UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

ANNSHAREE WEBB-HARRISON, Plaintiff, -vs- ASSOCIATES ASSET RECOVERY, LLC, TONY COOPER, and MICHELLE ROGERS, Defendants.	Civil Action No. 4:23-cv-3812-JD-TER **REPORT AND RECOMMENDATION**

I. INTRODUCTION

This action arises from Plaintiff's employment with Defendant Associates Asset Recovery, LLC (AAR). She alleges causes of action for sex and race discrimination, retaliation, and hostile work environment in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. She also asserts state law causes of action for intentional infliction of emotional distress as to all Defendants, assault as to AAR and Cooper, and battery as to AAR and Cooper. Presently before the Court is Defendants' Motion for Summary Judgment (ECF No. 34). Plaintiff filed a Response (ECF No. 38), and Defendants filed a Reply (ECF No. 39). All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(d), DSC. This report and recommendation is entered for review by the district judge.

II. FACTS

Associates Asset Recovery is a repossession company that specializes in recovering

various types of collateral, including vehicles, for financial institutions and other clients. Cooper Dep. 12 (ECF No. 38-16). AAR's corporate office is located in Florence, South Carolina, and it has twenty-five other staffed locations throughout Georgia, South Carolina, and North Carolina. Employee Handbook (ECF No. 38-15).

Plaintiff is a 55 year-old, African American female, who was employed by AAR from March 18, 2019, until June 4, 2021. Pl. Dep. 30-31 (ECF No. 38-19). During that time, she worked in various positions in the Florence corporate office. 30(b)(6) Dep. 23-25 (ECF No. 38-17). When she first started with AAR in March of 2019, she worked as a customer service representative. Def. Statement[1] p. 1 (ECF No. 38-3). She was later transferred to the Digital Recognition Network (DRN) department[2], working under Lisa Frazier (Caucasian female). Def. Statement p. 1-2. Sometime thereafter, she was transferred to the Billing Department under Debbie Cooper[3] (Caucasian female). Def. Statement p. 1.

The manager over the Florence location was Michelle Rogers[4] (Caucasian female). Chain of Command (ECF No. 38-9); 30(b)(6) Dep. 23-24. Rogers reported to Brandy Hayes (Caucasian female) and Shane Foster (Caucasian male). 30(b)(6) Dep. 23-24. Part of Foster's duties included receiving and investigating employee complaints. 30(b)(6) Dep. 13. Hayes and Foster reported to Tony Cooper (Caucasian male), the owner of AAR.[5] Cooper Dep. 18. Tammy Reason is Cooper's wife and also has ownership in AAR. Cooper Dep. 11. Cooper was heavily involved

1 It is not clear for what purpose this five-page statement was drafted, but it is signed by Cooper, Rogers, and Reason. Both Plaintiff and Defendants refer to the statement as "Defendant's Answer" and cite to it without objection.
2 Also known as the LPR Recovery Department. Def. Statement p. 1.
3 Debbie is also known as Debbie Hardee but is mostly frequently referred to as "Debbie Cooper" throughout the record. To distinguish Debbie Cooper from Tony Cooper, the court will refer to her as "Debbie."
4 Michelle's last name is spelled both "Rogers" and "Rodgers" throughout the record.
5 Plaintiff asserts that Defendants have provided conflicting responses as to who owns AAR, but Cooper holds himself out as the owner of AAR and its parent company, PAR Holding, LLC.

in the day-to-day operations of the business. Cooper Dep. 18.

The employee handbook provides that AAR "has a zero-tolerance policy for workplace violence, verbal and nonverbal threats and related actions." Employee Handbook p. 18. AAR's Anti-Discrimination and Harassment policy states, in part:

> Company policy prohibits unlawful discrimination and harassment based on race, color, creed, sex (including pregnancy), religion (including religious dress or religious grooming), age, national origin or ancestry, physical, visual or mental disability, medical condition, genetic information, sexual orientation, or any other consideration made unlawful by federal, state or local laws. All such discrimination and harassment is unlawful and prohibited by the Company. If you feel you have been subject to discrimination or harassment, please notify the Company immediately.

Employee Handbook p. 5. It further provides that "[i]f you feel that you have been discriminated against, harassed or retaliated against, you must immediately report any such incident to the Company. You can contact human resources, your immediate manager or any other Company manager to report your complaint. You will not be retaliated against for making a complaint." Employee Handbook p. 5.

At some point during her employment[6], Plaintiff asserts that she could hear Rogers calling her names, including "nigger," "black bitch," "bitch," and "cunt." Pl. Dep. 73-74. When she reported this to Debbie, Debbie told her that she would talk to Cooper about it, but in the meantime, she could use headphones to block out Rogers's comments. Pl. Dep. 187-88. She asserts that the comments continued after she made the complaint. Pl. Dep. 188. Rogers denies making any of these comments. Rogers Dep. 40, 92 (ECF No. 34-10).

In October of 2020, Plaintiff became aware that a coworker, Drew Andrews, called Plaintiff a "nigger" and used other threatening and offensive language in a text message to Frazier.

6 It is not clear from the record when Rogers made these comments or when Plaintiff reported them to Debbie.

30(b)(6) Dep. 60-61. Frazier showed the text message to Plaintiff. 30(b)(6) Dep. 61. Plaintiff reported it to her supervisor[7], and an investigation was conducted. Formal Complaint Investigation Report (ECF No. 38-7). Andrews was given a two-day suspension. Letter to Andrews (ECF No. 38-8).

Subsequent to Plaintiff's complaint, Rogers began criticizing Plaintiff's work and commenting that Plaintiff "didn't know [her] place." Pl. Dep. 70-71. When Plaintiff's direct supervisor, Debbie, supported Plaintiff and told Rogers that Plaintiff was doing as she had been told, Rogers called Debbie a "nigger-lover" in front of Plaintiff and that Cooper was going to have to choose between her and Plaintiff. Pl. Dep. 72-73; Graham Email[8] (ECF No. 38-4). Rogers denies making the statement. Rogers Dep. 19 (ECF No. 38-18). Plaintiff complained about this statement to Foster, who asserts that he discussed the matter with Howard Williamson, the Compliance Manager, and the Human Resources manager at the time, and looked into the matter. Foster Aff, ¶ 9 (ECF No. 38-3). He avers that they were not able to establish that it occurred. Foster Aff. ¶ 9. Defendant's Rule 30(b)(6) designee testified that she was unable to locate any documentation regarding this complaint and investigation. 30(b)(6) Dep. 35-36, 67.

Soon after, Cooper held a meeting with Plaintiff, Rogers, and Debbie and decided to transfer Plaintiff to the Digital Recognition Network (DRN) department, under the supervision of Frazier. Frazier Aff. ¶ 8 (ECF No. 38-2). Frazier found Plaintiff to be a good worker, and Plaintiff helped Frazier with many tasks, including providing her input with respect to hiring.

7 Plaintiff does not specifically identify the supervisor to whom she reported it.

8 Graham appears to be a coworker of Plaintiff, who sent an email describing the unprofessional atmosphere at AAR. The statement is difficult to understand in places. Graham states "When the incident my supervisor who at that time was Michelle and her so-called Coast supervisor I guess that we can call her tiny Michelle made a comment because he was she was upset with [Plaintiff] and Miss Debbie and call Ms. Debbie a nigger lover didn't shock me she said it did shock me that she said it out loud." Graham Email.

Frazier Aff. ¶ 9. While Plaintiff was working in Frazier's department, Tammy Reason called Frazier in her office and told her to stop hiring "dark colors" and to stop having Plaintiff assist her in hiring decisions because she is a person who is a "dark color." Frazier Aff. ¶ 10. Rogers also called Frazier a "nigger lover" because Frazier stood up for Plaintiff and did not mind working with her. Frazier Aff. ¶ 13. The evidence in the record does not indicate whether Plaintiff heard this comment or was even aware of it, or, if she was, whether she reported it to anyone. In addition, Cooper told Frazier not to speak to or help Plaintiff with any of her work. Frazier Aff. ¶ 12.

While in the DRN department, Plaintiff began receiving anonymous, racially offensive and threatening text messages[9] through the TextNow application.[10] Text Messages (ECF No. 38-1). She received such messages on November 4, 2020, November 5, 2020, November 19, 2020, January 24, 2021, and February 12, 2021. Text Messages. These messages referred to Plaintiff as a "slave," "Porch monkey," "nigger," and "bitch." Text Messages. Based on the content of the messages, the names being used, and the mention of recent events that occurred in the office, Plaintiff was convinced the messages were coming from an AAR employee or employees but she could not be sure who they were from because they were all anonymous. Pl. Dep. 98.

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9 Examples of these text messages include,

> On yo knees beggn when he done want you gone? Ya back actin like a slave. Pull yo head out it caus he want the niggers gone. It Fuckn racial and you too dumb to see. He givin new guy yo spot dat don't no shit. It all race caus no nig smart enough to manage. He start that boy dat don't no shit at $15 hour. Wake up bitch

Text Messages.

10 Some employees at AAR used a text messaging system called TextNow to communicate with other employees. By using the TextNow application, a person can send a text message to another's phone or computer and the recipient of the text message would not be aware of the sender's true phone number. The TextNow system did not require a separate application and text messages could be sent directly from a person's computer by accessing the TextNow application from a web browser. Some employees found TextNow easier to use because they could communicate with other employees from their computer rather than their phone as AAR discouraged the use of personal cell phones at work. 30(b)(6) Dep. 47; Cooper Dep. 93-94.

Plaintiff asserts that she notified Hayes, Frazier, Foster, and Cooper of the messages. Pl. Dep. 77-79. Foster avers Plaintiff only complained to him about the text message from Andrews and about Rogers calling Debbie a "nigger lover." Foster Aff. ¶¶ 7, 9. Cooper testified that Plaintiff showed him several messages of this nature, though he could not specifically identify the messages when shown. Cooper Dep. 31-32. He testified that he was "getting burned up with these text messages," too, and Rogers received some as well. Cooper Dep. 32, 59-60; Def. Statement (ECF No. 38-5) (noting that members of management were receiving similar text messages, regardless of race). The contents of the text messages received by Cooper and Rogers are not in the record. Cooper could not figure out who was sending the messages, and the police said there was no way for them to find out. Cooper Dep. 32. On February 24, 2021, a corporate officer meeting was held, and the minutes state "Tony read text messages sent to me." Feb. 24, 2021, Meeting Minutes. Though Plaintiff believes the text messages at issue during the meeting were the ones sent to her, Hayes, who took the minutes, testified that the text messages discussed at the meeting addressed a bedbug issue.[11] 30(b)(6) Dep. 46.

Plaintiff alleged in her complaint that Cooper told her to modify the pay records of black drivers so they would be paid less than other drivers. Compl. ¶ 24. However, in her deposition Plaintiff stated, "[t]he one I was told to change, that one was Jackie Robinson." Pl. Dep. 85. She also testified that, "[t]here were other black drivers than Jackie Robinson but Mr. Cooper only requested Jackie Robinson's pay be decreased." Pl. Dep. 85.

On or about June 3, 2021, Plaintiff met with Cooper in his office to discuss an issue related to her pay. Pl. Dep. 151. Plaintiff testified that Cooper had promised her a two-dollar increase

11 The next line in the minutes states "Tony addressed what he has done on bed bug issues." Feb. 24, 2021, Meeting Minutes.

in hourly pay to take on Debbie's position while she was on leave. Pl. Dep. 34-36. However, Foster avers that the meeting was about Plaintiff receiving a twenty-five cent hourly raise instead of a fifty cent hourly wage, because Cooper believed Plaintiff "did not deserve a fifty cent raise." Foster Aff. ¶ 5. He suggested that Plaintiff talk to Cooper about it. Foster Aff. ¶ 5. Foster avers that he went to Cooper's office with her, Foster Aff. ¶ 5, but Plaintiff testified that Debbie was in the office with her and no one else. Pl. Dep. 35. The conversation became very heated. Foster Aff. 5. Foster avers that Plaintiff "is a direct person and [Cooper] became upset and aggressive." Foster Aff. ¶ 5. Plaintiff asserts that Cooper pinned her up against a wall and spit on her. Pl. Dep. 34. She testified that she "was pinned up against the wall with him blocking me . . . [and] [y]elling and spitting in my face to where I couldn't move to the left or to the right or forward." Pl. Dep. 34. When asked if Cooper unintentionally had some "spittle" fly from his mouth as he was talking, Plaintiff testified "I didn't feel it was that." Pl. Dep. 35.

Foster avers that he was present during the conversation between Plaintiff and Cooper and he did not see Cooper spit on her, though he suggests Cooper could have been so angry that he spit while talking to her. Foster Aff. ¶ 5. Foster avers that Cooper pulled $100 out of his pocket and offered it to Plaintiff but she refused it. Foster Aff. ¶ 5. Plaintiff immediately left the office, and Debbie texted her to ask her if she was ok and whether she was coming back. Text Messages. Plaintiff responded, "[n]o my pressure is up my head is hurting just can't." Text Messages. Debbie responded "[t]his has been the most stressful day ever." Text Messages. The following day, Debbie again texted Plaintiff to ask if she was coming in, to which Plaintiff responded "Sorry mrs Debbie my pressure is up and I'm not coming I really don't like how things happened in the office Wednesday I should never had to go through all that for what I work for Tony wouldn't

even except someone dismissive not being paid his money once I tell him he make it my fault really." Text Messages.

Cooper has a much different recollection of his last meeting with Plaintiff. He testified that she called him to the office where she worked and was crying because she was in a bind with her checking account, which was in the negative. Cooper Dep. 25. He offered her the money he had on him, maybe $300, gave it to her, and told her that if she needed more money to let him know. Cooper Dep. 25. Plaintiff gave him a hug and told him she appreciated his help. Cooper Dep. 28.

Plaintiff did not return to AAR following the June 3, 2021, meeting with Cooper. She alleges that she was constructively discharged from her employment.

III. STANDARD OF REVIEW

Under Fed.R.Civ.P. 56, the moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. Id. Once the moving party has brought into question whether there is a genuine dispute for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine dispute for trial. Fed.R.Civ.P. 56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 247-48 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Barber v. Hosp. Corp. of Am., 977 F.2d 874-75 (4th Cir. 1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993).

To show that a genuine dispute of material fact exists, a party may not rest upon the mere allegations or denials of his pleadings. See Celotex, 477 U.S. at 324. Rather, the party must present evidence supporting his or her position by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed.R.Civ.P. 56(c)(1)(A); see also Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir. 1994); Orsi v. Kickwood, 999 F.2d 86 (4th Cir. 1993); Local Rules 7.04, 7.05, D.S.C.

IV. DISCUSSION

A. Discrimination and Retaliation

Title VII makes it "an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...." 42 U.S.C. § 2000e–2(a)(1). Section 1981 states, in relevant part, that "[a]ll persons ... shall have the same right ... to make and enforce

contracts ... as is enjoyed by white citizens." 42 U.S.C § 1981. The elements to establish race discrimination are the same under Title VII and § 1981. Love-Lane v. Martin, 355 F.3d 766, 786 (4th Cir. 2004); Guessous v. Fairview Prop. Invs., LLC, 828 F.3d 208, 217 (4th Cir. 2016) (explaining the elements required to establish race discrimination and retaliation are the same under Title VII and § 1981).

Title VII also makes it an "unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Further, § 1981 encompasses retaliation claims as well. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 446, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008)). The elements to establish retaliation are the same under Title VII and § 1981. Love-Lane, 355 F.3d at 786; Guessous, 828 F.3d at 217 (explaining the elements required to establish race discrimination and retaliation are the same under Title VII and § 1981).

A plaintiff asserting a claim of unlawful employment discrimination may proceed through two avenues of proof. First, he may establish through direct or circumstantial proof that a protected characteristic such as race was a motivating factor in the employer's adverse decision. See Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005). When direct evidence is lacking, a plaintiff may proceed under the burden-shifting proof scheme established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this burden-shifting scheme, Plaintiff has the initial burden of establishing a prima facie case of discrimination, which "var[ies] depending on the nature of the case." Briggs v. Waters,

484 F. Supp. 2d 466, 477 (E.D. Va. 2007).[12] Nevertheless, whether Plaintiff presents direct evidence of discrimination or chooses to engage in the burden-shifting analysis, she must show that she suffered an adverse employment action. See, e.g., Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284 (4th Cir. 2004)) (holding that to show race discrimination by direct evidence, a plaintiff typically must show discriminatory motivation on the part of the decisionmaker involved in the adverse employment action); Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643, 649-650 (4th Cir. 2021) (listing adverse employment action as one of the required elements to establish a prima facie case of discrimination).

1. Adverse Employment Action

In the discrimination context, "an adverse employment action is a discriminatory act that adversely affect[s] the terms, conditions, or benefits of the plaintiff's employment." Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation and internal quotation marks omitted). The Supreme Court of the United States has recently held that a plaintiff does not have to show that the harm incurred was "significant." Muldrow v. City of St. Louis, Missouri, 601 U.S. 346, 355, 144 S. Ct. 967, 974, 218 L. Ed. 2d 322 (2024). An employee need not show that the harm was significant, serious, substantial, "or any similar adjective suggesting that the

12 Justice Thomas, in his dissent and concurrence in two recent Supreme Court decisions, has questioned the viability of the "judge-made" burden-shifting proof scheme set forth in McDonnell Douglas, especially at summary judgment stage, noting that it was originally developed for use at a bench trial. See Hittle v. City of Stockton, 45 S.Ct. 759, 760–761 (2025) (J. Thomas dissent); Ames v. Ohio Dep't of Youth Servs., No. 23-1039, 2025 WL 1583264, at *9 (U.S. June 5, 2025) (J. Thomas concurrence). He notes that the Supreme Court has never required the use of or even held that the McDonnell Douglas framework is appropriate at the summary judgment stage. Ames, 2025 WL 1583264, at *9. In his concurrence in Ames, Thomas notes that the issue was not squarely before the Court at that time, but, until it is, "litigants and lower courts are free to proceed without the McDonnell Douglas framework," and to "resolve summary judgment motions [in Title VII cases] by applying the straightforward text of Rule 56." Ames, 2025 WL 1583264, at *12. In the absence of binding authority discontinuing the use of McDonnell Douglas at the summary judgment stage for Title VII cases, the undersigned will continue to do so especially where, as here, the parties do.

disadvantage to the employee must exceed a heightened bar." Id. She must simply show "some harm respecting an identifiable term or condition of employment." Id.

> Plaintiff points to several instances of adverse employment actions in her brief:
>
> > First, she was transferred to the DRN department after she made complaints about the racially offensive comments she heard from Andrews, Rogers, and other AAR employees. Second, subsequent to her complaints, Ms. Harrison was not given the raise she was promised. Third, Ms. Harrison's role in the DRN department was diminished and she was restricted from providing input to Frazier with regard to hiring in the DRN department. Fourth, Chris Hyatt (white male) was selected to lead the DRN department over Plaintiff, who was more qualified than Hyatt. Fifth, the hostile environment created by Cooper, Rogers, and AAR employees resulted in Plaintiff's termination by way of constructive discharge. Each of these are instances of adverse employment actions taken against Ms. Harrison.

Pl. Resp. p. 20 (ECF No. 38). Though Plaintiff lists these various employment actions, she does not discuss how or why they should be considered "adverse."

a. Transfers

It is undisputed that Plaintiff was moved to various departments while she was employed with AAR, though the record is not clear exactly when these transfers occurred or how long Plaintiff worked in each Department. As stated above, when she first started with AAR in March of 2019, Plaintiff worked as a customer service representative. Def. Statement p. 1. Sometime before Covid, Pl. Dep. 75, she was transferred to the DRN department, working under Frazier. Def. Statement p. 1-2. Sometime thereafter, she was transferred to the Billing Department under Debbie. The record reflects that Plaintiff was transferred to different departments to find a good fit for her since she had "a couple of different conflicts with other employees." Def. Statement p. 1. Foster, attested "I know Tony Cooper moved [Plaintiff] to four departments while employed at Associates Asset Recovery because of her performance and her inability to get along with other people. Plaintiff did have trouble getting along with her coworkers. I also understood this impacted

her ability to perform as expected at Associates Asset Recovery." Foster Aff. ¶ 6. A coworker of Plaintiff stated that she "had plenty of conflicts with people. Seemed like there was always squabbles with the people in the office. I know she was moved a lot to different departments while she was working there but I think that was due to the conflicts." Robinson Aff. ¶ 4 (ECF No. 34-7).

A party who asserts an allegedly discriminatory "transfer" must have suffered "some injury" regarding her employment terms or conditions such that the transfer left him "worse off" (though not necessarily "significantly" worse off). Muldrow, 601 U.S. at 359; see Downer v. Prince George's Cnty. Bd. of Educ., Civil Action No. BAH-21-1618, 2024 WL 3277563, at *11 (D. Md. July 2, 2024) (finding no adverse employment action with a shift transfer because the shifts required the same duties); Jackson v. Balt. Police Dep't, Civil Action No. WDQ-11-3569, 2013 WL 1121412, at *6 (D. Md. Mar. 15, 2013) (finding no adverse employment action in the absence of allegations that the new assignment "has less responsibility or opportunity for promotion, or any salary implications"). Plaintiff does not present evidence to show that she suffered any harm as a result of her transfers. Thus, they do not qualify as adverse employment actions.

b. Raise

Plaintiff also argues that she suffered an adverse employment action when she was not given the raise she was promised. There is little information in the record regarding this raise. In support of this adverse employment action, Plaintiff cites to Foster's affidavit:

> [Plaintiff]] asked me for a raise and I advocated she receive a fifty cent hourly increase. When she told me she only received a twenty-five cent increase, I talked with [Cooper] who told me [Plaintiff] did not deserve a fifty cent raise. I advised [Plaintiff] to go see [Cooper] about this because I understood she would receive a

fifty cent increase.

Foster Aff. ¶ 5. This conversation occurred the same day Plaintiff had the heated discussion with Cooper that resulted in her not returning to work for AAR. However, Plaintiff's pay records do not reflect a twenty-five cent hourly wage increase at any time, much less prior to the conversation with Cooper. The pay records indicate that Plaintiff began her employment with Defendant in March of 2019 at an hourly rate of $8.43. On January 27, 2020, her hourly rate increased to $9.48. It increased to $10.00 per hour on February 3, 2020. On October 19, 2020, Plaintiff's hourly rate increased to $10.50. On February 8, 2021, Plaintiff's hourly rate increased to $12.00.[13] She remained at this rate until her employment ended. Pl. Pay Records (ECF No. 39-5). There was no change in rate just prior to Plaintiff's conversation with Cooper at the beginning of June in 2021. Nevertheless, even assuming Plaintiff did receive a twenty-five cent increase rather than a fifty-cent increase, this lower-than-expected raise, standing alone, is not an adverse employment action. See, e.g., Lovell v. BBNT Sols., LLC, 295 F. Supp. 2d 611, 626 (E.D. Va. 2003) (finding no adverse employment action where Plaintiff received a raise that was less than she expected).

c. Diminished Responsibility

Third, Plaintiff argues that she suffered an adverse employment action when her role in the DRN department was diminished and she was restricted from providing input to Frazier with regard to hiring in the DRN department. Frazier averred that Plaintiff assisted her in making hiring decisions but was told by Reason to stop having Plaintiff assist her with the hiring decisions. Frazier Aff. ¶ 10. "[A] mere inconvenience or any alteration of job responsibilities will not suffice"

13Defendants state in their Reply that Plaintiff's hourly rates increased to $15.00 and then $18.00 by the time her employment ended. Def. Rep. p. 8. However, Plaintiff's pay records indicated that those rates were "HROT" rather than "HOURLY." Pl. Pay Records. Though Plaintiff may have been paid at a different rate at times, the records reflect that her hourly rate was $12.00 at the time her employment ended. See Pl. Dep. 37.

as an adverse employment action. Colie v. Carter Bank & Tr., Inc., No. 3:09-CV-00086, 2010 WL 4274735, at *10 (W.D. Va. Oct. 28, 2010) (citing Reinhardt v. Albuquerque Public Schools Bd. of Educ., 595 F.3d 1126, 1133 (10th Cir.2010)). "[A] slight change in duties, absent a showing that Plaintiff received less pay or fewer benefits or 'even that her adjusted work was especially onerous or humiliating' does not constitute the requisite adverse employment action." Somers v. Equal Emp. Opportunity Comm'n, No. 613CV00257MGLJDA, 2014 WL 12799324, at *4 (D.S.C. Feb. 21, 2014), report and recommendation adopted sub nom. Somers v. E.E.O.C., No. CIV.A. 6:13-00257, 2014 WL 1268582 (D.S.C. Mar. 26, 2014), aff'd, 589 F. App'x 178 (4th Cir. 2015) (citing Talamantes v. Berkeley Cnty. Sch. Dist., 340 F. Supp. 2d 684, 699 (D.S.C. 2004)). Plaintiff fails to present evidence to show that Defendant restricting Plaintiff from providing input to hiring decisions resulted in "some harm respecting an identifiable term or condition of employment." Muldrow, 601 U.S. at 355. Thus, the change in job responsibilities was not an adverse employment action.

d. Promotion

Next, Plaintiff alleges that she suffered an adverse employment action when Chris Hyatt, a white male, was selected to lead the DRN department over Plaintiff, who was more qualified than Hyatt. Defendants argue that Plaintiff did not allege failure to promote as a theory of recovery and cannot raise it for the first time in response to the summary judgment motion. Indeed, there are no such allegations in her complaint. Further, during Plaintiff's deposition, counsel went through the witnesses she had listed in her interrogatory responses and asked what they could testify to in this action. Pl. Dep. 116-23. When asked what Chris Hyatt would testify to, Plaintiff mentioned only harassment. See Pl. Dep. 123. She makes no mention in her

deposition that Hyatt was awarded a promotion over her. The only evidence Plaintiff cites with respect to this alleged failure to promote is Frazier's affidavit, in which she states

> AAR did not want black people to lead departments. For example, in February 2020, I was out on bereavement leave for a few weeks and [Plaintiff] took charge of the DRN department. She did a good job and reported to me daily while I was out of the office. However. [Cooper] removed her from this position because he did not want a black person to run the department. Instead, Cooper re-hired a white female to work in the DRN department that was terminated due to her unsatisfactory work ethic and excessive absences. Cooper also brought Chris Hyatt, a white male, into the DRN Department over [Plaintiff].

Frazier Aff. ¶ 11.

"It is well-established that parties cannot amend their complaints through briefing or oral advocacy." S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 184 (4th Cir. 2013); see also Walton v. Harker, 33 F.4th 165, 176 (4th Cir. 2022) (holding a party "cannot pursue claims that [ ]he failed to plead and only raised for the first time in response to a motion for summary judgment"). Nevertheless, even if Plaintiff could raise this failure to promote as an adverse employment action at this time, the evidence in the record does not support Plaintiff's argument that Plaintiff applied for a promotion and it was awarded to Hyatt instead.[14]

e. Constructive Discharge

Finally, Plaintiff asserts that she suffered an adverse employment action because "the

14To the extent the court could consider the statement "Cooper also brought Chris Hyatt, a white male, into the DRN department over Plaintiff," Frazier Aff. ¶ 11, as meaning Hyatt was chosen for a promotion instead of Plaintiff, there is no evidence in the record to support Plaintiff's statement in her Response that Plaintiff was more qualified than Hyatt. Thus, any such argument would fail upon consideration of this qualifications factor. See Hood-Wilson v. Bd. of Trs. of Cmty. Coll. of Baltimore Cnty., No. 20-CV-00124-LKG, 2024 WL 4893641, at *6 (D. Md. Nov. 26, 2024) (citing Venugopal v. Shire Labs., 334 F. Supp. 2d 835, 844 (D. Md. 2004) ("[I]n a failure-to-promote case, a plaintiff must prove that she was a better candidate for the position than the chosen applicant.").

hostile environment created by Cooper, Rogers, and AAR employees resulted in Plaintiff's termination by way of constructive discharge." Pl. Resp. p. 20. "[C]onstructive discharge is an adverse action which can fulfill that element of [a] discrimination or retaliation claim[ ]." Lloyd v. Riveredge Operating Co., LLC, No. GLR-20-3162, 2021 WL 2550495, at *4 (D. Md. June 21, 2021); Ofoche v. Apogee Med. Grp., Va., P.C., 815 F. App'x 690, 692 (2020) (analyzing constructive discharge as an adverse employment action within the context of a disparate treatment claim); Dones v. Donahoe, 987 F. Supp. 2d 659, 668 (2013) ("[C]onstructive discharge is a form of an adverse employment action.").

"Because the claim of constructive discharge is so open to abuse by those who leave employment of their own accord," the Fourth Circuit "has insisted that it be carefully cabined." Ali v. WorldWide Language Res., LLC, 686 F. Supp. 3d 430, 456 (E.D.N.C. 2023) (quoting Honor v. Booz-Allen & Hamilton, Inc., 383 F.3d 180, 187 (4th Cir. 2004), abrogated on other grounds by Chapman v. Oakland Living Ctr., Inc., 48 F.4th 222 (4th Cir. 2022)). To establish a constructive discharge, a plaintiff must show two things: first, she must show that "'working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'" Green v. Brennan, 578 U.S. 547, 555 (2016) (quoting Pennsylvania State Police v. Suders, 542 U.S. 129, 148, 124 S.Ct. 2342, 159 L.Ed.2d 204 (2004)). Second, a plaintiff must actually resign because of those conditions. Id.

"'Intolerability' is not established by showing merely that a reasonable person, confronted with the same choices as the employee, would have viewed resignation as the wisest or best decision, or even that the employee subjectively felt compelled to resign. Instead, intolerability is assessed by the objective standard of whether a reasonable person in the employee's position

would have felt compelled to resign, ... that is, whether he would have had no choice but to resign." Perkins v. Int'l Paper Co., 936 F.3d 196, 211–12 (4th Cir. 2019) (citation omitted). "Critically, difficult or unpleasant working conditions ..., without more, are not so intolerable as to compel a reasonable person to resign." Id. Further, "[t]he 'intolerability' standard governing constructive discharge claims is more stringent than the 'severe and pervasive' standard for hostile work environment claims." Nnadozie v. Genesis HealthCare Corp., 730 F. App'x 151, 162 (4th Cir. 2018) (citing Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126, 1133 (4th Cir. 1995)).

Plaintiff describes the following conditions as creating an intolerable working environment:

> [Plaintiff] was called racial slurs such as "nigger," "black bitch," and "slave" by coworkers, creating a hostile environment. She received threatening and racially charged text messages via the "TextNow" application, including comments like, "He want the niggers gone," and "It's all race caus no nig smart enough to manage." Lisa Frazier and Debbie Hardee, who supported [Plaintiff], were disparaged as "nigger-lovers" by Rogers, who was the manager of the Florence office. Tony Cooper, the owner, pinned [Plaintiff] against a wall and spat on her during a heated meeting about her pay. Under these circumstances, there is evidence that a reasonable person in [Plaintiff's] position would have felt compelled to resign.

Pl. Resp. pp. 20-21.

Viewing the evidence in the light most favorable to Plaintiff, Rogers, the manager of the Florence office, called Plaintiff a "nigger" and "black bitch," as well as other, non-race specific names, and continued to do so even after Plaintiff reported this to Debbie.[15]

15 Defendants argue on more than one occasion that Plaintiff's testimony regarding hearing Rogers make racial slurs against her must be discounted because her testimony has either been contradicted or not corroborated by other witnesses or evidence. However, conflicting testimony creates a credibility issue, and it is not the role of this court to judge the credibility of witnesses or to weigh their conflicting testimony. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a [court] ... ruling on a motion for summary judgment."); see also Summerlin v. Edgar, 809 F.2d 1034, 1039 (4th Cir. 1987) (holding conflicting testimony as to disputed issue creates genuine issue of material fact). The cases cited by Defendants are inapposite because Plaintiff's testimony that Rogers called her derogatory names is not based on assumptions,

On another occasion, a coworker, Andrews, referred to Plaintiff as a "nigger" in a text message to another employee, and that employee showed the message to Plaintiff. Andrews was suspended for two days after Plaintiff reported it.

In addition, Rogers referred to both Frazier and Debbie as "nigger-lovers." Plaintiff heard the comment made to Debbie and reported it to Foster. Foster stated that he investigated the complaint but could not verify that it occurred. There is no indication in the record that Plaintiff heard or even knew that Rogers called Frazier a "nigger-lover" or that it was ever reported to anyone.

Plaintiff also received threatening, anonymous text messages, referring to her as a "slave," "Porch monkey," "nigger," and "bitch." She reported these messages to Cooper, who testified that he and other employees, regardless of race, were receiving similar anonymous text messages and he was unable to determine who was sending them. He also reported the messages to the police, who stated they could not do anything about the messages.

Finally, Plaintiff attempted to speak with Cooper about her pay, which resulted in Cooper pinning her against the wall, yelling at her, and spitting in her face. There are no allegations of race-based comments during this discussion.

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speculation, or opinion. See Wilson v. Wal-Mart, Inc., No. CV 3:15-1157-JFA, 2016 WL 3086929, at *3 (D.S.C. June 2, 2016) ("Plaintiff's theory that the substance leaked from the meat cooler solely because of its proximity to the meat cooler is based upon nothing more than assumptions and speculation."); Nat'l Enterprises, Inc. v. Barnes, 201 F.3d 331, 335 (4th Cir. 2000) (finding "self-serving affidavit" regarding the plaintiff's recollection of the contents of a repurchase agreement insufficient to establish the terms of that agreement and to defeat a motion for summary judgment); Mackey v. Shalala, 360 F.3d 463, 469 (4th Cir. 2004) (holding that the plaintiff's opinion that her transfer was causally connected to her EEO complaints was insufficient to establish a prima facie case of retaliation). Whether Plaintiff is telling the truth is a decision for the factfinder, not the court at this stage of the litigation.

To begin, the court recognizes that "[f]ar more than a 'mere offensive utterance,' the word 'nigger' is pure anathema to African–Americans." Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001). "No word in the English language is as odious or loaded with as terrible a history." Oladokun v. Grafton School, Inc., 182 F.Supp.2d 483, 493 (D. Md. 2002). "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Spriggs, 242 F.3d at 185 (quoting Rodgers v. Western–Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993)). "Where such an abhorrent slur is alleged, there is no question that its use was offensive, unwelcome, and racially motivated." Roberts v. Fairfax Cty. Pub. Schs., 858 F.Supp.2d 605, 610 (E.D. Va. 2012) (citing Shields v. Fed. Exp. Corp., 120 Fed.Appx. 956, 961 (4th Cir. 2005) (unpublished) (per curiam)). However, this knowledge must be balanced with the understanding that, as stated above, "[b]ecause the claim of constructive discharge is so open to abuse by those who leave employment of their own accord," such claims must be "carefully cabined." Ali, 686 F. Supp.3d at 456. The law recognizes constructive discharge claims only where an employee "would have had no choice but to resign." Lee v. Belvac Prod. Mach., Inc., No. 20-1805, 2022 WL 4996507, at *3 (4th Cir. Oct. 4, 2022) (quoting Perkins v. Int'l Paper Co., 936 F.3d 196, 212 (4th Cir. 2019)) (emphasis in original). For the reasons discussed below, the evidence in this case is insufficient to support a finding of a constructive discharge.

In Dunlap v. TM Trucking of the Carolinas, LLC, 288 F.Supp.3d 654 (D.S.C. 2017), this court, upon consideration of a constructive discharge claim, found that the plaintiffs presented sufficient evidence that the conditions of their employment "were so intolerable that a reasonable

person would have found working for Defendants intolerable." Id. at 668. There, one plaintiff testified that their supervisor used the n-word at least one to two times per week, and also referred to African-American employees as "stupid asses," and "dumb motherfuckers." Id. at 659. Another plaintiff estimated that the same supervisor used the n-word at least eighty times in a twelve-month period. Id. at 659-60. The plaintiffs together recounted approximately fifteen specific instances of their supervisor using the n-word. Id. at 659-61. These facts were sufficient for the court to deny summary judgment as to the plaintiffs' claims of both hostile work environment and constructive discharge. Id. at 669.

In contrast, the court in Lindsay-Felton v. FQSR, LLC, 352 F. Supp. 3d 597 (E.D. Va. 2018), held that though certain facts were sufficient for the plaintiff's hostile work environment claim to survive, they were not enough to meet the higher, intolerability standard required for a claim of constructive discharge. Id. at 607. There, the record revealed that the plaintiff overheard her supervisor tell a group of potential new employees, "that's why you niggers will never be nothing," and another employee averred that the supervisor often referred to African-American employees as "niggers" and "cockroaches." Id. The supervisor also visited Plaintiff's store "almost every single day" and referred to her as dumb and stupid and on one occasion yelled at her while pointing his finger in her face in a threatening manner. Id. The court found these facts sufficient to create a dispute of fact as to whether Plaintiff was subjected to a hostile work environment. Id. at 605. However, under the higher burden required to show a constructive discharge, the court held the same facts were insufficient to show that the work environment was so intolerable that a reasonable employee would feel compelled to resign. Id. 607. The court found that the plaintiff's evidence failed to demonstrate "how often [the supervisor] came to her store to belittle her, or how

long he stayed at her store when he did visit, and she relies primarily on [the supervisor] yelling at her and repeatedly calling her stupid or dumb during the last several months of employment. Id. at 607 (citing Williams v. Giant Food Inc., 370 F.3d 423, 434 (4th Cir. 2004) (finding that allegations that the plaintiff's supervisors "yelled at her, told her she was a poor manager and gave her poor evaluations, chastised her in front of customers, and once required her to work with an injured back ... do not establish the objectively intolerable working conditions necessary to prove a constructive discharge"). As a result, the court found, the plaintiff failed to present sufficient evidence to show that her working conditions were so intolerable that they "should be viewed by the law as the functional equivalent of termination." Lindsay-Felton, 352 F.Supp.3d at 607.

The present case is more akin to Lindsey-Felton than Dunlap. Here, Plaintiff overheard Rogers, a supervisor over the office in which Plaintiff worked, refer to her as "nigger" and "black bitch," as well as other, non-race specific names, but she does not testify to how often this occurred or, to the extent it occurred more than once, does not present specific details of any other incidents. See, e.g., Skipper v. Giant Food Inc., 68 F. App'x 393, 399 (4th Cir. 2003) (holding in the context of a hostile work environment claim that a plaintiff must substantiate such claims with reasonable specifics about the incidents underlying the claim). Plaintiff also overheard Rogers call Debbie a "nigger-lover" on one occasion.[16] "The 'frequency of the conditions at issue' is an important part of the intolerability assessment." EEOC v. Greyhound Lines, Inc., 554 F. Supp. 3d 739, 753 (D. Md. 2021) (quoting Evans v. Int'l Paper Co., 936 F.3d 183, 193 (4th Cir. 2019)). "The more continuous the conduct, the more likely it will establish the required intolerability. On the other

16 There is no evidence in the record that Plaintiff knew Rogers called Frazier a "nigger lover." See Perkins, 936 F.3d at 207–08 (finding that the testimony of others subjected to harassment "was relevant ... only if [Plaintiff] 'was aware of [the harassment described in the testimony] during the course of her employment' " (quoting King v. McMillan, 594 F.3d 301, 310 (4th Cir. 2010))).

hand, when the conduct is isolated or infrequent, it is less likely to establish the requisite intolerability." Evans, 936 F.3d at 193.

The other evidence regarding use of the n-word and other racially insensitive names did not involve supervisors. One was a text message from Andrews, a coworker, to another employee, and the other text messages were anonymous, and Plaintiff cannot be sure they were sent from any employee at AAR. Once Plaintiff notified Cooper of these incidents, he took action, or at least attempted to take action, to end the harassment. Andrews was suspended, and Cooper contacted the police in an effort to determine who sent the other text messages but was ultimately unable to do so. Though there is no specific requirement for constructive discharge that a plaintiff must present evidence to impute liability for third-party harassment to her employer, such a requirement exists for hostile work environment claims, see Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014), and it follows that a plaintiff must be able to do so as well for the "graver" claim of constructive discharge. Cf. Green, 578 U.S. at 560 (noting that the Supreme Court in Pennsylvania State Police v. Suders, 542 U.S. 129, 150, 124 S. Ct. 2342, 2356, 159 L. Ed. 2d 204 (2004), in the context of the Ellerth/Faragher defense, recognized that it would be bizarre to always impute resignation to the employer in a constructive discharge claim when the lesser offense of hostile work environment requires evidence that liability can be imputed to the employer).

Finally, though Plaintiff's meeting with Cooper, during which he pinned her against a wall and spat in her face, may be severe, see Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 269 (4th Cir. 2015) (holding that a reasonable jury could conclude that a supervisor's two uses of racial slurs while yelling, made to the plaintiff's face so closely that the plaintiff could feel the supervisor's "breath on her face" and "sprayed [her] face with saliva," and accompanied by a threat

to fire the plaintiff, were severe enough to engender a hostile work environment), this isolated conduct by Cooper is insufficient to show that Plaintiff's working conditions were so intolerable that a reasonable person in her position would have felt compelled to resign. See Evans v. Int'l Paper Co., 936 F.3d 183, 193 (4th Cir. 2019) (holding that "when the conduct is isolated or infrequent, it is less likely to establish the requisite intolerability"). Further, there is no evidence that this encounter was based on Plaintiff's race or sex or in retaliation for Plaintiff's past complaints. Title VII only "prohibits an employment atmosphere that is permeated with discriminatory intimidation, ridicule, and insult" and "does not establish a general civility code for the American workplace." EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008) (internal citations and quotation marks omitted)). Based on the evidence presented, Plaintiff fails to create a dispute of fact for a jury as to whether her working conditions were so intolerable that a reasonable employee in her position would have felt compelled to resign. Thus, she fails to show that she has suffered the adverse employment action of constructive discharge.

As set forth above, an adverse employment action is a necessary element of discrimination and retaliation claims under Title VII and § 1981, regardless of whether a plaintiff presents direct evidence of discrimination and retaliation or chooses to proceed through the McDonnell Douglas burden-shifting scheme. See, e.g., Hill, 354 F.3d at 284; Sempowich, 19 F.4th at 649-650. Because Plaintiff has failed to show that she suffered an adverse employment action, summary judgment is appropriate as to her sex and race discrimination claims and her retaliation claims under Title VII and § 1981.

B. Hostile Work Environment

Plaintiff also asserts a cause of action for hostile work environment. To survive summary

judgment on her hostile work environment claim, Plaintiff must present sufficient evidence to show that the alleged conduct she experienced was: (1) unwelcome; (2) based on a protected characteristic; (3) sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive work environment; and (4) imputable to her employer. Pryor v. United Air Lines, Inc., 791 F.3d 488, 495-96 (4th Cir. 2015). "While the first element is subjective, the rest of the test is made up of objective components based on a 'reasonable person' standard." Robinson v. Priority Auto. Huntersville, Inc., 70 F.4th 776, 781-82 (4th Cir. 2023). It is undisputed that the conduct in question was unwelcome.

1. Defendant AAR

a. Severe or Pervasive

The severe or pervasive factor requires a showing that "'the environment would reasonably be perceived, and is perceived, as hostile or abusive.'" Boyer-Liberto, 786 F.3d at 277 (citing Harris v. Forklift Systems. Inc., 510 U.S. 17, 22 (1993)). The conduct must be both subjectively and objectively offensive to be cognizable under Title VII. Harris, 510 U.S. at 21–22. To be expected, courts often assume the conduct is subjectively offensive. See Ziskie v. Mineta, 547 F.3d 220, 227 (4th Cir. 2008). "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting Harris, 510 U.S. at 23, 114 S.Ct. 367). Factors to consider include "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance." Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir.

2000). Harassment is severe or pervasive only if the workplace is "pervaded with discriminatory conduct aimed to humiliate, ridicule, or intimidate." EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 316 (4th Cir. 2008) (internal quotation marks omitted). Rude treatment, callous behavior, and a routine difference of opinion and personality conflict do not suffice to state a hostile work environment claim. Id. at 315–16. "[S]imple teasing, off-hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (internal citations and quotation marks omitted). The Fourth Circuit has "recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test." Sunbelt Rentals, Inc., 521 F.3d at 315. However, the bar is not as high as that required to show a constructive discharge. Nnadozie, 730 F. App'x at 162. Thus, even if a plaintiff's working conditions were not intolerable for constructive discharge purposes, they could still meet the severe or pervasive standard necessary for a hostile work environment claim. Based on the evidence discussed in more detail above--Plaintiff overhearing Rogers call her a "nigger," "black bitch," and "slave," and overhearing Rogers call Debbie a "nigger-lover," the racially charged, anonymous text messages, the text message sent to Frazier calling Plaintiff a "nigger," and Cooper pinning Plaintiff against a wall and spitting on her—Plaintiff has presented sufficient evidence to create an issue of fact as to the severe or pervasive requirement for a hostile work environment claim.

b. Protected Status

Plaintiff must also show that those conditions were based on a protected status. To do so, Plaintiff must show that but for her race, or sex, or protected activity, she would not have been the victim of the alleged harassment. See Pueschel v. Peters, 577 F.3d 558, 565 (4th Cir. 2009). A

plaintiff alleging harassment "can succeed only by showing that she is the individual target of open hostility because of her [protected status]," not simply alleging that "she was the target of open hostility." Ziskie v. Mineta, 547 F.3d 220, 226 (4th Cir. 2008) (internal quotation and citations omitted). Plaintiff must show that the alleged hostile conduct was motivated by actual animus towards her protected trait. Gilliam v. S.C. Dep't Of Juv. Just., 474 F.3d 134, 142–43 (4th Cir. 2007). Clearly, use of phrases like "nigger," "nigger-lover," "black bitch, and "slave" indicate that the treatment Plaintiff suffered was because of her race. See, e.g., White v. BFI Waste Services, LLC, 375 F.3d 288, 298 (4th Cir.2004) (noting that the word "nigger" is "an unambiguously racial epithet"). Likewise, use of the word "bitch" indicates the treatment was based on sex. See, e.g., Harris v. Mayor & City Council of Baltimore, 429 F. App'x 195, 201 (4th Cir. 2011) (citing EEOC v. Central Wholesalers, Inc., 573 F.3d 167, 175 (4th Cir.2009)) (holding that a reasonable jury could conclude that use of words like "bitch" and "cunt" were based on the employee's gender).

Plaintiff also argues that she suffered the hostile work environment in retaliation for complaints she made about race discrimination. However, Plaintiff provides very few dates in her deposition regarding when particular events occurred, such as when she overheard Rogers calling her derogatory names or when she heard Rogers call Debbie a derogatory name or when she complained about these and other incidents. The record does reveal that the incident regarding the text message sent by Andrews occurred sometime in October of 2020, and she complained about it shortly thereafter, she received the anonymous texts beginning in November of 2020, and that her confrontation with Cooper occurred on June 3, 2021. There is sufficient temporal proximity between Plaintiff's complaint about the text message in October of 2020, and

the anonymous text messages in November of 2020, to create an issue of fact as to whether those messages were in retaliation for her protected activity. See Barnhill v. Bondi, 138 F.4th 123, 138 (4th Cir. 2025) (citing Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111, 127 (4th Cir. 2021) (explaining that the inference of causation does not begin to weaken until two months have passed between the protected activity and adverse action). However, there is not sufficient temporal proximity between the October 2020 complaint and the confrontation with Cooper in June of 2021 to show that but for her complaint, Cooper would not have pinned her against a wall and spit on her. See Perry v. Kappos, 489 Fed.Appx. 637, 643 (4th Cir. 2012) (quoting King v. Rumsfeld, 328 F.3d 145, 151 n. 5 (4th Cir. 2003)) ("Even a mere ten-week separation between the protected activity and [adverse action] 'is sufficiently long so as to weaken significantly the inference of causation between the two events.'").

c. Imputable to the Employer

Finally, the hostile work environment must be imputable to the employer. A hostile work environment is imputable to an employer under Title VII if it is created by a supervisor with authority over the employee. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). A workplace harasser qualifies as a supervisor when "he or she is empowered by the employer to take tangible employment actions against the victim." Vance v. Ball State Univ., 570 U.S. 421, 424 (2013). It is also imputable to the employer if the employer "knew or should have known" about coworker or third-party harassment and "failed to take effective action to stop it." Sunbelt Rentals, 521 F.3d at 319; Freeman v. Dal-Tile Corp., 750 F.3d 413, 423 (4th Cir. 2014) (hold that the same test regarding coworkers applies to harassment by third parties).

As stated above, the only harassing behavior to which Plaintiff was subjected that was based on her race, sex, or protected activity were Rogers calling her racial slurs, Andrews calling her a racial slur, and the anonymous text messages calling her racial slurs. Though Rogers was a supervisor over the Florence location where Plaintiff worked, she testified that she did not have any supervisory authority over Plaintiff. Rogers Dep. 13. It is undisputed that Andrews was a coworker and not a supervisor. Thus, for the harassment by Rogers and Andrews to be imputed to AAR, Plaintiff must present evidence to show that AAR knew about the harassment and failed to take effective action to stop it. The record reflects that Plaintiff complained to her supervisor, Debbie, about overhearing Rogers use racial slurs about her, but she was only told to wear headphones so she could not hear it and Rogers continued to use those slurs after she complained.[17] Plaintiff complained to Foster when Rogers called Debbie a "nigger-lover" in Plaintiff's presence, and Foster testified that he investigated her complaint but could not verify that it occurred. Nevertheless, no apparent action was taken to prevent it from happening again. In assessing the reasonableness of an employer's response, the court considers, among other things, "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." E.E.O.C. v. Xerxes Corp., 639 F.3d 658, 669 (4th Cir. 2011). Considering these factors, an issue of fact exists as to whether Rogers's conduct can be imputed to AAR.

With respect to the text sent by Andrews, the evidence reveals that when Plaintiff complained about the text message, the complaint was investigated and Andrews was suspended for two days. There is no evidence in the record that Andrews ever used racial slurs to Plaintiff or

17Plaintiff does not specifically identify when Rogers used these slurs or how often it occurred.

about Plaintiff or in any other context after his suspension. Thus, this harassment cannot be imputed to AAR for liability purposes.

Finally, Plaintiff testified that she reported the anonymous texts each time she received one to Frazier, then Foster, and then Cooper. There is no evidence in the record that Frazier or Foster took any remedial action regarding the texts. Cooper testified that he could not determine who sent the texts and the police indicated there was nothing they could do about the texts. However, Plaintiff received the texts between November of 2020, and February of 2021, and nothing in the record indicates when and to what extent Cooper attempted to determine who sent the texts or when he went to the police about them. Thus, based on the limited evidence in the record, an issue of fact exists as to whether the anonymous text messages can be imputed to AAR.

Based on the above discussion with respect to Plaintiff's hostile work environment claim, each of Plaintiff's alleged instances of harassment meet some of the requirements necessary to establish a hostile work environment claim, but only some of them meet all the factors. Nevertheless, viewing the evidence as a whole and in the light most favorable to Plaintiff, summary judgment is not appropriate on Plaintiff's hostile work environment claim under Title VII and as to Defendant AAR under § 1981.

2. Defendants Rogers and Cooper

However, Plaintiff also asserts her § 1981 hostile work environment claim against Rogers and Cooper individually. Individuals can be personally liable under § 1981 "when they intentionally cause a corporation to infringe the rights secured by 42 U.S.C.... § 1981." Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1146 (4th Cir. 1975). "To make out a claim for individual liability under § 1981, a plaintiff must demonstrate some affirmative link to causally

connect the actor with the discriminatory action, and the claim must be predicated on the actor's personal involvement." Hawthorne v. Virginia State Univ., 568 F. App'x 203, 204–05 (4th Cir. 2014) (citation and internal quotation marks omitted). Courts routinely hold that the failure to prevent harassment is insufficient to demonstrate the personal involvement necessary for individual liability under § 1981. See e.g., Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 75 (2d Cir. 2000) (holding that negligence in maintaining an anti-discrimination policy "does not constitute the 'personal involvement' or 'affirmative link' necessary to support a claim of individual liability" under § 1981); Malone v. Mr. Glass Doors & Windows Mfg., LLC, 2022 WL 3159876, at *12 (S.D. Fla. July 15, 2022) ("The fact that [the company president] may have been aware of the alleged disparate treatment, without more, is insufficient to establish his personal involvement in such conduct or mistreatment."), report and recommendation adopted, 2022 WL 3154198 (S.D. Fla. Aug. 8, 2022); Moore v. Shands Jacksonville Med. Ctr., Inc., 2011 WL 13157372, at *6 (M.D. Fla. Oct. 14, 2011) (collecting cases and finding that a manager's knowledge of "the alleged discriminatory conduct of others is insufficient to establish [the manager's] personal involvement in such conduct"). Discussed above, the only instance involving Cooper on which Plaintiff relies for her hostile work environment claim is when he pinned her against the wall and spit on her. However, there is no evidence in the record that this occurred because of Plaintiff's race. Therefore, Plaintiff fails to create an issue of fact as to her hostile work environment claim against Cooper.

On the other hand, Rogers was involved in several instances of harassment regarding racial slurs directed at or in the presence of Plaintiff. Thus, for the same reasons discussed above with respect to AAR, summary judgment is not appropriate as to Plaintiff's § 1981 hostile work

environment claim against Rogers.

C. Intentional Infliction of Emotional Distress

Plaintiff also asserts a state law claim for intentional infliction of emotional distress against all Defendants. To prove a claim for intentional infliction of emotional distress, Plaintiff must allege that (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the defendant caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it." Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (quoting Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)). The question of whether a defendant's conduct may be reasonably regarded as so extreme and outrageous as to allow recovery is a question for the court to determine in the first instance. Butts v. AVX Corp., 292 S.C. 256, 355 S.E.2d 876 (Ct. App. 1987).

The South Carolina Supreme Court "established the claim of intentional infliction of emotional distress carries with it a higher level of proof: [t]o permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area. . . . [T]he court must look for something 'more'—in the form of third party witness testimony and other corroborating evidence—in order to make a prima facie showing of 'severe' emotional distress." Beneficial Fin. I, Inc. v. Windham, 431 S.C. 256, 275, 847 S.E.2d 793, 803 (Ct. App. 2020) (quoting Hansson v. Scalise Builders of South

Carolina, 374 S.C. 352, 358-59, 650 S.E.2d 68, 72 (2007)). Here, Plaintiff has failed to present sufficient evidence with respect to the emotional distress she suffered. In Windham, the South Carolina Court of Appeals held that a plaintiff's affidavit testimony[18] attesting to the emotional harm he suffered was insufficient to meet his burden of establishing severe emotional distress because the affidavit testimony included "mere bald assertions." Windham, 431 .S.C. at 276, 847 S.E.2d at 804 (citing Hansson, 374 S.C. at 358, 650 S.E.2d at 72). Plaintiff has presented no similar testimony regarding her emotional distress, much less third party witness testimony or other corroborating evidence. Therefore, summary judgment is appropriate on Plaintiff's intentional infliction of emotional distress claim.

D. Assault and Battery

Plaintiff asserts a state law cause of actions for assault and for battery against AAR and Cooper as a result of the confrontation between the two where, viewing the evidence in the light most favorable to Plaintiff, Cooper pinned her against the wall while yelling at her and spat in her face. "An assault is an attempt or offer, with force or violence, to inflict bodily harm on another or engage in some offensive conduct." An assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant. Callum v. CVS Health Corp., 137 F.Supp.3d 817 (D.S.C. 2015)(citing Mellen v. Lane, 659 S.E.2d 236, 244 (S.C. Ct.App.2008); Gathers v. Harris Teeter Supermarket, Inc., 317 S.E.2d 748, 754 (S.C. Ct.App.1984). In the civil context, "[t]he elements of assault are: (1) conduct of the defendant which places the plaintiff, (2) in

18 The affidavit testimony provided,

> I have spent the last three years suffering with the constant fear that my home was going to be taken away from me .... I have spent the last several years in emotional distress, dealing with anxiety, embarrassment, humiliation, and fear. I have also suffered physical distress, including loss of sleep, headaches, pain and suffering.

Windham, 431 .S.C. at 276, 847 S.E.2d at 804. The court found this testimony insufficient to meet the "heightened standard of proof for emotional distress claims." Id.

reasonable fear of bodily harm." Capius US Ins., Inc. v. Middleton, 202 F.Supp.3d 540 (D.S.C. 2016)(citing Mellen, 659 S.E.2d 236, 244 (S.C.Ct.App.2008).

In general, a battery occurs by "the unlawful touching or striking of another by the aggressor himself or by any substance put in motion by him, done with the intention of bringing about a harmful or offensive contact which is not legally consented to by the other, and not otherwise privileged." Callum, 137 F.Supp.3d at 854. Alternatively, "[battery] is sometimes defined as any injury done to the person of another in a rude, insolent, or revengeful way." Capius, 202 F.Supp.3d at 854 (quoting Smith v. Smith, 9 S.E.2d 584, 589 (S.C. 1940)). "Physical injury is not an element of battery. While there must be a touching, any forcible contact, irrespective of its degree, will suffice." Id. at 855.

Defendants argue that Plaintiff's assault and battery causes of action fail because "Foster witnessed the tense discussion between Cooper and Plaintiff and did not testify Plaintiff was spit on or was pinned against the wall." Def. Mem. p. 31 (ECF No. 34-1). However, this argument views the facts in the light most favorable to the moving parties, Defendants, not the unmoving party, Plaintiff, as the court is required to do at this stage of the litigation. As stated previously, it is not the role of this court to judge the credibility of witnesses or to weigh their conflicting testimony. See Anderson, 477 U.S. at 255. Because disputes of fact exist, summary judgment is not appropriate.

V. CONCLUSION

For the reasons discussed above, it is recommended that Defendants' Motion for Summary Judgment (ECF No. 34) be granted as to Plaintiff's discrimination and retaliation causes of action under Title VII and § 1981and intentional infliction of emotional distress (First, Second, Fourth,

Fifth, and Seventh Causes of Action). It is recommended that the motion be denied as to Plaintiff's causes of action for hostile work environment under Title VII and § 1981[19], assault, and battery (Third, Sixth, Eighth, and Ninth Causes of Action).[20]

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

July 29, 2025
Florence, South Carolina

19 Except for Plaintiff's § 1981 hostile work environment claim against Cooper individually. It is recommended that summary judgment be granted on that claim against Cooper only.

20 Defendants also move for summary judgment on the issue of whether Plaintiff properly mitigated her damages. Because the question of liability has yet to be determined, the issue of damages is premature.