any disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive award; and (3) any difference between the award and civil penalties that are authorized or imposed in comparable cases.” Id., (citing State Farm, 538 U.S. at 418). Reprehensibility must be considered on the basis of five factors: (1) whether the harm done was physical as opposed to economic; (2) whether the conduct involved indifference to the health or safety of others; (3) whether the victim

was financially vulnerable; (4) whether the conduct involved repeated actions or was isolated; and (5) whether the harm suffered by the plaintiff resulted from conduct that was known or suspected to be unlawful. Id.

The Fourth Circuit reversed the jury's punitive damage award for racially hostile work environment in White v. BFI Waste Serv., LLC, 198 Fed.Appx. 283 (4th Cir. 2006). The plaintiffs complained their manager referred to them using the "n-word", "porch monkey," among other racial slurs over a period of years but the plaintiffs never reported the slurs. The Fourth Circuit note evidence at trial indicated the employee-plaintiffs received the employee handbook containing an anti-harassment policy and performed training on the policy, noting it held in Bryant v. Aiken Regional Med. Ctrs., Inc., 333 F.3d 536 (4th Cir. 2003) distributing an anti-harassment policy and conducting training seminars precluded a punitive damage award. Id. at 287. As to arguments the policy was ineffective because of the manager's conduct, the Fourth Circuit observed,

While the ineffectiveness of an antiharassment policy defeats an employer's affirmative defense, as we have already noted, a policy's ineffectiveness alone cannot demonstrate the lack of good faith required for justifying an award of punitive damages. If it could, employers with antiharassment policies who failed on their affirmative defenses would automatically be exposed to punitive damages, and there would have been no need for the Kolstad Court⁵ to formulate the additional "good-faith efforts" inquiry.

Id.

The evidence in the record shows Defendant AAR had an anti-harassment policy and gave training on that policy. [Pltf's 5, *See* Rough Draft Trial Tr. 61:17-62:2; 77:23-78:7] The evidence in the record shows Plaintiff in the instant case reported two racial slurs while employed and the

⁵ Kolstad v. American Dental Ass'n., 527 U.S. 526, 545 (1999)(holding "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII")

evidence in the record shows Plaintiff's complaints were investigated and discipline was implemented as to one of the two allegations while the other was considered unfounded.

In Mikels, the offender was suspended, reassigned to a different squad upon return to duty, and there were no reports of any further harassing conduct. The Fourth Circuit observed, "these remedial measures were sufficiently prompt and adequate to relieve the employer of potential liability for the conduct." Id. This was the same outcome that occurred following the comment made by Andrews in the instant case and, thus, AAR meets the requirements of proper response approved by the Fourth Circuit. AAR's preventative policies in place and its investigation of both the "Andrews slur" and "Rogers slur", and the punishment of Andrews are the remedial measures the Fourth Circuit found appropriate in Mikels.

Plaintiff did not report any other instances of racial slurs being made about her by other employees or managers of AAR. The additional racial slurs testified to at trial by Ms. Frazier and Plaintiff were not reported therefore Defendant AAR could not take any remedial action in regards to those alleged slurs. Yet it is clear the jury considered that testimony in the context of issuing its verdict and awarding compensatory and punitive damages. The anonymous text messages were not attributed to anyone at AAR, something Plaintiff admitted in her own testimony, though Mr. Cooper and Mr. Foster investigated the source of the anonymous text messages and were unable to determine who sent them, much less whether it was employees of AAR.

The jury's verdict for punitive damages was based on not just the two isolated instances but also the improper evidence of four race complaints under questioning of Mr. Cooper, Plaintiff's counsel's vouching for the credibility of Plaintiff's case by referencing his own representation of Courtney Mack in her race case against AAR, and the testimony from Mr. Williamson, as well as the anonymous text messages. The punitive damage verdict was not based on the two singular

incidents of racial slurs that were reported by Plaintiff nor would those two isolated instances be sufficient evidence to justify the punitive damage award, much less the compensatory damage award. As to the disparity of the award between actual harm to Plaintiff, Plaintiff's continued employment months after the alleged two reported slurs and departure over a wage argument is proof she did not suffer actual harm. Considering the three factors for determining if a punitive damage award is excessive and the five factors of reprehensibility, Defendant AAR's conduct was not reprehensible as it engaged in good faith efforts to comply with Title VII and enforced its policy with regards to the two racial slurs reported by Plaintiff.

The jury clearly also considered the anonymous text messages in awarding punitive damages against Defendant AAR finding Defendant knew or should have known Plaintiff was receiving these text messages and did nothing to prevent or correct it. However, the evidence in the record shows Mr. Cooper and Mr. Foster endeavored to determine who sent the anonymous text messages, even communicating with the police, and were unable to determine the source of the messages. Mr. Cooper had meetings attempting to determine who sent the text messages as he was receiving them too. Defendant AAR undertook to remedy the continued communications. The evidence does not support a finding Defendant AAR acted with malice or with reckless indifference to Plaintiff's federally protected rights in regards to the anonymous text messages as per Kolstad.

In reviewing a verdict against an employer for a racially hostile work environment, the District Court has the responsibility to insure the evidence presented is analyzed under the applicable law as to whether the conduct was so severe or pervasive so as to create a racially hostile work environment as defined under the law and, if so, whether the evidence suggests the employer acted with willful and reckless disregard for the Plaintiff's rights. The obligation is particularly so

in regards to racial slurs which are considered unacceptable, reprehensible and offensive. Because the use of the “n-word” is rightly reviled, a jury could quickly determine a racially hostile work environment existed and the employer should be penalized for it without deliberate consideration of the evidence in a case before them in conjunction with the court’s charge of the law. In fact, in this case, the jury was out for only two hours, proof it made its decision hurriedly.⁶ The jury certainly did not thoroughly consider the evidentiary credibility of the anonymous text messages in that time as there were several versions of the three text messages containing racial content dated the same date with the same verbiage but in text conversations on different conversations and widely varying dates, indicating these were cobbled together to create evidence rather than original text message communications. It is clear the jury determined the anonymous text messages were received by Plaintiff and attributable to Defendant AAR or that AAR was on notice of them and did not do enough to determine who sent them. The evidence in the record does not support that conclusion.

Evidence in the record of Defendant AAR’s efforts to address the anonymous text messages coupled with the manner in which Defendant AAR responded to Plaintiff’s two reports of racial slurs controverts the jury’s one-million dollar punitive damage award against Defendant AAR and establishes the verdict was based on passion and prejudice rather than deliberate consideration of the evidence in the record. *See* Rough Draft Trial Tr. 1244:20

As promulgated in Kolstad, “[w]here an employer has undertaken such good faith efforts at Title VII compliance, it demonstrates that it never acted in reckless disregard of federally protected rights.” Kolstad, 527 U.S. at 544. “In the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where

⁶ *See* Rough Draft Trial Tr. 1244:20

these decisions are contrary to the employer's good-faith efforts to comply with Title VII.” Id. at 545.

As in Vance, Mikels and White, Defendant AAR’s anti-harassment policy, it’s training, and its evidence of investigation into the two slurs is evidence it was engaging in good faith efforts to comply with Title VII and Section 1981. Defendant is entitled to a new trial, the punitive damage award should be set aside or the punitive damages amount should be significantly reduced.

7. In the alternative, the District Court should grant a remittitur, reducing the compensatory and punitive damage awards.

Alternatively, the Court should grant a remittitur a nominal damages award and a punitive damage award proportional to the nominal damages on the grounds that the Two Million Dollar (\$2,000,000) verdict for compensatory damages and the One Million Dollar (\$1,000,000) verdict awarding punitive damages are excessive and against the clear weight of the evidence. “If there is no evidence to support a portion of the verdict, the duty of the trial court is to require a remittitur or order a new trial.” Washington, 2010 WL 11646549, *11, (citing G.M. Garrett Realty, Inc. v. Century 21 Real Estate Corp., 17 F. App’x 169, 174 (4th Cir. 2001)). If “a trial court that finds a jury award excessive will order a new trial unless the plaintiff accepts a reduced jury award.” Id. at *10, (citing Atlas Food Sys. & Servs. v. Crane Nat’l Vendors, 99 F.3d 587, 593 (4th Cir. 1996)).

CONCLUSION

Defendant requests the District Court enter an Order granting Defendant a new trial because the verdict is against the clear weight of the evidence and to correct the clear errors of law to prevent manifest injustice, and/or reduce the compensatory and punitive damage awards and order a new trial if the Plaintiff does not accept the remittitur.

HAYNSWORTH SINKLER BOYD, P.A.

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June 17, 2026

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