No. 10-1254

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL FORD,

Plaintiff-Appellant,

v.

JAMES MANSFIELD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

APPELLANT'S CORRECTED OPENING BRIEF

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I. SUMMARY OF THE CASE.

This case arises from James Mansfield's personal campaign to obtain the termination of Michael Ford, the first African American building manager for the condominium association Mr. Mansfield represented, through the dissemination of false and racially stereotyped information about Mr. Ford.

Mr. Mansfield, acting in concert with members of the Association who made discriminatory remarks about Mr. Ford, initiated multiple investigations of Mr. Ford and the African American President of the Association, threatened to sue the Association's management company over Mr. Ford's hiring, distributed a letter that misrepresented Mr. Ford's employment background and a pending assault charge, and orchestrated at least two meetings in which he repeated his misrepresentations. Mr. Mansfield made these knowingly false statements with the intent and the desired effect of whipping up the residents to fear and terminate Mr. Ford. Mr. Mansfield's actions were motivated by Mr. Ford's race.

Mr. Mansfield's actions were clearly outside the scope of his representation of the Association, and ultimately deemed to be a conflict of interest by another court. His racially-based actions interfered with Mr. Ford's employment in violation of Section 1981 of the Civil Rights Act. Therefore, the district court's grant of summary judgment was reversible error.

II. JURISDICTIONAL STATEMENT.

On December 19, 2008, Mr. Ford brought this action against Mr. Mansfield, and several other defendants, in the United States District Court for the Eastern District of Virginia under 42 U.S.C. § 1981 ("Section 1981"), and against two corporate defendants under Title VII, 42 U.S.C. § 2000e-5. (JA 17-41.) The district court had subject matter jurisdiction under 28 U.S.C. § 1331.

On February 1, 2010, the district court granted Mr. Mansfield's motion for summary judgment, which was a final judgment that disposed of all of the claims. (JA 1623-1636.) On March 2, 2010, Mr. Ford timely filed a notice of appeal, in accordance with Rule 4(a)(1)(A), Fed. R. App. P. (JA 1637-1638.) This Court has jurisdiction over Mr. Ford's appeal, pursuant to 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUES.

1. Whether the district court erred as a matter of law in determining that the comments made to Mr. Ford did not reflect racial animus.

2. Whether the district court erred as a matter of law by failing to consider circumstantial evidence of discrimination, which the courts acknowledge can be as probative as direct evidence.

3. Whether the district court erred as a matter of law in requiring an employment relationship between Mr. Ford and Mr. Mansfield to prove a Section 1981 claim.

4. Whether the district court erred as a matter of law in treating Mr. Ford's prayer for emotional distress damages under Section 1981 as a separate claim for intentional infliction of emotional distress.

IV. STATEMENT OF THE CASE.

On December 19, 2008, Mr. Ford brought this race discrimination action against Mr. Mansfield and other defendants. (JA 17-41.) On April 21, 2009, Mr. Ford filed an amended complaint. (JA 42-70.) Mr. Ford alleged that Mr. Mansfield's racial animus motivated him to interfere with Mr. Ford's employment. (JA 65-66, at ¶¶ 116, 117.) He requested, as a remedy, compensatory damages, including back pay, front pay, and emotional distress damages. (JA 68.)

The district court denied Mr. Mansfield's motion to dismiss the Amended Complaint, on the grounds that: "Plaintiff has stated a claim upon which relief can be granted and because there may be material facts in dispute." (JA 71.)

A. Motion to Strike Emotional Distress Damages.

Mr. Mansfield filed his Renewed Motion to Strike Plaintiff's Claim for Emotional Distress Damages, which argued that the district court should strike Mr. Ford's prayer for relief for emotional distress damages because he had not produced medical records from the relevant time period that proved his emotional distress. (JA 86-93.)

Mr. Ford's opposition explained that he had produced all records in his

possession (JA 623-626), and cited Fourth Circuit precedent that his testimony alone – without medical records – is sufficient to support emotional distress damages. (JA 626-627.) He explained that Mr. Mansfield would have the opportunity to cross-examine Mr. Ford and his expert witness, Dr. Thomas Goldman, so the jury should be permitted to determine the emotional distress damages. (JA 627.)

B. Motion for Summary Judgment on the Section 1981 Claim.

Mr. Mansfield's summary judgment motion argued that he never referenced Mr. Ford's race or used racial epithets. (JA 119, 121.) Mr. Mansfield also argued that he could not be held liable under Section 1981 because he was not Mr. Ford's employer and had no contractual relationship with Mr. Ford. (JA 122.)

Mr. Ford's opposition cited case law for the proposition that Section 1981 covered persons such as Mr. Mansfield, without a contractual relationship with the plaintiff. (JA 678-679.) He also argued that he had presented substantial circumstantial evidence that could lead a reasonable jury to hold Mr. Mansfield liable for interfering with Mr. Ford's employment relationship. (JA 680-686.)

C. The District Court's Decision.

On February 1, 2010, the district court granted Mr. Mansfield's motion for summary judgment and his motion to strike Mr. Ford's request for emotional distress damages. (JA 1623-1636.) The district court held that Mr. Ford could not

show that Mr. Mansfield discriminated against him because Mr. Ford "has not presented any evidence that Defendant ever referenced his race or made any racial [sic] derogatory comments." (JA 1630-1631.) The district court also made the factual finding that the "much more obvious explanation is that Defendant was concerned about Plaintiff's criminal record and the pending charges against him." (JA 1631.) The district court did not hold that a reasonable jury could not find that Mr. Mansfield acted because of his racial animus.

The district court, in addressing whether the parties must be in a contractual relationship to impose liability under Section 1981, noted that Mr. Mansfield "could theoretically be liable depending on what role he played in the termination." (JA 1631.) However, it then held that, because the Horizon House Board "had more than adequate reasons for wanting [Mr. Ford] fired, none of which had anything to do with his race," it need not address that issue. (JA 1631-1632.) The district court recognized that Mr. Mansfield "may have made some comments and taken action to have [Mr. Ford] terminated," but held that Mr. Ford must also show that the Board acted because of racial animus. (*Id.*)

The district court granted Mr. Mansfield's motion to strike Mr. Ford's request for emotional distress damages because it held that he could not "make out a claim for intentional infliction of emotional distress damages." (JA 1634-1635.) Mr. Ford never brought a claim for intentional infliction of emotional distress, but

instead alleged that he had suffered emotional distress damages as a result of Mr. Mansfield's racially discriminatory actions.

The district court denied Mr. Mansfield's motion for attorney's fees: "Plaintiff acted in good faith in filing suit against Defendant Mr. Mansfield, and that the case was not frivolous, unreasonable, or without foundation." (JA 1641.) The district court also disallowed nearly 40 percent of Mr. Mansfield's bill of costs. (JA 1641-1647.)

V. STATEMENT OF FACTS.

A. Horizon House.

Horizon House is a condominium building in Arlington, Virginia. All unit owners are members of the Association (JA 169, at ¶ 3.1), governed by an elected Board of Directors. (JA 171-173.) The Board President serves as the point of contact for, and gives direction on behalf of, the Board to counsel for the Association, who was at that time appellee James Mansfield; the Board also gave direction to the building manager, who was appellant Michael Ford. (JA 695:18-696:4; JA 862:19-21; JA 1130-1131; JA 1132:15-1133:9.)

In late 2005 and early 2006, Zalco Realty ("Zalco"), a management company, managed Horizon House through a property manager and an on-site building manager. In 2005, Zalco assigned Michael Constant as the property manager at Horizon House. (JA 782:16-20.) In August 2005, Jennifer O'Keefe

served as the temporary interim building manager. (JA 697; JA 1134-1137.)

At the August 31, 2005 annual meeting, the Association members elected Vondell Carter, Susan Morris, Greg Weatherman, Adrienne Garretson, and David Faison as the new Board of the Association. (JA 858.) Mr. Carter, an Air Force colonel, was first elected to the Board in 2001 (JA 693:21-694:3), and in August 2005, became the first African American President of the Board, which had no other African American members. (JA 730:8-11; JA 747.)

B. Mr. Mansfield, as Counsel for the Association, was Only Authorized to Take Direction from the Board President.

Prior to Mr. Carter's election as Board President, the Board directed Mr. Mansfield to take direction from the President, rather than individual Board members, or other members of the Association. (JA 695:18-696:4; JA 862:19-21; JA 1132:15-1133:3.) After Mr. Carter's election as Board President, Mr. Mansfield began to act on his own and worked with residents other than Mr. Carter, rather than taking direction from the Board President. Bernard DiMuro, Mr. Ford's expert witness, testified that for a condominium association, while the client is the association, "that is an artificial entity," so the Board is "treat[ed] as the client." (JA 802:14-18 & JA 816 at ¶ 2.)

C. Horizon House Sought to Hire a Permanent Building Manager.

In November 2005, Mr. Constant provided the Board with the resumes of qualified applicants, including that of Mr. Ford. (JA 702:15-703:14; JA 788:14-

790:4.) Zalco scheduled interviews with these applicants and notified Board members of the interviews. (JA 1365:22-1366:8; JA 1367:5-15; JA 1368:20-22.) Ms. O'Keefe refused to submit an application and was not available for interviews. (JA 792 & JA 799.) Mr. Carter, Ms. Morris, and Mr. Weatherman showed up for Mr. Ford's scheduled interview, as did Mr. Constant. (JA 708:9-14.)[1] After the interviews, the Board members and Mr. Constant discussed the applicants and recommended three finalists, including Mr. Ford. (JA 795-796.)

D. <u>False Charges Pending Against Mr. Ford.</u>

Zalco performed routine background checks on all three finalists. (JA 797:15-21.) It found that a second degree assault charge and a fourth degree sex offense charge were pending against Mr. Ford in Prince George's County, Maryland. (JA 798:7-12; JA 1051:2-9.) Mr. Constant gave Mr. Carter this information. (JA 798:13-19.)

Over the next few days, Mr. Ford spoke with Mr. Carter and Mr. Constant to explain that the charges were false (JA 901:4-903:6, JA 904:2-906:8; JA 989, ¶¶ 17-18), and that the complainant made the charges because Mr. Ford had refused to renew her lease after he found she was committing fraud under housing regulations, and he denied any relationship with her. (*Id.*; JA 717:10-16.)

[1] Although Mr. Faison and Ms. Garretson were notified of Mr. Ford's interview, they chose not to attend. (JA 861:20-22; JA 1368:9-22.)

E. Mr. Mansfield Exceeded the Scope of His Representation by Interjecting Himself in Mr. Ford's Hiring.

Mr. Carter directed Mr. Mansfield to perform one limited task — to look into the pending charges and send a representative to observe Mr. Ford's trial. (JA 718:20-719:13.) In his 16 years as Horizon House counsel, Mr. Mansfield had never inserted himself in the hiring of any of the other building managers, all of whom had been Caucasian. (JA 1139:6-16.)

Mr. Ford asked William Ray Ford, his Maryland defense attorney, to speak with Mr. Carter about the case. (JA 904:2-9; JA 1036:14-1038:13.) William Ray Ford told Mr. Carter that Mr. Ford unequivocally denied the allegations. (JA 1038:14-18.)

Mr. Ford also asked William Ray Ford to speak with Mr. Mansfield. (JA 904:10-20; JA 1039:15-21.) William Ray Ford told Mr. Mansfield that Mr. Ford denied the allegations (JA 1038:14-18), and that Mr. Ford had not engaged in any sexual relationship with the complainant. (JA 1040:14-19.)

Mr. Mansfield asked William Ray Ford if Mr. Ford would agree to take a polygraph test. (JA 1041:2-1043:9.) After speaking with Mr. Ford, William Ray Ford told Mr. Mansfield that Mr. Ford would take the test. (JA 1044:20-1046:5.) William Ray Ford testified that he was confident that Mr. Ford would not incriminate himself, so did not try to dissuade Mr. Ford from taking the polygraph. (JA 1047:20-1050:6.)

Mr. Ford also told Mr. Mansfield directly that he was willing to take a polygraph test. He explained that the complainant's allegations were totally false, and confirmed he had no sexual relationship with the complainant. (JA 907-908, JA 1571.) Mr. Ford told Mr. Mansfield that he was not willing to pay the $500 cost of the test (JA 908:22-912:6; JA 1247-1249), and apparently Mr. Mansfield never sought the fee from the Association. Although Mr. Mansfield later stated emphatically in his January 17, 2006 letter to Mr. Carter that he had "strongly recommended that [Mr. Ford] undergo a lie-detector test," he omitted that he never asked the Board to pay for the test or that Mr. Ford agreed to take the test. (JA 1162:3-7 & JA 1240.)

F. The Horizon House Board Hired Mr. Ford.

In late-November 2005, the Board, in a 3-2 vote, voted to ask Zalco to hire Mr. Ford on a probationary basis as the building manager, and on a permanent basis if the Maryland charges were favorably resolved. (JA 707:4-13, JA 708:8-709:12, JA 710:12-711:8, JA 732:7-14; JA 1369:9-1370:6.)

Mr. Ford began working as Horizon House's building manager on December 5, 2005. (JA 913:2-5.) He was the first African American building manager at Horizon House. (JA 701.) Two Board members testified that he proved to be a good manager – efficient and disciplined, with excellent accounting skills (JA 1377-1379), and he impressed Board members with his substantial

accomplishments. (JA 748, ¶ 6.)

After the decision was made to hire Mr. Ford, Zalco terminated Ms. O'Keefe, who is Caucasian. (JA 698:16-21.) Upon learning of her termination, Mr. Mansfield repeatedly telephoned Messrs. Carter and Constant and threatened to pursue a wrongful termination action on behalf of Ms. O'Keefe (JA 735:9-16; JA 740:1-744:7), even though he knew she had performance problems. (JA 1138.) Although Mr. Mansfield later tried to deny that he threatened to sue Zalco on Ms. O'Keefe's behalf, he admitted that he told Zalco that she might have a discrimination claim, which could have been a reverse discrimination claim ("she was white, she was female") because they allegedly excluded her from the hiring process. (JA 1156.)

Mr. Carter was taken aback by the strength of Mr. Mansfield's approach regarding legal action on behalf of Ms. O'Keefe. (JA 743:10-744:3.) Mr. DiMuro testified that Mr. Mansfield acted improperly and beyond the scope of his representation when he threatened to take legal action on behalf of her, since the Board had not directed him to do so. (JA 812:10-20 & JA 817, JA 835.)

Mr. Mansfield, in his deposition, claimed that he did not know Mr. Ford was African American until January 2006. (JA 1147-1148; JA 1157-1159.) However, Mr. Mansfield would have no basis to conclude that Ms. O'Keefe might have a discrimination case ("she was white") unless he knew that Mr. Ford was African

American. The Board had not authorized Mr. Mansfield to act with regard to her termination. (JA 735:17-22.) Further, in the first several weeks after Mr. Ford started at Horizon House, Mr. Mansfield made several visits to see Ms. Garretson in her unit, and had face-to-face interactions with Mr. Ford, who is a dark-skinned African American. (JA 983, ¶ 3; JA 730:5-7.)

G. Mr. Mansfield's Unauthorized Investigations.

Acting without Board authorization, Mr. Mansfield pursued an investigation in December 2005 of some "link" connecting Mr. Ford and Mr. Carter. On December 14, 2005, Alex Morgan, Mr. Mansfield's law partner, at Mr. Mansfield's direction, hired Discreet Investigations of Virginia to investigate Mr. Ford and Mr. Carter. (JA 1141 & JA 1165-1167.) The only basis for investigating any connection between these two men was that both were African American. All four surviving Board members testified that they never authorized these investigations.[2] (JA 736:17-737:17; JA 1359:6-1360:12; JA 1361:21-1363:21; JA 859:14-860:18; JA 1266-1267.) Mr. Mansfield testified that even though three Board members voted to hire Mr. Ford, he initiated an investigation of only Messrs. Carter and Ford, but not the other two Board members. (JA 1140-1145.)

Mr. Mansfield and his two partners provided conflicting testimony about the initiation of the investigation. Mr. Morgan testified that he hired the investigator

[2] Ms. Garretson is now deceased.

after Mr. Mansfield said that Mr. Carter was trying to keep secret that Mr. Ford engaged in consensual sexual contact with the complainant. (JA 1258:10-1261:2, JA 1262:3-8.) Mr. Mansfield has no recollection of this conversation with Mr. Carter. (JA 1144:13-1145:7.) Mr. Mansfield contradicted Mr. Morgan's testimony by insisting that he "must have received direction either from the [property] manager or one of the board members." (JA 1140:7-16.) Mr. Hartsoe, Mr. Mansfield's other law partner, testified that he thought that Ms. Garretson had authorized the investigation. (JA 1078-1079.)

Mr. Faison, one of the dissident Board members, found the investigations "creepy." (JA 861:14-863:13.) Even Mr. Mansfield's law partner, Alex Morgan, thought it was "a little bit odd that [Mr. Mansfield] was getting involved" with the hiring of Mr. Ford. (JA 1255:22-1257:22.)

Mr. DiMuro testified that since the Board had not authorized these background checks, Mr. Mansfield did not have authority to do them (JA 804:10-15, JA 805:7-12 & JA 817), and that it was "highly unreasonable" to do a background check on Mr. Carter. (JA 803:18-20 & JA 817.)

H. Ms. Garretson's Racist Comments to Mr. Ford.

Shortly after Mr. Ford began at Horizon House, Ms. Garretson made remarks to him that a jury could determine are racist. After receiving a complaint about Ms. Garretson taking her dog out through the lobby, in violation of the

bylaws, Mr. Ford brought the rule to her attention. (JA 984-985, ¶ 5.) She immediately became angry, raised her voice, and told Mr. Ford he "needed to get some education. You need to get educated." (*Id.*) When she continued to berate Mr. Ford in what he believed to be a racist tone, he told her that he would talk to Mr. Carter and go through the Board to resolve the matter. (*Id.*)

Later that day, when Ms. Garretson asked questions of the front desk resident agent in a belittling manner, Mr. Ford said that her questions would be better directed to Mr. Carter or Mr. Constant. (JA 985, ¶ 6.) Ms. Garretson responded, "Boy, I'm not talking to you." (*Id.*) Ms. Garretson's use of the term "boy" to refer to Mr. Ford was a racial slur. (*Id.*)

In the same week that Ms. Garretson made these remarks, and on other occasions, Mr. Ford saw Mr. Mansfield check in at the front desk to visit her. (JA 983, ¶ 3.)

I. <u>An Anonymous Letter Accused Mr. Ford of Being Violent.</u>

On December 17, 2005, an anonymous letter was circulated that accused Mr. Ford of having a violent history and abusive character and criticized the Board for hiring him. (JA 1371 & JA 1380.) The letter read, "We do not need violence, or abusive conduct, in Horizon House. If something happens you would be liable." (JA 1380.) Jerry Garner, a Horizon House resident, had provided Mr. Mansfield with information about Mr. Ford's Ohio conviction. (JA 1231-1236.)

The note appeared to refer to Mr. Ford's 1995 guilty plea to an assault charge in Ohio, an incident which Mr. Ford disclosed on his Zalco application. (JA 949.) This conviction stemmed from Mr. Ford's confrontation with his uncle at his mother's funeral.[3] (JA 984, ¶ 4.) During his job interview, Mr. Ford explained these circumstances to the Board members. (JA 718:12-19.)

Rather than approach Mr. Ford for an explanation of this 10-year old conviction, Mr. Mucklow and other residents spread rumors that Mr. Ford's conviction resulted from his attack on a "little old lady" named Eulis. (JA 1372:18-1373:12.) In fact, Mr. Ford's uncle's first name was Eulis, a name used for both males and females. (JA 1587:6-13.)

J. Mr. Ford Received an Anonymous Racist Death Threat.

One week later, at the same time that Mr. Mansfield was conducting unauthorized investigations, a racist written death threat was sent to Mr. Ford at his Horizon House workplace, which he received on Christmas Eve. The envelope had the correct address and zip code of Horizon House, but was written in disguised handwriting. (JA 923:19-924:13 & JA 980.) The letter itself was written in printed block letters that appear to have been cut out from magazines (JA 923, JA 925 & JA 980), and read: "U R DED NIGGER UR FAMLY TOO." (*Id.*)

[3] Although Mr. Ford's uncle struck Mr. Ford first, when Mr. Ford fought back, his uncle suffered injuries that required him to be hospitalized. (JA 984, ¶ 4.) Mr. Ford pled guilty to a misdemeanor assault and served 45 days in prison. (*Id.*)

On the day Mr. Ford received and opened the envelope containing the threatening letter, his eight-year-old son accompanied him to work. (JA 926:7-21.) Mr. Ford then called Mr. Constant and Mr. Carter to tell them about the note. (JA 926:17-19.) Although both told him to call the police immediately, he decided to get his son out of the building first, because whoever wrote the note knew that Mr. Ford worked at Horizon House and brought his son to work. (JA 926:18-927:1.) When Mr. Ford returned to work, he reported the death threat to the Arlington County Police Department. (JA 927:2-6.) The FBI also investigated. (JA 928:21-929:2.)

K. Without Authorization, Mr. Mansfield Threatened to Sue Zalco on Behalf of Ms. Garretson to get Mr. Ford's Background Check.

In early January 2006, Mr. Mansfield threatened to sue Zalco on behalf of Ms. Garretson for not releasing Mr. Ford's salary information after Zalco responded that it gave her the same information that all other Board members received. (JA 1151:11-1152:5, JA 1155 & JA 1237.) Mr. Mansfield admitted that the Board did not authorize him to threaten to sue Zalco on behalf of Ms. Garretson. (JA 1153:15-1154:18.) In fact, they were attempting to get the results of Zalco's background investigation on Mr. Ford. (JA 1276-1278.)

L. The Racially-Hostile Work Atmosphere Intensified.

A group of Horizon House residents seeking to oust Mr. Carter and fire Mr. Ford began to meet, and called themselves the Concerned Citizens for Horizon

House ("Concerned Citizens"). (JA 1294-1295.) Members of the Concerned Citizens group included Mr. Mucklow, Paula Garner, and Wendy Schacht, who publicly suggested (including on the Horizon House website chatroom) that Mr. Carter, or even Mr. Ford, had written the anonymous racist death threat. (JA 1268:11-15; JA 1315 & JA 1346; JA 1374:9-1375:5.) Mr. Mucklow gave the police a sample of Mr. Carter's handwriting, in an attempt to encourage the police to investigate him for the death threat. (JA 1314:14-20.)

The Concerned Citizens met secretly several times between January 1, 2006 and February 2, 2006 (JA 1276-1278), in order to strategize about how to oust Mr. Carter and the two Board members who voted with him. (JA 1290-1292 & JA 1321.) Leonard Conrad, a member of the Concerned Citizens group, suggested that they hire Mr. Mansfield to sue the Board led by Mr. Carter. (JA 1111.)

Ms. Garretson, who made racist remarks to Mr. Ford, asked Mr. Mucklow to coordinate with Mr. Mansfield to develop a strategy to oust Mr. Carter and two other board members. (JA 1272-1276.) Mr. Mucklow asked Mr. Mansfield what procedures they could use. (JA 1319:6-1320:3.) Mr. Mucklow also sought Mr. Mansfield's advice on the proper wording of a petition to call for a special election and the procedures for holding the election. (*Id.*) Marie Eckes, another Concerned Citizens member, highlighted Mr. Mansfield's importance by instructing Mr. Mucklow "to use whatever Mr. Mansfield dictates." (JA 1316 & JA 1349.)

M. Mr. Mansfield Distributed a False and Racially-Charged Letter.

In the midst of this racially-charged atmosphere, on January 17, 2006, Mr. Mansfield wrote and distributed, without Board authorization, a letter to the Board marked "Confidential Attorney Client Privileged." (JA 1161 & JA 1239-1241.) In this letter, Mr. Mansfield called for the removal of Mr. Carter, Ms. Morris, and Mr. Weatherman, and falsely described the charges against Mr. Ford. (*Id.*) Mr. Mansfield deliberately misrepresented what Mr. Ford and his attorney had stated about those charges to defame Mr. Ford, frighten Horizon House residents, and paint Mr. Ford as dangerous to the white, elderly women in the building. (*Id.*)

Among the false statements made in the letter were that "Mr. Ford was fired by his previous employer for cause," and that he "admitted wrongdoings" with regard to the pending charges in Maryland. (*Id.*; JA 935:2-936:3, JA 940:14-941:2.) In fact, Mr. Ford's previous employer, the Lerner Corporation, told Mr. Carter that Mr. Ford was eligible for rehire. (JA 720-722.) Moreover, Mr. Ford had asked Lerner to release him from his employment if they did not allow him to work pending the resolution of the criminal charges against him. (JA 1028.)

Mr. Mansfield also falsely stated that Mr. Ford admitted that he had "consensual sexual relations with a tenant on two occasions," once in his office and once in her apartment. (JA 1161 & JA 1239-1241; JA 935:8-936:14.)

In fact, Mr. Ford and his attorney both told Mr. Mansfield that nothing

sexual had happened (JA 935:8-936:14; JA 989, ¶¶ 17-18; JA 1038:14-18, JA 1040:14-19), and that the reason that the complainant had brought the charges was in retaliation for his evicting her. (JA 935:8-936:14.) Moreover, the pending charge against Mr. Ford was for assault and not for rape, as the letter incorrectly suggested by stating that the charges were for sexual relations that were "against her will." (JA 1051:2-9; JA 1338.)

Mr. Mansfield's letter, including his statement that Mr. Ford had keys to all the units in Horizon House (JA 1240), raised the specter of a violent man having access to all the apartments in the building.

Finally, Mr. Mansfield said he confronted Mr. Ford with the request to take the lie detector test, but omitted the fact that Mr. Ford had agreed to take the test if the Association paid its cost. (JA 1161 & JA 1239-1241; JA 908:22-912:6.)

Mr. Mansfield also omitted that the complainant's allegations came after Mr. Ford notified her of her eviction for violating housing regulations, and that she failed to show up for a trial date. (JA 717.)

Virginia Smith, another member of the Concerned Citizens group, testified that she learned about Mr. Ford's pending charges for the first time from Mr. Mansfield's letter, and she felt that Mr. Ford's status as building manager was "threatening." (JA 1354-1356.) Mr. Mansfield's false descriptions of Mr. Ford's supposed admissions and the charges against him were based on stereotypes of

black men raping white women. (JA 723; JA 1056; JA 1121-1124; JA 1572.)

After Mr. Mansfield sent this letter to the Board, he ensured that it was distributed to all residents at Horizon House, even renters who were not Association members. (JA 1289, JA 1300 & JA 1323-1328.) Although the letter was marked "privileged," the Board did not authorize its dissemination. (JA 1308.) Mr. MacAdam was so upset about it being distributed, that he called Mr. Mansfield's law firm, which confirmed that the law firm did not object to this dissemination. (JA 1112, JA 1574-1579, JA 1113; JA 1300 & JA 1323-1328.)

Mr. DiMuro testified that only the Board, not Mr. Mansfield, would have the authority to provide information to the residents about Mr. Ford's background. (JA 806:5-10 & JA 816.) Further, only the Board, not the attorney, could authorize the disclosure of the January 17 letter to the residents, since only the Board can waive the privilege. (JA 813:14-17, JA 813:21-814:2 & JA 839-844.) His professional opinion was that, by writing the letter and facilitating its distribution beyond the Board, Mr. Mansfield "was acting in derogation of confidentiality he owed to the Association as its attorney." (JA 818.)

The Concerned Citizens members seeking Mr. Carter's ouster and Mr. Ford's termination testified that they found the statements about Mr. Ford to be more credible when they came from Mr. Mansfield, the Association's attorney, rather than from residents' gossip. (JA 863; JA 1302-1305.)

N. The Board's First Termination of Mr. Mansfield.

After Mr. Mansfield sent his January 17, 2006 letter, the Board voted by email, on January 18 and 19, 2006, to terminate Mr. Mansfield as the Association attorney. Mr. Carter wrote Mr. Mansfield a letter terminating his services. (JA 1163 & JA 1243.) Mr. Mansfield, immediately before the Concerned Citizens meeting on January 19, 2006, wrote back to Mr. Carter stating that he did not consider himself to be terminated because the Board did not act at a formal Board meeting, but had voted by email. (JA 1164 & JA 1244.)

O. Mr. Mansfield Inflamed Racial Tensions at the Concerned Citizens Meeting on January 19, 2006 and Escalated His Attacks.

After learning that the Board fired him, Mr. Mansfield became the principal speaker at the Concerned Citizens meeting on January 19, 2006, which was called to organize the petition drive to oust Mr. Carter as President of the Board and two other Board members. (JA 1287-1288.)[4] Mr. Mansfield orally presented all the false allegations against Mr. Ford that he had written in his January 17, 2006 letter, with dramatic emphasis on false facts about the pending criminal charges, creating alarm among the residents. (JA 1114-1116.)

In his presentation, Mr. Mansfield repeated the numerous misrepresentations

[4] The Concerned Citizens meeting was not an Association meeting, or an Association Board meeting. Therefore, Mr. Mansfield was not authorized by the Board of the Association to organize or conduct this meeting, and had a clear conflict of interest in doing so, as Mr. DiMuro concluded. (JA 818.)

in his January 17, 2006 letter, including that Mr. Ford had a consensual sexual relationship with the complainant; that the charges stemmed from alleged coercive intercourse rather than alleged touching; and a suggestion that he refused to take a polygraph test. (JA 717; JA 726-727; JA 1114-1120; JA 1125-1126.) Finally, Mr. Mansfield stated falsely that Mr. Ford was fired from his previous employer for cause, which he knew was not true. (JA 720-721.)

Fred MacAdam, an Association member, described the meeting as a "borderline angry mob" or "borderline lynch mob" that was trying to get rid of Messrs. Carter and Ford. (JA 1127.) He explained that Mr. Mansfield "left no doubt in anybody's mind that he [Mr. Ford] was charged with rape and it was rape we were talking about." (JA 1119:3-11.)

Ms. Bobbie Fisher, another resident, confirmed that this meeting became an "angry-like mob crowd," with screaming, and that Mr. Mansfield "incited this crowd," doing "everything but call him a rapist." (JA 893:12-22, JA 894:8-16, JA 895:4-5.) As a result, several residents at the meeting said that they did not want a rapist in their building. (JA 896:6-897:11-12.)

Mr. Carter, who also attended the meeting, characterized Mr. Mansfield's comments as "demoniz[ing]" Mr. Ford, in what he called a "rousing presentation." (JA 712.) Mr. Carter said that Mr. Mansfield's presentation "attacked Michael Ford" and "was playing upon the stereotypes of race in terms of a black male

having access to . . . this condominium and the . . . many white women who lived there . . .” (JA 713-714.) Mr. Carter also stated Mr. Mansfield’s presentation was “completely out of place . . . for a counsel . . . it incited the group of people to . . . a mob kind of mentality . . . to which they reacted predictably. . . . race was - was an integral part of it explicitly or implicitly.” (JA 715.) Mr. Mansfield talked about Mr. Ford’s Ohio conviction “in such a manner as to evoke the kind of reaction . . . that was desired and . . . focused upon Michael Ford and upon myself as the president.” (JA 727-728.)

The Board did not authorize Mr. Mansfield to attend the meeting. (JA 715; JA 867.) Mr. Mucklow, a Concerned Citizen member, called Mr. Mansfield a “hero” for his central role in getting Mr. Carter removed. (JA 1271:9-22.)

P. <u>The Board Ratified Its Decision to Fire Mr. Mansfield.</u>

On January 23, 2006, by a 3-2 vote, the Board terminated Mr. Mansfield at a formal Board meeting. (JA 748-749 & JA 760-766, ¶¶ 7-8; JA 868-869.)[5] Knowing that the Board had fired him, Mr. Mansfield entered into retainer agreements with individual residents so that he could continue to represent them and work for the removal of Mr. Carter and Mr. Ford. (JA 1160 & JA 1238; JA 1309-1318 & JA 1345.) One of the retainer agreements was signed by Paula

[5] Mr. Faison, who voted against Mr. Mansfield’s termination, conceded that after that meeting, Mr. Mansfield was no longer the attorney for the Association and should not have been billing the Association or acting on its behalf. (JA 866-867, JA 873, JA 874.)

Garner (JA 1238), whose husband provided Mr. Mansfield with information about Mr. Ford's Ohio case. (JA 1231-1236.) Mr. Mucklow confirmed that he and others retained Mr. Mansfield. (JA 1238, JA 1309-1313.) Therefore, Mr. Mansfield was representing a group of Association members, in an effort to oust members of the board of his previous client, the Horizon House Association.

Mr. DiMuro testified as to his expert opinion that once Mr. Mansfield was no longer "the lawyer for the association," from January 23, 2006 to February 2, 2006, "to the extent he was acting against the interests of certain Board members and with . . . bad intent planning to have them removed," his acts were outside the scope of his representation. (JA 807:18-808:14.)

Q. Mr. Mansfield Continued His Attacks after Mr. Ford's Acquittal.

On January 25, 2006, Mr. Ford was acquitted of the pending charges in Maryland. (JA 1149-1150.) Mr. Ford's criminal record was expunged. (JA 1047:12-19.) Mr. Mansfield did not report the acquittal to the Association membership. (JA 1581.)

After the Board's ratification of its decision to dismiss him as Association counsel, and notwithstanding Mr. Ford's acquittal, Mr. Mansfield and his law firm prepared and distributed a packet of materials for the February 2, 2006 meeting, which expressly called for a vote to oust the Board members who supported Mr. Ford's hiring. (JA 1306-1307 & JA 1329-1344.) The package focused, in large

part, on Mr. Ford, and false claims about the pending charges and Mr. Ford's past employment. (*Id.*) The Board did not authorize Mr. Mansfield to send out that package. (JA 1308.) In the package were court documents about the criminal sexual assault charges of which Mr. Ford was acquitted on January 25, 2006, without mention of the acquittal. (JA 870-872 & JA 875-890.) Mr. Mansfield's firm also included in the packet his January 17, 2006 letter, which included false statements about Mr. Ford. (JA 883-885.)[6]

At the February 2, 2006 meeting, pursuant to a petition from Association members organized by Mr. Mansfield, Ms. Garretson and Mr. Mucklow, the members voted to remove Mr. Carter, Ms. Morris, and Mr. Weatherman, and elect new directors, including Mr. Mucklow. (JA 1317.) The new board's first action was to terminate Mr. Ford's services and rehire Mr. Mansfield. (JA 1317-1318.)

Even after the new board told Mr. Ford that it terminated him, Zalco insisted that he return to work. On or about February 3, when Mr. Ford returned to Horizon House, Mr. Conrad, an organizer of the Concerned Citizens who had worked with Mr. Mansfield to oust Mr. Carter, screamed at Mr. Ford, "We don't want your kind in here!" in a lobby full of people. Members of the Association who were present gasped at these racist remarks. (JA 914-916; JA 991, ¶ 25.)

[6] Mr. Mansfield and other members of his firm billed the Association approximately 64.3 hours for the time from January 24 to February 2, 2006, after the Association has terminated them. (JA 1080-1082; JA 1090-1096.)

R. The Arlington County Circuit Court Disqualified and Admonished Mr. Mansfield for Continuing to Represent the Association Despite a Clear Conflict of Interest.

On February 15, 2006, Mr. Mansfield, on behalf of the Association, filed a Complaint in the Arlington County Circuit Court against Mr. Carter, Ms. Morris, and Mr. Weatherman, three of the five original Board members, Case No. 06-200. (JA 572-582.) These three former Board members then filed a Complaint in the same court against the new board, Case No. 06-225. (JA 583-605.)

Judge Alper disqualified Mr. Mansfield, because he "had a conflict of interest in representing the parties" caused by his "consecutive representation of the two boards." (JA 809:11-13, JA 810:6-8 & JA 829-830.) Judge Alper also found that Mr. Mansfield and members of his firm were witnesses in the cases, another basis to disqualify him. (JA 811:7-11 & JA 830-831.) The court concluded, in strong language, "I think that I've never seen a case where counsel's actions in a matter have been so central to the issues that are the decisive issues in this case." (JA 830-831.)

S. Mr. Mansfield's Actions Caused Mr. Ford to Suffer Severe Emotional Distress.

Mr. Ford experienced severe emotional distress as a result of the harassment by the Concerned Citizens group and Mr. Mansfield, and the false, racially stereotyped statements widely disseminated by Mr. Mansfield. After the death threat and false postings on the Horizon House website, Mr. Ford's work

environment significantly changed. He believed the death threat was sent by a resident, because the anonymous letter and postings were already circulating about the Ohio charge – about which only a few residents knew. (JA 988, ¶ 16.)

After Mr. Mansfield sent his January 17, 2006 letter, Mr. Ford's work environment further deteriorated. Mr. Ford was upset because the residents did not know the circumstances of his Ohio conviction that Mr. Mansfield distributed to the entire building, and that he was making false statements to frighten residents of a building "full of . . . single white ladies" (JA 920), to make them think he was violent. (JA 917-922.) He was also upset that certain residents were saying that he was a rapist, based on statements Mr. Mansfield had made. (JA 930-934.)

Dr. Goldman diagnosed Mr. Ford as having suffered a Major Depressive Disorder as a result of the actions taken against him by Mr. Mansfield and the Concerned Citizens group. Dr. Goldman found that Mr. Mansfield's dissemination of false and racially stereotyped statements about Mr. Ford, and his termination, all led him to suffer depression. Among his symptoms were sleep problems, significant weight gain, and feelings of failure. He withdrew from those closest to him, and felt abandoned. He also had suicidal ideation. (JA 1054-1055, JA 1057-1067 & JA 1067-1071, expert report.)

Dr. Goldman found that the record evidence that he examined, including deposition testimony, his examination of Mr. Ford, and interviews of Mr. Ford's

wife, demonstrated that Mr. Mansfield's attacks on Mr. Ford played on "racial fears . . . are stereotypical . . . [and] appeal to the paranoia or irrational fear that some people have about minority groups, particularly African-Americans." (JA 1063:7-17.)

Dr. Goldman specifically found that Mr. Mansfield's statements played on fears that African Americans "are sexually promiscuous, that they are sexually violent," and that "Mr. Ford was sexually violent . . . and possibly [capable of] serious violence against a woman." (JA 1064:7-20.)

VI. SUMMARY OF LEGAL ARGUMENT.

The district court erred when it decided that the comments made to Mr. Ford by two residents who were working closely with Mr. Mansfield were not race-based and could not be imputed to Mr. Mansfield.

The district court erred when it failed to consider the circumstantial evidence that Mr. Ford presented to show that Mr. Mansfield's proffered non-discriminatory reasons were false, including that Mr. Mansfield was not acting as the attorney for the Association when he made repeated false and racially stereotyped statements about Mr. Ford that led the Board to terminate his employment at Horizon House.

The district court erred in requiring Mr. Ford to show that he had an employment or contractual relationship with Mr. Mansfield in order to prove a Section 1981 claim.

The district court erred in striking Mr. Ford's prayer for emotional distress damages on his Section 1981 claim by treating it as a separate and stand-alone claim for intentional infliction of emotional distress.

VII. LEGAL ARGUMENT.

A. STANDARD OF REVIEW.

This Court reviews a grant of summary judgment *de novo,* applying the same standard as the district court, but without deference to the district court. *Perini Corp. v. Perini Constr., Inc.,* 915 F.2d 121, 123 (4th Cir. 1990).

The courts "must take special care" when considering summary judgment in a discrimination case, "because motive is often the critical issue." *Evans v. Tech. Apps. & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). This logically follows from the consistently applied principle that summary judgment is only appropriate when the district court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c)(2), Fed. R. Civ. P.; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (*en banc*).

A genuine issue of material fact is raised if a reasonable jury could return a verdict for the plaintiff on each element necessary to its case. *Banca Cremi, S.A. v.*

Alex. Brown & Sons, Inc., 132 F.3d 1017, 1027 (4th Cir. 1997).

The plaintiff "is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, and all internal conflicts in it resolved favorably to him." *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (*en banc*). The court must draw all justifiable inferences in favor of the nonmoving party, and the evidence must be such that the fact-finder could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 252. A court may not decide questions of credibility in ruling on summary judgment. *Id.* at 249.

B. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE COMMENTS MADE TO MR. FORD DID NOT REFLECT RACIAL ANIMUS.

1. Genuine issues of material fact exist as to whether the comments made to Mr. Ford were race-based and by deciding that issue, the district court usurped the jury's function.

Recently, the Supreme Court, without briefing or oral argument on the merits, held that the term "boy" can be probative evidence of racial animus. In *Ash*, the Court vacated the Eleventh Circuit's decision that the use of the word "boy" without racial qualifiers or modifiers was not evidence of racial animus. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (*per curiam*). The Court explained that terms like this, "standing alone," are not always "benign," and whether their use reflects discriminatory animus depends upon the speaker's "context, inflection, tone of voice, local custom, and historical usage." *Id.*; *see*

also King v. City of Eastpointe, 86 Fed. Appx. 790, 802 (6th Cir. 2003) (reversing summary judgment granted to a defendant who referred to an African American as "boy," but uttered no other racial epithets because "the use of a possible racial epithet *raises an issue of fact* as to whether [defendant's] actions . . . were based on race.") (emphasis added).[7] These are the same factual determinations that a jury should be permitted to make here, *i.e.*, whether the term "boy" directed to Mr. Ford reflected racial animus.

Here, the district court, contrary to the dictate of *Ash*, substituted its own views instead of permitting a jury to decide the meaning of these terms, and found that the comments, "boy" and "we don't want your kind here," directed toward Mr. Ford, an African American, had a non-racial meaning. (JA 1633.) The district court opined that "these comments are more easily, and more sensibly, explained as having non-racial meanings," and that "[w]hile the Court may not be able to decipher exactly what was meant by these comments, the Court can determine that there is no indication that they were intended to be racially derogatory." (*Id.*) Indeed, the district court conceded that there are contested issues of material fact — "the Court may not be able to decipher exactly what was meant by these

[7] The cases cited in this section are all cases in which the defendant only used the word "boy." There are yet other cases where "boy" was used in conjunction with other racial epithets, just as in this case. *See, e.g.*, *White v. BFI Waste Svcs, LLC*, 375 F.3d 288, 297 (4th Cir. 2004) (reversing summary judgment based on the fact that the use of the word "boy" may be evidence of racial animus).

comments" (*id.*) — but improperly made a factual determination as to what these words meant.

The district court also erred in finding that Mr. Mansfield could not be liable because "there is no way to credit such actions to [him]." (JA 1633.) However, the residents' comments to Mr. Ford may be used to impute racial animus to Mr. Mansfield, since such statements can be admitted if made "by a co-conspirator during the course and in furtherance of the conspiracy." *See* Rule 801(d)(2)(E), Fed. R. Evid. As both the Supreme Court and this Court recognized, evidence of other individuals' discriminatory animus may be admissible to prove the defendant's discriminatory animus. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387-88 (2008); *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 108 (4th Cir. 2000) (management's statements about an employee were admissible to show the Union's animus towards the employee because the Union and management had entered into a conspiracy to terminate him).

As in *USF Red Star*, there exists at least a genuine issue of material fact as to whether Mr. Mansfield was acting in concert with a member of the Board (Ms. Garretson) and with a key member of the Concerned Citizens group (Mr. Conrad), who made racist remarks. Their joint enterprise was created to have Mr. Ford terminated and Mr. Carter recalled. It is a disputed issue of material fact as to whether Mr. Mansfield worked closely with these residents who uttered racist

statements in a common enterprise. *See* Part VII.C.2, *infra*. Therefore, the district court is precluded from entering summary judgment on this issue.

This Court recently held that a district court should not decide whether it believes the evidence, and it is not the court's role to determine at summary judgment whether the evidence in fact proved discrimination. *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 294-95 (4th Cir. 2010). Instead, the evidence need only raise the possibility of discrimination:

> To be sure, we do not hold that Merritt's evidence *must* be believed or that, if believed, *must* yield an inference that Old Dominion unlawfully discriminated against her. **But because Merritt's evidence *may* well be believed and *may* well yield such an inference, Old Dominion is not entitled to summary judgment.**

Id. at 301 (emphasis added).

As this Court recently explained, "[I]t is not any single piece of evidence but rather the evidence taken in its entirety that leads us to believe [the plaintiff] deserves a trial. Disposition of [the plaintiff's] claim at the summary judgment stage would 'intrude on the jury function by substituting our own judgment for that of the finder of fact.'" *Merritt*, 601 F.3d at 302 (citations omitted).

As in *Merritt*, the district court erred when it intruded upon the jury's province in deciding this issue of material fact by concluding that the use of the term "boy" and "your kind" could not be interpreted as reflecting racial animus, and, therefore, its judgment must be reversed.

2. Whether the phrase "we don't want your kind here" in the workplace constitutes racial animus is also a genuine issue of disputed material fact that should be resolved by the jury.

Just as the word "boy," standing alone, has been sufficient to show racial animus, the phrase "we don't want your kind here" also has been found to be probative evidence of discrimination. In *Davis v. Clearlake Police Dept.*, No. C-07-03365-EDL, 2008 WL 4104344 (N.D. Cal. Sept. 3, 2008), a Section 1983 case, a police officer stopped a car driven by an African American man due to a lack of a visible registration, and told him that "we don't like your kind here." No other racial epithets were used. *Id.* at *1. The court held that whether that statement was racially discriminatory would be a triable issue of fact for the jury. *Id.* at *6.[8]

Similarly, in *Jamieson v. Poughkeepsie City School District*, 195 F. Supp. 2d 457 (S.D.N.Y. 2002), a Section 1981 and 1983 case, the plaintiff, a superintendent, was told by a School Board member that "You are going to be late all the time. I know your kind." *Id.* at 461. The Board member often referred to plaintiff by the term "you people," *id.* at 463, and publicly embarrassed plaintiff "in a manner that suggested a lack of respect for her," *id.* at 462, but made no other comments. In holding that summary judgment was improper, the court recognized that "[s]ummary judgment is sparingly used in discrimination cases where intent and

[8] In *Davis*, the court ultimately ruled against the plaintiff, but on grounds that he had not proven liability against the municipal defendant under the *Monell* standard. *Davis*, 2008 WL 4104344, at *3, *11.

state of mind are at issue because . . . careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination." *Id.* at 466 (citing *Graham v. Long Isl. R.R.*, 230 F.3d 34, 38 (2d Cir. 2000); *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999); and *Chertkova v. Conn. Gen. Life. Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996)).

This Court should reverse and remand for a jury to decide whether the use of "boy" and "we don't want your kind here," in connection with Mr. Mansfield's participation in a joint venture with Ms. Garretson and Mr. Conrad (who made these comments), along with the abundant other record evidence of race-based treatment, demonstrate his discriminatory interference with Mr. Ford's employment, in violation of Section 1981.[9]

C. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER CIRCUMSTANTIAL EVIDENCE OF DISCRIMINATION WHICH THE COURTS ACKNOWLEDGE CAN BE AS PROBATIVE AS DIRECT EVIDENCE.

Although the district court expressly acknowledged that "a plaintiff can make out a claim under 42 U.S.C. § 1981 . . . using either direct evidence or using the burden shifting framework of *McDonnell Douglas*" (JA 1630), it erred when it ignored the significant circumstantial evidence offered by Mr. Ford and essentially

[9] This evidence is also probative of the racially hostile work environment at Horizon House, to which Mr. Mansfield contributed through his repeated false statements about Mr. Ford, which the district court ignored. (JA 1632-1633.)

required him to present direct evidence, in a misapplication of burden-shifting.[10]

Here, Mr. Ford has presented substantial record evidence to support a jury finding that Mr. Mansfield's interference with Mr. Ford's employment was racially motivated.

1. Circumstantial evidence can be probative of racial animus.

This Court, in its *en banc Hill* decision, made clear that plaintiffs can prove unlawful discrimination through either direct or circumstantial evidence. *Hill*, 354 F.3d at 284. Given that most individuals do not openly admit that they discriminate, direct, "smoking gun" evidence of discrimination is rarely available in discrimination cases. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 534 (1993) (Souter, J., dissenting) (employees rarely have the "good luck to have direct evidence of discriminatory intent"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by"); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Foster v. Tandy Corp.*, 828 F.2d 1052, 1057 (4th Cir. 1987) ("plaintiffs can rarely prove racial discrimination by direct

[10] Section 1981 claims are generally subject to the same legal principles that govern Title VII discrimination claims. *Gairola v. Commonwealth of Virginia Dept. of Gen. Serv.*, 753 F.2d 1281, 1286 (4th Cir. 1985).

evidence").[11]

During the final step of the *McDonnell Douglas* analysis, the district court must consider whether the plaintiff proved that the defendants' stated reasons are actually a pretext for a discriminatory purpose. *McDonnell Douglas*, 411 U.S. at 804. A plaintiff can demonstrate pretext if there is sufficient evidence that the "asserted justification is false" or "unworthy of credence." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 148 (2000); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

A plaintiff can also demonstrate pretext by showing that the defendant's justification is not credible. *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 853-54 (4th Cir. 2001) ("*Reeves* teaches that when 'the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.'") (quoting *Reeves*, 530 U.S. at 147).

Thus, if a jury can disbelieve the defendant's proffered explanation, particularly if it is false, then *that alone can be enough to prove discrimination*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity)

[11] Hence, "circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). This Court observed that: "A plaintiff does not need a 'smoking gun' to prove invidious intent, and few plaintiffs will have one." *Merritt*, 601 F.3d at 299-300 (citing *Desert Palace*, 539 U.S. at 100).

> may, together with the elements of the prima facie case, suffice to show intentional discrimination. **Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination**, and the Court of Appeals was correct when it noted that, upon such rejection, "**[n]o additional proof of discrimination is *required***" . . .

St. Mary's, 509 U.S. at 511 (emphasis added) (citations omitted).

2. Mr. Ford has presented sufficient circumstantial evidence to rebut Mr. Mansfield's proffered non-discriminatory reasons.

This Court should find that Mr. Ford has presented sufficient circumstantial evidence of Mr. Mansfield's racial animus to allow his Section 1981 claim to go to trial. In order to prove a claim for discriminatory interference with his employment relationship, the Section 1981 plaintiff must show that: (1) "the defendant intended to discriminate on the basis of race," and (2) "the discrimination interfered with a contractual interest." *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 434 (4th Cir. 2006).

The district court evidently assumed that Mr. Ford had made out a *prima facie* case of discrimination under Section 1981 (JA 1631), for it then went on to address Mr. Mansfield's proffered non-discriminatory reasons. (JA 1631-1632.)

However, the district court either discounted, or totally ignored, the substantial circumstantial evidence that Mr. Ford presented to prove that the reasons offered by Mr. Mansfield "were not [his] true reasons, but were a pretext for discrimination." *Merritt*, 601 F.3d at 294 (citations omitted).

This Court should reverse the district court, because it essentially required Mr. Ford to present direct evidence of discrimination, when it concluded that Mr. Ford "cannot show that Defendant intended to discriminate against him on the basis of race [because] Plaintiff has not presented any evidence that Defendant ever referenced his race or made any racially derogatory comments" (JA 1630-1631), which would have to be direct evidence.

(a) Mr. Mansfield was not acting as the attorney for the association.

The district court evidently relied on Mr. Mansfield's argument that he "did not take any action as Plaintiff's employer, as he was counsel to the Association" (JA 119), in reaching its conclusion that Mr. Mansfield did not discriminate against Mr. Ford. However, there exists sufficient record evidence of disputed facts, including testimony from Mr. DiMuro, an expert witness on legal ethics, from which a jury could find that Mr. Mansfield was not acting as the "counsel to the Association" but was acting far outside the scope of his representation of the Association when he took numerous unauthorized acts that interfered with Mr. Ford's employment relationship:

- Mr. Mansfield acted improperly and beyond the scope of his representation when he threatened to take legal action on behalf of Ms. O'Keefe, since the Board had not directed him to do so. (JA 812:10-20 & JA 817, JA 835.)

- Mr. Mansfield did not have the authority to do the background checks of Mr. Ford and Mr. Carter, since the Board had not authorized them. (JA 804:10-15, JA 805:7-12 & JA 817.)

- Only the Board, not Mr. Mansfield, would have the authority to provide information to the residents about Mr. Ford's background. (JA 806:5-10 & JA 816.)[12]

- Mr. Mansfield could not authorize the disclosure of the January 17, 2006 letter to the residents, since only the Board can waive the privilege. (JA 813:14-17, JA 813:21-JA 814:2 & JA 839-844.)

- Mr. Mansfield, by writing the letter and facilitating its distribution beyond the Board, "was acting in derogation of confidentiality he owed to the Association as its attorney." (JA 818.)

- Mr. Mansfield was not authorized to convene or conduct the January 19, 2006 meeting of the Concerned Citizens group. (JA 818.)

- Once Mr. Mansfield was no longer "the lawyer for the association," from January 23, 2006 to February 2, 2006, "to the extent he was acting against the interests of certain Board members and with . . . bad intent planning to have them removed," his acts were outside the scope of his representation. (JA 807:18-808:14.)

In addition, the Board had not authorized Mr. Mansfield to sue Zalco on behalf of Ms. Garretson. (JA 1153-1154.)

Under *St. Mary's* and *Merritt*, this evidence alone is sufficient to demonstrate the falsity of Mr. Mansfield's proffered nondiscriminatory reasons, and is sufficient to permit a reasonable jury to find that Mr. Mansfield violated Mr. Ford's rights under Section 1981.

[12] The Board certainly did not authorize Mr. Mansfield to submit <u>false</u> information about Mr. Ford to the residents.

(b) Other circumstantial evidence that Mr. Mansfield's proffered non-discriminatory reasons were false.

The district court also improperly relied on Mr. Mansfield's assertion that Mr. Ford was fired solely or primarily due to his criminal background (JA 123; JA 1632), without considering whether a fact-finder could determine that this proffered explanation was a mere pretext for racial animus. Here, Mr. Ford presented ample evidence to prove that Mr. Mansfield's proffered and shifting explanations for his actions against Mr. Ford were unworthy of credence:

- Mr. Mansfield, when Mr. Ford was interviewed, was only authorized to send a representative to observe his trial (JA 718-719), but instead demanded that Mr. Ford take a polygraph test (JA 1041-1043), and later falsely suggested that Mr. Ford refused to take the test. (JA 1162, JA 1240.)

- Mr. Mansfield, after Mr. Ford was hired, threatened to sue Zalco on behalf of Ms. O'Keefe, whom Mr. Ford replaced. (JA 735, 740-741.)

- Mr. Mansfield claimed that he did not know that Mr. Ford was African American until January 2006 (JA 1147-1148, JA 1157-1159), although he had interacted with Mr. Ford during his visits to Horizon House in early- to mid-December 2005. (JA 983.)

- Mr. Mansfield conducted an unauthorized investigation of Mr. Carter and Mr. Ford in order to find "links" between them (JA 1165-1167), but he and his law partners presented contradictory reasons for initiating the investigation. (JA 1078-1079; JA 1140; JA 1258-1262.)

- Ms. Garretson, a Board member who worked closely with Mr. Mansfield in the Concerned Citizens group, made racist remarks ("boy") about Mr. Ford in the workplace (JA 985), and directed Mr. Mucklow to take direction from Mr. Mansfield. (JA 1272-1276.)

- Mr. Mansfield directed the Concerned Citizens group in their efforts to oust Mr. Carter and fire Mr. Ford, both African American men. (JA 1111, JA 1272-1276, JA 1316, JA 1319-1320, JA 1349.)

- Mr. Mansfield drafted an alleged "attorney-client privileged" letter that made numerous false statements about Mr. Ford's employment background and his pending charge (JA 1239-1241), which played on racial stereotypes about African American men in a residential workplace, and he authorized the distribution of that "privileged" letter to all residents. (JA 1289, JA 1300, JA 1323-1328.)

- After the Board terminated him, Mr. Mansfield organized and chaired an unauthorized meeting of Association members, which was not an Association meeting, at which he repeated the false statements in his January 17 letter, and dramatically emphasized the false facts, inciting the crowd into a mob-like frenzy, leaving no doubt in anyone's mind that Mr. Ford was charged with rape. (JA 712-715, JA 723-725, JA 727-728, JA 893-895, JA 1119, JA 1127, JA 1287-1288.)

- Even after Mr. Mansfield was terminated, his law firm distributed a packet of materials to the residents, which included the unauthorized January 17 letter, and court documents about Mr. Ford. (JA 1306-1307, JA 1329-1344.)

- Mr. Conrad, a member of the Concerned Citizens group who worked closely with Mr. Mansfield, made a racist remark to Mr. Ford ("We don't want your kind in here!") on the day after Mr. Carter was removed from the Board. (JA 914-916, JA 991.)

The significant misrepresentations that Mr. Mansfield made to Horizon House residents about Mr. Ford's background, both in writing and orally, and his unauthorized work with the Concerned Citizens, suggest that his actions were not motivated by any legitimate concerns about Mr. Ford's past.

Mr. Ford provided sufficient circumstantial evidence to establish a material

question as to whether his race motivated Mr. Mansfield's interference with his employment relationship, and to demonstrate that Mr. Mansfield's proffered and shifting reasons for his actions are not worthy of credence. The district court largely ignored this evidence, or improperly found facts in Mr. Mansfield's favor, so that its grant of summary judgment should be reversed.

D. THE DISTRICT COURT ERRED IN REQUIRING AN EMPLOYMENT RELATIONSHIP BETWEEN MR. FORD AND MR. MANSFIELD TO PROVE A SECTION 1981 CLAIM.

1. Section 1981 is a broad civil rights statute that protects against all types of race-based interference, including third-party interference with the right to "make and enforce contracts."

The focus of this appeal is not whether the employers' termination of Mr. Ford was unlawful under Section 1981; that issue is not before this Court, as Mr. Ford resolved his case against the employers. Instead, the narrow issue before this Court is whether a jury could conclude, based upon the record evidence, that Mr. Mansfield's interference with Mr. Ford's employment was race-based, and if so, whether these race-based actions interfered with Mr. Ford's employment relationship.

To prove a Section 1981 claim, a plaintiff need only establish that: (1) "[he] is a member of a racial minority; (2) the defendant intended to discriminate against [him] on the basis of race; and (3) the discrimination concerned a privilege protected under [Section] 1981." *Johnson v. Toys "R" Us-Delaware Inc.*, 95 Fed.

Appx. 1, 6 (4th Cir. 2004) (*per curiam*) (citations omitted).

The district court misconstrued these elements by requiring that Mr. Mansfield have an employment relationship with Mr. Ford in order to prove a Section 1981 claim. (JA 1633.) Contrary to the district court's analysis, the real focus of Mr. Ford's Section 1981 claim is Mr. Mansfield's *interference* with his contract, not whether Mr. Mansfield personally fired Mr. Ford. Section 1981 does not require that there be an employment relationship in order for a plaintiff to make a claim against that party for discrimination.[13]

Here, there exists compelling record evidence from which a jury could determine that Mr. Mansfield interfered with Mr. Ford's relationship with Horizon House, and that his actions were motivated by Mr. Ford's race. A jury could

[13] Courts in other circuits have endorsed a broad application of Section 1981 to various types of contractual relationships. *See, e.g.*, *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 294-95 (11th Cir. 1988) (Section 1981's protection is broad enough to cover a medical resident's claim against the hospital even though there was no employment relationship); *Martinez v. Pavex Corp*., 422 F. Supp. 2d 1284, 1291, n.7 (M.D. Fla. 2006) (Section 1981's protection encompasses plaintiffs who merely delivered goods to the defendant's facility and thus did not have a direct employment relationship); *Belfast v. Upsilon Chapter of Pi Kappa Alpha Fraternity at Auburn Univ.*, 267 F. Supp. 2d 1139, 1144 (M.D. Ala. 2003) ("Moreover, in a § 1981 case, Plaintiff is free to seek his remedy . . . against a third-party interferer."); *Lewis-Kearns v. Mayflower Transit, Inc*., 932 F. Supp. 1061, 1070 (N.D. Ill. 1996) (permitting a Section 1981 claim against co-workers in an agency relationship with the defendant employer); *Vakharia v. Swedish Covenant Hosp*., 765 F. Supp. 461, 471 (N.D. Ill. 1991) (Section 1981's coverage extended to an anesthesiologist who received referrals from defendant hospital); *Kolb v. Ohio*, 721 F. Supp. 885, 891-92, 906 (N.D. Ohio 1989) ("no contractual relationship or expectation of employment is required between a defendant and the plaintiff").

reasonably conclude that the Concerned Citizens group, orchestrated by Mr. Mansfield, and the "new" board of the Association that was elected as a result of the group's efforts, were biased by Mr. Mansfield's conduct, and that Mr. Mansfield's actions caused them to fire Mr. Ford. Further, the new board was not neutral, since it had several members of the Concerned Citizens, including those (Mr. Mucklow and Ms. Garretson) who coordinated activities with Mr. Mansfield. *See* Part V.L, *supra*.

Mr. Mansfield's alleged "attorney-client privileged" letter contained outright misrepresentations about Mr. Ford, the criminal charges against him, and his employment background. *See* Part V.M, *supra*. Mr. Mansfield's unauthorized presentation to the Concerned Citizens meeting on January 19, 2006 repeated his misrepresentations, which played on racial stereotypes about African American men, and greatly influenced the members present to oust Mr. Carter, and fire Mr. Ford. *See* Part V.D, *supra*.

Mr. Mansfield and his law firm were also key figures in ousting the old Board and electing the new board. Ms. Garretson, who made racist remarks about Mr. Ford, tasked Mr. Mucklow to work with Mr. Mansfield to develop a strategy to oust Mr. Carter. Ms. Eckes, another member of the group, emphasized the importance of following Mr. Mansfield's lead. *See* Part V.L, *supra*.

Mr. Mansfield was central in gathering information about Mr. Carter and

Mr. Ford, including by hiring an investigative firm to investigate them, and by threatening to sue the management company to obtain background information about Mr. Ford. *See* Parts V.G, V.K, *supra*.

Mr. Mansfield also wrote the key letter that incited the residents to oust Mr. Carter and terminate Mr. Ford, and was the principal speaker at the meeting of Concerned Citizens in which he repeated the false statements in his letter about Mr. Ford, at a time after the Board had fired him. *See* Parts V.L, V.M, *supra*.

Individual members of the Association then personally hired Mr. Mansfield to continue his fight against Mr. Carter and Mr. Ford. (JA 1238.) In that role, Mr. Mansfield drafted the petition that members signed to oust Mr. Carter and two other Board members, which led to Mr. Ford's termination. He and other members of his law firm sent out the package that contained this letter and other negative information about Mr. Ford, to convince the Association members to vote at the February 2, 2006 meeting, to replace the Board. (JA 1329-1344.)

The new board's first actions were to re-hire Mr. Mansfield as the Association's counsel, and to fire Mr. Ford. (JA 1317-1318.)

According to deposition testimony of two important members of the Concerned Citizens, Mr. Mansfield's letter and statements at the meeting were very important in convincing them to take action to oust Mr. Carter and fire Mr. Ford. They testified that the fact that the Association's attorney was making these

statements gave the statements more credence than if it had simply been residents talking in the hallways. (JA 863; JA 1302-1305.) Their testimony is powerful evidence of Mr. Mansfield's critical influence on both the members who voted for the new board that fired Mr. Ford, and the new board itself.

While this Court has not specifically addressed whether Section 1981 requires a direct employment relationship, this Court and district courts within the Fourth Circuit have confirmed the broad reach of Section 1981. *See, e.g.*, *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 437 (4th Cir. 2006) ("[S]ection 1981 . . . clearly governs racial animus in the making and enforcement of contracts . . . . The Reconstruction Congress wrote broadly, and we have given effect to that breadth as expressed in [S]ection 1981."); *Phillips v. Mabe*, 367 F. Supp. 2d 861, 869 (M.D.N.C. 2005) ("That Plaintiff does not have a contract with [Defendants] . . . is not important, because tortious interference by Defendants of Plaintiff's ability to contract . . . satisfies the contract requirement of § 1981."); *Shirkey v. Eastwind Cmty. Dev. Corp.*, 941 F. Supp. 567, 573 (D. Md. 1996) ("Section 1981 has been applied where there is no direct employer/employee relationship but where the discriminating entity interfered with the plaintiff's ability to enter into an employment contract on the basis of race.").

Hence, the district court erred in its view that Section 1981 does not allow a claim against Mr. Mansfield for interference with Mr. Ford's contract because the

Horizon House Board – and not Mr. Mansfield directly – made the decision to terminate Mr. Ford's employment. (JA 1633-1634.)[14]

The district court also erred in requiring Mr. Ford to show that the new board fired Mr. Ford because of his race. As discussed in Part VI.D.2 *infra*, in order to have a claim against a third party who interfered with Mr. Ford's employment relationship, he need only show that someone interfered with his contract based on his race. This Court should remand the case to have a jury determine whether Mr. Mansfield's actions constituted race-based interference, and if so, how this interference harmed Mr. Ford. The district court improperly decided these factual issues in granting summary judgment.

2. The courts have consistently recognized that Section 1981 protects against third party interference with contracts outside of an employment relationship.

To the extent there is any question whether Section 1981 reaches Mr. Mansfield's actions here, the Supreme Court has recognized that civil rights statutes, including Section 1981, permit claims for third-party interference. In

[14] In a footnote, the district court appears to concede that there could be liability in some instances of third-party interference, but incorrectly seems to view this type of claim as limited to defendants who are co-workers of the plaintiff. (JA 1633.) Relying on *Collin v. Rector & Bd. of Visitors of the Univ. of Va.*, 873 F. Supp. 1008, 1015-16 (W.D. Va. 1995), and *Harris v. Rector & Visitors of the Univ. of Va.*, No. 93-0025-C, 1993 WL 513295, at *2 (W.D. Va. Nov. 18, 1993), which involved co-worker liability, the district court observed that Mr. Mansfield "could theoretically be liable depending on the role he played in Ford's termination," but did not decide that issue because it "need not [be addressed]." (JA 1633.)

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969), the Supreme Court held that a person's right to lease property free from third-party interference was protected under Section 1982, a civil rights statute:

> [t]he right to 'lease' is *protected by [Section] 1982 against the actions of third parties*, as well as against the actions of the immediate lessor. . . A narrow construction of the language of [Section] 1982 would be quite inconsistent with the *broad and sweeping nature of the protection* meant to be afforded by [Section] 1 of the Civil Rights Act of 1866 . . . from which [Section] 1982 was derived.

Id. at 237 (emphasis added). While the *Sullivan* case addresses Section 1982, the Supreme Court has made clear that Sections 1981 and 1982 should be construed "alike because it has recognized the sister statutes' common language, origin, and purposes." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, __, 128 S. Ct. 1951, 1955 (2008); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) ("under the *in pari materia* canon, statutes addressing the same subject matter generally should be read as if they were one law") (citations omitted).

The focal point of the Supreme Court's analysis in a Section 1981 claim is the interference with plaintiff's contract, not with an employment relationship itself. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304 (1994) (Section 1981 covers *all* contracts, not just those relating to employment); *Patterson v. McLean Credit Union*, 491 U.S. 164, 210 (1989) (Brennan, J., dissenting in part) ("Section 1981 is a statute of general application, extending not just to employment contracts, but to *all* contracts."); *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d

206, 211 (4th Cir. 2007) ("Section 1981's prohibition on racial discrimination in the making and enforcement of contracts has long been applied to relationships far afield of employment."); *Shaikh v. City of Chicago*, 341 F.3d 627, 630 (7th Cir. 2003) ("Shaikh is correct in noting that a third party's interference with an individual's equal opportunity to enter into contracts or purchase property can support civil-rights claims under §§ 1981 and 1982."). Thus, while the Supreme Court has not directly addressed whether Section 1981 protects plaintiffs from third-party interference with their contracts, it is clear that case law and statutory interpretation principles support a finding that Mr. Mansfield's interference with Mr. Ford's contract with Horizon House is actionable under Section 1981.

Similarly, district courts have consistently found that a defendant can be held liable under Section 1981 for interference with a plaintiff's contractual rights, without a contractual relationship between them. *See Phillips*, 367 F. Supp. 2d at 869 (Section 1981 does not require a contractual relationship between the plaintiff and defendant); *Shirkey*, 941 F. Supp. at 573-74 (holding defendant liable without requiring an employment relationship, since defendant interfered with plaintiff's contractual rights); *Ladson v. Ulltra East Parking Corp.*, 853 F. Supp. 699, 702-03 (S.D.N.Y. 1994) (holding defendant, a customer of the employer, liable, where defendant made false complaints about the plaintiff's job performance); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1008

(S.D. Tex. 1981) (finding that the plaintiff fishermen stated a Section 1981 claim against defendant dock owners without requiring an employment relationship).

Therefore, Mr. Mansfield's race-based interference with Mr. Ford's employment, as described above, is actionable under Section 1981, even though Mr. Mansfield was not Mr. Ford's employer.

3. The plain meaning and legislative history of Section 1981, and public policy, support application of Section 1981 to interference claims including Mr. Ford's claim against Mr. Mansfield.

The plain meaning of Section 1981 and the legislative history of the 1991 Amendment to Section 1981, together confirm that this Court should read Section 1981 broadly to encompass the types of interference in which Mr. Mansfield engaged, leading the new Board to terminate Mr. Ford's employment.

Section 1981, as originally enacted, stated that: "All persons … shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a).

Congress expanded the language of Section 1981 in the 1991 Amendments to the Civil Rights Act, to define broadly the phrase "to make and enforce" contracts to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits . . . of the contractual relationship." 42 U.S.C. § 1981(b); *see also* S. COMM. ON LABOR AND HUMAN RESOURCES, CIVIL RIGHTS ACT OF 1990, S. 2104; S. REP. No. 101-315, at 6 (1990) ("1990 Senate

Report") (through "restoration of [the] broad scope of section 1981, Congress will ensure that Americans may not be harassed, fired, or otherwise discriminated against in contracts because of their race.").

Thus, Section 1981 now guarantees that persons of all races will have the equal right to enjoy the benefits of their contractual relationships, including the right to invoke whatever measures are necessary to ensure that all aspects of their contractual rights are protected. *See, e.g.*, *CBOCS West*, 128 S. Ct. at 1959; *Rivers*, 511 U.S. at 303. This legislative history to the 1991 Amendments also confirms that Section 1981 prohibits the type of interference that Mr. Mansfield posed with Mr. Ford's employment.

In granting summary judgment, the district court effectively relied upon the case law prior to the 1991 Amendments, as did Mr. Mansfield in his summary judgment motion in citing a 1990 decision. (JA 123.) This improperly restricted Section 1981's enforcement to parties with whom the plaintiff has a contract.

In a very similar factual situation, the district court in *Ladson* held that an employee could state a Section 1981 claim against a customer (Tretin) who acted in collusion with the employer (a parking garage) by submitting false "complaints" to the employer about the employee's job performance. *Ladson v. Ulltra East Parking Corp.*, 853 F. Supp. 699, 703-04 (S.D.N.Y. 1994) ("This new evidence, if borne out at trial, would indicate cooperation between Tretin and the Company in

the obstruction of Ladson's efforts to enforce his employment contract."). Just as did the individual defendant in *Ladson*, Mr. Mansfield made false and racially stereotyped allegations about Mr. Ford to the Association members, to obtain the ouster of certain Board members and the termination of Mr. Ford.

E. THE DISTRICT COURT ERRED WHEN IT TREATED MR. FORD'S PRAYER FOR EMOTIONAL DISTRESS DAMAGES UNDER SECTION 1981 AS A SEPARATE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

This Court should find that the district court erred in striking Mr. Ford's request for emotional distress damages on the ground that he could not state a claim for intentional infliction of emotional distress. In fact, Mr. Ford's claim for emotional distress damages was part of the *remedies* for his Section 1981 claim, not a separate cause of action.

Mr. Ford brought only one claim against Mr. Mansfield, for race discrimination in violation of Section 1981. (JA 64-67, at Count II.) As part of the remedies for the Section 1981 claim, Mr. Ford sought the following relief:

> 3. An award to plaintiff of compensatory damages, including back pay, front pay, and emotional distress damages in an amount appropriate to the proof presented at trial;
>
> 4. An award to plaintiff of punitive damages in an amount appropriate to the proof presented at trial; [and]
>
> 5. An award to plaintiff of reasonable attorneys' fees and costs; . . .

(JA 68, ¶¶ 3-5.) These are the types of damages that can be awarded on a Section

1981 claim. *See, e.g.*, *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 546-48 (4th Cir. 2003) (compensatory damages for emotional distress and punitive damages); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 441 (4th Cir. 2000) (punitive damages); *see also* 42 U.S.C. § 1988 (attorney's fees and costs).

Mr. Mansfield himself recognized, in moving to strike Mr. Ford's request for emotional distress damages, that Mr. Ford sought emotional distress damages on his Section 1981 claim. (JA 90.)

In order to prove entitlement to emotional distress damages as part of the remedies for a Section 1981 claim, the Fourth Circuit has clearly held that "a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress." *Bryant*, 333 F.3d at 546 (citing *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996)).[15]

The plaintiff must present evidence, either his own testimony, or combined with that of family members and friends, which "must indicate with specificity 'how [the plaintiff's] alleged distress manifested itself.'" *Id.* at 547 (quoting *Price*,

[15] Other circuits have reached the same result. *See, e.g.*, *Heaton v. The Weitz Co., Inc.*, 534 F.3d 882, 891-92 (8th Cir. 2008) (award of emotional damages based solely on testimony from the plaintiff and his spouse regarding emotional distress that he experienced as a result of his employer's actions); *EEOC v. WC&M Enterprises, Inc.*, 496 F.3d 393, 402 (5th Cir. 2007) ("A claimant's testimony, without more, may support an award of compensatory damages for emotional distress); *DeCorte v. Jordan*, 497 F.3d 433, 442 (5th Cir. 2007) ("corroborating testimony and medical evidence is not required in every case involving compensatory damages").

93 F.3d at 1254).

Here, Mr. Ford intended to submit not only his own testimony, but also that of his wife, and the expert testimony of Dr. Thomas Goldman that Mr. Ford suffered severe emotional distress, including a major depressive disorder, as a result of the events leading up to the termination of Mr. Ford's employment as Building Manager at Horizon House. (JA 1055-1075.) This evidence was more than sufficient to permit a reasonable juror to award emotional distress damages.

However, the district court required Mr. Ford to make out the elements of "a claim for intentional infliction of emotional distress" [IIED] under Virginia law (JA 1634) – a claim not in this case. These elements for a common-law IIED claim impose a substantially higher burden than those for compensatory damages for emotional distress, including requiring "conduct that was outrageous or intolerable" and resulting in "severe emotional distress." *Id.*

Under *Bryant*, reigning Fourth Circuit precedent, Mr. Ford did not have to show that Mr. Mansfield's conduct was "outrageous or intolerable" or that he suffered "severe" emotional distress (although he submits that his emotional distress after his termination was severe under any standard), to recover compensatory damages for emotional distress on his Section 1981 claim.

The district court appeared to rely on Mr. Ford's inability to obtain his full medical records from the Veterans Administration (JA 1634), which evidently has

lost or otherwise misplaced records for past years. This was also legal error, as Mr. Ford was not required to present corroborating evidence through his medical records. In fact, as this Court held in *Bryant*, a plaintiff's own "testimony, standing alone, can support an award of compensatory damages for emotional distress." *Bryant*, 333 F.3d at 546.

Thus, under *Bryant* and *Price*, this Court should find that it was legal error for the district court to apply the higher burden of proof standard for a common-law IIED claim to Mr. Ford's request for compensatory damages for emotional distress.

VIII. CONCLUSION.

This Court should reverse the district court's grant of summary judgment on Mr. Ford's Section 1981 claim, because the district court erred in (1) determining that the comments made to Mr. Ford did not reflect racial animus and could not be imputed to Mr. Mansfield; (2) failing to consider circumstantial evidence showing that Mr. Mansfield's proffered non-discriminatory reasons for his actions were false; and (3) requiring an employment relationship for a Section 1981 claim.

The district court further erred in striking Mr. Ford's request for emotional distress damages on his Section 1981 claim by treating that request as a separate claim for intentional infliction of emotional distress and by requiring medical records to corroborate his emotional damages.

IX. STATEMENT REGARDING ORAL ARGUMENT.

Counsel believes that oral argument would be helpful in elucidating the complexity and novelty of these issues.

Respectfully submitted,

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_____

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Certificate of Service

I hereby certify that on this 14th day of May, 2010, a copy of the foregoing Appellant's Corrected Opening Brief was served on counsel of record by this Court's ECF system, to:

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