Case No. 18-2196

In the
UNITED STATES COURT OF APPEALS
for the
FOURTH CIRCUIT

ERIKA BAZEMORE,
Appellant

v.

BEST BUY
Appellee

Appeal from the United States District Court for the District of Maryland
18-cv-00264-PJM

RESPONSE BRIEF OF DEFENDANT-APPELLEE, BEST BUY

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 18-2196 Caption: Erika Bazemore v. Best Buy

Pursuant to FRAP 26.1 and Local Rule 26.1,

Best Buy Stores, L.P.
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☑YES ☐NO
If yes, identify all parent corporations, including all generations of parent corporations:

Best Buy Co., Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ William W. Carrier, III Date: December 10, 2019

Counsel for: Best Buy

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STATEMENT OF JURISDICTION

The United States District Court for the District of Maryland had subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 and 42 U.S.C. §2000e-5(f)(3). The action presents a federal question under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended.

By order dated June 25, 2018, the district court granted Best Buy's Motion to Dismiss First Amended Complaint or in the Alternative, for Summary Judgment, and dismissed Erika Bazemore's claim. On July 19, 2018, Ms. Bazemore moved for reconsideration. By order dated September 10, 2018, the district court denied Ms. Bazemore's motion for reconsideration. Ms. Bazemore filed a timely Notice of Appeal on October 4, 2018.

STATEMENT OF THE ISSUES

1. Whether the district court was correct in dismissing for failure to state a claim Bazemore's amended complaint asserting a claim based on a racially hostile work environment claim under Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. ("Title VII")?

2. If the district court's dismissal of Ms. Bazemore's amended complaint under F. R. Civ. P. 12(b)(6) was erroneous, whether Best Buy was entitled to judgment as a matter of law under F. R. Civ. P. 56(a) based upon undisputed material facts?

STATEMENT OF THE CASE

A. Procedural History

Ms. Bazemore's claim arises out of a February 5, 2017, workplace event while she stood among a group of co-workers, which she describes as follows:

> . . . Co-worker, Anne Creel was eating a bag of mixed nuts, and she looks at the group and says, "Hey, do you know what these were called back in the day? (Referring to a Brazilian Nut) And so we are waiting for the answer "what?", and before proceeding she adds, "Do you promise not to call HR on me?" and she turns and looks directly at me and says "Nigger Tits!" and burst out laughing. Everyone was frozen for a few seconds and I broke the silence by saying, "Okay" and immediately walking away. I was the only black female present in the group.

J.A. 49. Ms. Bazemore reported Creel's comment to Best Buy's Employee Relations Department. J.A. 49. During Best Buy's investigation, Creel admitted making the comment. J.A. 50-51. On February 5, 2017, Best Buy issued Creel a final warning under its written discipline guidelines. J.A. 16, 51.

On March 28, 2017, dissatisfied with Best Buy's response, Ms. Bazemore filed a charge of discrimination for racial and gender-based harassment with the Maryland Commission on Civil Rights. J.A. 12.[1] Following the August 31, 2017, dismissal of her charge, Ms. Bazemore, *pro se*, filed on December 22, 2017, a complaint in the Prince George's County Circuit Court. J.A. 51. Best Buy timely

[1] Ms. Bazemore's charge complains of two things: the Creel February 5 statement and the absence of "corrective action." J.A. 12.

removed the action to the United States District Court for the District of Maryland ("District Court"). J.A. 2. On February 13, 2018, Best Buy moved to dismiss Ms. Bazemore's complaint pursuant to F. R. Civ. P. 12(b)(6) and, alternatively, for summary judgment under F. R. Civ. P. 56, J.A. 9. Ms. Bazemore responded to the motion by filing on February 20, 2018, a First Amended Complaint. J.A. 49-52. The amended complaint contains essentially the same material allegations as the original complaint. It, like the original complaint, contends that Creel's sanction was insufficient, and it seeks compensatory damages of $500,000 as a result of the emotional trauma allegedly suffered by Ms. Bazemore from the incident.[2] J.A. 52. On February 28, 2018, Best Buy moved to dismiss the First Amended Complaint, and alternatively, for summary judgment. J.A. 62. On June 25, 2018, the District Court issued a memorandum opinion and order granting Best Buy's motion to dismiss with prejudice. J.A. 128-136.

B. Relevant Facts

The relevant facts differ depending on whether Ms. Bazemore's claim is considered under a Rule 12(b)(6) standard or under Rule 56. In either case, however, the factual underpinnings must be viewed in the context of the particular claim that Ms. Bazemore asserts. All hostile environment claims, including Ms.

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[2] Ms. Bazemore continued to work at Best Buy Store #446, when the incident occurred, until November 25, 2018, when she transferred to another Maryland Best Buy. On September 15, 2019, she was promoted to a supervisory position.

Bazemore's, begin with the claimant's perception of an event or series of events that create in the mind of the claimant an intolerable working condition. The claimant, therefore, is peculiarly suited to know, and to identify, what it is that makes her environment hostile. That means: (1) facts that are unknown to, or yet to be discovered by, the claimant are limited relevance in assessing the legal sufficiency of the claim; and (2) that a claimant should be presumed to have alleged all conduct that contributes to her perception.

1. Facts Relevant to Best Buy's Motion to Dismiss.

The facts that Ms. Bazemore, and her representatives, offer to support her claim grow, and morph, with each successive filing at the District Court and appellate levels. Notwithstanding this "factual creep," the basis for determining whether Ms. Bazemore has stated a claim upon which relief may be granted depends, in the first instance, on the allegations in her pleadings and the reasonable inferences, beyond mere speculation, that flow from them. *See King v. Rubenstein*, 825 F.3d 206, 225 (4th Cir. 2006) (stating facts must "raise a right to relief above the speculative level"); *see also Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). In addition, as a *pro se* litigant, if her pleading contains a potentially cognizable claim, Ms. Bazemore is permitted the opportunity to particularize her allegations beyond her

pleading.[3] *King*, 825 F.3d at 225. Ultimately, however, the burden is on Ms. Bazemore to allege sufficient facts to raise a right to relief above a speculation level and state a claim to relief that is plausible on its face. *King v. Rubenstein*, *id.* (even *pro se* litigants must allege facts sufficient to state a claim).

The material allegations in Ms. Bazemore's amended complaint are as follows:

1. The February 5, 2017, initial incident, as described in paragraph 2 of the Amended Complaint. J.A. 49.

2. Ms. Bazemore's report of the incident to Best Buy on February 6, 2017. Amended Complaint, ¶ 3. J.A. 49.

3. The resulting investigation including a February 9 telephone call from Coleen Hayes, Ms. Hayes's February 20 voicemail to Ms. Bazemore informing her that the matter had been resolved and case officially closed, and Ms. Bazemore's February 27 call-back to Ms. Hayes and voicemail indicating that she was confused and that things in the store were tense. Amended Complaint ¶ 4. J.A. 50.

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[3] Whether Ms. Bazemore is entitled to the liberal pleading standards afforded *pro se* litigants is questionable. Obviously, at the District Court level no attorney appeared on her behalf. Ms. Bazemore's procedural maneuverings, however, point strongly to her being advised by a lawyer. Amending one's complaint in the face of a motion to dismiss, J.A. 2, responding to Rule 12 and 56 motions by requesting opportunity for discovery, J.A. 118, and moving to reconsider, J.A. 137, are all tactics beyond the ken of the general public.

4. Creel's admitting to the statement, and the "write-up" received by Creel for her comment. Amended Complaint ¶¶ 9, 10. J.A. 50-51.

5. Post-comment treatment of Ms. Bazemore by Creel and her supervisor, April Brewster, which Ms. Bazemore characterizes as avoidance and shunning. Amended Complaint ¶¶ 7, 8. J.A. 50.

The remainder of the amended complaint consists largely of Bazemore's describing her emotional trauma and her dissatisfaction with the penalty that Creel received. *See, e.g.,* Amended Complaint ¶¶ 7, 14-19. J.A. 50-52. It contains no other allegations of similar conduct on the part of Ms. Creel, either before or after the February 5, 2017, incident. And although she represents that she reported "continued hostility" after February 5 in her February 27 voicemail to Ms. Hayes, *see* Opening Brief of Plaintiff-Appellant Erika Bazemore (Appellant's Brief") at 5, the passage in her Amended Complaint that she cites does not support her assertion.[4]

Consistent with the law in this circuit regarding pleading standards for *pro se* parties, the District Court credited in its memorandum opinion additional allegations raised by Ms. Bazemore in her other filings, including her opposition to Best Buy's motion. For instance, the District Court took into account Ms.

[4] Ms. Bazemore cites paragraph 7 of her amended complaint in support of that allegation. Paragraph 7, which describes her February 27 voicemail message, states only that: (1) Ms. Bazemore was "confused"; (2) that things in the store remained "tense"; and (3) that her general manager was "avoiding" her. J.A. 50.

Bazemore's assertion that two other employees, a Caucasian male and an Indian male, had been fired for making similar slurs. J.A. 132. The court also took into account Ms. Bazemore's contention that Creel on two occasions referred to "persons of color" as gypsies. J.A. 134. The District Court concluded, correctly, that these allegations were neither sufficiently specific nor relevant to the "sufficiency of Ms. Bazemore's allegations." J.A. 134.

2. Facts Relevant to Best Buy's Motion for Summary Judgment.

The facts relevant to Best Buy's motion for summary judgment do not stray far from the allegations offered by Ms. Bazemore in opposition to the motion to dismiss. In response to Ms. Bazemore's implication that Best Buy's discipline of Ms. Creel fell short, Best Buy included in support of its motion the disciplinary guidelines in effect at the time of its investigation. *See* Best Buy Coaching and Corrective Action Process Guidelines (the "Guidelines"). J.A. 18-38. As described in more detail below, the plain language of those guidelines supports the final warning that Best Buy issued Creel. Best Buy also included in support of its Rule 56 motion an affidavit of the investigator, Colleen Hayes. J.A. 75. Ms. Hayes's affidavit confirms, among other things, that Creel had no supervisory responsibilities over Ms. Bazemore. J.A. 47. It also establishes:

1. that Ms. Bazemore represented to Ms. Hayes at the outset of the investigation that she and Ms. Creel had a good working relationship prior to the incident and Ms.

Bazemore had no issue with Ms. Creel's conduct before the February 5 comment; and

2. that since the investigation there have been no further reported incidents involving Ms. Creel and Ms. Bazemore.

J.A. 47. Ms. Bazemore disputed neither of these points, although she obviously is in a position to do so.

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed Ms. Bazemore's claim under Federal Rule of Civil Procedure 12(b)(6). Ms. Creel's comment is not, as a matter of law, imputable to Best Buy. And the other matters that Ms. Bazemore offers to support her claim are legally insufficient to state a viable claim. To state a hostile work environment claim, there must be alleged conduct imputable to the defendant that was so severe or pervasive to alter the plaintiff's conditions of employment. The frequency and severity of the conduct that Ms. Bazemore alleges comes nowhere close to that standard.

In addition, the undisputed material facts entitle Best Buy to judgment as a matter of law on Ms. Bazemore's claim. Best Buy responded promptly to Ms. Bazemore's report. Ms. Hayes, in the course of her investigation, learned from Ms. Bazemore that she had a good relationship with Creel before the February 5 comment, and had no prior issues with Creel's conduct. Creel, when interviewed, admitted to Ms. Hayes that she had made the offending comment. As a result, and

consistent with its disciplinary guidelines, Best Buy issued Creel a Final Warning, a sanction that under the guidelines immediately precedes termination. Since the warning, there have been no reported issues involving Ms. Creel and Ms. Bazemore.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* the district court's ruling on a motion to dismiss for failure to state a claim. *Stahle v. CTS Corp.,* 817 F.3d 96, 99 (4th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This "plausibility" standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* When a complaint "pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."' *Id.* (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 557 (2007)). Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [and] . . . are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678-79; *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250, 253 (4th Cir. 2009).

An appellate court may affirm a district court's judgment upon grounds shown by the record. *SEC v. Chenery Corporation*, 318 U.S. 80, 88 (1943); *Wiencko v. Ehrlich (In re Wiencko)*, 99 Fed. Appx. 466, 469 (4th Cir. 2004); *Republican Party,* 980 F.2d at 952. Accordingly, the District Court's ruling may be affirmed if the undisputed material facts entitle Best Buy to judgment as a matter of law. Summary judgment motions are also reviewed *de novo*. *EEOC v. Navy Fed. Credit Union,* 424 F.3d 397, 405 (4th Cir. 2005). A motion for summary judgment is appropriate where "there is no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. In assessing a motion for summary judgment, all reasonable inferences must be drawn in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). The party opposing summary judgment, however, "may not rest upon mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256 (citation omitted). Moreover, "a complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

II. The Conduct Alleged in Ms. Bazemore's First Amended Complaint, and Otherwise Offered to Support Her Claim, Is Not Sufficient to Support a Hostile Environment Claim.

To establish sex or race based hostile work environment claim under Title VII, Ms. Bazemore must sufficiently allege that: (1) she experienced unwelcome harassment; (2) the harassment was based on her race or sex; (3) the harassment was sufficiently severe or persuasive to alter the conditions of employment and create an abusive atmosphere; and (4) which is imputable to the employer. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015); *Ruffin v. Lockheed Martin Corp.,* 126 F. Supp. 3d 521, 528 (D. Md. 2015). These elements are, of course, conjunctive, and a plaintiff must plead and prove each to support a hostile environment claim. Here, Ms. Bazemore's claim fails at the pleading level because, as a matter of law, the February 5 statement is not imputable to Best Buy, and the other cited conduct is not sufficient to support her claim.

A. Creel's February 5 Statement is Not Imputable to Best Buy.

As offensive and inappropriate as Ms. Creel's February 5 remark may be, it is not, as the District Court found, imputable to Best Buy. Although conduct by supervisors is imputable to an employer, an employer is not liable for co-worker conduct unless it knew or should have known about it and failed to stop or prevent it. *See Faragher,* 524 U.S. at 789; *Boyer-Liberto,* 786 F.3d at 278. Ms. Bazemore's reliance on *Boyer-Liberto* is therefore misplaced. In *Boyer-Liberto,*

the critical factor justifying the plaintiff's claim was the relationship of the declarant to the employee. *Id.* Because the declarant was in a supervisory position,[5] the employer was strictly liable for his comments. *Id.* at 278–79.

B. The Additional Facts that Ms. Bazemore Cites to Support Her Hostile Environment Claim Are Insufficient as a Matter of Law.

As Creel was not Bazemore's supervisor, her claim depends on alleging that Best Buy failed to take effective action to stop Creel's continued hostility. *Boyer v. Liberto*, 786 F.3d at 278. Bazemore attempts to do so by referencing post-incident events that, even when taken together, fall well outside the conduct necessary to establish continuing harassment. "[T]he standard for proving an abusive work environment is intended to be a high one." *Karim v. Staples, Inc.,* 210 F. Supp. 2d 737, 752 (D. Md. 2002) (citing *Porter v. Nat'l Con-Serv, Inc.,* 51 F. Supp. 2d 656, 659 (D. Md. 1998)); *Norris v. City of Anderson,* 125 F. Supp. 2d 759, 766 (D.S.C. 2000). "For a hostile work environment claim to lie there must be evidence of conduct 'severe or pervasive enough' to create 'an environment that a reasonable person would find hostile or abusive.'" *Von Gunten v. Maryland*, 243 F.3d 858, 870 (4th Cir. 2001) (quoting *Harris*, 510 U.S. at 21).

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[5] Several of the other cases relied upon by Ms. Bazemore involve conduct by supervisors for which an employer is strictly liable and therefore do not support Ms. Bazemore's argument. *See, e.g., Chambers v. Walmart Stores*, 2015 WL 4479100 at *4 (M.D.N.C. July 22, 2015).

Title VII was not designed to purge all harassing or annoying behavior in the workplace, only that which renders the workplace objectively and subjectively hostile or abusive. *Hartsell v. Duplex Prods., Inc.,* 123 F.3d 766, 773 (4th Cir. 1997) ("Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace."); *Lissau v. S. Food Serv., Inc.,* 159 F.3d 177, 183 (4th Cir. 1998) (Title VII does not "provide a remedy for every instance of verbal or physical harassment in the workplace"); *Hopkins v. Baltimore Gas & Elec. Co.,* 77 F.3d 745, 753 (4th Cir. 1996) ("Title VII is not designed 'to purge the workplace of vulgarity.'") (quoting *Baskerville v. Culligan Int'l Co.,* 50 F.3d 428, 430 (7th Cir. 1995)). Thus, the Supreme Court has instructed, "ordinary tribulations of the workplace, 'such as the sporadic use of abusive language . . . and occasional teasing' are not actionable." *Faragher,* 524 U.S. at 788 (citation omitted). *See also Clark Cnty. Sch. Dist. v. Breeden,* 532 U.S. 268 (2001) ("A recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.") (quoting *Faragher,* 524 U.S. at 788) (internal quotations omitted).

In determining whether the harassment was sufficiently severe or pervasive to establish a hostile work environment, courts consider the "totality of the circumstances," not just isolated incidents. *Faragher v. City of Boca Raton,* 524

U.S. 775, 787-88 (1998). This assessment includes "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Beardsley v. Webb,* 30 F.3d 524, 529 (4th Cir. 1994) (internal quotation marks omitted) (quoting *Harris,* 510 U.S. at 21). "The conduct, furthermore, must be "extreme." *Faragher,* 524 U.S. at 778. Incidents that would objectively give rise to bruised or wounded feelings will not satisfy the "severe" or "pervasive" standard. *Id.* Rather, the employer's conduct must be so objectively offensive as to alter the "conditions" of the victim's employment. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81 (1998).

To support her claim, Ms. Bazemore describes post-incident conduct on the part of Creel and others. She offers, in her various pleadings and filings, that Creel, in her presence, referred to customers of "color" as gypsies, both before and after the incident. J.A. 119. She also describes post-incident shunning, J.A. 50, and "dirty looks," J.A. 139, from Ms. Brewster and Ms. Creel. In addition, Ms. Bazemore also points to two instances when Best Buy previously terminated other employees for use of the word nigger. J.A. 118.[6]

[6] Most of the allegations that Ms. Bazemore offers to support her claim are not mentioned in her amended complaint. Rather, they are contained in her opposition to Best Buy's motion, J.A. 115, and in her motion for reconsideration, J.A. 137.

The District Court properly found that these events, alone or together, were insufficient to rise to the level of severity or pervasiveness required of hostile environment claims. The allegations regarding Ms. Bazemore's gypsy comments are, as the District Court concluded, sufficiently devoid of detail (including where, how many, when, and at whom directed) to be credited. And there is nothing to establish or even infer that Ms. Bazemore ever made Best Buy aware of them. Similarly, Ms. Bazemore provides no detail about previous terminations based on use of the word "nigger." In fact, such terminations, if they occurred, would seem to undercut, rather than support, her hostile environment claim.

The cases cited by Ms. Bazemore as examples of claims that have survived motions to dismiss based on less severe allegations, *see* Appellant Brief p. 17 n.10, illustrate how Ms. Bazemore's allegations fall short. *Lindsay v. E. Penn Mfg. Co.,* No. 1:18CV406, 2019 WL 1244088 (M.D.N.C. Mar. 18, 2019), included allegations that co-workers repeatedly called the plaintiff a "black mother fucker" and on multiple occasions spit on black workers. When the plaintiff reported the allegations, the employer "took no meaningful action and blamed Plaintiff for bringing the treatment on himself." *Id.* at *1. *Chambers v. Walmart Stores,* No. 1:14CV996, 2015 WL 4479100 (M.D.N.C. July 22, 2015), involved repetitive and continuous harassment by a supervisor, including racial slurs, "negative stereotyping, verbal kidding, teasing, joking, intimidating acts of bullying," and

hostility. *Id.* at *1. In *Muldrow v. Schmidt Baking Company, Inc.,* No. CIV. WDQ-11-0519, 2011 WL 2620271 (D. Md. June 30, 2011), in response to the plaintiff's report of a customer's racial slurs, including direct, aggressive references to the plaintiff as "nigger," the employer suspended then terminated the plaintiff. *Id.* at *3. And *Reid v. Dalco Nonwovens, LLC,* 154 F. Supp. 3d 273 (W.D.N.C. 2016), a summary judgment case, involved conduct by the plaintiff's supervisor.

The allegations and facts at issue in *Lindsay*, *Chambers*, M*uldrow*, and *Reid* are in stark contrast to those of Bazemore—an unimputable comment by a co-worker, an investigation and corrective action, the plaintiff's subjective feelings of threat, discomfort, avoidance, and tension, two unspecific instances of her co-workers' other racially insensitive conduct that she witnessed but did not report, and two instances where Best Buy terminated other employees for racial slurs.

C. The District Court's Decision Should be Affirmed Because Best Buy is Entitled to Judgment as a Matter of Law Based on the Undisputed Facts.

If this Court determines that the District Court erred in dismissing Bazemore's complaint for failure to state a claim upon which relief may be granted, the ruling should still be affirmed. The undisputed material facts establish

that Best Buy diligently investigated Ms. Bazemore's claim in a timely fashion,[7] and upon confirming Ms. Bazemore's complaint, disciplined Creel consistent with its disciplinary guidelines. Since Creel's discipline, there has been no further offending conduct. Best Buy is therefore to judgment as a matter of law.

1. Best Buy's Response to Ms. Bazemore's Complaint Was Prompt and Reasonable.

On February 6, 2017, Ms. Bazemore reported the incident. J.A. 59. Colleen Hayes, who works in the Employee Relations Department at Best Buy, promptly investigated. J.A. 75. On February 9, 2017, as part of her investigation, Ms. Hayes called Ms. Bazemore. J.A. 50. In their conversation, Ms. Bazemore told Ms. Hayes that she had a good working relationship with Creel and no issue with Creel's conduct prior to February 5, 2017. J.A. 47, 50. Ms. Hayes then spoke to Creel, who admitted that she made the comment that gave rise to Ms. Bazemore's complaint. J.A. 47, 76.

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[7] Ms. Bazemore challenges Best Buy's diligence, both in responding to the complaint and not following up with her regarding Creel's discipline. She does not dispute, however, that Best Buy immediately responded through its Employee Relations Department, which began investigating the very same week. J.A. 46-47. Ms. Bazemore also admits that on January 20, 2017, Hayes called Ms. Bazemore to inform her that the investigation had concluded and the matter resolved. J.A. 139. *Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 928 (8th Cir. 2010) —the only case relied on by Ms. Bazemore to support her proposed heightened standard—involved an employer who did not respond to the plaintiff's complaints for weeks, and then after informing the plaintiff that the offending employee would be terminated from employment, did not do so.

On February 18, 2018, based on the conclusion that Creel's statement was a "serious offense" under Best Buy's guidelines, Creel received a Final Warning, the last step short of termination in Best Buy's progressive discipline system. J.A. 16, 76. There were no further incidents involving Ms. Creel and Ms. Bazemore following the February 18 Final Warning. J.A. 76.[8]

Ms. Bazemore's attempts to cast doubt on the reasonableness of Best Buy's response by characterizing the sanction as inconsistent with Best Buy's written disciplinary guidelines. **In short, Ms. Bazemore contends that no response short of a termination was adequate.** That argument is both based on a gross distortion of the guidelines, and ignores the discretion afforded an employer in fashioning discipline, even in situations involving prohibited discrimination.

2. Best Buy's Corrective Action Was Appropriate Under Its Disciplinary Guidelines.

The Best Buy Guidelines establish a progressive disciplinary system for Best Buy employees. In addition to informal counseling for lesser offenses, the Guidelines establish three levels of corrective action: a Written Warning, a Final

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[8] In her brief, Ms. Bazemore also alleges that since filing her action, she has since learned that Best Buy opened an investigation into Brewster's management, and that Brewster subsequently resigned. Appellant's Brief at 10. This alleged fact, for whatever its worth, is not included in the record and therefore should not be taken into consideration. *Colonial Penn Ins. Co. v. Coil,* 887 F.2d 1236, 1239 (4th Cir. 1989) (declining to consider evidence that was not included in the record). It is not alleged "to clarify allegations in her complaint." It is an entirely new allegation.

Warning, and Involuntary Termination. J.A. 23. The Guidelines prohibit all forms of discrimination and harassment in the workplace. J.A. 18-35. For purposes of discipline, they place illegal discrimination and harassment into one of two categories. The first, characterized as a "serious offense," subjects an offending employee to either a Final Warning or Involuntary Termination. J.A. 26. The second, classified as "Reckless Conduct," applies an offense for which termination is the only specified remedy.

According to Ms. Bazemore, Creel's conduct falls only into the latter category and required that she be terminated. That, however, both mischaracterizes the Guidelines and is contrary to the recognized latitude permitted an employer in fashioning discipline. *See e.g., Swentek v. USAIR, Inc.,* 830 F.2d 552, 558 (4th Cir. 1987) (written warning in conformance with an employer's policy is sufficient to support a district court's dismissal); *see also Media Gen. Operations, Inc. v. NLRB,* 394 F.3d 207, 212 (4th Cir. 2005) ("Discipline of an employee is a matter left to the discretion of the employer.") (internal citation and quotation marks omitted); *NLRB v. Consolidated Diesel Electric Co., Div. of Condec Corp.,* 469 F.2d 1016, 1024 n.21 (4th Cir. 1972) ("The question of proper discipline of an employee is a matter left to the discretion of the employer.").

Under the Guidelines, inappropriate discriminatory conduct can fall under either of two levels, based on its severity. The lesser of the two levels classifies harassment as a serious offense. The Guidelines provide:

> **Disorderly Conduct**
>
> Conduct which substantially impairs the discipline or order of the work environment. Disorderly Conduct also includes, but is not limited to, such conduct 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 offensive or degrading remarks, comments or implication; unwelcome requests to "date," "meet" or "visit" another employee or other similar behavior, which to a reasonable person could be expected to create a hostile, intimidating or offensive work environment, but which is not considered serious enough to warrant immediate termination. Also see the Reckless Conduct section.

J.A. 89. The corrective action recommended for this offense is a Final Warning or Termination. *Id.*

The second, more serious category of harassment, falls under Reckless Conduct:

Reckless Conduct

> 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.

J.A. 30. The only specified remedy for discriminatory conduct falling into this category is termination. *Id.*[9]

Best Buy appropriately treated Creel's comment as a serious offense. Whatever can be said about Creel's comment, it is not a threat, intimidation, unwanted physical contact, or abuse of management authority. And the record does not support a characterization of Creel's one-time comment as willful creation of intolerable circumstances. By Ms. Bazemore's own admission, her relationship with Creel prior to the comment was good. And neither Ms. Bazemore, who

[9] Like most progressive discipline systems, the Policy reserves to Best Buy the right to depart from the guidelines when it deems appropriate. J.A. 20.

continued to work with Creel after the incident, or other Best Buy employees, have reported similar transgressions involving Creel since the incident. All of which leads to a single characterization of the incident, not as malicious, but an isolated offensive remark, intended as a "joke," J.A. 50, by an unenlightened employee with no appreciation of the severity of her comment and its effect.

In any case, if there is any ambiguity as to which offense category Creel's conduct falls, under the express language of the Policy, it is Best Buy's interpretation that governs. J.A. 20.

3. The Absence of Any Further Reported Conduct Establishes the Effectiveness of Best Buy's Response.

Importantly, Ms. Bazemore did not report any further harassing conduct by Creel following the warning. J.A. 47. Nor were there any reports by other Best Buy employees of similar conduct by Creel. *Id.* The absence of any subsequent harassing conduct leaves no room to challenge the effectiveness of the response. *See Spicer*, 66 F.3d at 711 (holding that "when an employer's remedial response results in the cessation of the complained of conduct, liability must cease as well"); *see also Swentek*, 830 F.2d at 558 (treating as probative of adequacy of remedial response the fact that following reprimand no further complaints were made

against alleged harasser). The record shows that once Creel was disciplined, she engaged in no further racially offensive comments toward Ms. Bazemore.[10]

CONCLUSION

For the aforementioned reasons, Best Buy Stores, LP, respectfully requests that this Court affirm the district court's rulings dismissing Ms. Bazemore's First Amended Complaint and denying her motion for reconsideration. Alternatively, should the Court find that dismissal was inappropriate, the district court's ruling should be affirmed on the basis of summary judgment.

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[10] To challenge the adequacy and Best Buy's response Ms. Bazemore points to Creel's use of the term "gypsies," both before and after the February 5 comment. Appellant's Brief at 34. None of the "gypsy" comments were ever directed toward Ms. Bazemore. Appellant's Brief at 7-8. And there is no record that Ms. Bazemore, who witnessed them, ever reported the comments to Best Buy. In fact, although Ms. Bazemore states that Creel used the term gypsy "prior to the February 5 harassment," Ms. Bazemore told Ms. Hayes during the investigation that she had a good relationship with Creel until the incident and had no problems with Creel's pre-incident conduct. J.A. 47.

CERTIFICATE OF COMPLIANCE

This motion complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. 32(a)(6). According to the word-processing system, the relevant portions of this brief contain 6,307 words.

/s/
Emelia N. Hall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of December, 2019, a copy of the foregoing was served electronically via ECF/PACER on:

Daniel S. Harawa
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/s/
Emelia N. Hall