No. 13-2893

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES NICHOLS, Plaintiff-Appellant, v. MICHIGAN CITY PLANT PLANNING DEPARTMENT Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division No. 3:12-cv-042 The Honorable Philip P. Simon

REPLY BRIEF OF APPELLANT JAMES NICHOLS

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ORAL ARGUMENT REQUESTED

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I. Nichols Preserved His Appellate Arguments.

Michigan City opens with a curious claim—Nichols waived his arguments on appeal by failing to assert them at summary judgment. Michigan City argues "none of the arguments advanced on appeal were presented to the district court." (Response Br. at 15). Michigan City is mistaken. While not a model of eloquence, Nichols asserted his mistreatment was based on race and that material issues of fact existed.

Michigan City's position also contravenes case law. A trial court has special obligations with respect to *pro se* litigants. "This heightened judicial solicitude is justified in light of the difficulties of the *pro se* litigant in mastering the procedural and substantive requirements of the legal structure." *Philos Technologies Inc. v. Philos & D Inc.*, 645 F.3d 851, 858 (7th Cir. 2011), *quoting Caruth v. Pickney*, 683 F.2d 1044, 1050 (7th Cir. 1982). Trial courts should ensure *pro se* litigant claims are given "fair and meaningful consideration." *Madyun v. Thompson*, 657 F.2d 868, 876 (7th Cir. 1981). Accordingly, *pro se* plaintiff's pleadings are liberally construed. *Caruth*, 683 F.2d at 1050. Michigan City defies this principle.

Nichols was granted *in forma pauperis* status and proceeded *pro se*. Nichols' summary judgment response made the assertion on which this appeal is founded—that Nichols' mistreatment and termination were race based. (Doc. 31). Specificity is the soul of credibility, and Michigan City never delineates the novel appellate arguments.

Michigan City's position might have merit if Nichols filed nothing, or an indecipherable response. But he did neither. Indeed, the district court could discern

Nichols' position. Further, Michigan City "stipulated to all facts in the light most favorable to Nichols as the non-moving party . . . ." (Response Br. at 8). Accounting for Nichols' *pro se* status, the fact he argued his mistreatment was based on race, and that his appellate arguments echo his summary judgment response, waiver does not exist.

Additionally, Michigan City contends Nichols improperly relied upon the statements of Frank Davis and Scott Peterson. To the contrary; their statements were signed, based on personal knowledge, and attached as exhibits to Nichols' summary judgment response. (Doc. 31 at 5-6). Considering substance over style, the statements were properly submitted. But even if the Court discards Davis and Peterson's statements, little changes. Davis and Peterson were relegated to the periphery on appeal. The Argument section of the Opening Brief made one reference to Davis (p. 13) and Peterson (p. 24). Michigan City's claim that Davis and Peterson's statements cannot create an issue of material fact is thus a straw man.

In sum, the liberal construction afforded *pro se* litigants confirms Nichols' summary judgment response preserved the appellate arguments. Davis and Peterson's statements were properly submitted, and in any event, not outcome determinative.

II. Genuine Issues of Fact Persist As To Whether Nichols Experienced a Racially Hostile Work Environment.

A. Disregarding "boy" diluted the severity of the harassment.

On this issue, Michigan City's Response Brief is notable not for what it says, but what it does not. Nichols argued the district court's analysis failed because it ignored the racial overtones of "boy." (Opening Br. at 9, 12-13, 17-18). Nichols cited Supreme Court case law, *Ash v. Tyson Foods*, 546 U.S. 454 (2006), which undermined the district

court's analysis, along with additional cases holding that "boy" is racially offensive. (Opening Br. at 12-13). Michigan City passes over these cases in silence.

As set forth in the Opening Brief (and ignored in the Response Brief), the district court's neglect of "boy" is also critical because it isolated the "black nigger" remark. The district court described the "black nigger" remark thusly:

- "the sole alleged incident"
- "the single . . . epithet"
- "the (alleged) one-time use."

(Doc. 35 at 8).

These depictions are inaccurate. Eliminating "boy" from the analysis renders the district court's ruling flawed, and Michigan City offers nothing to support it.

B. Numerous incidents over three weeks is not "isolated."

Title VII does not make an offensive utterance actionable, but rather addresses work environments permeated by discrimination. *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993). Michigan City claims the racial harassment was isolated. "Nichols focuses on ["black nigger" and "boy"] in his brief; however, these two statements are simply not the type of harassment that Title VII is meant to address." (Response Br. at 18). Michigan City misses the point. A slew of other incidents occurred which Nichols perceived as motivated by race. Given the slurs, this perception was reasonable. Separating the racial comments from the other incidents, Michigan City mimics the district court's flawed approach. "Context matters," and it may present a jury question. *Passananti v. Cook County*, 689 F.3d 655, 668-69 (7th Cir. 2012). Yet context was

disregarded here.

Michigan City never acknowledges the truncated timeframe in which events transpired. Nichols barely worked three weeks at Springfield. In those three weeks, he was subjected to two racial slurs and other racially motivated mistreatment. The three-week timeframe confirms the incidents were the antithesis of isolated.

Ignoring Nichols' reliance on recent decisions such as *Passananti* and *Hall v. City of Chicago*, 713 F.3d 325 (7th Cir. 2013), Michigan City cites *Weiss v. Coca-Cola*, 990 F.3d 333 (7th Cir. 1993), to show that isolated incidents do not give rise to liability. But as *Weiss* did not involve the truncated timeframe of three weeks, this case is inapt. Instead, *Weiss* concerned five incidents of sexual harassment over six months. *Id.* at 334-35. Nichols experienced two racial epithets, numerous instances of racially motivated harassment, and termination—in three weeks. While no clear demarcation separates isolated incidents from pervasive discrimination, multiple incidents each week exemplify "pervasive."

Even if the events were isolated, they still support Nichols' claim. Frequency is important, but sporadic incidents will suffice if abusive. *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1345 (7th Cir. 1995). The racial comments at issue here, especially in the short time span, were abusive. And while the remarks were characterized as jokes, Nichols found neither slur funny.

C. Michigan City's attempts to defend summary judgment fail.

Michigan City makes a series of arguments attempting to show the district court ruled correctly. None are persuasive. First, Michigan City asserts Nichols' argument that the district court carved up incidents of harassment is suspect because "he cites the case law that deals with supervisor and co-worker harassment." (Response Br. at 21). This is an inconsequential distinction. While *Mason v. Southern Ill. Univ.*, 233 F.3d 1036 (7th Cir. 2000), and *Hall* concerned supervisor harassment, Michigan City cites no authority for the proposition that district courts can carve up incidents of harassment if a supervisor is not involved. Thus, the district court committed reversible error when it "set[] aside the racial epithet . . . ." (Doc. 35 at 5).

Second, Michigan City claims that Nichols did not show the harassment changed the terms of his employment. The record demonstrates otherwise. Upon first walking into Springfield, school personnel refused to tell Nichols the location of the janitor's room. They also manufactured messes and attempted to entrap him. These incidents altered the terms of employment.

Finally, Michigan City impugns Nichols' mental state. Yet Michigan City never reconciles Nichols' "strange behavior" with his ability to work at Joy Elementary, that John Yeakley knew Nichols personally, or that Nichols went through a background check and interview. (Doc. 30-3 at 3, 7). Nor does Michigan City address the obvious inference, especially in light of Nichols' satisfactory performance at Joy Elementary, that any strange behavior was a reaction to the harassment.

III. Employer Liability Exists Because Michigan City Was Notified of The Harassment.

Nichols reported the harassment during his meeting with Emshwiller. (Doc. 30-3 at 31-32). Michigan City's claim that it was not on notice thus fails. Moreover, Michigan City contradicts itself. It initially claims the harassment was reported too late (without specifying the deadline missed), but later says it was not reported at all. Neither assertion is correct; Nichols promptly reported the racial harassment.

Michigan City asserts Nichols misstates the record when he contends two days passed "between the racial slur and his reporting." (Response Br. at 22). Michigan City claims it is unclear how much time passed between the "black nigger" slur and termination. Michigan City confuses the two timeframes. First, the time between the slur and Nichols' complaint appears to be a week. Second, the time between Nichols' complaint (a Friday) and his removal (the following Tuesday) is a few days. In both instances, the timeframe was compact. If Michigan City is certain that Nichols' complaint to Emshwiller and his removal did not occur the following week, it should point to support in the record. Since it has not, the inference in Nichols' favor is that his complaint to Emshwiller immediately preceded his exit.

Michigan City further argues Nichols wants "it both ways." (Response Br. at 22). Michigan City frames the issue in false terms: "[h]e either suffered a hostile work environment based on his race, which started the moment he walked into Springfield as a substitute janitor, or he suffered an isolated incident of a racial slur being 'hurled' at him." (Response Br. at 22-23). Nichols' start was certainly unwelcome, and at some point thereafter, as the incidents piled up and slurs were uttered, the environment

became hostile. The approach used to determine whether a hostile environment exists is a totality of circumstances, not as Michigan City implies, a precise pinpointing of when the environment became hostile. Michigan City's analysis is again plagued by its evasion of the three-week timeframe. Nichols acted promptly in notifying supervisors about the harassment, and Michigan City's demand that Nichols had to report the harassment contemporaneously is without support.

IV. Nichols' Termination Violated Title VII Because of Johnston's Influence on Emshwiller, Schroeder, and Yeakley.

Where a subordinate conceals relevant information from the decision-making employee or feeds false information to him, she influences the decision and the prejudices of the subordinate are imputed to the decision maker. *Maarouf v. Walker Mfg. Co.*, 210 F.3d 750, 754 (7th Cir. 2000). In other words, the discriminatory motive of the employee drives the adverse employment action. *Id*. Such was the case here as Johnston provided input to Emshwiller, Schroeder, and Yeakley. (Doc. 30-3 at 30; 33).

Nichols criticized the district court's opinion because it never considered Johnston's influence on the decision makers. Michigan City makes no effort to defend this shortcoming. Rather, it attempts to distinguish *Hasan v. Foley & Lardner LLP,* because the person who made the discriminatory statements participated in the decision to terminate the plaintiff. 552 F.3d 520, 528 (7th Cir. 2008). "Nichols has no evidence that Johnston participated in the decision to remove him, and, in fact, the affidavits of Yeakley and Schroeder indicate that they made that decision." (Response Br. at 27). Michigan City fails to recognize the factor of suspicious timing. *See Troupe v.*

May Dep't Stores Co., 20 F.3d 734, 737 (7th Cir. 1994). And it would strain credulity to suggest Johnston's complaint about Nichols did not influence Emshwiller, Yeakley, or Schroeder. While Yeakley and Schroeder indicated they made the decision to remove Nichols, that is immaterial as Johnston influenced them. The sequence of events bears this out: Schroeder and Yeakley were with Johnston, entered Emshwiller's office, exited soon after, and told Nichols to leave and never come back. (Doc. 30-3 at 33-34). A triable issue thus exists on whether the termination had discriminatory motivations. *See Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 721 (7th Cir. 2005).

Finally, while Michigan City factually distinguishes *Hasan,* it evades Nichols' reliance on *Hunt v. City of Markham,* 219 F.3d 649 (7th Cir. 2000). *Hunt* undermines Michigan City's *Hasan* distinction because the mayor in *Hunt* did not participate (and had no authority) in meetings concerning personnel issues. *Id*. at 652-53. As Johnston's influence is imputed to the decision makers, Nichols' termination violates Title VII.

CONCLUSION

Viewed in a light most favorable to Nichols, the Court should reverse and allow a jury to determine whether Nichols' three weeks at Springfield Elementary constituted a racially hostile work environment and whether his termination was based on race.

November 12, 2013

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Plaintiff-Appellant, James Nichols, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 2,580 words.

November 12, 2013

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Appellant's Reply Brief upon the party listed herein, by mailing same on November 12, 2013, at 115 South LaSalle, Suite 2600, Chicago, Illinois 60603 to:

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