UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 24-585, 24-895 Caption [use short title] Banks v. McGlynn, Hays & Co., Inc., et al.

Motion for: Leave to File Amicus Brief

Set forth below precise, complete statement of relief sought:

The National Employment Lawyers Association/New York seeks leave to file the accompanying amicus brief.

MOVING PARTY: The National Employment Lawyers Association/New York **OPPOSING PARTY:** McGlynn, Hays & Co., Inc., et al. (Defendants-Appellees)

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Russell Lasser Kornblith **OPPOSING ATTORNEY:** Edward Weissman

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Court- Judge/ Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/Russell Lasser Kornblith **Date:** August 16, 2024 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, the National Employment Lawyers/New York ("NELA/NY") requests leave to file the accompanying amicus curiae brief in support of Plaintiff-Appellant Edward Banks and urging reversal of the district court's February 20, 2024 Order. Plaintiff-Appellant consented to the filing by NELA/NY of an amicus brief. NELA/NY sought consent from Defendants-Appellees to the filing of an amicus brief, but their counsel did not give consent, thereby necessitating this motion.

II. INTEREST OF AMICUS CURIAE

Amicus seeks to file the accompanying amicus brief on behalf of NELA/NY, the New York affiliate of the National Employment Lawyers Association ("NELA"). NELA is a national bar association dedicated to the vindication of the rights of individual employees. It is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 circuit, state, and local affiliates focusing their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship.

NELA/NY is one of NELA's largest affiliates and has more than 400 members. NELA/NY is dedicated to advancing the rights of individual employees

to work in an environment that is free of discrimination, harassment, and retaliation. Its members advance these goals by providing legal representation, as well as filing amicus briefs, in cases that raise important questions related to employment law. NELA/NY's members have represented thousands of clients in employment matters, including in race discrimination cases. The organization aims to highlight the practical effects of legal decisions on the lives and rights of working people.

NELA/NY submits this proposed amicus brief to further the Court's understanding of the uniquely harmful place of the N-word and its impact on Black workers. The proposed brief summarizes existing case law in this circuit, case law in other circuits and state courts, and academic research on this subject. All of these sources point to a singular conclusion: Any use of the N-word in the workplace may transform the workplace into a hostile work environment; there is no such thing as a trivial or non-severe use of the N-word.

In addition, amicus writes to address the role of stereotyping in performance critiques. Employers often justify adverse employment actions through pretextual claims of performance deficiencies. Rather than accept these assertions at face value, courts must probe these asserted performance deficiencies with an eye towards the elimination of bias. Thirty-five years of case law point to this conclusion.

III. REASONS WHY AN AMICUS BRIEF IS DESIRABLE AND WHY THE MATTERS ADDRESSED ARE RELEVANT TO THE DISPOSITION OF THIS CASE

In the concurrently filed proposed amicus brief, NELA/NY shares the broader context of the district court's decision, which runs against fifty years of case law condemning the N-word. The district court's decision below failed to grapple with courts' condemnation of the N-word in the workplace dating back to the 1970s. The court instead drew on other case law analyzing other insults. But, in doing so, the district court failed to recognize the uniquely harmful place of the N-word in American life. Amicus thus writes to provide context on the N-word's immutable harm—a harm that courts have recognized over the course of the past fifty years.

The district court's holding may have broad impacts for NELA/NY's members and clients if left undisturbed: It would greenlight the use of the N-word in the workplace, inviting the word and its accompanying menace of violence into businesses and offices. But doing so would also run contrary to the precedents of this Court and courts across the country, which have sought to stomp out the word's use in the workplace over the past half century. NELA/NY thus proposes to set out the evolution of case law on the N-word both in this Court and in courts across the country, so that the full impact and context of the district court's decision can be understood.

NELA/NY's proposed amicus also addresses the role of stereotyping in the performance critiques of employees. Employers often defend discrimination cases by asserting that the employee's performance was deficient. Yet, upon closer examination, such performance critiques often substitute stereotypes of protected classes for observed performance. Where an employer asserts a performance critique that sounds in stereotype, at least thirty-five years of case law observes that courts must take a critical eye towards the employer's proffered non-discriminatory reasons and ask if the same critiques would be applied to an employee who behaved in the same way but was not a member of the protected class. Amicus thus writes to provide the full context of this body of case law and to explain how the district court's decision below failed to fully grapple with it.

The issues raised in NELA/NY's proposed amicus brief are both relevant to the issues to be decided and would assist the Court in the disposition of this case on appeal. This case does not exist in a vacuum but threatens years of progress in rooting out the N-word's violent sting and insidious stereotypes in the workplace—two goals of NELA/NY and its members.

IV. CONCLUSION

For the foregoing reasons, this Court should grant NELA/NY'S motion for leave to file the concurrently filed proposed amicus brief in support of Appellants and urging reversal of the district court's order.

Respectfully submitted,

Dated: August 16, 2024

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AMICUS BRIEF

24-585-cv(L), 24-895-cv(CON)

United States Court of Appeals

for the

Second Circuit

EDWARD BANKS,

Plaintiff-Appellant,

– v. –

McGLYNN, HAYS & CO., INC., Individually and Jointly,
GERARD CARLUCCI, JACK ROBINSON, CHRISTOPHER SULLIVAN,
CIRO DONNIACUO, JOSEPH I. CRINCOLI,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF FOR NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK (NELA/NY) IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the National Employment Lawyers Association/New York ("NELA/NY"), the New York affiliate of the National Employment Lawyers Association ("NELA").[1] NELA is a national bar association dedicated to the vindication of the rights of individual employees. It is the nation's only professional organization comprised exclusively of lawyers who represent individual employees. NELA has over 4,000 member attorneys and 69 circuit, state, and local affiliates focusing their expertise on employment discrimination, employee compensation and benefits, and other issues arising out of the employment relationship.

NELA/NY is one of NELA's largest affiliates, with more than 400 members. NELA/NY is dedicated to advancing the rights of individual employees to work in an environment that is free of discrimination, harassment, and retaliation. Its members advance these goals by providing legal representation, as well as filing amicus briefs, in cases that raise important questions related to employment law.

[1] No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than amicus curiae, its members, and its counsel—contributed money that was intended to fund preparing and submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellant recused from NELA/NY's deliberations regarding whether to submit this brief.

NELA/NY's members have represented thousands of clients in employment matters, including in race discrimination cases. The organization aims to highlight the practical effects of legal decisions on the lives and rights of working people.

NELA/NY submits this brief to further the Court's understanding of the uniquely harmful place of the N-word and its impact on Black workers. [2] This brief summarizes existing case law in this circuit, case law in other circuits and state courts, and academic research on this subject. All of these sources point to a singular conclusion: Any use of the N-word in the workplace may transform the workplace into a hostile work environment. There is no such thing as a trivial use of the N-word.

In addition, amicus writes to address the role of stereotyping in performance critiques. Employers often justify adverse employment actions through pretextual claims of performance deficiencies. Rather than accept these assertions at face value, courts must probe these asserted performance deficiencies with an eye towards the elimination of bias.

[2] This brief refers to the racial epithet throughout as "the N-word." Where quoting other sources, this brief reprints them as originally written. Some readers may find these repeated references triggering, and caution is urged.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The N-word occupies a singular place in American life. It is the most odious word in the English language. It conjures centuries of racial repression and violence. It echoes slavery and de jure segregation. It is racism encapsulated.

There should thus be no question how many uses of the N-word are permissible in the workplace: None. A single use of the N-word by a coworker creates a hostile work environment. Amicus writes to address this important issue and existing case law that supports that any use of the N-word may create a hostile work environment and therefore juries must decide such issues of fact.

Amicus further addresses the proper role of the court in confronting performance critiques that sound in racial stereotypes. Amicus explains that courts have long condemned stereotyping in employment decision-making. Accordingly, courts must carefully parse performance critiques that parrot racial stereotypes. Often, whether a critique is genuine or is borne of racial stereotyping is a factual issue that must be determined by the jury or factfinder.

III. ARGUMENT

A. Any Use of the N-word Creates a Hostile Work Environment

The N-word is considered the most offensive word in the English language.[3] It "carries with it, not just the stab of present insult, but the stinging barbs of history, which catch and tear at the psyche the way thorns tear at the skin." *Bailey v. S.F. Dist. Atty's Off.*, No. S265223, 2024 WL 3561569, at *8 (Cal. July 29, 2024). Courts have acknowledged its severity for decades.[4] Indeed, few, if any, now reprint the word in its entirety, using, instead, the shorthand "n-word"—in a testament to the full word's "enduring toxicity." *Scaife v. U.S. Dep't of Veterans Affs.*, 504 F. Supp. 3d 893, 905 (S.D. Ind. 2020), *aff'd sub nom. Scaife v. U.S. Dep't of Veterans Affs.*,

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[3] *See, e.g.*, Darryll M. Halcomb Lewis, *The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of the Epithet "Nigger": Use of a Single Epithet*, 53 AM. BUS. L.J. 383, 403 (2016); Gregory S. Parks & Shayne E. Jones, *Nigger: A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law*, 98 J. OF CRIM. L. & CRIMINOLOGY 1305, 1316 (2008) (citing *Merriam-Webster's Collegiate Dictionary* ranking of the word as "perhaps the most offensive and inflammatory racial slur in English"). *See further,* Randall L. Kennedy, *Nigger: The Strange Career of a Troublesome Word* (2002) ("Over the years, *nigger* has become the best known of the American language's many racial insults, evolving into the paradigmatic slur."); *Monteiro v. The Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (characterizing the n-word as "the most noxious racial epithet in the contemporary American lexicon").

[4] *See* Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-Word": Some Thoughts on* Galloway v. General Motors Service Parts Operations *and* Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL. L. REV. 741, 746-48 & nn. 36, 41 (1997); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (showing that the term "nigger-rigged" was "a common term in the car business" did not defeat the plaintiff's claim of racial harassment).

49 F.4th 1109 (7th Cir. 2022). Thus courts overwhelmingly hold that the N-word's uniquely offensive place in American history may create a hostile work environment even after one singular use.

1. The N-word Occupies a Uniquely Offensive Place in American Life and Thus in the Workplace.

The N-word originated during slavery, and its use continued throughout the Reconstruction Era as a "weapon of racial containment." Elizabeth S. Pryor, *The Etymology of Nigger: Resistance, Language, and the Politics of Freedom in the Antebellum North*, 36 J. OF THE EARLY REPUBLIC, 203, 205 (2016); *see also* Randall L. Kennedy, *Who Can Say "Nigger"?... And Other Considerations*, 26 J. BLACKS IN HIGHER EDUCATION 86(2000).

> Nigger was the word kissing the air as families were auctioned throughout the American South. It hovered below black lynched bodies and accompanied civilian and police brutality against blacks throughout the last century. It was the word used by Sheriff Clarence Strider each day during the trial against two white men accused [of] (acquitted, but later confessing to) brutally slaying fourteen year old Emmit Till. . . . Sheriff Strider, the town's law enforcement official, greeted black court reporters and Till's mother each day with, "hello niggers."

Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 193 (2003).

Because of this history, the N-word is considered the most offensive word in the English language, and is often used as a "comparative benchmark" of the

offensiveness of other epithets. Lewis, *supra* at 404. "[T]he N-word is such a powerful insult that its reach has spread beyond the black community to become a tool to denigrate other racial and ethnic groups at home and abroad." Abigail L. Perdue & Gregory S. Parks, *The Nth Decree: Examining Intera-racial Use of the N-Word in Employment Discrimination Cases*, 64 DEPAUL L. REV. 65, 84-85 (2014).

Since at least the 1970s courts have recognized the N-word's singularly hateful place in American life. In 1976, the Supreme Court of Minnesota addressed the use of the N-word in a case of racial discrimination, stating, "We cannot regard use of the term 'nigger' . . . as anything but discrimination . . . based on . . . race. . . . When a racial epithet is used to refer to a [black] person . . . , an adverse distinction is implied between that person and other persons not of his race. The use of the term 'nigger' has no place in the civil treatment of a citizen . . . . " *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 203 (Minn. 1976).[5] As the Supreme Court of Washington and a California appellate court put it around the same time:

> As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as "mere insulting language." Changing sensitivity in society alters the acceptability of former terms.... "Although the slang epithet 'nigger' may once have been in common usage, along with such other racial characterizations as 'wop,' 'chink,' 'jap,' 'bohunk,' or 'shanty Irish,' the former expression has become particularly abusive and insulting in light of

[5] Courts initially reprinted the N-word in its entirety but have since recognized the harmful and triggering effects of doing so. Accordingly, courts now commonly refer to the term only as "the N-word"—as the district court did here. S.A. 3 n.2.

> recent developments in the civil rights' movement as it pertains to the American Negro."

Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) (en banc) (quoting *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216, 219 n.4 (Cal. 1970)).

Accordingly, Courts have recognized that this racial epithet standing alone is the definition of race discrimination: "The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination *per se*." *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984).

This recognition has echoed across jurisdictions. In *Rodgers v. Western–Southern Life Insurance Co.*, 12 F.3d 668, 671 (7th Cir. 1993), the plaintiff was referred to as the N-word twice in the course of twelve years of employment. Despite significant time between uses, the Seventh Circuit held that ***"[p]erhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.***" *Id.* at 675. (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)) (emphasis added).

This Court adopted this language from *Rodgers* in *Richardson v. New York State Department of Correctional Services*, 180 F.3d 426, 439 (2d Cir. 1999) and *Rivera v. Rochester Genesee Regional Transportation Authority*, 743 F.3d 11, 24 (2d Cir. 2014), among other cases. Courts in the Second Circuit have collectively cited *Rodgers* over 50 times, affirming its central place in this Court's jurisprudence.

In total, *Rodgers* has been cited in over 500 cases, including by all but one Federal Court of Appeals.

The Fifth Circuit, for example, has consistently held that the N-word "demonstrates racial animus." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 289 (5th Cir. 2004) (citing *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993) ("[T]he term 'nigger' is a universally recognized opprobrium, stigmatizing African–Americans because of their race."")). The Fourth Circuit has likewise concluded that "the word 'nigger' is pure anathema to African–Americans." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001).[6] And the Seventh Circuit has endorsed that characterization, adding that "the word 'was created to divest people of their humanity.' Put mildly, 'the word 'nigger' can have a highly disturbing impact on the listener.'" *Scaife*, 504 F. Supp. 3d at 905 (citing *Iconoclasts: Maya Angelou* (Sundance Channel Nov. 30, 2006) and *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477 (7th Cir. 2004)). Then-Judge Kavanaugh, in a D.C. Circuit opinion, similarly stated as follows:

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[6] In 2008, the Honorable Andre M. Davis of the United States Court of Appeals for the Fourth Circuit addressed an unknown man in an opinion piece in the *Baltimore Sun*. Perdue et al., *supra* at 85. Judge Davis recounted being called an N-word by a pedestrian during his tenure as a district court judge, and years later the experience still clung to him. He wrote, "you gave me a quite unexpected but not altogether unforeseeable flashback. In the shared journey of Americans to attain a society marked by mutual respect for the differences among us, one needn't travel far to be reminded how far we have to travel." *Id.*

> [I]n my view, being called the n-word by a supervisor . . . suffices by itself to establish a racially hostile work environment. That epithet has been labeled, variously, a term that "sums up . . . all the bitter years of insult and struggle in America . . . . No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African–Americans."

Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (quoting Langston Hughes, *The Big Sea* 269 (2d ed.1993) (1940)). This is so because the N-word is "probably the most offensive word in English." *See id.* (quoting Random House Webster's College Dictionary 894 (2d rev. ed. 2000)). Opprobrium for the word is thus universal.

The gravamen of the N-word is the harm that the Supreme Court identified in *Brown v. Board of Education*: the othering of African-Americans in service of racial subordination. This othering "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 494, (1954). This is the harm against which our civil rights laws stand.[7]

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[7] Some courts have even found that the N-word constitutes "fighting words." *See, e.g.*, *In re Spivey*, 480 S.E.2d 693, 699 (N.C. 1997) (rejecting defendant's argument that his use of the N-word was protected by the First Amendment and holding instead that it "presents a classic case of the use of 'fighting words' tending to incite an immediate breach of the peace"); *see also Hrobowski*, 358 F.3d at 477 (citing *Virginia v. Black*, 538 U.S. 343, 355 (2003) (noting that the Ku Klux Klan vowed to "keep niggers out of your town" as part of its campaign of racial violence and intimidation); *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991)

2. The Use of the N-word by a Coworker May Create a Hostile Work Environment Under this Court's Precedents, and the Determination Should Therefore be Left to Juries.

Because of the N-word's uniquely harmful role, courts, including this one, have held that its utterance can create a hostile work environment and that such a determination should be left to a jury. This Court first addressed the use of the N-word in *Richardson v. New York State Department of Correctional Services*, 180 F.3d 426 (2d Cir. 1999). *Richardson* looked to *Rodgers* for guidance, and noted that "a single episode of harassment, if severe enough, can establish a hostile work environment," highlighting the disjunctive nature of the "severe *or* pervasive" standard. *Id.* at 437 (emphasis added).[8] The *Richardson* court encouraged a

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("The omnipresence of race based attitudes and experiences in the lives of black Americans causes even nonviolent events to be interpreted as degrading, threatening, and offensive.") vacated in part, 765 F. Supp. 1529, 1530-32 (D. Me. 1991).

[8] *Meritor* recognized an important change in the law in this regard: "chang[ing] 'severe *and* persistent,' the conjunctive *Henson* locution, to the disjunctive 'severe *or* pervasive.'" Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REC. 895, 940 (2010). Courts have underscored the significance of this change. *See, e.g.*, *Ayissi-Etoh*, 712 F.3d at 579 ("The test set forth by the Supreme Court is whether the alleged conduct is 'sufficiently severe *or* pervasive'—written in the disjunctive—not whether the conduct is 'sufficiently severe *and* pervasive.' A single, sufficiently severe incident, then, may suffice to create a hostile work environment."); *Castleberry v. STI Grp.*, 863 F.3d 259, 264-265 (3d Cir. 2017) (noting that "the distinction" between the two words means they

consideration of the work environment in totality when analyzing whether a single incident of discrimination "sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment." *Id.* (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995); *see also Banks v. Gen. Motors, LLC*, 81 F.4th 242, 267 (2d Cir. 2023) ("In assessing a hostile work environment claim, the emphasis is on the hostility of the work environment as a whole.") (citation omitted). *Richardson* further held that courts should not evaluate the degree of hostility at summary judgment because, "[r]easonable jurors may well disagree about whether these incidents would negatively alter the working conditions of a reasonable employee. But the potential for such disagreement renders summary judgment inappropriate." 180 F.3d at 439.

More recently, in *Rivera*, this Court affirmed the holdings of *Richardson* and *Rodgers*, holding that four instances of being called the N-word precluded summary judgment on a hostile work environment claim. 743 F.3d at 21, 24; *see also La Grande v. DeCrescente Distrib. Co.*, 370 F. App'x 206, 210-11 (2d Cir. 2010) (finding four instances of a manager calling plaintiff the N-word along with threats of physical violence, sufficient to survive a motion to dismiss).

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are "alternative possibilities" which "lends support" for an "isolated incident of discrimination").

The Second Circuit has not yet decided the "precise question" of whether a single use of a "vile racial slur" creates a hostile work environment. *See Spencer v. Glob. Innovative Grp., LLC*, No. 17 Civ. 7604 (PGG) (BCM), 2023 WL 6633860, at *12 (S.D.N.Y. Oct. 12, 2023) (rejecting report and recommendation that overhearing a supervisor use the N-word was not sufficiently severe to create a hostile work environment). Nonetheless, several cases from this Court indicate that it does. In *Albert-Roberts v. GGG Construction, LLC*, 542 F. App'x 62 (2d Cir. 2013), the defendant referred to the plaintiff's husband as an N-word a singular time. This Court held that such *indirect* use of the N-word did not meet the requisite severity for a hostile work environment claim, but nonetheless left the door open, stating, "[t]here may well exist circumstances where a single use of the word 'nigger' would rise to the level of a hostile work environment . . . ." *Id.* at 64. Likewise, in *Daniel v. T&M Protection Resources, LLC*, this Court declined "to confront the issue of whether the one-time use of the slur 'nigger' by a supervisor to a subordinate can, by itself, support a claim for a hostile work environment" but still concluded that the district court erred "when it rejected this possibility as a matter of law." 689 F. App'x 1, 2 (2d Cir. 2017).

This Court recently reaffirmed *Rivera*'s holding that the level of hostility generated from racist remarks is a "question of fact for the jury" in *Banks v. General Motors, LLC*, 81 F.4th at 266. *Banks* rejected the district court's characterization of

isolated epithets as "stray remarks," instead finding that not only can stray remarks contribute to a finding of discrimination, but that "a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment." *Id.* at 266-67 (quoting *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997)); *see also Rasmy v. Marriott Int'l Inc.*, 952 F.3d 379, 393 (2d Cir. 2020) ("Discriminatory conduct not directly targeted at another employee (*e.g.*, discriminatory remarks made in an employee's presence though addressed to another person) can contribute to the creation of an actionable hostile work environment.").[9] In finding that the district court erred in granting summary judgment to the defendant, this Court explained, "[W]e have repeatedly cautioned against setting the bar too high" in establishing the standard for a hostile work environment claim. *Banks*, 81 F.4th at 268 (quoting *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (alteration in original)).[10] These cases collectively indicate that a single use of the N-word by a

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[9] *See further Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115-16 (2d Cir. 2007) ("Where we described remarks as 'stray,' the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination . . . . We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category.").

[10] Many district courts have thus correctly applied this Court's guidance in recognizing that whether racist remarks created a hostile work environment must be left to a jury. In *Equal Employment Opportunity Commission v. 98 Starr Road Operating Co., LLC*, for example, the District of Vermont held that the use of the N-word toward Black employees by White residents of a senior care facility was

colleague may create a hostile work environment, and that the issue should be reserved for the jury based on the facts of the case.

3. Other Courts to Consider the Question Have Overwhelmingly Held that Even a Single Use of the N-word Can Create a Hostile Work Environment.

The Courts of Appeals have been nearly universal in their condemnation of even a single use of the N-word. In *Castleberry v. STI Group*, the Third Circuit held that one use of the N-word was sufficient to state a hostile work environment claim. 863 F.3d 259, 264 (3d Cir. 2017). Similarly, in *Boyer-Liberto v. Fontainebleau Corp.*, the Fourth Circuit held that two uses of an epithet equivalent to the N-word "whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment." 786 F.3d 264, 280 (4th Cir. 2015) (en banc). And in *Adams v. Austal, U.S.A., LLC*, the Eleventh Circuit held that "[a] reasonable jury could find that [plaintiff's] work

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sufficiently severe to constitute a hostile work environment, despite the lack of involvement from a supervisor. 682 F. Supp. 3d 414 (D. Vt. 2023). *Johnson v. City of New York* similarly acknowledged "that non-binding precedent within this Circuit indicates that '[t]here may well exist circumstances where a single use of the word 'nigger' would rise to the level of a hostile work environment.'" No. 17-CV-7585 (PKC) (RER), 2019 WL 4468442, at *7 n.13 (E.D.N.Y. Sept. 18, 2019) (quoting *Albert-Roberts*, 542 F. App'x at 64).

environment was objectively hostile" from an isolated act of a racially offensive carving on the workplace bathroom wall. 754 F.3d 1240, 1254 (11th Cir. 2014).

Other authorities similarly affirm that a single use of the N-word, even by a non-supervisor may constitute severe harassment sufficient to state a claim. The EEOC Compliance Manual highlights that "a single, extremely serious incident of harassment may be sufficient to constitute a Title VII violation . . . . Examples . . . include . . . an unambiguous racial epithet such as the 'N-word.'" Section 15: Race and Color Discrimination VII(A)(2) (2006).

The Supreme Court of California recently addressed the isolated use of the N-word by a colleague in *Bailey v. San Francisco District Attorney's Office*, No. S265223, 2024 WL 3561569, at *8 (Cal. July 29, 2024). The court thoughtfully considered the issues and concluded that the isolated use of the N-word, even in a non-threatening manner, could be sufficiently severe because there is "no question that conduct by a coworkers can give rise to a claim of harassment." *Id.* at 10 (citing *Paschall v. Tube Processing Corp.*, 28 F.4th 805, 814 (7th Cir. 2022)).

Bailey also recognized that context may enhance the N-word's sting. *See id.* The court considered the forced proximity of the plaintiff and the defendant following the incident, which, the court explained, could reasonably interfere with the plaintiff's work performance. *See id.* at *10. And the court also analyzed the relationship between the colleague and other supervisors to determine whether the

colleague was acting with a "certain degree of impunity" typically reserved for supervisors. *Id.* Thus the California Supreme Court concluded that even though the speaker was a colleague, and not a supervisor, the word's hurt or abuse and the colleague's role could create a hostile work environment. *Id. see also Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (concluding that the term "boy" could be probative of racial animus in a Title VII case, because a word may have various meanings that "depend on various factors including context, inflection, tone of voice, local custom, and historical usage"); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1142-43 (10th Cir. 2008) (discussing, in Title VII hostile work environment case, a White manager's reference to the Black plaintiff as "boy," and noting that "whether Mr. Cagle's comment was racially motivated and what effect it had on Mr. Tademy are judgments of the sort we are not equipped to make as an appellate court reviewing a cold record. Nor were they appropriate for the district court in ruling on a summary judgment motion.").

Conversely, other courts have noted that severity comes from the hurt of the words, regardless of context: "The connotation of the epithet itself can materially contribute to the remark's severity. Racial epithets are regarded as especially egregious and capable of engendering a severe impact." *Taylor v. Metzger*, 706 A.2d 685, 690 (N.J. 1998) (holding that a single use of "jungle bunny" was sufficiently severe to contribute to a hostile work environment). The abuse comes from the

experience of hearing the word, regardless of the speaker. *See Ross v. Douglas Cnty.*, 234 F.3d 391, 396 (8th Cir. 2000) (holding that the use of the N-word by a Black supervisor did not alter the severity of the harm caused); *see also Taylor*, 706 A.2d at 503 (quoting Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2338 (1989) ("However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.") and Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (1990) ("The experience of being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face. The injury is instantaneous.").

In other words, although context may enhance the N-word's sting, it does not diminish it. And the precise contours of the harm must be reserved for the jury.

* * *

These authorities stand for three principles: First, the N-word occupies a uniquely odious place in American life that may render a workplace hostile through even a single utterance. Second, although context may enhance the word's sting, it does not diminish it. And, third, ultimate assessment of the word's impact is fact-intensive and must therefore be left to a jury.

The district court below failed to grapple with this analysis. First, drawing all reasonable inferences for the Plaintiff, evidence in the record indicates that the N-

word was used at least two times: "N-Car" and "Thank my N" meaning the "N-word," as well as on other occasions. *See* Appellant's Br. 3-7. The district court acknowledged the severity of the N-word in a footnote, calling it "odious" and "violent," S.A. 3 n.2 (quoting *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 86 n.3 (2d Cir. 2021) (en banc) (Lohier, J., concurring in part)). Yet, in its analysis, the district court downplayed the severity of this racism. It did not engage with the N-word's tortured history, nor with the context in which it was used against Plaintiff, the ways in which it altered Plaintiff's work environment, nor with Plaintiff's supervisor's responses to being told of its use.[11] These failures run afoul of the case law of this Court set forth above and the broad consensus in other courts.

B. The Use of Racial Stereotypes in Wrongful Termination Cases Is Evidence of Discrimination

Employers often defend employment discrimination cases by asserting that the employee has not performed. Yet these critiques themselves are often tainted with bias. The Supreme Court recognized the potential for stereotyping to foul performance critiques in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, the majority credited the testimony of a psychologist who opined that the employer "had unlawfully discriminated against Hopkins on the basis of sex by consciously

[11] Indeed, Defendants even admitted that Plaintiff's complaints about use of the N-word figured into the decision to terminate him. *See* Appellant's Br. 41.

giving credence and effect to partners' comments that resulted from sex stereotyping." *Id.* at 237. The Court thus held that where the employer defends its decisions based on performance critiques themselves infected with bias, the employer must prove by a preponderance of the evidence that it would have made the same decisions in the absence of bias. *See id.* at 253. This framework is foundational: An employer does not escape liability on the basis of ipse dixit performance critiques; rather, it must prove by preponderance of the evidence that such critiques are not borne of bias. *See id.* at 253; *see also id*. at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . . "); *id.* at 272 (O'Connor, J., concurring) (noting plaintiff's "failure to conform to [gender] stereotypes" as a discriminatory factor in decision making). This case presents an opportunity to affirm this rule.

1. This Court Has Long Recognized that Performance Critiques Based in Sex Stereotypes Should Not Be Credited.

Putatively legitimate performance concerns that sound in stereotypes are discriminatory and should not be accepted in discrimination cases. "When employment decisions are based on invidious sex stereotypes, a reasonable jury could infer the existence of discriminatory intent." *Sassaman v. Gamache*, 566 F.3d

307, 313 (2d Cir. 2009). The Second Circuit has thus consistently held that employment decisions resulting from stereotypes about women violate Title VII. *See, e.g.*, *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (holding that "stereotypical remarks about the incompatibility of motherhood and employment 'can certainly be *evidence* that gender played a part' in an employment decision") (quoting *Hopkins*, 490 U.S. at 251). As Professor Kerri Lynn Stone explains, a "critique that an individual is too much like or not enough like the stereotype for her group, a predisposition to hold group members to different standards and thus to treat them differently because of their protected-class status, is belied." Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 594 (2011). "This type of stereotyping in employment decisions, [] is precisely the type of evil that Title VII is designed to prevent." *Zhao v. State Univ. of N.Y.*, 472 F. Supp. 2d 289, 310 (E.D.N.Y. 2007) (discussing discrimination against plaintiff based on her Chinese origin); *Galdieri–Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998) ("Evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender."). Such "unlawful discrimination can stem from stereotypes" that need not be conscious on the part of the decision maker. *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999) (collecting cases).

2. Performance Critiques Sounding in Racial Stereotypes Are Equally Worthy of Condemnation.

"These same principles undoubtedly apply with equal force to racial and ethnic stereotyping." *Zhao*, 472 F. Supp. 2d at 310. "Stereotypes or cognitive biases based on race are as incompatible with Title VII's mandate as stereotypes based on age or sex; here too, the entire spectrum of disparate treatment is prohibited." *Thomas*, 183 F.3d at 59 (internal citations omitted). "[U]se of the above adjectives ['aggressive', 'agitated', 'angry', 'belligerent'] to describe an employee could, in combination with other concrete factual allegations, support a claim of racial and/or gender discrimination." *Humphries v. City Univ. of N.Y.*, No. 13 Civ. 2641(PAE), 2013 WL 6196561, at *9 (S.D.N.Y. Nov. 26, 2013). Thus, if it is unlawful to take action against a woman for being "too emotional," it must also be unlawful to discriminate against a Black man who becomes "disruptive." *Cf. Miller v. Levi & Korsinsky, LLP*, 695 F. Supp. 3d 397, 412 (S.D.N.Y. 2023) (quoting *Hussain v. Fed. Express Corp.*, 657 F. App'x 591, 594 (7th Cir. 2016)).

Courts in this circuit have not hesitated to apply the logic of *Hopkins* to race discrimination cases. They have held that "[s]tereotypical remarks can be evidence that race 'played a part' in an adverse action." *Walston v. City of New York*, No. 22-CV-10002 (LAK)(JW), 2024 WL 1376905, at *13 (S.D.N.Y. Mar. 7, 2024), *report and recommendation adopted*, 2024 WL 1374837 (S.D.N.Y. Apr. 1, 2024) (quoting

Back, 365 F.3d at 119). For example, in *Zhao*, the district court cited extensive gender discrimination law in finding that the plaintiff was potentially subject to unlawful stereotyping on account of her Chinese origin. 472 F. Supp. 2d at 309. Likewise, in *Weiping Liu v. Indium Corporation of America*, the district court recognized that Title VII prohibits "the supposition that [an individual] *will* conform to a [class-based] stereotype and is therefore less suited to perform a certain function." No. 6:16-cv-01080 (BKS/TWD), 2019 WL 3825511, at *12 n.27 (N.D.N.Y. Aug. 15, 2019), *aff'd sub nom. Liu v. Indium Corp. of Am.*, No. 20-64, 2021 WL 3822871 (2d Cir. Aug. 27, 2021) (quoting the Court's definition of sex stereotyping in *Naumovski v. Norris*, 934 F.3d 200, 215 n.44 (2d Cir. 2019) (internal quotations omitted)). And courts have further recognized that performance critiques that sound in conformity to stereotypes are equally deplorable and outside the bounds of our civil rights laws. *See Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 378 (2d Cir. 2003) (holding that the "demeaning ethnic stereotype that Jews are 'cheap'" contributed to the prima facie case of discrimination).

The recognition that performance critiques may sound in bias and stereotypes is particularly important because "[s]eldom is an employer willing to admit, or a plaintiff able to prove, that the decisionmaker consciously used race" in employment decisions. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L.

REV. 1161, 1173 (1995); *see also* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 637 (2000) (finding that employers are less likely to comment about race now that racist remarks are deemed unacceptable by society). Instead, the employer will often couch its decisions in facially neutral rationales. *See, e.g.*, *Mason v. Se. Pa. Transp. Auth.*, 134 F. Supp. 3d 868, 871, 875–77 (E.D. Pa. 2015) (noting that defendants' comments about plaintiff's criminal record and if he was "staying out of trouble," while "not overtly racist, [] could be considered to embody cultural stereotypes derogatory towards African Americans," and holding this evidence combined with the use of a racial epithet sufficient to defeat summary judgment); *cf. Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998) (explaining that when "other indicia of discrimination are properly presented, the remarks can no longer be deemed 'stray,' and the jury has a right to conclude that they bear a more ominous significance"); *Humphries v. City Univ. of N.Y.*, No. 13 Civ. 2641(PAE)., 2013 WL 6196561, at *9 (S.D.N.Y. Nov. 26, 2013) ("Whether remarks by defendants or defendants' employees support an inference of discrimination depends, however, on the context in which they were made and whether, fairly considered, they themselves reveal discrimination or 'tend[ ] to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class.'") (citing *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 116 (2d Cir. 2007)).

In such contexts, the potential for stereotypes to infect observed reality is high: Stereotypes are "preexisting theories and frameworks that help us understand our raw experiences" which contain "sweeping concepts of the behaviors, traits and attitudes associated with the members of a social category." Stone, *supra* at 613 (quoting Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes*, Psychology Today (May 1998), https://www.psychologytoday.com/us/articles/199805/where-bias-begins-the-truth-about-stereotypes).[12] *Hopkins* and its progeny thus instruct that courts must take a critical eye to such critiques, asking not just whether the facially neutral reasons for an employment decision are legitimate, but, also, whether bias has motivated them. If it has, the employer must prove that such bias is not the cause of its decision. Absent such proof, an employer's performance critiques flunk *Hopkins*'s test.

The district court here failed to take such a critical eye. It instead accepted Defendants' contentions that Plaintiff "slept on the job, was not where he needed to be during working hours, and was involved in a near physical altercation with a co-worker . . . ." S.A. 20. The district court did not analyze whether these critiques were

[12] *See further* David J. Schneider, *The Psychology of Stereotyping,* 170 (2004); Jacklyn Huey & Michael J. Lynch, *The Image of Black Women in Criminology: Historical Stereotypes as Theoretical Foundation,* Justice with Prejudice: Race and Criminal Justice in America 72, 78-88 (Michael J. Lynch & E. Britt Patterson eds., 1996).

amplified by Plaintiff's race. Such an oversight is incompatible with this Court's precedents and must therefore be corrected.

IV. CONCLUSION

For the above reasons, the district court's decision with respect to use for the N-word and stereotypes should be vacated and reversed.

Respectfully submitted,

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