

**RECORD NO. 10-1254**

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*In The*  
**United States Court of Appeals**  
*For The Fourth Circuit*

**MICHAEL FORD,**

*Plaintiff – Appellant,*

**v.**

**JAMES MANSFIELD, ESQ.,**

*Defendant – Appellee,*

**and**

**ZALCO REALTY, INCORPORATED; MDV MAINTENANCE,  
INCORPORATED; HORIZON HOUSE CONDOMINIUM UNIT OWNERS;  
DAVID FAISON; ERIC MUCKLOW; VIRGINIA A. SMITH,**

*Defendants.*

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

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**BRIEF OF APPELLEE**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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/s/ Robert E. Draim

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April 7, 2010

(date)

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### **SUMMARY OF THE CASE**

Mr. Mansfield is a Virginia-licensed attorney who served as counsel for a condominium association in Arlington County, and in that capacity provided advice to his client concerning whether to hire Mr. Ford as a building manager in light of Mr. Ford's violent criminal record and pending criminal sexual assault charges. There was absolutely no evidence that Mr. Mansfield raised any concern as to Mr. Ford's race. Moreover, the undisputed evidence showed that most of the other candidates for the building manager position were minorities, yet Mr. Mansfield raised no concern as to any of them. Mr. Ford was hired for the position, but was later terminated at the request of the condominium association's board of directors. The undisputed evidence was that the action of the association board was based upon non-racial reasons including Mr. Ford's criminal history and the circumstances of his hire by the prior board.

Mr. Ford filed the present lawsuit against the condominium association, Mansfield and others, alleging racial discrimination. All of the other defendants were dismissed upon a settlement prior to discovery in this case, which then proceeded to discovery as to Mr. Ford's claims against Mr. Mansfield. After countless hours of deposition testimony as well as written discovery and the production of hundreds of pages of documents, the undisputed evidence showed

that Mr. Mansfield could not be liable to Mr. Ford for a civil rights claim based on alleged hostile work environment or wrongful termination/interference.

Accordingly, the district court did not err in granting Mr. Mansfield's motion for summary judgment. Likewise, the district court did not err in granting Mr. Mansfield's renewed motion to strike Mr. Ford's claim for emotional distress damages, given his failure to produce his medical records relating to his purported treatment.

### **JURISDICTIONAL STATEMENT**

Mr. Mansfield agrees with Mr. Ford's Jurisdictional Statement, except that Mr. Ford fails to note in his Jurisdictional Statement that in addition to granting Mr. Mansfield's motion for summary judgment the district court also granted Mr. Mansfield's motion to strike Mr. Ford's claim for emotional distress damages. (JA 1623-1636.)

### **STATEMENT OF THE ISSUES**

The issues presented by Mr. Ford's appeal should be rephrased as follows:

1. Whether the district court erred in granting summary judgment in favor of Mr. Mansfield on Mr. Ford's claim for hostile work environment based on his race, where the district court found that Mr. Ford failed to show any negative or unwanted conduct by Mr. Mansfield that was directed towards him based on his race.

2. Whether the district court erred in granting summary judgment in favor of Mr. Mansfield on Mr. Ford's claim of wrongful termination and/or interference based on his race, where the district court found that no reasonable juror could find that Mr. Mansfield took any action against Mr. Ford because of his race, or that Mr. Ford was fired because of his race.

3. Whether the district court erred in granting Mr. Mansfield's renewed motion to strike Mr. Ford's claim for emotional distress damages, where the district court found that Mr. Ford had failed to produce any medical documentation to support his claim for emotional distress, or other objectively verifiable evidence of emotional distress.

### **STATEMENT OF THE CASE**

On December 19, 2008, Mr. Ford filed his complaint against Mr. Mansfield and other defendants, alleging race discrimination. (JA 17-41.) Mr. Mansfield was served with the complaint on March 23, 2009. (JA 1.) Mr. Mansfield thereupon filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on April 10, 2009. (JA 1.) Before Mr. Mansfield's motion could be heard, Mr. Ford filed an amended complaint on April 21, 2009. (JA 42-70.) On May 5, 2009, Mr. Mansfield filed his motion to dismiss the amended complaint, pursuant to Fed. R. Civ. P. 12(b)(6). (JA 2.)

On June 10, 2009, the district court issued an Order denying Mr. Mansfield's motion to dismiss the amended complaint. (JA 71.) The district court's order was necessarily based upon the four corners of Mr. Ford's pleading, and without the benefit of any discovery or evidence. Indeed, the district court's order stated that there "*may* be material facts in dispute." (emphasis supplied) (JA 71.)

On November 13, 2009, Mr. Mansfield filed his motion to compel discovery and/or to strike Mr. Ford's claim for emotional distress damages. (JA 8.) The grounds for Mr. Mansfield's motion to strike included that Mr. Ford had failed to produce any medical records despite having represented that they had been requested and would be produced. On November 20, 2009, the district court granted Mr. Mansfield's motion and directed Mr. Ford's counsel to respond by November 24, 2009 as to the status of the medical records. On November 25, 2009, Mr. Mansfield filed a renewed motion to strike Mr. Ford's claim for emotional distress damages. Mr. Ford filed an opposition to the renewed motion (JA 622-650), and Mr. Mansfield filed a reply memorandum (JA 651-654). Oral argument was held on January 6, 2010, at the conclusion of which the district court took Mr. Mansfield's motion under advisement. The district court thereupon granted Mr. Mansfield's motion for the reasons stated in its Memorandum Opinion (JA 1623-1636).



On November 30, 2009, Mr. Mansfield filed his motion for summary judgment pursuant to Fed. R. Civ. P. 56. Mr. Mansfield's motion was supported in part by numerous affidavits of Horizon House residents and board members, attesting to the non-racial reasons for their actions. Mr. Ford filed an opposition to Mr. Mansfield's motion for summary judgment (JA 655-1380), and Mr. Mansfield filed a reply memorandum (JA 1381-1566). Oral argument was held on January 6, 2010, at the conclusion of which the district court took Mr. Mansfield's motion under advisement. The district court thereupon granted Mr. Mansfield's motion for the reasons stated in its Memorandum Opinion (JA 1623-1636).

### **STATEMENT OF FACTS**

#### **I. The Undisputed Facts**

##### **A. Horizon House**

Horizon House is a condominium community in Arlington, Virginia, consisting of a high-rise building with approximately 288 units. The recorded Bylaws of Horizon House Condominium, adopted pursuant to the Condominium Act, Va. Code Ann. § 55-79.39 *et seq.*, provide that all unit owners in Horizon House are members of the Unit Owners' Association (the "Association"). (JA 0169.)

The Bylaws of the Association further provide for the governance of the Association by a Board of Directors elected by the members of the Association,

with each unit owner(s) having a fractional voting share. (JA 0170.) Pursuant to the Bylaws, each Director serves a two year term, with staggered elections taking place at an annual meeting of the unit owners in August of each year. (JA 0174; JA 0208.) In addition, the Bylaws provide that a director may be removed “with or without cause” following notice and an opportunity to be heard at a meeting. (JA 0171-173.)

## **B. Management of Horizon House**

As with most condominium associations, Horizon House is typically under a contract with an experienced management company for the provision of a number of important functions. Beginning in 2003 or 2004, Horizon House utilized the services of Zalco Realty, which is based in Silver Spring, Maryland. (JA 241-244.) In or about September 2005, Michael Constant was appointed the Zalco “portfolio manager” for Horizon House, overseeing the management of the Horizon House account. (JA 257-259.)

In addition, a building manager provides certain onsite management functions at Horizon House. (JA 244.) The building manager at Horizon House has an office on the main level, and has key access to each residential unit. (JA 298-300.)

**C. James Mansfield**

James Mansfield is an attorney who is licensed to practice law in Virginia, and who is a member in good standing of the Virginia State Bar. (JA 326.)

Mr. Mansfield began serving as counsel for the Association in 1990. (JA 326.) Mr. Mansfield has never been an officer or director of the Association, and he has never resided at Horizon House. (JA 326.)

**D. Board of Directors Elections**

At the annual meeting in August 2001, Vondell Carter was elected to the Board among approximately five candidates vying for three open positions. (JA 205.) Mr. Carter was the only African-American among the candidates, and he received the highest number of votes among all the candidates, *i.e.* more than any of the white candidates. (JA 206.) Mr. Carter was then reelected to the Board at the annual meetings in August 2003 and August 2005, and although he was again the only African-American among the candidates, he received higher vote percentages than certain white candidates. (JA 209-210; JA 215.) Mr. Carter conceded that he does not have any basis for believing that there could have been any racial discrimination in the Association members' vote for directors in those years, given that he won election and beat white candidates. (JA 207; JA 210-211.)

At the annual meeting of August 2004, Mr. Carter's wife, Susan Morris, was also elected to the five-person Board. (JA 216-217.) Following the election at the annual meeting of August 2005, the five members of the Board of Directors were: Vondell Carter; Susan Morris; Greg Weatherman; David Faison; and Adrienne Garretson. (JA 329-331.) Mr. Carter was selected by the Board to serve as President. (JA 329-331; 339-340.)

**E. Mr. Mansfield's Participation at Association Board Meetings**

As counsel for the Association, Mr. Mansfield came to some of the monthly Board meetings. (JA 212-213.) During those meetings, Mr. Mansfield never made any racially derogatory statement or comment. (JA 214.)

**F. The Search for a New Building Manager**

In the fall of 2005, the interim building manager for Horizon House was Jennifer O'Keefe. (JA 329-331.) Zalco was asked to assist in the search for a permanent building manager and an ad was published in the Washington Post, directing interested candidates to submit their resumes to Zalco. (JA 350; JA 260-261.)<sup>1</sup>

The interested candidates were then provided an application form by Zalco and asked to return it to Zalco when it was completed. (JA 260-261; JA 270-271; 285-286).

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<sup>1</sup> The resume submitted by Mr. Ford to Zalco was not located or produced by either Mr. Ford or Zalco.

One of the applicants for the building manager position was Mr. Ford. (JA 362-365.) In response to a question as to the applicant's criminal background, Mr. Ford noted that he has been convicted of misdemeanor assault in Ohio in 1995. (JA 363.)<sup>2</sup>

Mr. Constant and his staff at Zalco reviewed the resumes and completed applications of interested candidates, and began to arrange interviews at Horizon House, to be attended by the Association's Board members as well as Mr. Constant. (JA 219-220.)

On or about November 4, 2005, Mr. Ford and at least two other selected applicants were interviewed by three board members (Vondell Carter, Susan Morris and Greg Weatherman) and Mr. Constant.<sup>3</sup> Mr. Mansfield was not present at the interviews. (JA 219; JA 287.)

The applicants interviewed on that date included at least two and perhaps three African-Americans, including Mr. Ford.<sup>4</sup> To the best of anyone's

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<sup>2</sup> Although Mr. Ford's application stated that the assault conviction had been "expunged," Mr. Ford had only moved for expungement, and it was in fact never expunged. (JA 281-283.)

<sup>3</sup> The other two board members (David Faison and Adrienne Garretson) were not present for the interviews. (JA 336-338; JA 351-352.)

<sup>4</sup> See JA 218 (Mr. Carter recalling two African-American interviewees); JA 335 (Ms. Morris recalling two African-Americans, one Asian-American and one Caucasian); JA 351-352 (Mr. Weatherman recalling three African-American interviewees); JA 269 (Mr. Constant recalling three African-American interviewees).

knowledge, Mr. Ford was the only person interviewed who had a criminal record or who was the subject of any criminal sexual assault charges. (JA 269-270.)

**G. Mr. Ford's Criminal Record**

In 1995, Mr. Ford was charged in Ohio with felony assault. He pled guilty to misdemeanor assault and was sentenced to sixty days in jail. (JA 366-367.) The victim in the Ohio assault, whom Mr. Ford identified as his uncle, was hospitalized. (JA 320.)<sup>5</sup>

On August 3, 2005, Mr. Ford was charged with two counts of sexual assault upon a tenant in the apartment building in which he had served as building manager. (JA 368-370.) The charges were still pending at the time that Mr. Ford began working at Horizon House on December 5, 2005. On January 25, 2006, after Mr. Ford had been working at Horizon House for nearly two months, he was found not guilty at a trial in Prince George's County, Maryland.

**H. The Decision to Ask that Mr. Ford Be Hired as Building Manager**

Notwithstanding Mr. Ford's criminal record and pending criminal charges, the three board members who had interviewed him (Vondell Carter, Susan Morris

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<sup>5</sup> Mr. Ford argues that, despite his guilty plea in Ohio, his assault upon his uncle was in reality justified. In addition to raising what amounts to a collateral attack upon his own guilty plea, Mr. Ford in any event misses the point. The Horizon House residents were not required to accept Mr. Ford's word that the assault was justified, and they cannot be characterized as racists for having concerns that a person with a conviction for criminal assault was hired as their building manager.

and Greg Weatherman) voted to request that Zalco place Mr. Ford at Horizon House, purportedly on a “probationary” status. (JA 221, JA 222; JA 245-246; JA 262-266.)<sup>6</sup> In order to minimize any potential liability to Horizon House, Mr. Ford was hired as an employee of MDV Maintenance, Inc., a subsidiary of Zalco, rather than as an employee of Horizon House. (JA 221, JA 222; JA 247; JA 262-266; JA 341-342.)

### **I. Mr. Ford Began Working at Horizon House**

Mr. Ford began working at Horizon House on December 5, 2005. (JA 292.) Although he was purportedly retained on a “probationary” basis, pending the outcome of his criminal charges, Mr. Ford conceded that he was given access to the keys to every one of the residential units at Horizon House. (JA 298-301.) Specifically, Mr. Ford was given a key to a box which contained keys to every one of the units in the condominium building. (JA 298-301.)

### **J. Horizon House Residents Became Concerned and Upset at the Board**

After Mr. Ford began working at Horizon House, residents learned of his past assault conviction and his pending sexual assault charges. (JA 441-443; JA 457-459; JA 1403-1405; JA 488-490; JA 504-506; JA 520-522.) As would be

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<sup>6</sup> It is not necessary for purposes of this appeal to determine if the “meeting” at which such action was taken was properly held, or whether the other two Board members, David Faison and Adriane Garretson, were present and voted. There are apparently no minutes of any board meeting at which a vote was taken with respect to Mr. Ford being selected as building manager.

expected, many residents were concerned that an individual with such a record was serving as building manager with key access to their units, and they were upset at the three Board members who voted to select him as the building manager. (JA 441-443; JA 457-459; JA 1403-1405; JA 488-490; JA 504-506; JA 520-522.)

As a result, residents expressed their disapproval to Mr. Carter, Ms. Morris, and Mr. Weatherman that they had voted to hire a building manager with a past conviction and pending sexual assault charges. (JA 353.)

The premise for Mr. Ford's claim in this case was that the Horizon House residents would not have been so concerned, or so upset, if the Board had hired a *white* building manager with a criminal record and pending sexual assault charges. However, such a premise is rank speculation and defies common sense.

#### **K. Mr. Ford's Work at Horizon House**

Mr. Ford worked as building manager at Horizon House for approximately two months, from December 5, 2005 until about February 2, 2006, and for additional time in February 2006. The only time that he left work early or failed to come to work for any reason other than unrelated personal leave time was December 24, 2005 when he left early in the afternoon after receiving the anonymous death threat discussed below. (JA 318.)<sup>7</sup> Apart from that one

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<sup>7</sup> Mr. Ford was not scheduled to work on Christmas day or the following weekend, and he returned to work as scheduled the following Monday morning. (JA 318-319).



afternoon, Mr. Ford never felt compelled to leave the Horizon House premises because of any perceived hostile work environment. (JA 319.) What's more, after Mr. Ford was advised by Zalco that his services at Horizon House were terminated, he was asked by Zalco to return temporarily, and he voluntarily agreed to do so. (JA 267-268.)

Near the end of Mr. Ford's employment at Horizon House, he prepared a detailed manager's report for the Board of Directors. (JA 371-378.) There was no mention in Mr. Ford's report that he had experienced any hostile work conditions. (JA 371-378.)

**L. Mr. Ford's Interactions with Horizon House Residents**

Mr. Ford could only identify a few verbal statements made in his presence during his approximate two months as the Horizon House building manager, which Mr. Ford considered to be racially derogatory, and none of those few statements were made by Mr. Mansfield or in his presence.

Specifically, Mr. Ford testified in deposition that Adriane Garretson, a former Board member at Horizon House who is now deceased, made two statements to Mr. Ford which he considers to have been racially derogatory. (JA 302-310.) As described by Mr. Ford, approximately one week after he began working at Horizon House, he called Ms. Garretson into his office to tell her not to bring her dog through the lobby, and Ms. Garretson became upset. (JA 303-304.)

According to Mr. Ford, Ms. Garretson told him “that I needed to get some education; you need to get education, you don’t know the bylaws, you need to get some education.” (JA 304.)<sup>8</sup>

Mr. Ford testified that Ms. Garretson returned the same day and began harassing the Horizon House front desk agent. When Mr. Ford advised Ms. Garretson that the Front desk agent could not answer her questions, Ms. Garretson reportedly responded “Boy, I’m not talking to you.” (JA 305-306.) Mr. Ford further testified that he and Ms. Garretson did not have any conversations after that incident, so that for the last two-plus months of his work at Horizon House even Ms. Garretson did not make any alleged racially derogatory statements to him. (JA 310.)

With respect to these two isolated exchanges with Ms. Garretson, Mr. Ford concedes that Mr. Mansfield was not present, and that Mr. Ford has no reason to know whether Mr. Mansfield even became aware of the incident. (JA 308-310; JA 314.)

The only other incident which Mr. Ford can identify in which anyone at Horizon House made any racially derogatory statement in his presence was a statement by another Horizon House resident, Lenny Conrad, after Mr. Ford was

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<sup>8</sup> Even assuming that Ms. Garretson made that statement, it was hardly racial. Ironically, the statement is fully consistent with the fact that Mr. Ford was dismissed from college for “academic deficiency” after failing numerous courses including English. (JA 379-381; JA 382.)

terminated from Horizon House on February 2, 2006. (JA 311-312.) According to Mr. Ford, Mr. Conrad told Mr. Ford in the lobby of Horizon House, while other residents were present, that “we don’t want your kind in here.” (JA 311.) However, the term “your kind” cannot be assumed as referring to African-Americans, as distinguished from persons with a criminal record of a violent crime. In any event, Mr. Ford does not contend that Mr. Mansfield was present or had any knowledge that Mr. Conrad would be making such a comment. (JA 313.)

**M. Mr. Mansfield’s Discussions with Mr. Ford**

Mr. Ford also conceded in his deposition that in his telephone conversation and one brief meeting with Mr. Mansfield, Mr. Mansfield was professional and did not make and racially derogatory comments. (JA 288; JA 293; JA 294; JA 296-297.) On one occasion, Mr. Ford admitted that Mr. Mansfield stopped by to meet him and that they had a “cordial” encounter. (JA 294.) In addition, Mr. Ford admitted that Mr. Mansfield was “professional” in Mr. Mansfield’s e-mail exchange with Mr. Ford concerning an issue unrelated to Mr. Ford’s employment status. (JA 294-295.) Mr. Ford’s last communication with Mr. Mansfield was a telephone conversation, also an issue unrelated to Mr. Ford’s employment status, and Mr. Ford did not recall anything notable about that conversation. (JA 296-297.)

In their telephone conversation, Mr. Mansfield inquired if Mr. Ford would consent to take a polygraph, in order to verify that he did not assault the former tenant. (JA 289.) Mr. Ford reportedly agreed on the condition that the Association pay for the polygraph, which the Association was apparently unwilling to do. (JA 289-290.) The issue was not pursued, and Mr. Ford was hired as building manager without having to submit to a polygraph. (JA 291.)

**N. The Anonymous Death Threat Allegedly Sent to Mr. Ford**

Mr. Ford claimed that on December 24, 2005, he received an envelope in the mail that was addressed to him at his office in Horizon House. Inside the envelope was a single page containing block lettering from a magazine or newspaper, containing the message: "U R DED NIGGER U R FAMLY TOO." (JA 383-384.)

Mr. Ford did not claim that Mr. Mansfield authored the note or that Mr. Mansfield had any involvement in sending it to him. Indeed, it was undisputed that the identity of the note's author is unknown. (JA 52; JA 315; JA 316-317; JA 231.) In fact, the Arlington County Police and even the FBI investigated the note and were unable to identify the source. (JA 316-317; JA 231.)

Mr. Ford complained in his Amended Complaint at paragraphs 50 and 116 that Mr. Mansfield failed to investigate the source of the note. (JA 52; JA 65-66.) However, Mr. Ford did not provide a copy of the note to Mr. Mansfield, nor was Mr. Ford told that Mr. Mansfield had been directed by anyone to do anything in

connection with the note. (JA 317.) In addition, Mr. Carter, who was president of Horizon House at the time Mr. Ford allegedly received the note, testified that he does not recall asking Mr. Mansfield to take any action with respect to the note, or recall any direction by the Board for Mr. Mansfield to take any action. (JA 232-233.) Moreover, there is no basis to assume that Mr. Mansfield would have uncovered the perpetrator when the Arlington County Police Department and the FBI were unable to do so.

**O. The Horizon House Website “Chat Room”**

One of the Horizon House residents, Eric Mucklow, registered the domain name for an online “message board” at which Horizon House residents could post messages or comments. (JA 388.) As one of the administrators of the message board, Mr. Mucklow had the authority to approve or deny posts to the message board. (JA 388; JA 390-391.) Mr. Mucklow only excluded posts that were pornographic or commercial in nature. (JA 391.) Mr. Ford did not identify any specific submission that was supportive of him and which Mr. Mucklow refused to post. In fact, when Mr. Ford was acquitted of the sexual assault charges on January 25, 2006, Mr. Mucklow posted a submission by Greg Weatherman that same day announcing Mr. Ford’s acquittal. (JA 400-401.)

**P. The Petition Calling for an Association Meeting**

In January 2006, a Petition was drafted, calling for a special meeting of the Horizon House members eligible to vote, for the purpose of considering whether to remove Vondell Carter, Susan Morris, and Greg Weatherman as directors, as well as to consider certain bylaws amendments. (JA 402-414.)

The Petition did not make reference to anyone's race, and there was no racially derogatory language in the Petition. (JA 402-414.) Moreover, the Petition did not even mention Mr. Ford. Rather, the Petition expressly stated that the special meeting was being requested to conduct a vote pursuant to the Bylaws for the removal of those three directors based on allegations that they had violated the Association's Bylaws and statutory provisions, breached their duties, and failed to act in the best interest of the Association. (JA 402-414).

**Q. Mr. Mansfield's January 17, 2006 letter to Vondell Carter**

On January 17, 2006, Mr. Mansfield wrote a letter to Mr. Carter, President of the Association. (JA 415-417.) The only portion of Mr. Mansfield's letter which related specifically to Mr. Ford is found at the middle of page 2. (JA 416.) Nowhere in that paragraph (or elsewhere in the letter) is there any mention of Mr. Ford's race. (JA 415-417.) Nor does that paragraph contain any racial epithet or racially derogatory statement. (JA 415-417.)

In that paragraph, Mr. Mansfield recounted in part that at the time Mr. Ford was hired he had two criminal sexual battery charges against him in Prince George's County, Maryland, arising out of two alleged incidents at the residential building that Mr. Ford had previously managed. (JA 416.) Mr. Mansfield noted that he had advised Mr. Carter that Mr. Ford's criminal charges should be resolved before he would be eligible for hire. Mr. Mansfield noted that the woman "alleges" that the "encounters" were against her will. (JA 416.) Mr. Mansfield did not say that Mr. Ford was guilty of the crimes charged, only that the charges had required a showing of probable cause. (JA 416.) Likewise, Mr. Mansfield did not describe the charges as "rape". (JA 416.) Mr. Mansfield further noted that with Mr. Carter's consent he had spoken with Mr. Ford, who admitted that there were "consensual sexual relations." (JA 416.) Mr. Mansfield advised Mr. Carter that Mr. Ford had at least "demonstrated errors of judgment which alone should have disqualified him." (JA 416.)<sup>9</sup>

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<sup>9</sup> Mr. Ford disputed telling Mr. Mansfield that he had consensual sexual relations with the complaining witness, but that dispute is not material to Mr. Ford's civil rights claim. The premise for Mr. Ford's claim, *i.e.* that there is some stereotype that African-Americans claim consent, whenever charged with a criminal sexual offense, is completely unfounded. Indeed, this Court can take judicial notice that criminal defendants of all races often defend sexual charges on the basis of consent, and also that African-American defendants cannot be said to raise the defense any more frequently than defendants of other races.

Mr. Mansfield asked in the letter that Mr. Carter convene a Board meeting immediately “so that these matters might be discussed in detail.” (JA 416.) Mr. Mansfield further stated his opinion to Mr. Carter that Mr. Carter, Ms. Morris and Mr. Weatherman should resign from the Board “to avoid the appearance of impropriety and mitigate any resulting liability...” (JA 416-417.)

**R. January 19, 2006 Concerned Citizen Meeting**

A meeting was held on January 19, 2006 in the Community Room of the Horizon House. (JA 418.) A two-page agenda was printed and distributed, relating to a number of topics to be discussed. (JA 419-420.)

Needless to say, attendees at the January 19, 2006 meeting were not excluded on the basis of race, and African-American residents (including Vondell Carter, Bobbie Fisher, and others) were among those in attendance. (JA 425-426.)

As would be expected in a residential community meeting concerning whether the Association directors should have hired a building manager who had a criminal record as well as pending sexual assault charges, a number of residents were vocal in expressing their opinions and displeasure. However, no one (including Mr. Mansfield) expressed the view that Mr. Ford should be removed as building manager because of his race. (JA 426.) No racial epithets were used by Mr. Mansfield or anyone else at the January 19, 2006 meeting. (JA 428; JA 224-226; JA 392-394).



Mr. Mansfield did not even mention Mr. Ford's race in his comments at the January 19, 2006 meeting. (JA 223; JA 424.) Nor did Mr. Mansfield mention the race of Vondell Carter, who was sitting in the first row, or any other Horizon House resident. (JA 223; 394.)

**S. February 2, 2006 Special Meeting**

On February 2, 2006, a special meeting of the Horizon House members was held in the Community Room at the Horizon House. (JA 435-436; JA 227.) The meeting was announced and was open to all members of the Association. Needless to say, no one was excluded from the meeting based on their race, and African-American residents were among those in attendance. (JA 227; JA 429). Mr. Mansfield was in attendance, as was an attorney who had been retained by Mr. Carter, Ms. Morris, and Mr. Weatherman. (JA 228-229.)

At the February 2, 2006 special meeting, Mr. Mansfield did not refer to Mr. Ford's race or to the race of any other person. (JA 396-397; JA 230.) Likewise, Mr. Mansfield did not make a racial epithet or racially derogatory statement. (JA 396-397; JA 230.)

A vote of members was taken during the February 2, 2006 special meeting, and the result was overwhelming in favor of removing Mr. Carter, Ms. Morris, and Mr. Weatherman as directors, with over 68% of the shares in attendance voting for removal and approximately 27% of those in attendance voting against removal.

(JA 435-438; JA 439; JA 356.)<sup>10</sup> Francisco Martinez-Alvarez, Julia Dragun, Eric Mucklow, Paige McManus, and Bonnie Williams were elected to fill the vacant positions on the board. (JA 440.)<sup>11</sup>

The vote to remove Mr. Carter, Ms. Morris, and Mr. Weatherman as directors was not based on racial motivations, but instead on concerns over their actions as Board members. (JA 442; JA 457; JA 1403-1404; JA 488-489; JA 504-505; JA 520-521.)

It should be noted that of the three Board members removed from office by overwhelming vote of the Horizon House members, one is African-American (Vondell Carter) and two are white (Susan Morris and Greg Weatherman).

**T. New Board's Decision to Request Zalco to Replace Mr. Ford as Building Manager**

Later that evening, the newly elected Board held a meeting and voted *unanimously* to ask Zalco to remove Mr. Ford as building manager at Horizon House. (JA 536-537; JA 395.) The Board's decision to ask Zalco Realty to replace Mr. Ford as building manager was not racially motivated. (JA 459; JA

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<sup>10</sup> Of the total Horizon House shares, *i.e.* including shares present and not present, 42.8814% voted to remove Mr. Carter, while 17.4050% voted against his removal. (JA 439.) Over 43% voted to remove Ms. Morris and Mr. Weatherman, with 16.3847% and 16.7248% voting against their removal, respectively. (JA 439.) Just over 2% of the total fractional shares abstained from voting. (JA 439.)

<sup>11</sup> A resolution was also passed to increase the size of the board to seven members. (JA 435-438.)

1404; JA 489; JA 505.) Because Mr. Mansfield was not on the Board of Directors, he did not have a vote to cast. (JA 326-327.)

**U. Mr. Ford's Application for Employment as Building Manager at Bonaventure Realty after Horizon House**

Following Mr. Ford's termination from his employment with Zalco's subsidiary, MDV, Mr. Ford applied for employment at Bonaventure Property Management ("Bonaventure"). (JA 538-542.) In his application for employment at Bonaventure, Mr. Ford responded as follows to a question as to the reasons why he left his previous employment: "Board of Directors changed Political Mess [sic]." (JA 538-542.)

**V. Vondell Carter's Description of Mr. Ford's Termination from Horizon House in Letter of Recommendation**

Along with his application to Bonaventure, Mr. Ford also submitted a letter of recommendation written by Vondell Carter. (JA 548.) In this letter, Mr. Carter stated that "[t]he termination of Fords [sic] employment at Horizon House was solely the result of political conflict within the community." (JA 548.)

**W. Mr. Ford's Employment at Bonaventure Realty after Horizon House**

Mr. Ford was employed by Bonaventure as an Assistant Property Manager at The Encore beginning on April 7, 2006. (JA 538-542; JA 543-544.)<sup>12</sup> Mr. Ford

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<sup>12</sup> In his deposition testimony, Mr. Ford falsely stated that he was not employed anywhere between leaving Horizon House in February and his employment at Green Contracting in June 2006. (JA 284.)

was then terminated for cause from his employment by Bonaventure effective May 3, 2006. (JA 543-544; JA 545-546.) Mr. Ford filed for unemployment compensation, which was denied upon a determination that he had been terminated for cause. (JA 547.)

**X. Mr. Ford's Description of Events to His Wife and Ex-Wife**

At the time of Mr. Ford's employment as building manager at Horizon House, he was married to Kimberly Ford. (JA 552.) Although the two separated in 1998, i.e. prior to Mr. Ford's employment at Horizon House, they saw each other two or three times per week because they have a son together. (JA 553-554.)<sup>13</sup> Kimberly Ford does not recall Mr. Ford ever telling her that his work at Horizon House was impacted by racial comments towards him or that Mr. Ford felt that he was specifically discriminated against. (JA 555; JA 556.)

During the period in which Mr. Ford worked at Horizon House, he was dating Andrea Ford, whom he married following his divorce from Kimberly Ford. (JA 565.) Andrea Ford does not remember Mr. Ford ever telling her that anything Mr. Mansfield said was racially motivated. (JA 566.)

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<sup>13</sup> In addition, Kimberly Ford testified that Mr. Ford hired her to do administrative work in Horizon House, and that she was paid. It is not known if Mr. Ford was authorized to hire his ex-wife.

## **Y. The Litigation in Arlington Circuit Court**

On February 10, 2006, the Association, by Mr. Mansfield serving as its attorney, filed suit in Arlington Circuit Court against Vondell Carter, Susan Morris, and Greg Weatherman. (JA 572-582.) Vondell Carter, Susan Morris, and Greg Weatherman shortly thereafter filed a separate action in Arlington Circuit Court. (JA 583-605.)

On February 17, 2006, the Arlington Circuit Court issued a temporary injunction against Vondell Carter, Susan Morris, and Greg Weatherman, enjoining them from conducting any business as or holding themselves out as members of the Horizon House board of directors. (JA 60; JA 606-608.)

The two cases brought in Arlington Circuit Court were eventually settled on January 9, 2007. (JA 609-621.) Vondell Carter, Susan Morris, and Greg Weatherman joined in the settlement. (JA 620-621.) In the Order of Settlement, Mr. Carter, Ms. Morris, and Mr. Weatherman agreed not to contest the validity of the February 2, 2006 election. (JA 614.)

As a result, the Arlington Circuit Court, upon entry of an agreed Order, recognized the validity of the overwhelming vote of Horizon House members to remove Vondell Carter, Susan Morris and Greg Weatherman as directors.

## **II. Mr. Mansfield's Reply to Mr. Ford's Statement of Facts**

Mr. Ford's Statement of Facts contains numerous distortions of the undisputed evidence, as described below.

### **A. "Horizon House"**

Mr. Mansfield does not dispute Mr. Ford's statement of facts in Section A ("Horizon House"), except to note that the President's role as the "point of contact" for Association counsel is not expressly provided in the Association Bylaws and that the Bylaws do not otherwise prohibit Association counsel from communicating with other Directors of the Association. (JA 166-201.)

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

Mr. Ford cites to no evidence to support his statement that Mr. Mansfield "began to act on his own" following Mr. Carter's election to the position of President. In any event, there was no evidence that that Mr. Mansfield ever refused to take direction from Mr. Carter due to Mr. Carter's race.

### **C. "Horizon House Sought to Hire a Permanent Building Manager."**

Contrary to Mr. Ford's assertion, David Faison did not choose to not attend Mr. Ford's interview. Mr. Faison did not attend the interview because he was given insufficient notice and because he was traveling out of town. (JA 1421-1422.) In any event, Mr. Ford does not contend that Mr. Mansfield interfered in the interview process.

**D. “False Charges Pending Against Mr. Ford.”**

No other applicant for the building manager position had a criminal record or was the subject of a criminal prosecution at the time. (JA 269-270.) What’s more, Arthur Dubin, President of Zalco, could not recall another manager ever being hired with pending charges. (JA 1437-1438.)

Mr. Ford states that he told Mr. Carter and Mr. Constant that the sexual assault charges against him were false and that the complainant had made up the charges because Mr. Ford had refused to renew her lease. However, there was no evidence that Mr. Mansfield told anyone that Mr. Ford was guilty of either crime or that he had admitted guilt.

What’s more, the Horizon House residents were understandably upset that their Board had hired a building manager with pending sexual assault charges, whether or not Mr. Ford professed his innocence or was later acquitted. Indeed, Mr. Ford’s insistence on his innocence does not support the conclusion that Horizon House residents and Mr. Mansfield were racists for questioning the judgment of those Board members in hiring Mr. Ford while those charges were pending.

**E. “Mansfield Exceeded the Scope of Representation by Interjecting Himself in Mr. Ford’s Hiring.”**

The evidence was undisputed that Mr. Mansfield did not “interject himself” into the hiring of Mr. Ford. Mr. Carter directed Mr. Mansfield to do more than

send a representative to Mr. Ford's trial, as Mr. Ford contends. Mr. Carter admitted that he asked for Mr. Mansfield's opinion on the hiring of Mr. Ford while charges were pending against him. (JA 1455; JA 1470.) In fact, Mr. Ford stated that his attorney, William Ray Ford, told him that Mr. Carter wanted Mr. Ford to speak with Mr. Mansfield. (JA 1493-1494.) Mr. Carter also consented to having Mr. Mansfield request that Mr. Ford submit to a polygraph test. (JA 415-417.)

In addition, the fact that Mr. Mansfield never before questioned the hiring of a building manager is easily explained by the fact that there was no evidence that any prior Board had ever hired a building manager with a criminal record or pending charges.

Mr. Ford erroneously suggests that Mr. Mansfield took it upon himself to contact Mr. Ford's criminal defense attorney to ask that Mr. Ford submit to a polygraph test. On the contrary, Mr. Mansfield recommended to Mr. Carter that Mr. Ford be asked to submit to a polygraph test, and Mr. Carter consented. (JA 415-417.) Mr. Mansfield thereupon spoke with William Ray Ford (Mr. Ford's criminal defense attorney), who offered his consent after speaking with Mr. Ford. Notably, Mr. Ford makes no complaint that Mr. Carter and William Ray Ford acted in a racially discriminatory manner when they consented to the request. In any event, Mr. Ford was hired without taking a polygraph.



At the time of Mr. Mansfield's conversations with William Ray Ford, Mr. Ford's trial had not yet occurred. It is undisputed that until Mr. Ford's trial, Mr. Mansfield was only aware that a finding of probable cause had been made that Mr. Ford had committed a second degree assault (which involved a touching of an intimate area) and a fourth degree sex offense. (JA 1443-1444.) In fact, William Ray Ford testified that he told Mr. Carter that he "didn't know whether they (the charges) were true or not..." (JA 1445.)

**F. "The Horizon House Board Hired Mr. Ford."**

Mr. Ford cites the deposition testimony of Vondell Carter and Greg Weatherman to support the statement that the Board voted 3-2 to hire Mr. Ford as building manager. In fact, while Mr. Weatherman recalled a 3-2 vote, Vondell Carter stated that Mr. Faison and Ms. Garretson chose not to be present. (JA 710-711; JA 1369.)<sup>14</sup> David Faison testified that the Board never voted on Mr. Ford's employment, and that a Board meeting was held in November 2005 without any vote concerning Mr. Ford taking place at that meeting. (JA 1428; JA 1431-1432.)

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<sup>14</sup> Mr. Constant testified that Mr. Carter and Ms. Morris persuaded Mr. Weatherman to go along with voting for Mr. Ford in the absence of the other two Directors. (JA 1507-1512; JA 1514-1518.) Mr. Faison and Ms. Garretson complained to Mr. Constant that Mr. Ford was hired without giving them a vote. (JA 1507-1512; JA 1514-1518.) Mr. Constant advised Mr. Carter to not hire Mr. Ford because of the pending charges. (JA 1513-1515.) Mr. Carter ignored this advice, telling Mr. Constant that he had to help Mr. Ford because he didn't know who else would. (JA 1515.) Mr. Constant felt Mr. Carter made Mr. Ford's hiring "personal," and advised Mr. Carter to heed Mr. Mansfield's recommendations. (JA 1515-1516.)

Indeed, there was no evidence of any minutes reflecting a Board vote on hiring Mr. Ford as building manager.

Mr. Ford states that he “impressed Board members” with his performance, yet cites only to the Affidavit of Vondell Carter. David Faison, who was also on the board, was not impressed with Mr. Ford’s performance and believed that Mr. Ford only took direction from Vondell Carter, Susan Morris, and Greg Weatherman. (JA 1423-1424; JA 1425-1426; JA 1501.) In any event, Mr. Ford does not contend that Mr. Mansfield ever said anything false or derogatory about Mr. Ford’s job performance at Horizon House.

Mr. Ford misconstrues the evidence as to Mr. Mansfield’s concerns surrounding the termination of Jennifer O’Keefe as interim building manager. Mr. Mansfield was concerned that Ms. O’Keefe might have a cause of action for gender discrimination. (JA 1481.) Although Mr. Carter testified that he construed Mr. Mansfield as threatening to take action on behalf of Ms. O’Keefe, Mr. Carter did not recall any specifics, *i.e.* whether the basis would be “reverse discrimination” as suggested by Mr. Ford, and Mr. Carter further conceded that no such action was in any event ever taken by Mr. Mansfield. (JA 740 & 742.) Likewise, Mr. Mansfield did not threaten Zalco with litigation, but instead sought to ensure that Zalco followed proper procedure. (JA 1506.)

The evidence was undisputed that Mr. Mansfield objected to the Board hiring Mr. Ford while there were pending criminal charges, and not because of his race. Likewise, as noted above, there was no evidence that Mr. Mansfield raised any objection to the Board's consideration of any of the other candidates, most or all of whom were minorities.

**G. "Mr. Mansfield's Unauthorized Investigations"**

The letter sent by Alex Morgan to Discreet Investigations did not contain any reference to the race of the individuals. (JA 1165.) In any event, Mr. Ford's suggestion that the request was somehow racial makes no logical sense, because it would not require any investigation to determine their race. Mr. Mansfield wanted to know if there was any connection between the two (including any past work relationship) in order to understand why Mr. Carter insisted on hiring a person as building manager who had a criminal record for violent assault and pending criminal sexual assault charges. (JA 1471-1473).

Moreover, it was not necessary to determine whether or not Mr. Mansfield's letter required Board "authorization," as this was not a suit by Horizon House to challenge Mansfield's fees.

Mr. Ford suggests there was a "conflict" in the testimony as to who first suggested a background search, but that is entirely inconsequential. Whoever first suggested it, Mr. Mansfield's motivation was to limit the Association's liability

and any potential danger to the residents of Horizon House as a result of the Board's decision to hire an individual with a violent criminal record and pending sexual assault charges. (JA 1165; JA 1471.)

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

Mr. Ford states that Ms. Garretson told him he "needed to get some education" after he confronted her about taking her dog through the Horizon House lobby. (JA 984-985.) Ms. Garretson also told Mr. Ford "You don't know the Bylaws." (JA 984-985.) Rather than being a racist comment, Ms. Garretson was instead challenging Mr. Ford's knowledge of the Horizon House bylaws on the issue of dogs in the lobby. In any event, the statement was not made by Mr. Mansfield, and Mr. Ford concedes that Mansfield was not even present. (JA 308-310; JA 314.)

Likewise, Mr. Ford accuses Ms. Garretson of making a racial slur with her purported comment "Boy, I'm not talking to you." However, Mr. Ford identifies nothing that would suggest that Ms. Garretson's use of the word "boy" was racial. Indeed, without any further words suggesting a racial connotation, there is nothing to show that Ms. Garretson was not simply referring to the fact that she was a woman who was older than Mr. Ford. In any event, the word was not uttered by Mr. Mansfield, and Mr. Ford concedes that Mr. Mansfield was not even present at the time. (JA 308-310; JA 314.) Likewise, as noted above, the evidence was

undisputed that Mr. Mansfield *never* used any racial epithets when referring to Mr. Ford.

Mr. Ford cites no evidence that any alleged visit by Mr. Mansfield to Ms. Garretson was in any way related to Garretson's two brief encounters with Mr. Ford, or even to Mr. Ford's employment at Horizon House. In his own affidavit, Mr. Ford does not state a reason for Mansfield's alleged visits to Garretson. (JA 983.) Moreover, no log book or other document was produced which verified that Mr. Mansfield checked in to see Ms. Garretson.

**I. "An Anonymous Letter Accused Mr. Ford of Being Violent."**

There is no evidence that the anonymous December 17, 2005 letter sent to Greg Weatherman was any way connected to Mr. Mansfield. Additionally, the contents of the letter, *i.e.* that Mr. Ford had a history of violence, were truthful. While Mr. Ford attempts to explain away his conviction, the fact remains that he was convicted of criminal assault in Ohio in 1995, that the victim of the assault was hospitalized, and that Mr. Ford served time in jail as a result of the conviction.<sup>15</sup> (JA 366-367; JA 320.)

The fact that Mr. Ford may have "explained" the circumstances of his assault to Mr. Carter, Mr. Weatherman, and Ms. Morris is immaterial. The Horizon House residents (and Mr. Mansfield) cannot be accused of being racists

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<sup>15</sup> Mr. Mansfield also notes that Mr. Ford erroneously stated on his Zalco employment application that the conviction had been expunged. (JA 1490-1492.)

for expressing concern that the three Board members had hired someone with a criminal record of violent assault to be building manager with key access to every unit.

Mr. Ford cites to no evidence that Mr. Mansfield was in any way involved in spreading “rumors” that Mr. Ford assaulted a “little old lady.” Indeed, the only individual named by Mr. Weatherman was Eric Mucklow. (JA 1372-1373.) Moreover, Mr. Ford concedes that the victim of his assault, whom he identifies as his uncle, was named Eulis, which is a name used for both males and females.

**J. “Mr. Ford Received an Anonymous Racist Death Threat.”**

As with the anonymous December 17, 2005 letter to Mr. Weatherman, there is nothing to connect the anonymous letter received by Mr. Ford on December 24, 2005 to Mr. Mansfield. Indeed, it is undisputed that the identity of the note’s author is unknown. (JA 52; JA 315; JA 316-317; JA 231.) Arlington County Police and the FBI were unable to identify the source. (JA 316-317; JA 231.) While Mr. Ford claimed that the note caused him to fear for the safety of his family, he continued working and even employed his wife at Horizon House.

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

Adrienne Garretson, in her capacity as a Board member and Treasurer, wanted Zalco to provide her with all Horizon House financial documents,

including (but not limited to) documents relating to Mr. Ford's salary. (JA 1476-1478.) There is no logical basis for Mr. Ford's suggestion that Ms. Garretson's request was racially motivated. Nor was there anything racial with respect to Mr. Mansfield's January 12, 2006 letter to Zalco (JA 1237), demanding that Zalco honor Ms. Garretson's request. Indeed, the letter does not refer to anyone's race. With respect to Eric Mucklow's testimony that he understood Ms. Garretson wanted to see Zalco's information concerning Mr. Ford's criminal background check, that only shows that Ms. Garretson's concern related to Mr. Ford's criminal record and not his race.

**L. "The Racially-Hostile Work Atmosphere Intensified."**

Mr. Ford cites to no evidence that there was a "racially charged atmosphere at Horizon House," and the characterization is belied by the undisputed evidence summarized above. Nor does he cite any evidence to support his illogical conclusion that the Horizon House residents began to call for Mr. Carter's removal and Mr. Ford's termination as a "reaction" to news of the anonymous threat to Mr. Ford.

Likewise, since the author of the threat was unknown, it cannot be considered as "racist" for Horizon House residents to speculate as to the author, including whether Mr. Ford may have himself written it. In any event, Mr. Ford

does not contend that Mr. Mansfield ever suggested that Mr. Ford authored the note.

Moreover, there was no evidence that Horizon House residents were motivated by race in their efforts to seek the removal of Mr. Carter, Mr. Weatherman and Ms. Morris as directors, or in the subsequent Board decision to ask Zalco to replace Mr. Ford as building manager. Mr. Ford tries to suggest something sinister about the fact that Horizon House residents met to discuss a course of action in light of the decision by three Board members to hire a building manager with a violent criminal record and pending criminal sexual assault charges.

Mr. Ford erroneously suggests that the evidence showed that Mr. Mansfield provided the Concerned Citizens with significant assistance. Mr. Mucklow stated that he discussed with Mr. Mansfield the procedure for removing the three directors. (JA 1274-1276.) Mr. Mucklow testified that Mr. Mansfield was not very much help, reviewing only the wording of the petition. (JA 1287-1288.) Since the Association Bylaws contained procedures for the removal of directors, there was nothing improper, and certainly nothing racial, in Mr. Mansfield offering his advice as to those procedures.



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

Again, there was simply no evidence of any “racially-charged atmosphere” at Horizon House. In addition, Mr. Mansfield’s January 17, 2006 letter to Mr. Carter and the other Board members did not reference Mr. Ford’s race and did not falsely describe the pending criminal sexual assault charges. Nor did Mr. Mansfield’s letter call for the removal of Mr. Carter, Ms. Morris, and Mr. Weatherman. Instead, Mr. Mansfield offered his legal opinion that it was in the best interests of his client, the Association, for the three to resign in order to mitigate any potential liability. (JA 415-417.) Finally, Mr. Ford cites to Mr. Mansfield’s deposition testimony as his only evidence that Mr. Mansfield acted “deliberately” to defame Mr. Ford and to frighten residents into thinking he was dangerous. Needless to say, Mr. Mansfield’s deposition testimony provided no such support.

The undisputed evidence was that Mr. Ford was placed on unpaid administrative leave by his prior employer when the sexual assault charges were filed, and that Mr. Ford was terminated when the prior employer refused Mr. Ford’s demand to be reinstated. (JA 1028.) Whether or not Mr. Ford was fired for cause by the prior employer is immaterial, as there was nothing racial in Mr. Mansfield’s description of his understanding as to those events. Likewise, whether or not Mr. Ford admitted to having had any consensual sexual contact with the

accuser is immaterial, as there was nothing racial in Mr. Mansfield's description of his understanding as to Mr. Ford's defense to the charges.

Nowhere in Mansfield's January 17, 2006 letter did he state that Mr. Ford was charged with rape. Mr. Mansfield described that charges against Mr. Ford as "two criminal sexual battery charges." (JA 416.) Since Mr. Ford was charged with two separate counts arising out of two separate alleged incidents involving sexual contact against the accuser's consent, Mr. Mansfield's description was not inaccurate.<sup>16</sup> Likewise, there is no basis for Mr. Ford's statement that Mr. Mansfield's letter was "based on stereotypes of black men raping white women."<sup>17</sup>

Also, Virginia Smith did not testify that she found Mr. Ford, specifically, "threatening," as Mr. Ford erroneously states. Smith testified that "when someone is in charge of a property I consider my home, has keys to my unit and is in a position of responsibility and has charges or allegations of sexual misconduct pending, that that is a little threatening." (JA 1354-1355).

Since Mr. Mansfield's January 17, 2006 letter to Mr. Carter and the other Board members did not reference Mr. Ford's race or make any racially derogatory

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<sup>16</sup> Indeed, Mr. Ford's criminal defense attorney (William Ray Ford) testified that the charging document was inartfully worded and might have been construed as alleging two sexual batteries. (JA 1448-1450.)

<sup>17</sup> Mr. Mansfield's letter did not reference the accuser's race, so it defies logic to suggest that Mr. Mansfield's letter was based on a purported stereotype of black men raping white women.

statement, the dissemination of that letter to Horizon House residents cannot be viewed as racial.

**N. “The Board’s First Termination of Mansfield”**

It was undisputed that the email vote to terminate Mr. Mansfield as Association counsel was invalid under the Association’s Bylaws because it was not unanimous and did not take place at a Board meeting. (JA 0176; JA 1523-1525.)

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

As noted above, Mr. Mansfield had not been “fired” as Association counsel. Moreover, Mr. Ford’s exaggerated characterizations of the January 19, 2006 meeting are belied by the undisputed facts of what actually transpired. There was no evidence of any fistfights or that the police were called, and no racially derogatory term was uttered.

There was absolutely no evidence cited by Mr. Ford, including Mr. Carter’s deposition, that Mr. Mansfield called Mr. Ford a “demon” or any such words, that Mr. Mansfield yelled or cursed, that he made any reference to black men having access to white women, or that he made any reference at all to anyone’s race. Likewise, there was no evidence that Mr. Mansfield stated in his January 17, 2006 letter or in the January 19, 2006 meeting that Mr. Ford was charged with “coercive intercourse” or that Mr. Ford had refused to take a polygraph test. (JA 415-417.)

Mr. Ford presents no authoritative evidence of a purported stereotype of black managers having access to apartments occupied by white women. In any event, as noted above, there was simply no evidence that Mr. Mansfield ever referred to Mr. Ford's race or the race of Horizon House residents.

Mr. Mansfield was invited to attend the meeting of Horizon House residents, which was open to the public. (JA 1287-1288.) Members of the Board, including Mr. Carter, were present at the meeting, and there is no evidence that Mr. Mansfield was directed to leave.

**P. "The Board Ratified Its Decision to Fire Mr. Mansfield."**

After contacting ethics counsel of the Virginia State Bar, Mr. Mansfield believed that he could continue to represent the Association in light of the repeated violations of the Bylaws by Mr. Carter, Ms. Morris, and Mr. Weatherman. (JA 1469.)

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

Although Mr. Ford was ultimately acquitted of the Maryland sexual assault charges, the Horizon House residents were nevertheless upset with Mr. Carter, Mr. Weatherman and Ms. Morris for voting to hire someone who at the time was the subject of such charges. It was unnecessary for Mr. Mansfield to "report" Mr.

Ford's acquittal, as a report of the acquittal was posted on the Horizon House website the same day.<sup>18</sup>

There is no evidence that Mr. Mansfield prepared and distributed a packet of materials. Rather, Mr. Mucklow testified that the packet was mailed from the firm because of fear that Mr. Ford, Mr. Carter, or Ms. Morris might intercept the packet if distributed by other means. (JA 1306-1307.) In any event, Mr. Ford fails to identify any racial epithet or remark in that packet.

The undisputed facts concerning the February 2, 2006 meeting are set forth above. Notably, Mr. Ford does not attempt to controvert the undisputed evidence that the overwhelming majority of Horizon House residents voted to remove Mr. Carter, Mr. Weatherman and Ms. Morris as directors, for non-racial reasons. The new Board then voted unanimously to ask Zalco to replace Mr. Ford as building manager, although it was not the new Board's first action. (JA 536-537.) As reflected in the affidavits and deposition testimony of those Board members, it was undisputed that the new Board's decision to ask Zalco to replace Mr. Ford as building manager was not racially motivated. (JA 457-519; JA 1403-1418; JA 1429-1430; JA 1501.)

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<sup>18</sup> The charges against Mr. Ford were not expunged until more than one year after Mr. Ford's trial. (JA 1447.)

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

Mr. Ford mischaracterizes Arlington Circuit Judge Alper’s decision in which she ruled that Mr. Mansfield was disqualified from representing the Association in the litigation in that Court. Judge Alper made no ruling that Mr. Mansfield had taken any action as a conflict of interest or in violation of any obligation owed by him to the Association. In addition, Mr. Ford ignores that the Arlington litigation was ultimately settled upon the agreement of Mr. Carter, Mr. Weatherman, and Ms. Morris not to contest the validity of the February 2, 2006 election.

**S. “Mr. Mansfield’s Actions Caused Mr. Ford to Suffer Severe Emotional Distress.”**

Mr. Ford asserts that he suffered emotional distress damages as a result of depression purportedly caused by the termination of his employment.<sup>19</sup> However, despite being ordered to do so, Mr. Ford failed to produce any medical records relating to his purported emotional distress.

Mr. Ford did not see a psychiatrist until referred to Dr. Goldman by his attorneys as part of this litigation. Dr. Goldman’s only source of information

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<sup>19</sup> Although not mentioned in his appeal brief, Mr. Ford formerly complained that he incurred lost income as the result of the purported wrongful termination as Horizon House building manager. However, as noted above, Mr. Ford was hired as an Assistant Property Manager by Bonaventure Property Management approximately one month after his termination by Zalco. Mr. Ford was then terminated by Bonaventure for cause, leading to the denial of his application for unemployment benefits.

relating to these matters comes from his interview with Mr. Ford, a review of Mr. Ford's First Amended Complaint, and a telephone interview with Mr. Ford's current wife. (JA 1530-1533; JA 1535-1537.) Dr. Goldman did not review Mr. Ford's medical records. (JA 1531-1533.) Dr. Goldman's interview with Mr. Ford only lasted approximately two hours and took place more than three years after the relevant events. (JA 1534.)<sup>20</sup>

### **SUMMARY OF THE ARGUMENT**

The district court properly entered summary judgment, dismissing Mr. Ford's claims under 42 U.S.C. § 1981, because the undisputed evidence showed that Mr. Mansfield did not take any action against Mr. Ford on the basis of Mr. Ford's race, and Mr. Ford was terminated as a building manager at the request of the board of directors of the Association for reasons unrelated to his race. The district court also properly granted Mr. Mansfield's motion to strike Mr. Ford's claim for emotional distress, as a result of Mr. Ford's failure to produce medical records of his purported treatment.

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<sup>20</sup> Mr. Ford was separately evaluated by a psychiatrist retained as an expert by Mr. Mansfield. A copy of Dr. Liza Gold's report is at JA 1541-1566. Dr. Gold reported that Mr. Ford was uncooperative and evasive during the examination. (JA 1553.) Mr. Ford refused to discuss his work history or his career, and would not answer a number of questions posed by Dr. Gold. (JA 1552-1553.) Dr. Gold concluded that there is no objective psychiatric or medical evidence to support Mr. Ford's claim that he suffered depression after his termination as building manager, and that even *if* Mr. Ford did in fact suffer any depression it was more likely a result of Mr. Ford's history of dysfunction, repeated job loss, and financial problems. (JA 1553.)

## **ARGUMENT**

### **A. The District Court Properly Entered Summary Judgment**

#### **1. Statement of the Standard of Review**

The Fourth Circuit reviews the district court's grant of summary judgment *de novo*. Bacon v. City of Richmond, Virginia, 475 F.3d 633 (4th Cir. 2007).

Summary judgment should be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The purpose of summary judgment is “to avoid a clearly unnecessary trial.” Jackson v. Iris.com, 524 F. Supp. 2d 742, 747 (E.D. Va. 2007) (summary judgment granted). Summary judgment is considered an “integral part” of the Federal Rules of Civil Procedure, “which are designed to obtain a just, expeditious, and inexpensive resolution of every civil matter.” Lewis v. City of Virginia Beach Sheriff's Office, 409 F. Supp. 2d 696, 704 (E.D. Va. 2006) (summary judgment granted).

“Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists.” Laios v. Wasylik, 544 F. Supp. 2d 538, 541 (E.D. Va. 2008) (summary judgment granted). The party opposing summary judgment must go beyond the pleadings, with affidavits, admissions or other discovery, and “designate ‘specific facts showing



that there is a genuine issue for trial’’. Emmett v. Johnson, 511 F. Supp. 2d 634, 636 (E.D. Va. 2007), aff’d, 532 F.3d 291 (4th Cir. 2008) (summary judgment granted), quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). “‘The plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’” Celotex Corp. v. Catrett, 477 U.S. at 322. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly support motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). “The non-moving party may not rely on mere conclusory allegations or speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.” D’Amico v. City of New York, 132 F.3d 145, 149 (2d Cir. 1998).

This Court and other federal courts have often affirmed or granted summary judgment motions dismissing Title VII claims for racial discrimination, where the undisputed facts fail to establish the requisite elements for the plaintiff’s claim. See, e.g., Moore v. Mukasey, 305 Fed. Appx. 111, 118 (4th Cir. 2008) (upholding this Court’s entry of summary judgment where plaintiff failed to present evidence that employer’s actions were pretext for race discrimination.); Holland v. Washington Homes, Inc., 487 F.3d 208 (4th Cir. 2007), cert. denied, 552 U.S. 1102

(2008) (upholding entry of summary judgment granted where no evidence presented that termination was due to race, rather than plaintiff's actions.); Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 191 (4th Cir. 2004) (upholding entry of summary judgment in finding that hostile work environment claim failed because it was based on professional frustrations, not personal racial attacks); Hawkins v. Pepsico, Inc., 203 F.3d 274 (4th Cir. 2000), cert. denied, 531 U.S. 875 (2000) (upholding entry of summary judgment where plaintiff could not show that employee's problems with employer were racial in nature.); Carter v. Ball, 33 F.3d 450 (4th Cir. 1994) (holding that the display of a poster that may or may not be generally offensive to African-Americans, along with vague allegations of harsher treatment by supervisors, is not an act severe enough to alter the conditions of employment.); Alford v. Martin & Gass, Inc., 2009 WL 497581, 10 (E.D. Va. 2009) (individual defendant's motion for summary judgment granted to plaintiff's Title VII and § 1981 claims because Defendant did not have any contractual relationship with plaintiff, was not plaintiff's employer, and plaintiff offered no evidence of severe and pervasive conduct on the part of individual defendant or other employees); Parker v. The Smithfield Packing Co., Inc., 2007 WL 983845, 4 (E.D. Va. 2007) (summary judgment granted on hostile work environment claim where plaintiff only pointed toward one comment with no allegations of repetition.); James v. City of Chesapeake, 424 F. Supp. 2d 852, 856 (E.D. Va.

2005) (summary judgment granted where plaintiff failed to produce direct evidence of discrimination.). See also Odesina v. Saint Francis Hospital, 71 Fed. Appx. 80, 2003 WL 2152320 (2d Cir. 2003) (summary judgment appropriate where the few incidents of racial hostility alleged by plaintiff did not create a hostile work environment.); Sherrod v. Philadelphia Gas Works, 57 Fed. Appx. 68 (3d Cir. 2003) (summary judgment upheld where no evidence that the defendant or any of its employees referred to plaintiff using racial slurs and that statements considered racist by plaintiff were subject to non-racial interpretation.).

**2. As a Matter of Law, the Undisputed Facts Failed to Establish any Liability of Mansfield for Racial Discrimination Against Mr. Ford.**

In order to establish a section 1981 cause of action, the plaintiff must show 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 § 1981.<sup>21</sup> Jordan v. Alternative Resources Corp., 458 F.3d 332, 345 (4th Cir. 2006). See also Johnson v. Toys “R” Us-Del., Inc., 95 Fed. Appx. 1, 6 (4th Cir. 2004); Davis v. Am. Soc’y of Civil Eng’r, 330 F. Supp. 2d 647, 654 (E.D. Va. 2004).

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<sup>21</sup> Section 1981 states 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).

The Fourth Circuit has noted: the “[l]aw does not blindly ascribe to race all personal conflicts between individuals of different races. To do so would turn the workplace into a litigious cauldron of racial suspicion. Instead, legally sufficient evidence is required to transform an ordinary conflict such as that between [an employee and employer] into an actionable claim of discrimination.” Hawkins, 203 F.3d at 282.

In addition, a claim seeking personal liability under § 1981 must be predicated on the actor’s personal involvement. See Davis v. Reed, 462 F. Supp. 410, 413 (W.D. Okla. 1977); see also Parratt v. Taylor, 451 U.S. 527, 537 n. 3, 101 S. Ct. 1908, 1913 n. 3 (1981). There must be some affirmative link to causally connect the actor with the discriminatory action. Cf. McClelland v. Facticeau, 610 F.2d 693, 696 (10th Cir. 1979).

Based on the undisputed facts, Mr. Mansfield’s statements and actions were not racially discriminatory. Nor did Mr. Mansfield *intentionally* discriminate against Mr. Ford on the basis of race. As noted above, Mr. Mansfield did not take any action as Mr. Ford’s employer, as he was counsel to the Association. In addition, Mr. Mansfield did not even reference Mr. Ford’s race in his January 17, 2006 letter to the board of directors, or in his remarks at the January 19, 2006 and February 2, 2006 meetings of Horizon House residents. The issue was whether the Association’s board of directors should have hired someone with a past conviction

of a violent crime and pending sexual assault charges to be building manager. That issue was ultimately one for the Horizon House residents to determine, pursuant to their Bylaws. The residents overwhelmingly voted to replace the directors who had hired Mr. Ford as their building manager, and the new Board of Directors then unanimously voted to ask that Mr. Ford be removed as building manager. The undisputed evidence failed to show that Mr. Mansfield created a “hostile work environment” or that Mr. Mansfield terminated and/or interfered with Mr. Ford’s employment on the basis of his race.

**a. The Undisputed Evidence Failed to Show any Hostile Work Environment, Let Alone any Act by Mr. Mansfield Contributing to any Hostile Work Environment.**

Although Mr. Ford alleged in this case that he suffered a hostile work environment based on his race during his brief tenure as building manager at Horizon House, and that Mr. Mansfield was somehow liable for creating or contributing to such hostile work environment, Mr. Ford appears to have nearly abandoned the claim in this appeal. Indeed, “hostile work environment” is only mentioned in one sentence of a footnote at page 35 of Mr. Ford’s appeal brief. In any event, the district court did not err in dismissing Mr. Ford’s claim against Mr. Mansfield for hostile work environment.

In order to establish a claim for hostile work environment, a plaintiff must show (1) unwelcome conduct or harassment; (2) based on race, gender, or other

protected characteristic; (3) sufficiently severe and pervasive so as to alter the conditions of employment and create a hostile work environment; and (4) some basis for imputing liability to the employer. Spriggs v. Diamond Auto Glass, 242 F.3d 179, 183 (4th Cir. 2001); Smith v. First Union Nat'l Bank, 202 F.3d 234, 241 (4th Cir. 2000).

Racial harassment in the workplace is actionable only if “the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere.” Causey v. Balog, 162 F.3d 795, 801 (4th Cir. 1998) (affirming the district court’s award of summary judgment.). See also Clark County School Dist. v. Breeden, 532 U.S. 268, 269, 121 S.Ct. 1508 (2001); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80, 118 S.Ct. 998 (1998) (recognizing that the law does not establish “a general civility code” nor does it “prohibit all verbal or physical harassment in the workplace”).

“[A]bsent harassment of a racial or sexual nature, generalized job grievances or personality conflicts are not sufficient to state a claim for discrimination.” Springs v. Mayer Brown, LLP, Slip Copy, 2009 WL 3461231 \*5 (W.D.N.C. 2009), citing Baqir v. Principi, 434 F.3d 733, 747 (4th Cir. 2006) (stating that general complaints of rude treatment were insufficient to sustain a hostile work environment claim).

Here, the evidence was undisputed that Mr. Mansfield could not be liable to Mr. Ford for hostile work environment. First, Mr. Mansfield was never Mr. Ford's employer. Second, Mr. Mansfield never referenced Mr. Ford's race or made any racially derogatory statement about Mr. Ford. Third, although Mr. Mansfield cannot be liable for the actions of individual Horizon House residents, even the few isolated comments identified by Mr. Ford on the part of Adrienne Garretson and Lenny Conrad were not inherently racial and were certainly not "so severe and pervasive as to alter the terms and conditions" of Mr. Ford's employment. Fourth, Mr. Ford's employment at Horizon House was altered only because an overwhelming majority of Horizon House residents voted to remove the directors who had voted to hire Mr. Ford notwithstanding his criminal record.

**b. The Undisputed Evidence Failed to Show that Mr. Ford was Terminated from his Employment at Horizon House on the Basis of his Race.**

To establish a *prima facie* case under Section 1981 for wrongful termination based on race, a plaintiff "must show that: (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). See also Honor v.

Booz-Allen & Hamilton, Inc., 383 F.3d at 188; Karpel v. Inova Health Sys. Serv., 134 F.3d 1222, 1228 (4th Cir. 1998).

The courts frequently grant summary judgment in favor of defendants where the undisputed evidence shows that the plaintiff's termination was not the result of racial discrimination. See, e.g., Samuel v. Williamsburg-James City County School Bd., 540 F. Supp. 2d 667 (E.D. Va. 2008); Amaram v. Virginia State University, 476 F. Supp. 2d 535 (E.D. Va. 2007); Davis v. Am. Soc'y of Civil Eng'r, 330 F. Supp. 2d 647 (E.D. Va. 2004); Herron v. Virginia Com. University, 366 F. Supp. 2d 355 (E.D. Va. 2004).

Mr. Ford's claim that he was terminated by Mansfield due to his race must fail because Mansfield was not Mr. Ford's employer. Likewise, Mansfield did not supervise Mr. Ford's employment or exercise control over the hiring, firing, or conditions of employment. "The Fourth Circuit has held that an individual is an 'employer' under Title VII if he or she 'serves in a supervisory position and exercises significant control over [complainant's] hiring, firing, or conditions of employment.'" Mitchell v. RJK of Gloucester, Inc., 899 F. Supp. 246, 248 (E.D. Va. 1995), citing Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989).

In Alford v. Martin & Gass, Inc., the district court granted summary judgment for the defendant on the basis that the plaintiff "did not have any contractual relationship with [the defendant]," dismissing both the "Title VII and



§ 1981 claims of discrimination and retaliation because [defendant] was not [plaintiff's] employer and did not have a contractual relationship with him.” 2009 WL 497581, \*10.

The evidence is undisputed that Mr. Ford did not have a contractual relationship with Mr. Mansfield, or that Mr. Mansfield had significant control over Mr. Ford's hiring, firing, or conditions of employment. The evidence was undisputed that Zalco terminated Mr. Ford's employment with its subsidiary, MDV Maintenance, and that the Horizon House Board of Directors requested that Mr. Ford be replaced as building manager due to their concerns over his criminal history and the circumstance surrounding his hiring. (JA 457-459; JA 1403-1405; JA 488-490; JA 504-506.)

Indeed, the Horizon House members voted overwhelmingly to replace the three directors who had hired Mr. Ford, and the newly constituted Board then voted unanimously (without Mansfield casting any vote) to ask that Zalco replace Mr. Ford as building manager.

**c. The Undisputed Evidence Failed to Show that Mr. Mansfield Interfered with Mr. Ford's Employment at Horizon House on the Basis of Mr. Ford's Race.**

“Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the

existing or proposed contractual relationship.” Domino’s Pizza, Inc. v. McDonald, 546 U.S. 470, 476, 126 S. Ct. 1246, 1250 (2006). As discussed above, in order to establish a section 1981 cause of action, the plaintiff must show 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 § 1981, in this case the right to make or enforce a contract. Jordan v. Alternative Resources Corp., 458 F.3d at 345. See Davis v. Am. Soc’y of Civil Eng’r, 330 F. Supp. 2d at 654; Johnson, 95 F. Appx. at 6, citing Morris v. Dillard Dep’t Stores, Inc., 277 F.3d at 751.

The courts have upheld summary judgment dismissal of wrongful interference claims where the evidence failed to show that the purported interference was based on the plaintiff’s race. See e.g., Johnson v. Spohn, 334 Fed. Appx. 673 (5th Cir. 2009); Orgain v. City of Salisbury, Md., 305 Fed. Appx. 90 (4th Cir. 2008); Johnson v. Toys “R” Us-Del., Inc., 95 Fed. Appx. 1 (4th Cir. 2004).

Contrary to Mr. Ford’s assertion, the district court did not grant Mr. Mansfield’s motion for summary judgment due to the lack of an employment relationship between Mr. Ford and Mr. Mansfield. Instead, in ruling on Mr. Ford’s claim of wrongful termination the district court noted while “Plaintiff was not fired

by Defendant,” “it is clear that the body which did choose to terminate Mr. Ford, the Horizon House Board, had more adequate reasons for wanting Mr. Ford fired, none of which had anything to do with his race.” (JA 1631-1632.)

The district court correctly noted that “a claim seeking personal liability under § 1981 must be predicated on the actor’s personal involvement.” (JA 1632.) See Collin v. Rector and Bd. of Visitors of University of Virginia, 873 F. Supp. 1008, 1015 (W.D.Va. 1995); Harris v. Rector and Bd. of Visitors of University of Virginia, No. 93-0025-C, 1993 WL 513295 at \*2 (W.D.Va. 1993); Davis v. Reed, 462 F. Supp. 410, 413 (W.D. Okla. 1977). See also Parratt, 451 U.S. at 537 n. 3, 101 S. Ct. at 1913 n. 3 (1981).

The undisputed evidence shows no casual link between Mr. Mansfield and any discriminatory action. In arriving at this determination, the district court examined Mr. Ford’s allegations concerning the comments purportedly made to him by Ms. Garretson and Mr. Conrad, as well as the January 17, 2006 letter. (JA 415-417.)

As noted above, the comments made to Mr. Ford by Ms. Garretson and Mr. Conrad were made outside of the presence of Mr. Mansfield and without Mr.

Mansfield's personal involvement.<sup>22</sup> (JA 308-310; JA 314.) Likewise, the text of the January 17, 2006 letter is unambiguous and clearly not racial in nature. (JA 415-417.)

The undisputed facts show that Mr. Ford was fired not due to his race, but due to the manner in which the three former directors hired him and due to Mr. Ford's criminal history. Mr. Ford's employment at Horizon House was terminated by Zalco and MDV Maintenance following a vote of the Horizon House Board of Directors. Four members of the Board of Directors provided affidavits detailing their reasons for asking Zalco to remove Mr. Ford as building manager, none of which reflect any racial discrimination. (JA 457-459; JA 1403-1405; JA 488-490; JA 504-506.) Mr. Ford failed to produce any evidence refuting these affidavits or the reasons put forth by the Board of Directors for their course of action.

Because there was no evidence that Mr. Mansfield interfered with Mr. Ford's employment on the basis of Mr. Ford's race, and because Mr. Ford was terminated for reasons not related to his race, it is not necessary for this Court to

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<sup>22</sup> Mr. Ford attempts to portray the statements purportedly made by Ms. Garretson and Mr. Conrad as part of a "conspiracy" that included Mr. Mansfield, without any evidence to support such an accusation, and notwithstanding that he did not even name Ms. Garretson or Mr. Conrad as defendants in this suit. (JA 17-18; JA 42-43.)

determine whether an interference claim might be brought against an individual who is not a co-worker or supervisor of the plaintiff.<sup>23</sup>

**B. The District Court Properly Struck Mr. Ford's Claim for Emotional Distress Damages**

**1. Statement of the Standard of Review**

The Fourth Circuit reviews the district court's imposition of discovery sanctions for abuse of discretion. See Southern States Rack And Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 595 (4th Cir. 2003), citing Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 513 n. 10 (4th Cir. 2002). Fed. R. Civ. P. 37(b)(2)(A) allows courts to impose various sanctions if a party fails to obey an order to provide discovery, including striking pleadings in whole or in part.

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<sup>23</sup> In several of the cases cited by Mr. Ford in support of his contention that an employment relationship is not necessary to establish a § 1981 claim, the defendants were co-workers, supervisors, or other superiors who controlled the plaintiff's employment status. See Phillips v. Mabe, 367 F. Supp. 2d 861 (M.D.N.C. 2005); Collin, 873 F. Supp. 1008 (W.D. Va. 1995); Kolb v. Ohio, 721 F. Supp. 885, 891-92 (N.D. Ohio 1989); Zaklama v. Mt. Sinai Med.Ctr., 842 F.2d 291, 294-95 (11th Cir. 1988). Moreover, the Fourth Circuit upheld the district court's award of summary judgment in Johnson v. Toys "R" Us-Delaware Inc., 95 Fed. Appx. 1, 10 (4th Cir. 2004). In Martinez v. Pavex Corp., the district court noted that whether an employee could bring a § 1981 hostile work environment claim against a non-employer presented an issue of first impression in the Eleventh Circuit. 422 F. Supp. 2d 1284, 1291, n.7 (M.D. Fla. 2006). Similarly, the district court in Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan, recognized that neither party presented argument regarding the lack of an employment relationship between the parties. 518 F. Supp. 993, 1008 (S.D. Tex. 1981).

**2. Mr. Ford's Failure to Comply with a Court Order Warranted the Court's Striking of the Claim for Emotional Distress Damages.**

On November 13, 2009, Mr. Mansfield filed his motion to compel discovery and/or to strike Mr. Ford's claim for emotional distress damages. (JA 8.) The grounds for Mr. Mansfield's motion included that Mr. Ford had failed to produce any medical records despite having represented that they would be produced. Mr. Ford had testified in deposition that he has consulted a psychiatrist at DeWitt Army Community Hospital for alleged depression following his termination as building manager at Horizon House. Mr. Mansfield sought all such medical records, in addition to other records relating to Mr. Ford's medical and psychological treatment. On November 20, 2009, the district court granted Mr. Mansfield's motion and directed Mr. Ford's counsel to respond by November 24, 2009 as to the status of the medical records relating to Mr. Ford's treatment at DeWitt Army Community Hospital.

Mr. Mansfield filed a Renewed Motion to Strike Mr. Ford's Claim for Emotional Distress Damages on November 25, 2009. (JA 86-93.) The renewed motion recited that on November 20, 2009, counsel for Mr. Ford and Mr. Mansfield spoke with a representative for DeWitt and were advised that Mr. Ford signed out his medical file from DeWitt on August 8, 2009, *i.e.* after Mr. Ford had been served with Mr. Mansfield's document requests. The DeWitt representative further advised that repeated calls had been made to Mr. Ford asking that he return

the file, but that Mr. Ford failed to return the telephone calls made by DeWitt and that Mr. Ford had failed to return his medical file to DeWitt as requested. Mr. Ford filed an opposition to the renewed motion (JA 622-650), and Mr. Mansfield filed a reply memorandum (JA 651-654).

Mr. Ford's summary of Mr. Mansfield's renewed motion does not accurately describe the grounds for the motion. For example, Mr. Mansfield's motion was not merely premised upon Mr. Ford's failure to produce medical records "that proved his emotional distress", as stated by Mr. Ford. Rather, since Mr. Ford represented that he had consulted a psychiatrist and had otherwise been treated at DeWitt during the relevant time period, Mr. Mansfield was necessarily entitled to all such documents not only to test Mr. Ford's allegations but to determine if such records might actually refute Mr. Ford's allegations. Additionally, Mr. Ford's failure to produce the medical records would have hindered Mr. Mansfield's ability to cross-examine Mr. Ford as to the alleged emotional distress.

Clearly, under Fed. R. Civ. P. 37(b)(2)(A), the district court had the authority to sanction Mr. Ford for his failure to obey the November 20, 2009 order. The district court acted within its discretion by striking Mr. Ford's claim for emotional distress damages as a result of his willful disregard for the district court's order.

### **CONCLUSION**

The district court's grant of summary judgment should be affirmed, as the record is clear that there are no facts genuinely in dispute as to Mr. Ford's claims. Likewise, the district court's grant of Mr. Mansfield's renewed motion to strike Mr. Ford's claim for emotional distress damages should be affirmed, where Mr. Ford failed to produce medical records as ordered by the district court on November 20, 2009.

Dated: June 21, 2010

**JAMES MANSFIELD**

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Dated: June 21, 2010

/s/ Robert E. Draim  
Counsel for Appellee

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I hereby certify that on this 21<sup>st</sup> day of June, 2010, I caused the foregoing Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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