IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TANGALA CARTER, Plaintiff, v. CALIFORNIA GRILL, LLC, *d/b/a* FOXY'S CABARET, Defendant.	§ § § § § § § § § §	1-19-CV-588-RP

ORDER

Before the Court is Defendant California Grill, LLC *d/b/a* Foxy's Cabaret's ("Foxy's") Motion for Summary Judgment, (Dkt. 18), and all related briefing. Having considered the parties' submissions, the record, and the applicable law, the Court will deny Foxy's motion for summary judgment.

This is an employment discrimination case. (*See* Compl., Dkt 1). Plaintiff Tangala Carter ("Carter") alleges that Foxy's discriminated and retaliated against her because of her race in violation of 42 U.S.C. §1981 ("Section 1981"), Title VII of the Civil Rights Act of 1964, and the Texas Commission on Human Rights Act ("TCHRA"). (*Id.* at 4–6). Carter worked as a waitress at Foxy's from June 2017 until December 29, 2017, when she resigned. (Carter Decl., Dkt. 21-2, at 1).[1] Carter states that she was forced to resign because Foxy's "refus[ed] to allow [her] to wait on tables" after she complained about the pervasive use of the n-word among her colleagues and difference in treatment between white and Black employees. (*Id.* at 4–7).

[1] The Court rejects Foxy's contention that Carter's declaration is "not properly before this Court" because it is cited to in the "Statement of Facts" attached to Carter's response, rather than in her response itself. (Dkt. 22, at 2 n.1).

Carter reports that she heard white employees use the n-word at Foxy's "every day, generally to address or refer to a black employee or customer." (*Id.* at 1). In addition, Carter also found that white employees were treated differently than Black employees at Foxy's. (*Id.* at 3). Black employees, according to Carter, were required to complete extra cleaning tasks and were not allowed to take breaks as white employees did. (*Id.*; Carter Dep., Dkt. 24-1, at 31). Tommy Perkins ("Perkins"), general manager of Foxy's, is "not aware of any instances" in which white employees were treated more favorably than non-white employees, and asserts that Carter "never complained" about this to him. (Perkins Decl., Dkt. 18-3, at 3). In her EEOC charge, Carter alleges that she explicitly complained to Perkins that "white employees were treated much better than the black employees, given easier job duties and [were] talked to less harshly than black employees." (EEOC Charge, Dkt. 21-3, at 2).

In Carter's first month of work, manager Taylor Ratcliff ("Ratcliff"), a white man, allegedly said to her: "what's up [n-word]?" and told her he was "just kidding" when she said his use of the n-word made her uncomfortable. (Carter Decl., Dkt. 21-2, at 1–2; Carter Dep., Dkt. 24-1, at 25). Ratcliff continued to use the n-word to greet Carter, and generally used the word towards her "constantly." (Carter Decl., Dkt. 21-2, at 2). Carter reported Ratcliffe's behavior to Perkins in or around November 2017. (*Id.* at 4; Carter Dep., Dkt. 24-1, at 26). Perkins says he spoke with Ratcliff about "five to ten minutes" later and counseled him that "we do not use that word." (Perkins Decl., Dkt. 18-3, at 1). After she complained, Carter saw Perkins witness Ratcliff use the n-word around her and in conversation, but Perkins did not "do anything about it" and Ratcliff continued to use the word in Carter's presence. (Carter Decl., Dkt. 21-2, at 6). Ratcliff contends that he never used the n-word "directed at, to, or about Ms. Carter during her shifts at Foxy's." (Ratcliff Decl., Dkt. 18-2, at 1).

Carter contends that another white employee, Ashley, also used the n-word around Carter "frequently." (Carter Decl., Dkt. 21-2, at 6; Carter Dep., Dkt. 24-1, at 23). In or around October 2017, Carter told Ashley that she found it offensive and uncomfortable to be called the n-word by a white person, especially at work. (Carter Decl., Dkt. 21-2, at 6). Ashley responded by telling Carter that she used the n-word with her Black friends, and continued to use the word to refer to Carter, particularly when "she was greeting somebody else, speaking to someone, or explaining something to somebody, and [Carter] was close by, she would use that word." (*Id.*). Carter reported Ashley's behavior to one of the managers, Dan, who said he would talk to Ashley. (*Id.*; Carter Dep., Dkt. 24-1, at 25). Ashley nevertheless continued to use the world "as much as she could" while talking to Carter. (Carter Decl., Dkt. 21-2, at 6).

A third white employee, Erica, also used the n-word towards Carter "just about every time [they] worked together." (*Id.*). Carter similarly reported Erica's use of the word and how it made her feel to Dan, yet Erica continued to use the word around Carter. (*Id.* at 3). After Carter complained about Erica's behavior to both Dan and Perkins, Erica came up to Carter singing along with a song and sang the n-word "right up in [Carter's] face, in a way that was threatening." (*Id.* at 6; Carter Dep., Dkt. 24-1, at 32) ("[W]hen you get in somebody face doing this, [n-word, n-word], you know, that[']s kind of, you know, aggressive to me[.]").

After Carter reported the racism she witnessed at Foxy's to Perkins, her hours were reduced and she was assigned to less lucrative areas of the club, where she could "not earn as much money." (*Id.* at 4). Carter "had almost no work at all" after management began "preventing [her] from earning tips, [her] primary source of income" by reducing her shifts from five to two shifts per week, reassigning her from the bar to the floor, and assigning waitresses to tables to prevent Carter from serving customers. (*Id.* at 4–6; Carter Dep., Dkt. 24-1, at 13). Carter says customers told her that "they had been told that if I or the other [B]lack waitress tried to help them, that they were to tell us

they were already being taken care of." (Carter Decl., Dkt. 21-2, at 6). Carter heard a manager, Dave Thomas ("Thomas"), tell one customer: "we've already got a waitress for you. Some of the other girls, I'm not going to say that they are lazy, but this is the best waitress," when assigning a white waitress to that customer. (*Id.*).

Carter also found that her colleagues and managers began treating her differently after she complained to management about racism at Foxy's—"the employees all made me feel unwelcome and uncomfortable." (*Id.* at 5). The individuals who she complained about continued to use the n-word when talking to Carter "seemingly on purpose to upset me," and refused to talk to or work with Carter. (*Id.*). Perkins also refused to speak with Carter after she complained to him, and began "behaving rudely toward" Carter, in one instance by bumping into her and knocking her phone out of her hand. (*Id.*; Carter Dep., Dkt. 24-1, at 32–33; EEOC Charge, Dkt. 21-3, at 2).

On November 7, 2017, Carter contacted Thomas about her hours being cut, and he told her that Foxy's had reduced her hours "because she had not reached out to them sooner" and "had posted something on Facebook about race discrimination." (EEOC Charge, Dkt. 21-3, at 2; Carter Dep., Dkt. 24-1, at 32) In early December 2017, Carter also complained to the manager Dan about "the table assignment issue," but nothing changed after that. (Carter Decl., Dkt. 21-2, at 6). Carter then filed an EEOC charge on December 7, 2017 concerning "the racial slurs and differences in job assignments" at Foxy's. (EEOC Charge, Dkt. 21-3, at 2).[2]

On December 29, 2017, Carter arrived to Foxy's to find that she did not have any tables to wait because "all of the customers were being assigned to white waitresses." (*Id.* at 7; Carter Dep.,

[2] The Court finds unpersuasive Foxy's contention that Carter's deposition testimony is inconsistent with her testimony regarding her complaints to Thomas and Dan. (Dkt. 22, at 2–3). Carter's declaration and EEOC charge do not contradict her deposition testimony, but rather supplement it. (*Compare* Carter Decl., Dkt. 21-2 *with* Carter Dep., Dkt. 24-1; EEOC Charge, Dkt. 21-3; Am. EEOC Charge, Dkt. 18-4). The Court thus rejects Foxy's arguments as to the purported incompetence of Carter's sworn declaration.

Dkt. 24-1, at 26–27; *see also* Am. EEOC Charge, Dkt. 18-4, at 2). When she attempted to wait on someone she knew in the VIP section, she was prevented from entering the section by two security guards, while white waitresses were allowed to enter the VIP section. (Carter Decl., Dkt. 21-2, 7; Am. EEOC Charge, Dkt. 18-4, at 2). When Carter told the managers, Thomas and Dan, that she did not want to remain at Foxy's if she was unable to wait on any tables, Thomas told her she would be abandoning her job if she left. (Carter Decl., Dkt. 21-2, at 7; Am. EEOC Charge, Dkt. 18-4, at 3). Carter then told Dan she was resigning from her job because she was not being "allowed to work." (Carter Decl., Dkt. 21-2, at 7). Carter amended her EEOC charge after her resignation. (Am. EEOC Charge, Dkt. 18-4, at 2). On March 11, 2019, the EEOC dismissed Carter's charge because it was "unable to conclude that the information obtained establishes violations of the statutes" but noted that its dismissal "does not certify that the respondent is in compliance with the statues." (EEOC Not., Dkt. 18-6, at 2).

II. LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin All. v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000).[3]

III. DISCUSSION

A. Race Discrimination Claims

Carter brings race discrimination claims against Foxy's under Title VII of the Civil Rights Act of 1964 (Title VII), Section 1981, and the TCHRA. (Compl., Dkt. 1, at 4–6). The Fifth Circuit has consistently held that "race discrimination claims brought pursuant to section 1981 are governed by the same evidentiary framework applicable to employment discrimination claims under Title VII."

[3] The Court rejects Foxy's contention that Carter's inclusion of an appendix, which summarizes her summary judgment evidence with specific citations to the record, means that Carter "has not met her summary judgment burden." (Dkt. 22, at 1–2). Each portion of Carter's appendix includes a citation to the record. (*See* Appendix, Dkt. 18-1). Contrary to Foxy's assertion that *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003) stands for the proposition that "the nonmovant's response must refer to evidence specifically within its briefing," that court disregarded summary judgment evidence that was not cited to anywhere within plaintiffs' briefing but was included as an attachment to plaintiff's brief. Here, in contrast, Carter refers to specific evidence in her appendix. (*See* Appendix, Dkt. 18-1). The Court declines Foxy's invitation to hold Carter to a more heightened briefing standard than that set forth in the local and federal rules.

Pegram v. Honeywell, Inc., 361 F.3d 272, 281 n. 7 (5th Cir.2004); *see also Jones v. Robinson Prop. Group*, 427 F.3d 987, 992 (5th Cir. 2005) ("[T]he analysis under both [Title VII and § 1981] [is] identical, the only substantive differences between the two statutes being their respective statute of limitations and the requirement under Title VII that the employee exhaust administrative remedies." (citations omitted)). Texas courts also construe the TCHRA consistently with federal law interpreting Title VII. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n.2 (5th Cir. 1999) ("[T]he law governing claims under the TCHRA and Title VII is identical."). Because the same analysis applies to all three statutes, the court will consider these claims together under the Title VII evidentiary framework.

Because Carter attempts to prove race-based discrimination under Title VII through circumstantial evidence, the Court must evaluate her claims under the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as modified by the Fifth Circuit. *Paske v. Fitzgerald*, 785 F.3d 977, 984 (5th Cir. 2015). "Under the modified *McDonnell Douglas* approach, the plaintiff must first demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact that either (1) the employer's reason is a pretext or (2) that the employer's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected characteristic." *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 411–12 (5th Cir. 2007). To establish her prima facie case, Carter must show that she "(1) is a member of a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside of the protected class, or, in the case of disparate treatment, shows that other similarly situated employees were treated more favorably."

Standley v. Rogers, 680 F. App'x 326, 327 (5th Cir. 2017) (quoting *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004)).

Foxy's contends that Carter has failed to establish a prima facie case of gender discrimination because she cannot demonstrate that she suffered an adverse employment decision or that she was replaced by someone outside of her protected group. (Dkt. 18, at 7, 11). Foxy's asserts that Carter voluntarily resigned "during one night where she felt like she was not receiving enough table[s]," and failed to raise her concerns about table assignments to management. (*Id.* at 7). Carter responds that the circumstances that surrounded her resignation rise to the level of constructive discharge since her complaints of racism "directly affected her compensation and earning opportunities at Foxy's," and emphasizes that she did complain to multiple managers about the reduction in her hours and earning potential due to table assignments. (Dkt. 21, at 8; Carter Decl., Dkt. 21-2, at 4–6). Foxy's disputes that Carter complained to anyone about her reduction in hours and reassignment before December 29, 2017, and asks the Court to disregard these allegations in Carter's declaration as contradictory to her deposition testimony—which the Court declines to do while noting that this fact is in dispute. (Reply, Dkt. 22, at 2).

While an employee's resignation typically does not constitute an adverse employment decision, here Carter alleges her resignation constituted "constructive discharge" because she only resigned "after months of attempting to get Foxy's to address the racial slurs" and "after management responded to her complaints of discrimination by making it harder, and ultimately nearly impossible, for her to earn any money there." (Dkt. 21, at 10). A constructive discharge occurs when an employer makes working conditions so intolerable that an employee feels compelled to resign. *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir.2007) (discussing constructive discharge under Title VII); *Boze v. Branstetter*, 912 F.2d 801 (5th Cir. 1990) (discussing constructive discharge under Section 1981). When evaluating whether Carter's allegations rise to the level of constructive

discharge, the Court examines the following factors: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) offers of early retirement that would make the employee worse off whether the offer were accepted or not. *McCoy*, 492 F. 3d at 557.

Although Foxy's attempts to recast Carter's resignation as stemming from "[a] single evening (or even a series of evenings) wherein Plaintiff alleges she did not receive as many customers as she would like," Carter has provided evidence that shortly after she complained to management of racist treatment by colleagues and managers, Foxy's removed her from the bar and began assigning tables in such a way that made it impossible for Carter to earn money on her shifts. (Carter Decl., Dkt. 21-2, at 4–7; Carter Dep., Dkt. 24-1, at 13, 20). Carter also asserts that the use of racial slurs continued even after she complained to Perkins, and he allegedly took remedial action. (Carter Decl., Dkt. 21-2, at 4–6; Perkins Decl., Dkt. 18-3, at 2). Foxy's disputes that it ever assigned waitresses to tables, and argues that Carter failed to complain to management about the reduction in her hours or ask "why tables were not directed her way." (Dkt. 18, at 8; Dkt. 22, at 3–4). In contrast, Carter's asserts that she was demoted from her bar shift, her salary was reduced, and she was prevented entirely from working after she complained of racism at Foxy's to Perkins. (Carter Decl., Dkt. 21-2, at 4–7).

In light of this conflicting evidence regarding an adverse employment decision, the Court finds that material issues of fact remain as to whether Foxy's discriminated against Carter in violation of Title VII, Section 1981, and the TCHRA by constructively terminating her employment after she complained of the use of the n-word by white colleagues. Accordingly, Foxy's motion for summary judgment on these claims is denied.

B. Retaliation Claims

Carter also brings retaliation claims under Title VII, Section 1981, and the TCHRA. (Compl., Dkt. 1, at 4–6). Title VII's anti-retaliation provision prohibits employers from "discriminat[ing] against" an employee "because he has opposed any practice made an unlawful employment practice" by Title VII or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). The TCHRA has a similar anti-retaliation provision, and it is applied in the same manner as is the Title VII provision. *See* TEX. LAB. CODE ANN. § 21.055 (Ann. 1996 & Supp. 2004-05); *Shackelford*, 190 F.3d at 404 n.2 ("[T]he law governing claims under the TCHRA and Title VII is identical."). Retaliation claims made under Section 1981 are also treated the same as are Title VII retaliation claims. *Arrieta v. Yellow Transp., Inc.*, 2008 WL 5220569, at *15 (N.D. Tex. Dec. 12, 2008), *aff'd sub nom. Hernandez v. Yellow Transp., Inc.*, 641 F.3d 118 (5th Cir. 2011), *opinion withdrawn and superseded on reh'g*, 670 F.3d 644 (5th Cir. 2012), *and aff'd sub nom. Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012). For ease of reference, the court will refer only to Title VII in its analysis of Carter's retaliation claims, but the reasoning and holdings apply equally to the claims to the extent brought under Section 1981 and the TCHRA. *See Dumas v. Union Pac. R.R. Co.*, 2008 WL 4158736, at *2 n.2 (5th Cir. Sept. 8, 2008) ("When a plaintiff pursues both as parallel causes of action, Title VII and § 1981 require the same proof to establish liability.").

Because Carter has once again only offered circumstantial evidence of retaliation, the Court will similarly apply the modified *McDonnell Douglas* burden-shifting paradigm to her retaliation claims. Under this approach, Carter must first establish a prima facie case of retaliation by showing that (1) she engaged in a protected activity, (2) an adverse employment action occurred, and (3) a causal link existed between the protected activity and the adverse employment action. *Hernandez v. Metro. Transit Auth. of Harris Cnty.*, 673 F. App'x 414, 419 (5th Cir. 2016). An employee engages in a protected

activity by (1) opposing an employment practice made unlawful by Title VII, or (2) by making a charge or testifying, assisting, or participating in an investigation, proceeding, or hearing under Title VII. *See Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996) (quoting 42 U.S.C. § 2000e-3(a)). The underlying practice need not actually be illegal, but the employee must at least reasonably believe that it is. *See id.*

Foxy's contends that Carter's retaliation claims must be dismissed because she cannot show that she was subjected to an adverse employment action or that "there was a causal connection between her alleged protected activity and the alleged adverse action." (Dkt. 18, at 11). Carter responds that she has in fact shown that her complaints about the use of racial slurs and the disparity in treatment of waitresses based on race "resulted in her being unable to earn a living at Foxy's, and then being threatened with disciplinary action if she refused to remain at the establishment despite not being allowed to work." (Dkt. 21, at 10). Because a material dispute of fact exists as to whether Carter experienced an adverse employment decision, the Court will similarly deny Foxy's motion for summary judgment on this basis. *See* Section III(A).

C. Hostile Work Environment Claim

Carter also brings a hostile work environment claim under Title VII, alleging that Foxy's discriminatory and retaliatory conduct was "so severe or pervasive as to create hostile working environment." (Compl., Dkt. 1, at 5). To establish a prima facie race-based hostile work environment claim, Carter must demonstrate that she (1) [s]he belongs to a protected group; (2) [s]he was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Caldwell v. Lozano*, 689 F. App'x 315, 322 (5th Cir. 2017). If a plaintiff claims that a supervisor harassed the employee, the plaintiff need not satisfy the fifth element. *Watts v. Kroger Co.*,

170 F.3d 505, 509 (5th Cir. 1999); *see also Dandy v. United Parcel Service, Inc.*, 388 F.3d 263, 271 (7th Cir. 2004) (use of the n-word by supervisors has particularly severe impact on work environments). "Harassment affects a 'term, condition, or privilege of employment' if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Hernandez*, 670 F.3d at 651 (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).

Foxy's challenges the fourth and fifth factors of Carter's prima facie case, arguing that Carter's allegations "do not rise to the level of creating an actionable hostile work environment" and, in any event, Foxy's took "prompt remedial action" while Carter failed to avail herself of Foxy's "corrective opportunity." (Dkt. 18, at 10). The parties dispute the pervasiveness of the harassment Carter endured. While Foxy's asserts that Carter's claim centers on the use of a racial slur by "one coworker and one manager," Carter insists that up to four Foxy's employees used racial slurs in her presence nearly every time she was at work, including after Carter complained to management and Foxy's claims it took remedial action. (Dkt. 18, at 7; Carter Decl., Dkt. 21-2, at 4–6). Carter further asserts that Ratcliff, a manager, called her the n-word regularly even after Carter asked him to stop and complained of his behavior to Perkins, the general manager of Foxy's. (Carter Decl., Dkt. 21-2, at 1–2, 5–6). Ratcliff himself denies having used the n-word towards Carter, though Perkins recalls Carter's complaint regarding Ratcliff's use of a "racially charged word." (Ratcliff Decl., Dkt. 18-2, at 1; Perkins Decl., Dkt. 18-3, at 2).

Although the parties dispute whether Ratcliff, a manager, used to n-word toward Carter, Foxy's does not dispute Carter's allegations that three other employees used the n-word towards or around her frequently. (Carter Decl., Dkt. 21-2, at 2–3). Foxy's description of the use of the n-word by its employees as "mere 'offensive utterances'" is contradicted by the record, as Carter describes the use of the n-word by white colleagues as "constant," which made her feel "uncomfortable, sad,

and depressed at work." (Dkt. 18, at 9; Carter Decl., Dkt. 21-2, at 3). Carter's allegations thus demonstrate that she was "continuously called the n-word at work," and such experienced harassment "sufficiently severe or pervasive" to be actionable under a hostile work environment claim. *See Melvin v. Barr Roofing Co.*, 806 F. Appx 301, 309 (5th Cir. 2020) (finding plaintiff's allegations that "he was continuously called the n-word at work" sufficient to establish prima facie case of a hostile work environment); *Freeman v. Dal–Tile Corp.*, 750 F.3d 413, 422 (4th Cir. 2014) (""[T]he word '[n-word]' is pure anathema to African–Americans,' as it should be to everyone."); *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 356 (8th Cir. 1997) ("[U]se of the [n]-word even in jest could be evidence of racial antipathy.").

Having found that Carter has established that the harassment was sufficiently pervasive and severe, the Court next evaluates whether Foxy's has demonstrated that it took prompt remedial action to address Carter's complaints of racial animus. Foxy's challenges Carter's assertion that she complained to multiple managers about the racism she encountered at work, yet concedes that Carter did complain to Perkins, general manager of Foxy's, of Ratcliff's use of the n-word towards her. (Perkins Decl., Dkt. 18-3, at 2). Carter, in contrast, alleges that she complained to multiple managers, including Perkins, about the use of the n-word at Foxy's, abut that "nothing changed." (Carter Decl., Dkt. 21-2, at 4–6). Because Carter's colleagues continued to use the n-word in her presence even after she complained to Perkins and he purportedly took remedial action, Carter has presented sufficient factual support to create a fact issue as to whether Foxy's in fact took remedial action in response to Carter's complaints. (Carter Decl., Dkt. 21-2, at 5–6); *Melvin*, 806 F. Appx at 309–10 ("A jury could conclude that [defendant] failed to take remedial action if, after [plaintiff] complained, his coworkers—including his supervisor—continued to use racial slurs in the face of [plaintiff]'s request to the contrary. Accordingly, a fact issue exists about whether [defendant] took action to remedy the harassment."). In addition, the parties dispute whether Ratcliff ever used the n-

word towards Carter—an allegation that, if true, would absolve Carter of the need to make any showing with regard to this element of her hostile work environment claim. (*Compare* Carter Decl., Dkt. 21-2, at 1–2, 5–6 with Ratcliff Decl., Dkt. 18-2, at 1); *Watts*, 170 F.3d at 509.

Because the parties dispute whether Ratcliff, a manager, used the n-word towards Carter, and whether Foxy's took remedial action in response to Carter's complaints of racism in the workplace, the Court will deny Foxy's motion for summary judgment on Carter's hostile work environment claim.

V. CONCLUSION

Accordingly, **IT IS ORDERED** that Foxy's Motion for Summary Judgment, (Dkt. 18), is **DENIED**.

SIGNED on May 11, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE