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

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **BOJANGLES' RESTAURANTS, INC.,** **Defendant.**	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Bojangles' Restaurants, Inc. ("Bojangles'") moves the Court for summary judgement on both claims asserted by Plaintiff U.S. Equal Employment Opportunity Commission (the "EEOC") on behalf of Jonathan Wolfe: gender-based harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. Bojangles' is entitled to summary judgment because the EEOC has failed to establish a prima facie case as to either claim, and Bojangles' terminated Wolfe's employment for a legitimate, nonretaliatory reason: insubordinate conduct.

Bojangles' employed Wolfe as a crew member in one of its Fayetteville, North Carolina restaurants for about nine months in 2012 and 2013. Wolfe, who identified as a male to management and co-workers throughout her employment at Bojangles', now contends she is a transgender female.[1] Alleging hostile comments by other Bojangles' employees, the EEOC contends that Bojangles' subjected Wolfe to a hostile work environment based on Wolfe's transgender status. But the handful of comments Wolfe has alleged, spread over the course of her nine-month employment, do not rise to the level of a hostile work environment. The EEOC's

[1] As the EEOC and Wolfe assert that Wolfe's preferred identity is now female, Bojangles' will refer to Wolfe by feminine pronouns in this memorandum.

retaliation claim also fails, as the last complaint Wolfe contends she made during her employment occurred at least four months prior to her termination, and there is no evidence that Wolfe's alleged complaint had any bearing on her termination. It is uncontroverted that Bojangles' fired Wolfe for insubordinate conduct. Accordingly, Bojangles' is entitled to summary judgment on both claims in the EEOC's complaint.

I. STATEMENT OF FACTS

Bojangles' employed Wolfe as a crew member at its restaurant on Owen Drive in Fayetteville, North Carolina. Wolfe worked part-time between May 9, 2012 and February 27, 2013. (Riggins Dep. at 58; Eubanks Dec. ¶ 16.) Ella Riggins served as the Unit Director at Bojangles' Owen Drive restaurant during Wolfe's employment. (Wolfe Dep. at 46.) Sharon Irwin served as the Area Director at the time. (*Id.* at 47.) Irwin supervised approximately eight Bojangles' restaurants in the area, including the Owen Drive restaurant where Wolfe worked. (Irwin Dec. ¶ 2.)[2]

Although Wolfe claims in this action to be a transgender female, she presented as a male and did not identify as transgender to either Riggins or Irwin when hired. (Wolfe Dep. at 46, 58-60, 128; Irwin Dep. at 10.) It is undisputed that Wolfe during her employment never identified as transgender to Irwin. (Wolfe Dep. at 128; Irwin Dep. at 10.) Wolfe's co-workers uniformly deny that Wolfe identified as a female while employed by Bojangles'. (Singleton Dep. at 6-7; Irwin Dep. at 10; Riggins Dep. at 28-31; Bowden Dec. ¶ 8.) During the more than four years since Wolfe's employment with Bojangles' ended, Wolfe has continued to routinely present as male in public. (Wolfe Dep. at 155-59 & Ex. 39.)

[2] During times relevant to this action, Sharon Irwin was known as Sharon McCullough. Some exhibits refer to Irwin by her former last name, McCullough. She is referred to as Irwin throughout this brief.

Bojangles' personnel policies and procedures did not differentiate between male and female in any event. Bojangles' mandatory uniform included unisex pants, belt, shirt, shoes and hat. Bojangles' personal appearance policy required that the hair of all crew members – regardless of their sex – be properly secured and covered by a hat. (Eubanks Dec. ¶ 15 & Ex. A at 11.) The policy prohibited all employees from wearing excessive makeup and jewelry and required their fingernails to be neatly trimmed and clean (without artificial nails or nail polish). (*Id.*) These rules derive from food safety concerns, and Bojangles' enforced them without regard to an individual's gender. (*Id.*; Eubanks Dep. at 60-63 & Ex. 3; Riggins Dep. at 79.)

The EEOC's complaint contends that Bojangles' "subject[ed] 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." (Compl., *Dkt.* 1 at 1.) Viewed in in the light most favorable to the EEOC, the evidence shows that Wolfe identified a total of five sex-based comments that she considers to have been harassment. Most are entirely uncorroborated.

Wolfe claims that the ***first*** gender-based comment she received was from a co-worker, Kristen Bowden: "She told me that I needed to pray, I was going to hell. . . she told me that God made me a man." (Wolfe Dep. at 192-93.) Wolfe testified that she reported the statement to Riggins, and it was quickly rectified. "[B]asically [Bowden] just apologized and told me it would never happen again . . . . [I]t never happened again." (*Id.* at 192-93.) Bowden transferred to another Bojangles' store in September 2012, placing the alleged incident and complaint at least five months before Wolfe's employment ended. (Eubanks Dec. ¶ 17.) No other witness has corroborated this alleged statement.

Wolfe alleges that the ***second*** incident occurred in October 2012, when she arrived at the Owen Drive location, while off the clock, dressed as a woman. According to Wolfe, Riggins "told me that I was not allowed to enter the store dressed like that ever again." (Wolfe Dep. at 78.) Wolfe does not recall anything else that Riggins said in their October 2012 conversation. (Wolfe Dep. at 80-81.) Riggins denies making this statement, and no other witness has offered testimony supporting Wolfe's assertion. (Riggins Dep. at 89.)

In the ***third*** alleged incident, Wolfe claims to have been insulted by a co-worker in October 2012 because of her sexual orientation: "His name was Marquise. He was telling me that I was gay and I should kill myself because I was going to hell." (Wolfe Dep. at 82.)[3] Wolfe does not allege that Marquise made any other comment during the remainder of her employment that she considered to be harassment. (Wolfe Dep. at 128.) No other witness has corroborated this alleged statement.

Without corroboration, Wolfe maintains that shortly afterward she complained to Irwin about both Marquise's statement and Riggins's admonition regarding clothing. (Wolfe Dep. at 83.)

> Q. What do you say you said to Sharon in that phone conversation?
>
> A. I told her basically what I just said, along the lines of what occurred with Marquise, and I also had let her know that like, hey, look, Ella was telling me that she hired me as a man, I got to stay a man if I'm going to work for her. And she told me that she would launch an investigation and I was not to repeat anything that I've told her to anybody but her. But she never launched an investigation . . .
>
> Q. Do you recall anything else that you said in the conversation?
>
> A. That was all she said.
>
> Q. Do you recall anything else you said?

[3] Wolfe now denies that she is gay or homosexual (Wolfe Dep. at 124); however, every other fact witness in this case has said that Wolfe identified as a gay man. (Hall Dep. at 18; Singleton Dep. at 6-7; Irwin Dep. 11-12; Bowden Dec. ¶ 5; Clocher Dec. ¶ 6.)

A. What I said, no. That was basically the gist of the conversation.

(Wolfe Dep. at 83-85.) Irwin denies that Wolfe made these complaints. (Irwin Dec. ¶ 9.)

These first three incidents are the only ostensibly gender-related matters about which Wolfe claims to have complained during the duration of her employment with Bojangles'. As Wolfe testified:

> Q. Were there any other times between October of 2012 and your termination in February 2013 in which you complained to anyone at Bojangles' human resources or management about any of your treatment at work?
>
> A. No. They told me they were handling it.

(Wolfe Dep. at 86-87.)

Responding to the leading question of the EEOC's attorney in deposition, Wolfe also claimed that Riggins corrected co-workers who called her by her alleged feminine nickname, Dee Dee, or used feminine pronouns to describe Wolfe. (Wolfe Dep. at 190-91.) With respect to this ***fourth*** gender-based comment, Wolfe stated that Riggins said, "His name is Jonathan. That's a boy." (Wolfe Dep. at 190.) Riggins denies this contention, and no one else heard these alleged comments. In fact, every current and former employee who testified denied having called Wolfe by female names or pronouns or having been requested by Wolfe to do so. (Singleton Dep. at 6-7; Bowden Dec. ¶ 8, Riggins Dep. at 30-31; Irwin Dep. at 10.) Wolfe admitted that she never complained to anyone at Bojangles' about Riggins' alleged comments. (Wolfe Dep. at 83, 86-87.) Moreover, although Wolfe did not specify how many times Riggins made the alleged comment, Riggins and Wolfe rarely worked together. (Riggins Dep. at 42; Wolfe Dep. at 85 ("[M]e and Ms. Riggins didn't work together too often.").)

Wolfe's success as an employee with Bojangles' between October 2012 and the final week of her employment in February 2013 belies any contention that her work environment was

hostile or that it had any effect on her work performance. Riggins and Irwin regarded Wolfe as a valuable employee. (Irwin Dep. at 9-10; Riggins Dep. at 58-63.) Wolfe received positive ratings in Bojangles' performance review and a pay raise (Riggins Dep. at 58-64 & Exs. 19-20), and she was selected to assist in opening a new Bojangles' location on a short-term basis in December 2012. (Irwin Dep. at 50-52.) Wolfe did not object to returning to the Owen Drive restaurant after finishing her short-term assignment at the new Bojangles' location. (Wolfe Dep. at 68.)[4]

In late February 2013, Wolfe obtained long braided hair extensions that fell to or below her waist. (Singleton Dep. at 48-49 & Ex. 3.) Wolfe testified that she went to the Owen Drive restaurant on her birthday: "I needed to check the schedule to see when I returned to work because I took [three or four] days off for my birthday." (Wolfe Dep. at 72-73.) "I walked into the store with yarn braided into my hair." (Wolfe Dep. at 74.) Under Bojangles' food safety policy, the hair of all Bojangles' crew members, regardless of sex, must be properly secured and covered by a hat. (Eubanks Dec. ¶ 15 & Ex. A at 11.) What transpired during Wolfe's few minutes at the store is disputed, but Wolfe recounted the short incident during her deposition as the ***fifth*** gender-based comment she received in her nine-months of employment:

> Ella came from the back of the store, and as she approached the counter she was shaking her head in disagreeance, and then the first word she said was "no." And I asked her what did she mean, and she told me that if I wanted to continue with being employed that I need to remove my braids. . . . I told Ms. Riggins that the handbook states that they only had to be pulled back and be restrained. She told me no, that she hired a man and that is what she expected me to stay as long as I work for her.

[4] Wolfe answered "Yes" to the EEOC's leading question in deposition, "Did you tell Ms. Sharon that co-workers at the Owen Drive store picked on you?" (Wolfe Dep. at 192.) This allegation, for which Wolfe did not specify a date, does not contain a complaint about sex-based harassment. Wolfe admitted in deposition that she made no complaints about her treatment between October 2012 and February 2013. (Wolfe Dep. at 86-87.)

(Wolfe Dep. at 75-76.) In deposition, Riggins denied saying anything about Wolfe being a man, and she testified that she told Wolfe only that her hair must be properly restrained. (Riggins Dep. at 88-89.)

Shortly after the incident on February 21, 2013, Wolfe called Bojangles' human resources department. (Wolfe Dep. at 96-97.) Wolfe reached Jeannine Eubanks, Bojangles' Senior Director of Human Resources. (*Id.*) In deposition, Wolfe did not recall anything she said to Eubanks during this call. (*Id.* at 97.) Eubanks, however, maintained handwritten notes of the conversation and in deposition recalled many specific aspects of the call:

> Q. Yeah. So Jonathan called you at what, nine?
>
> A. 9:50 a.m. Introduced himself as Jonathan Wolfe, said he was an employee at the Owen Drive location, that he'd had a problem with his unit director. And I confirmed – I believe I confirmed that that was Ella. And he was very upset.
> I believe I asked him if he had talked to Sharon or would he be willing to talk to Sharon, which he said yes, he would. He – again, as I said, was very excited and was – excuse the choice of words, but chatty. And he told me that he had taken three days off because it was his birthday and that he had gone by the restaurant to show everyone his new extensions. He told me he spent over $200 on those extensions and that – I got the impression they weren't well received in the restaurant.

(Eubanks Dep. at 104.)

Wolfe did not complain about any gender-based comments during the call with Eubanks. (Eubanks Dep. at 130; Eubanks Dec. ¶¶ 19-20.) During Wolfe's brief call with Eubanks, Wolfe stated that she had "talked to Sharon [Irwin] about derogatory remarks made to him because of sexual preference." (Eubanks Dep. at 125.) Eubanks inquired to ensure that Wolfe's statements to Irwin had been adequately addressed and was satisfied that Wolfe was not then complaining about ongoing mistreatment. (*Id.* at 126-29; Eubanks Dec. ¶ 20.) Eubanks testified in deposition:

> Nothing in my conversation with Jonathan ever led me to believe that he had any of this residual concerns or fears or anything. He was mad about his hair because he spent $200 on his hair. He made that clear to me.

(*Id.* at 130.)

> The same day, Irwin called Wolfe to follow up on Wolfe's complaint to Eubanks:
>
> We talked about – we didn't talk about the hair first. He told me that he didn't want to go back to Owen Drive, that he wanted Ella fired, and I told him that wasn't happening. "What else can I do for you?" *He told me he wanted to transfer to the Raeford Road Bojangles'. "That's fine, but we still have to address your hair."*
>
> *"What do I have to do?" I said, "You have to be within health department regulations."*
>
> *. . . . He said, "I'll cut them. It's not a problem."*
>
> "Okay, call [the Raeford Road location] on Thursday, and get your schedule for next week," and it was done. We were good. Then I told him, "But if you're scared of Ella like you just told me you were, just – if you feel like there's going to be" – because he told me he felt like there's going to be a confrontation. *"Don't go back into Owen Drive anymore. Let it be."*
>
> "Yes, ma'am, I will." And we hung up. We were done.

(Irwin Dep. at 39-40 (emphasis added)). Wolfe now claims that the transfer to Bojangles' Raeford Road restaurant was involuntary. (Wolfe Dep. at 93-94.) But it is undisputed that the end result of the February 21, 2013 incident was Wolfe's transfer from the Owen Drive location to another Bojangles' restaurant in Fayetteville. (*Id* .at 93-94, 112.)

Just six days later on February 27, 2013 – after Wolfe had already communicated with her new unit director, Kristen Bowden, about her schedule – Wolfe returned to the Owen Drive restaurant, in violation of Irwin's directive. (Wolfe Dep. at 101-02; Bowden Decl. ¶ 13.) Although Wolfe's testimony about the sequence of events on that date is contradicted by several witnesses, it is undisputed that Wolfe engaged in a verbal confrontation with Riggins and that Riggins directed Wolfe to leave the restaurant. (Wolfe Dep. at 101-02.) Wolfe made no

purchases during the "five, six" minutes she visited the store – "Never even placed an order." (Wolfe Dep. at 102-03.)

On the same day, Wolfe called Bojangles' customer service hotline to report the incident. Bojangles' retained an audio recording of the call, which Wolfe verified as accurate in her deposition. (Wolfe Dep. at 106-16.) During the nearly eight-minute call, Wolfe referenced her hair twelve times. (*Id*.) At no point in the call did Wolfe allege that the February 27 incident – or any incident prior – had anything to do with her sex, gender identity or gender expression. Rather, she emphasized that the new hair extensions were the sole source of conflict:

> I mean today I was one of the guests, ***but other than today and when I did my hair, I never had a problem with that***. When I did my hair it became a big controversy over the whole issue. It became a whole controversy when I did my hair, and so that's what – that's what led to my transferring to another spot.

(Wolfe Dep. at 112 (emphasis added).)[5]

The events of February 27 led to another call between Wolfe and Irwin. The specific statements made on that call are disputed, but it is undisputed that the call ended with Irwin informing Wolfe that her employment with Bojangles' was terminated. Wolfe testified in deposition:

> She [Irwin] was telling me that I was terminated for entering Owen Drive and that basically was the gist of the conversation. She told me that she – she was like, "I told you not to go back to the store. You didn't listen and you're fired."

(Wolfe Dep. at 104.)

Indeed, Irwin made the decision to terminate Wolfe's employment during their February 27, 2013 phone call. She did so of her own accord, without input from anyone else at

[5] The "whole controversy" related to Wolfe's hair, but not for any reason relating to Wolfe's sex. In fact, the EEOC essentially concedes this point, as it has not asserted a disparate treatment claim on behalf of Wolfe. Waist-length hair and food preparation do not mix well (Eubanks Dep. at 60-63, Riggins Dep. at 76-79), and Wolfe acknowledged in describing the events of February 21 that the restraint of her braided yarn extensions, as required under Bojangles' policy, would be an issue. (Wolfe Dep. at 75-76.) Wolfe does not allege that Irwin's decisions – to reassign and ultimately terminate Wolfe – were made on account of Wolfe's hair. (Wolfe Dep. at 93-94; 104.)

Bojangles'. (Irwin Dep. at 20-21; Riggins Dep. at 106-07.) And she did so without any knowledge of Wolfe's gender expression or gender identity. As Wolfe testified:

Q. You never asked Sharon to call you by a female name, did you?

A. No. I barely worked with Sharon.

(Wolfe Dep. at 128.) Irwin expressly denied considering any purported complaint from Wolfe about gender-based harassment in reaching her decision to terminate Wolfe. (Irwin Dec. ¶ 16.) Moreover, there is not a scintilla of evidence in this case that Irwin – the sole decision-maker with respect to Wolfe's transfer and termination – ever expressed any animus toward Wolfe due to her sex, alleged gender identity or sexual orientation, or as a result of Wolfe's putative complaint about mistreatment.

In the Complaint, the EEOC asserts two causes of action: for "Harassment/Hostile Work Environment" under Title VII, 42 U.S.C. § 2000e-2(a)(1) (Compl., *Dkt.* 1, ¶¶ 17-44), and for retaliation in violation of Title VII. (*Id.* ¶¶ 45-52.)

II. ARGUMENT

Summary judgment is proper where, as here, the record reveals "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If the plaintiff fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then "the plain language of Rule 56[(a)] mandates the entry of summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citations omitted). Though the EEOC and Wolfe's narratives sometimes conflict, Wolfe is bound by her deposition testimony, and "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

A. The EEOC Cannot Establish a Prima Facie Case of Retaliation Based on Discipline that Occurred Four Months After the Allegedly Protected Activity.

To establish a prima facie case of retaliation under Title VII and thus avoid summary judgment, a plaintiff must show that (1) she engaged in protected activity, (2) her employer took materially adverse action against her, and (3) "a causal connection existed between the protected activity and the asserted adverse action." *Lettieri v. Equant Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). By citing Wolfe's contention that she engaged in protected activity, it may be possible for the EEOC to satisfy the first element of a prima facie case,[6] but the EEOC and Wolfe cannot establish any causal connection between Wolfe's alleged October 2012 complaint to Irwin and her February 2013 transfer and termination.

A four-month interval between alleged protective activity and termination, without more, does not establish a causal connection. As the Supreme Court observed, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (citing cases concluding three and four-month periods between protected activity and adverse action were insufficient to establish causation). The Fourth Circuit has hewed closely to this standard, routinely holding that "a three- or four-month lapse between the protected activities and discharge was too long to establish a causal connection by temporal proximity alone." *Perry v. Kappos*, 489 F. App'x 637, 643 (4th Cir. 2012) (unpublished) (holding that "a three-month lapse is too long to establish causation, without more"); *Shields v.*

[6] Neither the Supreme Court nor the Fourth Circuit has held that Title VII prohibits discrimination on the basis of sexual orientation or transgender status. *See Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation."). Because the EEOC and Wolfe cannot establish causation, it is not necessary to determine whether Wolfe's alleged complaint about derogatory comments made by co-workers on the basis of sexual orientation or gender identity qualified as protected activity.

Fed. Express Corp., 120 F. App'x 956, 963 (4th Cir. 2005) (unpublished) (affirming summary judgment where "three to four months passed between Shields's protected activity and the first warning letter he received"); *Pascual v. Lowe's Home Ctrs.*, Inc., 193 F. App'x 229, 233 (4th Cir. 2006) (unpublished) (holding that three to four month period between protected activity and adverse action "is too long to establish a causal connection by temporal proximity alone"); *see also Clausell v. Bayer Corp.*, No. 5:15-CV-50-BO, 2016 WL 3339476, at *1 (E.D.N.C. June 10, 2016) (four months apart insufficient to establish causation); *Huckelba v. Deering*, No. 5:16-CV-247-D, 2016 WL 6082032 (E.D.N.C. Oct. 17, 2016) (same).

In this case, Wolfe's putative complaint to Irwin in October 2012 came approximately four months before the transfer and termination, both of which occurred during the last week of February 2013. Wolfe confirmed in deposition that the October 2012 complaint was the only one she made to Bojangles' management about any alleged mistreatment on the basis of gender:

> ***Q. Were there any other times between October of 2012 and your termination in February 2013 in which you complained to anyone at Bojangles' human resources or management about any of your treatment at work?***
>
> ***A. No. They told me they were handling it.***

(Wolfe Dep. at 86-87 (emphasis added).)

Absent the requisite temporal connection between protected activity and adverse action, a plaintiff must show "evidence of recurring retaliatory animus during the intervening period" to establish causation. *Lettieri*, 478 F.3d at 650. Thus, in *Lettieri* the plaintiff demonstrated causation by showing that she was stripped of job responsibilities, authority, and direct client contact before she was ultimately terminated. *Id.* at 650-51. Accordingly, the seven months between complaint and termination were united by the intervening retaliatory conduct. *Id.*

Here Wolfe and the EEOC can point to no intervening retaliatory conduct by Bojangles' in the wake of Wolfe's October 2012 complaint. In fact, the evidence is the opposite: Bojangles' promoted Wolfe to head cashier at the Owen Drive restaurant (Irwin Dep. at 10, 106), gave Wolfe a favorable performance review and pay raise (Riggins Dep. at 58-64 & Exs. 19-20), and allowed Wolfe to participate in a new store opening in December 2012. (Irwin Dep. at 10, 51.) Riggins and Irwin selected Wolfe as one of "[t]he top two people from each of [Irwin's] restaurants" for the short-term assignment. (*Id.* at 52.) There is no evidence that Irwin harbored or expressed any animus toward Wolfe for any reason. Accordingly, the fact that Bojangles' transferred and then terminated Wolfe's employment some four months after her lone alleged complaint falls short of establishing a prima facie case of retaliation.

B. Even if Wolfe Could Demonstrate a Prima Facie Case of Retaliation, Bojangles' Acted for Legitimate, Non-Discriminatory Reasons.

Even were the EEOC and Wolfe to establish a prima facie case of retaliation, which they cannot, Bojangles' would still prevail at summary judgment through the *McDonnel Douglas* burden-shifting framework. Bojangles' meets its burden to produce evidence of a "legitimate, nondiscriminatory reason for the adverse employment action." *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007). The EEOC cannot show that Bojangles' reason – Wolfe's insubordinate conduct in returning to the Owen Drive restaurant and in cursing Irwin, Bojangles' Area Director – were pretext for discrimination. *See id.*

With respect to Wolfe's allegedly involuntary transfer, both Wolfe and Bojangles' agree that Irwin made the decision to transfer Wolfe from the Owen Drive store as a consequence of the February 21, 2013 incident. (Wolfe Dep. at 93-94; Irwin Dep. at 39-40.) With respect to Irwin's decision to terminate Wolfe's employment six days later, the evidence is undisputed that Wolfe's insubordinate return to the Owen Drive restaurant precipitated the telephone call that

ended in the termination. Wolfe admitted in deposition that Irwin explained to her that her return to the Owen Drive restaurant was a factor in her termination:

> She [Irwin] was telling me that I was terminated for entering Owen Drive and that basically was the gist of the conversation. She told me that she – she was like, "I told you not to go back to the store. You didn't listen and you're fired."

(Wolfe Dep. at 104.)

In communicating about the transfer to Riggins, Irwin further explained that Wolfe had cursed at her repeatedly during their final telephone call. (Riggins Dep. at 113-14.) It was the confluence of this insubordination – disregarding Irwin's instructions not to return to the Owen Drive store and responding to Irwin disrespectfully – that led to Wolfe's termination. (Irwin Dep. at 131-32; Irwin Dec. ¶ 16.)

The EEOC will likely contend that Irwin's simultaneous citation to both Wolfe's return to the Owen Drive store and Wolfe's disrespect during their telephone call is evidence of pretext. Such a contention would be wrong both factually and legally. "Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it. The former would not create a 'genuine' dispute, the latter would fail to be 'material.'" *Holland*, 487 F.3d at 216 (citations omitted).

As a factual matter, there is no contradiction in Irwin's explanation for terminating Wolfe's employment. Wolfe's insubordination, both in disobeying Irwin's request that she avoid the Owen Drive restaurant and in using disrespectful language while discussing the incident, unites the misconduct as a consistent reason for the termination. It is clear from the record evidence that Irwin believed both factors joined and informed her decision, as she

contemporaneously related both of them when she described the heated and personally insulting conversation to her colleagues. (Riggins Dep. at 113-14; Irwin Dep. at 131-32.)

As a legal matter, there is no material discrepancy in Irwin's statements. In *Holland*, for example, the plaintiff contended that a conflict between the employer's stated reason for termination – threatening his supervisor – and that reported to a state employment agency – layoff – was sufficient evidence of pretext. The Fourth Circuit rejected the argument, reasoning that the company's explanations for the different reasons were uncontested. *Id.* That the report of layoff was intended to be "charitable" to the employee was not contradicted by any contrary explanation. *Id.* Moreover, it did not matter in the pretext analysis whether the employee actually threatened his supervisor, but only whether the employer honestly believed that the employee should be discharged. *Id.* at 217.

In addition, to demonstrate pretext, it is not enough that an employer's stated reason can be disbelieved: "the fact-finder must believe [the plaintiff's] explanation of intentional . . . discrimination." *Love-Lane v. Martin*, 355 F.3d 766, 788 (4th Cir. 2004). Thus, in *Love-Lane* the Fourth Circuit concluded that there was insufficient evidence of pretext for race-based discrimination where even where the plaintiff's evidence "casts some doubt" on the asserted legitimate, non-discriminatory reason. *Id.* The court held that no rational jury could believe that race was in fact the explanation for the plaintiff's reassignment where there was no evidence that the disputed decisions were motivated by racial bias or animus. *Id.* at 789.

Thus, even were there daylight between direct disobedience and being disrespectful while being reprimanded for that disobedience, *Holland* establishes that any argued discrepancy within Bojangles' stated reason for the termination does not rise to the level of pretext. That Irwin was charitable to Wolfe and did not describe in detail the scope and extent of Wolfe's extraordinary

disrespect and vulgarity each time she explained Wolfe's termination does not mean that she violated Title VII. In fact, just as in *Holland*, the EEOC has offered *no evidence* that Irwin disbelieved that the incidents occurred or and has offered *no evidence* that retaliation was the real reason for Wolfe's termination. Rather, Wolfe's testimony erases any doubt that Irwin honestly believed that Wolfe had engaged in insubordinate behavior.

> She [Irwin] was telling me that I was terminated for entering Owen Drive and that basically was the gist of the conversation. She told me that she – she was like, "I told you not to go back to the store. You didn't listen and you're fired."

(Wolfe Dep. at 104.)

Finally, even if Wolfe and the EEOC could raise some doubt about Bojangles' legitimate, non-discriminatory reasons for termination, the facts and holding of *Love-Lane* mandate summary judgment in any event. There is simply *no evidence* on which a rational jury could believe that retaliation played any role in Bojangles' decisions to transfer and terminate Wolfe. As Wolfe reported to the Bojangles' hotline on the day of her termination, retaliation had nothing to do with the events of late February 2013. Wolfe's complaint was all about her new $200 hair extensions:

> I mean today I was one of the guests, ***but other than today and when I did my hair, I never had a problem with that***. When I did my hair it became a big controversy over the whole issue. It became a whole controversy when I did my hair, and so that's what -- that's what led to my transferring to another spot.

(Wolfe Dep. at 112 (emphasis added).)

Accordingly, because there is no basis on which to conclude Bojangles' stated non-discriminatory reason is false and not a scintilla of evidence to suggest that retaliation was the real reason for Wolfe's termination, summary judgment should be granted to Bojangles' on the EEOC's retaliation claim.

C. Five Alleged Derogatory Comments Did Not Create a Hostile Work Environment.

The five alleged instances of harassment cited by Wolfe do not fit neatly into a clear category of prohibited discrimination. One of the comments was expressly about sexual orientation. The others were ostensibly about Wolfe's gender identity. Neither the Supreme Court nor the Fourth Circuit has held that either of these categories is protected by Title VII. *See Wrightson*, 99 F.3d at 143 ("Title VII does not afford a cause of action for discrimination based upon sexual orientation.").

Yet even were the comments viewed as sex-stereotyping like that addressed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), no precedent in this circuit or elsewhere suggests that the comments about which Wolfe complains rose to the level of a hostile work environment. To establish a hostile work environment claim, a plaintiff must show (1) that she was harassed because of her sex; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer. *Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766, 772 (4th Cir. 1997). Even when viewed in the light most favorable to the EEOC and Wolfe, the evidence fails to satisfy the third element: that the alleged harassment be so "severe or pervasive" as "to create an abusive working environment." Thus the EEOC's claim fails.

A hostile work environment may exist only "[w]hen 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." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations omitted). As the Supreme Court has repeatedly held, "mere utterance of an epithet which engenders offensive feelings in [an] employee does not sufficiently affect the conditions of employment to implicate Title VII." *Id.*

(citations omitted). As courts in the Fourth Circuit have routinely concluded, occasional gender-based comments that do not permeate the workplace or alter the working environment do not give rise to a cause of action under Title VII. *See, e.g., Hartsell*, 123 F.3d 766.

In *Hartsell*, for example, the Fourth Circuit held that five demeaning gender-based comments were not sufficiently severe or pervasive to support a hostile work environment claim. *Id.* at 773. The Court reasoned that "[n]one of the alleged comments were even vulgar, much less obscene." *Id.* "Title VII is not a federal guarantee of refinement and sophistication in the workplace – in this context, it prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive." *Id.*

Likewise, in *Singleton v. Department of Correctional Education*, 115 F. App'x 119, 122–23 (4th Cir. 2004) (unpublished), the Fourth Circuit held that "allegations that Shinault made offensive comments, showed her unwanted attention that made her uncomfortable, and continuously expressed a sexual interest in her do not meet the high standard set forth under Title VII." Absent evidence of obscene behavior and an impact on the plaintiff's ability to perform her job, the court concluded that no hostile work environment claim existed. *Id.*

Harassment based on sex-stereotyping rises to the level of a hostile work environment only where there is evidence of conduct much more egregious than that alleged by Wolfe in this case. In *E.E.O.C. v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013), the plaintiff produced evidence that his supervisor specifically targeted him with abuse, referring to him as "'pu—y,' 'princess,' and 'fa—ot,' often 'two to three times a day.' About two to three times per week—while [plaintiff] was bent over to perform a task—[supervisor] approached him from behind and simulated anal intercourse with him." *Id.* at 449. The supervisor also exposed his genitals about 10 times. *Id.* The Fifth Circuit held that this type of conduct presented a factual

issue about the severity or pervasiveness of the conduct that was properly resolved by the jury. *Id.* at 462. The facts in *Boh Brothers* underscore just how inconsequential was the conduct at issue in the instant case.

As the Supreme Court has instructed, the hostility or abusiveness of a workplace "can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Here the minimal conduct that Wolfe has alleged meets none of the markers of abusive or hostile conduct.

The first alleged comment about which Wolfe testified – "[Bowden] told me that I needed to pray, I was going to hell" – was quickly followed by an apology that was, according to Wolfe, directed by Riggins. (Wolfe Dep. 192-93.) The next comment Wolfe identified – "[Marquise] was telling me that I was gay and I should kill myself because I was going to hell" (Wolfe Dep. at 82) – was also an isolated incident, as Wolfe did not report any other harassment from Marquise or any other similar statement. (Wolfe Dep. at 128.) No one else reported hearing these comments.

Wolfe next alleges two instances in which Riggins allegedly told her that she could not dress or identify as a woman, which Riggins denies. (Wolfe Dep. at 75-76, 78.) These two alleged comments, separated by four months, cannot be described as frequent. Nor were they severe. They were not physically threatening or humiliating. And there is no evidence that the comments interfered with Wolfe's work performance. In fact, Riggins rated Wolfe favorably and awarded Wolfe a pay raise in the same month she is alleged to have forbidden Wolfe from dressing as a woman. (Riggins Dep. at 58-64 & Exs. 19-20.)

The final gender-based comments alleged by Wolfe consist of the name and pronoun corrections allegedly made by Riggins. Again, no other witness has corroborated Wolfe's allegation. Even crediting Wolfe's allegation as true, the lack of support from any other witness in the case underscores how far short of "pervasive" these and other alleged comments were and how they could not have "permeated" Wolfe's work environment.

Considering Riggins' alleged name and pronoun corrections in combination with the other four comments made over the course of Wolfe's nine-month employment, these infrequent corrections fall far short of a hostile work environment. First, these alleged comments should not be weighed in assessing the hostility of the environment because Wolfe never complained about them to anyone at Bojangles'. *See Harris*, 510 U.S. at 23 ("The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive.").[7] Moreover, there is no evidence that Riggins' alleged comments correcting Wolfe's name and gender were intended to be insulting. Wolfe never revealed her gender identity to Riggins and never told Riggins that she preferred to be called a name other than Jonathan. (Wolfe Dep. at 46, 59-60; Riggins Dep. at 30-31.) Yet even were these comment some evidence of harassment, the comments were not frequent, not severe, and not physically threatening or intimidating, and the uncontroverted evidence – positive performance review, pay raise, and selection for special assignment – plainly establishes that the comments had no impact on Wolfe's work performance. (Riggins Dep. at 58-64 & Exs. 19-20.)

[7] There is no basis for imputing liability to Bojangles' for this conduct in any event. Under *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), an employer is not liable for harassment by a supervisor where "(1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). To the extent that Wolfe believed that Riggins' insistence that co-workers call Wolfe "Jonathan" and refer to Wolfe as male – the same way that Wolfe identified to Riggins – was harassment, Wolfe made no attempt to take advantage of Bojangles' preventative or corrective opportunities to lodge her complaints about Riggins' behavior. (Wolfe Dep. at 86-87.)

Accordingly, the facts in this case are even more benign than those in *Hartsell* and *Singleton*. The comments alleged by Wolfe are far from the demeaning and insulting daily conduct described in *Boh Brothers*. And like *Hartsell* and *Singleton*, Wolfe does not allege any comments that were obscene or vulgar. The few comments Wolfe identifies, spread over nine months, are far from the type of mistreatment that "permeate" the workplace or alter the working environment. They cannot form the basis of a hostile work environment claim.

The EEOC and Wolfe are unlikely to cite any authority supporting the contention that these five comments create a triable issue of hostile work environment. Rather, they may try to augment Wolfe's deposition testimony with additional, contradictory written testimony from Wolfe or by citing to the deposition testimony of Wolfe's friend and former co-worker, Shimika Singleton. Singleton testified that she heard one of Wolfe's co-workers call Wolfe "sissy" on several occasions and heard another call Wolfe "sissy" or "punk." (Singleton Dep. at 12, 35-36, 53.) But Wolfe never complained to Singleton or anyone else about these alleged comments. (Singleton Dep. at 35-36; Wolfe Dep. at 86-87.) More importantly, Wolfe did not mention these putative comments when she testified in deposition that she had "described every incident of alleged harassment" that she could recall. (Wolfe Dep. at 128.)

The EEOC cannot rely on such third-party evidence outside Wolfe's testimony to bolster its meager claim that Wolfe's work environment was hostile. In establishing a hostile work environment claim:

> [T]he plaintiff must prove that he or she *personally* found the environment to be hostile or abusive. Although a plaintiff can more easily satisfy this test, the test is not met – notwithstanding an objectively harassing job environment – if the plaintiff, by his or her words, conduct, and actions did not find the conduct to be hostile or abusive.

I Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* 20-52 – 20-53 (5th ed. 2012 & Supp. 2015). This black-letter law flows from the Supreme Court's instruction that

"if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris*, 510 U.S. at 21–22 (1993).

Here Wolfe had ample opportunity to cite the comments described by Singleton as evidence of harassment – during her employment, after her employment, in her EEOC charge, and in her deposition. Yet Wolfe never identified any of the comments described by Singleton, nor did she complain about them while employed by Bojangles'. Accordingly, there is no basis on which to conclude that such alleged comments – or any others belatedly added by the EEOC in response to its response to this motion for summary judgment – should be considered in the severe-or-pervasive analysis. Because the comments offered as evidence by Wolfe in this litigation did not create an objectively and subjectively hostile work environment, Bojangles' is entitled to summary judgment on the EEOC's claim of discrimination due to alleged hostile environment.

III. CONCLUSION

In her conversation with Bojangles' customer service hotline on February 27, 2013, Wolfe summed up the extent and nature of her dispute with Bojangles':

> I mean today I was one of the guests, ***but other than today and when I did my hair, I never had a problem with that***. When I did my hair it became a big controversy over the whole issue. It became a whole controversy when I did my hair, and so that's what – that's what led to my transferring to another spot.

(Wolfe Dep. at 112 (emphasis added).)

As Wolfe admits, this action materialized not as a result of gender-based discrimination or retaliation, but because of the inherent conflict between waist-length yarn hair braids and the constraints of food safety and preparation, as expressed in Bojangles' gender-neutral policy. None of the complaints that Wolfe has voiced since February 2013, even if believed, creates a

cause of action for hostile work environment or retaliation. Accordingly, Bojangles' is entitled to summary judgment on all of the EEOC's claims.

This 28th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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This 28th day of July, 2017.

/s/ Charles E. Johnson

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