No. _____

In The
Supreme Court of the United States

TERRY HAYNIE,

Petitioner,

v.

UNITED AIR LINES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erroneously applied *Nat'l R.R. Passenger Corp. v. Morgan* when it considered each incident of harassment as a single, discrete incident instead of an ongoing pattern of conduct establishing a hostile work environment in direct contradiction to this Court's ruling in *Morgan*.

2. Whether the court below erroneously held that Haynie's claims for retaliation, retaliatory hostile work environment, and constructive discharge pursuant to United's Motion to Dismiss, despite the fact that they were filed timely.

3. Whether the District Court erred in granting United's motion for summary judgment despite the existence of disputed issues of material fact and uncontroverted evidence that the Petitioner complained of the hostile environment and the Respondent failed to investigate.

PARTIES TO THE PROCEEDINGS

Terry Haynie, Petitioner

United Air Lines, Inc., Respondent

CORPORATE DISCLOSURE STATEMENT

United Airlines, Inc. is wholly owned United Continental Holdings, Inc. In 2013, United Airlines, Inc. was merged into and with Continental Airlines, Inc. Continental Airlines, Inc. was the surviving entity, and was renamed United Airlines, Inc.

TABLE OF CONTENTS

Page

APPENDIX:

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OPINION BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Fourth Circuit is included herein at Appendix 1a.

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. Section 1254(1). The Fourth Circuit's memorandum opinion was entered on October 19, 2018 and Petitioner's Petition for Rehearing and Rehearing En Banc was denied on December 17, 2018.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race."

42 U.S.C. § 2000e-3(a) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. § 1981 provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

STATEMENT OF THE CASE

Haynie/Appellant ("Haynie") brought this individual original action against his employer, United Air Lines, Inc. ("United"), by filing a Complaint on May 14, 2015 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). These claims, except for the race-based hostile work environment count, accrued after he filed an action against United in May 2012 for race-based hostile work environment in U.S. District Court N.D. California ("California Case"). Haynie's California Case - later severed, transferred to, and consolidated with the original case below - was originally part of a multiple plaintiff's employment discrimination case. At the time of the transfer of the California case, Haynie and other plaintiffs needed leave of the district court in that action to further amend their complaint in the California case.

The California case was transferred to the district below where the trial court, *sua sponte*, ordered Haynie to show cause why the California case should not be dismissed. App 8a. The subject action included the race-based hostile work environment count from the California case. In response to the District Court's order, Haynie amended his original Complaint below by filing a four count Amended Complaint, again with claims, except for the race-based hostile work environment count, which accrued

after the initiation of the California case – retaliation, retaliatory hostile work environment, and constructive discharge.

On United's motion to dismiss, the trial court dismissed Haynie's claims for retaliation, retaliatory hostile work environment and constructive discharge, which were a part of the action initiated below, and proceeded with only his race-based hostile work environment count, which was the basis of California case. App 12a. The lower court ruled essentially that Haynie did not have leave of court to initiate the original action below for claims which did not accrue until after the California case was filed, and for which the district court below was the proper venue for bringing the original action for those claims.

The trial court subsequently granted United's motion for summary judgment on the race-based hostile work environment count from the California case, entered final judgment thereon, and denied Haynie's Rule 59 Motion to Alter, Amend and Vacate.

STATEMENT OF FACTS

1. Haynie's Early Years With United

Haynie is an African-American male who began working as a pilot with United on December 5, 1988. Haynie was employed at United from 1988 until he was forced to resign on March 4, 2014. He was exposed to a hostile work environment based on race shortly after the commencement of his employment in December 1988, which continued at varying levels of severity until his forced resignation in March 2014.

Much of the harassment that Haynie endured stemmed from litigation surrounding United's employment practices. On April 14, 1973, the United States initiated litigation against United alleging a pattern and practice of race-based discrimination against African-Americans in hiring, termination, and other employment practices. *USA v. United Airlines, Inc.*, CA No. 73-c-972. In April 1976, the court entered a Consent Decree that required that United engage in a wide range of remedial activities including changes in the hiring of pilots. *Id.* As a result, many white pilots resented newly hired African-American pilots.

Haynie endured a litany of hostile and harassing events that began with his hiring and continued throughout his employment. Many of these events were unquestionably racial in nature. For instance, during his initial training, United's employees were unwelcoming, and repeatedly made racial statements during his initial training. Haynie often heard coworkers say "these niggers getting the jobs." In fact, Haynie overheard the n-word many times while he was at the training center. White coworkers resented Haynie and other newly hired African-American pilots and perceived them to be beneficiaries of preferential treatment due to the existence of a Consent Order between United and the Equal Employment Opportunity Commission ("EEOC"). White supervisors made things unfairly difficult by unfairly failing African-American pilots on "check rides." As Haynie testified, "No matter what [he] did, it was wrong."

In 2000, his then-Chief Pilot and supervisor, Bob Spielman, told Haynie "I am the Chief Pilot and

I own you!" Of course, any African-American descendant of slaves will reasonably perceive being told that he is "owned" as being a racial statement.

2. Zurich Incident

In 2008, a flight attendant told Haynie that his first officer was so inebriated that he should not be allowed to fly the next morning. Haynie initially asked the pilot to call in sick. The pilot responded by saying "Fuck ALPA and fuck you, nigger." As a result, Haynie was forced to report the pilot, and the Chief Pilot Walter Clark removed the first officer from the flight duties.

3. Continuing Harassment

In 2008, Haynie received prank phone calls in his hotel room on layovers. Haynie believes the calls occurred "three or four . . . maybe five times over a month" before he began to take his hotel room phone off the hook—stopping the calls. The callers would mimic "burp" sounds, "fart noises," or "[s]ometimes it would be silence." Haynie reported these calls to his flight office and his supervisors.

On multiple occasions, Haynie would return to United's flight operations office at his domicile (or base) in the Dulles International Airport three or four days later to find that his flight bag was "deliberately" moved, *i.e.*, "in the closet way up in the corner buried." This occurred four or five times before he ended it by taking his flight bag home with him.

In 2010, Haynie's corporate mailbox ("V file") in United's flight office at the Dulles International Airport, repeatedly went missing.

Most notably, Haynie was repeatedly exposed to racist graffiti, i.e. handwritten messages, directed at him from 2008 until his resignation. Haynie testified about and provided pictures of multiple instances of graffiti directed toward him. For instance, the most notable graffiti that Haynie observed stated "Nigger Haynie." Other examples of the graffiti included "Haynie Sucks Dick" "Fuck you Haynie" and "Haynie You Suck." Much of the graffiti was written inside a folder or panel in the cockpit where only his United coworkers had access.

Haynie complained to his supervisor, Assistant Chief Pilot Laura (Logan) Brennan about the graffiti. Logan saw that the graffiti was removed, but took no other action. In fact, Logan told Haynie that he was being too sensitive. Haynie also recorded the instances of graffiti in United's logbooks, so United's management could see the reports of racist graffiti. He notified managerial employee James Frank and even showed the graffiti to him. Frank took a picture of the graffiti, but took no further actions. Haynie also told Logan that his v-file was disappearing and his flight bag was being moved. However, despite these notifications, neither Logan nor United did anything to investigate any of the incidents.

In October 2012, someone tampered with the wheels on Haynie's vehicle on two occasions: loosening of lug nuts (May 2012) and puncturing a tire (October 2012).

Milder Flight Deck Incident

United allowed Haynie's subordinates to treat him disrespectfully with impunity. Haynie's flight schedule was paired with First Officer Charles Milder

on June 10 through 12, 2012. On June 10, 2012 and June 11, 2012, Haynie successfully completed flights with Milder, without incident, but Haynie found Milder to be unfriendly, rude, and "insubordinate." Haynie testified that Milder was "stand-offish and non-communicative." Milder ignored Haynie regarding a key operational issue when Milder refused to follow key standard operating procedures and complete the "go dark" checklist. Haynie told supervisor James Smith that Milder had refused to do the "go dark" checklist.

Citing Milder's demeanor, Haynie asked Smith, one of his managing pilots, to remove Milder from the third day of the schedule on June 12, 2012. Smith, instead, asked that Haynie talk through the matter with Milder, his subordinate, and Haynie agreed. Haynie spoke to Milder about his demeanor in the flight deck). Milder admitted to Haynie that he was giving him a hard time and that he was motivated the fact that Haynie had previously reported a pilot for being drunk. This was the same pilot who responded to Haynie by saying "Fuck you nigger!" Instead of disciplining Milder for being insubordinate to Haynie, this incident led to Haynie's forced separation from United.

4. Circumstances Leading to Haynie's Forced Resignation

After the Flight Deck Incident, United placed Haynie on a do-not-fly ("DNF") status and required Haynie to obtain a medical clearance. At a disciplinary hearing on January 8, 2013, United suspended Haynie for sixty days without pay. United conducted a second disciplinary hearing on May 9,

2013 and suspended Haynie for ninety days without pay. Prior to the second disciplinary hearing, United and Haynie agreed to restore Haynie to DNF status in exchange for Haynie's agreement to visit a medical practitioner who was agreeable to both parties. United and Haynie could not agree on a mutually acceptable doctor to conduct the examination. United never allowed Haynie to fly again and on March 4, 2014, left with no other choice, Haynie submitted his resignation.

A. RELEVANT PROCEDURAL HISTORY

Haynie brought this individual original action against his employer, United, by filing a Complaint on May 14, 2015 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). This action was one for declaratory, permanent injunctive, and monetary relief and sought redress for the deprivation of Haynie's civil rights, as prohibited by Title VII and Section 1981, which prohibit, *inter alia,* racially discriminatory terms and conditions of employment, and the creation of a hostile work environment. Haynie also sought damages resulting from his economic losses, including those, which occurred as a result of his separation from employment with United, due to the hostile work environment, retaliation, retaliatory hostile work environment, and constructive discharge, as well as non-economic damages for, among other non-physiological injuries, mental and emotional distress.

These claims, except for the race-based hostile work environment count, accrued after he filed an action against United in May 2012 for race-based

hostile work environment in U.S. District Court N.D. California ("California Case"). Haynie's California Case – later severed, transferred to, and consolidated with the original case below - was originally part of a multiple plaintiffs employment discrimination case.

The California case was transferred to the Eastern District of Virginia where the trial court, *sua sponte*, ordered Haynie to show cause why the California case should not be dismissed. The subject action included the race-based hostile work environment count from the California case. Haynie amended his original Complaint by filing a four count Amended Complaint, again with claims, except for the race-based hostile work environment count, which accrued after the initiation of the California case – retaliation, retaliatory hostile work environment, and constructive discharge.

At the hearing on the Court's order to show cause, the Court ordered Haynie to file an amended complaint that consolidated the cases and included all claims except those excluded by the California court. App 10a, 17a. When Haynie filed the amended complaint, as ordered, United filed a motion to dismiss.

On United's motion to dismiss, the trial court dismissed Haynie's claims for retaliation, retaliatory hostile work environment and constructive discharge, which were a part of the action initiated below, and proceeded with only his race-based hostile work environment count, which was the basis of California case. The lower court ruled essentially that Haynie did not have leave of court to initiate the original action below for claims, which did not accrue until

after the California case was filed, and for which the District Court below was the proper venue for bringing the original action for those claims.

On May 5, 2017, United filed a Motion for Summary Judgment. This Court granted the motion and entered an Order of Dismissal on June 28, 2017 granting United's Motion for Summary Judgment on the race-based hostile work environment count from the California case and denying Haynie's Motion for Partial Summary Judgment. The trial court subsequently denied Haynie's Rule 59 Motion to Alter, Amend and Vacate.

A panel of the Fourth Circuit affirmed the district court's judgment in part and vacated in part district court's judgment in part and remanded the case to the district court for additional analysis of the award of attorney's fees. The Fourth Circuit affirmed the district court's orders as to the motion to dismiss, motion for summary judgment, motion under Federal Rule of Civil Procedure 59(e), and the award of costs to United for a discovery request for the reasons stated by the district court. The Fourth Circuit offered no further explanation for its ruling. The Fourth Circuit vacated the district court's decision to award attorney's fees in the amount of $30,000 based upon the district court's failure to consider the factors outlined in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226, n.28 (4th Cir. 1978).

The Petitioner sought rehearing and the petition for rehearing and a rehearing en banc was denied. App 15a.

SUMMARY OF ARGUMENT

Haynie originally filed a suit in California District court as part of a multiple plaintiffs employment discrimination case against United. While the case was pending, United retaliated against Haynie and subsequently forced him to resign. As a result, Haynie filed a second EEOC charge and subsequently filed an action for retaliation, retaliatory hostile work environment, and constructive discharge in the Eastern District. Haynie's California case was severed and transferred to the Eastern District of Virginia.

The District Court ordered that Haynie file an amended complaint consolidating the two cases, but granted United's motion to dismiss the retaliation and constructive discharge claims. The District Court erred by dismissing Haynie's claims for retaliation, retaliatory hostile work environment and constructive discharge. The dismissal of these claims made it more difficult for Haynie to survive United's Motion for Summary Judgment, because it raised the bar concerning the facts that Haynie had to prove and it narrowed the scope of evidence that Haynie could use to do so.

Ultimately, the District Court erred by granting United's motion for summary judgment despite the existence of disputed issues of material facts. Most notably, the Court improperly applied *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) and failed to consider evidence that proved that Haynie was subjected to a hostile work environment.

REASONS FOR GRANTING THE PETITION

A. This Case Presents Recurring Questions of Exceptional Importance Warranting the Court's Immediate Resolution.

Despite this Court's ruling in Morgan, many lower courts continue to apply Morgan too narrowly. These courts continue to dismiss legitimate cases where employees are subjected to a hostile work environment simply because primary harassing acts occur outside the limitations period. The resolution of this question is important to employees and employers to establish clearly the standard by which the cases should be judged. This issue will not be resolved without this Court's guidance.

B. The Lower Courts Erred By Applying *Morgan* Improperly and Refusing to Acknowledge that the Harassing Behavior that Occurred Within the Statute of Limitations Period Could be Linked to More Overtly Racist Behavior.

The lower courts erred in not properly considering circumstantial evidence and the totality of circumstances as mandated by *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 at 117, 122 S. Ct. 2061 (2002) (even if certain conduct is not actionable because it is untimely, evidence of that conduct may still properly be considered as relevant background evidence); (a hostile work environment claim depends on "a series of separate acts that collectively constitute one 'unlawful employment practice.'" (internal citation omitted); *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264, 273 (2015) ("hostile work environments generally result only

after an accumulation of discrete instances of harassment" (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 at 115) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.... Such claims are based on the cumulative effect of individual acts."). The lower courts should have left it to a jury to *consider all* of the discrete and hostile acts directed at Haynie, including the "Nigger Haynie" graffiti, as part of the background, atmosphere, and totality of circumstances of Haynie's hostile work environment, particularly regarding the issues of the racial motives and intent, not just by Haynie's immediate supervisors, but by United itself.

While the trial court made reference to the basic principles of *Nat'l R.R. Passenger Corp.,* the trial court incorrectly viewed the hostile work environment evidence too narrowly and applied an overly restrictive view of the evidence of racial hostile work environment. At the June 23, 2017 hearing on the summary judgment motions, the Court stated:

> THE COURT: "Now you do correctly point out that the way the law is structured, events that occurred before the cutoff can still be considered as part of the totality of events that create a racially hostile environment if there are meaningful events of hostility that occur within the proper time period, and I - - as I understand this case, there are only three groupings of events that could possibly be within the time period" App 54a.

> MR. HAIRSTON: "If I could address that, one, we would suggest that there were instances of racial graffiti and that Captain Haynie did, in fact, testify to the fact that there were instances of racial graffiti. In fact, there was one particular instance that he indicated that it did - - it said, "Nigger Haynie." App 55a.
>
> THE COURT: "But the problem is there's no evidence of when that occurred. It had to occur - - that has to occur within the time period to be actionable. That's your problem. The fact that - - the fact that six years ago, that graffiti may have existed doesn't mean that the fact that "Haynie sucks," which occurs within the tine period, is part of a continuing pattern of race-based hostility. App 55a.

The Court trivialized the massive significance of the "Nigger Haynie" graffiti, particularly as to how it permeated and tinged all of the other hostile graffiti with a racial motive. In the case of *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264, supra, the Court noted at page 280: "We also grasp that the use of Clubb's chosen slur—"porch monkey"—is about as odious as the use of the word "nigger." *See Spriggs,* 242 F.3d at 185. The latter epithet, of course, "is pure anathema to African-Americans." *Id.*

The Court also failed to consider the "Milder" incident in its proper context. While Milder did not actually use a racial slur, his animosity toward

Captain Haynie was in support of an individual who had said "Fuck you nigger!" to Haynie.

As a result of the Court's improper analysis and narrow view of the evidence, the Court deprived a rational juror, if allowed to hear testimony, the ability to reasonably conclude that Haynie was indeed subjected to a hostile work environment on account of his race.

C. The Fourth Circuit's Decision to Dismiss Haynie's Claims of Retaliation, Retaliatory Hostile Work Environment, and Constructive Discharge Was Incorrect and Should Be Reversed Because the Claims Were Filed Timely.

The parties first appeared before this court on October 2, 2015 for a status hearing. At that time, there were two cases pending before the court – action number 1:15cv604 ("Haynie I") that was transferred from a California court and action number 1:15cv625 ("Haynie II"), a newly filed action. At that time, the Haynie proposed to abandon all but four counts of his Complaints, leaving counts of hostile work environment, retaliation, retaliatory hostile work environment, and constructive discharge to be resolved by this court. App ___. Haynie suggested that the court consolidate these claims into one action, because these retaliation, retaliatory hostile work environment, and constructive discharge claims were not previously raised in Haynie I. App 20a.

At that status hearing, the Court ordered Haynie to file an amended complaint in Haynie II that did not incorporate any issue already resolved during

earlier litigation in California. App 10a. Specifically, the Court stated:

> I'm allowing the Haynie to file, in fact, they have to file within 14 days a proper first amendment to the 625…If you have a proper complaint – claim for constructive charge (sic) and for retaliation, then you can put them in there, and we'll get it all resolved in one matter.

App 24a-25a.

The Court's ruling and Order directing Haynie to file an amended complaint did not include instructions to file for leave to amend. Haynie reasonably interpreted the Court's statement and ruling to mean that the Court was directing Haynie to file an amended complaint, which could include the retaliation, retaliatory hostile work environment, and constructive discharge claims. There was no indication whatsoever that a motion for leave to amend was necessary.

Pursuant to the Court's directive, the Haynie filed his Amended Complaint. Subsequently, United filed a motion to dismiss the Amended Complaint for two primary reasons. First, United asserted that the Haynie had not sought leave to amend its complaint. Second, United maintained that the retaliation, retaliatory hostile work environment, and constructive discharge claims were time-barred. The Court granted United's motion and dismissed all but Haynie's claim for hostile work environment. App 12a.

Haynie contends that the Court's Order dismissing the Haynie's claims for retaliation, retaliatory hostile work environment, and constructive discharge was error for three reasons. First, the Court's dismissal of the claims directly contradicted the plain meaning of the court's previous ruling on October 2, 2015. In essence, the Court ordered Haynie to file an amended complaint, but dismissed the retaliation and constructive discharge claims when Haynie complied with the court's order. Given the court's instructions on October 2, 2015, it was certainly reasonable for the Haynie to believe that he did not need to seek leave to amend. The Court abused its discretion by dismissing the claims.

Second, the Court improperly converted United's Motion to Dismiss to a Motion for Summary Judgment by considering United's exhibits and requiring the Haynie to provide factual evidence to support his claim that the Title VII constructive discharge and retaliation claims were not time-barred without a reasonable opportunity to do so. Rule 12(d) of the Federal Rules of Civil Procedure provides:

> If, on a motion under 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Haynie was denied an opportunity to present evidence that the claims were timely. At the hearing, the Court accepted United's argument that the claims

for retaliation, retaliatory hostile work environment, and constructive discharge were filed 91 days after the issuance of the right to sue letter. App 27a. Haynie informed the Court that, if given the opportunity, he could provide proof that he did not receive the right to sue letter by the presumed date and that he desired to file an affidavit that would address issues relating to the equitable tolling of the statute of limitations. App 40a. However, the Court rejected Haynie's proffer and dismissed the claims of retaliation, retaliatory hostile work environment, and constructive discharge App 12a.

In *Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985), the court held that the trial court abused its discretion when it converted a Rule 12(b)(6) motion to a summary motion without giving the non-moving party a "reasonable opportunity for discovery." In *Gay*, the defendants filed a motion to dismiss pursuant to Rule 12(b)(6) and filed affidavits in support of their motion. *Id.* at 176-177. In ruling on the defendant's motion, the court considered material outside the pleadings. *Id*. at 177. The *Gay* court held:

> [W]hen matters outside the pleadings are submitted with a motion to dismiss . . . the motion shall be treated as one for summary judgment. . . and all parties shall be given reasonable opportunity to present material made pertinent to such a motion . . .In interpreting the requirements of this rule, the court has held that the term "reasonable opportunity" requires that all parties be given " 'some indication by the court . . .that it is treating the

> 12(b)(6) motion as a motion for summary judgment,' and with the consequent right in the opposing party to file counter affidavits or pursue reasonable discovery." Additional cites omitted. *Id*. at 177.

In this case, Haynie pled that he filed his Complaint within 90 days of receiving the right to sue letter. United filed a Request for Judicial Notice, requesting that the Court consider ten exhibits and argued that the exhibits demonstrated that the Complaint was not filed timely. By considering these exhibits, particularly the right to sue letters, the court converted United's Rule 12(b)(6) motion to a motion for summary judgment. Over Haynie's objection, the Court then refused to allow Haynie a reasonable opportunity to pursue reasonable discovery and to present material pertinent to the motion - namely affidavits relating to the receipt of the right to sue letter. As the *Gay* court held: the lack of reasonable opportunity for discovery [makes] conversion of the Rule 12(b)(6) motion "wholly inappropriate." *Gay*, 761 F.2d at 177-178.

Third, even if Haynie's Title VII claims for retaliation, retaliatory hostile work environment, and constructive discharge were time-barred, they were filed timely, pursuant to Haynie's Section 1981 action. Haynie was constructively discharged on March 4, 2014. Moreover, Haynie alleged that the retaliatory actions persisted up to the date of his resignation and included the forced termination of his employment on March 4, 2014.

It is well-settled that the statute of limitations for Section 1981 claims is four years. *James v. Circuit City Stores, Inc.*, 370 F.3d 417, 420 (4th Cir. 2004). Haynie's second suit was filed on May 14, 2015, so the retaliation and constructive discharge claims were clearly within the four-year period. Therefore, the Court should have allowed Haynie to pursue these claims.

The dismissal of the retaliation claim had a significant impact on the litigation of this case and the Court's consideration and ultimate dismissal of the Haynie's hostile work environment claim. When the Court dismissed the retaliation and constructive discharge claims, it stated that "[c]ount 1 [the hostile work environment claim] is going to allow you to address most of the issues that appear to be troubling your client, and your case can still go forward." App 43a. That was only partially true.

The Court's elimination of the retaliation and constructive discharge claims severely limited the usefulness of Haynie's evidence that was outside the statutory period for harassment. The Court then rejected Haynie's reliance on *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) by holding that Haynie could not identify any incidents of discrimination within the statutory time frame, and therefore, Haynie had no events that he could link to the previous acts of discrimination [JA 425] The Supreme Court has held that in a constructive discharge case, "the employee's resignation is the culmination of the intolerable discriminatory conduct of the employer such that the relevant limitation period starts with the employee's resignation, not the last act of the employer. *Guessous v. Fairview*

Property Inv., 828 F.3d 208, 222 (4th Cir. 2016) citing *Green*, 136 S. Ct. 1769, 1777-78 (2016).

If Haynie's retaliation, retaliatory hostile work environment, and constructive discharge claims had survived, Haynie would have had a better opportunity to link the previous acts to the forced resignation and the retaliation that preceded it. Moreover, there is a lower threshold for proving a retaliation claim.

D. Haynie had an Absolute Right and No Choice But to File A Second Action Relating to His Separate Claims for Constructive Discharge, Retaliation and Retaliatory Hostile Work Environment Addressed in His Latest EEOC Complaint, and They Were Improperly Dismissed.

Haynie I arose out of facts that led to a right to sue letter issued on August 17, 2012. App 60a. Subsequent to and because of the filing of that EEOC complaint, Haynie was subjected to harassment, a hostile work environment, and was constructively discharged on March 4, 2014. As a result, Haynie exercised his absolute right to file a second EEOC complaint regarding these illegal retaliatory conditions. App 63a. A right to sue notice for the second EEOC complaint was issued on February 9, 2015. App 66a. Haynie then exercised his absolute right to file a complaint arising from United's new treatment and filed Haynie II on May 14, 2015.

The California court entered its Order severing the cases and transferring venue in Haynie I on February 2, 2015. However, the case remained in a legal holding pattern until it was finally transferred to the Eastern District of Virginia on May 11, 2015.

This was the same period during which Haynie's time for filing a complaint for actions arising from his most recent right to sue letter was expiring. Haynie had no choice but to file the complaint without seeking leave from the District Court.

If Haynie had not filed a new action relating to the claims in his second EEOC complaint and right to sue letter, he risked having the claim dismissed as untimely. In *Angles v. Dollar Tree Stores*, the court held that the Plaintiff's complaint was time-barred despite the fact that he had moved to amend a pending complaint to join the additional claim. *Angles v. Dollar Tree Stores*, No. 10-1723, 1, 14 (4th Cir. 2012). The *Angles* plaintiff received a right to sue letter while he had one action pending. *Id.* at 3-4. The trial court denied his motion for leave to amend the existing complaint to add the additional claims relating to the right to sue letter. *Id.* at 5. He subsequently filed a new complaint, which, by that point, was beyond the Title VII ninety-day limitations period. *Id.* The Fourth Circuit held that it was proper to dismiss the new complaint as untimely, because the plaintiff's efforts to amend the first complaint did not toll the statute of limitations. *Id.* at 14. Had Captain Haynie filed a motion to amend rather than filing a new suit, he risked the same fate with this Court.

The trial court's dismissal of Haynie's retaliation claims dramatically affected the case and the consideration of United's Motion for Summary Judgment by raising the bar that Haynie had to clear. It is undisputed that, based on the evidence presented by United, that the June 12, 2012 Milder incident triggered a series of events, which culminated in

Haynie's ultimate separation from his employment, occurred just a few weeks after Haynie filed a May, 2012 discrimination lawsuit against United in San Francisco, California. Haynie's hostile work environment claim encompasses a claim for a retaliatory hostile work environment, which should be a viable part of Haynie's claim, notwithstanding the rulings of this Court on November 20, 2015.

The Fourth Circuit has long recognized a retaliatory hostile work environment claim. *Ross v. Communications Satellite Corp.*, 759 F.2d 355 at 363 (4th Cir. 1985) ("retaliatory harassment" can also comprise adverse employment action); *Van Gunten v. Maryland*, 243 F.3d 858, 864-65 (4th Cir. 2001) abrogated on other grounds by *Burlington N.*, 548 U.S. 53, 126 S. Ct. 240. By failing to acknowledge the viability of Haynie's retaliatory hostile work environment claim, the Court failed to consider the evidence through the standards applicable to a retaliation claim and did not give credence to the motivation for the admittedly hostile acts against Captain Haynie.

These events were triggered by his discrimination claims and even if not explicitly racial, the retaliatory motives related to Haynie's hostile work environment. The Court's comments at the hearing confirmed that some of the acts against Haynie were "hostile". App 54a. The Court's view that the Milder cockpit incident "was not racial" ignored context, and if considered through the lens of a retaliation claim should have created a jury issue. Milder was a white subordinate who, per Haynie, was disrespectful of and insubordinate to Haynie, as

well as company rules. United investigated and disciplined Haynie, but not Milder.

In *Burlington N & Santa Fe RR Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, the Supreme Court recognized that the standard for retaliation *is not as high as the standard for discrimination under Title VII*. The Court held that, to prove retaliation, "a Haynie must show that a reasonable employee would have found the challenged action materially adverse, `which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 2415. In *Burlington*, the Court acknowledged that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. Instead, it includes actions that would have been materially adverse to a reasonable employee to the point that they could dissuade a reasonable worker from making or supporting a charge of discrimination. The *Burlington* Court stated:

> "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." 548 U.S. 53 at p. 69.

E. The Fourth Circuit Erred by Upholding the Lower Court's Decision to Grant United's Motion for Summary Judgment Despite the Existence of Issues of Material Issues of Disputed Fact.

A party seeking summary judgment must establish with admissible evidence that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.[1] In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105 (2000), the Supreme Court stated that in resolving whether a motion for summary judgment establishes "no genuine issue as to any material fact", all evidence and reasonable inferences must be viewed in the light most favorable to the non-movant. The courts may give credence to the evidence favorable to the movant only to the extent that it is "uncontradicted and unimpeached", at least to the extent it comes from "disinterested witnesses."[2] Sufficient evidence exists in the record to confirm the disputed versions of events and raise triable issues of fact to preclude summary judgment, even based on the United's exhibits and evidence.

Instead of following the foregoing principles, the Court adopted the United's version of disputed facts and in so doing, impermissibly engaged in summary judgment fact finding. A district court must "view the evidence in the light most favorable to the nonmoving party. *Jacobs v. N.C. Admin. Office of the*

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[1] Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[2] *Reeves*, 530 U.S. at 151.

Courts (citing *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam). "Summary Judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." *Id.* Therefore, the court cannot weigh the evidence or make credibility determinations. *Id.* at 569. The district court may not "credit the evidence of the party seeking summary judgment and fail properly to acknowledge key evidence offered by the party opposing that motion." *Id.* at 570. See also: *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105 (2000) (Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge). Summary judgment is not to be a trial on affidavits, and facts are not to be found. Finding of facts is clear error. See *Jacobs v. North Carolina Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015).

The facts set forth by United in its Memorandum in support of its Motion for Summary Judgment demonstrated that Haynie endured severe and pervasive harassment that was sufficient to survive the Motion. United's Memorandum described a litany of racially hostile events that Haynie endured over many years. These events began with Haynie's hiring and continued until his forced resignation. They included, but were not limited to:

> Racial Insults during his initial training,
>
> Hostile comments by Supervisor Bob Speilman that "I own you!"
>
> Zurich incident in which a subordinate said "Fuck you Nigger!"

> Prank phone calls,
>
> Hiding his flight bags,
>
> Making his electronic mailbox disappear,
>
> Graffiti in his cockpits including "Nigger Haynie,"
>
> Tampering with his vehicles,
>
> Milder Incident in which a subordinate is disrespectful, insubordinate, and refuses to perform key operating procedures.

These incidents must be viewed in the context that many of United's Caucasian pilots resented black pilots because of the consent decree that caused United to change its hiring practices as it related to hiring African-American pilots. This created animosity and a hostile work environment that permeated the work environment for years. When viewed in this light, these incidents take on an added racial significance.

For instance, United and the District Court minimized the Milder Incident and failed to attach any racial significance to the event. However. When viewed in context, Milder was not just an unfriendly pilot. Milder was a Caucasian pilot who resented taking instructions from an African-American pilot, and expressed that resentment by being rude and insubordinate and by refusing to follow key operating procedures. Milder even admitted to Haynie that he was deliberately giving him a hard time. Yet, United did nothing when Haynie reported the conduct, but ask Haynie to talk with Milder.

Similarly, United and the District Court focused on the fact that much of the graffiti was not explicitly racial in nature. However, the "Nigger Haynie" graffiti should not be viewed as an isolated incident. It is one part of a pattern of sustained graffiti directed at Haynie. That pattern of graffiti is part of a larger pattern of sustained harassment directed at Haynie. When all of this conduct is viewed together, one reaches the unmistakable conclusion that Haynie was the victim of a hostile work environment because of his race.

At a minimum, when these facts are viewed in the proper context, they establish genuine issues of material fact that warranted the denial of United's Motion for Summary Judgment. Case law is clear that summary judgment should not be granted unless the motion for summary judgment establishes that there is "no genuine issue as to any material fact" and that all evidence and reasonable inferences must be viewed in the light most favorable to the non-moving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105 (2000). Haynie presented enough facts, even if limited to those listed by United in its Motion for Summary Judgment to create genuine issues of material fact that should have been considered by a jury.

Moreover, there was sufficient evidence that Haynie complained of the hostile environment and United failed to investigate. Title VII bars employers from negligently failing to discover co-worker harassment or failing to respond to a report of such harassment-irrespective of whether the harassing conduct also predated the period of liability. In the

context of co-worker harassment, "the employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it." *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333-34 (4th Cir. 2003). In construing this standard, the Fourth Circuit has held that "[k]nowledge of harassment can be imputed to an employer if a reasonable person, intent on complying with Title VII, would have known about the harassment . . . Once the employer has notice, then it ***must*** respond with remedial action reasonably calculated to end the harassment." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008) (Emphasis added; internal quotations admitted.)

In the case at bar, United's own evidence established multiple instances of harassment that should have put United on notice and sparked an investigation. Haynie recorded each instance of graffiti in United's logbooks. This would have included the "Nigger Haynie" graffiti, which alone should have sparked an investigation. United had this information in their possession; yet, there is no evidence whatsoever that United ever took any steps to investigate.

Haynie reported the graffiti to supervisor, Laura Logan, who told him that he was being too sensitive. He showed the graffiti to managerial employee, James Frank, who took a picture of the graffiti, but did no more.

As *Morgan* reflects, hostile work environment claims, by their very nature, extend over a period of time, sometimes a long time – they are both "repeated" and "cumulative." If the Haynie's evidence

of explicitly racial harassment and the non-explicit harassment is viewed as a continuum of events, instead of isolated events, there is sufficient evidence to allow a jury to link the events that occurred before and after the statutory period. This is exactly what the Morgan court envisioned when it held that Title VII does not "bar an employee from using the prior acts as background evidence in support of a timely claim. *Morgan*, 536 U.S. at 114.

CONCLUSION

The petition for writ of certiorari should be granted.

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