IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:16-cv-00654-BO

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| U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>BOJANGLES' RESTAURANTS, INC.,<br><br>Defendant. | ) | **MEMORANDUM IN SUPPORT OF PLAINTIFF EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** |

Pursuant to Federal Rule of Civil Procedure 56(c), Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") respectfully moves this Court for partial summary judgment against Defendant Bojangles' Restaurants, Inc. ("Defendant") as to Defendant's third, fourth, sixth, seventh, eighth, ninth, tenth, and twelfth affirmative defenses. In support of its Motion for Partial Summary Judgment, EEOC states as follows:

## NATURE OF THE CASE

On July 6, 2016, EEOC filed this action under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and Title I of the Civil Rights Act of 1991, to correct unlawful employment practices on the bases of sex and retaliation, and to provide appropriate relief to Jonathan Wolfe ("Wolfe"), who was adversely affected by such practices. Specifically, EEOC alleges in its Complaint that Defendant discriminated against Wolfe by subjecting Wolfe to a hostile work environment because of her gender identity (*i.e.*, sex) and/or because of her failure to conform to Defendant's sex-based preferences, expectations, or stereotypes. EEOC further alleges that Defendant discriminated against Wolfe in violation of Title VII when it involuntarily transferred then terminated Wolfe in retaliation for complaining about the harassment. [ECF 1].

## STATEMENT OF RELEVANT FACTS

Defendant filed its Answer on September 5, 2016. [ECF 6]. Defendant's Answer articulated numerous defenses, including its third, fourth, sixth, seventh, eighth, ninth, tenth, and twelfth affirmative defenses (collectively "challenged defenses"), which are the subject of EEOC's motion. *Id.* The challenged defenses read as follows:

> **THIRD DEFENSE**: To the extent that the EEOC seeks to assert claims under Title VII based upon alleged acts of discrimination or harassment occurring more than 180 days prior to the filing of a relevant, valid and timely charge of discrimination with the EEOC, such claims are barred by the applicable statute of limitations.
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> **FOURTH DEFENSE**: The EEOC's claims are barred to the extent that they were not referred to in or developed in the course of the EEOC's reasonable investigation of any relevant, valid and timely filed charge of discrimination on which the EEOC bases this action and to the extent Wolfe has otherwise failed to exhaust her administrative remedies as required by law.
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> **SIXTH DEFENSE**: The EEOC's claims are barred because the conduct alleged (which is expressly denied), even if true, was consensual and not unwelcome to Wolfe.
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> **SEVENTH DEFENSE**: The EEOC's claims are barred to the extent Wolfe failed to make reasonable efforts to mitigate her damages, and the EEOC's claims for lost earnings on behalf of Wolfe must be reduced by compensation she has received or should have received.
>
> **EIGHTH DEFENSE**: To the extent that Wolfe has suffered damages from the conduct alleged in the EEOC's complaint, which Bojangles' denies, Bojangles' and/or its former or current agents were not the legal or proximate cause of such damages.
>
> **NINTH DEFENSE**: If Wolfe has been damaged as alleged, which is denied, her damage has been caused by her own intentional or negligent actions or omissions.
>
> **TENTH DEFENSE**: The EEOC's claims are barred by the doctrines of laches, estoppel and waiver.
>
> **TWELFTH DEFENSE**: Subject to a reasonable opportunity for investigation and discovery, the EEOC's claims are barred or limited by the doctrine of after-acquired evidence as it applies to Wolfe.

[ECF 6].

On June 19, 2017, EEOC deposed Defendant pursuant to Federal Rule of Civil Procedure 30(b)(6). During the 30(b)(6) deposition, EEOC inquired into Defendant's factual bases for the challenged defenses; Defendant, however, repeatedly deferred to legal counsel and, with one exception, was unable or unwilling to testify as to any factual basis. [*See* App'x 5, 30(b)(6) Dep. 154:20-158:8]. The one exception pertained to the twelfth defense, wherein Defendant testified as to a single piece of after-acquired evidence, Wolfe's omission of a previous employer on her application for employment. [App'x 5, 30(b)(6) Dep. 162:7-163:3].

On October 25, 2016, EEOC served written discovery, including interrogatories and requests for production, on Defendant. EEOC's discovery sought, *inter alia*, facts and documents specifically supporting Defendant's sixth, ninth, and tenth defenses.[1] [App'x 15, Interrogs. 17, 18, 19; App'x 9, Reqs. 19, 20, 21].

In response to an interrogatory asking Defendant to identify all facts supporting its sixth defense, Defendant stated,

> **RESPONSE:** To the extent that Wolfe contends that she was subjected to any inappropriate sexual conduct, she invited and participated in the conduct. For example, during the only incident about which Wolfe complained while employed by Bojangles', Wolfe admitted to Sharon Irwin that she began and willingly participated in a conversation with two male colleagues about her sexual preferences.[2]

[App'x 15, Interrog. 17]. In further support of its sixth defense, Defendant produced documents marked as BOJANGLES-00000001-2, 212-216. [App'x 9, Req. 19; App'x 10]. BOJANGLES-

[1] EEOC did not serve written discovery requests that specifically addressed facts supporting Defendant's third, fourth, seventh, eighth and twelfth defenses, electing instead to conduct discovery on those defenses through depositions.

[2] As discussed *infra* at part II(C), EEOC and the factual record dispute the material facts of Defendant's contention.

00000216, a handwritten statement of coworker Christy McDonald, is a duplicate of BOJANGLES-00000001. [App'x 16]. Likewise, BOJANGLES-00000215, a typed, signed statement of Unit Director Ella Riggins, is a duplicate of BOJANGLES-00000002. [App'x 16]. BOJANGLES-00000212-214 comprises a complete set of handwritten notes created by Defendant's then-Director of Human Resources Jeannine Eubanks. [App'x 17, Eubanks 113:9-114:2; App'x 5, 30(b)(6) 20:10-23, 186:24-187:1].

In response to an interrogatory asking Defendant to identify all facts supporting its ninth defense, Defendant stated,

> **RESPONSE:** Bojangles' elected to terminate Wolfe's employments [sic] based upon Wolfe's repeatedly insubordinate and disrespectful conduct. In addition to violating Irwin's instructions not to return to the Owen Drive location and behaving unprofessionally at the Owen Drive location on February 27, 2013, Wolfe was insubordinate and disrespectful while speaking with Irwin during her investigation of the February 27, 2013 incident. Accordingly, Wolfe's termination and alleged damage was caused by her own volitional acts. Bojangles' reserves the right to supplement this response when and if additional relevant facts are discovered.[3]

[App'x 15, Interrog. 18]. In further support of its ninth defense, Defendant produced documents marked as BOJANGLES-00000217-220, in addition to the documents produced in support of its sixth defense. [App'x 9, Req. 20; App'x 10; App'x 16]. BOJANGLES-00000217-218 is a report from ServiceCheck, a third-party service Defendant uses for employee and customer complaints, to Bojangles' Area Director Sharon Irwin (formerly Sharon McCollough). This report was generated on February 27, 2013, prior to Wolfe's termination, as a result of Wolfe filing a complaint against Unit Director Riggins. [App'x 16]. BOJANGLES-00000219-220 is an email exchange between Area Director Irwin and Senior Director of Human Resources Eubanks.

[3] EEOC and the factual record dispute the material facts of Defendant's contention. However, because Defendant's defense fails as a matter of law, an analysis of the factual record is not necessary for purposes of Plaintiff's Motion for Partial Summary Judgment.

The exchange, which occurred the day after Wolfe was terminated, purports to codify Irwin's reasons for terminating Wolfe. [App'x 16].

In response to an interrogatory asking Defendant to identify all facts supporting its tenth defense, Defendant stated,

> **RESPONSE:** Bojangles' alleges that the lawsuit is defective to the extent that it seeks to assert claims under Title VII based upon alleged acts of discrimination or harassment occurring more than 180 days prior to the filing of a relevant, valid and timely charge of discrimination with the EEOC. Discovery is ongoing, and Bojangles' has not yet determined the specific acts of discrimination or harassment occurring more than 180 days prior to the filing of Wolfe's charge of discrimination upon which the EEOC's lawsuit is based. Bojangles' reserves the right to supplement this response when and if such acts are discovered.

[App'x 15, Interrog. 18]. Defendant did not produce any documents to support its tenth defense.[4] [App'x 9, Req. 21; App'x 10].

Defendant has not supplemented its responses to the relevant interrogatories or requests for production.

## LEGAL ARGUMENT

### I. Summary Judgment Standard and Its Applicability to EEOC's Challenges to Defendant's Affirmative Defenses

The Fourth Circuit's standard for summary judgment is well established:

> A district court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. A fact is material if it might affect the outcome of the suit under the governing law.
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> In considering a motion for summary judgment, the district court must view the evidence in the light most favorable to the nonmoving party. Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits. The court therefore cannot weigh the evidence or make credibility determinations.

[4] Notably, Defendant never produced any documents in support of its tenth defense.

*Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568-69 (4th Cir. 2015)(internal citations omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)(summary judgment may only be granted if the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party); *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 174 (4th Cir. 2009)("Summary judgment should only be rendered if 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" )(quoting Fed. R. Civ. P. 56(c)).

"The moving party must demonstrate the lack of a genuine issue of fact for trial and if that burden is met, the party opposing the motion must 'go beyond the pleadings' and come forward with evidence of a genuine factual dispute." *Thompson v. Blessed Home, Inc.*, 22 F. Supp. 3d 542, 544 (E.D.N.C. 2014)(citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "Conclusory allegations are insufficient to defeat a motion for summary judgment." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.")(emphasis in original)).

A summary judgment motion filed by a plaintiff challenging a defendant's affirmative defenses is appropriate, and applies the same analysis as a traditional summary judgment motion. *See, e.g., Id.*; *EEOC v. Triangle Catering, LLC*, No. 5:15-CV-00016-FL, 2017 WL 818261, 2017 U.S. Dist. LEXIS 28476 (E.D.N.C. Mar. 1, 2017); *North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-CV-633-BO, 2014 WL 6609763, 2014 U.S. Dist. LEXIS 163541 (E.D.N.C. 2014); *see also Boston Sci. Corp. v. Cordis Corp.*, 422 F. Supp. 2d 1102, 1106–07 (N.D. Cal.

2006)("Partial summary judgment on an affirmative defense is governed by the same standard which applies to summary judgment of a claim.").

## II. Analysis of Defendant's Affirmative Defenses

### a. Defendant's third affirmative defense should be dismissed as a matter of law.

As its third defense, Defendant asserts that any "acts of discrimination or harassment occurring more than 180 days prior to the filing of a relevant, valid and timely charge of discrimination with the EEOC . . . are barred by the applicable statute of limitations." Defendant's third defense fails on the facts with regard to both EEOC's retaliation and harassment/hostile work environment claims, and fundamentally misunderstands Supreme Court precedent with regard to EEOC's harassment/hostile work environment claim. *See generally Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-15, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).

Wolfe began her employment with Defendant as a Biscuit Maker on or around May 9, 2012, at Defendant's Owen Drive restaurant in Fayetteville, North Carolina. [ECF 1 ¶13; ECF 6 ¶13]. EEOC's Complaint alleges that Defendant subjected Wolfe to harassment/a hostile work environment at Defendant's Owen Drive Restaurant. [ECF 1]. The harassment, which began within the first few months of Wolfe's employment, continued until Defendant transferred Wolfe to a Raeford Road location on or about February 21, 2013. [ECF 1 ¶¶ 17-38, 45]. EEOC alleges Defendant transferred Wolfe in retaliation for complaining about the harassment. [ECF 1 ¶¶45-48]. Defendant subsequently terminated Wolfe on February 27, 2013, EEOC alleges also in retaliation for her complaints. [*See* ECF 1 ¶48; ECF 6 ¶48].

In North Carolina, an individual must file a charge of discrimination (hereafter sometimes "charge") with the EEOC within 180 days after the "alleged unlawful employment

practice" occurred. 42 U.S.C. § 2000e-5(a)(1). An "alleged unlawful employment practice" can be a discrete act such as retaliatory transfer and subsequent termination, or can be of a continuous nature such as the on-going sex-based harassment/hostile work environment experienced by Wolfe. *Nat'l R.R. Passenger Corp.*, 536 U.S. at 110-15. The Supreme Court has addressed the statutory charge filing period for both discrete and continuous unlawful employment practices:

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.' [A plaintiff] can only file a charge to cover discrete acts that 'occurred' within the appropriate time period. . . . .
>
> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years . . . .
>
> . . . . A hostile work environment claim is comprised of a series of separate acts that collectively constitute one 'unlawful employment practice.' The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. **It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period.** Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

*Id.* at 114-17 (internal citations omitted)(emphasis supplied).

Both Wolfe's transfer on February 21, 2013 and termination on February 27, 2013, clearly fall within 180 days of May 2, 2013, the date EEOC received Wolfe's charge. To be precise, Defendant transferred Wolfe 70 days prior to Wolfe's filing of her EEOC charge, and terminated her 64 days prior to the filing of her charge. Likewise, because several of the acts that collectively constitute EEOC's harassment/hostile work environment claim occurred within

180 days of May 2, 2017,[5] all components of the harassment/hostile work environment claim (even those falling beyond the 180-day limitation period) are properly before the court.

There is nothing in the record or in law upon which Defendant can rely to establish EEOC's claims are barred by the applicable statute of limitations. Accordingly, EEOC respectfully requests that this Court dismiss with prejudice Defendant's third affirmative defense; hold that EEOC's retaliatory transfer and discharge claims are based upon timely-filed claims; and hold that EEOC's sex harassment/hostile work environment claim is based upon a timely-filed claim and properly includes related conducted that occurred inside and outside the 180 day statutory limitations period.

b. Defendant failed to establish its fourth affirmative defense and it should be dismissed.

Defendant's fourth defense consists of two related defenses. First, Defendant raises the defense that "EEOC's claims are barred to the extent that they were not referred to in or developed in the course of the EEOC's reasonable investigation of any relevant, valid and timely filed charge of discrimination on which the EEOC bases this action." Second, Defendant raises the defense that "Wolfe has [] failed to exhaust her administrative remedies as required by law." Both aspects of Defendant's fourth affirmative defense fail.

It is well settled that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Gen. Tel. Co. v. EEOC,* 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)(citing *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 366 (4th Cir. 1976)(holding that suits brought by the Commission are not

[5] For example, on February 21, 2013 Wolfe's Unit Director told Wolfe she could not wear braids because Wolfe is "a male"; in or around January 2013, the Unit Director instructed Wolfe not to use her normal voice and to change the way Wolfe walked and behaved so that Wolfe would "look like a male"; and in or around December 2012, an Assistant Unit Director began making frequent statements such as "pray to God or go to hell," "God made woman for man," and "Boy, you need to pray" to Wolfe. [ECF 1 ¶¶ 24, 29, 26].

limited to the initial charge and can be based on evidence of other discrimination developed in the course of a reasonable investigation of that charge)). Wolfe's charge on its face alleged harassment based on sex (gender identity) and retaliatory transfer and discharge. [App'x 4]. Defendant received notice of Wolfe's charge in or around "early May 2013". [App'x 5, 30(b)(6) Dep. 10:3-8, 17:25-20:1]. EEOC investigated the allegations contained in Wolfe's charge. At the conclusion of the investigation EEOC issued a Letter of Determination finding that Defendant subjected Wolfe to harassment based on sex, and transferred and discharged her in retaliation for complaining about the harassment. [App'x 11]. EEOC engaged in efforts to conciliate the charge, satisfying its duty with respect to conciliation. [App'x 12; App'x 5, 30(b)(6) Dep. 114:3-115:11; App'x 13]. Following the failure of conciliation efforts, EEOC filed its lawsuit alleging harassment based on sex (gender identity) and retaliatory transfer and discharge. [ECF 1]. EEOC's allegations in this lawsuit are clearly derived and developed from Wolfe's charge and EEOC's investigation of the same.

With respect to Defendant's assertion that Wolfe failed to exhaust her administrative remedies, Wolfe is not a party to this litigation, and therefore Wolfe's standing is of no consequence. EEOC may sue and seek relief for Wolfe regardless of whether Wolfe exhausted her administrative remedies. *See, e.g.*, *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 373-74 (4th Cir. 1976)("[T]he standing of the EEOC to sue under Title VII cannot be controlled or determined by the standing of the charging party to sue, limited as he is in rights to the vindication of his own individual rights."); *EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533, 541-42 (9th Cir. 1976)("EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights. In this case, enforcement by the EEOC of the objectives of Title VII should not be frustrated because a private charging party may not have had 'standing' to make a particular

claim."); *EEOC v. Stone Pony Pizza, Inc.*, 172 F. Supp. 3d 941, 948-49 (N.D. Miss. 2016)(discussing EEOC's broad authority to bring suit on behalf of aggrieved individuals, including those who have not filed charges).[6] Nevertheless, the undisputed evidence as discussed above shows that Wolfe did in fact exhaust her administrative remedies.

There is nothing in the record or in law upon which Defendant can rely to support its defense. Based on the foregoing, EEOC respectfully requests that this Court dismiss with prejudice Defendant's fourth affirmative defense; hold that EEOC's harassment/hostile work environment claims are properly before the Court; and hold that EEOC has satisfied all of the Commission's prerequisites for filing suit.

c. Defendant failed to establish its sixth affirmative defense and it should be dismissed.

Defendant asserts in its sixth defense that "[t]he EEOC's claims are barred because the conduct alleged (which is expressly denied), even if true, was consensual and not unwelcome to Wolfe."[7] "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)(citing 29 C.F.R. § 1604.11(a)(1985)). The correct inquiry is whether the aggrieved party indicated that the alleged harassment was unwelcome, not whether the aggrieved person voluntarily participated in the harassment. *Id.* The record evidence in this case does not support a finding that the harassment Wolfe experienced was consensual or welcomed by Wolfe.

[6] Even had EEOC's standing been dependent on Wolfe's exhaustion of administrative remedies, EEOC would prevail. Wolfe filed a written and signed charge that met all of the *Holowecki* indicia within the statutory limitations period. *See generally*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008).

[7] As a preliminary matter, even if Defendant could satisfy a welcomeness defense, which EEOC argues it cannot, the defense applies only to EEOC's harassment/hostile work environment claim, and does not apply to EEOC's retaliation claim.

Defendant cannot demonstrate that Wolfe welcomed the harassment she experienced at Defendant's Owen Drive restaurant, nor can it show there is a genuine issue of material fact with respect to welcomeness. The overwhelming evidence shows that Wolfe did *not* welcome the conduct that forms the basis of EEOC's harassment/hostile work environment claim.

With discovery now closed, Defendant has directed EEOC to seven pages of documents that it contends prove its welcomeness defense: BOJANGLES-00000001-2 and BOJANGLES-00000212-216. [App'x 16]. However, the pages identified by Defendant do not prove the defense. BOJANGLES-00000216, which is a handwritten statement by coworker Christy McDonald, is a duplicate of BOJANGLES-00000001. Likewise, BOJANGLES-00000215, which is a typed and signed statement by Unit Director Ella Riggins, is a duplicate of BOJANGLES-00000002. Neither of the statements provide support that Wolfe participated in or otherwise welcomed any harassment. BOJANGLES-00000212-214 comprise a complete set of handwritten notes created by Defendant's then-Director of Human Resources Jeannine Eubanks. [App'x 17, Eubanks 113:9-114:2; App'x 5, 30(b)(6) 20:10-23, 186:24-187:1]. All of Eubanks' notes were created in February 2013. [App'x 5, 30(b)(6) 187:2-3]. According to the notes, on February 21, 2013, Eubanks had a conversation with Area Director Sharon Irwin[8] about Wolfe in which Irwin described Wolfe as a "good employee but 'bisexual'." Eubanks also spoke with Wolfe on February 21 (one week before Wolfe's termination), and during that conversation Wolfe "**allege[d] he [sic] talked to Sharon [Irwin] about derogatory remarks made to him [sic] because of sexual preference**." Eubanks' notes also detail a second conversation with

[8] Each Bojangles' restaurant is managed by a Unit Director. Unit Directors are supervised by Area Directors. Ella Riggins was the Unit Director over the Owen Drive restaurant, where Wolfe worked. Sharon Irwin was the Area Director over the area that included the Owen Drive restaurant. Both Riggins and Irwin supervised Wolfe, and could take tangible employment actions against Wolfe. [ECF 1 ¶15, 16; ECF 6 ¶15, 16; App'x 1, Riggins 9:12-14; App'x 2, Irwin 49:18-50:12].

Area Director Irwin, in which Irwin relayed an incident wherein Irwin allegedly counseled Wolfe and a male worker for talking about Wolfe's "sexuality," and stated that Wolfe "brings it [presumably, her sexuality] up all the time."

EEOC served an interrogatory asking Defendant to identify all facts supporting its sixth defense. The only purported example of welcomeness that Defendant provided was "during the only incident about which Wolfe complained while employed by Defendant, Wolfe admitted to Sharon Irwin that she began and willingly participated in a conversation with two male colleagues about her sexual preferences." [App'x 15, Interrog. 17].

According to testimony from Irwin, on one occasion Irwin counseled Wolfe and two (maybe one, Defendant's testimony on this notable point is inconsistent) coworkers about a conversation of a sexual nature.[9] [App'x 2, Irwin 11:13-12:13, 95:8- 97:3, 100:17-101:10]. An aggrieved individual's "use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.' The [trier of fact] must determine whether plaintiff welcomed the particular conduct in question **from the alleged harasser**." *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987)(quoting *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983))(emphasis supplied). Moreover, Irwin's testimony as recounted below dispels Defendant's contention that more than one such incident occurred:

> Q. In its position statement, Bojangles' represents to the EEOC that when it was investigating Ms. Wolfe's charge their investigation revealed that Ms. Wolfe frequently discussed matters of an inappropriate and highly sexual nature in the workplace. You told me about one conversation that Ms. Wolfe allegedly engaged in with the two other boys where she called you and she was hiding in the bathroom, correct?

[9] EEOC does not agree with either Bojangles' or Irwin's characterization of the incident. EEOC, instead, argues that Irwin retaliated against Wolfe by threatening her with termination after Wolfe became so terrorized by a coworker that Wolfe locked herself in the bathroom and had Irwin called to the store for rescue. *See* n.10.

A. Correct.

Q. What other inappropriate highly sexual conversations do you have direct knowledge of that Ms. Wolfe participated in?

A. I don't have any knowledge of any other conversations.

Q. So just the one example, correct?

A. Correct.

[App'x 2, Irwin 142:16-143:5]. This testimony is particularly important given Defendant's 30(b)(6) testimony that this "fact"—"that Ms. Wolfe frequently discussed matters of an inappropriate and highly sexual nature in the workplace"—came from Irwin.[10] [App'x 5, 30(b)(6) 69:9-70:11].

The entire universe of evidence Defendant has to support its sixth defense, that Wolfe welcomed or participated in the alleged harassment, is one potential incident with one (or maybe two) coworker(s). Defendant can point to nothing more in the record. The allegations in EEOC's Complaint, however, focus on harassment Wolfe experienced from Defendant's management, not coworkers. [*See* ECF ¶¶17-38]. Even if Wolfe had engaged in discussions of a sexual nature with a coworker, those discussions do not permit individuals outside the conversation to harass Wolfe. *See Swentek*, 830 F.2d at 557. Moreover, Defendant's evidence actually supports EEOC's argument that the alleged harassment was ***not*** welcome. Specifically, the evidence shows that Wolfe complained about the conduct at the Owen Drive restaurant prior to her termination. Eubanks' notes, which were created one week prior to Wolfe's termination, state

[10] Irwin, according to her own testimony, became aware of the conversation because Wolfe was upset and had locked herself in a bathroom in order to get away from her coworkers. [App'x 2, Irwin 11:13-12:13, 95:8- 97:3, 100:17-101:10]. Not only did Irwin not consider the coworkers' conversation to constitute harassment, she berated Wolfe for allegedly starting the conversation and threatened to terminate Wolfe.

"**allege[d] he [sic] talked to Sharon [Irwin] about derogatory remarks made to him [sic] because of sexual preference**."

Even taken in the light most favorable to Defendant, the evidence is insufficient for a reasonable jury to conclude that Wolfe welcomed the harassment. Based on the foregoing, EEOC respectfully requests that this Court dismiss with prejudice Defendant's sixth affirmative defense, and hold that the evidence is insufficient to conclude that Wolfe welcomed any harassment she experienced at Defendant's Owen Drive restaurant; or, in the alternative, to hold that Defendant's welcomeness defense, if applicable, could only be asserted at trial in response to EEOC's hostile work environment allegation.

d. Defendant failed to establish its seventh affirmative defense factually and as a matter of law.

Defendant's seventh defense states, in relevant part, that "EEOC's claims are barred to the extent Wolfe failed to make reasonable efforts to mitigate her damages." As a preliminary matter, this defense is legally unsound. The duty to mitigate can be a bar to a claimant's ***recovery***, not to a defendant's ***liability***. *See* 42 U.S.C. § 2000e-5(g)(1)("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . ."). Regardless, the factual record in this case establishes that Defendant cannot prevail on this defense and that EEOC is not barred from recovering for its claims.

A Title VII claimant has a duty to mitigate damages. *See* 42 U.S.C. § 2000e-5(g)(1). This duty "requires the claimant to use reasonable diligence in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982). "Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied." *Id.* at 231-32. "The burden is on

the defendant . . . to show that the claimant was not 'reasonably diligent in seeking and accepting new employment substantially equivalent to that from which he was discharged.'" *EEOC v. Consol Energy, Inc.*, No. 16-1230, 860 F.3d 131, 2017 U.S. App. LEXIS 10385, at *32-33 (4th Cir. June 12, 2017)(quoting *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1273 (4th Cir. 1985)). "The reasonableness of a worker's effort to secure substantially equivalent employment is determined by, *inter alia*, the economic climate in which the worker finds himself, the worker's skill and qualifications, and the worker's age and personal limitations." *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir.1988).

Defendant has not put forth a scintilla of evidence to suggest Wolfe abrogated her duty to mitigate. To the contrary, EEOC has offered ample evidence that Wolfe engaged in reasonable and diligent efforts to mitigate her damages following her termination by Defendant. Foremost, Wolfe obtained another position with a different fast food restaurant following her termination. [App'x 16 at BOJANGLES-00000301; App'x 3, Wolfe 33:13-14; App'x 19 at Interrog. 6]. Prior to obtaining this replacement position, Wolfe applied to at least seven additional fast food restaurants or grocery stores and was referred to numerous positions through the North Carolina Department of Commerce Unemployment Security Division. [App'x 19 at Interrog. 6; App'x 20]. Wolfe testified that she applied for "numerous" jobs between her termination by Defendant and when she obtained a replacement position. [App'x 3, Wolfe 138:3-139:12] According to Wolfe, there was no period of time in which she was not looking for work. [Id.]

The record is void of evidence upon which Defendant can rely to support its seventh affirmative defense. Based on the foregoing, EEOC respectfully requests that this Court dismiss with prejudice Defendant's seventh affirmative defense; hold that the evidence is insufficient for a reasonable jury to conclude that Wolfe failed to satisfy her duty to mitigate; or, in the

alternative, hold that Defendant's defense, if applicable, only serves as a bar to recovery, and does not preclude the liability of Defendant.

e. Defendant's eighth affirmative defense should be dismissed as a matter of law.

As its eighth defense, Defendant asserts, "[t]o the extent that Wolfe has suffered damages from the conduct alleged in the EEOC's complaint . . . Bojangles' and/or its former or current agents were not the legal or proximate cause of such damages." Defendant's eighth affirmative defense should be dismissed as a matter of law.

An employer is generally liable for the damages an employee suffers as a result of discriminatory and retaliatory conduct perpetrated by its managers. *See generally Faragher* v. *City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Here, Defendant is vicariously liable under Title VII for Area Director Irwin's and Unit Director Riggins' discriminatory and retaliatory acts because both individuals were empowered by Defendant to take tangible employment actions against Wolfe. *Id.* at 780; *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439, 186 L. Ed. 2d 565 (2013). Defendant, further, can be held vicariously liable, if the discriminatory motive of one of its agents (*e.g.*, Unit Director Riggins) can be aggregated with the act of another agent (*e.g.*, Area Director Irwin). *Staub v. Proctor Hosp.*, 562 U.S. 411, 418, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011)(USERRA case explaining "cat's paw" theory of liability);[11] *see also Vicino v. Maryland*, 982 F. Supp. 2d 601, 611 (D. Md. Nov. 8, 2013).

[11] Title VII and USERRA analysis and application are "very similar." *Staub*, 562 U.S. at 417; *see also Adefila v. Select Speciality Hosp.*, 28 F. Supp. 3d 517, 523 n.4 (M.D.N.C. June 24, 2014).

"Proximate cause requires only 'some direct relation between the injury asserted and the injurious conduct alleged,' and excludes only those 'link[s] that [are] too remote, purely contingent, or indirect.'" *Staub*, 562 U.S. at 419 (quoting *Hemi Group, LLC v. City of N.Y.*, 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010). "[I]f a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id.* at 422 (emphasis in original).[12] An employer will be at fault if its agent(s) "committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." *Id.* at 421.

Defendant has put forth no evidence to suggest that liability for Riggins' and Irwin's conduct can be severed from Defendant. To the contrary, Defendant admits that both individuals were capable of taking tangible employment actions against Wolfe. [ECF 1 ¶16; ECF 6 ¶16]. Defendant has no legal or factual basis to support its eight defense. Therefore, if EEOC can prove its allegations, Defendant will be strictly and vicariously liable for Wolfe's harassment, transfer, and discharge under Supreme Court precedent.

Based on the foregoing, EEOC respectfully requests that this dismiss with prejudice Defendant's eighth affirmative defense. EEOC further requests that this Court hold that, if EEOC succeeds on one or more of Defendant's claims, Defendant is liable for all damages which are fit and proper.

f. Defendant's ninth affirmative defense should be dismissed as a matter of law.

[12] An aggrieved individual seeking relief in a Title VII disparate treatment case must always show "intent." *See, e.g., Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988).

As its ninth affirmative defense, Defendant asserts what is essentially a contributory negligence claim. Generally, under tort law, a plaintiff cannot recover if her negligence contributed to her harm. *See Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 149 (4th Cir. 2001) ("Under the law of contributory negligence, such negligence need not cause all of the alleged injury; if contributory negligence causes any of a plaintiff's injury, recovery is barred."). While Title VII analysis borrows from tort law from time to time, it not an action sounding in tort and Title VII analysis has not borrowed the contributory negligence defense in any form. In fact, the idea of contributory negligence runs completely afoul of Title VII's proof structure.

As stated at footnote 12, an aggrieved individual seeking relief in a Title VII disparate treatment case must always show "intent." *See, e.g., Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988). If a Title VII disparate treatment plaintiff cannot show intentional discriminatory conduct, the plaintiff cannot prevail. This standard is baked into both Title VII's direct evidence and *McDonnell-Douglas* burden-shifting standards of proof. Contributory negligence, as its name suggests, is only applicable in cases where *negligence* must be proved. As one district court case opined:

> [T]he contributory negligence defenses in the present case do not relate to the primary issues of whether Defendant [] intentionally discriminated and retaliated against Mr. Breaux. It is a well-established general principle that contributory negligence is not a bar to recovery based on intentional acts. *See* Restatement (Second) of Torts § 481 (1965) ('The plaintiff's contributory negligence does not bar recovery against a defendant for a harm caused by conduct of the defendant which is wrongful because it is intended to cause harm to some legally protected interest of the plaintiff or a third person.') . . . . Thus, the affirmative defenses based on contributory negligence in the present case are not relevant to the claims asserted in the Complaint. *See Scroggins v. State of Kans., Dept. of Human Resources*, 802 F.2d 1289, 1292 n.4 (10th Cir. 1986) ('The Agency's enumerated defenses to plaintiff's Title VII claim are incredible and therefore exceedingly noteworthy: assumption of the risk, contributory negligence, laches, consent, statute of limitations, and 'Title VII is an inappropriate legislative act.'); *Djahed v. Boniface and Co., Inc.*, 2009 WL 453408, at *3 (M.D. Fla. Feb. 23, 2009)

(finding that contributory negligence is not an applicable defense to Title VII []) .
. . .

*EEOC v. Prod. Fabricators*, 873 F. Supp. 2d 1093, 1102-03 (D. Minn. June 18, 2012)(additional citations omitted). To the extent Defendant argues that Wolfe was "contributorily negligent" in the sense that she engaged in behavior that justified her termination (which EEOC denies), that is merely Defendant's "legitimate, non-discriminatory reason" defense, not a separate and distinct "contributory negligence" defense.

Based on the foregoing, EEOC respectfully requests that this Court dismiss with prejudice Defendant's ninth affirmative defense, and hold that a "contributory negligence" defense is inapplicable to Title VII disparate treatment claims.

g. Defendant failed to establish its tenth affirmative defense and it should be dismissed.

Defendant's tenth affirmative defense alleges that "EEOC's claims are barred by the doctrines of laches, estoppel and waiver." In response to EEOC's discovery requesting *any* factual or documentary support for this defense, Defendant has produced nothing. [App'x 9, Req. 21; App'x 10; App'x 15, Interrog. 19]. This alone is sufficient to grant EEOC's motion for partial summary judgment with regard to Defendant's tenth affirmative defense. "[A]n assertion of an affirmative defense must contain 'more than labels and conclusions' and a 'formulaic recitation' of the elements of the defense." *Malibu Media, LLC v. Doe*, No. RWT 13-cv-0512, 2015 U.S. Dist. LEXIS 37588 at *4 (D. Md. Mar. 25, 2015)(quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "An assertion of an affirmative defense is insufficient if it does not contain 'enough facts' demonstrating that it is 'plausible on its face.'" *Id.*

Regarding Defendant's laches defense, there is no statute of limitations applicable to suits filed by the EEOC. *Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355 (1977). If, however, the EEOC's delay in bringing suit is unreasonable and the defendant is prejudiced by the delay, a court may fashion relief pursuant to the doctrine of laches. *See EEOC v. Navy Fed. Credit Union,* 424 F.3d 397, 409 (4th Cir. 2005), *cert. denied* 547 U.S. 1041 (2006). "Laches is an equitable doctrine, which requires a party to demonstrate that it was prejudiced by the opposing party's lack of diligence" or unreasonable delay. *EEOC v. Lockheed Martin Global Telecomms., Inc.*, 514 F. Supp. 2d 797, 801 (D. Md. 2007)(citing *Navy Fed. Credit Union*, 424 F.3d at 409). To establish a laches defense, Defendant must prove (1) EEOC lacked diligence in pursuing the instant claim and (2) that it suffered prejudice as a result. *Navy Fed. Credit Union*, 424 F.3d at 409 (4th Cir. 2005). Defendant can prove neither.

"The Fourth Circuit [] has repeatedly warned that 'generalized allegation[s] of harm from the passage of time' do not constitute prejudice." *EEOC v. PBM Graphics, Inc.*, 877 F. Supp. 2d 334, 366 (M.D.N.C. 2012)(quoting *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979)). "Prejudice is demonstrated by a disadvantage in asserting or establishing a claimed right, or some other harm caused by detrimental reliance on the plaintiff's conduct." *Lockheed Martin*, 514 F. Supp. 2d. at 803 (citing *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). The defendant has the burden of proving "that any lost evidence would ultimately support its position." *Id.* (citing *Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp.*, 448 F.2d 949, 958 (4th Cir. 1971). Fatal to—and dispositive of—its defense, Defendant admits that it has not been prejudiced in any respect with regard to the passage of time between Wolfe filing her charge and EEOC filing its lawsuit. [App'x 5, 30(b)(6) 158:6-161:20].

Defendant likewise has no grounds to assert a waiver defense. Waiver involves the knowing and intentional surrender of a right. *See Potesta v. United States Fid. & Guar. Co.*, No. 96-2229, 1998 U.S. App. LEXIS 15113 at *6 (4th Cir. July 7, 1998); *Littlejohn v. Loyalty Life Ins. Co.*, No. 1:95CV00651, 1996 U.S. Dist. LEXIS 20245 at * 11 (M.D.N.C. Dec. 20, 1996). EEOC has not knowingly and intentionally surrendered any of its rights. Further, Defendant has offered, and EEOC is aware of, no facts that would support a waiver defense.

Finally, Defendant has no grounds to assert an estoppel defense. "A party seeking to utilize equitable estoppel must show that it has relied on [a] representation at issue in changing its position, causing a detriment." *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 575 F. Supp. 2d 696, 711 (D. Md. Aug. 28, 2008); *see also Heckler v. Cmty. Health Servs.*, 104 S. Ct. 2218, 2223-24 (1984)("[T]he party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.")(internal citation omitted)). Defendant has offered, and EEOC is aware of, no facts that would support an estoppel defense.

Based on the foregoing, EEOC respectfully requests that this Court dismiss with prejudice Defendant's tenth affirmative defense.

h. Defendant failed to establish its twelfth affirmative defense and it should be dismissed.

The final defense challenged by EEOC is Defendant's after-acquired evidence defense. An after-acquired evidence defense, generally, holds that an employee's remedies for employment discrimination may be curtailed if the employer later learns of wrongdoing by the employee that could have been the basis for legitimate termination. *See generally McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 130 L. Ed. 2d 852, 115 S. Ct. 879 (1995). "[I]n

order for an employer to invoke the defense successfully, 'it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.'" *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1238 (4th Cir. 1995)(quoting *McKennon*).

As with mitigation, the after-acquired evidence defense is a bar to ***recovery***, not Defendant's ***liability***. *See generally id*.; *Egbuna v. Time-Life Libraries,* 153 F.3d 184, 188-89, n.2 (4th Cir. 1998). Further, it is not a total bar to recovery. When the after-acquired evidence defense does apply, it extinguishes entitlement to front pay and reinstatement. *Id.* at 362. The defense also limits back pay, but only to the date the employer learned about the conduct that could have led to the employee's legitimate, non-discriminatory discharge. *McKennon*, 513 U.S. at 362.

EEOC no longer seeks front pay or reinstatement, and has limited its claim for back pay to the period ending August 31, 2014. [App'x 21; App'x 22].

The only piece of after-acquired evidence to which Defendant was willing to testify to is an omission of previous employment on Wolfe's application. [App'x 5, 30(b)(6) Dep. 162:7-163:3]. Defendant did not learn about the omission until Wolfe's deposition on April 27, 2017. Even if this omission was "of such severity that [Wolfe] in fact would have been terminated on those grounds alone"—which EEOC disputes—Defendant did not learn of this fact until 970 days after the last day for which EEOC seeks back pay damages. The defense, therefore, does not apply.

Although Defendant appears to have abandoned the following argument during litigation, Defendant asserted an alternative basis for after-acquired evidence during the EEOC's administrative investigation. Specifically, Defendant asserted that "[f]ollowing his [sic]

termination, Bojangles' received employee complaints and proof that Mr. [sic] Wolfe also sent inappropriate, provocative pictures of himself [sic] via text message to his [sic] Bojangles' co-workers while he [sic] was employed – in clear violation of Bojangles' sexual harassment policy and for which Mr. [sic] Wolfe would have been subject to immediate termination." [App'x 7 at at BOJANGLES-00000068]. Evidence produced during discovery is insufficient to establish an after-acquired evidence defense on that basis. In response to EEOC's discovery regarding this statement, Defendant directed EEOC to a singular photograph that Defendant had previously attached to its position statement submitted during the EEOC's investigation. [App'x 9 at Req. 23; App'x 10]. Bojangles' has failed to identify any additional purportedly "provocative pictures." [App'x 5, 30(b)(6) Dep. 66:3-21, 67:25-68:11; App'x 2, Irwin 143:6-16].[13] Regardless, and dispositive of its defense, Defendant testified that it knew about the picture ***before*** Wolfe was terminated, and that Defendant ***did not*** and ***would not*** have terminated Wolfe for the picture. [App'x 5, 30(b)(6) Dep. 78:22-81:13]. The defense, again, does not apply.

Based on the foregoing, EEOC respectfully requests that this Court dismiss with prejudice Defendant's twelfth affirmative defense.

**III. Conclusion**

WHEREFORE, the Court should grant Plaintiff U.S. Equal Employment Opportunity Commission's Motion for Partial Summary Judgment and dismiss with prejudice Defendant's third, fourth, sixth, seventh, eighth, ninth, tenth, and twelfth affirmative defenses.

Filed this the 27th day of July, 2017.

Respectfully submitted:

U.S. EQUAL EMPLOYMENT

[13] The picture's recipient, a personal friend of Wolfe's, testified that she was not offended by the picture and "loved" receiving pictures of Wolfe. [App'x 8, Singleton 26:3-27:1].

OPPORTUNITY COMMISSION

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## CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2017, I electronically filed the above **MEMORANDUM IN SUPPORT OF PLAINTIFF EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which automatically sends notification of such filing to counsel of record at the email addresses listed below:

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