No. 18-2196

IN THE

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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**ERIKA BAZEMORE**

*Plaintiff-Appellant,*

**v.**

**BEST BUY**

*Defendant-Appellee.*

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On Appeal from the United States District Court
For the District of Maryland, Southern Division (18-cv-00264-PJM)

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Reply Brief of Plaintiff-Appellant – Erika Bazemore

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### I. Ms. Bazemore's Allegations of a Hostile Work Environment were Sufficient to Survive a Motion to Dismiss.

Erika Bazemore alleged that her coworker, Anne Creel, targeted her with the slur "Nigger Tits" in the middle of the Best Buy sales floor in front of her colleagues. Ms. Bazemore felt that she could not report the harassment to the store's General Manager, April Brewster, because Brewster and Creel were best friends and she was worried that Brewster would not take her complaint seriously. Ms. Bazemore therefore called Best Buy HR to report the harassment, informing them that she did not go to her boss, Brewster, because her boss and the harasser were best friends.

Despite notice of Creel and Brewster's close personal relationship, Best Buy appointed Brewster to remedy the situation. The "corrective action" taken by Best Buy was limited to Brewster and Creel having a sole private meeting,[1] after which Brewster filled out a scant report claiming that Creel "made a comment . . . that was offensive" and that she gave Creel a "final warning." This action fell short of Best Buy's policies both in theory and in practice. Best Buy has a zero-tolerance policy for racial slurs, and consistent with this policy, Best Buy has terminated employees

[1] Best Buy now asserts Colleen Hayes interviewed Creel as part of its investigation. Appellee's Br. 17 ("Ms. Hayes then spoke to Creel."). This assertion is not alleged in the complaint, was not in the record before the district court, and should not be considered by this Court. *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 696–97 (4th Cir. 2018) (citing Fed. R. App. P. 10(a)).

in the past for saying "n****r." That Best Buy appointed Creel's best friend to remedy Ms. Bazemore's complaint and did not follow its own policies and practices only confirmed Ms. Bazemore's fear that her complaint would be mishandled.

Ms. Bazemore further alleged that Best Buy's action was ineffective. Her workplace was drastically altered as a result of the harassment—Creel *and* Brewster started to treat her with hostility.[2] Creel also continued to use racial slurs after Best Buy took "action." Ms. Bazemore put Best Buy on notice that its action was ineffective, because when HR left Ms. Bazemore a voicemail claiming the matter had been "resolved," Ms. Bazemore called back to report that nothing had been done and that things were "still tense."[3] Best Buy did not return her call, however, and took no further action regarding her complaint.

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[2] Oddly, Best Buy repeatedly cites the positive relationship that Ms. Bazemore and Creel had before the incident as supporting their case. Appellee's Br 7, 8, 17, 21. But it is precisely the drastic change in behavior by both Creel and the General Manager that adds to the severity of the harassment.

[3] Best Buy's contention that Ms. Bazemore's amended complaint does not allege continued hostility, Appellee's Br. 6, is incorrect. *See* J.A. 50. ("In the message I stated, that I was confused, because it seems like nothing has happened, I stated how she said the matter had been resolved, but informed her I didn't see how. Things in the store were still tense."); *see also* J.A. 117 (Opp'n to Def's Mot. to Dismiss) ("Colleen Hayes from Best Buy Corporate Employee Relations was made aware of the unlawful act immediately following on February 6, 2017, and yet did nothing adequate to resolve with what had happened, even after my detailed voicemail expressing how I was confused because she quickly closed the case but nothing has happened.").

Ms. Bazemore's complaint sufficiently alleges facts that state the elements of a hostile work environment claim: (1) unwelcome harassment, (2) based on her race and sex, (3) that was "sufficiently severe or pervasive to alter [her] conditions of employment and to create an abusive work environment"; and (4) "is imputable to the employer." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc). Ms. Bazemore plausibly alleged unwelcome harassment based on race and sex when Ms. Creel targeted her with the slur "N****r T*ts," that was severe enough to alter her work environment. J.A. 49–52. Ms. Bazemore also plausibly alleged a basis to hold Best Buy liable. After she promptly reported the harassment, Best Buy failed to take remedial action reasonably calculated to address Creel's harassment and negligently allowed the resulting hostility to persist. When Ms. Bazemore's complaint is construed liberally and taken as true, *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014), which is particularly appropriate because she is a "*pro se* plaintiff rais[ing] civil rights issues," *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018), Ms. Bazemore stated a plausible hostile work environment claim against Best Buy. The district court erred in dismissing the claim.

### A. <u>This Court must liberally construe Ms. Bazemore's *pro se* pleadings, taking all facts pleaded as true and drawing all reasonable inferences in her favor.</u>

Before addressing the merits of Ms. Bazemore's complaint, Best Buy makes several incorrect assertions about the standards governing motions to dismiss and *pro se* pleadings.

First, Best Buy suggests Ms. Bazemore's complaint should not be liberally construed because her "procedural maneuverings . . . point strongly to her being advised by a lawyer." Appellee's Br. 5 n.3. This assertion is utterly unfounded.[4] As Best Buy acknowledges, *see* Appellee's Br. 6, the district court construed Ms. Bazemore's pleadings liberally because she was *pro se*, *see* J.A. 130, and this Court should too.

Next, Best Buy complains of "factual creep," arguing that the allegations in Ms. Bazemore's complaint have "grow[n] and morph[ed] with each successive filing." Appellee's Br. 4. But because Ms. Bazemore was *pro se*, case law makes clear that her pleadings can help clarify her complaint. *See Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989) ("Responsive pleadings thus may be necessary for a *pro se* plaintiff to clarify [her] legal theories."); *Williams v. Priatno*, 829 F.3d 118, 120 n.1

[4] The "procedural maneuverings" referred to by Best Buy are that Ms. Bazemore filed an amended complaint, requested discovery, and moved for reconsideration. Appellee's Br. 5 n.3.

(2d Cir. 2016) ("Some allegations concerning the circumstances of Williams's attempted filing of his grievance are taken from his *pro se* opposition to the motion to dismiss, which we may consider in resolving this appeal."); *Greenhill v. Spellings*, 482 F.3d 569, 572 (D.C. Cir. 2007) ("We have also permitted courts to consider supplemental material filed by a *pro se* litigant in order to clarify the precise claims being urged."). And, in any event, Ms. Bazemore's complaint contained the essential factual components of her claim.[5] J.A. 49–52.

Then, without citing a single case, Best Buy contends that "facts that are unknown to, or yet to be discovered by [Ms. Bazemore] are of limited relevance in assessing the legal sufficiency of the claim." Appellee's Br. 4. Best Buy further asserts, also without support, that Ms. Bazemore "should be presumed to have alleged all conduct that contributes to her perception." Appellee's Br. 4. That's not the law. A complaint need not be exhaustive. *See* Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). And this Court has trumpeted the importance of discovery in employment discrimination cases because before discovery, there is an "information-asymmetry" that makes discrimination claims "particularly vulnerable to premature dismissal." *Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017); *see also*

[5] Notably, Best Buy does not say what facts "crept" into Ms. Bazemore's pleadings that are not an elaboration on the allegations in her complaint.

*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (explaining that liberal construction of pleadings is necessary "[b]efore discovery has unearthed relevant facts and evidence"); *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 484 (4th Cir. 2014) (reasoning that discovery is often needed in employment discrimination cases because "key evidence lies in the control of the moving party").

Finally, Best Buy asserts that at the pleading stage, "a plaintiff must plead and prove each [element] to support a hostile environment claim." Appellee's Br. 11. But as this Court has made clear, Ms. Bazemore was "not required to plead facts that constitute[d] a prima facie case in order to survive a motion to dismiss." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (citing *Swierkiewicz*, 534 U.S. at 510–15). At the pleading stage, "a complaint need not . . . *forecast evidence* sufficient to *prove* an element of the claim," rather a complaint "need only *allege facts* sufficient to *state* elements of the claim." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 291 (4th Cir. 2012) (cleaned up).

When Ms. Bazemore's complaint is construed liberally and the correct legal standard is applied, Ms. Bazemore alleged a plausible hostile work environment claim that should have survived a motion to dismiss.

### B. Ms. Bazemore plausibly alleged harassment that was severe or pervasive.

Turning to the plausibility of Ms. Bazemore's complaint, Best Buy asserts that the "District Court properly found that [the allegations in the complaint], alone or together, were insufficient to rise to the level of severity or pervasiveness required of hostile environment claims." Appellee's Br. 15. That's incorrect. The district court made clear that it did "not reach the issue of whether Bazemore has properly pled conduct that was sufficiently severe or pervasive . . . ." J.A. 132.

Then, throughout its brief, Best Buy insinuates that Creel's harassment was not sufficiently severe or pervasive, but does not develop this argument. *See, e.g.*, Appellee's Br. 8 (summarily asserting that the "frequency and severity of the conduct Ms. Bazemore alleges comes nowhere close to [the hostile work environment] standard"); *id.* at 22 (characterizing Creel's use of the slur as "an isolated offensive remark, intended as a 'joke,' by an unenlightened employee with no appreciation of the severity of her comment and its effect"). Because Best Buy "fail[ed] to develop this argument to any extent in its brief," this Court should find it waived.[6] *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012); *see Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (cleaned up)

[6] Indeed, a perusal of the table of contents to Best Buy's brief shows that Best Buy is not affirmatively arguing the severe or pervasive point.

("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue."); *Hensley v. Price*, 876 F.3d 573, 580 n.5 (4th Cir. 2017) (cleaned up) ("Appellate courts are not like pigs, hunting for truffles buried in briefs.").

Best Buy also cites several cases for the proposition that Title VII was not designed to "purge" the workplace of all misbehavior. Appellee's Br. 13. It is undisputed that "Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment." *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). But being publicly humiliated in front of coworkers and a supervisor by a racial slur is not merely routine workplace "teasing." Appellee's Br. 13. This Court has repeatedly made clear that the slur n****r is "[f]ar more than a 'mere offensive utterance,'" *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001), as it is "pure anathema to African-Americans," *Savage v. Maryland*, 896 F.3d 260, 277 (4th Cir. 2018). The severity of the slur was only magnified by Creel pairing it with the word "t*ts" to target Ms. Bazemore as a Black woman. What Creel said to Ms. Bazemore was "degrading and humiliating in the extreme." *Boyer-Liberto*, 786 F.3d at 280.

But it is not just the slur that is at issue. It is also that Creel harassed Ms. Bazemore in public, in front of her coworkers. *See EEOC v. R&R Ventures*, 244 F.3d 334, 340 (4th Cir. 2001) (noting that severity is "compounded by the context in

which it [takes] place," such as "in front of other employees and customers"). Creel was in a position of influence because of her close personal relationship with General Manager April Brewster. *See Boyer-Liberto*, 786 F.3d at 279 (finding that the close relationship between harassing coworker and the employer compounded the severity of the hostile environment). And Creel and Brewster began shunning Ms. Bazemore after she reported the harassment. *See Conner v. Schrader-Bridgeport Int'l, Inc*., 227 F.3d 179, 197 (4th Cir. 2000) (noting that an accumulation of subsequent less severe incidents "exacerbate[d] the severity of the situation"). As the Supreme Court has explained, a hostile work environment "can be determined only by looking at *all* the circumstances." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993) (emphasis added). Here, the circumstances surrounding the intolerable slur worked to magnify its severity.

At bottom, whether the harassment was sufficiently "severe or pervasive is quintessentially a question of fact" that this Court should not resolve at the motion-to-dismiss stage. *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 335 (4th Cir. 2010). For the reasons more fully explained in the opening brief, Ms. Bazemore alleged harassment that was severe or pervasive enough to survive a motion to dismiss.

### C. Ms. Bazemore plausibly alleged a basis for imputing liability on Best Buy.

Best Buy's brief addresses the fourth element, imputability, primarily under the rubric of summary judgment. Best Buy asserts, in passing, that "[a]s offensive and inappropriate as Ms. Creel's remark may be, it is not, as the District Court found, imputable to Best Buy." Appellee's Br. 11. As to whether the district court was correct in granting Best Buy's motion to dismiss on this basis, Best Buy has also "fail[ed] to develop this argument to any extent in its brief," and this Court should find it waived. *Belk*, 679 F.3d at 152 n.4.

Ms. Bazemore plausibly alleged a basis for imposing liability on Best Buy for the reasons stated in the opening brief and as explained below in Section II.B.

## II. Best Buy is Not Entitled to Summary Judgment.

Best Buy alternatively argues that it is entitled to summary judgment. Appellee's Br. 17. This argument must be rejected for two reasons: (1) Ms. Bazemore is entitled to discovery, and (2) Best Buy's response was *not* effective as a matter of law.

### A. Ms. Bazemore requested discovery.

Best Buy's request to affirm on the alternate basis of summary judgment is premature. "Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask." *McCray*, 741 F.3d at 483. Generally,

"summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to [her] opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986). The necessity of allowing a reasonable opportunity to develop materials before summary judgment is even more pronounced here because Ms. Bazemore was proceeding *pro se* before the district court. *See Dolgaleva v. Va. Beach City Pub. Sch.*, 364 F. App'x 820, 825 (4th Cir. 2010) (unpublished) ("When dealing with *pro se* litigants . . . it is particularly important that the litigant either have notice and a chance to file appropriate supplementary materials for a summary judgment proceeding, or at least have had a full opportunity to present all the matter the district court would have needed to render summary judgment.").

Despite being *pro se*, in her opposition to Best Buy's motion to dismiss or in the alternative for summary judgment, Ms. Bazemore cited Rule 56(f),[7] and persistently requested discovery. J.A. 112, 116-19. Ms. Bazemore's invocation of Rule 56(f) shows that she was opposing summary judgment because facts were unavailable to her. And although her opposition papers did not include a Rule 56 affidavit, this Court "ha[s] not always insisted on a Rule 56(f) affidavit if the

[7] Ms. Bazemore cited Rule 56(f), J.A. 119, which was formerly Rule 56(d). *See McCray* 741 F.3d at 484 n.2. ("The language of Rule 56(d) appeared in Rule 56(f) before amendments in 2010, but these amendments made no substantial change to the rule.").

nonmoving party has adequately informed the district court that the motion is pre-mature and that more discovery is necessary." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002). Excusing the lack of an affidavit is especially appropriate "where, as here, the non-moving party is proceeding *pro se*." *Putney v. Likin*, 656 F. App'x 632, 638 (4th Cir. 2016) (unpublished).

To be certain, Ms. Bazemore put the district court on notice that summary judgment was premature because she needed discovery. She asked for discovery to address several specific matters that were in Best Buy's exclusive control:

- Details of Best Buy's Corrective Action – "I wish to conduct discovery in order to further develop the facts of the case as permitted by the discovery rules, specifically to establish . . . [t]he inadequacy of Best Buy's response," J.A. 119; *see also* J.A. 117;

- Inconsistent Application of Best Buy's Disciplinary Policy – Ms. Bazemore requested discovery to determine whether Best Buy was inconsistently applying its harassment policy, based on her knowledge of employees who had been terminated for using the word n****r, Ms. Bazemore explained that "I am entitled to discovery on these previous incidents," J.A. 118;

- Other Misconduct by Creel – Ms. Bazemore requested discovery about other incidents surrounding Creel's misconduct, based on her good-faith belief that this was not an isolated occurrence from her knowledge of Creel's other racist statements such as calling customers "gypsies," J.A. 119;

- Brewster's Conflict of Interest – Ms. Bazemore requested discovery to show that Best Buy's inadequate response stemmed from the close friendship between the manager, April Brewster, and Creel—"discovery will show that Best Buy failed to adequately respond, and will show that my fear from the very beginning, that nothing would be done because of who Anne Creel is to April Brewster, has come true," J.A. 119.

As these requests make clear, there was an obvious information-asymmetry because key evidence about Best Buy's actions are still wholly within Best Buy's control. And because the district court dismissed Ms. Bazemore's complaint at the 12(b)(6) stage, *see* J.A. 136, it did not have a reason to reach her discovery requests. Because the district court did not have an opportunity to address Ms. Bazemore's requests for discovery, this Court should not affirm the decision below on the alternative ground of summary judgment.

Indeed, Best Buy's primary argument about the adequacy of its response is that there were no other complaints. *See* Appellee's Br. 22. But, before discovery, this Court has explained that a defendant's assertion of an "absence" of additional complaints "is no[t] *evidence* in the record demonstrating the absence of complaints." *Willis v. Town of Marshall*, 426 F.3d 251, 263–64 (4th Cir. 2005). Thus, "summary judgment [is] premature" before discovery because "[w]hether complaints were or were not received is a matter wholly within the knowledge of the [Best Buy]." *Id.* Because Ms. Bazemore has not had a chance to discover this information despite her requests, summary judgment would be inappropriate.

**B. <u>Best Buy's response was not adequate as a matter of law.</u>**

Even on this limited record, Best Buy's response was not adequate as a matter of law. Employers are liable for a hostile work environment arising from coworker harassment when they know of the harassment and "fail[ ] to take prompt remedial

action reasonably calculated to end the harassment." *Strothers v. City of Laurel*, 895 F.3d 317, 334 (4th Cir. 2018) (quotation omitted). At summary judgment, a "plaintiff need prove only that [their employer] failed to exercise reasonable care," and is not required to establish their employer's "response to the complaints was inadequate as a matter of law." *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335 (4th Cir. 2011) (quotation omitted).[8]

Best Buy asserts that "an employer is not liable for coworker conduct unless it knew or should have known about it and failed to stop or prevent it." Appellee's Br. 11. This articulation of the legal standard is incomplete. This Court has explained that when a coworker's harassment creates a hostile work environment, the employer is liable "if [it] knew or should have known about the harassment and failed to take effective action . . . by responding with remedial action reasonably calculated to end the harassment." *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 498 (4th Cir. 2015) (quotation omitted). "[A]n employer will *always* be liable when its negligence leads to the creation or continuation of a hostile work environment." *Vance v. Ball State Univ.*, 570 U.S. 421, 447 (2013) (emphasis added).

[8] Due to a misplaced quotation mark, Appellant's opening brief mistakenly included the phrase "is not require to establish their employer's" in a quotation from *Hoyle*. Opening Br. 23.

Thus, Best Buy's assertion that it cannot be liable because it responded with "an investigation and corrective action" is incorrect. Appellee's Br. 16. It is not enough for an employer to simply respond to harassment, that response must be reasonably calculated to end the harassment.[9] This Court made this point plain: "[a] complete failure to act by the employer is *not* required; an employer may not insulate itself entirely from liability by taking some token action in response to [workplace harassment]." *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1133 (4th Cir. 1995) (emphasis added). Rather, whether an employer's response to harassment is adequate turns on its "promptness . . . , the specific remedial measures taken, and the effectiveness of [the remedial] measures." *Pryor*, 791 F.3d at 498.

Best Buy is not entitled to summary judgment because its response was both inadequately designed to abate the hostile work environment and ineffective in correcting the harassing behavior and the hostility that flowed from it.

[9] Best Buy points out that Creel was not Ms. Bazemore's supervisor. *See* Appellee's Br. 11–12. Employers are not immune simply because the harasser is not a supervisor. Rather, employers are liable for coworker harassment when they are aware of the harassment and "fail[] to take prompt remedial action reasonably calculated to end the harassment." *Strothers*, 895 F.3d at 334. And, as in *Boyer-Liberto*, the real-world relationship between the harasser and management supports Ms. Bazemore's reasonable belief that the harassment was severe enough to create a hostile work environment. 786 F.3d at 279.

1. Best Buy's response was inadequate.

First, Best Buy's investigation was inadequate. In her initial conversation with Ms. Bazemore, Best Buy's HR representative, Colleen Hayes, did not ask Ms. Bazemore a single follow-up question and there is no evidence that she interviewed any witnesses. J.A. 139. Then, despite Best Buy's notice of a conflict of interest created by Brewster's friendship with Creel, Best Buy delegated the investigation to Brewster. J.A. 16. Unsurprisingly, Brewster's documentation of Creel's harassment in the "Corrective Action Form" is vague and evasive, describing the phrase "N****r T*ts" euphemistically as "offensive." *Id.* And following this cursory and superficial investigation, Best Buy closed the case two days later. J.A. 16, 50–51. In fact, Best Buy continues to minimize the slur "n***** t*ts," labelling it merely "offensive." *See* Appellee's Br. 22. Best Buy's persistent downplaying of Creel's harassment reflects the inadequacy of its response.

Second, Ms. Bazemore alleged that she called Best Buy's HR representative and left a voicemail stating that "things in the store were still very tense" and that "both Creel and Brewster were giving [Ms. Bazemore] hostile, unfriendly, and judgmental looks and trying to avoid [her]." J.A. 139. Best Buy's HR department never returned Ms. Bazemore's calls. *Id.*

Third, Ms. Bazemore alleged that the *first time* she learned of *any* action taken by Best Buy in response to her complaint was *six months* after the incident—leaving

her in the dark for months. J.A. 50–51. And yet, months prior, she had called Best Buy's HR representative twice, leaving a voicemail explaining that she was "confused[] because it seem[ed] like nothing ha[d] happened" and that Best Buy had not "resolved" the problem at all. J.A. 50.

This Court cannot say that Best Buy's response was adequate as a matter of law when considering these glaring shortcomings. "[A] reasonable finder of fact could infer that [Best Buy] intended [its response] as nothing more than a slap on the wrist or perhaps even an outright sham." *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989) *vacated, in part, on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc).

2. Best Buy's response was ineffective.

Not only was Best Buy's response inadequate, it was also ineffective. Ms. Bazemore alleged that Creel continued to use racial epithets after her meeting with Brewster, calling customers "gypsies." These comments show Best Buy's remedial action did not work and are relevant here because for hostile work environment claims, "the totality of the circumstances includes conduct directed not at the plaintiff." *Hoyle*, 650 F.3d at 333; *see Spriggs*, 242 F.3d at 184 ("We 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 the complainant [and her harasser.]"); *Ziskie v. Mineta*, 547 F.3d 220, 225 (4th Cir.

2008) ("[E]vidence about how other employees were treated . . . can be probative of whether the environment was indeed a sexually hostile one, even if the plaintiff did not witness the conduct herself."); *see also Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) ("[R]acist attacks need not be directed at the complainant in order to create a hostile [work] environment.").

Still, Best Buy claims that "[s]ince Creel's discipline, there has been no further offending conduct," Appellee's Br. 17, and that "other Best Buy employees" have not "reported similar transgressions involving Creel since the incident," Appellee's Br. 22. But using the epithet "gypsy" *is* "offending conduct," and whether other complaints about Creel's racist or sexist behavior were lodged with her best friend—General Manager Brewster—or with Best Buy's HR department, is precisely the kind of information that can be known only through discovery. *See Willis*, 426 F.3d at 263–64.

Best Buy's response was also ineffective because, as Ms. Bazemore alleged, in response to her report of the harassment, both Creel and Ms. Bazemore's boss, Brewster, started treating Ms. Bazemore with open hostility. Best Buy responds that Ms. Bazemore's allegations of continued hostility are insufficient because these "post-incident events" "fall well outside the conduct necessary to establish continuing harassment." Appellee's Br. 12. But a plaintiff does not have to allege the continuing conduct would independently rise to severe or pervasive harassment

for it to be relevant to a hostile work environment claim. *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1124 (8th Cir. 2007) ("To show that a hostile work environment has continued after an employer's remedial action, a plaintiff need not prove an entire accumulation of harassing acts, amounting to a new and free-standing hostile work environment."). Rather, incidents of hostility that continue after an employer's "corrective action" and are reported to the employer are directly relevant to the effectiveness of an employer's response—continued hostility strongly suggests that the initial response was ineffective. *EEOC v. Xerxes Corp.*, 639 F.3d 658, 670 (4th Cir. 2011) ("The employer is, of course, obliged to respond to any repeat conduct." (quoting *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir.1998)); *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 178 (4th Cir. 2009) (reasoning that a relevant consideration in assessing reasonableness is whether an employer "t[ook] increasingly progressive measures to address the harassment when its responses proved ineffective.").

On this incomplete record, this Court also cannot say that Best Buy's response effectively abated the hostile work environment such that the company is entitled to summary judgment.

3. Best Buy's remaining arguments do not support granting summary judgment.

Best Buy purports to sum up Ms. Bazemore's argument by saying that "[i]n short, Ms. Bazemore contends that no response short of a termination was adequate." Appellee's Br. 18. That is inaccurate. Ms. Bazemore said she expected "a sit down with the General Manager," "a store meeting reminding the staff about the ethics policy," or at the very least "an apology." J.A. 50. Ms. Bazemore—as any reasonable employee would—expected her employer to comply with the law and to respond appropriately to incidents of racist and sexist harassment in the workplace. She never asked for Creel to be terminated.

Indeed, there were several actions that Best Buy could have taken short of termination that may have been reasonable. For example, when Ms. Bazemore reported that Creel publicly humiliated her with a racist and sexist slur in front of coworkers and a supervisor, a reasonable response would be a staff-wide training reminding employees of Best Buy's anti-harassment policies in tandem with serious, impartial disciplinary action taken against the offender. *See, e.g.*, *Mikels v. City of Durham*, 183 F.3d 323, 329 (4th Cir. 1999) (response adequate when employer promptly warned harasser, held a team meeting, management issued official reprimand, suspended harasser for two-months, and reassigned harasser to a different squad). Best Buy did none of this. When Ms. Bazemore called HR and left a message explaining that she was left in dark, saw no corrective action taken, and

was confused about whether Best Buy took her complaint seriously or had taken any corrective action at all, a reasonable response would be to assure her that they were taking her report seriously and would take remedial action. *See Waldo v. Consumers Energy Co.*, 726 F.3d 802, 814 (6th Cir. 2013) ("Steps that would establish a base level of reasonably appropriate corrective action may include . . . following up with [the complainant] regarding whether the harassment was continuing . . . "). Instead, Best Buy never responded.[10] When Ms. Bazemore also reported that the environment in the store was tense and Creel, and now the General Manager, were hostile to her, a reasonable response would be to investigate this new complaint as it was likely connected to her prior complaint of harassment. *See Hirase-Doi v. U.S. W. Commc'ns, Inc.*, 61 F.3d 777, 784 n.3 (10th Cir. 1995) (emphasis added) (finding that subsequent complaints of "threatening stares" from harasser could "constitute *continuing* sexual harassment"), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). Best Buy did nothing.

[10] Best Buy suggests that following-up with a victim of harassment is a "heightened standard." Appellee's Br. 17 n.17. The question is whether Best Buy's choice to not follow-up with the victim was objectively reasonable given the circumstances. *See Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 930–31 (8th Cir. 2010) ("The jury could reasonably find that [the employer] did not take [the victim's] complaints seriously, given its repeated failure to keep her apprised of its response or to follow through on its stated intentions.").

Finally, Best Buy argues that the corrective action it took was within its own discretion and interpretation of its disciplinary guidelines. Appellee's Br. 18–22. But a full reading of Best Buy's policies belies that assertion. Best Buy's policies classify the use of racial slurs as "Reckless Conduct" that typically results in termination. *See* Excerpt Below at J.A. 30.[11]

| **Reckless Conduct**<br><br>Conduct which creates a substantial and unjustifiable risk of harm, damage or injury to another person or causes such harm, damage or injury to the property of the company, during work time or on company premises. Reckless conduct also includes, but is not limited to, such work place violence as: | |
|---|---|
| • Harassment of employee(s), applicants, customers, vendors or contract workers based on age, race, color, disability, national origin, gender, religion, sexual orientation, gender identity, ancestry or other characteristic protected by federal, state or local law, which consists of threats, intimidation, unwanted physical contact, misuse of management authority or position or the willful creation of circumstances which would make the workplace intolerable unless immediate and effective relief is provided. Also see Disorderly Conduct. | T |
| • Physical assault, attempted assault or extremely offensive, aggressive and/or threatening verbal or non-verbal conduct (i.e., racial slurs or taunts, threats of bodily harm to a person or family, etc.) of employee(s), applicants, customers, vendors or contract workers. | T |

Best Buy's brief conveniently omits the portion of its guidelines that explicitly address "racial slurs." Appellee's Br. 20. Best Buy's failure to follow its own policy—the standard of care the company set for itself—is probative of the inadequacy of its action and provides yet another reason why the company is not entitled to judgment as a matter of law. *See Pryor*, 791 F.3d at 499 n.7 ("[A] company's policies reflect its reasoned belief as to the best way to address and end

[11] T stands for "termination" in Best Buy's guidelines. *See* J.A. 26.

harassing conduct"; and failure to "compl[y] with those policies is a factor" that suggests unreasonableness); *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 932 (7th Cir. 2017) (reasoning that an employer "is accountable to the standard of care that it created for itself [in its policies]").

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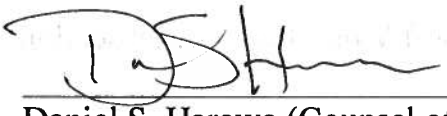
Ultimately, "[t]he adequacy of [Best Buy's] response once it was aware of the harassment is a factual issue," and "a genuine issue of fact exist[s] about whether [Best Buy]'s action was reasonably calculated to end the harassment." *Amirmokri*, 60 F.3d at 1131. For that reason, Best Buy is not entitled to summary judgment.

## CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the district court's decision and remand for further proceedings.



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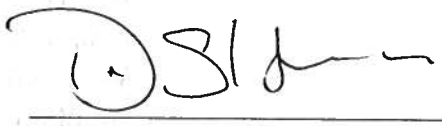
## CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure, undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes and images, contains no more than 6,500 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 5,577 words.



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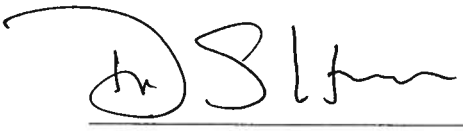
## CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.



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