UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RYAN LUTER, *et al.*,	:	
Plaintiffs,	:	**3:22-cv-00398-JCH**
v.	:	
TERRASMART, INC., *et al.*,	:	**JUNE 27, 2022**
Defendants.	:	

DEFENDANT TERRASMART, INC.'S
NOTICE OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendant Terrasmart, Inc. ("Terrasmart"), hereby moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Counts One through Seven of Plaintiffs' Amended Complaint (Dk. No. 25) for failure to state a claim upon which relief can be granted. The grounds for the motion are that:

(1) Plaintiffs fail to allege conduct that is sufficiently severe or pervasive to be actionable under any of the statutes cited in Counts One, Two or Three of the Amended Complaint. Further, even if the conduct alleged was sufficiently severe or pervasive (which it is not), Plaintiffs failed to present facts sufficient to impute liability for the conduct of a co-worker to Terrasmart.

(2) Counts Four and Five, which allege state law statutory claims under Conn. Gen. Stat. §§52-571a and 52-571c, must be dismissed because Plaintiffs do not allege that Terrasmart engaged in any conduct which violates these statutes and Plaintiffs failed to demonstrate that the conduct of a co-worker should be imputed to Terrasmart.

(3) Counts Six (alleging negligent supervision) and Seven (alleging both negligent retention and hiring) must also be dismissed because Plaintiffs cannot demonstrate that Terrasmart

knew, or reasonably should have known, that Plaintiffs' co-worker had a propensity to engage in the conduct alleged before the conduct occurred.

Terrasmart incorporates by reference its Memorandum of Law in Support of Defendant Terrasmart, Inc.'s Motion to Dismiss the Amended Complaint, and for the reasons stated therein, respectfully request that this Court grant the Motion and dismiss Counts One through Seven against Terrasmart, Inc., with prejudice.

Dated at New Haven, Connecticut on this 27th day of June, 2022.

Respectfully submitted,

ATTORNEYS FOR DEFENDANT, TERRASMART, INC.

/s/ Kyle Roseman
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CERTIFICATION

I hereby certify that on June 27, 2022 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Kyle Roseman
Kyle Roseman(ct31254)

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TERRASMART, INC.'S MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Terrasmart, Inc. ("Terrasmart" or the "Company") moves to dismiss Counts One through Seven of Plaintiffs' Amended Complaint (Dkt. No. 25)[1] for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. Rule 12(b)(6). In the Amended Complaint, Ryan Luter, Ralph Luter, Ralph Brown, Dwayne Gardner, Elijah Dampier, and Teven Lockhard (collectively "Plaintiffs"), former employees of temporary staffing agency Defendant 360 Industrial Services, LLC ("360") who were previously assigned to perform services for Terrasmart in Connecticut, allege ten (10) meritless causes of action against Defendants Terrasmart and 360. Seven (7) of those causes of action are against Terrasmart and warrant dismissal because they fail to state a claim upon which relief can be granted.

Plaintiffs claim that a co-worker named "John" (last name unknown) made racially derogatory and threatening comments in the presence of one of the individually named plaintiffs, Ryan Luter. (Am. Compl. ¶¶ 34-37). Viewing the allegations in the Amended Complaint as true, as is required for purposes of this motion, the alleged inappropriate conduct by John was an

[1] References to the Amended Complaint are referred to herein as "Am. Compl. ¶___".

isolated incident that occurred on one day, September 1, 2021. (*Id.*). Plaintiffs do not allege that anyone, other than John, made racially charged or threatening comments during their short tenure, nor do they claim that any other individually named plaintiff, other than Ryan Luter, heard the comments allegedly made by John on September 1, 2021. On the next scheduled workday, Friday, September 3, 2021, Terrasmart conducted an investigation which included obtaining statements from Plaintiffs and contacting the state police. (Am. Compl. ¶¶60-61). Significantly, *John left the worksite*. (Am. Compl. ¶61). Plaintiffs do not allege that any other racially disparaging comments were made by John (or anyone else at the worksite).

Notwithstanding the isolated nature of the conduct alleged, as well as the appropriate, remedial measures taken by Terrasmart in response thereto, Plaintiffs bring this lawsuit seeking to recover damages, attorneys' fees and costs. However, as detailed more fully herein, all of Plaintiffs' claims against Terrasmart are legally insufficient and should be dismissed. In sum:

- Plaintiffs' hostile work environment claims (Counts One, Two and Three) must be dismissed because John's alleged conduct was not sufficiently severe and pervasive to be actionable under guiding legal authority in this jurisdiction. The fact that the only individual who witnessed the alleged conduct did not immediately report it and waited until the end of his shift (to advise Terrasmart) and the end of the day (to advise the other individually named plaintiffs) is telling and suggests the conduct was not so subjectively abusive and hostile as to alter the work environment. Even if Plaintiffs could establish a hostile work environment, they are unable to impute the conduct of John, a co-worker, to Terrasmart. Terrasmart did everything it could to stop the allegedly offensive behavior by John, and, in fact, did stop the behavior. Plaintiffs do not allege that the conduct continued after lodging the complaint and John left the worksite.

- Plaintiffs' state law statutory claims under Conn. Gen. Stat. §§52-571a and 52-571c for damages resulting from "intimidation based upon bigotry or bias" (Count Four) and "deprivation of equal rights and privileges" (Count Five) should be dismissed because Terrasmart did not engage in any conduct that could be deemed violative of the statutes cited. Indeed, according to the Amended Complaint, *John* engaged in the only conduct that could even arguable be considered a violation of these statutes, not Terrasmart. As Plaintiffs are unable to impute liability for John's conduct to Terrasmart, these state law statutory claims must be dismissed.

- Plaintiffs' negligent supervision (Count Six) and negligent retention/hiring (Count Seven) claims are also subject to dismissal because Plaintiffs cannot demonstrate that John's alleged conduct was reasonably foreseeable to Terrasmart. Plaintiffs do not allege that John engaged in any conduct *before* September 1, 2021 that would have put Terrasmart on notice of a propensity for John to make racially derogatory slurs or threats.

For all of these reasons, and those detailed more fully herein, Counts One through Seven of the Amended Complaint should be dismissed against Terrasmart with prejudice.

I. FACTUAL AND PROCEDURAL HISTORY[2]

Terrasmart is a solar technology company that builds and installs large scale and commercial solar energy projects. (Am. Compl. ¶17). 360 is a staffing company that contracts with various entities, including Terrasmart, to provide workers to perform services on projects throughout the country. (*Id*. ¶¶23-24). Plaintiffs were hired by 360 to work on solar installation projects for Terrasmart. (*Id*. ¶¶ 27-28). Plaintiffs, who self-identify as African-American, along with four (4) other African-American individuals from Mississippi, were assigned to work for Terrasmart at the Quinebaug Solar Energy Centers located in Brooklyn and Canterbury, Connecticut. (*Id*. ¶¶ 10-15, 28 & 35).

Plaintiffs allege that on Wednesday, September 1, 2021, a Caucasian worker named John (last name unknown), threatened to kill the 10 "n------"[3] from Mississippi and mentioned getting a gun from his car. (*Id*. ¶¶ 35-36). Plaintiffs allege John went to his car and put something in his pocket. (*Id*. ¶35). Plaintiffs claim that at the *end* of his shift, Plaintiff Ryan Luter reported the comments allegedly made by John to Terrasmart supervisors Walt Taylor and Houston Wilson. (*Id*. ¶43). The supervisors advised Ryan Luter that they spoke to John and he "would probably get

[2] For purposes of this motion only, and in accordance with applicable law, Terrasmart assumes that the non-conclusory allegations asserted in the Amended Complaint are true. Notwithstanding, Terrasmart reserves the right to controvert any and all allegations contained in the Amended Complaint at any subsequent stage in the litigation of this matter.
[3] For purposes of this motion, Terrasmart assumes the term referenced in the Amended Complaint as "n------" refers to a derogatory racial slur against African Americans.

terminated." (*Id.*). At the *end of the day*, Ryan Luter informed the other named Plaintiffs about the threat purportedly made by John. (*Id.* ¶44).

Plaintiffs did not work the following day, Thursday, September 2, 2021, due to heavy rain. (*Id.* ¶54). On Friday, September 3, 2021, Plaintiffs spoke with Terrasmart management, Human Resources and the police regarding the incident that allegedly occurred with John on September 1st. (*Id.* ¶59-61). Plaintiffs submitted written statements regarding the purported incident. (*Id.* ¶ 61). John left the Quinebaug job site. (*Id.* ¶59). Plaintiffs claim they no longer felt comfortable working for Terrasmart at the Quinebaug Solar Center Project. (*Id.* ¶62).

Plaintiffs filed a Complaint in the United States District Court for the District of Connecticut on March 17, 2022 alleging the following five (5) separate causes of action against Terrasmart: "hostile environment" in violation of 42 U.S.C. § 1981 ("Section 1981"); "damages resulting for intimidation based upon bigotry or bias" in violation of Conn. Gen. Stat. § 52-571c; "deprivation of equal rights and privileges" in violation of Conn. Gen. Stat. §52-571a; negligent supervision; and, negligent retention/hiring. (Dkt. No. 1). Also on March 17, 2022, Plaintiffs each filed complaints with the Connecticut Commission on Human Rights and Opportunities ("CHRO") against Terrasmart and separately against 360. (Am. Compl. ¶4). Plaintiffs requested expedited release of jurisdiction from the CHRO, which was granted on April 29, 2022. (*Id.* ¶6).

Plaintiffs filed their Amended Complaint on May 9, 2022. (Dkt. 14). Plaintiffs allege the following seven (7) causes of action against Terrasmart: (1) "Hostile Environment" pursuant to Section 1981; (2) "Hostile Environment" pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"); (3) "Hostile Environment" pursuant to the Connecticut Fair Employment Practices Act ("CFEPA"); (4) actions for damages resulting from intimidation based upon bigotry or bias

pursuant to C.G.S. § 52-571c; (5) action for deprivation of equal rights and privileges pursuant to Conn. Gen. Stat. § 52-571a; (6) negligent supervision; and, (7) negligent retention/hiring. (*Id*.).

As detailed herein, even affording Plaintiffs the benefit of all the most favorable inferences, based on the allegations in the Amended Complaint, all seven (7) counts against Terrasmart should be dismissed because Plaintiffs have failed to state claims for which relief can be granted.

II. LEGAL STANDARD – 12(B)(6) MOTION TO DISMISS

An initial pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). When a defendant tests the sufficiency of a complaint through a motion under Rule 12(b)(6), in order to survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009) (applying *Iqbal/Twombly* standard). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Harris*, 572 F.3d at 72 (quoting *Iqbal, supra*). *See also Am. Italian Women for Greater New Haven v. City of New Haven*, 2022 U.S. Dist. LEXIS 99305, *4, (D. Conn. June 2, 2022)(J. Hall)(dismissing complaint and noting for motion to dismiss under 12(b)(6) "the court does not credit legal conclusions or [t]hreadbare recitals of the elements of a cause of action.").

A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Application of these well-established principles to Plaintiffs' Amended Complaint compels the granting of this motion and dismissal of all claims against Terrasmart.

III. ARGUMENT

A. Plaintiffs' "Hostile Environment" Claims (Counts One, Two and Three) Are Legally Insufficient and Should be Dismissed.

1. Legal Standard – Hostile Work Environment.

To establish a hostile work environment claim under Title VII, "a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Jones v. Sansom*, 2022 U.S. Dist. LEXIS 59514, at *1 (D. Conn. Mar. 31, 2022)(internal citations and quotations omitted). *See also Brittell v. Dep't. of Corr.*, 247 Conn. 148, 166-67, 717 A.2d 1254 (1998) (applying the same standard for hostile work environment claims under the CFEPA); and, *Ruiz v. Cty. of Rockland,* 609 F.3d 486, 491 (2d. Cir. 2010) (applying the same standard for hostile work environment claims under Section 1981). The conduct must be "severe or pervasive enough that a reasonable person would find it hostile or abusive" and "the victim must subjectively perceive the work environment to be abusive." *Benitez v. Jarvis Airfoil, Inc.*, 2020 U.S. Dist. LEXIS 54786, at *20 (D. Conn. Mar. 30, 2020) citing *Littlejohn v. City of New York*, 795 F.3d 297, 321 (2d Cir. 2015).

In addition, to prevail on their harassment claims, Plaintiffs must also demonstrate a specific basis for imputing the conduct that created the purportedly hostile work environment to Terrasmart. "[I]f the [alleged] harasser is a co-worker and not a supervisor, an employer is liable only if it was negligent in controlling the working conditions." *Id.* To establish negligence, the Court must consider whether Terrasmart: (1) "failed to provide a reasonable avenue for complaint"; or, (2) "knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action." *Id.* at *21 citing *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d. Cir. 2000).

Here, the conduct alleged in the Amended Complaint is not sufficiently severe or pervasive to be legally actionable and, even if it was, Plaintiffs are unable to impute liability to Terrasmart for co-worker John's purported conduct.

2. John's Alleged Conduct on September 1, 2021 Is Not Sufficiently Severe or Pervasive to be Actionable.

Even viewing the allegations in the Amended Complaint in the light most favorable to Plaintiffs, John's conduct on September 1, 2021 was not sufficiently severe or pervasive to constitute an actionable hostile work environment based on race. "[W]hether racial slurs constitute a hostile work environment typically depends upon the quantity, frequency, and severity of those slurs, considered cumulatively in order to obtain a realistic view of the work environment." *Benitez*, 2020 U.S. Dist. LEXIS 54786, at *20 citing *Schwapp v. Town of Avon*, 118 F.3d 106, 111 (2d Cir. 1997). Courts in this jurisdiction will evaluate the totality of the circumstances, including an analysis of whether the alleged conduct is physically threatening. *Id*. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998); *Harris v. Forklift Sys*., 510 U.S. 20, 21 (1993)(mere utterance of an epithet which engenders offensive feelings does not sufficiently affect the conditions of employment). Indeed, the Second Circuit has noted that "for racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a *steady barrage* of opprobrious racial comments." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)(emphasis added). Moreover, the severe and pervasive requirement contains both an objective and subjective component. Plaintiffs must show both that a reasonable person would perceive the environment as hostile and abusive *and* Plaintiffs themselves "subjectively perceive the work environment to be abusive." *Benitez v.*

Jarvis Airfoil, Inc., 2020 U.S. Dist. LEXIS 54786, at *20 (D. Conn. Mar. 30, 2020) citing *Littlejohn v. City of New York*, 795 F.3d 297, 321 (2d Cir. 2015). Plaintiffs cannot meet either the objective or subjective standards of a racially hostile work environment.

a. The Conduct Alleged Was Not Objectively Hostile and Abusive

Plaintiffs' hostile work environment claims are based on *one* isolated instance of co-worker John allegedly using the n-word and making threats on September 1, 2021. (Am. Compl. ¶¶ 34-37). A claim of hostile work environment on the basis of race requires more than a "few isolated incidents of racial enmity." *Schwapp*, 118 F.3d at 110. In this case, Plaintiffs cite to only *one* instance of inappropriate conduct. John's alleged conduct was certainly not "episodic" as it occurred on one occasion. Moreover, it cannot credibly be characterized as either a "steady barrage of opprobrious racial comments" or "continuous and concerned." *Gorzynski*, 596 F.3d at 102. Again, the conduct occurred on one isolated occasion. Plaintiffs do not allege that John engaged in any other offensive or threatening conduct at any time *after* the September 1, 2021 incident. Indeed, according to the Amended Complaint, John was removed from the worksite after Ryan Luter and Ralph Luter complained of John's alleged conduct. (Am. Compl. ¶¶43, 56 & 59). Viewing the totality of the circumstances, John's conduct was not objectively severe nor pervasive enough to adversely alter the terms or conditions of Plaintiffs' employment.

Courts in this jurisdiction have routinely dismissed hostile work environment claims with far more egregious allegations than those in this case. In *Blue v. City of Hartford*, the court found that the plaintiff was unable to establish a racial hostile work environment claim based on a co-worker calling plaintiff, in the presence of others, a "clown ass n------." 2019 U.S. Dist. LEXIS 227033, *23. Viewing these allegations in the light most favorable to the plaintiff, the court granted defendant's motion to dismiss the hostile work environment claim because the conduct

alleged was not sufficiently severe or pervasive to be actionable. *Id*. The court further compared the number of racial incidents in *Blue* to two other cases:

> Plaintiff's allegations do not come anywhere close to the number of racial incidents in *La Grande* or *Crawford*, for example. In *La Grande*, the plaintiff's manager used a racial epithet on four occasions; and coworkers repeatedly made derogatory comments about black men (among other incidents). 370 F. App'x 206, 210–11. In *Crawford*, the plaintiff provided an extensive list of incidents—many of which included coworkers' use of the word "[n-word]." 2015 WL 8023680, at *8. In the instant case, Plaintiff's allegations do not go[ ] beyond a few uses of the 'n word' by a single co-worker, which, although offensive, fail to state a claim of hostile work environment.

Id. at *9. Similar to *Blue*, and consistent with established case law in this jurisdiction, the allegations in the Amended Complaint are woefully insufficient to support a hostile work environment under any of the statutes alleged. *See Gauba v. Travelers Rental Co*., 2015 U.S. Dist. LEXIS 26899 (D. Conn. Mar. 5, 2015)(dismissing hostile work environment claim where plaintiff only identified one occurrence of a co-worker's use of a racial slur in the relevant time period); *Stembridge v. New York*, 88 F. Supp. 2d 276, 286 (S.D.N.Y. 2000) (holding seven instances over three years, including indirect racial remarks, direct racial slurs, and hanging of black doll near plaintiff's workstation, were insufficient as a matter of law to support a race-based hostile work environment claim); *Heyward v. Jud. Dep't of Conn.,* 178 Conn. App. 757, 764 (2017)(holding racial comments made by her manager and a coworker, along with allegations that a manager denied plaintiff vacation time and medical leave and yelled at her in front of coworkers and members of the public, were insufficient as a matter of law to state a claim for race-based hostile work environment).[4]

[4] Further critically undermining any suggestion that the work environment was objectively hostile and abusive is the fact that 4 other African-American employees from Mississippi continued working on the Quinebaug Solar Center project *after* the September 1, 2021 incident. (Am. Compl. ¶¶ 35 and 62).

b. Plaintiffs Did Not Subjectively View the Work Environment To Be Hostile or Abusive

Based on the allegations in the Amended Complaint, Plaintiffs cannot credibly claim that they perceived their work environment to be "hostile or abusive." Ryan Luter was the only individually named plaintiff who heard the comments purportedly made by John on September 1, 2021. (Am. Compl. ¶44). Ryan Luter waited until the *end of his shift* to report John's conduct and then waited until the *end of the day* to advise the other individually named plaintiffs of what purportedly occurred. (Am. Compl. ¶¶ 43-44). If the comments were so egregious as to impact Ryan Luter's ability to continue working, he would have stopped working, immediately reported the comments and advised the other individually named plaintiffs of his concerns. Ryan Luter did not perceive his work environment to be sufficiently hostile or abusive based upon the allegations in the Amended Complaint.

As it relates to the other individually named Plaintiffs, they did not witness John's alleged conduct on September 1, 2021. After being advised of the conduct by Ryan Luter on September 1, 2021, they did not complain to any member of Terrasmart management and returned to work on the next available work day (Friday, September 3, 2021). (Am. Compl. ¶55). The conduct alleged in the Amended Complaint indicates that the other individually named Plaintiffs also did not perceive their work environment to be hostile or abusive.

Accordingly, Plaintiffs cannot demonstrate that the work environment was either objectively or subjectively hostile based on race.

3. Plaintiffs Cannot Impute Co-Worker John's Alleged Conduct to Terrasmart

Assuming, *arguendo*, Plaintiffs were able to demonstrate a hostile work environment existed (which they cannot), Plaintiffs still need to establish a basis for imputing liability for John's

conduct to Terrasmart. John was a co-worker, not a supervisor, to Plaintiffs. John is not identified as a supervisor in the Amended Complaint, whereas Mr. Taylor and Mr. Wilson are specifically identified as supervisors. (Am. Compl. ¶38). "An employer's liability for hostile work environment claims depends on whether the underlying harassment is perpetrated by the plaintiff's supervisor or his non-supervisory co-workers. If the harassment is perpetrated by the plaintiff's non-supervisory coworkers, an employer's vicarious liability depends on the plaintiff showing that the employer knew (or reasonably should have known) about the harassment but failed to take appropriate remedial action." *Wiercinski v. Mangia 57, Inc*., 787 F.3d 106, 113 (2d Cir. 2015) citing *Petrosino v. Bell Atl.,* 385 F.3d 210, 225 (2d Cir.2004).

Upon learning about the incident with John from Ryan Luter and Ralph Luter:

- Supervisor "Wilson said that John would probably get terminated" (Am. Compl. ¶43)
- John left the worksite (Am. Compl. ¶59)
- Terrasmart Human Resources was advised of the situation (Am. Compl. ¶60)
- The state police were advised of the situation (Am. Compl. ¶60)
- Plaintiffs spoke to the state police (Am. Compl. ¶61)
- Plaintiffs provided statements to Terrasmart (Am. Compl. ¶61)

The allegations in the Amended Complaint demonstrate that Terrasmart took appropriate, remedial action in response to learning about John's alleged conduct. There is simply no factual claim in the Amended Complaint to demonstrate otherwise. Plaintiffs do not allege that John's conduct continued after Ryan Luter and Ralph Luter complained. Indeed, Plaintiffs allege that statements were taken, Human Resources and the state police were contacted and *John left the worksite*. (Am. Compl. ¶¶59-61). Based upon the four-corners of the Amended Complaint, there is simply no basis to impute liability for John's alleged conduct to Terrasmart.

Plaintiffs cannot demonstrate that the conduct alleged was sufficiently severe or pervasive to meet the established legal standard in this jurisdiction of a hostile work environment under any of the statutes alleged. Even if they could, they cannot establish that any liability for John's conduct should be imputed to Terrasmart because it promptly addressed the issues raised by, among other things, conducting an investigation and removing the alleged harasser from the workplace. Therefore, Counts One through Three of the Amended Complaint are legally deficient and must be dismissed.

B. Plaintiffs' Claim for Damages Resulting from Intimidation Based Upon Bigotry or Bias pursuant to Conn. Gen. Stat. § 52-571c (Count Four) Must be Dismissed.

Plaintiffs allege Terrasmart violated Conn. Gen. Stat. § 53a-181k(3)[5] and Conn. Gen. Stat. § 52-571c due to co-worker John's conduct of allegedly threatening Plaintiffs and using a racial epithet. Conn. Gen. Stat. §53a-181k(a) provides:

> A person is guilty of intimidation based on bigotry or bias in the second degree when such a person maliciously, and with specific intent to intimidate or harass another person or group of persons motivated in whole or in substantial part by the actual or perceived race, religion, ethnicity, disability, sex, sexual orientation or gender identity or expression of such other person or group of persons, does any of the following: (1) Causes physical contact with such other person or group of persons, (2) damages, destroys or defaces any real or personal property of such other person or group of persons, or (3) threatens, by word or act, to do an act described in subdivision (1) or (2) of this subsection, if there is reasonable cause to believe that an act described in subdivision (1) or (2) of this subsection will occur.

Conn. Gen. Stat. §52-571c, which is captioned "action for damages resulting from intimidation based on bigotry or bias," provides that a victim "may bring a civil action *against the person* who committed such act to recover damages for such injury." *Gawlik v. Malloy*, 2019 Conn. Super. LEXIS 1626, at *38-39 (New Haven Sup. Ct. May 31, 2019) (emphasis added). These sections

[5] The cited statute, Conn. Gen. Stat. § 53a-181k(3), does not exist. Viewing the allegations in the light most favorable to Plaintiff, Terrasmart presumes Plaintiffs meant to allege violation of Conn. Gen. Stat. §53a-181k*(a)*(3).

do not support a claim against Terrasmart based upon the allegations in the Amended Complaint. As noted in the statute, Plaintiffs must allege that *Terrasmart's* conduct was malicious or had the specific intent necessary to be in violation of Conn. Gen. Stat. § 53a-181k. The Amended Complaint is void of any factual allegations that could reasonably be interpreted to suggest *Terrasmart* acted maliciously or with the specific intent to cause Plaintiffs harm pursuant to Conn. Gen. Stat. § 53a-181k.

Plaintiffs also failed to demonstrate that the conduct of John should be imputed to Terrasmart. John's alleged conduct occurred on a single day, in a single incident on September 1, 2021. Plaintiffs failed to allege that Terrasmart knew, or should have known, of John's propensity or likelihood to engage in such conduct. Further, the incident was immediately investigated by Terrasmart, and that investigation resulted in John leaving the worksite and no further inappropriate conduct occurring. As detailed in the Amended Complaint, Terrasmart elevated the investigation to Human Resources and contacted the local authorities. (Am. Compl. ¶ 60). Plaintiffs have not alleged any specific facts to support imputing liability for John's alleged conduct to Terrasmart.

Accordingly, Count Four, seeking to recover damages resulting from alleged intimidation based upon bigotry or bias pursuant to Conn. Gen. Stat. § 52-571c should be dismissed against Terrasmart.

C. Plaintiffs' Claim for Deprivation of Equal Rights and Privileges Pursuant to Conn. Gen. Stat. § 52-571a (Count Five) Must Be Dismissed.

Conn. Gen. Stat. § 52-571a provides for any person aggrieved by a violation of Conn. Gen. Stat. § 53-37b to apply for "injunctive relief, recovery of damages or such other relief as the court deems just and equitable." Conn. Gen. Stat. § 53-37b, entitled "Deprivation of a Person's Equal Rights and Privileges By Force or Threat," provides:

> Any person who, acting alone or in conspiracy with another, for the purpose of depriving any person or class of persons of the equal protection of the laws of this state or the United States, or of equal privileges and immunities under the laws of this state or the United States, engages in the use of force or threat, as provided in section 53a-62, shall be guilty of a class A misdemeanor, except that if bodily injury results such person shall be guilty of a class C felony or if death results such person shall be guilty of a class B felony.

Conn. Gen. Stat. § 53a-62 further provides, in relevant part:

> a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person, or (B) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror…

When the three above-referenced statutes are read together, "it is clear that §52-571a authorizes a civil action when a plaintiff alleges that, by the use or threat of force, the defendants conspired to deprive the plaintiff of the equal protection of the laws/privileges and immunities of this state or the United States." *Rose v. Waterbury,* Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X10-UWY-CV-136021577-S (Aug. 11, 2021, Bellis, J.).

Plaintiffs do not claim that Terrasmart engaged in threatening conduct in violation of Conn. Gen. Stat. § 52-571a. Instead, Plaintiffs claim that "John, acting alone or in conspiracy with other Terrasmart employees, threatened the use of force as provided for in section 53a-62." (Am. Compl. ¶86). In Connecticut, "[c] onspiracy…is a specific intent crime, with the intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense which is the object of the conspiracy." *Burton v. Mason*, 2022 Conn. Super. LEXIS 92, at *40 (Waterbury Sup. Ct., Jan 21, 2022)(internal citations and quotations omitted). There are simply no allegations in the Amended Complaint that Terrasmart intended to conspire with John to threaten Plaintiffs. The fact that Terrasmart immediately conducted an investigation and John left the worksite further undermines any claims of a "conspiracy" between John and Terrasmart. Plaintiffs' self-serving

conclusory allegations reciting the elements of the claim (Am. Compl. ¶86) are woefully insufficient to survive the instant motion to dismiss.

Accordingly, Count Five should be dismissed.

D. Count Six Must Be Dismissed Because Plaintiffs Cannot Establish A Legally Cognizable Negligent Supervision Claim.

Plaintiffs claim Terrasmart "knew or reasonably should have known, that John was prone to violent and racist acts." (Am. Compl. ¶91). However, Plaintiffs' self-serving conclusory statements amount to nothing more than "threadbare recitals" of the elements of a negligent supervision claim and are legally insufficient in the face of the instant motion to dismiss. *Am. Italian Women for Greater New Haven,* 2022 U.S. Dist. LEXIS 99305 at *4.

In order to prove a claim of negligent supervision under Connecticut law, Plaintiffs must plead and prove that they suffered an injury due to Terrasmart's failure to supervise an employee whom Terrasmart had a duty to supervise. *Abate v. Circuit–Wise, Inc*., 130 F.Supp.2d 341, 344 (D.Conn.2001). Critically, "[a] defendant does not owe a duty of care to protect a plaintiff from another employee's tortious acts unless the defendant *knew or reasonably should have known* of the employee's propensity to engage in that type of tortious conduct." *Burford v. McDonald's Corp.*, 321 F. Supp. 2d 358, 366–67 (D. Conn. 2004)(emphasis added). In *Burford,* the defendant learned of alleged misconduct by another employee *after* the plaintiff reported the conduct to their manager. *Burford*, 321 F. Supp. 2d. at 366. Significantly, the plaintiff had not alleged even a single harassing incident that occurred after the conduct was reported. *Id*. As such, the Court found that plaintiff failed to plead and prove that she suffered an injury due to the defendant's failure to supervise an employee whom the defendant had a duty to supervise. *Id.* at 367, *see also Abate,* 130 F.Supp.2d at 344.

Here, Plaintiffs cannot demonstrate that Terrasmart "knew or reasonably should have known" of John's purported propensity to use racial epithets or make verbal threats. There are simply no factual allegations in the Amended Complaint to support such a theory. Plaintiffs claim Ryan Luter reported John's offensive conduct (which allegedly occurred on September 1, 2021) at the end of Mr. Luter's September 1st shift. (Am. Compl. ¶43). Similar to *Buford*, Plaintiffs failed to allege a single harassing incident by John *after* September 1, 2021. Even affording Plaintiffs the benefit of all the most favorable inferences, no allegations are pled in the Amended Complaint to support their meritless negligent supervision claim. *See Burford*, 321 F.Supp.2d at 367 (dismissing negligent supervision claim where plaintiff failed to specify a single harassing incident that occurred *after* the date she complained of allegedly unlawful conduct); *Hart v. World Wrestling Entm't, Inc*., 2012 U.S. Dist. LEXIS 43184, *25-27 (D. Conn. Mar. 28, 2012)(granting motion to dismiss negligent supervision claim where plaintiff failed to demonstrate defendants "knew or reasonably should have known about any tortious conduct"); *Miller v. Ethan Allen Global, Inc*., 2011 U.S. Dist. LEXIS 94662, *31-32 (D. Conn. Aug. 22, 2011)(granting motion to dismiss negligent supervision claim where there were "no facts from which to infer that, at the time the tortious conduct was committed, [defendant] should have been or was aware of [plaintiff's coworker's] propensity to act in such a manner").

Facts showing the "element of foreseeability must be alleged in order to state a cognizable claim" of negligent supervision. *Miller*, 355 F.Supp. 2d, at 648. The Amended Complaint lacks *any* factual allegations demonstrating the conduct Plaintiffs allege occurred on September 1, 2021 was foreseeable by Terrasmart. Accordingly, Count Six should be dismissed.

E. Plaintiffs' Negligent Retention and Negligent Hiring Claims (Count Seven) Are Legally Insufficient.

Plaintiffs allege Terrasmart "knew, or reasonably should have known about John's propensity for violence and racist behavior prior to the incident that occurred on September 1, 2021." (Am. Compl. ¶96). Similar to their meritless negligent supervision claim, Plaintiffs' self-serving conclusory statements amount to nothing more than "threadbare recitals" of the elements of negligent retention and negligent hiring claims and are legally insufficient in the face of the instant motion to dismiss. *Am. Italian Women for Greater New Haven,* 2022 U.S. Dist. LEXIS 99305 at *4. Although pled as one "count," negligent retention and negligent hiring are two separate causes of action that are analyzed separately and distinctly by the courts.

1. Plaintiffs' Negligent Retention Claim Should Be Dismissed.

"A negligent retention claim requires a plaintiff to prove that during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness and the employer fails to take further action." *Chylinski v. Bank of Am., N.A.* 630 F. Supp. 2d 218, 221 (D. Conn. 2009) citing *Doe v. Abrahante*, 1998 Conn. Super. LEXIS 1177, at *1 (Conn. Super. Ct. Apr. 28, 1998)(internal quotations omitted). As detailed above, Plaintiffs cannot demonstrate that Terrasmart knew, or should have known, that John had a propensity for the conduct alleged.

Assuming the allegations in the Amended Complaint as true for purposes of this motion, Terrasmart took appropriate action upon learning of John's alleged conduct. Specifically, Ryan Luter reported John's purported conduct at the end of his shift on Wednesday, September 1, 2021. (Am. Compl. ¶43). A Terrasmart supervisor advised "John would probably get terminated." (*Id.*). On Thursday, September 2nd, Plaintiffs did not work due to heavy rain. (Am. Compl. ¶54). Upon reporting to work on Friday, September 3rd, Ralph Luter complained about John's conduct and

"John suddenly left." (Am. Compl. ¶¶ 55-56 & 59). In sum, Ryan Luter and Ralph Luter complained about John and John left the worksite. The police were called and Terrasmart took written statements from all named Plaintiffs. (Am. Compl. ¶61). Based upon the allegations in the Amended Complaint, Plaintiffs cannot credibly claim that Terrasmart failed to take action upon learning of John's alleged conduct of September 1, 2021.

Accordingly, Plaintiffs have not pled sufficient factual allegations to maintain their negligent retention claim and the claim should be dismissed.

2. Plaintiffs' Negligent Hiring Claim Should Also Be Dismissed.

A claim for negligent hiring exists "in any situation where a third party is injured by an employer's own negligence in failing to select an employee fit or competent to perform the services of employment." *Maisano v. Congregation Or Shalom,* 2009 WL 415696, at *6 (Conn. Super. Ct. Jan. 26, 2009). Plaintiffs cannot simply allege that Terrasmart acted negligently, "[r]ather, [they] must allege facts, which if proven, would support [their] claim." *Miller v. Ethan Allen Global, Inc*., 2011 U.S. Dist. LEXIS 94662, *29-30 (D. Conn. Aug. 22, 2011).

Here, Plaintiffs have not alleged *any* facts related to the hiring of John by Terrasmart. The individual(s) who selected John for hire are not identified in the Amended Complaint and there is no factual allegation indicating how Terrasmart was negligent in making the decision to hire John. The Amended Complaint does not contain any factual allegations demonstrating Terrasmart "knew or reasonably should have known" John was not "fit or competent to perform the services of employment" at any time *prior to* the alleged September 1, 2021 incident. Plaintiffs do not (and cannot) claim Terrasmart had any knowledge at the time of hiring which would suggest John could (or would) engage in the conduct alleged. In *Fletcher v. City of New Haven Dep't of Police Serv.*, a negligent hiring claim was dismissed under factually similar circumstances:

> the complaint contains no allegations regarding the identity of the person who was negligently hired or the *identity of the person who made the hiring decision*. No facts are alleged to show that the *employee whose hiring is at issue was unfit or incompetent for his or her position*. No facts are alleged to show that *the person who made the hiring decision was negligent*. No facts are alleged to show when or in what manner the unidentified employee whose hiring is at issue caused harm to the plaintiff. And *no facts are alleged to show a causal link between the harm suffered by the plaintiff and a hiring decision by any defendant*.

2011 U.S. Dist. LEXIS 34711, *7-8 (D. Conn. Mar. 31, 2011)(emphasis added). Accordingly, Plaintiff's negligent hiring claim must similarly be dismissed. *See Miller*, 2011 U.S. Dist. LEXIS 94662 at *30 (dismissing negligent hiring claim where plaintiff failed to "identify why each individual was unfit for their respective positions" and "failed to allege any facts describing how the individual doing the hiring was negligent"); *Favale v. Roman Catholic Diocese of Bridgeport*, 233 F.R.D. 243, 246 (D. Conn. 2005)(noting "defendants cannot be held liable for their alleged negligent hiring, training, supervision or retention of an employee accused of wrongful conduct unless they had notice of said employee's propensity for the type of behavior causing the plaintiff's harm.").

"The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised ... It is well settled that defendants cannot be held liable for their alleged negligent hiring, training, supervision or retention of an employee accused of wrongful conduct unless they had notice of said employee's propensity for the type of behavior causing the plaintiff's harm." *Elbert v. Connecticut Yankee Council, Inc.,* Docket No. CV-0100456879-S (New Haven Sup. Ct., July 16, 2004)(citations and internal quotations omitted). As Plaintiffs cannot demonstrate that any of John's alleged conduct on September 1, 2021 was foreseeable, Count Seven should be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' claims against Terrasmart are meritless and Counts One through Seven of the Amended Complaint should be dismissed in their entirety, with prejudice.

Dated at New Haven, Connecticut on this 27th day of June, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on June 27, 2022 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Kyle Roseman
Kyle Roseman(ct31254)