

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

U.S. EQUAL EMPLOYMENT )  
OPPORTUNITY COMMISSION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BOJANGLES' RESTAURANTS, INC., )  
 )  
Defendant. )  

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**STATEMENT OF MATERIAL  
FACTS ACCOMPANYING  
PLAINTIFF EEOC'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 56.1(a)(1), Plaintiff U.S. Equal Employment Opportunity Commission ( "EEOC" or "Commission"), submits in support of its Motion for Partial Summary Judgment the following material facts. All evidence cited herein is attached to Plaintiff's Appendix to Local Civil Rule 56.1 Statement of Material Facts.

1. At all relevant times, Defendant has continuously been a Delaware corporation authorized to conduct business in North Carolina; has conducted business in North Carolina and the City of Fayetteville, North Carolina; and has continuously had at least 15 employees. [ECF 1 ¶4; ECF 6 ¶4].

2. At all relevant times, Defendant has continuously been an employer engaged in an industry affecting commerce under Sections 701(b), (g), and (h) of Title VII, 42 U.S.C. §§ 2000e(b), (g), and (h). [ECF 1 ¶5; ECF 6 ¶5].

3. Wolfe began her employment with Defendant on or around May 9, 2012 as a Biscuit Maker at Defendant's Owen Drive store in Fayetteville, North Carolina. [ECF 1 ¶13; ECF 6 ¶13].

4. As a Biscuit Maker, Wolfe was supervised by the Owen Drive restaurant Assistant Unit Directors and Unit Director. [ECF 1 ¶15; ECF 6 ¶15].

5. At all times relevant, Ella Riggins was the Unit Director of Defendant's Owen Drive restaurant. [App'x 1, Riggins 9:12-14].

6. Unit Directors report to Area Directors, who oversee multiple restaurants within a geographic region. [ECF 1 ¶15; ECF 6 ¶15].

7. At all times relevant, Sharon Irwin (formerly Sharon McCollough) was the Area Director over the region that included Defendant's Owen Drive restaurant, two restaurants located on Raeford Road, one restaurant located on Corporation Drive in Hope Mills, and one restaurant located on North Main Street in Hope Mills. [App'x 2, Irwin 49:18-50:12].

8. Both Defendant's Unit Director (Riggins) and Area Director (Irwin) had authority to take tangible employment actions against Wolfe. [ECF 1 ¶16; ECF 6 ¶16].

9. Wolfe was transferred from Defendant's Owen Drive restaurant to one of Defendant's restaurants located on Raeford Road on February 21, 2013. [ECF 1 ¶45; ECF 6 ¶45].

10. Wolfe did not request and was against the transfer. [App'x 3, Wolfe 88:19-20; 94:2-12].

11. Wolfe was terminated on February 27, 2013. [See ECF 1 ¶48; ECF 6 ¶48].

12. On May 2, 2013, Wolfe filed Charge of Discrimination 433-2013-01334 ("Charge") with the EEOC. [App'x 4, Charge].

13. Wolfe's written and signed charge met all *Holowecki* indicia. [*Id.*]

14. The allegations on the face of the Charge speak for themselves. [*Id.*]

15. The Charge alleges with particularity that Wolfe was harassed based on her sex (gender identity) by her Unit Director since October 2012, and that Wolfe had reported the harassment to an Area Director. [*Id.*]

16. The Charge also alleges with particularity that Wolfe was transferred on February 21, 2013 and terminated on February 27, 2013 in retaliation for complaining about the harassment. [*Id.*]

17. Wolfe's Charge was filed within 180 days of the unlawful employment practices alleged on the face of her Charge. [*Id.*; App'x 5, 30(b)(6) Dep. 16:8-17:24].

18. Within ten (10) days of receiving Wolfe's Charge, EEOC sent a Notice of Charge of Discrimination and a copy of the Charge to Defendant. [App'x 6, Notice of Charge].

19. Defendant received the Notice of Charge of Discrimination and a copy of the Charge. [App'x 5, 30(b)(6) Dep. 17:25-20:1].

20. Plaintiff investigated Wolfe's Charge.

21. Defendant submitted a position statement, dated June 28, 2013, with exhibits A through E to the Commission during the Commission's administrative investigation of Wolfe's Charge. [App'x 7, Def's Pos. Stmt.].

22. The position statement speaks for itself, and includes the allegation that “[f]ollowing [Wolfe's] 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.” [*Id.* at BOJANGLES-00000068]. One picture was attached to Defendant's position statement. [*Id.* at BOJANGLES-00000077].

23. Although Defendant had knowledge of this picture at the time Defendant terminated Wolfe, it did not terminate Wolfe because of the picture, [App'x 5, 30(b)(6) Dep. 78:22-81:13].

24. Defendant would not have terminated Wolfe because of the picture. [App'x 5, 30(b)(6) Dep. 78:22-81:13].

25. The picture's recipient was not offended by the picture and "loved" receiving pictures of Wolfe. [App'x 8, Singleton 26:3-27:1].

26. Throughout the administrative investigation of Wolfe's Charge and this litigation, Defendant has not identified or produced any pictures other than the one attached to its position statement that Defendant contends are "inappropriate" or "provocative." [See App'x 5, 30(b)(6) Dep. 66:3-21, 67:25-68:11; App'x 2, Irwin 143:6-16; App'x 9, Def.'s Resp. to Req. 23; App'x 10, Def. Letter to EEOC dtd. 2/20/2017].

27. On July 1, 2015, the Commission issued its Letter of Determination following its administrative investigation of Wolfe's Charge. [App'x 11, Ltr. Of Deter.].

28. The Letter of Determination speaks for itself, and specifically states that the Commission determined that Wolfe was subject to harassment based on her sex, that Charging Party's supervisor was aware of and took place in the harassment, that Charging Party complained about the harassment and Defendant failed to take corrective action or to prevent further action, and that Charging Party had been transferred and ultimately terminated in retaliation for complaining about the harassment. [*Id.*]

29. The Letter of Determination invited Defendant to participate in conciliation. [*Id.*]

30. Defendant received a copy of the Commission's Letter of Determination, and was aware of the letter's contents. [App'x 5, 30(b)(6) Dep. 110:21-113:11].

31. The parties engaged in conciliation efforts, but their efforts failed result in a resolution that was acceptable to the Commission. [App'x 5, 30(b)(6) Dep. 113:12-25].

32. The Commission issued a Notice of Conciliation Failure to Defendant dated December 4, 2015. [App'x 12, Not. Of Concil. Fail.].

33. Defendant received a copy of the Commission's Notice of Conciliation Failure. [App'x 5, 30(b)(6) Dep. 114:3-115:11].

34. EEOC satisfied its conciliation obligations with respect to Wolfe's Charge. [ECF 1 ¶¶7-10; ECF 6 ¶¶7-10; App'x 13, Church Eml to Steenbergh dtd. 7/14/2017].

35. EEOC filed the instant lawsuit on July 6, 2016. [ECF 1].

36. The instant lawsuit arises from Wolfe's Charge and seeks to correct unlawful employment practices on the bases of sex, and provide appropriate relief to Jonathan Wolfe, who was adversely affected by such practices. [ECF 1 p.1].

37. More than thirty days prior to the institution of this lawsuit, Wolfe filed a charge with the Commission alleging violations of Title VII by Defendant. [ECF 1 ¶ 6; ECF 6 ¶ 6].

38. Defendant filed its Answer on September 5, 2016. [ECF 6].

39. Defendant's Answer articulates the following challenged affirmative defenses:

a. **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. [ECF 6 p.6].

b. **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. [*Id.*]

c. **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. [*Id.* at p.7]

d. **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. [*Id.* at p.7]

e. **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. [*Id.*]

f. **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. [*Id.*]

g. **TENTH DEFENSE**: The EEOC's claims are barred by the doctrines of laches, estoppel and waiver. [*Id.*]

h. **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. [*Id.* at p.8]

40. On October 25, 2016, EEOC served its First Set of Interrogatories and First Set of Requests for Production to Defendant. [See App'x 14, Steenbergh Eml to Church dtd. 10/25/2016; see also App'x 15, Def's Resp. to EEOC Interrogs.; see also App'x 9, Def's Resp. to EEOC Reqs.].

41. The Commission's discovery and Defendant's responses thereto speak for themselves. [See App'x 15, Def's Resp. to EEOC Interrogs.; App'x 9, Def's Resp. to EEOC Reqs.; see also App'x 10, Church ltr to Steenbergh dtd. 2/20/2017].

42. The Commission's discovery sought, *inter alia*, facts and documents supporting Defendant's sixth, ninth, and tenth defenses. [See App'x 15, Def's Resp. to EEOC Interrogs. 17, 18, 19; App'x 9, Def's Resp. to EEOC Reqs. 19, 20, 21].

43. Defendant produced no documents to support its tenth defense. [App'x 9, Def's Resp. to EEOC Req. 21; App'x 10, Church ltr to Steenbergh dtd. 2/20/2017].

44. In support of its sixth defense, Defendant produced the documents marked as BOJANGLES-00000001-2, 212-216. [App'x 9, Def's Resp. to EEOC Req. 19; App'x 10, Church ltr to Steenbergh dtd. 2/20/2017; see also App'x 16, BOJANGLES-00000001-2, 212-220].

45. In support of its ninth defense, Defendant produced the documents marked as BOJANGLES-00000001-2, 212-220. [App'x 9, Def's Resp. to EEOC Req. 20; App'x 10, Church ltr to Steenbergh dtd. 2/20/2017; see also App'x 16, BOJANGLES-00000001-2, 212-220].

46. BOJANGLES-00000216 is a duplicate of BOJANGLES-00000001. [App'x 16 at BOJANGLES-00000001, BOJANGLES-00000216].

47. BOJANGLES-00000001 is a handwritten statement of Christy McDonald, a Bojangles' employee. [*Id.*].

48. BOJANGLES-00000215 is a duplicate of BOJANGLES-00000002. [App'x 16 at BOJANGLES-00000002, BOJANGLES-00000215].

49. BOJANGLES-00000002 is a typed, signed statement of Unit Director Riggins. [*Id.*].

50. BOJANGLES-00000212-214 comprises a complete set of handwritten notes created by Defendant's then-Director of Human Resources Jeannine Eubanks. [App'x 16 at BOJANGLES-00000212-214; App'x 17, Eubanks 113:9-114:2; App'x 5, 30(b)(6) Dep. 20:10-23, 186:24-187:1].

51. All of Eubanks' handwritten notes were created in February 2013. [App'x 5, 30(b)(6) Dep. 187:2-3].

52. Eubanks' notes speak for themselves. [App'x 16 at BOJANGLES-00000212-214].

53. The Commission served upon Defendant interrogatory number 17, which reads, "Identify all facts that support Defendant's Sixth Defense, as set forth in Defendant's Answer." [See App'x 15, Def's Resp. to EEOC Interrog. 17].

54. Defendant's full response to EEOC's interrogatory number 17 states: "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." [*Id.*]

55. The Commission served upon Defendant interrogatory number 18, which reads, “Identify all facts that support Defendant’s Ninth Defense, as set forth in Defendant’s Answer.” [See App’x 15, Def’s Resp. to EEOC Interrog. 18].

56. Defendant’s full response to EEOC’s interrogatory number 18 states: “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.” [Id.].

57. The Commission served upon Defendant interrogatory number 19, which reads, “Identify all facts that support Defendant’s Tenth Defense, as set forth in Defendant’s Answer.” [See App’x 15, Def’s Resp. to EEOC Interrog. 19].

58. Defendant’s full response to EEOC’s interrogatory number 19 states: “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.” [Id.].

59. The Commission's discovery also sought facts and documents supporting Defendant's contention that Wolfe "sent inappropriate, provocative pictures" of herself to coworkers. [App'x 9, Def's Resp. to EEOC Req. 23; App'x 10, Church ltr to Steenbergh dtd. 2/20/2017].

60. Defendant never supplemented its responses to EEOC's interrogatories 17, 18, or 19.

61. Defendant never supplemented its responses to EEOC's requests for production 19, 20, 21, or 23.

62. On June 19, 2017, Bojangles' appeared for deposition pursuant to a properly-served Amended Notice of Fed. R. Civ. P. 30(b)(6) Deposition. [App'x 18, Am. Notice of FRCP 30(b)(6) Dep.; App'x 5, 30(b)(6) Dep. at pp.1-2].<sup>1</sup>

63. Defendant intends to pursue the affirmative defenses challenged by EEOC's Motion for Partial Summary Judgment. [App'x 5, 30(b)(6) Dep. 154:20-158:8].

64. Wolfe was deposed in this matter on April 27, 2017. [App'x 3, Wolfe at p.1].<sup>2</sup>

65. Wolfe made numerous verbal complaints about managers and coworkers to Defendant, to which Defendant failed to respond. [App'x 3, Wolfe 81:6-86:18, 192:13-194:21].

66. Wolfe applied for "numerous" jobs between her termination from Defendant and obtaining a replacement position, and stated there was no period of time in which she was not looking for work. [App'x 3, Wolfe 138:3-139:12].

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<sup>1</sup> Defendant's deposition testimony speaks for itself, and EEOC relies on the same to the extent necessary to support its contentions. The portions of Defendant's deposition testimony referenced in EEOC's memorandum in support of its Motion for Partial Summary Judgment are included in EEOC's Appendix 5.

<sup>2</sup> Wolfe's deposition testimony speaks for itself, and EEOC relies on the same to the extent necessary to support its contentions. The portions of Wolfe's deposition testimony referenced in EEOC's memorandum in support of its Motion for Partial Summary Judgment are included in EEOC's Appendix 3.

67. Subsequent to Wolfe's termination from Bojangles', Wolfe obtained another position with a different fast food restaurant. [App'x 16, BOJANGLES-00000301; App'x 3, Wolfe 33:13-14; App'x 19 EEOC's Resp. to Def.'s Rog. 6].

68. Prior to obtaining this replacement position, Wolfe applied to at least seven additional fast food restaurants or grocery stores. [See App'x 19, EEOC's Resp. to Def.'s Rog. 6].

69. Records provided by the North Carolina Department of Commerce Unemployment Security Division show Wolfe was referred to numerous positions subsequent to her termination by Defendant. [App'x 20, EEOC v. Bojangles\_PLT000365-366].

70. Area Director Sharon Irwin (formerly known as Sharon McCollough) was deposed in this matter on April 25, 2017. [App'x 2, Irwin at p.1].<sup>3</sup>

71. Unit Director Ella Riggins was deposed in this matter on April 26, 2017. [App'x 1, Riggins at p.1].<sup>4</sup>

72. EEOC no longer seeks front pay or reinstatement, and has limited its claim to back pay through August 31, 2014. [App'x 21, Pl's 2d Supp. FRCP 26(a)(1) Discl.; App'x 22, Pl's 6th Supp. to Def's Init. Disc.].

Filed this the 27<sup>th</sup> day of July, 2017.

Respectfully submitted:

U.S. EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION

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<sup>3</sup> Irwin's deposition testimony speaks for itself, and EEOC relies on the same to the extent necessary to support its contentions. The portions of Irwin's deposition testimony referenced in EEOC's memorandum in support of its Motion for Partial Summary Judgment are included in EEOC's Appendix 2.

<sup>4</sup> Riggins' deposition testimony speaks for itself, and EEOC relies on the same to the extent necessary to support its contentions. The portions of Riggins' deposition testimony referenced in EEOC's memorandum in support of its Motion for Partial Summary Judgment are included in EEOC's Appendix 1.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of July, 2017, I electronically filed the above **STATEMENT OF MATERIAL FACTS ACCOMPANYING 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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