BEFORE
THE PRINCE GEORGE'S COUNTY
HUMAN RIGHTS COMMISSION

IN RE: TEONNA MARSHALL

Complainant

By

EXECUTIVE DIRECTOR

vs.

SEAFOOD FUSIONS, INC.
a/k/a Hook and Reel, Inc.

Respondent

Human Rights Commission
Clerk Received
January 24, 2023

HRC Case No.: HRC21-0202

EEOC Case No.: 531-202-02614

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THE OPINION AND ORDER OF THE PRINCE GEORGE'S COUNTY HUMAN RIGHTS COMMISSION

Pursuant to the Prince George's County Code, Subtitle 2, Division 12, Subdivision 1, §2-185 et seq. (2022 Edition), the Prince George's County Human Rights Commission ("Commission") adjudicates the charge of discrimination brought by Complainant Teonna Marshall against Respondent Seafood Fusions, Inc., for sexual harassment and for failure to properly address the sexual harassment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended.

This matter was called for Public Hearing before a three-member Employment Panel ("Panel") on May 11, 2022, May 16, 2022, June 15, 2022, June 16, 2022, and June 23, 2022. After the hearing, the Panel deliberated and recommended to the full Commission a finding that the Respondent, Seafood Fusions, Inc., did not discriminate against Complainant in violation of Title VII of the Civil Rights Act of 1964, as amended, or the Prince George's County Code, Subtitle 2,

Division 12, Subdivision 7, § 2-222. As outlined in detail below, the Commission unanimously accepts the recommendation of the Panel.

## I. FINDINGS OF FACT

The following findings of fact are derived from witness testimonies proffered at the Public Hearings on May 11, 2022, May 16, 2022, June 15, 2022, June 16, 2022, and June 23, 2022; and admitted exhibits.

### A. BACKGROUND

Complainant, Teonna Marshall ("Complainant") is a resident of Prince George's County, Maryland. Respondent, Seafood Fusions, Inc., is one of many restaurants and bars owned by Hook and Reel, Inc. Respondent, Seafood Fusions, Inc. is located in the Woodmore Town Center in Lanham, Maryland in Prince George's County. In October of 2019, Respondent hired Complainant as a server. (Hearing Transcript, "Tr.", Volume 1, p. 24). At all times relevant to this complaint, Respondent's franchise owner was Shaun Carson ("Carson"). (Tr. Vol. 4, p. 653). Respondent's general manager was Brian Hall ("GM Hall") and he supervised the staff. (Tr. Vol. 4, p. 655). Respondent's assistant manager was Abdul Sanyang ("AM Sanyang") and he supported GM Hall. (Tr. Vol. 4, p. 655). Respondent's other assistant manager was Anthony Thomas ("AM Thomas") and he also assisted GM Hall with supervising employees at the restaurant. (Tr. Vol. 4, p. 655). AM Thomas was one of Complainant's supervisors. (Tr. Vol. 1, p. 43; Executive Director, "ED", Exhibit, "Ex." 30).

#### 1. <u>July 1, 2020 Picture Incident</u>

On or about June 24, 2020, Complainant worked her last scheduled shift at the restaurant, as she was not scheduled to work in the upcoming weeks. (ED, Exs. 14-15). On or about June 30, 2020, Complainant sent a text message to GM Hall to inquire about her lack of a work schedule.

(ED, Exs. 14-15). In response, GM Hall informed Complainant that she had been removed from the work schedule because of a recent dine and dash incident (a customer walking out of the restaurant without paying). (ED, Exs. 2, 14-15). GM Hall informed Complainant that upper management was displeased with the incident and that she could reapply for her position after thirty days. (ED, Exs. 2, 14-15). Complainant was not informed by Human Resources that she had been terminated from her employment. (ED, Ex. 5).

On July 1, 2020 at 12:10 a.m., while outside of the restaurant, Complainant received a text message from AM Thomas that contained a picture of his genitalia. Complainant responded, "Are you fucking kidding me?" and AM Thomas replied, "Oh ok sorry wrong number", immediately followed by, "Oh I'm sorry wrong number". (ED, Ex. 8). According to Complainant, prior to this text, she and AM Thomas had not communicated via texts or phone calls outside of the workplace. (Tr. Vol. 1, p. 89; Ex. 34). They had only communicated via a messaging application during a work group chat. (Tr. Vol. 1, p. 89).

### 2. <u>Complainant's Report and Respondent's Investigation of the Picture Incident</u>

On July 1, 2020, the same day that she received the picture text message from AM Thomas, Complainant contacted AM Sanyang by telephone and forwarded to him the picture via text message. (Tr. Vol. 1, p. 89; ED, Ex. 2). Complainant informed AM Sanyang that she was not comfortable talking to GM Hall because he is close to AM Thomas. (ED, Ex. 6). She also told AM Sanyang that, "it's literally just that we have had NO phone or outside of work conversations no phone calls or nothing". (ED, Ex. 6). Once AM Sanyang received the picture from Complainant, AM Sanyang told her that there would be an investigation. (ED, Ex. 6). AM Sanyang then forwarded the picture to the Regional Manager, Andres Don Martin ("RM Don Martin"), who was on personal time off at the time of the picture incident. (Tr. Vol. 4, pp. 607, 635).

According to AM Sanyang, he properly followed the Respondent's policy on addressing sexual harassment complaints made by an employee. (Tr. Vol. 4, p. 639). The policy entitled, Nondiscrimination/Anti-Harassment Policy and Complaint Procedure, was contained within the Team Member Handbook for Hook and Reel (ED, Exs. 3-4). The policy defined discrimination and sexual harassment and encouraged employees, who believed that they have been a victim of discrimination or harassment, to submit a complaint to their supervisors, a member of the management team, or Human Resources ("HR"). (ED, Exs. 3-4). Under the policy, once the employee submits a complaint to the management team, the management team notifies HR about the complaint and HR then performs a prompt and thorough investigation. (ED, Exs. 3-4). AM Sanyang testified that managers provide the employee handbook (which includes a copy of the Nondiscrimination/Anti-Harassment Policy and Complaint Procedure) to new hires and require them to sign an acknowledgment of their receipt of the employee handbook and its attachments. (Tr. Vol. 4, p. 568).

On July 16, 2020, Stephanie Frias ("HR Frias"), who had provided contract human resource services to Respondent for three years, received the picture from RM Don Martin and began an investigation. (Tr. Vol. 4, pp. 524, 526-530, 547). HR Frias spoke with the employees involved and with knowledge of the incident. (Tr. Vol. 4, pp. 526-527). On July 16, 2020, HR Frias contacted Complainant, questioned her about the picture incident and informed her that she was still employed by Respondent and could return to work whenever she wanted. (Tr. Vol. 4, pp. 526, 530). Complainant responded that she would not return to work. (Tr. Vol. 1, p. 95). According to HR Frias, Complainant also stated that prior to receiving the picture from AM Thomas, there had been no incidents between them. (Tr. Vol. 4, pp. 530, 536). HR Frias testified that based on

her experience working in human resources, the time frame in which investigations are resolved is generally 7 to 10 business days. (Tr. Vol. 4, p. 538).

The next day, on July 17, 2020, HR Frias completed the investigation and determined that AM Thomas had accidentally texted the picture to Complainant. (Tr. Vol. 4, p. 542). Nevertheless, Respondent terminated AM Thomas on that same day, July 17, 2020. (Tr. Vol. 4, p. 542). Respondent also terminated GM Hall on July 17, 2020, because his work performance did not meet Respondent's expectations and because HR Frias had determined that GM Hall had no authority to terminate Complainant because of the dine and dash incident. (Tr. Vol. 4, pp. 553-554).

Prior to the July 1, 2020 picture incident, neither Respondent (nor the HR) had received any sexual harassment complaints from Complainant about AM Thomas or any other employee of Respondent. (Tr. Vol. 4, pp. 551, 616, 621-624). AM Sanyang was unaware of any sexual harassment complaints against Respondent. (Tr. Vol. 4, pp. 616, 621). Complainant's complaint was the first one that HR had handled for the Respondent. (Tr. Vol. 4, p. 524).

### 3. Testimony Regarding Picture Incident and Other Harassment Allegations

On October 29, 2020, Complainant filed a Form 5 Charge of Discrimination ("Form 5") with the Equal Employment Opportunity Commission ("EEOC") alleging sexual discrimination. (ED, Ex. 1). In the Form 5, Complainant alleged that Respondent discriminated against her based on her sex when AM Thomas sexually harassed her by texting her a picture of his genitalia. She alleged that on June 25, 2020, franchise owner Carson erroneously accused her of the dine and dash incident and discharged her. She stated that she had been discriminated against because of her "sex (Female), in violation of Title VII of the Civil Rights Act of 1964, as amended, with respect to sexual harassment and discharge". (Tr. Vol. 2, p. 154; ED, Ex. 1).

The Prince George's County Office of Human Rights ("PGCOHR") conducted an investigation. In her email to PGCOHR Investigator Langston Clay ("Clay"), Complainant stated that she had complained to management (i.e., GM Hall and AM Sanyang) about 3-5 times during her employment and prior to the picture incident about sexually harassing behavior but they did not take her seriously. (ED, Ex. 10). Complainant also stated that it took Respondent's HR Department approximately one month from the incident to contact her. (Tr. Vol. 1, p. 193; ED, Ex. 10). Complainant stated that on June 24, 2020, she had the conversation with GM Hall about what she believed to be her termination and that on July 1, 2020, she received the picture from AM Thomas. (ED, Exs. 1, 8, 14-15).

At hearing, Complainant testified that she did not receive or sign any documents regarding a sexual harassment policy at the beginning of her employment and that she believed GM Hall was also HR. (Tr. Vol. 1, pp. 25-26; Vol. 2, p. 182). Complainant testified to other harassment incidents that she did not include in her Form 5. She testified that AM Thomas constantly asked her out and tried to hug her and that she reported his harassing behavior to GM Hall. (Tr. Vol. 1, pp. 33-34). Complainant testified that her coworker, Zack Hunter ("Hunter"), informed her that AM Thomas had talked about doing inappropriate things to Complainant. (Tr. Vol. 1, p. 45). Complainant testified that GM Hall touched her but she was more afraid of him because of his position, so she did not "tell him off" in the same way she had done with AM Thomas. (Tr. Vol. 1, pp. 34-35, 37). Complainant testified that GM Hall was regularly inappropriate with the other employees and had once held an all-female meeting for the employees and told them that "sex cures COVID". (Tr. Vol. 1, p. 38). Complainant testified that GM Hall also referred to some female employees as his "all-star girls" and paraded them around to customers during their shifts. (Tr. Vol. 1, p. 49).

Regarding her reporting of these incidents, Complainant testified that she informed AM Sanyang, her shift lead, Brittany Pearsall, and Hunter, about AM Thomas's alleged inappropriate acts and/or comments. (Tr. Vol. 1, p. 45). Complainant testified that she reported to AM Sanyang an incident, where a customer introduced by GM Hall, harassed her during her shift. (Tr. Vol. 1, pp. 63, 65). However, AM Sanyang testified that he did not recall this incident. (Tr. Vol. 4, p. 642). When questioned about why she never mentioned any of these prior incidents in her Form 5, Complainant stated that the picture incident was the only incident with proof. (Tr. Vol. 2, pp. 156, 174).

### 4. <u>Investigation by the Prince George's County Office of Human Rights</u>

In Clay's Report of Investigation ("ROI"), he only noted the picture incident on July 1, 2020. There is no reference to any prior sexual harassment incidents between Complainant and AM Thomas or any other member of Respondent's management team. (Tr. Vol. 3, pp. 490-491). Clay testified that Complainant did not inform him during the investigation that: (1) there were "all-star girls" in the restaurant or that she had been subjected to "the creepy manager massage"; (2) against her wishes, GM Hall introduced her to customers who would then grope her; and (3) GM Hall held all-female meetings at the restaurant and informed them that "sex cures COVID". (Tr. Vol. 3, pp. 493-495). Clay testified that had Complainant mentioned these incidents, he would have included them in the ROI because that would have been relevant information. (Tr. Vol. 3, p. 496).

Clay included in his investigation, notes from his interview with Jamaya Andrews (Andrews"), who was a server at the restaurant until the summer of 2020. Andrews stated that GM Hall sexually harassed her but that she did not report this to anyone or bring it to Respondent's notice. (ED, Ex. 20). Andrews also stated that AM Thomas used to always ask Complainant to go

on dates with him and would tell Complainant all the sexual things that he would do to her. (ED, Ex. 20). At hearing, Andrews testified that managers sexually harassed other female employees (e.g., by hugging the employees about 10-15 times every hour of every work shift) and that everyone knew it. (Tr. Vol. 3, pp. 406-407; ED, Ex. 20). Andrews testified that she did not see AM Thomas sexually harass Complainant, but she recalls an incident where Complainant told him not to hug her. (Tr. Vol. 3, pp. 404, 419).

Clay interviewed Sherrika Dixon, who worked at the restaurant until April of 2021. She stated that she did not witness any specific harassing conduct or untoward behavior in the restaurant. (ED, ROI at p. 9). Clay also interviewed Yashica Johnson, who was hired in October of 2020 after the two managers were terminated. She stated that she was unaware of any past or present inappropriate conduct by any member of the management team. (ED, ROI at p. 9).

AM Sanyang testified that he was unaware of an all-star girl's group, never witnessed any of the managers giving creepy massages to the female employees, never saw GM Hall introduce female employees to customers, never heard GM Hall tell the female employees that sex cures COVID; nor had he witnessed GM Hall or AM Thomas hug the female employees. (Tr. Vol. 4, pp. 621-624). Franchisee owner Carson testified that he was unaware of any sexual harassment complaints from any employee prior to the picture incident. (Tr. Vol. 4, pp. 659-693).

### 5. **PGCOHR Executive Director's Letter of Determination and Request for Certification for Public Hearing**

PGCOHR Executive Director, Renee Battle-Brooks ("ED Battle-Brooks") issued a Letter of Determination ("LOD") dated October 27, 2021. In the LOD, she concluded that there was "sufficient evidence to support Complainant's allegation that she was subjected to sexual harassment (Hostile Work Environment) on the basis of sex (Female)". (ED, LOD, p. 4). However,

ED Battle-Brooks noted that Complainant's allegation that she was terminated on the basis of her female sex was "without merit". (ED, LOD, p. 2).

In a July 10, 2022 Request for Certification for Public Hearing, ED Battle-Brooks stated that Respondent was aware of the graphic image sent from the manager to Complainant but "took no action until on or about July 17, 2020", and as "a direct result" of the Respondent's inaction, Complainant "was forced to constructively discharge her employment because she did not feel comfortable or safe returning to work in the hostile work environment . . . ." (ED, Request for Certification for Public Hearing at p. 2). On April 27, 2022, ED Battle-Brooks amended this request to state that, "[t]hroughout [Complainant's] employment with Respondent, she was subjected to pervasive and ongoing discrimination based on sex" which was caused by harassment by management that "created a work environment that a reasonable person would consider hostile and/or abusive and offensive". (ED, Motion to Amend Request for Certification for Public Hearing; Amended Request for Certification for Public Hearing at p. 2). Further, ED Battle-Brooks found that Respondent took no action once it received Complainant's notice of the harassment until 16 days later, which was a failure to take immediate and appropriate steps to address the complaint. (ED, Amended Request for Certification for Public Hearing at pp. 2-3).

According to ED Battle-Brooks, due to Respondent's inaction, Complainant was forced to, or in other words, was constructively discharged from her employment because she did not feel comfortable or safe to return to work in a hostile environment created by the severe misconduct of AM Thomas. (ED, Amended Request for Certification for Public Hearing at p. 3). ED Battle-Brooks further found that Respondent "failed to correct" its employment policy "or train its staff and managers on laws against discrimination in order to protect all employees from

discrimination" and that Respondent should be assessed monetary fines. (ED, Amended Request for Certification for Public Hearing at p. 3).

### 6. Respondent's Argument

In a Motion in *Limine* filed on April 27, 2022, and in opposition to the request for a public hearing, Respondent argued that Complainant alleged in her Form 5 only that she felt sexually harassed when AM Thomas texted her the picture of his genitalia. (*See* Respondent's Motion in *Limine*, p. 2). Respondent asserted that Complainant herself had maintained that she and AM Thomas had no prior harassing conduct between them. Further, Respondent asserted that there were no claims that employees harassed or offended Complainant on prior occasions; and there were no witnesses who sufficiently corroborated Complainant's claim that the management team had engaged in prior acts of sexual harassment which would make Respondent liable for damages.

## II. ANALYSIS

For the foregoing reasons, and having thoroughly reviewed the record consisting of exhibits and pleadings submitted by the Executive Director and the Respondent and the transcripts of witness testimonies proffered over a five-day hearing, the Commission finds that Complainant failed to meet her burden of proof to show that she was subjected to harassment based on her sex amounting to a hostile work environment that is imputable to Respondent.[1]

### A. Applicable Law

Under Prince George's County Code, Subtitle 2, Division 12, Subdivision 7, § 2-222, "[n]o employer in the County shall discharge or refuse to hire any person, or act against any person with

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[1] The Commission concurs with ED Battle-Brooks that Complainant's allegation in her Form 5—that she was terminated on the basis of her female sex—is without merit. (ED, Letter of Determination, p. 2). Accordingly, the Commission does not address this claim further and only decides Complainant's claim of hostile work environment discrimination based on her sex.

respect to compensation or other terms and conditions of employment, or limit, segregate, classify, or assign employees because of discrimination". Under Federal law, in accordance with Title VII of the Civil Rights Act of 1964, amended, it is unlawful for an employer "to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex". 42 U.S.C. § 2000e-2(a)(1). *See also* Manikhi v. Mass Transit Administration et al., 360 Md. 333, 348, 758 A.2d 95 (2000). A claim of "hostile environment sex discrimination is actionable under Title VII". *See* Manikhi, supra, at 348. This is because "an employee's work environment is a term or condition of employment". *See* E.E.O.C. v. Xerxes Corp., 639 F.3d 658, 668 (4th Cir. 2011) (citation omitted). Thus, to successfully establish a claim for sexual harassment, the plaintiff must prove each of the following elements: "(1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to the employer". Manikhi, supra, at 348.

**B. The picture incident was the only corroborated instance of unwelcome conduct towards Complainant.**

A factfinder first determines if the subject conduct is objectively unwelcome. *See* E.E.O.C. v. Central Wholesalers, Inc., 573 F.3d 167, 175 (4th Cir. 2009) (internal quotations omitted). An objectively unwelcome conduct is one that would "allow a reasonable jury to conclude [that the] conduct was unwelcome". *Id.* A subjectively unwelcome conduct is shown by the employee's outward expressions of offense. *Id.*

In the instant case, it is undisputed that the picture incident of July 1, 2020, was unwelcomed by Complainant. Complainant and AM Thomas, who was her supervisor and texted the picture of his genitalia to Complainant, had the same account of this incident even though he claimed it was an accident. E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 314 (4th Cir. 2008)

(reasoning that a jury could find the alleged harassment "unwelcome" because the victim told management and a coworker that he found the religiously demeaning conduct to be offensive).

While Complainant alleged that AM Thomas also subjected her to unwelcome conduct prior to July 1, 2020, by constantly asking her out and trying to hug her, there is no corroborating evidence in the record to support her allegations. Although Andrews testified that she saw Complainant tell AM Thomas not to hug her, Andrews never saw AM Thomas hug Complainant or sexually harass her. (Tr. Vol. 3, pp. 404, 419). When Complainant reported the picture incident to AM Sanyang, she did not make AM Sanyang aware, at that time of her report, of any of unwelcome conduct from AM Thomas. (Tr. Vol., pp. 621-622). Instead, she told AM Sanyang that she and AM Thomas had never texted each other before nor had they had any prior phone calls or conversations outside of work. (ED, Exs. 2, 34). There is no corroborating evidence to show that Complainant spoke to AM Sanyang about any allegations of prior unwanted conduct by AM Thomas or GM Hall. (Tr. Vol. 1, p. 45). In fact, when asked at the hearing about whether she ever reported any ongoing problems to AM Sanyang, Complainant replied, "No." (Tr. Vol. 1, p. 64).

Complainant alleged that co-worker, Hunter, informed her that AM Thomas was talking about wanting to have sex with her. (Tr. Vol. 1, p. 45). However, there is no testimony from Hunter to corroborate this allegation. Complainant presented a text between her and Hunter (ED, Ex.2), as follows:

> The Complainant: Yep so guess who tried it
> Zack Hunter: Anthony
> The Complainant: I'm like….ON TOP of you telling everyone your gonna try and fuck me behind my back… you actually try!!!!!!!! [emoji]
> Zack Hunter: I figured it was a matter of time.

Complainant initiated this text and did not give the date, time, and full context for this text. Assuming but not deciding that this text was about AM Thomas bantering throughout the office

about his intent to make advances of a sexual nature towards Complainant, the text does not suffice to show, as Complainant claims, that AM Thomas actually made such an advance on her. We note, as well, that alleged "second-hand harassment" such as certain comments or discussions which occur behind a person's back, "although relevant, [is] less objectionable than harassment directed at the [Complainant]". *See* Jennings v. Univ. of N.C., 444 F.3d 255, 272 (4th Cir. 2006). Thus, assuming but not deciding that AM Thomas engaged in this banter, as described, we do not consider this banter that was not directed at the Complainant as objectively unwelcome conduct.

Moreover, Complainant undermined her own claim that AM Thomas engaged in unwelcome conduct towards her prior to the picture incident. During Respondent's investigation of the picture incident, Complainant told HR Frias that prior to receiving the picture from AM Thomas, there had been no incidents between her and AM Thomas; nor had she received any prior communications from him. (Tr. Vol. 1, p. 89; Ex, 34). It is telling that in her Form 5 charge filed with the EEOC, when interviewed by Respondent's investigator HR Frias, and when interviewed by PGCOHR Investigator Clay, Complainant did not mention any instances where AM Thomas had engaged in conduct that was inappropriate and unwelcome of a sexual nature prior to the picture incident.

Complainant also attributed unwelcome conduct to Respondent's manager GM Hall. She testified that GM Hall was regularly inappropriate with the other employees and that during an all-female meeting for the employees, he told them that "sex cures COVID". (Tr. Vol. 1., p. 38). Complainant alleged that GM Hall also referred to some female employees as his "all-star girls" and paraded them around to customers during their shifts and that this conduct led to a customer harassing her during her shift and AM Sanyang had to rescue her. (Tr. Vol. 1, pp. 49, 63, 65).

However, AM Sanyang testified that he did not recall this incident. (Tr. Vol. 4, p. 642). Neither was he aware of any of the employees being referred to as the "all-star girls", nor had he witnessed any member of the managerial team harassing the female employees. (Tr. Vol. 4, pp. 621-622). AM Sanyang testified that he never witnessed any of the managers hugging the female employees or holding all-female employee meetings. (Tr. Vol. 4, pp. 623-624). Thus, there is no corroborating evidence for Complainant's allegations that GM Hall engaged in unwelcome conduct towards her or any other female employee that worked for Respondent. Again, it is telling that in her Form 5 charge filed with the EEOC, when interviewed Respondent's investigator HR Frias, and when interviewed by PGCOHR Investigator Clay, Complainant did not attribute any instances of inappropriate and unwelcome conduct to GM Hall or any other manager. (Tr. Vol. 3, pp. 490, 487, 491). Noteworthy, as well, is that Complainant reported the picture incident to AM Sanyang in accordance with the Respondent's Non-Discrimination/Anti-Harassment Policy and Complaint Procedure, but did not report instances of harassing conduct by AM Thomas and GM Hall to AM Sanyang, franchise owner Carson, or Respondent's HR staff.

Respondent had no knowledge of any sexual harassment claims by any of the employees at the restaurant. HR Frias, franchise owner Carson, and AM Sanyang, all testified that they had neither witnessed nor heard of any sexual harassment complaints from Complainant or any other employees. (Tr. Vol. 4, pp. 524, 616-625, 642, 659-664). The first time they were informed of any unwelcome conduct was when Complainant informed AM Sanyang about the picture incident of July 1, 2020. (Tr. Vol. 4, p. 524). Complainant did not inform HR Frias of any alleged prior unwelcome conduct during their phone call on July 16, 2020. (Tr. Vol. 2, p. 195; Vol. 4, pg. 530). Andrews did not report any unwelcome conduct to HR Frias. (Tr. Vol. 4, p. 524; ED, Ex. 20).

Complainant did testify that she did not trust GM Hall enough to tell him about prior incidents of unwelcome overtures from AM Thomas. Complainant testified that she believed that nothing would happen if she reported him. (Tr. Vol. 2, p. 199). She testified that she did not inform franchise owner Carson, who testified that he was at the restaurant about 2-3 nights a week (Tr. Vol. 4, pg. 689-690), because she did not feel that it was necessary for her to report to anyone about the alleged prior unwelcomed conduct by the managers because everyone knew what was going on. (Tr. Vol. 2, pp. 195-196). Andrews testified that she was too afraid to report incidents to anyone else (ED, Ex. 20).

Complainant (and Andrews) bore the responsibility of following Respondent's Nondiscrimination/Anti-Harassment Policy and Complaint Procedure by reporting any instances of sexual harassment to the managers and/or the HR Department. This duty to notify Respondent about such conduct is not alleviated by Complainant's "subjective fears of confrontation, unpleasantness or retaliation". *See* Barrett v. The Applied Radiant Energy Corp., 240 F.3d 262, 268 (4th Cir. 2001). This is because "allowing subjective fears to vitiate an employee's reporting requirement would completely undermine Title VII's basic policy" that is intended to "encourage[e] forethought by employers and sav[e] action by objecting employees". *Id.* Especially since "[t]he reporting requirement is so essential to the law of sexual harassment". *See* Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 270 (4th Cir. 2001).

Assuming the Complainant's allegations as to prior incidents of unwelcome conduct are true, it would mean that she was experiencing sexual harassment for about eight months before she made a complaint to Respondent. (Tr. Vol. 1, p. 25). Such an inordinate delay is unreasonable and inconsistent with her obligation under Title VII to promptly notify the Respondent of a

harassment matter. *See* Matvia, supra, at 269-70 (holding that a victim must promptly report harassment if she wishes to recover under Title VII).

Accordingly, we find that only AM Thomas's picture of his genitalia that he sent to Complainant on July 1, 2020, was both subjectively and objectively unwelcome conduct; and that there is insufficient evidence in the record to support Complainant's claim that AM Thomas and GM Hall also subjected her to unwelcome conduct prior to the picture incident.

**C. Assuming arguendo, the unwelcome conduct was based on Complainant's sex.**

The content and context of the alleged conduct is important to inform whether the conduct was based on the Complainant's sex. *See*, *e.g.*, E.E.O.C. v. Central Wholesalers, 573 F.3d at 175 (finding that a reasonable jury could conclude that harassment was based on the plaintiff's sex when evidence showed repeated use of the b – word when referencing women, Playboy items in the office, and partially naked women on a screensaver in the office). Complainant identifies as a woman and alleges that the unwelcome conduct or the picture incident was based on her sex as a female. AM Thomas sent the text to Complainant around midnight and after work hours; and at the time of the text, he told Complainant that it was sent accidently to the wrong number and he immediately apologized to her. Assuming but not deciding that the text was based on Complainant's sex as a female, we examine whether Complainant has met her burden of proof on the two remaining elements of a hostile work environment claim based on sexual harassment, as set forth below.

**D. The unwelcome conduct was not severe or pervasive to alter the Complainant's conditions of employment and create a hostile work environment.**

One of the factors "in determining whether a hostile environment is sufficiently severe or pervasive to alter the conditions of the victim's employment", which would thereby violate Title

VII, “is whether the discriminatory conduct unreasonably interferes with an employee’s work performance”. *Id.* at 347 (internal quotations omitted). This means that it is beyond Title VII’s purview if an unwanted conduct “is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . that a reasonable person would find hostile or abusive”. *Id.* at 348. Thus, for an alleged unwanted conduct to fall within Title VII’s scope, the factfinder must examine “all the circumstances, [including] the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance”, as well as determine “whether it unreasonably interferes with an employee’s work performance”. *See* Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

In the instant case, we must determine whether the unwanted conduct of the text message from AM Thomas was sufficiently severe or pervasive by asking whether a reasonable jury could perceive the text message as abusive or hostile. We must also ask whether Complainant did, in fact, perceive the text message as such. In order for Complainant to prevail on this claim, she must subjectively perceive the restaurant’s environment as abusive based on the alleged unwanted conduct (i.e., the text message of AM Thomas’s genitalia). *See* Harris, supra, at 22-23.

According to the Complainant, upon receiving the picture from AM Thomas on July 1, 2020, she forwarded it to AM Sanyang on the same day; and she refused to return to the restaurant even after Respondent’s HR Frias informed her that she had not been terminated. (Tr. Vol. 1, p. 95). Thus, it can be said that the Complainant subjectively perceived her work environment as abusive or hostile.

However, an objective determination is based on the totality of the circumstances, which “may include the frequency of the discriminatory conduct; its severity; whether it is physically

threatening or humiliating, or a mere offensive utterance", as well as "whether it unreasonably interferes with an employee's work performance". *See* Harris, supra, at 23. In other words, the "very nature" of a hostile-work-environment claim "involves repeated conduct". *See* McIver v. Bridgestone Americas, Inc., 42 F.4th 398, 407 (4th Cir. 2022) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002)). Further, the conduct must be so "extreme to amount to a change in the terms and conditions of employment". Faragher v. Boca Raton, 524 U.S. 775, 788 (1998) (internal quotations omitted); *see also* E.E.O.C. v. Sunbelt, 521 F.3d at 315.

Here, AM Thomas's text message of his genitalia, alone, to Complainant may certainly be considered offensive from an objective standpoint. However, it is insufficiently severe to prove a claim of hostile work environment based on sex, even when the conduct is highly offensive and even if when the conduct's genesis is from a supervisor, from a "mere offensive utterance". *See* Harris, supra, at 23. E.E.O.C. v. Sunbelt, 521 F.3d at 315. This insufficiency of evidence is apparent here given that according to Complainant, she and AM Thomas had not communicated via text message or phone call outside of work prior to the picture incident and Complainant did not point to other instances of unwelcome conduct of a sexual nature from AM Thomas. (ED, Ex. 8). Accordingly, there is no evidence in the record from which to conclude that this one picture incident, albeit showing genitalia, rises to the level of "severe or pervasive" unwelcome conduct creating a work environment that a reasonable person would find to be hostile or abusive.

In reaching this finding, we have considered the testimony of Andrews, the only employee, aside from Complainant, who claimed there were instances of unwelcome conduct at the restaurant. Andrews testified that Respondent's managers sexually harassed other female employees (e.g., by hugging the employees about 10-15 times every hour of every work shift) and everyone knew it. (Tr. Vol., 3, pp. 406-407; ED, Ex. 20). Also submitted as evidence was a text

message between GM Hall and Andrews, where GM Hall said to Andrews, "Come give me my hug". (ED, Ex. 21). However, Andrews testified that she never saw AM Thomas hug Complainant or sexually harass her. (Tr. Vol. 3, pp. 404, 419). Andrews also testified that she did not report any unwelcome conduct to HR Frias. (Tr. Vol. 4, p. 524; ED, Ex. 20). Thus, Andrews's testimony is internally inconsistent. Further, neither Andrews's testimony, if true; nor her text message with GM Hall pointing to hugging at the restaurant suffice to show that there was any unwelcome conduct of hugging at the restaurant and, if so, that it was "severe or pervasive" so as to prove, much less, buttress Complainant's claim that she was subjected to a hostile or abusive work environment at Respondent's restaurant.

Finally, Complainant did not provide evidence to show that her work conditions were impacted by the picture incident. She understood from GM Hall on June 24, 2020, that she may no longer have a job because of the dine and dash incident. When the picture incident occurred on July 1, 2020, Complainant was still off duty due to the dine and dash incident being attributed to her. On July 16, 2020, when HR Frias interviewed Complainant about the picture incident, HR Frias informed Complainant that she had not been terminated and could report to work but Complainant decided against returning to work. Respondent terminated AM Thomas for the picture incident (and terminated GM Hall for his handling of the dine and dash incident) on July 17, 2020. (Tr. Vol. 4, pg. 526-547). HR Frias acted in accordance with Respondent's policy for addressing harassment concerns by interviewing Complainant on July 16, 2020, and Friar was able to conclude her investigation the next day on July 17, 2020. Friar gave an investigation start time of 7-10 business days for these types of matters. With the picture incident occurring on July 1, 2020, around midnight, and reported immediately by Complainant, the upper limit of 10 business days for contacting Complainant was July 15, 2020. Thus, Friar's contact with Complainant was

only one day beyond this upper limit of 10 business days. Given Respondent's prompt attention to Complainant's report of the picture incident and Respondent's termination of AM Thomas, it is not apparent from the record, nor did Complainant assert how the picture incident interfered with her work at the restaurant so as to amount to a hostile work environment. Equally noteworthy is the fact that Complainant did not file her charge against respondent until several months after the picture incident, after AM Thomas had been terminated, and when she had not worked at the restaurant for some time.

**E. The picture incident was not imputable to the Respondent under Title VII.**

Thus far, we have concluded that Complainant was subjected to unwelcome conduct arguably based on her sex as a female due only to the picture incident. Considering the evidence in this case, the picture incident, however, does not amount to severe or pervasive conduct that creates an abusive or hostile work environment that is actionable as under Title VII. Had the record shown that there was a hostile environment at the restaurant and given that AM Thomas was a supervisor, the Respondent would be vicariously liable unless it could satisfy the affirmative defense set forth in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L. Ed.2d 662 (1998). Specifically, the employer must show that: (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that the employer provided. Here, the burden of establishing this affirmative defense does not shift to Respondent because, as set forth above, Complainant failed to prove that because of her sex, she was subjected to an abusive or hostile work environment due to the picture incident; and failed to prove that other instances of

unwelcome conduct directed at her occurred and amounted to a hostile work environment at the restaurant.

## III. CONCLUSION

The Commission finds that Complainant failed to prove that Respondent subjected her to a hostile work environment based on her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, or the Prince George's County Code, Subtitle 2, Division 12, Subdivision 7, § 2-222. Thus, Complainant is not entitled to recover damages from Respondent.

BEFORE
THE PRINCE GEORGE'S COUNTY
HUMAN RIGHTS COMMISSION

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| IN RE: TEONNA MARSHALL<br>Complainant | Human Rights Commission<br>Clerk Received<br>January 24, 2023 |
| By<br>EXECUTIVE DIRECTOR | HRC Case No.: HRC21-0202<br>EEOC Case No.: 531-202-02614 |
| vs.<br>SEAFOOD FUSIONS, INC.<br>a/k/a Hook and Reel, Inc.<br>Respondent | |

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ORDER

Pursuant to the authority conferred on this Commission by Prince George's County Code, Subtitle 2, Division 12, Subdivision 1, §2-185 et seq.; Subdivision 3, §2-194 et seq., (2022 Edition), and for the reasons set forth above, the Commission issues this Opinion and Order and finds that the Respondent, Seafood Fusions, Inc., did not discriminate against Complainant in violation of Title VII of the Civil Rights Act of 1964, as amended, or the Prince George's County Code, Subtitle 2, Division 12, Subdivision 7, §2-222.

The Complaint initiating this action, HRC21-0202, is dismissed with prejudice.

On the **24th** day of **January** 2023, **IT IS SO ORDERED**.

Under Section 2-197-C of the Prince George's County Code, any party aggrieved by a final decision of the Commission in a contested case is entitled to file an appeal pursuant to Subtitle B of the Maryland Rules of Procedure, Annotated Code of Maryland, within thirty (30) days from the date last entered above.

Charlene Proctor, Chairperson
Prince George's County
Human Rights Commission

Employment Panel:

Nathaniel Bryant, Chair
Sylvia Johnson, Commissioner[2]
Felicia Sadler, Commissioner

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***Prince George's County Human Rights Commission***

[2] A full Panel heard this matter and completed deliberations on this matter. At the time of issuance of this Opinion and Order, only Commissioner Johnson remained as a member of the Panel, as the other two Commissioners had served their terms.