No. 13-2893

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES NICHOLS, Plaintiff-Appellant, v. MICHIGAN CITY PLANT PLANNING DEPTARTMENT, 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

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT JAMES NICHOLS

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ORAL ARGUMENT REQUESTED

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Appellate Court No: 13-2893

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JURISDICTIONAL STATEMENT

As Nichols filed this action alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), the district court had federal question jurisdiction under 28 U.S.C. § 1331. On August 1, 2013, the district court granted summary judgment against Nichols on all claims, and entered judgment in favor of Michigan City Plant Planning Department. (Docs. 35, 36).

Nichols filed a timely notice of appeal on August 26, 2013. (Doc. 37). The Seventh Circuit Court of Appeals has jurisdiction of this appeal under 28 U.S.C. §§ 1291 and 1294, which bestow jurisdiction on courts of appeals from all final decisions of the district courts, along with Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

I. Nichols' three weeks at Springfield Elementary School were rife with abuse, including being called "boy" and "black nigger." Reviewed in a light most favorable to Nichols, did the district court err in finding no question of fact that Nichols experienced a racially hostile work environment?

II. Nichols was terminated after a confrontation he had with a co-worker who had previously called Nichols "boy" and "black nigger." That co-worker met with Nichols' supervisors, who in turn fired Nichols. Reviewed in a light most favorable to Nichols, did the district court err in finding no question of fact that Nichols' termination was not based on race?

STATEMENT OF THE CASE

This is an employment discrimination matter originating in the district court for the Northern District of Indiana, South Bend Division. Plaintiff James Nichols, *pro se*, alleged racial discrimination and harassment during his short stint as a public school janitor. (Doc. 1). Defendant Michigan City Plant Planning Department moved for summary judgment. (Doc. 27). While the "black nigger" slur hurled at Nichols gave the district court pause, it ultimately granted summary judgment. (Doc. 35). Nichols appeals. (Doc. 37).

STATEMENT OF FACTS

The Hiring and Placement of Nichols

On January 5, 2011, Michigan City Plant Planning Department ("Michigan City") hired Nichols as a substitute janitor. (Doc. 30-3 at 3). Nichols learned about the position through a friend, John Yeakley, who would be Nichols' supervisor. (Doc. 30-3 at 3). Nichols went through the typical hiring process, filling out an application and undergoing a criminal background check. (Doc. 30-3 at 3).

Nichols first worked for three days at Joy Elementary School. (Doc. 30-3 at 7). This assignment went without incident. *Id*. Nichols explained that at Joy, "everybody treated me like I'm a human being." *Id*.

Nichols was then sent to Springfield Elementary School on January 19, 2011. (Doc. 30-3 at 4). Nichols was scheduled to work at Springfield until a permanent replacement was found for a recently retired janitor. (Doc. 30-3 at 4, 5, 13). Nichols was the only janitor on the day shift; two additional janitors worked the night shift. (Doc. 30-3 at 22). All the school employees and supervisors Nichols encountered at Springfield were white. (Doc. 30-3 at 7-9). Nichols is black. (Doc. 1).

The Harassment of Nichols

Seeking the janitor's room on his first day at Springfield, Nichols asked two teacher's aides where he should go. (Doc. 30-3 at 6). They told him they did not know. *Id*. Nichols then asked two teachers who responded similarly. (Doc. 30-3 at 6-8). For fifteen minutes, Nichols wandered the halls. *Id*. After Nichols found the janitor's room, the employees who had professed ignorance about its location watched Nichols enter

the room and said "you found it." (Doc. 30-3 at 10). Later that day, Nichols met Bette Johnston, the school's food services manager. *Id*. Upon introducing himself, Johnston mumbled something, raised a towel, and then waved her hand at Nichols. *Id*. Johnston was not Nichols' supervisor. (Doc. 30-3 at 36).

On Nichols' second day at Springfield, a purse was left unattended in an area Nichols was cleaning. (Doc. 30-3 at 14-15). The owner of the purse was never determined, but Nichols suspected it was an attempt to entrap him. (Doc. 30-3 at 16-17). Nichols' third day was more of the same. A teacher's aide pointed out his grandson to Nichols and told Nichols not to speak with the child. (Doc. 30-3 at 19). The aide then stared at Nichols during lunch. *Id*. After lunch, Nichols was cleaning the cafeteria floor. (Doc. 30-3 at 17-18; Doc. 1-1 at 2.). Upon finishing, he left the cafeteria to throw out garbage. *Id*. Returning moments later, Nichols found debris on the floor. *Id*. The only people in the cafeteria were Johnston and her assistant Angie Darschewski. *Id*.

On the Friday afternoon before Nichols' firing, Johnston walked by Nichols with Darschewski and called him a "black nigger." (Doc. 30-3 at 22-23). When Nichols asked them what she had said, they responded that it was a joke. (Doc. 30-3 at 23-24). Nichols replied that he would pray for them. *Id*.

Johnston's "black nigger" slur was not isolated. On another occasion, Johnston said to a group of school employees "Where that boy at?" (Doc. 30-3 at 43-44). Unbeknownst to Johnston, Nichols was walking through the cafeteria. *Id*. When the group realized Nichols was within earshot, they stopped laughing. *Id*. The 52-year-old

Nichols said "boy" "was racially motivated. I don't believe, I know it was racially motivated." *Id*.

Johnston also repeatedly accused Nichols of stealing cups. (Doc. 30-3 at 21). She would bring Nichols lunch trays knowing that Nichols did not want the food since he brought a lunch. (Doc. 30-3 at 26). Nichols explained, "she would take the tray, and slam it to my chest, like, slam it." *Id*. Johnston also left the cash register open and unattended while Nichols cleaned the cafeteria. (Doc. 30-3 at 20).

While the slurs and mistreatment impacted Nichols, he held it in: "I kept doing my job. I kept it inside me. . . . It was, like, I go home, and pray about it. I pray every night about it." (Doc. 30-3 at 45).

The Firing of Nichols

The end came on February 7, 2011, the Tuesday following Johnston's Friday afternoon "black nigger" slur. (Doc. 30-3 at 27). That morning, Johnston accused Nichols of stealing a shovel. *Id*. Then at lunch, Johnston prodded Nichols by giving him a lunch tray. (Doc. 30-3 at 28). Exasperated, Nichols declined and asked why she insisted in bringing food he did not want. *Id*.

Agitated by the lunchroom encounter, Johnston went to Springfield principal Lisa Emshwiller. (Doc. 30-3 at 30). Johnston accused Nichols of behaving offensively. (Doc. 30-3 at 31). Emshwiller then confronted Nichols, who complained about Johnston, including her "black nigger" slur. (Doc. 30-3 at 31-32). He also told Emshwiller that Johnston threw debris on the floor, laughed at him, and bullied him and others. *Id*. Emshwiller said she was unaware of these events, and told Nichols that

Johnston had filed a report about him. *Id*.

While Emshwiller refused to divulge the report's contents, Nichols challenged Johnston's credibility. (Doc. 30-3 at 31-33). But the writing was on the wall. *Id*. Nichols' supervisors, Doug Schroeder and John Yeakley, appeared with Johnston. (Doc. 30-3 at 33-34). They entered Emshwiller's office, exited soon after, and told Nichols to leave and not come back. *Id*. Nichols was never given another assignment by Michigan City. (Doc. 35 at 4). Nor did he know Michigan City had a mechanism for reporting harassment. (Doc. 30-3 at 41).

Schroeder and Yeakley, both white, later denied Nichols' race motivated their decision, claiming his behavior was the catalyst. (Doc. 30-4 & 5). Emshwiller and Johnston also denied racial animus. (Doc. 30-6 & 7).

Nichols Files Suit

Nichols went to the EEOC on February 23, 2011, claiming racial harassment and discrimination. (Docs. 1, 31 at 4-5). During the EEOC process, Springfield employees denied racial animus and said Nichols was mentally ill. (Docs. 30-3 at 39; 31 at 4). The EEOC issued Nichols a right-to-sue letter and Nichols proceeded *pro se*. (Doc. 1). He averred racial harassment and discrimination, along with defamation based on the mental instability allegations. (Docs. 1, 31). The district court allowed Nichols to proceed *in forma pauperis*. (Doc. 3).

After Nichols' deposition, Michigan City moved for summary judgment. (Doc. 27). Michigan City stipulated that Nichols suffered an adverse employment action. (Doc. 29 at 11). Attaching affidavits of Johnston, Schroeder, Yeakley, and Emshwiller,

Michigan City argued "there is no evidence that the harassment claimed by Plaintiff was either based on his race or sufficiently severe or pervasive." (Doc. 29 at 7).

Nichols responded that genuine issues of fact precluded summary judgment. (Doc. 31 at 3). He attached a statement from night shift janitor Scott Peterson, who stated that Nichols "did his job well, with no complaints, and was always friendly." (Doc. 31 at 10). Nichols also included a statement by Frank Davis, who drove Nichols from work. (Doc. 31 at 9). Davis stated that Nichols complained "everyday" about Johnston and Emshwiller harassing him. *Id*. Along with these statements, Nichols argued that Johnston's comments to Emshwiller (and forwarded to Schroeder and Yeakley) were false and defamatory. (Doc. 31 at 3). Finally, Nichols went on disability for psychological problems prompted by the Springfield experience. (Doc. 31 at 3).

The district court vacillated, but ultimately found against Nichols because "professional misconduct – even of the most egregious nature – isn't Title VII harassment or discrimination, at least not necessarily." (Doc. 35 at 2). Summary judgment for Michigan City was thus proper:

> I'm certainly not condoning [Michigan City's] behavior. But there's simply no indication that it was motivated by race. To the contrary, it looks to me – if you believe Nichols – like a few members of the staff at Springfield Elementary just took an immediate and intense disliking to him. They may have acted completely unprofessionally towards him, but that's not sufficient to show a racial motivation as required under the applicable law.

(Doc. 35 at 6). Finally, the defamation claim fell because it was barred by principles of absolute immunity. (Doc. 35 at 1, n. 1). Nichols appeals. (Doc. 37).

SUMMARY OF ARGUMENT

To say James Nichols was given the cold shoulder by Springfield employees would imply a passive acceptance to his presence that simply did not exist. Rather, they actively made Nichols' job unbearable by using racial slurs and harassing him. While the district court was right to express misgivings about Nichols' mistreatment, it was wrong to do nothing about it.

Three errors plague the district court's analysis. First, the court separated the racial slurs from the other harassment. This was wrong as a matter of law. The two had to be considered together, and doing so punctuates the racial motivations of the other harassment.

Second, the district court ignored the racial overtones of "boy." The Supreme Court has noted that "boy" has negative racial connotations, yet the district court never considered the word, referring to the "black nigger" slur as the "sole alleged incident." Overlooking "boy" diluted the severity of Nichols' harassment and contravened Supreme Court precedent. Further, by deciding that "boy" was not offensive, the district court invaded the province of the jury and viewed facts in a light favorable to Michigan City.

Third, the district court disregarded the sequence of events. Johnston's "black nigger" slur was uttered on late Friday, and by the following Tuesday, Nichols had been fired. The termination followed Johnston's meetings with Emshwiller, Schroeder, and Yeakley. Thus, Johnston provided input into the termination and expressed discriminatory feelings immediately before the termination. It was reversible error to

ignore that when a person with racial animus provides input into the decision making process, the decision makers can be influenced by that animus.

Ultimately, this case is not tailored for summary judgment. Nichols asserts Springfield employees harassed him based on race. They deny it. At summary judgment, a court can neither make credibility determinations nor choose between competing inferences. And whether racially inflammatory comments combined with harassment created a hostile work environment is a quintessential jury question. The Court should reverse under its *de novo* review and allow Nichols his day in court.

ARGUMENT

I. The Standard of Review Is *De Novo*.

The Court reviews a district court's grant of summary judgment *de novo*. *Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994). In deciding whether summary judgment is proper, the Court views the evidence and all reasonable inferences in the light most favorable to the non-movant. *Id.* A grant of summary judgment in an employment discrimination case "should be approached with special caution." *Id.* at 423.

II. Nichols Experienced a Racially Hostile Work Environment.

Title VII prohibits employers from requiring people to work in a discriminatory hostile or abusive environment. 42 U.S.C. § 2000e-2(a)(1); *Whittaker v. Northern Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005). To survive summary judgment on a hostile work environment claim under Title VII, Nichols must show: (1) the work environment was both subjectively and objectively offensive; (2) his race was the cause of the harassment; (3) the conduct was severe or pervasive; and (4) there was a basis for employer liability. *Mendenhall v. Mueller Streamline Co.,* 419 F.3d 686, 691 (7th Cir. 2005).

A. Slurs and race-based abuse rendered the work environment offensive.

The first two elements of a hostile work environment claim require a showing of offensive racial harassment. *Id*. To be actionable under Title VII, such harassment must alter the conditions of employment or create an intimidating, hostile, or offensive work environment. *Ngeunjuntr v. Metropolitan Life Ins. Co.*, 146 F.3d 464, 467 (7th Cir. 1998). No single act can more quickly create an abusive working environment "than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993).

As Justice Jackson wrote: "These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed . . . ." *Kunz v. New York*, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

In addition to "black nigger," Nichols was also called "boy." (Doc. 30-3 at 22-23; 43-44). The Supreme Court addressed the racial connotations of this word in *Ash v. Tyson Foods, Inc*., 546 U.S. 454 (2006) (per curiam). Two black employees claimed a supervisor's use of "boy" demonstrated discriminatory animus. *Id*. at 455. The Eleventh Circuit disagreed, holding that "boy" had to be modified by a racial classification such as "black" or "white." *Id*. at 456. The Supreme Court unanimously reversed. Although "boy" does not always evince racial animus, "it does not follow that the term, standing alone, is always benign." *Id*. The meaning will depend on context, inflection, and local custom. *Id*. "Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous." *Id*.

Also instructive is *Tademy v. Union Pacific Corp*., where a supervisor's intent in calling plaintiff "boy" precluded summary judgment. 614 F.3d 1132 (10th Cir. 2008). Summary judgment was reversed because "boy" "has been used to demean African-American men, among others, throughout American history." *Id*. at 1142-43. Since inflection or context could alter the word's meaning, defendant's usage and the effect on plaintiff were questions not resolvable at summary judgment. *Id*. *See also Riley-Jackson v. Casino Queen, Inc*., 2010 U.S. Dist. LEXIS 126491, *17 (S.D. Ill. Dec. 1, 2010) ("There is, of course, no way in which a supervisor can call an adult African-American 'boy' that is not

racially derogatory."); *Hawkins v. Groot Industries, Inc.*, 2003 U.S. Dist. LEXIS 5051, *8 (N.D. Ill. Mar. 31, 2003) ("calling an adult black man 'boy' strikes the court as an objectively inherently offensive comment.").

The preceding case law confirms Nichols presented evidence that the workplace was objectively offensive. Johnston called Nichols "black nigger" and "boy." (Doc. 30-3 at 22-23; 43-44). She also accused him of stealing cups, needled him by bringing him unwanted food, and baited him with an open cash register. (Doc. 30-3 at 20-21; 26). This conduct—when considered against the backdrop of epithets like "black nigger" and "boy"—implies discriminatory motivations underlying it. Viewed in a light most favorable to Nichols, these facts demonstrate the workplace was objectively offensive.

Nichols also subjectively believed he was mired in a hostile work environment. After an incident-free experience at Joy Elementary, the mistreatment by the all-white Springfield workforce left him chastened. (Doc. 30-3 at 7). Being called "black nigger" was disturbing. About the "boy" remark, Nichols said, "I know it was racially motivated." (Doc. 30-3 at 43-44). Nichols was impacted by the abuse, complaining "everyday" to Frank Davis. (Doc. 31 at 9). Still, he continued working and "kept it inside." (Doc. 30-3 at 45). He would then go home and "pray every night about it." (Doc. 30-3 at 45). Ultimately, Nichols suffered psychological problems from the harassment. (Doc. 31 at 3).

In sum, the record establishes that Nichols' three weeks at Springfield were subjectively and objectively offensive and that race was the catalyst.

B. The harassment of Nichols was severe or pervasive.

The third element of a hostile work environment claim requires harassment that was severe or pervasive. *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002). Harassment need not be both severe and pervasive, one serious act of harassment could rise to an actionable level as could a series of less severe acts. *Smith v. Sheahan*, 189 F.3d 529, 533-34 (7th Cir. 1999). In evaluating this element, courts examine the totality of circumstances—the frequency and severity of the discriminatory conduct, whether it is threatening or humiliating, and whether it impacts an employee's work. *Id.* The conduct need not be so severe as to "cause a tangible psychological injury" before it is actionable. *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993). The severe or pervasive element is met when the workplace is one that a reasonable person would find hostile and that the plaintiff in fact did. *Robinson v. Sappington*, 351 F.3d 317, 329 (7th Cir. 2003).

1. The "black nigger" slur is severe harassment.

Racially-charged words satisfy the severe or pervasive element. In *Hrobowski v. Worthington Steel Co.*, a work environment in which plaintiff was subjected to the word "nigger" was sufficiently severe to support a hostile work environment claim. 358 F.3d 473, 477 (7th Cir. 2004). A hostile work environment was also found in *Rodgers* when a supervisor said "nigger" twice in plaintiff's presence. 12 F.3d at 675-76.

The Court has overlooked workplace slurs in limited situations not present here. For example, an offensive remark uttered in the heat of a workplace altercation is not racial harassment. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000). An utterance made during office banter will not suffice. *Logan v. Kautex Textron N. Am.*, 259 F.3d 635, 639 (7th Cir. 2001). Nor will a racial epithet spurred by plaintiff's inappropriate

conduct. *Sanders v. Vill. of Dixmoor*, 178 F.3d 869, 870 (7th Cir. 1999). Finally, remarks not directed at the plaintiff are typically insufficient. *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559, 567 (7th Cir. 2004). Michigan City can invoke none of these exceptions.

Nichols has demonstrated an alteration in the conditions of his employment and that the discriminatory conduct was severe or pervasive. He was called "black nigger" while being harassed by a number of Springfield employees. Multiple attempts to entrap him were made. (Doc. 30-3 at 20). Johnston would slam lunch trays into Nichols' chest. (Doc. 30-3 at 26). The truncated time frame of three weeks further captures the pervasiveness. While sporadic comments are unlikely to establish a hostile work environment, this case involves a barrage of abuse over three weeks, the nadir being the "black nigger" slur.

Michigan City has downplayed the "black nigger" slur because it was uttered once. At summary judgment, Michigan City argued that the "*only* evidence that has a racial undertone is Plaintiff's claim that he was called a 'black nigger' on *one occasion*." (Doc. 32 at 5) (emphasis in original). This contention ignores the Court's determination in *Cerros v. Steel Technologies, Inc.*, that "[w]hile there is no 'magic number' of slurs that indicate a hostile work environment, we have recognized before that an unambiguously racial epithet falls on the 'more severe' end of the spectrum." 288 F.3d 1040, 1047 (7th Cir. 2002). *Cerros* reversed a bench trial verdict for the defendant because the district court characterized racial incidents as too isolated. The district court's decision "may have resulted from a misunderstanding about the legal threshold for harassment cases . . . [and] set the bar too high." *Id.* The district court's ruling here is similarly flawed as it

echoed Michigan City's position that the slur was said only once. (Doc. 35 at 8). This position is tenuous because it flouts *Cerros*, and as set forth in the following section, ignores the "boy" remark.

The district court's handling of the "black nigger" slur is flawed for an additional reason. The Court has cautioned district courts not to "carve up" incidents of harassment and then separately analyze incidents to see if each, by itself, is severe or pervasive. *Mason v. Southern Ill. Univ.*, 233 F.3d 1036, 1045 (7th Cir. 2000). But that is precisely what the district court did here:

> *Let's set aside the racial epithet for a minute* and look at the remaining alleged misconduct he describes in his complaint. It's probably fair to characterize this mistreatment as subjectively and objectively offensive, and it's certainly plausible that a jury might find that it was severe or pervasive. The problem for Nichols is that there doesn't seem to be any evidence that it was racially motivated.
>
> (Doc. 35 at 5) (emphasis added).

Setting the slurs aside is what *Mason* instructs not to do. And carving up the incidents is reversible error under *Hall v. City of Chicago*, 713 F.3d 325 (7th Cir. 2013). The employer in *Hall* argued that none of the supervisor's conduct, when viewed in an individual context, was objectionable. The Court responded, "[t]o an extent, we agree. We question whether any of [the supervisor's] individual acts *alone* were sufficiently severe to constitute a hostile workplace under Title VII." *Id*. at 330-31 (emphasis in original). But this was not the proper lens, and under the totality of circumstances test, there was enough discriminatory conduct to survive summary judgment, necessitating reversal. *Id*.

Here, the district court should have evaluated each incident in relation to one another. Separating the incidents establishing a hostile work environment divorced

them from their context and left them isolated. This disaggregation fostered the court's conclusion that the other mistreatment was not racially motivated. *See* Doc. 35 at 5.

In sum, the third element of a hostile work environment claim has been met because a reasonable person in Nichols' position would find the environment severe or pervasive. Under the totality of the circumstances, the conditions Nichols experienced, the racial animus of Springfield employees, and Nichols' termination establish that a jury could find Nichols was subjected to a hostile work environment.

2. Discarding the "boy" remark impermissibly altered the analysis.

Johnston called Nichols "boy" in front of other school employees. (Doc. 30-3 at 43-44). When the group realized Nichols heard the remark, they stopped laughing. *Id*. Nichols was certain the remark was racially motivated. *Id*.

Inexplicably, the district court never considered "boy." It instead found the "black nigger" slur alone was not enough to sustain the severe or pervasive element. In doing so, the court emphasized the isolated nature of the "black nigger" remark:

- "the sole alleged incident clearly involving racial animus"
- "the single – and seemingly offhand – epithet"
- "the (alleged) one-time use of a racial epithet"

(Doc. 35 at 8).

These depictions are thus inaccurate. The "black nigger" comment had to be considered alongside "boy." Numerous courts, including the Supreme Court, have recognized "boy" is divisive. *See Ash*, 546 U.S. at 456. Leaving this word out of the analysis imperils the district court's conclusion.

3. Whether harassment is severe or pervasive is a jury question.

Finally, the district court erred in finding the severe or pervasive element did not present a genuine issue of fact. The grant of summary judgment here contradicts *Passananti v. Cook County*, 689 F.3d 655 (7th Cir. 2012). The plaintiff in *Passananti* alleged a supervisor subjected her to sexual harassment and unlawful termination. A jury agreed but the district court granted defendants' motion for judgment as a matter of law. The Court reversed, warning that in determining the severe or pervasive question, "[c]ontext matters, and it will often present a jury question." *Id*. at 668-69. Thus, a court must use "an appropriate sensitivity" to that context to distinguish between vulgarity and discriminatory language that a reasonable person would find hostile. *Id*.

The district court disregarded context here. First, Nichols had gone through an interview and background check before being hired. (Doc. 30-3 at 3). Second, Nichols had no problems at his prior assignment at Joy Elementary School. (Doc. 30-3 at 7). Third, Nichols' time at Springfield was only three weeks. Fourth, Johnston's conduct was also physical as she slammed lunch trays into Nichols' chest. (Doc. 30-3 at 26). Fifth, the mistreatment of Nichols by an all-white workforce occurred in the midst of racial slurs directed at him. None of this was considered. Whether Nichols' harassment was severe or pervasive cannot be resolved at summary judgment. A jury could conclude that multiple racial comments combined with abuse and entrapment efforts were sufficiently severe to create a hostile work environment.

C. Employer liability exists because Michigan City responded to Nichols' harassment by firing him.

The last element of a hostile work environment claim requires a basis for employer liability. *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004). This evaluation turns on who perpetrated the harassment—supervisors or co-workers. *Id*. Employers are strictly liable for harassment inflicted by supervisors. *Id*. When co-workers alone create the hostile work environment, the plaintiff must show the employer was negligent either in discovering or remedying the harassment. *Id*. When a hostile work environment stems from conduct by supervisors and co-workers, all instances of harassment are relevant. *Mason*, 233 F.3d at 1044-45.

An employer can be liable for a hostile work environment if it does not adequately respond to employee harassment. *Sutherland v. Wal-Mart Stores, Inc.*, 632 F.3d 990, 994 (7th Cir. 2011). Thus, the employer must respond in a manner likely to end the harassment. *Id*. at 995. Prompt investigation demonstrates a reasonable corrective action. *Porter v. Erie Foods Int'l, Inc.*, 576 F.3d 629, 636 (7th Cir. 2009). Firing Nichols was the antithesis of taking "the harassment seriously and [taking] appropriate steps to bring the harassment to an end." *See id*.

Consider the events culminating in Nichols' termination. After the lunchroom dispute, Johnston went to Emshwiller and accused Nichols of behaving offensively. (Doc 30-3 at 31). Emshwiller then confronted Nichols. It was at that point Nichols told Emshwiller about the "black nigger" slur, and that he had been routinely harassed. (Doc. 30-3 at 31-32). Shortly thereafter, Nichols' supervisors appeared with Johnston and met with Emshwiller. (Doc. 30-3 at 33-34). Nichols was then fired. *Id*. Terminating Nichols after he complained about the harassment is the basis for Michigan City's

liability because this response was inadequate. While removing Nichols did end the harassment, this perverse result cannot be what courts intended.

Michigan City has also argued that Nichols never availed himself of the mechanism Michigan City provides for reporting harassment. (Doc. 29 at 6). But Nichols was never apprised of such a policy. (Doc. 30-3 at 41). As such, Michigan City's policy is of no import. Instructive on this point is *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *Faragher* held that an employer did not take reasonable steps to prevent harassment in part because the employer never disseminated its harassment policy. *Id.* at 808. If Nichols never knew about the policy he cannot be faulted for not consulting it.

Ultimately, the question for liability purposes is whether Michigan City tolerated hostile working conditions. *See Dunn v. Washington County Hosp.*, 429 F.3d 689, 691-92 (7th Cir. 2005). It did. When Nichols complained about the "black nigger" slur and other mistreatment he experienced, it had been less than two full working days since the slur was said. And when Nichols reported the harassment he had not yet been terminated. Thus, Michigan City should not be able to capitalize on the speed in which it fired Nichols. Similarly, Nichols should not be penalized for not complaining contemporaneously about the slur. Because Michigan City's response was inadequate, liability exists.

D. The facts are viewed in a light most favorable to Nichols.

At summary judgment, a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). Viewing the evidence in a light most favorable to Nichols,

summary judgment was improper as contestable issues of material fact exist.

The district court refused to credit Nichols' testimony that he felt harassed by being called "black nigger" and "boy" and that he believed the other mistreatment was race-based. (Doc. 30-3 at 43-45). These facts could permit a reasonable jury to conclude that Nichols was harassed because of his race. And even if the evidence presented by Nichols does not compel the conclusion that Michigan City discriminated against him, at a minimum, it overcomes summary judgment. A plaintiff may defeat summary judgment with his own deposition. *Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC*, 464 F.3d 659, 664-65 (7th Cir. 2006). *See also Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir. 1994) (plaintiff can present deposition testimony demonstrating an issue of material fact).

The district court's failure to view the evidence in Nichols' favor warrants reversal per *Lambert v. Peri Formworks Systems, Inc.*, No. 12-2502 (7th Cir. Jul 24, 2013). In *Lambert*, a supervisor referred to workers as "donkeys" and a "gorilla." *Slip Op.* at 4. Another supervisor said he did not respect the plaintiff because he is a "nigger." *Id.* Granting defendant summary judgment, the district court emphasized that the harassment occurred over several years, was not physically threatening, and did not impact plaintiff's work. *Id.* at 10-12. The Court reversed because the district court's analysis minimized "the degree of offense" in the supervisor's racial insult. *Id.* at 11. Further, "donkeys" and "gorilla" were words a jury "could see as racial slurs." *Id.* And since a jury could conclude the remarks created a hostile work environment, summary judgment was improper. *Id.* Most critically, *Lambert* concluded that "[Plaintiff's] case is

right on the line, but we think that the standard of review for summary judgments tips it slightly in his favor." *Id.* That standard should have similarly benefited Nichols.

One final point bears mention. Summary judgment is unsuitable for settling questions of intent. The "ultimate question of discrimination" is best resolved by a jury choosing among competing inferences and making credibility determinations. *Courtney,* 42 F.3d at 424. The Springfield and Michigan City employees deny racial animus while Nichols offers evidence of discriminatory conduct. Thus, the district court could not "resolve the conflict between these two positions without deciding which side to believe." *See Sarsha v. Sears Roebuck & Co.,* 3 F.3d 1035, 1041-42 (7th Cir. 1993) (reversing summary judgment due to conflicting positions on intent). Because a trial is the proper venue for choosing between competing inferences, the Court should reverse on Nichols' racial harassment claim.

III. Nichols' Discriminatory Termination Violated Title VII.

Title VII prohibits employers from discriminating against a person with respect to compensation, terms, conditions, or privileges of employment because of race. 42 U.S.C. § 2000e–2(a)(1). Acting "because of race" means acting for discriminatory reasons. *Jordan v. City of Gary*, 396 F.3d 825, 832 (7th Cir. 2005).

The district court found against Nichols on his discrimination claim because "getting a raw deal isn't the same as getting a raw deal *because you're a member of a protected class*." (Doc. 35 at 10) (emphasis in original). As in its hostile work environment analysis, the district court downplayed Johnston's racially-charged words. Furthermore, Johnston's direct influence on the decision makers, Yeakley and Schroeder, was passed

over in silence. These missteps constitute reversible error.

A. Nichols can prevail under the indirect method.

A plaintiff can avoid summary judgment in two ways: the burden-shifting method from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), (indirect method), or presenting direct or circumstantial evidence that could permit a jury to conclude the employer acted with discriminatory intent, (direct method). *Jordan,* 396 F.3d at 831-33. Discriminatory termination exists under both methods here.

Under the indirect method, a plaintiff must demonstrate he (1) is in a protected class, (2) performed his job consistent with the employer's expectations, (3) suffered an adverse action, and (4) circumstances suggest the adverse action was motivated by his race. *Timmons v. General Motors Corp.*, 469 F. 3d 1122, 1126-28 (7th Cir. 2006). The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action, and then back to the employee to prove that reason was pretextual. *Id*.

The district court refused to consider the indirect method because "Nichols doesn't allege that he was treated different than any other employee." (Doc. 35 at 9, n. 3). But such an approach is too rigid. "The *McDonnell Douglas* method of proving discrimination was not meant to be inflexible." *Timmons*, 469 F.3d at 1126. And because a plaintiff can sometimes not identify similarly situated employees, he can show circumstances surrounding the adverse action suggested unlawful motivations. *Id*.

Nichols satisfies the indirect test. He is in a protected class. (Doc. 1). He also suffered an adverse action, as Michigan City stipulated to at summary judgment. (Doc.

29 at 11). Further, Nichols performed his job consistent with Michigan City's expectations as he worked at Joy Elementary School without incident. (Doc. 30-3 at 7). His work was acceptable such that he was asked to return and assist at Springfield. *Id*. While at Springfield, night shift janitor Scott Peterson stated that Nichols "did his job well, with no complaints, and was always friendly." (Doc. 31 at 10). It was not until Nichols' third week at Springfield, and after his dispute with Johnston, that he was terminated. And the circumstances surrounding his termination demonstrate race was a factor. As set forth further below, Johnston had input in the decision to terminate Nichols because she attended and participated in the meetings which led to his firing. Nichols has presented circumstances suggesting his firing was racially motivated and can thus prevail under the indirect method.

B. Johnston's influence on the decision to fire Nichols is direct evidence of discriminatory intent.

Under the direct method, a plaintiff may show either direct or circumstantial evidence pointing to the conclusion that an employer acted for illegal reasons. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 527 (7th Cir. 2008). Circumstantial evidence under the direct method allows a jury to infer intentional discrimination by the decision maker. *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003). Suspicious timing, ambiguous statements, and other things from which discriminatory intent might be drawn are circumstantial evidence that combined can compose "a convincing mosaic of discrimination." *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994).

Comments by a non-decision maker do not typically suffice as evidence of discriminatory intent. *Williams v. Seniff*, 342 F.3d 774, 790 (7th Cir. 2003). This was the

cornerstone of the district court's ruling here. It held that "a school cafeteria services manager generally doesn't have the authority to hire and fire janitors." (Doc. 35 at 7). But it is different when those providing input into the decision express discriminatory feelings (1) around the time of, and (2) in reference to, the adverse employment action. *Hunt v. City of Markham*, 219 F.3d 649, 652 (7th Cir. 2000). If a person with racial animus provides input into the decision-making process then "it may be possible to infer that the decision makers were influenced by those feelings." *Id*. at 652-53.

Further, where a subordinate conceals relevant information from the decision-making employee or feeds false information to him, she is able to influence 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 such a case, the discriminatory motive of the employee, not the autonomous judgment of the decision maker, drives the adverse employment action. *Id*.

Johnston provided input to Emshwiller, Schroeder, and Yeakley shortly before Nichols was terminated. (Doc. 30-3 at 30; 33-34). The district court never considered this fact. While the district court acknowledged in passing that Nichols' termination came on the heels of Johnston's slur ("a few days later"), it never made the connection that Johnston influenced, if not propelled, the firing. (Doc. 35 at 7).

Johnston's prejudices are imputed to Schroeder and Yeakley. The district court's failure to consider this defies the admonition that courts cannot "ignore comments made by someone who is not directly responsible for an employee's supervision." *Hasan*, 552 F.3d 520, 527-28. Summary judgment should thus be reversed as it was in

Hasan. There, a partner who had expressed anti-Muslim sentiments attended (and participated in) the meeting at which plaintiff was fired. *Id*. at 528. The district court concluded such sentiments were not valid circumstantial evidence of discrimination because the partner was not plaintiff's direct supervisor. *Id*. This was reversible error because the fact "others were also involved in making that decision does not make [the partner's] participation irrelevant." *Id*.

Mirroring *Hasan*, Johnston attended and participated in meetings with Emshwiller, and then Emshwiller, Schroeder, and Yeakley. (Doc. 30-3 at 30; 33-34). And per *Hasan*, even if Emshwiller, Schroeder, and Yeakley had no racial animus, they cannot mask Johnston's. The district court's decision and *Hasan* cannot be reconciled. If reversal was necessary in *Hasan* because discriminatory comments by a non-supervisor were marginalized, it is even more so here because such comments were ignored.

Also warranting reversal is *Hunt*, 219 F.3d 649. A mayor's discriminatory remarks about plaintiff police officers were relevant to the question of discrimination even though the mayor did not have authority over police personnel issues. *Id*. at 652-53. The Court reversed because the district court failed to consider the mayor's derogatory comments. *Id*. at 652. "Emanating from a source that influenced the personnel action (or nonaction) of which these plaintiffs complain, the derogatory comments became evidence of discrimination." *Id*. at 653. Like *Hunt*, reversal is needed because Johnston's slurs were evidence of Nichols' unlawful termination.

In sum, regardless of the type of evidence presented, summary judgment can be avoided by presenting evidence creating a triable issue as to whether the termination

had discriminatory motivations. *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 721 (7th Cir. 2005). Nichols did so here. A reasonable jury could conclude that Nichols' termination was a continuation of the racially hostile work environment he experienced. Reviewed *de novo*, summary judgment on the unlawful termination should be reversed.

CONCLUSION

The district court disregarded critical components of the hostile environment and unlawful termination analyses, downplayed integral facts, and viewed the facts in Michigan City's favor. Reversal is needed.

Respectfully submitted,

s/Christopher Keleher

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

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

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a monospaced font. The length of this brief is 7,637 words according to the Microsoft word count function.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Christopher Keleher, hereby certify that fifteen paper copies of the Appellant's Brief and Required Short Appendix were sent within 7 days of filing on the Court's ECF system via hand delivery to:

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PROOF OF SERVICE

This is to certify that I have served a copy of the Appellant's Brief and Required Short Appendix upon the party listed herein, by mailing same on September 27, 2013 at 115 South LaSalle, Suite 2600, Chicago, Illinois 60603 to:

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CIRCUIT RULE 30(d) STATEMENT

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 30(d), versions of the brief that are available in non-scanned PDF format.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

JAMES NICHOLS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:12-cv-042
	)	
MICHIGAN CITY PLANT PLANNING DEPT.,	)	
	)	
Defendant.	)	

OPINION AND ORDER

James Nichols was hired as a substitute janitor by Michigan City Plant Planning Department in early January 2011, and a few weeks later, he was placed on a temporary assignment at Springfield Elementary School. The posting was an uncomfortable mess from the outset. He says that staff and students alike were hostile to him; according to his allegations, they created messes for the sole purpose of making him clean them up, treated him with constant suspicion, and on one occasion, called him an inflammatory racial epithet. Finally, after a few weeks on the job, the Planning Department informed Nichols that he was no longer needed at the school and ultimately declined to place him on another assignment.

Nichols responded to this treatment by filing a lawsuit asserting Title VII claims for racial harassment and discrimination.[1] He primarily alleges that he was harassed and

[1] In a subsequent filing, Nichols advised me that he wished to add a defamation claim to his lawsuit, citing a position statement filed by the Planning Department in a subsequent EEOC proceeding. (DE 16.) As the Planning Department correctly notes, even if I were inclined to consider it, this state law claim is barred by principles of absolute immunity because the statement was made in the context of a quasi-judicial proceeding. *See Hartman v. Keri*, 883 N.E.2d 774, 779-80 (Ind. 2008).

treated poorly by members of the Springfield Elementary staff, and that rather than intervene, his supervisor dismissed him "under racially motivated circumstances." The case is now before me on the Planning Department's summary judgment motion.

I can sympathize with Nichols to some degree. If you believe him, the staff at Springfield Elementary seems to have treated him quite poorly. But professional misconduct – even of the most egregious nature – isn't Title VII harassment or discrimination, at least not necessarily. It has to be motivated by some sort of racial bias. And in this case, once I parse through the mistreatment that Nichols *thinks* was racially motivated but doesn't have any tangible basis for his belief, I'm left with a single racial slur used by a non-supervising co-worker. And while that theoretically could be enough to support a Title VII harassment claim (though as I'll explain below, I actually don't actually think it is here), the fact is that he didn't tell the Springfield Elementary principal or his employer until it was much too late for them to do anything to remedy the situation. That's fatal to his lawsuit. Therefore, and for the reasons discussed below, the Planning Department's summary judgment motion (DE 27) is **GRANTED**.

BACKGROUND

Nichols began working for the Planning Department as a substitute custodian on January 5, 2011. (DE 1-1 at 2). Nichols' supervisors there were Doug Schroeder and John Yeakey, both of whom are white. (DE 30-3 at 14). He was initially assigned to Joy Elementary, where he worked for three days and was not used for a brief time thereafter. (DE 30-3 at 4.) Nichols' second assignment was to Springfield Elementary on January 19, 2011. (DE 30-3 at 4.)

As I alluded to above, things started to go wrong pretty much from the moment that Nichols walked in the door. He alleges that when he arrived at the school he asked two students and two teachers (I think – it's a little unclear in the record whether it was two teachers and two students, or whether it was two young teachers) where the janitor's closet was, but they falsely claimed not to know. (DE 30-3 at 6.) There is also a vague suggestion that Bette Johnston, the food service manager at Springfield Elementary, acted frightened towards him on multiple occasions. (DE 30-3 at 10.) Nichols also claims that on his second day at the school, someone left a purse out, ostensibly with the purpose of entrapping him into stealing it (DE 1-1 at 2-3; DE 30-3 at 15-17), and that Johnston routinely left the cash register open when he was present (again, with the implication that she was trying to bait him into stealing money). (DE 30-3 at 20-21.)

Nichols alleges that on his third day on the job, two staff members (including Johnston) at Springfield Elementary threw food and garbage on the floor after he had cleaned it. (DE 1-1 at 2.) He claims that he was called a "boy" by school personnel on more than one occasion, which he believes was racially motivated. (DE 30-3 at 43.) Perhaps most explicitly, he says that on a single occasion, Johnston or another cafeteria worker (it's a little unclear which) walked by him and called him "a black [racial epithet]." (DE 30-3 at 22-23.) Notably, Nichols didn't report that incident to the school principal or his superiors at the Planning Department. (DE 30-3 at 25.)

Matters finally came to a head on February 7, 2011, when, according to Nichols, he was harassed by Johnston, who claimed he had taken a shovel and then tried to give him unwanted lunch trays. (DE 30-3 at 27-28.) After this dust up, Johnston went to school principal Lisa Emshwiller to discuss Nichols' behavior. (DE 30-6 at 1.)

Emshwiller then met with Nichols to discuss the concerns Johnston had raised; Nichols explained how and why he believed Johnston had been harassing him. (DE 30-6 at 1-2.) Notably, according to Nichols's own account of the conversation, when he informed Emshwiller that he had been called a racial epithet, the principal indicated that this was the first she had heard of the allegation. (DE 30-3 at 32.) Following this meeting, Emshwiller spoke with Nichols' supervisors, Schroeder and Yeakey, who made the decision to remove Nichols from his assignment at Springfield Elementary. (DE 30-5 at 1.) They claim that no decision had been made at that point with regard to whether Nichols would be used as a substitute custodian in the future. (DE 30-4 at 3; DE 30-5 at 2-3.) In any event, the Planning Department never placed Nichols at another job site. (DE 30-4 at 3-4.)

Nichols filed the pending complaint alleging race-based harassment and discrimination. (DE 1.) Michigan City Plant Planning Department has since moved for summary judgment.[2] (DE 27.)

DISCUSSION

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). A genuine dispute about a material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making this determination, I must construe all facts and draw all reasonable inferences from the record in the light most

[2] There is also a Rule 56 Motion to Strike pending. (DE 33.) However, my decision to grant summary judgment is the same whether or not I consider the exhibits attached by that motion, so the Motion to Strike is **DENIED AS MOOT**.

favorable to the nonmoving party. *Id*. at 255. But the nonmoving party is not entitled to the benefit of "inferences that are supported by only speculation or conjecture." *Argyropoulos v. City of Alton*, 539 F.3d 724, 732 (7th Cir. 2008) (citations and quotations omitted).

Title VII Harassment

Nichols first contends that Michigan City Plant Planning Department harassed him because of his race in violation of Title VII of the Civil Rights Act (as amended). In order to defeat summary judgment on this claim, he must point me to sufficient evidence to show: "(1) the work environment must have been both subjectively and objectively offensive; (2) his race must have been the cause of the harassment; (3) the conduct must have been severe or pervasive; and (4) there must have been a basis for employer liability." *Montgomery v. American Airlines, Inc.*, 626 F.3d 382, 390 (7th Cir. 2010) (*citing Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 912 (7th Cir. 2010)).

Let's set aside the racial epithet for a minute and look at the remaining alleged misconduct he describes in his complaint. It's probably fair to characterize this mistreatment as subjectively and objectively offensive, and it's certainly plausible that a jury might find that it was severe or pervasive. The problem for Nichols is that there doesn't seem to be any evidence that it was racially motivated. With respect to a Title VII harassment claim, "[t]he complained of conduct must have ... [a] racial character or purpose." *See Hardin v. S.C. Johnson & Son, Inc.,* 167 F.3d 340, 345 (7th Cir. 1999) (*citing Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989)); *accord Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011). In other words, even severe or pervasive conduct that's subjectively and objectively offensive won't support a Title VII

race-based harassment claim if there isn't any indication that racial animosity is the driving force behind it.

So does the conduct cited by Nichols have such a racial character or purpose? It's hard to see how it does. Being rude to a temporary janitor by not telling him where to go or by making messes for him to clean up is deplorable conduct. The same goes for trying to bait him into stealing a purse or money from the cash register. I'm certainly not condoning this behavior. But there's simply no indication that it was motivated by race. To the contrary, it looks to me – if you believe Nichols – like a few members of the staff at Springfield Elementary just took an immediate and intense disliking to him. They may have acted completely unprofessionally towards him, but that's not sufficient to show a racial motivation as required under the applicable law. *See Hardin*, 167 F.3d at 345 ("Obviously, we agree with the district court that it is unfortunate that [the plaintiff] was subjected to such [abusive] behavior. Nevertheless, we cannot conclude that these actions constituted sexual or racial harassment."); *see also Luckie v. Ameritech Corp.*, 389 F.3d 708, 713 (7th Cir. 2004) (granting summary judgment where "[n]one of these [alleged harassing] incidents are sufficiently connected to race so as to satisfy the second element of the hostile environment analysis").

That takes me to the incident alleged by Nichols in which either Johnston or another cafeteria worker (it's a bit unclear which one) called him the "n word." That's very troubling on its face. The Seventh Circuit has suggested that even one incident can be the basis for a Title VII harassment claim if it's sufficiently severe – and specifically if it involves the same inflammatory racial epithet at issue in this case. *See Cerros v. Steel Techns., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002) (opining that a single incident

involving a racial epithet might be sufficient to support a Title VII harassment claim); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (holding same with respect to two incidents); *see also Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999) (holding the same with respect to a Title VII sex-based harassment claim).

But Nichols has two main problems. First and foremost, as I noted above, he didn't go to the principal or to his superiors at the Planning Department to inform them of the incident. Indeed, the first time any of them became aware of the allegation was at the meeting a few days later in which Nichols was told he was no longer needed at the school. That's important because neither Johnston nor the other cafeteria worker were Nichols's supervisor. As a recent Supreme Court decision recently clarified, a supervisor for Title VII harassment purposes is someone who has "the authority to effect a tangible change in a victim's terms or conditions of employment." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2448 (2013). Here, Nichols has pointed me to zero evidence that Johnston or the unidentified cafeteria worker who (he says) called him a racial slur had the power to change the terms or conditions of his employment – and indeed, I suspect that's probably due to the fact that a school's cafeteria services manager generally doesn't have the authority to hire and fire janitors.

The distinction between supervisors and non-supervising co-workers makes a world of difference in this case. Courts are much more willing to impose vicarious liability on an employer for harassment when the offender is the plaintiff's supervisor. *Id.* at 2441. When it's just an ordinary co-worker, however, an employer will only be liable for harassment "if the employer was negligent with respect to the offensive behavior.'" *Id.*; *accord Cerros*, 288 F.3d at 1045.

And there's the rub for Nichols. How could Springfield Elementary or the Planning Department be negligent in stopping the continued use of racial slurs (and similar outrageous conduct) if the people up the chain of command didn't know that was going on until they had already decided to remove Nichols from the job site? Obviously they couldn't. Now, it's possible that Nichols could argue that he was removed in retaliation for complaining about the racial epithet. But he hasn't brought that type of claim. He's asserting a harassment claim against his employer. And there's just no evidence that – with respect to the sole alleged incident clearly involving racial animus – his employer was even aware of his co-workers' purported misconduct, much less that it was negligent in preventing it. Summary judgment is warranted on the claim for this reason alone.

That's not all. Even severe race-based harassment must do more than offend the victim. It instead must be "so severe or pervasive that it *alters the conditions of the plaintiff's employment*." *Thompson v. Memorial Hosp. of Carbondale*, 625 F.3d 394, 401 (7th Cir. 2010) (emphasis added); *accord Dear v. Shinseki*, 578 F.3d 605, 611 (7th Cir. 2009). In this case, Nichols hasn't pointed me to any facts indicating that the single – and seemingly offhand – epithet fundamentally altered the conditions of his employment. Instead, it seems like just another example of his (generally non-racially motivated) alleged mistreatment by the staff at Springfield Elementary, and especially Johnston, whom Nichols portrays as taking an intense – and probably irrational, if you believe his allegations – dislike to him.

At the end of the day, the bottom line is that Nichols hasn't demonstrated that the (alleged) one-time use of a racial epithet was so severe and so offensive *in this particular*

case that it fundamentally changed the terms of his employment. Nor has he shown that Springfield Elementary or the Planning Department knew that their employees were harassing him but failed to stop the mistreatment. He needed to do both of those if he wanted his lawsuit to go to trial. Summary judgment is the time in the litigation process where a party needs to lay its cards on the table and tell me how its going to prevail on its claims, assuming the jury believes its evidence. *See Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) ("Summary judgment is the 'put up or shut up' moment in a lawsuit."). Therefore, summary judgment is appropriate on his Title VII harassment claim.

Title VII Discrimination

Now on to the discrimination claim. Nichols doesn't really spend much time explaining this theory; indeed, he mostly just says that he was discriminated against without identifying the facts that might support the allegation. Presumably he thinks that either Springfield Elementary told him not to come back because he was African-American, or the Planning Department refused to staff him on additional temporary jobs for the same reason, or perhaps a bit of both.

Given that vagueness and paucity, I'm not inclined to spend much time on this claim. It should suffice to say, Nichols doesn't come close to demonstrating that he has a viable Title VII discrimination claim. "Under the direct[3] method [of proving discrimination], a plaintiff must come forward either with direct or circumstantial

[3] The alternative to the "direct method." is the "indirect method," which generally shifts the burden of proof back to a defendant-employer if the plaintiff can show (among other things) that another employee not in his or her class was treated more favorably than he or she was. *See Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). This approach is inapplicable in this case because Nichols doesn't allege that he was treated different than any other employee.

evidence that 'points directly to a discriminatory reason for the employer's action.'" *See Burks v. Wis. Dep't of Transp.*, 464 F.3d 744, 750 n.3 (7th Cir. 2006). Nichols just hasn't done that here. He's pointed me to nothing concrete showing that his race motivated Springfield Elementary's decision to tell him not to return to the school, or the Planning Department's decision not to staff him on another job. Indeed, it seems pretty much undisputed that Nichols was removed from Springfield Elementary because he was involved in a number of confrontations with the school's staff members, and the Planning Department didn't place him on another job site because of the problems he had at the school.

It very well might be the case that Nichols didn't do anything to warrant the mistreatment by the Springfield Elementary staff, and if that's the case, it's especially unfortunate that the Planning Department decided not to staff him on additional projects. But getting a raw deal isn't the same thing as getting a raw deal *because you're a member of a protected class*. Nichols needed to point me to evidence showing that the latter is what happened if he wanted to get a discrimination claim past the summary judgment stage, and he simply didn't do that. Therefore, summary judgment is warranted on that claim as well.

CONCLUSION

For the foregoing reasons, the court **GRANTS** the pending Motion for Summary Judgment (DE 27) in its entirety. Because this ruling disposes of all the issues in this case, the clerk shall **ENTER FINAL JUDGMENT** in favor of the Michigan City Plant Planning Department stating that James Nichols is entitled to no relief on his complaint. The clerk shall treat this civil action as **TERMINATED**. All further settings in this

action are hereby **VACATED**. Finally, for the reasons noted above, the pending Motion to Strike (DE 33) is **DENIED AS MOOT**.

SO ORDERED.

ENTERED: August 1, 2013.

s/ Philip P. Simon
PHILIP P. SIMON, CHIEF JUDGE
UNITED STATES DISTRICT COURT