

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.)

**PLAINTIFF EEOC'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") respectfully submits the following in opposition to Defendant's Motion for Summary Judgment [ECF 26]:

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 sex, specifically her gender identity, 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

Wolfe is a transgender female, meaning that she was born male but her gender identity is female. [App'x 1, Wolfe 197:20-25]. Wolfe has identified herself as female since a very young age, and has recognized herself as transgender since high school. [*Id.* at 171:8-172:13, 197:20-25; App'x 12 pp.9-10]. While Wolfe identifies and usually presents as female, she is biologically and legally male. [App'x 1, Wolfe 197:24-198:5].

Wolfe was employed as an hourly crew member at Defendant's Owen Drive restaurant ("Owen Drive") from May 9, 2012 until February 21, 2013. [ECF 27 ¶4]. At Owen Drive, Wolfe was directly supervised by, among other employees, Unit Director Ella Riggins, Assistant Unit Director Janice Locklear, Assistant Unit Director Jermell Taylor, and Assistant Unit Director Kristen Bowden. [ECF 27 ¶5; ECF 28-3 ¶3; App'x 2, Riggins 16:6-9, 45:16-46:2]. Unit Director Riggins was supervised by Area Director Sharon Irwin (formerly McCollough). [ECF 27 ¶6].

When Unit Director Riggins hired Wolfe in May 2012, Riggins believed Wolfe was a heterosexual male. [App'x 2, Riggins 24:16-18]. However, Riggins perception of Wolfe changed after approximately six months (*i.e.*, in or around October or November 2012) when Wolfe shared with Riggins a picture of Wolfe presenting as a woman. [*Id.* at 24:23-25:10]. Around this same time, October 2012, Wolfe, on one of her days off, entered Owen Drive wearing a woman's wig. [App'x 1, Wolfe 77:18-79:23]. Unit Director Riggins saw Wolfe wearing the wig and told Wolfe that she (Wolfe) could never come into the restaurant dressed as a woman again. [*Id.*] Wolfe complained to Area Director Irwin about this incident. [*Id.* at 81:6-11].

Wolfe's sex and gender identity were the targets of offensive comments by a number of supervisors and employees. Assistant Unit Director Kristen Bowden told Wolfe that Wolfe was "going to hell" because "God made [Wolfe] a man" and Wolfe needed to pray. [App'x 1, Wolfe 192:18-193:7; *see also* App'x 2, Riggins 48:3-13]. Assistant Unit Director Locklear called Wolfe a "sissy" "about 50 or more" times and said, "You're not a girl. Stop acting like a girl. What's the purpose of being gay?" [App'x 5, Singleton 11:1-12:18, 35:17-23].¹ Assistant Unit Director Taylor called and/or referred to Wolfe as a "punk" and "little sissy." [*Id.* at 49:10-50:10, 53:12-21]. Another of Wolfe's co-workers, "Dashawn", made sex-based comments about Wolfe. [*Id.*].

Wolfe's preferred name is De'Ashia. [App'x 1, Wolfe 5:19]. When Wolfe would identify using her preferred female name, Riggins would correct Wolfe stating, "That's a him. You are a boy." [App'x

¹ Shift manager Singleton, who witnessed Locklear's statements, testified, "Sissy is—was Janice's favorite word when it came to [Wolfe]." [App'x 5, Singleton 59:21-22].

1, Wolfe 128:12-16]. Likewise, whenever Riggins heard coworkers referring to Wolfe by the nickname “Dee Dee” or with feminine pronouns, Riggins would correct the coworkers by stating, “His name is Jonathan. That’s a boy” and “that man [is] he, not she.” [*Id.* at 190:2-191:5].

At some point between October 2012 and December 2012, Wolfe began working as a head cashier. [App’x 2, Riggins 55:18-21, 66:8-10]. Riggins told Wolfe that if Wolfe wanted to run a cash register then she “needed to conform to the identity of a male, to be a male, walk, talk and act like a male.” [App’x 1, Wolfe 126:12-24].

From approximately mid-December 2012 through approximately January 5, 2013, Defendant temporarily assigned Wolfe to assist with the opening of Defendant’s new Corporation Drive location. [App’x 2, Riggins 53:11-19; App’x 6, Irwin 52:2-22]. Defendant chose Wolfe because she was one of the top two best employees at Owen Drive. [*Id.*] While on assignment at Corporation Drive, Wolfe told Irwin that she (Wolfe) liked working at Corporation Drive because “people didn’t pick on me or try to correct me when I identified as a she.” [App’x 1, Wolfe 191:21-192:10].

Around February 14, 2013, Area Director Irwin received a call that Wolfe had locked herself in the restroom while working at Owen Drive and needed Irwin’s help. [App’x 6, Irwin 19:13-20:5, 90:23-94:18]. Irwin called Wolfe, who said, “‘I’m in the bathroom. I’m really scared. I need you to come up here right now The two boys in the kitchen are asking me questions and I’m really scared to answer. I’m really uncomfortable. Can you come up here?’”² [*Id.* at 93:11-17]. Irwin went to the restaurant and learned that Wolfe’s coworkers (whose identities Irwin cannot recall) were asking Wolfe personal questions about how Wolfe engages in sexual intercourse. [*Id.* 93:25-94:4, 94:19-20]. Wolfe told Irwin that one coworker, Marquis, said Wolfe should commit suicide because Wolfe is “gay.” [App’x 1, Wolfe 82:3-20, 83:4-14, 85:3-9]. Irwin, who characterized the event as “one of those kids being kids having conversations that they really shouldn’t be having, and it was nothing,” threatened to terminate Wolfe “no questions asked” if a similar incident occurred again, and instructed Wolfe to “man up.” [App’x 6, Irwin

² Before Irwin was contacted about this incident, Wolfe had told Assistant Unit Director Taylor about the coworker’s (Marquis) comments. [App’x 1, Wolfe 85:3-9]. Taylor told Wolfe “there was nothing that no one could really do.” [*Id.*].

94:5-11, 94:25-95:4; App'x 14, Eubanks 133:11-21]. Irwin reported this incident to Senior Director of Human Resources Eubanks the following day. [App'x 6, Irwin 20:12-14].

While complaining to Irwin about the coworker around February 14, 2013, Wolfe also complained that “[Riggins] was telling me that she hired me as a man, I got to stay a man if I'm going to work for her.” [App'x 1, Wolfe 83:6-14]. Irwin told Wolfe that Irwin would “launch an investigation” and Wolfe “was not to repeat anything [Wolfe] told [Irwin] to anybody.” [*Id.*] Wolfe also reported the coworker's comments to Riggins. [App'x 1, Wolfe 85:12-16].

On February 21, 2013, Wolfe had her hair styled in long women's braids when she entered the restaurant as a customer. Assistant Unit Director Janice Locklear, who was at the counter when Wolfe came in, expressed disgust and told Wolfe that Riggins was going to terminate Wolfe. [App'x 1, Wolfe 74:1-75:9; App'x 4; App'x 5, Singleton 11:1-16]. Upon seeing Wolfe, Riggins “was shaking her head in disagreement, and then the first word she said was ‘no.’ . . . [S]he told me that if I wanted to continue with being employed that I need to remove my braids.” [App'x 1, Wolfe 75:10-18]. “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.” [*Id.* at 76:3-8; *see also* App'x 5, Singleton 16:13-17:2, 42:24-43:1]. “Ms. Riggins told me . . . I had to act like a male, dress, walk and talk like a male.” [App'x 1, Wolfe 88:9-19]. Though Riggins claims she did not direct any such comment to Wolfe, Riggins does admit that when Locklear asked Riggins if Riggins was going to “let them wear miniskirts and stuff in here,” Riggins stated “*I hired a man, so he's a man or something like that.*” [App'x 2, Riggins 85:16-86:3, 89:11-15, 91:12-20 (emphasis supplied)].³

Shortly afterward, at approximately 9:50 a.m., Wolfe called Defendant's employee hotline, which connected Wolfe with Senior Director of Human Resources Jeannine Eubanks. [App'x 1, Wolfe 96:15-97:4]. This was the first of two calls between Wolfe and Eubanks in the record. [*Id.*] Wolfe and Eubanks discussed “some of the problems that [Wolfe] was having at work.” [*Id.* at 97:12-22; App'x 14, Eubanks

³ That same day, February 21, Riggins created a Work Incident Report, a formal employee disciplinary record, for Wolfe. [App'x 15; App'x 8, 30(b)(6) 98:5-100:18]. The purported basis for the Work Incident Report was Wolfe's failure to appear for a meeting and make cinnamon twists on February 2 – nineteen days before Riggins created the Work Incident Report. The Work Incident Report is the only disciplinary record in Wolfe's personnel file.

102:19-103:7]. During their phone call, Wolfe advised Eubanks that she “talked to [Area Director Irwin] about *derogatory remarks made to him* [sic] *because of sexual preference.*” [App’x 4 (emphasis supplied)]. Eubanks told Wolfe that Eubanks “would get in contact with the area director or someone to look at what [Wolfe] was complaining about.” [App’x 1, Wolfe 99:6-10]. In fact, by the time Eubanks spoke with Wolfe, Eubanks had already spoken with Irwin, who had advised Eubanks that Wolfe is a “good employee, *but ‘bisexual’.*” [App’x 4 (emphasis supplied); App’x 14, Eubanks 116:15-19].

After Wolfe and Eubanks spoke, Irwin called Wolfe. [App’x 1, Wolfe 93:3-9; App’x 6, Irwin 36:7-13]. Irwin initially terminated Wolfe, and hung up the phone before Wolfe had the opportunity to discuss what had occurred inside Owen Drive. [App’x 1, Wolfe 93:3-18]. Approximately 30 minutes later, Irwin called Wolfe back and revoked the termination. [*Id.*] Irwin then advised Wolfe that she (Wolfe) was being transferred from Owen Drive to restaurant # 735 located at 7661 Raeford Road, Fayetteville, North Carolina 28304. [App’x 1, Wolfe 94:2-12; App’x 6, Irwin 50:13-17]. Wolfe did not request and was against the transfer due to lack of reliable transportation. [App’x 1, Wolfe 88:19-89:16, 94:2-12; App’x 10, Hall 10:5-19, 15:3-11]. In February 2013, Wolfe lived approximately 4.5 miles from Owen Drive, and her lack of reliable transportation was known to Unit Director Riggins. [App’x 2, Riggins 59:8-60:5]. The Raeford Road restaurant that Irwin transferred Wolfe to was nearly ten (10) miles away from Wolfe’s home.⁴

On February 27, Wolfe again entered the Owen Drive restaurant as a customer. Wolfe was permitted to be in the restaurant. [App’x 6, Irwin 40:12-17]. Before Wolfe could place her order, Riggins confronted Wolfe and demanded that Wolfe leave. [App’x 2, Riggins 104:16-25; App’x 1, Wolfe 90:11-21, 101:25-102:7]. Wolfe complied and left the restaurant without incident. [App’x 1, Wolfe 102:15-23; App’x 17]. Later that day, Area Director Irwin called Wolfe and terminated her (Wolfe), stating, “I told you not to go back to the store. You didn't listen and you're fired.” [App’x 1, Wolfe 104:2-17]. Irwin had

⁴ There were at least three other restaurants within Irwin’s area that were closer to Wolfe’s home than the restaurant at 7661 Raeford Road: 3008 North Main Street (approximately 3 miles from Wolfe’s home), 4554 Raeford Road (approximately 4.5 miles), and 5750 Corporation Drive (approximately 7.6 miles). [App’x 6, Irwin 50:5-9].

never told Wolfe that Wolfe was not allowed to return to Owen Drive. [*Id.* at 90:22-91:1]. Before Wolfe could respond, Irwin hung up the phone. [*Id.* at 104:13-17]

Also on February 27, after Irwin terminated Wolfe (for the second time in six days), Wolfe “called HR again . . . to try to figure out what was going on, and I mentioned to whoever I spoke to about my complaints and whatever was being done, and that was when I was told that my complaint was never filed. There was never an investigation opened on my claim by Ms. Sharon.” [*Id.* at 90:22-91:7, 100:7-101:6].

The following day, February 28, Irwin notified Senior Director of Human Resources Eubanks that Wolfe was terminated for going “into Owen trying to start something with [Riggins] and for spreading gossip.”⁵ [App’x 7]. Upon learning that Irwin had terminated Wolfe, Eubanks and Senior Vice President of Human Resources Vickie Smith expressed confusion over whether and why Wolfe had been told to cut her hair, asking “If we allowed women to work with long hair, as long as it is restrained, why wouldn’t we let him?” [*Id.*] Eubanks then, without any indication that Wolfe intended to file a charge of discrimination, contacted counsel to verify whether the termination could give rise to any legal exposure, including a gender stereotyping claim. [App’x 4; App’x 14, Eubanks 82:13-21, 139:14-142:4].

LEGAL ARGUMENT

I. *Summary Judgment Standard*

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.

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

⁵ Indeed, during the investigation of this Charge, Defendant had taken the position that it terminated Wolfe, “because he came to the restaurant (when he was not scheduled to work), was loud and disruptive to the restaurant’s business, held up the line for Bojangles’ paying customers, and was insubordinate to the restaurant’s manager [Unit Director Riggins] in front of Bojangles’ customers.” [App’x 3 p.1].

tried on the merits. The court therefore cannot weigh the evidence or make credibility determinations.

Jacobs v. N.C. Admin. Office of the Courts, 780 F.3d 562, 568-69 (4th Cir. 2015)(internal citations omitted); *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 evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in [the nonmovant’s] favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

II. *Defendant’s near total reliance on conflicting testimonial evidence makes summary judgment inappropriate in this case.*

Summary judgment is generally not appropriate when the parties present conflicting testimonial evidence. *See, e.g., Tolan v. Cotton*, 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895 (2014)(per curiam); *Jacobs*, 780 F.3d at 576 (“[C]ourts need not credit the moving party’s evidence when it is either contradicted or impeached by the nonmoving party”)(citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000))(emphasis in original); *Brown v. Charlotte Pipe & Foundry Co.*, 2011 WL 2421034, 2011 U.S. Dist. LEXIS 66005, at *8 (W.D.N.C. June 13, 2011)(“When resolution of issues of fact depends upon a determination of credibility, summary judgment is improper.”)(citing *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979)). This is because resolution of the underlying issue or issues of material fact almost always hinges on witness credibility, which is within the jury’s purview to determine. *See Tolan*, 134 S. Ct. at 1868 (“The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system.”); *Anderson*, 477 U.S. at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”). It is irrelevant whether the testimony comes through deposition testimony or through affidavit. *See, e.g., Davis*, 600 F.2d at 460 (“Although summary judgment under Rule 56 is a

useful device . . . it may not be invoked where, as here, the affidavits present conflicting versions of the facts which require credibility determinations.”).

Most evidence in this case is testimonial. Defendant, in fact, has put forward almost no documentary evidence beyond its employee handbook to support its motion. Further, each of Defendant’s essential witnesses concedes that effectively every key fact in this case is a matter of proverbial “she said/she said.” Summary judgment, therefore, is inappropriate in this case. Defendant’s motion should be denied and this matter should be submitted to a jury to hear the witnesses’ competing testimonies and make the necessary credibility determinations.

III. *Questions of Material Fact Preclude Summary Judgment on EEOC’s Harassment Claim.*

Title VII’s wide-sweeping prohibition against employment discrimination includes a ban against sex-based hostile work environments. *See, e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Under the hostile work environment theory, at summary judgment EEOC need only establish a genuine issue of material fact as to whether Wolfe was subjected to conduct which was: (1) based on Wolfe’s sex; (2) sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment; (3) unwelcome; and (4) imputable to Defendant. *See, Ocheltree v. Scollon Prods.*, 335 F.3d 325, 331 (4th Cir. 2003); *EEOC v. R&R Ventures*, 244 F.3d 334, 338 (4th Cir. 2001). EEOC meets this burden and, therefore, summary judgment must be denied with respect to EEOC’s hostile work environment claim.

a. Title VII protects Wolfe, a transgender female, based on Wolfe’s gender identity (i.e., Wolfe’s sex), regardless of whether Defendant conclusively knew that Wolfe is transgender.

i. Title VII protects transgender individuals from discrimination on the basis of gender identity.

While Defendant notes that neither the Supreme Court nor the Fourth Circuit have definitively stated that discrimination based on gender identity is prohibited by Title VII, Defendant does not argue this point. [ECF 29 p.11 at n.6, 17]. Defendant’s declination is well-measured, as both its own policies

and statutory interpretation support EEOC's position that discrimination based on gender identity is inherently discrimination based on sex, and therefore is unlawful under Title VII.⁶

Title VII prohibits employers from discriminating against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Sex and gender are inextricably linked, and therefore discrimination on the basis of gender identity is inherently discrimination on the basis of sex. [See App'x 12 pp.3-4, 11-12; App'x 13, Muehl 97:24-98:9 ("[U]nderstanding that sex and gender are distinct but related concepts is very basic 101-type information that anyone in my field should be able to discuss.")].⁷ This fluid interchangeability between sex and gender was articulated in the Supreme Court's seminal *Price Waterhouse* opinion. See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). The Court in *Price Waterhouse* declared that when Congress passed Title VII, it made the "simple but momentous announcement" that "**sex**," like other protected characteristics, is "not relevant" to the terms and conditions of employment; therefore, employers "may not take **gender** into account" with regard to establishing terms and conditions of employment. *Id.* at 239 (emphasis supplied).

⁶ Defendant's employment policies are in accord with the EEOC's position. Defendant's anti-harassment and discrimination policy, which states in relevant part, "[a]ny form of illegal harassment or discrimination that is related to an individual's . . . sex [or] gender . . . or any other characteristic protected by law is a violation of this policy," protects employees from discrimination based on gender identity. [ECF 28-2 p.16; App'x 14, Eubanks 42:6-23, 57:23-59:16, 167:13-168:1].

⁷ EEOC retained Karen Muehl, Ph.D., a counseling psychologist, as an expert witness in this case. Dr. Muehl's area of specialization is transgender and gender non-conforming clients. [App'x 12 p.22]. In addition to counseling this population in her private practice, Dr. Muehl has provided outreach and consultation services that specifically focus on trans-identified issues. [*Id.* pp.25-26]. Dr. Muehl is a member of the Charlotte Transgender Healthcare Group, World Professional Association for Transgender Health, and the American Psychological Association. [*Id.* p.21]. Defendant has not challenged Dr. Muehl's designation as an expert witness. Nor has Defendant identified or offered any rebuttal expert to contradict Dr. Muehl's methodology, credentials, or opinions. EEOC has submitted a copy of Dr. Muehl's report that contains redactions of personal, sensitive information. EEOC will submit an unredacted copy of Dr. Muehl's report for *in camera* review to chambers via email.

Given that sex and gender are virtually indistinguishable, it would be, for all intents and purposes, unnecessarily duplicative for Title VII to specially enumerate “gender identity” alongside “sex” as a protected characteristic.⁸

Not only is discrimination based on an individual’s gender identity inherently discrimination based on sex, it is also inherently based on sex stereotypes. *See* n.8 (all cites); *see also Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011)(collecting cases);⁹ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047-59 (7th Cir. 2017)(collecting cases); *cf. Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 345-47 (7th Cir. 2017)(analyzing discrimination based on sexual orientation). “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” *Price Waterhouse*, 490 U.S. at 251 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

Either as straightforward discrimination or under a stereotyping theory, Title VII protects transgender individuals, including Wolfe, from discrimination on the basis of sex, which includes one’s gender identity.

⁸ *See Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)(“[S]ex under Title VII encompasses both sex - that is, the biological differences between men and women - and gender.”); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)(“By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination.”); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008)(“[D]iscrimination on the basis of gender identity is literally discrimination ‘because of ... sex.’”); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. Mar. 18, 2016)(“Discrimination ‘because of sex,’ therefore, is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the distinction between male and female or discrimination because of the properties or characteristics by which individuals may be classified as male or female.”); *see also Chavez v. Credit Nation Auto Sales, LLC*, 641 Fed. Appx. 883, 884 (11th Cir. 2016)(“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”).

⁹ Although *Glenn* was an Equal Protection Clause case, the Eleventh Circuit made clear that its conclusion that the plaintiff’s discharge was sex discrimination would have been the same under Title VII. *See* 663 F.3d at 1321.

ii. Wolfe is a transgender female.

Wolfe is a transgender female. [App'x 1, Wolfe 171:8-172:13, 197:20-25; App'x 12 p.10]. While Wolfe identifies and usually presents as female, she is biologically and legally male. [App'x 1, Wolfe 197:24-198:5].¹⁰ Defendant cannot plausibly challenge Wolfe's self-identification as a transgender woman; but to the extent it does, this raises the first of many material questions of fact.¹¹ Although born male, Wolfe usually presents as female, but does not do so 100 percent of the time. [*Id.* at 198:6-199:8]. It is not uncommon for transgender individuals (such as Wolfe) who have not biologically transitioned or legally changed their name and sex identifiers to express both genders. [App'x 13, Muehl 94:13-95:14]. This is especially true in the workplace, where many transgender people hide or minimize their gender identity to avoid discrimination. [App'x 12 p.6]. There is more than sufficient evidence in the record for a jury to conclude that Wolfe is transgender.

iii. Defendant's understanding of Wolfe's correct gender identity or her status as transgender does not prevent EEOC from establishing a hostile work environment claim.

Defendant claims that while Wolfe was employed at Owen Drive, Defendant's employees had no knowledge Wolfe was transgender. [ECF 29 p. 2]. This claim, which is disputed by the record, is ultimately irrelevant to the analysis of EEOC's hostile work environment claim. Title VII protects

¹⁰ Dr. Muehl conducted a forensic interview of Wolfe on March 31, 2017. [App'x 12 pp.7-11]. The examination, which lasted approximately two hours, was conducted in a clinical interview format, similar to an intake interview Dr. Muehl would conduct with a new client. [*Id.* p.7; App'x 13, Muehl 50:15-52:13]. Dr. Muehl assessed Wolfe for gender dysphoria ("GD") using DSM-IV criteria, and determined that Wolfe "endorsed symptoms sufficient to meet the diagnostic criteria for [GD]." [App'x 12 pp.7-9; App'x 13, Muehl 53:13-54:18, 56:20-25]. While not all transgender individuals meet the criteria for GD, "[b]y definition, a person diagnosed with GD is transgender or gender nonconforming." [App'x 12 p.5]. Based on Dr. Muehl's forensic interview of Wolfe, Dr. Muehl "can't think of anything" that would cause her to doubt Wolfe's self-identification as a transgender female. [App'x 13, Muehl 70:16-73:17, 93:8-95:2].

¹¹ That Defendant attempts to argue "[d]uring the more than four years since Wolfe's employment with Bojangles' ended Wolfe has continued to *routinely* present as male in public" [ECF 29 p.2 (emphasis supplied)] by presenting seven pictures (one in which Wolfe is wearing a pink spaghetti-strap tank top and woman's choker necklace) posted on social media over the span of 42 months belies a continued fundamental misunderstanding of human gender identity and development, and specifically, the transgender experience.

employees even in situations where actionable discrimination is based on a protected characteristic, even if Defendant is mistaken or inaccurate in its perception of the protected characteristic.

There is a genuine issue of material fact as to whether Wolfe's gender identity was known to Wolfe's coworkers. Certain female coworkers referred to Wolfe as "Dee Dee"—a shortened nickname derived from Wolfe's preferred name, which is De'Ashia—and used feminine pronouns in reference to Wolfe. [App'x 1, Wolfe 190:2-190:22]. During Wolfe's employment, Wolfe shared pictures of Wolfe presenting as a woman with Defendant's employees, including Unit Director Riggins. [App'x 2, Riggins 25:3-10; App'x 3 p.10]. Further, Wolfe entered Owen Drive presenting as a woman on at least two occasions: in or about October 2012 wearing a woman's wig and on February 21, 2013 wearing woman's braids. [App'x 1, Wolfe 77:18-79:23; App'x 2, Riggins 78:8-9]. Defendant, in its position statement to the EEOC, noted that "[s]hortly after he was hired, Mr. Wolfe announced (to use his words) that he was a 'cross dresser.'" [App'x 3 p.2].

Even if Defendant's employees did not know that the correct label for Wolfe was "transgender," they were clear about one thing: Wolfe did *not* fit their expectations that biological males should act in conformity with their genders. [See ECF 29 n.3].¹² When Unit Director Riggins first hired Wolfe, Riggins believed Wolfe was a heterosexual male; however, Riggins admits her perception changed approximately six months later after Wolfe shared a picture of Wolfe presenting as a woman. [App'x 2, Riggins 24:23-25:10]. And six days prior to Wolfe's termination, Area Director Irwin described Wolfe as a "good employee but 'bisexual'" to then-Director of Human Resources Jeannine Eubanks. [App'x 4].

Regardless of whether Defendant correctly knew that Wolfe is transgender or merely thought Wolfe fit under a different label, Defendant remains liable under Title VII. That Defendant incorrectly conflated Wolfe's perceived sexual orientation with her gender identity or gender expression does not negate otherwise actionable discrimination. This "mistaken belief" principle can be seen in other Title VII contexts, most frequently race and national origin claims. *See, e.g., Jones v. UPS Ground Freight,*

¹² Even if Wolfe was a gay male, which both Wolfe and EEOC deny, she would still be subject to the protections of Title VII for the reasons discussed *supra* Part III(a)(i).

683 F.3d 1283, 1299 (11th Cir. 2012) (“[A] harasser’s use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability.”); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 401–02 (5th Cir. 2007)(collecting cases and holding that a Muslim man’s national-origin discrimination claim survived summary judgment even though his harassers did not know his country of origin); *see also EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 456–57, n.9 (5th Cir. 2013)(“We do not require a plaintiff to prop up his employer’s subjective discriminatory animus by proving that it was rooted in some objective truth; here, for example, that Woods was not, in fact, ‘manly.’ Rather, in considering the motivation behind a harasser’s behavior, we look to evidence of the harasser’s subjective view of the victim.”).

- b. There is sufficient evidence to establish a genuine issue of material fact as to whether Wolfe was subjected to conduct which was based on Wolfe’s sex and sufficiently severe or pervasive to alter the conditions of employment and was creating an abusive work environment.

Harassing conduct meets the “severe or pervasive” threshold when it creates an “environment [that] would reasonably be perceived, and is perceived, as hostile or abusive.” *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015)(quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)). “Whether the environment is objectively hostile or abusive is ‘judged from the perspective of a reasonable person in the plaintiff’s position.’” *Id.* (quoting *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). “That determination is made ‘by looking at all the circumstances,’ which ‘*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.’” *Id.* (quoting *Harris*)(emphasis supplied). While a hostile work environment may involve repeated conduct, even isolated incidents can suffice if sufficiently severe. *Id.* (holding a supervisor’s two uses of “porch monkey” was severe enough to create a hostile environment). “In measuring the severity of harassing conduct, the status of the harasser may be a *significant* factor — e.g., ‘a supervisor’s use of [a racial epithet] impacts the work environment far more severely than use by co-equals.’” *Id.* at 278 (quoting *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993))(emphasis

supplied). The Fourth Circuit holds that the proper inquiry is “not whether work has been impaired, but whether working conditions have been discriminatorily altered.” *EEOC v. R&R Ventures*, 244 F.3d 334, 340 (4th Cir. 2001).

Purposefully misgendering transgender individuals who are gender dysphoric (*e.g.*, such as referring to Wolfe as male, he, man, or boy) is pure anathema and can be derailing to people who are trying to live in accordance with their felt sense of gender. [*See* App’x 12 pp.5-6, 11].¹³ Purposefully misgendering alone is sufficiently severe to create a hostile work environment.

While employed at Defendant’s Owen Drive restaurant, Wolfe was repeatedly subjected to comments that struck at and diminished Wolfe’s gender identity. These comments were not only cruel, they were painful reminders to Wolfe that others refuse to accept a fact that is essential to Wolfe’s sense of self: that she is a woman. Just as egregious as the comments themselves is the fact that, more often than not, this abuse came from Wolfe’s *supervisors*¹⁴– the individuals responsible for protecting Wolfe from harassment and discrimination. The harassing environment that Wolfe experienced includes the following:¹⁵

- On one of Wolfe’s days off in or about October 2012,¹⁶ Wolfe came into Owen Drive wearing a woman’s wig. [App’x 1, Wolfe 77:18-79:23]. Unit Director Riggins saw Wolfe

¹³ It is notable that the Supreme Court recently rebuked two organizations for submitting *amicus* briefs which purposefully misgendered the transgender plaintiff in *G.G. v. Gloucester County School Board*, No. 16-273. [App’x 19].

¹⁴ “To be considered a supervisor, the employee need not have the final say as to the tangible employment action; instead, the employee’s decision may be ‘subject to approval by higher management.’” *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015)(quoting *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013)). Here, Unit Director Riggins and Assistant Unit Directors Locklear, Taylor, and Bowden were all supervisors of Wolfe.

¹⁵ To the extent any of Defendant’s witnesses deny Wolfe’s allegations, they create a genuine issue of material fact. However, at summary judgment, the Court must continue to construe all evidence in the light most favorable to the EEOC.

¹⁶ This is consistent with the general timeframe during which Riggins’ perception of Wolfe as a heterosexual male changed.

wearing the wig and told Wolfe that she (Wolfe) could never come into the restaurant dressed as a woman again. [*Id.*]

- When Wolfe would identify using her preferred female name, Riggins would correct Wolfe stating, “That’s a him. You are a boy.” [*Id.* at 128:12-16]. Likewise, Riggins repeatedly corrected coworkers who called Wolfe “Dee Dee”, which is an abbreviation of Wolfe’s preferred female name, De’Ashia, stating, “His name is Jonathan. That’s a boy.” [*Id.* at 190:2-191:5]. Riggins also repeatedly corrected coworkers who referred to Wolfe using feminine pronouns, stating, “that man [is] he, not she.” [*Id.*]
- On at least one occasion, Assistant Unit Director Bowden told Wolfe that Wolfe was “going to hell” because “God made [Wolfe] a man” and that that Wolfe needed to pray. [*Id.* at 192:18-193:7; *see also* App’x 2, Riggins 48:3-13].
- At some point between October 2012 and December 2012, Riggins moved Wolfe from working in the kitchen to head cashier, where she had direct contact with customers. [App’x 2, Riggins 55:18-21, 66:8-10]. Before doing so, Riggins told Wolfe that if Wolfe wanted to run the cash register, then Wolfe “needed to conform to the identity of a male, to be a male, walk, talk and act like a male.” [App’x 1, Wolfe 126:12-24].
- Around February 14, 2013, a coworker told Wolfe she should commit suicide because Wolfe is “gay.” [App’x 1, Wolfe 82:3-20, 85:3-9]. Wolfe complained to the on-duty supervisor, Assistant Unit Director Taylor, who told Wolfe “there was nothing that no one could really do.” [*Id.*].
- Assistant Unit Director Locklear called Wolfe “sissy” “about 50 or more” times and said, “You’re not a girl. Stop acting like a girl. What’s the purpose of being gay?” [App’x 5, Singleton 11:1-12:18, 35:17-23].¹⁷ As one of Wolfe’s coworkers, Shimika Singleton, testified, “Sissy is—

¹⁷ Testimony of a fact witness, such as Singleton, which tends to confirm the existence of a hostile work environment, is clearly relevant and admissible, even if this conduct was not reported or experienced by the victim. *See, e.g., EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 317 (4th Cir. 2008)(“While we must

was Janice's favorite word when it came to [Wolfe]." [Id. at 59:21-22]. Singleton knew the comments affected Wolfe because Wolfe would "just get quiet and shut down." [Id. at 13:8-22].

- Assistant Unit Director Taylor¹⁸ called and/or referred to Wolfe as a "punk" and "little sissy." [Id. at 49:10-50:10, 53:12-21]. Another of Wolfe's co-workers, "Dashawn", made sex-based comments about Wolfe. [Id. at 49:10-18].

This hostile environment, which Wolfe's supervisors actively and openly fostered, culminated into the events of February 21, 2013. It is uncontested that on that day, after Riggins had previously warned Wolfe never to enter Owen Drive dressed as a woman, Wolfe entered the restaurant wearing women's braids. Assistant Unit Director Locklear was the first supervisor to see Wolfe that day. Locklear expressed disgust at Wolfe's appearance and told Wolfe that Riggins was going to terminate Wolfe. [App'x 1, Wolfe 74:1-75:9; App'x 4; App'x 5, Singleton 11:1-11]. Locklear told Wolfe, "Why do you have those braids in your head? You're a boy. You're not a girl." [App'x 5, Singleton 11:1-11].

When Unit Director Riggins saw Wolfe, Riggins "was shaking her head in disagreement, and then the first word she said was 'no.' . . . [S]he told me that if I wanted to continue with being employed that I need to remove my braids." [App'x 1, Wolfe 75:10-18]. "***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.***" [Id. at Wolfe 76:3-8 (emphasis supplied)].

focus primarily 'on [victim's] personal experience,' comments made to others are also 'relevant to determining whether [victim] was subjected to' severe or pervasive religious harassment. For '[w]e are, after all, concerned with the 'environment' of workplace hostility, and whatever the contours of one's environment, they surely may exceed the individual dynamic between complainant and his [coworkers].'"(internal citations omitted); *Jackson v. Quanax Corp.*, 191 F.3d 647, 660-61 (6th Cir. 1999)("[I]n the sexual harassment context, this Court has deemed probative remarks that demeaned women generally while not demeaning any one woman in particular."); *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1275 (7th Cir. 1991)("Both of these examples help to fulfill the objective standard of a hostile work environment that provided fertile ground for an outgrowth of racial harassment."); *Johnson v. United Furniture Indus., Inc.*, No. 1:05cv317, 2007 U.S. Dist. LEXIS 37016, at *10-13 (N.D. Miss. May 21, 2007)(plaintiff's testimony buttressed by coworkers who witnessed harasser call plaintiff "n-word" behind plaintiff's back); see also *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997); *Madison v. IBP, Inc.*, 257 F.3d 780, 794 n.10 (8th Cir. 2001), overruled on other grounds, 536 U.S. 919 (2002)(instruction that jury "may consider harassment that Madison was unaware of, in determining intent, and whether the harassment was a part of the pattern and practice of harassment against her.").

¹⁸ Taylor was eventually trained as a Unit Director by Riggins and promoted to Unit Director of Defendant's Roanoke Rapids restaurant. [App'x 2, Riggins 130:11-17].

“Ms. Riggins told me . . . *I had to act like a male, dress, walk and talk like a male.*” [App’x 1, Wolfe 88:9-19 (emphasis supplied)]. Shift manager Singleton heard Unit Director Riggins say to Wolfe, “I hired you as a man so you’re going to act that way” and “make sure that when you come in that those braids aren’t in your head. Come in as I hired you.” [App’x 5, Singleton 16:13-17:2, 42:24-43:1]. While Unit Director Riggins denies making these comments directly to Wolfe (thereby creating a genuine issue of material fact), Riggins admits she responded as follows to Assistant Unit Director Locklear’s comment, “I guess next you’re going to let them wear miniskirts and stuff in here”:

A. That's when I made the comment to [Assistant Unit Director Locklear] and [Shift manager Singleton]. . . *I hired a man, so he's a man or something like that.*

Q. You said, "I hired a man, he's a man"?

A. Yeah.

Q. Why did you say that?

A. Because she said something about him coming to work in miniskirts.

[App’x 2, Riggins 85:13-86:3, 89:11-15, 91:12-20 (emphasis supplied)].

Although Unit Director Riggins describes the February 21 interaction as brief and civil, it was enough to incite Riggins to call Area Director Irwin “four or five” times and send one text. [App’x 2, Riggins 88:8-89:10; App’x 6, Irwin 28:16-29:25, 35:25-36:5]. Irwin, in response, spoke with Senior Director of Human Resources Eubanks. During the first conversation between Eubanks and Irwin, Irwin advised Eubanks that Wolfe is a “good employee, *but ‘bisexual’*”; that “[Wolfe] did come to the store in a mini-skirt & braids”; that Irwin thought “everyone was shocked and comments were made”; and that Riggins called Wolfe “probably with the intention to terminate Wolfe.” [App’x 4 (emphasis supplied); App’x 14, Eubanks 116:15-19, 118:6-10]. Irwin told Eubanks to expect a call from Wolfe. [App’x 14, Eubanks 116:11-14]. Wolfe did call Eubanks, as discussed in the next subsection.

Although Defendant’s current position is that Wolfe did not complain about harassment on February 21, in its response to Wolfe’s Charge of Discrimination, Defendant at one time claimed to have “commenced an immediate investigation of Mr. Wolfe’s complaint that included interviews of Bojangles’

employees who were working at the restaurant during Mr. Wolfe's visit on February 21.” [App’x 3 pp.3-4]. Eubanks testified that she believed Area Director Irwin was investigating the February 21 incident, stating “I would have anticipated that [Irwin] was talking to people, getting information, setting up meetings, things like that.” [App’x 14, Eubanks 140:5-17]. Irwin, however, admits she did not investigate and did not interview witnesses. [App’x 6, Irwin 47:13-15, 58:10-16].

The harassment that Wolfe endured—which was primarily perpetuated by *supervisors* and went straight to the core of her gender identity—is far more severe than conduct at issue in the pre- *Boyer-Liberto* cases upon which Defendant relies. See *Hartsell v. Duplex Prod., Inc.*, 123 F.3d 766, (4th Cir. 1997)(comments regarding stereotypical gender roles); *Singleton v. Dep’t of Corr. Educ.*, 115 F. App’x 119 (4th Cir. 2004)(coworker’s unwanted attention and compliments). Further, like the victim in *Boh Brothers*, Wolfe was a unique target of Defendant’s abuse. See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 461 (5th Cir. 2013)(noting the harassing conduct was reserved for the victim and not directed at other crew members).

- c. There is sufficient evidence to establish a genuine issue of material fact as to whether the conduct was unwelcome to Wolfe.¹⁹

The harassment was clearly unwelcome to Wolfe, who made numerous verbal complaints.²⁰ Specifically, the record evidence shows that Wolfe complained to Unit Director Riggins that Assistant Unit Director Bowden told Wolfe that Wolfe was going to hell and needed to pray because “God made me a man.” [App’x 1, Wolfe 192:16-25].²¹ Wolfe also complained to Area Director Irwin multiple times

¹⁹ EEOC also addresses Defendant’s welcomeness defense in its Memorandum in Support of Plaintiff EEOC’s Motion for Partial Summary Judgment, which EEOC incorporates as if repeated verbatim. [ECF 23 pp.11-15].

²⁰ To the extent any of Defendant’s witnesses deny any of Wolfe’s allegations, their conflicting testimony creates a genuine issue of material fact for a jury to resolve.

²¹ Riggins was aware that on at least one occasion Assistant Unit Director Bowden made comments that “upset” Wolfe. [App’x 2, Riggins 48:3-49:14]. Riggins denies Wolfe complained to her about Bowden, and claims she learned about Bowden’s comments from Assistant Unit Director Locklear. [*Id.*] Riggins does not recall the content of Bowden’s statements and, although the comments upset Wolfe, claims to have never discussed the same with Wolfe. [*Id.*] A genuine issue of material fact exists as to whether Wolfe complained to Riggins about Bowden.

beginning in October 2012 [App'x 1, Wolfe 81:6-9], again while working at Corporation Drive [*id.* at 191:21-192:10], and again on February 14, 2013²² —*approximately two weeks before Wolfe's formal termination*—when Wolfe called Irwin saying that she, Wolfe, was “scared,” “uncomfortable,” and hiding in a bathroom because she was being harassed by coworkers.²³ [App'x 6, Irwin 19:13-20:5, 90:23-94:18; *see also* App'x 3 p.3]. When the harassment reached a tipping point and before Wolfe was informally terminated, involuntarily transferred, and then formally terminated, Wolfe shared her problems and complaints with Senior Director of Human Resources Eubanks. [App'x 1, Wolfe 97:12-22; App'x 14, Eubanks 102:19-103:7]. To the extent Defendant raises a welcomeness defense, Wolfe's repeated complaints during her employment demonstrate that at a minimum there is a question of fact as to whether the conduct was welcome.

- d. There is sufficient evidence to establish a genuine issue of material fact as to whether the conduct at Defendant's Owen Drive restaurant is imputable to Defendant.

“Under Title VII, an employer's liability for such harassment may depend on the status of the harasser.” *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

If the harassing employee is the victim's coworker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a 'supervisor,' however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (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.

²² Defendant argues that this complaint occurred in October 2012. In doing so, Defendant both ignores its own witness's testimony and its own position statement to the EEOC, which both place the event in February 2013. Thus, Defendant creates a genuine issue of material fact. Because the district court must view the evidence in the light most favorable to the EEOC, the court must for summary judgment purposes assume this complaint occurred around February 14, 2013.

²³ Before contacting Irwin, Wolfe had complained about the coworker to the on-duty supervisor, Assistant Unit Director Taylor. [App'x 1, Wolfe 85:3-9]. Wolfe later complained about the coworker to Riggins. [*Id.* at 85:12-16].

Id. (citing *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). “[A]n employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.” *Id.* The putative supervisor “need not have the final say as to the tangible employment action; instead, the employee's decision may be ‘subject to approval by higher management.’” *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 278 (4th Cir. 2015)(quoting *Vance*).

In this case, Defendant is liable for harassment committed by its supervisors that culminated in a tangible employment action. Alternatively, Defendant is liable for Wolfe’s supervisors’ harassment because Defendant failed to prevent and correct the conduct, and is further liable for the harassment by Wolfe’s coworkers, which Defendant knew of but took no steps to stop.

i. Defendant is strictly liable because the harassment culminated in a tangible employment action.

Most of the complained of conduct was committed by Unit Director Riggins and Assistant Unit Directors Locklear, Taylor, and Bowden, all of whom are supervisors,²⁴ and culminated in at least four tangible employment actions. First, after Wolfe left the restaurant on February 21, Riggins did something she had never done before during Wolfe’s employment: she created a Work Incident Report, *i.e.* a disciplinary record, for Wolfe. [App’x 15; App’x 8, 30(b)(6) 98:11-100:18]. The purported basis for the Work Incident Report was Wolfe’s failure to appear for a meeting and make cinnamon twists on February 2 – *nineteen days* before Riggins created the Work Incident Report. [*Id.*] Second, on February 21, when Wolfe attempted to complain to Irwin about the events at Owen Drive, Irwin terminated Wolfe and hung up the phone before Wolfe could speak. [App’x 1, Wolfe 93:3-18]. Third, after revoking Wolfe’s termination approximately 30 minutes later, Irwin involuntarily transferred Wolfe to one of Defendant’s

²⁴ It is undisputed that Unit Director Riggins and Area Director Irwin are supervisors for liability purposes; both were empowered to take tangible employment actions against Wolfe. With regard to Assistant Unit Directors Locklear, Taylor, and Bowden, they had authority to terminate hourly employees for “blatant behavior” and authority to recommend employee terminations to Unit Director Riggins. [App’x 14, Eubanks 79:6-14]. Therefore, while the question is a closer call for the Assistant Unit Directors, viewing the evidence in the light most favorable to the EEOC requires the court to conclude that the Assistant Unit Directors were supervisors for liability purposes under *Vance* and *Boyer-Liberto*.

restaurants located on Raeford Road. [App'x 1, Wolfe 88:19-89:16, 94:2-12; App'x 10, Hall 10:5-19, 15:3-11]. Finally, on February 27 Wolfe was formally terminated in retaliation for complaining about the hostile work environment at Owen Drive. *See infra* at Part IV. Viewing the evidence in the light most favorable to the EEOC, because the harassment, which was mainly perpetuated by Wolfe's supervisors, resulted in one or more tangible employment actions, Defendant is strictly liable.

ii. Defendant is liable even if the conduct had not resulted in a tangible employment action because Defendant cannot establish either prong of the *Faragher/Ellerth* defense.

Even if the harassment had not culminated in a tangible employment action, there is a genuine issue of material fact as to whether Defendant can satisfy **both** prongs of its *Faragher/Ellerth* defense. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *see also Boyer-Liberto*, 786 F.3d at 278.

Defendant did have a policy; however, merely having a policy is not enough—it needs to be effectively communicated and effectively enforced. *See Faragher*, 524 U.S. at 811. “The institution and enforcement of [an anti-harassment] policy, in conjunction with an adequate complaint procedure, aid the employer in establishing that it has exercised reasonable care to prevent discrimination.” *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 187 (4th Cir. 2001)(internal quotation marks omitted). “However, the mere promulgation of an anti-harassment policy, no matter how well-conceived, will not suffice to show the requisite level of care where the employer has administered the policy in bad faith or has rendered it ineffectual by acting unreasonably.” *Id.* (internal quotation marks omitted); *see also EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 320 (4th Cir. 2008)(“While the adoption of an effective anti-harassment policy is an important factor in determining whether [an employer] exercised reasonable care, the policy must be effective in order to have meaningful value.” (internal quotation marks omitted)). An employer renders a facially satisfactory anti-harassment policy ineffectual by failing to promptly and effectively respond to complaints, especially complaints of repeated conduct. *EEOC v. Xerxes Corp.*, 639 F.3d 658, 669-70 (4th Cir. 2011)(“There is no ‘exhaustive list’ or ‘particular combination’ of remedial measures or steps that an employer need employ Among other things, we have considered the promptness of the employer’s investigation when complaints are made, whether offending employees were counseled or

disciplined for their actions, and whether the employer's response was actually effective.”)(internal citation omitted).

There is a genuine issue of material fact as to whether Defendant effectively communicated its policy. When Wolfe was initially hired, Riggins did not provide Wolfe with any substantive training on Defendant’s harassment policy or handbook. [App’x 1 , Wolfe 50:9-19, 55:7-56:4, 61:25-62:15]. Instead, Riggins merely gave Wolfe an envelope full of paperwork that Riggins did not review with Wolfe. [*Id.* at 50:17-51:11]. Wolfe, when presented with a copy of the handbook at her deposition, was not sure if the envelope of paperwork Riggins provided to Wolfe on Wolfe’s first day of work even contained a copy of Defendant’s employee handbook. [*Id.* at 57:7-19]. While Defendant claims to maintain management and hourly employee training records, it has failed to produce any documentary evidence showing if and when any employee (including Wolfe), supervisor, or manager received harassment training. [App’x 8, 30(b)(6) 39:7-16, 41:16-18, 42:10-12, App’x 9 Req. 14].²⁵ Shift manager Singleton states that employees did not receive harassment training at Owen Drive. [App’x 5, Singleton 55:8-18].

There is a further genuine issue of material fact as to whether Defendant effectively enforced its policy. Wolfe satisfied Defendant’s reporting requirements when she complained about the harassment at least five times prior to her termination. [See Part III(c), *supra*; App’x 14, Eubanks 51:21-52:6]. At least three of Wolfe’s complaints were to Area Director Irwin, *who in February 2013 threatened to terminate Wolfe while responding to a complaint in which Wolfe was “scared,” “uncomfortable,” and hiding in a bathroom because she was being harassed by coworkers.*²⁶ Wolfe also complained to Irwin that “[Riggins] was telling me that she hired me as a man, I got to stay a man if I'm going to work for her,” to which Irwin responded that she (Irwin) would “launch an investigation.” It was not until after

²⁵ Riggins testified that she received approximately one hour of harassment and handbook training in 2004, and training in 2010 on a number of topics to include harassment. [App’x 2, Riggins 12:4-14:5]. Irwin received harassment training in 2000 and in 2007, and did not receive additional harassment training until April 2013, approximately two months after Defendant terminated Wolfe. [App’x 6, Irwin 85:10-11, 86:5-8, 86:16-20].

²⁶ This complaint is sufficient notice under *Vance*’s negligence standard of liability for coworker harassment.

Wolfe was formally terminated that Wolfe learned Irwin had not investigated Wolfe's complaints. Viewing the evidence of Defendant's response, or lack thereof, to Wolfe's complaints, EEOC has established a material question of fact as to the first prong of Defendant's *Faragher/Ellerth* defense.

The evidence also raises a question of fact as to the second prong of Defendant's *Faragher/ Ellerth* defense. As detailed below, Wolfe complained about the harassment at least five times prior to her termination. She complained to her direct supervisor, she complained to her direct supervisor's supervisor, and she complained to the Senior Director of Human Resources. Therefore, taking the evidence in the light most favorable to the EEOC, there is a genuine issue of material fact as to whether Wolfe unreasonably failed to take advantage of any preventive or corrective opportunities that Defendant may have provided.

- e. The Court should deny Defendant's motion for summary judgment with regard to EEOC's harassment claim.

Viewing the evidence in the light most favorable to the EEOC, EEOC has established a genuine issue of material fact as to all elements of its hostile work environment claim and, therefore, Defendant's motion must be denied. Wolfe was subjected to an actionable hostile work environment in which multiple egregious comments were made—primarily by Wolfe's supervisors—about Wolfe's gender identity. Wolfe complained about the harassment multiple times, including six days prior to her formal termination, to multiple company representatives, including the Senior Director of Human Resources. Management usually did not react to Wolfe's complaints; but when they did, they threatened Wolfe with termination, terminated Wolfe then revoked the termination approximately 30 minutes later, and involuntarily transferred Wolfe before formally terminating her employment.

IV. Questions of Material Fact Preclude Summary Judgment as to EEOC's Retaliation Claim.

At summary judgment, in order to move forward with its retaliation claim EEOC need only establish a genuine issue of material fact as to whether (1) Wolfe engaged in protected activity, (2) Defendant took an adverse employment action against Wolfe, and (3) there is a causal link between the two events. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 271 (4th Cir. 2015)(quoting *EEOC v.*

Navy Fed. Credit Union, 424 F.3d 397, 405-06 (4th Cir. 2005)). EEOC meets this burden and, therefore, summary judgment must be denied with respect to EEOC’s retaliation claim.

“In the context of element one of a retaliation claim, an employee is protected when she opposes ‘not only . . . employment actions actually unlawful under Title VII but also employment actions [she] reasonably believes to be unlawful.’” *Id.* at 282 (quoting *Navy Federal*). “[A]n employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress.” *Id.* In other words, EEOC is not required to prove a harassment claim in order to establish a retaliation claim.

- a. There is sufficient evidence to establish a genuine issue of material fact as to whether Wolfe engaged in protected activity.

There is a genuine issue of material fact as to whether Wolfe engaged in protected activity. *See* Part III(c), *supra*. To reiterate the most salient points of the factual record:

- In or around October 2012, Wolfe complained to Unit Director Riggins about Assistant Unit Director Bowden telling Wolfe that Wolfe was going to hell and needed to pray because “God made me a man.” [App’x 1, Wolfe 192:18-193:7].²⁷
- Around October 2012, Wolfe complained to Irwin that Riggins had told Wolfe that she (Wolfe) could never come into the restaurant dressed as a woman again. [*Id.* at 81:6-9].
- Around January 2013, while on temporary assignment at Defendant’s Corporation Drive restaurant, and less than *two months* before Wolfe’s termination, Wolfe told Irwin that she (Wolfe) liked working at the Corporation Drive location because “people didn’t pick on me or try to correct me when I identified as a she.” [*Id.* at 191:21-192:10].
- Around February 14, 2013—*approximately two weeks before Wolfe’s formal termination*—Wolfe complained to Irwin about harassment from both a coworker (who told Wolfe to commit suicide because Wolfe is “gay”) and harassment from Unit Director Riggins. When responding

²⁷ *See* n.21, *supra*.

to the complaint, Irwin instructed Wolfe to “man up” and threatened to terminate Wolfe “no questions asked” if a similar incident occurred again. [*Id.* at 82:3-20, 83:4-14, 85:3-9; App’x 6, Irwin 19:13-20:5, 90:23-95:24; App’x 14, Eubanks 133:11-21; *see also* App’x 3 p.3]. Wolfe later complained to Riggins about the coworker. [App’x 1, Wolfe 85:12-16].

- On February 21, *six days* before Wolfe’s formal termination, Wolfe complained to Senior Director of Human Resources Eubanks about “some of the problems that [Wolfe] was having at work,” including “*derogatory remarks made to him* [sic] *because of sexual preference.*” [App’x 4 (emphasis supplied); App’x 1, Wolfe 97:12-22; App’x 14, Eubanks 102:19-103:7].

Taken in a light most favorable to EEOC, Wolfe’s complaints, independently and collectively, are sufficient to constitute protected activity. They are unequivocal oppositions to a hostile work environment based on sex that, at minimum, was forming or, as EEOC contends, was in existence at Owen Drive.

- b. Defendant admits to terminating Wolfe, and there is sufficient evidence to establish a genuine issue of material fact as to whether Defendant took at least three additional adverse employment actions against Wolfe.

Defendant admits that it subjected Wolfe to at least one adverse employment action, her termination on February 27, 2013, and therefore this element is established. [See ECF 1 ¶48; ECF 6 ¶48]. EEOC additionally notes that six days prior to Wolfe’s termination, on February 21, 2013, Defendant subjected Wolfe to at least three additional adverse employment actions: (1) for the first time in her tenure, Wolfe was formally disciplined by Unit Director Riggins; (2) Wolfe was terminated by Area Director Irwin, who revoked the termination approximately 30 minutes later; and (3) Wolfe, who lacked reliable transportation, was involuntarily transferred from the Owen Drive restaurant to a location that was further away from her home. *See* Part III(d)(i), *supra*; *see also* *Munday v. Waste Mgt., Inc.*, 126 F.3d 239, 243 (4th Cir 1997)(relying on *DiMeglio v. Haines*, 45 F.3d 790, 804 n.6 (4th Cir. 1995), for the proposition that reassignment may constitute an adverse employment action).

- c. There is sufficient evidence to establish a genuine issue of material fact as to whether a causal connection exists between Wolfe’s protected activity and the multiple adverse employment actions.

“Normally, very little evidence of a causal connection is required to establish a *prima facie* case.” *Tinsley v. First Union Nat’l Bank*, 155 F.3d 435, 443 (4th Cir. 1998). “[M]erely the closeness in time between the filing of a discrimination charge and an employer’s firing an employee is sufficient to make a *prima facie* case of causality.” *Id.*; see also *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)(holding that “very close” temporal proximity between the employer’s knowledge of protected activity and the adverse employment action is sufficient evidence of causality to establish a *prima facie* case); *King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003)(permitting an inference of causation where a plaintiff was terminated two months and two weeks after engaging in protected activity). Even where temporal proximity cannot be established, a plaintiff can demonstrate a genuine issue of material fact by presenting evidence that the adverse employment action was a reaction to protected activity. See *Bhella v. England*, 91 Fed. App’x 835, 849 (4th Cir. 2004).

Taking the facts in a light most favorable to EEOC, temporal proximity is easily established. *Six days* before Wolfe was terminated, Wolfe complained to Senior Director of Human Resources Eubanks about “some of the problems that [Wolfe] was having at work, ” including “*derogatory remarks made to him* [sic] *because of sexual preference.*” Approximately *two weeks* before Wolfe’s formal termination, Wolfe complained to Irwin about harassment from both a coworker (who told Wolfe to commit suicide because Wolfe is “gay”) and Unit Director Riggins. And less than *two months* before Wolfe’s termination, Wolfe told Irwin that she (Wolfe) liked working at the Corporation Drive location because “people didn’t pick on me or try to correct me when I identified as a she.”²⁸

- d. There is sufficient evidence to establish a genuine issue of material fact as to whether Defendant’s proffered legitimate reason for terminating Wolfe is pretextual.

Wolfe was fired after nine months without any performance issues – except of course for the write up that Riggins prepared on February 21 for Wolfe’s supposed failure to make cinnamon twists 19

²⁸ There exists ample additional evidence in the record to support the requisite causal connection, most notably Area Director Irwin’s threat to terminate Wolfe “no questions asked” when responding to Wolfe’s harassment complaints approximately *two weeks* before Wolfe’s formal termination. However, given space constraints and the clear satisfaction of temporal proximity, EEOC foregoes this discussion.

days earlier. The sole decisionmaker, Area Director Irwin, asserts that Wolfe was terminated for being disrespectful during a phone call on February 27, 2013. Area Director Irwin was unequivocal at deposition: “I terminated [Wolfe] *solely* for being disrespectful and cursing at me.” [App’x 6, Irwin 121:7-8 (emphasis supplied)]. Irwin claims that Wolfe cursed at Irwin “nonstop” or “nine or ten” times on February 27, which was out of character for Wolfe. [App’x 6, Irwin 21:16-22:16]. Further, Irwin testified that she had no intention of terminating Wolfe for entering the Owen Drive restaurant on February 27, and that **Wolfe was allowed to be in the Owen Drive restaurant on February 27**. [App’x 6, Irwin 40:12-17, 82:19-83:18].

Only one other person, Wolfe, was on that call, and Wolfe denies cursing and disrespecting Irwin. Wolfe states that Irwin terminated Wolfe then hung up the phone before Wolfe had the opportunity to object to the termination, let alone curse. [App’x 1, Wolfe 104:10-15]. This was similar to the phone call on February 21, during which Irwin called, terminated Wolfe, and then hung up before Wolfe could speak. [*Id.* at 93:3-18]. Because each witness’s credibility must be evaluated to resolve this question of fact, summary judgment must be denied.

Beyond competing testimony, there is ample record evidence from which a jury could conclude that Irwin’s explanation is a pretext for retaliation. None of the documentary evidence in the record, including Defendant’s position statement to the EEOC; a February 28, 2013 email from Irwin to Senior Director of Human Resources Eubanks; Eubanks’ handwritten notes from a conversation with Irwin; and an internal record dictated to then-Unit Director Bowden by Irwin support Irwin’s unambiguous testimony that Wolfe cursed at Irwin, even once. [*See* App’x 3, 4, 7, 18; App’x 8, 30(b)(6) 61:21-62:5, 100:19-101:19; ECF 28-3 ¶16]. If it were true that Wolfe cursed at Irwin “nonstop” or “nine or ten” times during a phone call, that would certainly be egregious—and a reasonable person would expect that detail to be documented *somewhere*. The absence of any corroborating documentation to support Irwin’s contention begs the question: did it really happen that way?

In direct opposition to Irwin, Defendant maintains that “[Wolfe] was terminated for disruptive behavior, not for the use of inappropriate language.” [App’x 8, 30(b)(6) 88:1-7]. Further, under

Defendant's version of events, Irwin made the decision to terminate Wolfe based *solely* on Unit Director Riggins' description of the events of February 27 and *without* speaking with Wolfe. [App'x 3 p.4].

As with Irwin's explanation, Defendant's proffered reason is undercut by the documentary evidence in this case. There are only two pieces of non-testimonial evidence regarding the events of February 27, 2013 at Owen Drive. First, is Unit Director Riggins' statement. [App'x 16]. The statement—notably— describes Wolfe as “mumbling,” and does not reference or allude to Wolfe being loud or interrupting customer service. Riggins also states, “this is not the first time he has lied, *I did not ask him anything about his hair cause I really don't care about his hair . . .*” (emphasis supplied). Second, is another statement written by Christy McDonald, an hourly employee at Owen Drive. [App'x 17]. Like Riggins, McDonald does not reference or allude to Wolfe being loud or disrupting customer service. Based on the absence of evidence in these statements, a reasonable jury could conclude that Wolfe was not loud and did not disrupt operations on February 27, 2013.

Whatever Defendant's actual proffered reason, there is ample evidence that, when viewed in the light most favorable to the EEOC, create a genuine issue of fact as to whether that reason is pretextual. Defendant's explanation has shifted in meaningful (not minimal) ways over time and has been in stark contrast to the testimony of Area Director Irwin, the person Defendant claims was solely responsible for the decision to terminate Wolfe. Defendant's inconsistent justifications alone are evidence of pretext, and therefore are grounds for denying summary judgment. *See Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 574-75 (4th Cir. 2015)(quoting *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852-53 (4th Cir. 2001)) (“The fact that an employer ‘has offered different justifications at different times for [an adverse employment action] is, in and of itself, probative of pretext.’”).

A reasonable jury could also find in favor of the EEOC in light of evidence that Defendant's human resources management recognized Wolfe's termination was problematic and began second-guessing Irwin's decision, including by consulting their attorneys. The record shows that the day after Wolfe was terminated, Senior Director of Human Resources Eubanks was concerned enough to consult an attorney about whether there is coverage for gender based discrimination or stereotypes in the state of

North Carolina. [App'x 4; App'x 14, Eubanks 82:13-21, 139:14-142:4]. Eubanks admitted she “wasn't convinced there was a reason to terminate [Wolfe]” and believed Irwin was still “on a fact-finding mission at that point.” [App'x 14, Eubanks 140:7-8]. Eubanks' supervisor, Senior Vice President of Human Resources Vickie Smith, also was not convinced that Wolfe's termination was legitimate. Smith “was questioning why we wouldn't let him work with braids. If we allowed women to work with long hair, as long as it is restrained, why wouldn't we let him?” [App'x 7]. Smith's question was fair, given that a number of women at Owen Drive had long braids, and one man had “dreads that's real long down his back” that were similar to Wolfe's braids. [App'x 5, Singleton 17:3-18:10, 57:11-58:2]. Given the evidence that both Eubanks and Smith thought termination was not clearly warranted, a reasonable jury could determine that it was not, and that Irwin, the sole decision maker, is not credible. More specifically, a jury could conclude that Irwin made up her claim that Wolfe was disrespectful and, instead, find that when Irwin fired Wolfe, she was making good on her earlier threat and attempt to terminate Wolfe, and that Defendant's proffered reasons otherwise are pretext for retaliation.²⁹

- e. The court should deny Defendant's motion for summary judgment as to EEOC's retaliation claim.

Viewing the evidence in the light most favorable to the EEOC, EEOC has established a genuine issue of material fact as to all elements of its claim and, therefore, Defendant's motion must be denied. Wolfe made repeated complaints about the harassment at Owen Drive. Instead of addressing Wolfe's complaints, Wolfe was threatened with termination and, approximately two weeks later, she was actually terminated. Whether or not the sole decisionmaker's reason for terminating Wolfe is believable is a question of fact that can only be decided by a jury. To the extent Defendant has embellished those reasons, Defendant's contradictory explanations for its conduct toward Wolfe do not pass muster, and the documentary evidence in this case tells the truth: Wolfe was subjected to multiple adverse employment

²⁹ Wolfe's termination record states that she is eligible for rehire, in contravention of Defendant's policy that all employees who are terminated for cause are not eligible for rehire. [App'x 18; App'x 14, Eubanks 53:22-54:3].

actions because she complained about gender stereotypes and the way her supervisors and coworkers treated her because they felt she did not conform to those stereotypes.

V. Conclusion

As the record evidence shows, this is a case in which Defendant's managers perpetuated a discriminatory and hostile work environment for Wolfe and subjected Wolfe to offensive comments targeting the core of her identity as female. Management, specifically Unit Director Riggins and Assistant Unit Director Locklear, reacted negatively to Wolfe's presentation as a female, and that reaction reached a crescendo and culminated in tangible employment actions when Wolfe entered Owen Drive with long feminine braids. The court should reject Defendant's attempt to reframe the dispute as a disagreement over dress code or Wolfe's own allegedly disrespectful conduct (which Wolfe denies). Viewing the evidence in the light most favorable to EEOC, a reasonable jury could conclude that management objected to Wolfe's gender identity, harassed her because of it, and did not want to deal with a transgender employee who was increasingly presenting as a woman and more consistently complaining about the harassment.

For the reasons discussed above, Defendant's Motion for Summary Judgment should be denied *in toto*. All of EEOC's claims should proceed to a jury for determination.

Filed this the 17th day of August, 2017.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2017, I electronically filed the above **PLAINTIFF EEOC'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR 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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