APPENDIX

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APPENDIX A

United States Court of Appeals
Fifth Circuit

No. 22-60034

Bailie Bye,
Plaintiff– Appellant,

v.

MGM Resorts International, Incorporated,
doing business as Beau Rivage Resort and Casino,
Defendant–Appellee.

Filed: September 28, 2022

Appeal from the United States District Court for the
Southern District of Mississippi

Before: JONES, HO, and WILSON, *Circuit Judges*.

EDITH JONES, *Circuit Judge*:

Plaintiff is a working mother who brought suit against her employer for pregnancy discrimination under Title VII, constructive discharge, and creating a hostile work environment. The district court granted summary

judgment to her employer because she failed to create triable fact issues. We concur. We also find no error or abuse of discretion in the district court's dismissal of her belatedly-raised Fair Labor Standards Act ("FLSA") claim. *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11, 135 S. Ct. 346, 346 (2014) (per curiam) is inapposite. The judgment is AFFIRMED.

BACKGROUND

Defendant Beau Rivage Resorts, LLC operates a casino and resort facility in Biloxi, Mississippi. Plaintiff Bailie Bye was employed at Beau Rivage as a server at Defendant's Terrace Café from January 7, 2015, until she gave two weeks' notice on June 28, 2019. She brought suit against Beau Rivage alleging that, while she was employed, she was subject to pregnancy and sex discrimination, harassment, and constructive discharge in violation of Title VII of the Civil Rights Act. Specifically, she challenges the adequacy of her lactation breaks and she alleges harassment from co-workers due to her lactation breaks.

As a matter of course, servers at the Terrace Café were provided a mandatory 30-minute break and two additional optional 15-minute breaks during their shifts. They would generally follow a breaker schedule to track their breaks. For each shift, one of the servers would serve as a "breaker," who was responsible for relieving each server for his or her break. The breaker would relieve those who started earliest in the shift and rotate to those who arrived later. The earliest arrivals would come in at 6am, the next round at 8am, and the last round at 1pm. Servers were sometimes delayed, however, from taking their breaks for any number of reasons including staffing, shift changes, the number of patrons in the restaurant, or customers lingering at the table. It was in the servers' best

interest to delay a break until a table's entrée was served in order to retain the tip from that table instead of having the table (and the accompanying tip) transferred to the breaker. This was especially true given the added complication of having to involve a manager to close out a check for a server who was on break.

Ms. Bye returned to work from maternity leave on March 10, 2019. She worked the 8am-4pm shift. Upon her return, she requested two 30 to 40-minute lactation breaks. At first, she did not request that her breaks occur at any particular time. Her request was approved, and she received access to a locked lactation room. She typically received her first break according to the breaker schedule and her second break after the breaker relieved the other servers. For just over two months, Ms. Bye took either two 30-minute breaks or one hour-long break each full day she worked.

On May 11, 2019, Ms. Bye sought a modified accommodation, seeking two 45-minute breaks at specific times—the first at 10am and the second at 1pm. She included a medical certification from her physician, which stated that "she must be able to pump breast milk twice during her shift in 45 min increments, once at 10:00am and at 1:00 pm." Management was initially concerned that scheduling breaks at specific times would be difficult due to the unpredictable nature of the business and the need for flexibility in order to maintain continuity in service. Thus, in response to her request, Beau Rivage offered Ms. Bye three options: (1) she could work the earlier 6am shift, allowing her to take an earlier break at 8am; (2) she could work as the breaker for as long as she needed to in order to take her breaks as needed; or (3) she could break once in the morning and once in the afternoon for 45 minutes as close as possible to the times she requested, but not

necessarily at those exact times. Ms. Bye rejected all three proposals.

Nevertheless, management granted Ms. Bye's request for an accommodation on June 14, 2019, indicating that she could take her first break sometime between 10am and 10:30am and her second break sometime between 1pm and 1:30pm. According to Beau Rivage, in compliance with this new schedule, Ms. Bye's manager would speak with the breaker at the beginning of every shift to ensure that Ms. Bye received her breaks at the necessary time. When the breaker was unable to accommodate Ms. Bye's schedule, one of the managers would step in and cover her tables or close her section so she could go on her break. Ms. Bye contends, on the other hand, that her breaks were "sporadic, sometimes not occurring at all" and sometimes occurring "30 minutes to over an hour past time." She suggests that there were multiple times when the breaker did not respect her specific break time and that there was effectively "no accommodation made for Ms. Bye to take breaks."

Ms. Bye further alleges that her co-workers began to harass her as a result of this new break schedule. She describes various instances where coworkers got frustrated with her for wanting to leave early or for taking her breaks. She asserts that her co-workers did not want to work with her and that they made negative comments to her about her lactation breaks. She also contends that her general manager was attempting to terminate her, but her belief is based entirely on the fact that one of the restaurant hostesses, Jennifer Cress, told Ms. Bye that Jennifer knew about a group message among restaurant workers where an unidentified person stated that the general manager "was working on getting rid of [Plaintiff]." Ms. Bye never saw this message herself, and

Jennifer told her that she did not "know how true it is" or "who it came from" because she was not a participant in the group message.

Due to this alleged mistreatment, Ms. Bye contends that she complained to human resources about not receiving breaks as scheduled and the purported harassment by her co-workers, but that nothing ultimately came of her reports. She testified in her deposition that, "[r]ight when [she] was finally starting to actually get pump breaks at the times that [she] needed them, the harassment had gotten overwhelming." She gave two weeks' notice on June 28, 2019.

On May 29, 2019, Ms. Bye filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging harassment, sex discrimination, and retaliation due to being "denied the ability to take needed breaks and use a breast pump." She filed a second charge with the EEOC on August 2, 2019, alleging retaliation and that she "was forced to quit [her] job at the Beau Rivage due to them refusing to allow [her] to take breaks to pump breast milk, along with harassment from [her] coworkers." The EEOC issued right to sue letters for both charges on September 17, 2019.

On November 13, 2019, Ms. Bye filed suit against Beau Rivage in the Circuit Court of Harrison County, Mississippi, alleging pregnancy and sex discrimination, harassment, and constructive discharge in violation of Title VII. Defendants removed the case to federal court.

The district court granted summary judgment to Beau Rivage, holding that Ms. Bye did not present sufficient evidence to support a prima facie case of either disparate treatment, harassment, or constructive discharge. Regarding her allegations of inadequate lactation breaks,

the court further noted that, even if Ms. Bye could support a prima facie case of disparate treatment, her claim would still fail because Beau Rivage has articulated legitimate, nondiscriminatory reasons for not giving her breaks at the exact times requested.

Ms. Bye also invoked the FLSA for the first time in response to the motion for summary judgment, and the district court rejected the claim as untimely and not properly before the court. Ms. Bye appealed.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo, "applying the same standard as the district court." *Brandon v. Sage Corp.*, 808 F.3d 266, 269 (5th Cir. 2015) (citing *Roberts v. City of Shreveport*, 397 F.3d 287, 291 (5th Cir. 2005)). A party is entitled to summary judgment "if the movant shows that 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; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). But "[o]nce the moving party has initially shown that there is an absence of evidence to support the non-moving party's cause, the nonmovant must come forward with specific facts showing a genuine factual issue for trial." *U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (internal quotation marks omitted).

DISCUSSION

Ms. Bye raises three primary arguments[1] on appeal. First, she challenges the district court's conclusion that she failed to make out a prima facie case of harassment or hostile work environment. Second, she suggests that her

[1] Ms. Bye does not challenge on appeal the district court's rejection of her disparate-treatment claims.

constructive discharge claim should have made it to a jury. Third, she contends that the district court erred by dismissing her FLSA claim.

I. Harassment/Hostile Work Environment

The district court held that Ms. Bye failed to establish a prima facie case of harassment or hostile work environment. "Title VII does not prohibit all harassment." *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 325 (5th Cir. 2019), as revised (Feb. 7, 2019). The "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 2283–84 (1998) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 1002 (1998)). These standards are intended to "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.* at 788, 118 S. Ct. at 2284 (internal quotation marks omitted). "[A]llegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation." *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 826 (5th Cir. 2019) (internal quotation marks omitted). Rather, there must be "discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment." *Badgerow v. REJ Properties, Inc.*, 974 F.3d 610, 617 (5th Cir. 2020) (internal quotation marks and alterations omitted).

In order to establish a hostile work environment claim, Ms. Bye had to demonstrate that

> (1) the employee belonged to a protected class; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action.

Woods v. Delta Beverage Grp., Inc., 274 F.3d 295, 298 (5th Cir. 2001). The district court determined that, "at a minimum the third and fourth elements are problematic" for Ms. Bye. It concluded that she failed to produce "any competent summary judgment evidence, other than her own conclusory assertions or subjective beliefs," that indicated that the alleged harassment was related to her lactation breaks. While she provided comments that her co-workers made about her taking breaks to pump, she has submitted no evidence showing the frequency of the comments or who specifically made them. Additionally, according to the district court, the conduct described by Ms. Bye was not "sufficiently severe or pervasive," as she again failed to demonstrate that the alleged hostility was more than "mere offensive utterances," which are not sufficient to establish a claim under Title VII.

We find nothing problematic about the district court's assessment of the evidence. Ms. Bye contends that the district court inappropriately dismissed evidence that "employees chose to and purposefully failed to break Ms. Bye on time, harassed Ms. Bye by clapping when she had to leave to go to the hospital for her child, [and] refus[ed] to work with Ms. Bye." But as the district court observed, Ms. Bye provided no evidence regarding who said what or how often, or how this treatment was related to her

needing to take lactation breaks. All the court had was Ms. Bye's own account, unsupported by competent evidence. And her subjective beliefs as to the motivation of others are insufficient.

Additionally, the level of mistreatment she claims occurred would not constitute harassment or a hostile work environment under Title VII. For conduct to be sufficiently severe or pervasive, it must be both objectively and subjectively offensive. *Badgerow*, 974 F.3d at 617–18. To determine whether the work environment is objectively offensive, the court considers the totality of the circumstances, including "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance." *Id.* at 618 (internal quotation marks omitted). "No single factor is determinative." *Id.* (internal quotation marks omitted).

Ms. Bye's allegations do not support a finding that the conduct was objectively severe. At worst, her co-workers were unkind to her, and she had difficulty working with some of them. But not all troubled work relationships can be remedied by federal law. Title VII is not a tool to exact revenge on those with whom one does not get along. The picture she paints is not of a hostile or abusive working environment as evaluated by the totality of the circumstances. Ms. Bye's harassment claim fails as a matter of law.

II. Constructive Discharge

For similar reasons, the court correctly granted summary judgment on Ms. Bye's constructive discharge claim. She contends that Beau Rivage constructively discharged her by not allowing her to take lactation breaks as needed. "To prove a constructive discharge, a

'plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign.'" *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001) (quoting *Faruki v. Parsons*, 123 F.3d 315, 319 (5th Cir. 1997)). This court has considered the following events relevant in determining whether a reasonable employee would feel compelled to resign:

> (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.

Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 991 (5th Cir. 2008) (quoting *Aryain v. Wal–Mart Stores Tex. LP*, 534 F.3d 473, 481 (5th Cir. 2008)).

Ms. Bye seeks to rely upon the "badgering, harassment, or humiliation" by other employees, but, again, she has provided insufficient evidence that conditions were so intolerable that she was compelled to resign. "Constructive discharge requires a greater degree of harassment than that required by a hostile environment claim." *Brown*, 237 F.3d at 566. "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge . . . ." *Id.* On appeal, she faults the district court for allegedly failing to consider the physical pain she endured because she did not receive her lactation breaks on time. And while there is no evidence to question that Ms. Bye experienced discomfort, she concedes she received her

lactation breaks most of the time, even if they were 30 minutes to an hour past the scheduled time. A reasonable employee in Ms. Bye's shoes would not have considered these late lactation breaks so intolerable as to compel resignation, especially given management's ongoing efforts to accommodate her requests. Ms. Bye's subjective disparagement of management's efforts, given much evidence of the difficulty of arranging breaks exactly while also accommodating servers' needs to close out tables, is not sufficient to maintain her constructive discharge claim.

III. FLSA

Finally, Ms. Bye challenges the district court's dismissal of her untimely raised FLSA claim. Ms. Bye never alluded to an FLSA claim until she responded to the defendant's motion for summary judgment. The district court determined that this belated reference demonstrated the claim was not properly presented. See *Douglas v. Wells Fargo Bank, N.A.*, 992 F.3d 367, 373 (5th Cir. 2021). It is true that "[a] claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court." *Jackson v. Gautreaux*, 3 F.4th 182, 188 (5th Cir. 2021) (quoting *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005)). Indeed, this court has "repeatedly emphasized this rule." *Id.* at 188–89 (collecting cases).

Ms. Bye, however, relies on the Supreme Court's statement in *Johnson v. City of Shelby, Miss.*, that "[f]ederal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." 574 U.S. 10, 11, 135 S. Ct. 346, 346 (2014) (per curiam). In *Johnson*, the plaintiffs' failure to cite 42 U.S.C. § 1983 in their

complaint was a hypertechnical error, given that the only plausible basis for federal court jurisdiction there was that the plaintiffs were terminated in violation of their First Amendment rights by their public employer, which could only proceed according to § 1983.[2] *Id.* at 11, 135 S. Ct. 346–47. The Supreme Court cited *Twombly*[3] and *Iqbal*[4] in concluding that plaintiffs' allegations plainly "informed [the Defendant] of the factual basis for the[] complaint," as a result of which the plaintiffs were "required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* at 12, 135 S. Ct. at 347.

Johnson is inapposite here for various reasons. First, the only claim considered by the Supreme Court was plaintiffs' sole claim under Section 1983, whereas here, the plaintiff's pleadings exclusively and repeatedly focus on Title VII claims alone. In *Johnson*, the Court noted that the plaintiffs' recitation of facts left no room for doubt as to the legal basis for their claim, *see id.*, whereas here, the plaintiff, represented by highly

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[2] In support of this holding, the Court cited an employment discrimination case for the proposition that "imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2),'" thus suggesting that this conclusion is not limited to the § 1983 context. *Johnson*, 574 U.S. at 11, 135 S. Ct. at 347 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 998 (2002)); *see also, e.g.*, *Melvin v. Barr Roofing Co.*, 806 F. App'x 301, 308 (5th Cir. 2020) (unpublished) (*Johnson* applied to hostile work environment claim); *Thomas v. S. Farm Bureau Life Ins. Co.*, 751 F. App'x 538, 540 n.9 (5th Cir. 2018) (unpublished) (*Johnson* applied to wrongful discharge claim). Unpublished cases from this court are, however, non-precedential.

[3] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007).

[4] *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009).

competent counsel, was the mistress of her complaint, and the several claims she pled all arose from Title VII. Neither the defendant nor the district court were required to read into the carefully stated complaint (together with exhibits demonstrating exhaustion of Title VII remedies) a wholly different claim that was not pled. This is one reason why this court has "repeatedly emphasized" that new claims need not be considered when first raised in responses to summary judgment motions.

Second, nothing in *Johnson* purports to supersede the ordinary rules of case management prescribed by the Federal Rules of Civil Procedure. To be clear, in *Johnson*, the lower courts had granted and affirmed summary judgment based on plaintiffs' pleading omission, but the Court's opinion is premised on the obviousness of Section 1983 as the vehicle under which the claim had proceeded. Here, the progress of the case was quite different. The district court explained that Ms. Bye's attempt to raise an FLSA claim occurred months after the deadline for pleading amendments, well after the discovery cutoff date, and within a month or two of the trial setting. The court emphasized, correctly, how the case had developed for nearly two years in light of scheduling conferences and orders intended precisely to shape the case for impending trial or other final resolution.

Third, an FLSA claim for denial of lactation breaks invokes different facts and remedies than Title VII, e.g., claims for failure to pay overtime and potential double damages. *See* 29 U.S.C. § 207(r)(1)(A), Sec. 216. Although Section 207(r) specifies that an employer has no duty to compensate an employee for lactation breaks, the Department of Labor has ruled that if the employee

uses regular break time for lactation, she must be paid in tandem with other employees.[5] Nothing in plaintiff's pleading asserted any damage claim consistent with the FLSA pregnancy provision. The district court noted this deficiency, stating that no facts had been adduced that as to unpaid minimum wage or overtime, nor did Ms. Bye claim other FLSA-related damages, e.g., the employer's abuse of exceptions like sick leave. In fact, because this provision has generally been enforced by the Labor Department rather than individual plaintiffs, the plaintiff's belated attempt to inject an FLSA claim here left the court and the defendants largely in the dark about its potential reach and consequences. Contrary to the dissent, this was a "new" claim.

Fourth, in connection with case management, we note the district court considered *sua sponte* whether Ms. Bye should be permitted to amend and add the FLSA claim, but it rejected that option. The Supreme Court's *Johnson* opinion does not discuss the implications to be drawn from Fed. R. Civ. Pro. 16, but it seems unlikely that in the course of holding only that facts, rather than legal theories, matter at the pleading stage, the Court intended to upset the case management framework articulated in Rule 16, titled "Pretrial Conferences; Scheduling, Management." Briefly summarizing its detailed provisions (which are further usually elaborated on by local district court rules), the purposes of pretrial conferences include expediting disposition of the action; establishing early and continuing judicial control to avoid protracting the case; improving the quality of trial through more thorough preparation; and

[5] FAQs pertinent to Section 207(r), at dol.gov/agencies/whd/nursingmothers/faq, visited 9/27/2022.

facilitating settlement. Rule 16(a). Further, a court *must* ordinarily issue a scheduling order that, *inter alia*, limits the time to amend the pleadings, complete discovery, and file dispositive motions. Rule 16(b)(2), (3)(A). Finally, among many case management aims stated for pretrial conferences, the court "may" "formulat[e] and simplify[] the issues, and eliminat[e] frivolous claims and defenses." Rule 16(c)(2)(A). Each of these steps had occurred in this case, more than once. Yet at no time during the two-year pendency of the case had Ms. Bye alluded to an FLSA claim, and the parties were on the verge of trial when the district court ruled on defendant's motion for summary judgment. The court cited the length of her delay, the prejudice to the defendant, and the burden on the court from a continuance that would be required to address her new claim. The belated FLSA claim was an abuse of the opposing party and the court, and it was no abuse of discretion for the district court to deny an amendment. Moreover, Ms. Bye failed to address this aspect of the court's decision and has forfeited any challenge to it. *In re Southmark Corp.*, 163 F.3d 925, 934 n.12 (5th Cir. 1999). In essence, she concedes the impropriety of her dilatory maneuver.

Fifth, our colleague cites two cases that allegedly adopted a "broad" version of *Johnson*, but each is plainly distinguishable. The Second Circuit in *Quinones* reversed a Rule 12(b)(6) dismissal on the pleadings where the district court incorrectly found no Sec 1981 discrimination claim had been pled—despite that the plaintiff's first paragraph stated, "[t]he claim for discriminatory conduct based on Hispanic origin is brought pursuant to 42 U.S.C. Sec. 1981." *Quinones v. City of Binghamton*, 997 F.3d 461, 468-69 (2d Cir. 2021).

Plaintiff's complaint also alleged he sustained damages because he was discriminated against on the basis of Hispanic origin." *Id.* Unlike this case, *Quinone*s had not proceeded through the court-supervised pretrial management process to the end of discovery and verge of trial before the "new" claim had been articulated. And in *Koger v. Dart*, 950 F.3d 971, 974–75 (7th Cir. 2020), the Seventh Circuit noted that the magistrate judge herself had understood a prisoner plaintiff's suit to include a due process damage claim for the prison's loss of his books, even though the court later held the claim was insufficiently pled. There was no surprise to the defendants or the court about that claim which had been maintained from the outset. And again, there is no discussion of the impact of pretrial case management upended by the plaintiff's tactic of belated articulation. We do not disagree with *Johnson*, nor with the sister circuits' decisions, but each case must be understood in its specific procedural setting. The procedural setting of the instant case likewise necessarily bears on the latitude with which the "facts only" pleading rules apply as a case moves further, via case management principles, toward trial or definitive motion practice.

CONCLUSION

For the foregoing reasons, the judgment is AFFIRMED.

JAMES C. HO, *Circuit Judge*, concurring in part and dissenting in part:

The Fair Labor Standards Act is often understood as helping workers by providing extra pay for extra hours worked. But "that is not the only way—and perhaps not even the best way—to understand the FLSA." *Hewitt v.*

Helix Energy Sols. Grp., 15 F.4th 289, 303 (5th Cir. 2021) (en banc) (Ho, J., concurring), cert. granted, _U.S._, 142 S. Ct. 2674 (2022). What drives many Americans is not higher pay, but a better life. What gets countless citizens out of bed each morning is not work, but family. Many workers prefer "more free time over more money," because that means more opportunity to "rest, recreate, and spend time with loved ones." *Id.* In sum, the FLSA helps many workers lead more joyous and abundant lives by offering not greater compensation, but better working conditions.

Consistent with these principles, Congress amended the FLSA in 2010 to require employers to provide nursing mothers reasonable unpaid break time to express breast milk after the birth of a child. Pub. L. No. 111–148, § 4207, 124 Stat. 119, 577–78 (2010). As amended, the Act requires employers to "provide . . . a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk," and "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. § 207(r)(1)(A)–(B).

The complaint in this case appears to plead all of the facts necessary to support a claim that the Beau Rivage Resort and Casino in Biloxi, Mississippi, violated Bailie Bye's rights to a reasonable break time for nursing as required by the 2010 amendments to the FLSA. Specifically, Bye's complaint alleges that the lactation breaks that the Beau Rivage afforded her "were sporadic." "The room was filthy, and [she] had to

complain to make sure that the room was cleaned up so that the room was sanitary to pump." "Every time she needed a break [she] was questioned or told that she had to wait." Her "breast became engorged" because she "was not given regular breaks," leading to "unbearable pain at work." She was "told that she could not take a break until employees who had not taken their breaks yet had taken their breaks." As a result, she was only given her break "hours past its required time." "Because of [her] pumps breaks," "co-workers began to harass" her. She was eventually "forced to leave her employment because she could no longer endure the harassment and physical pain from not being allowed to take her pump breaks."

These allegations would seem to be well sufficient to state a claim under the FLSA, but for one problem: The complaint does not mention the FLSA. It mentions only Title VII of the Civil Rights Act of 1964.

The panel majority concludes that this omission is fatal to the FLSA claim, and accordingly dismisses it without addressing its merits.

I respect the majority's reasoning. But I'm not sure it's consistent with governing Supreme Court precedent.

I.

Reasonable minds can disagree over how much detail a plaintiff should be required to include in a complaint—and how best to strike the balance between ensuring fair notice to defendants and avoiding unnecessary burden on plaintiffs. In this case, Bye's complaint mentions no statutory basis for relief other than Title VII. So Beau Rivage might reasonably infer that Bye deliberately chose not to pursue relief under any provision of law

other than Title VII. *Expressio unius* usually means *exclusio alterius*. *See ante*, at 11–12.

But the Supreme Court has made clear that plaintiffs need only plead facts—not legal theories.

In *Johnson v. City of Shelby, Mississippi*, 574 U.S. 10 (2014) (per curiam), the Supreme Court summarily reversed our court for mistakenly requiring plaintiffs to plead legal theories as well as facts. The Court explained that "[a] plaintiff . . . must plead facts sufficient to show that her claim has substantive plausibility." *Id.* at 12 (emphasis added). It concluded that the complaint in that case alleged sufficient facts: "Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city." *Id.*

And here's the kicker: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* (emphasis added).

So *Johnson* makes clear that "it is unnecessary to set out a legal theory for the plaintiff's claim for relief." *Id.* (quotations omitted, emphasis added).

Other circuits have interpreted *Johnson* similarly. The Seventh Circuit summed it up this way: Under *Johnson*, "[c]omplaints plead *grievances*, not legal theories." *Koger v. Dart*, 950 F.3d 971, 974 (7th Cir. 2020). So it didn't matter that a complaint "initially relied only on the First Amendment"—the plaintiff could still invoke the Due Process Clause "at later stages of the suit." *Id.* at 975. What's more, the plaintiff "did not [even] need to amend the complaint to do so." *Id.* The Second Circuit has taken the same approach. *See Quinones v. City of*

Binghamton, 997 F.3d 461, 468 (2nd Cir. 2021) ("[T]he complaint identifies a single cause of action for retaliation and does not similarly label a cause of action for discrimination. But this failure is not fatal here.") (following *Johnson*).

To be sure, I can understand the temptation to reconceptualize *Johnson*. After all, the plaintiffs there plainly alleged a constitutional violation by the city—their complaint just neglected to mention 42 U.S.C. § 1983. It would surely be "obvious" to any defendant—and certainly to any municipal lawyer worth their salt—that a complaint that alleges a constitutional violation by a city surely means to seek relief under § 1983. *See ante*, at 12 (noting "the *obviousness* of Section 1983 as the vehicle under which the claim had proceeded" in *Johnson*) (emphasis added).

So it would have been easy for the Court to decide *Johnson* based on the inherent obviousness of § 1983 claims, and nothing more.

But it didn't. *Johnson* is premised not on § 1983, but on general pleading principles.

II.

Before I conclude, I offer a few brief rebuttals to various additional points made by the panel majority.

1. The majority tries to distinguish this case from Johnson on the ground that "each case must be understood in its specific procedural setting." *Ante*, at 14.

As the majority explains, Bye did not refer to the FLSA until "well after . . . discovery," when she "first raised [it] in responses to summary judgment motions." *Id.* at 12. Based on that procedural posture, the majority concludes that allowing Bye's claim to proceed at this

stage would "supersede the ordinary rules of case management" and "upset the case management framework articulated in Rule 16." *Id.* at 12, 13.

But *Johnson* involved precisely the same procedural posture. Like Bye, the plaintiffs in *Johnson* did not mention their statutory basis for relief until "after" discovery, in response to a motion for summary judgment. *See Johnson v. City of Shelby*, 743 F.3d 59, 61 (5th Cir. 2013), rev'd, 574 U.S. 10 ("Following discovery, the City . . . filed a motion for summary judgment," where it "argued that it was entitled to judgment in its favor because [the plaintiffs] did not invoke 42 U.S.C. § 1983 in their complaint.").

2. The majority offers another observation about the procedural posture of this case: The court below "considered sua sponte whether Ms. Bye should be permitted to amend and add the FLSA claim, but it rejected that option." *Ante*, at 13. That is significant, the majority says, because "it was no abuse of discretion for the district court to deny an amendment"— and what's more, "Bye failed to address this aspect of the court's decision and has [thus] forfeited any challenge to it." *Id.* at 13–14. And in the absence of an amendment, the majority contends, Bye's FLSA claim conflicts with the established principle that "new claims need not be considered when first raised in responses to summary judgment motions." *Id.* at 11.

But *Johnson* makes clear that there was no need for Bye to amend her complaint.

To begin with, no amendment was necessary because the complaint is already sufficient. That's the whole point of *Johnson*: Facts are enough— and legal theory is not required—to state a claim. *See* 574 U.S. at 12 ("no more"

is "required" than providing a "factual basis for the[] complaint," and "it is unnecessary to set out a legal theory") (quotations omitted).

What's more, the Court noted that the plaintiffs there should "be accorded an opportunity" to amend their complaint—but only for purposes of "clarification," not legal mandate. *See id.* ("For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983."); *see also Koger*, 950 F.3d at 975 (under *Johnson*, plaintiff "did not need to amend the complaint").

3. Finally, the majority observes that Bye failed to allege damages in the form of either "unpaid minimum wage or overtime," as contemplated by 29 U.S.C. § 216(b). *Ante*, at 12. But that is not surprising. As the Labor Department has noted, unpaid minimum wages and overtime compensation are not the appropriate remedies for violations of the FLSA nursing provision "in most circumstances."[1] I have found no circuit opinions to date that analyze what remedies are available under 29

[1] *See, e.g., Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073-01, 80078 (Dec. 21, 2010) ("Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. 216(b). Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks."); *see also* 29 U.S.C. § 207(r)(2) ("An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.").

U.S.C. § 207(r)(2) for plaintiffs like Bye. But in all events, the point is that the district court should have decided Bye's FLSA claim on the merits, rather than refuse to consider her claim altogether.

***

I agree with the majority with respect to the Title VII claim. I disagree as to the FLSA claim. Accordingly, I concur in part and dissent in part.

APPENDIX B

In the United States District Court for the Southern District of Mississippi, Southern Division

Civil No. 1:20cv3-HSO-RHWR

Bailie Bye,
Plaintiff,

v.

MGM Resorts International, Incorporated,
doing business as Beau Rivage Resort and Casino,
Defendant.

Filed: December 16, 2021

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION [42] FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Motion [42] for Summary Judgment filed by Defendant MGM Resorts International, Inc., doing business as Beau Rivage Resort and Casino ("Defendant" or the "Beau Rivage"). Plaintiff Bailie Bye ("Plaintiff" or "Bye") has filed a Response [47], and Defendant has filed a Reply [49]. After due consideration of the record, the Motion [42],

related pleadings, and relevant legal authority, the Court is of the opinion that Defendant's Motion [42] for Summary Judgment should be granted, and that Plaintiff's claims should be dismissed with prejudice.

I. BACKGROUND

A. Factual Background

1. Plaintiff's employment with Beau Rivage

Defendant operates a casino and resort facility in Biloxi, Mississippi. *See* Mitchell Decl. [42-1] at 1 (Declaration of Defendant's Vice-President of Human Resources Allison Smith Mitchell). This case arises out of Plaintiff's claims that, while employed with Defendant, she was subjected to pregnancy and sex discrimination, harassment, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). *See* Compl. [1-2] at 4–8. Construing all facts in Plaintiff's favor for purposes of summary judgment, she began working at Defendant's facility as a server at its Terrace Café restaurant in January 2015. *See* Pl.'s Dep. [42-2] at 44, 61–62. Terrace Café operates on a 24-hour basis, with approximately eight servers working during the day shift on staggered schedules. *See* Cobb Decl. [42-6] at 1–2. When Plaintiff first began her employment at the restaurant, she typically worked the shift from 6:00 a.m. until 2:00 p.m. *See* Pl.'s Dep. [42-2] at 81.

Plaintiff's first child was born in November 2016, *see id*. at 46, and when she returned from maternity leave in 2017, she began working the 8:00 a.m. until 4:00 p.m. day shift due to childcare issues, *see id.* at 81–82. Plaintiff testified that, while she was pregnant with her first child, she informed Defendant that she wanted to breast feed her new baby, but after she returned to work, *see id*. at

44, 46, she was forced to stop breast feeding because she "wasn't given pump breaks," *id.* at 44, and was told that she "was taking too long to pump," *id.* at 45. It is undisputed that Plaintiff did not file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") at that time. *See id.* at 48–49.

Following the birth of her second child in 2019, Plaintiff returned to work at the Terrace Café in the same server position, working the same shift, performing the same job duties, and receiving the same or a greater level of pay. *See id.* at 127–28. At the time Plaintiff returned to work in 2019, the Collective Bargaining Agreement between Defendant and the servers' union required servers to take one 30-minute break per shift. *See* Pl.'s Dep. [42-2] at 100–01. The servers also were given the option to take two additional 15-minute breaks, for a total of 60 minutes of break time per shift, but they were not required to do so. *See id.* Plaintiff explained in her deposition that the Terrace Café utilized a server known as a "breaker" who would relieve an employee who went on break. *See id.* at 97.

Plaintiff testified that there were factors that could sometimes arise that delayed servers' breaks, including staffing, shift changes, issues in the kitchen, the number of patrons in the restaurant, party size at a table, or customers staying longer at a table, *see id.* at 108, 121–25, but that "[e]very situation is unique," *id.* at 122. If there needed to be a transfer of a check from one server to a breaker, this could create a delay in starting a break because a manager had to become involved. *See id.* at 122–23. Also, "if the breaker was finishing the table for the server and the tip was going to the server that was on break, then a manager would have to be involved when

closing out, running the payment and everything in between." *Id.* at 123.

Plaintiff acknowledged in her deposition that for purposes of retaining tips it would be in the server's best interest to delay a break and retain the table, instead of turning it over to the breaker before the entrée was served. This was so because it allowed a server to try to close out as many tickets as possible before being relieved by a breaker. *See id.* at 99–100, 125–26.

2. Plaintiff's return from her second maternity leave

a. Plaintiff's initial break schedule

Before Plaintiff returned from her second maternity leave in 2019, she sent a text message to her manager, Sarah Cormier ("Cormier"), inquiring if she could receive two 30-minutes breaks, instead of one 30-minute and two 15-minute breaks, in order to pump breast milk. *See id.* at 115. Cormier responded, "you'll get your breaks. I'm in at 8:00 a.m., so we can talk about it then." *Id.*

When Plaintiff returned to work in March 2019, she spoke with Cormier about "the best way to try to get [Plaintiff's] breaks in," *id.* at 133, and completed a lactation break information form requesting two 30- to 40-minute breaks, *see id.* at 128-31. Plaintiff was approved to take lactation breaks, *see id.* at 136, and received the door code for a locked lactation room, *see id.* at 133, 173. According to Plaintiff, she would typically begin work around 8:00 a.m. and would receive her first break pursuant to the breaker schedule. *See id.* at 137. After the breaker had completed breaking all the sections in the restaurant, Plaintiff would then get her second break. *See id.* at 138–39.

Defendant tracked breaks using a team update sheet, or what Plaintiff referred to as a breaker time log, which she reviewed during her deposition. *See id.* at 142–47. The log reflected that from March 10, 2019, through May 16, 2019, Plaintiff either took two 30-minute breaks or one hour-long break each full day she worked. *See id.* at 145–69. Plaintiff did not originally request breaks at a specific time, *see id.* at 222–23, and she agreed that Defendant had accommodated her requests during this time period, *see id.* at 171.

b. Plaintiff's request for accommodation

On May 11, 2019, Plaintiff submitted a request for accommodation seeking two 45-minute breaks at specific times, one at 10:00 a.m. and one at 1:00 p.m., due to her pumping intervals, and access to the private room with proper refrigeration for milk. *See id.* at 171–72, 177–78; Request [42-5] at 25–27. Plaintiff also submitted a medical certification from her physician, which stated that Plaintiff "must be able to pump break milk . . . until breast feeding (pumping milk) is no longer needed." Cert. [42-5] at 29; *see* Pl.'s Dep. [42-2] at 179. According to the physician's certification, "she must be able to pump breast milk twice during her shift in 45 min increments, once at 10:00 am and at 1:00 pm," Cert. [42-5] at 30 (emphasis in original), in order "to prevent her milk build up and to prevent pain for the patient," *id.* at 31. Throughout the month of May, Plaintiff continued to have lactation breaks per her original schedule. *See* Pl.'s Dep. [42-2] at 184–90.

Marie Twiggs ("Twiggs"), who worked in Defendant's human resources department, communicated with Plaintiff about her request to take longer breaks at specific times, and on May 31, 2019, she sent correspondence to Plaintiff's doctor requesting additional

information. *See id.* at 181-84; Letter [42-5] at 33. Twiggs asked the physician to clarify "if there is a medical reason for the breaks to be at 10 am and 1 pm," and "what the maximum amount of time in between pumping should be to avoid milk build-up and pain or discomfort?" Letter [42-5] at 33. It is unclear from the record what, if any, response Defendant received from Plaintiff's doctor.

Following discussions between Plaintiff and Twiggs, Defendant offered three options: (1) working the earlier 6:00 a.m. shift, which would permit Plaintiff to break early around 8:00 a.m.; (2) working the breaker schedule for as long as Plaintiff needed to do so in order to be able to take breaks as needed; or (3) breaking once in the morning and once in the afternoon for 45 minutes as close as possible to the times Plaintiff had requested, but not necessarily at those exact times. *See* Pl.'s Dep. [42-2] at 190–94; Ex. [42-5] at 38. Plaintiff did not accept the first option due to day care issues and the length of time between breaks, *see* Pl.'s Dep. [42-2] at 192, and she did not accept the second option because she "would not be making the same amount of money," *id.* at 193. Plaintiff also did not think that the third option was a reasonable one for her because she felt that, if she accepted it, "the times would constantly get pushed further and further." *Id.* at 194.

Eventually, Defendant granted Plaintiff's request for accommodation and sent her a letter to that effect dated June 14, 2019. *See id.* at 195; Letter [42-5] at 39. Defendant afforded Plaintiff two 45-minute breaks. *See* Pl.'s Dep. [42-2] at 195; Letter [42-5] at 39. The first break would start sometime between 10:00 a.m. and 10:30 a.m., and the second would begin between 1:00 p.m. and 1:30 p.m. *See* Pl.'s Dep. [42-2] at 195–96; Letter [42-5] at 39. Defendant's letter informed Plaintiff that "[i]f you would like to

request an additional accommodation in the future or modification to your original accommodation, please contact Employee Relations immediately to discuss your options." Letter [42-5] at 39.

Once this new break schedule began, manager Carol Adams ("Adams") would speak with the breaker at the beginning of the shift about ensuring that Plaintiff was receiving her breaks as close as possible to the times Plaintiff had requested. *See* Pl.'s Dep. [42-2] at 217. At times when the breaker was not ready or able to relieve Plaintiff, one of the managers would allow her to take her break and would watch over Plaintiff's tables until the breaker was available. *See id.* At other times, a manager would completely close Plaintiff's section so that she could take her break. *See id.* Plaintiff nevertheless testified that she believed that she was being discriminated against because she felt like it was "a never-ending battle to get the breaks at the times that [she] needed it." *Id.* at 221; *see also id.* at 217–24.[1]

c. Plaintiff's allegations of harassment

Plaintiff asserts that, towards the end of her employment with Defendant, coworkers on her shift began to harass her. *See id.* at 224–25. When asked to

[1] Plaintiff states in her Response to the Motion for Summary Judgment that "Ms. Bye also detailed in her Interrogatory responses some of the harassment she endured. For instance, her manager Sarah Cormier told Ms. Bye point blank that lactation breaks need to stop because the breaks are too much." Resp. [47] at 13 (citing Ex. O). However, that Response was to an interrogatory inquiring about lactation breaks after Plaintiff's first pregnancy, *see* Ex. O at 3-4, which is not relevant here because Plaintiff's claims related to returning to work following maternity leave for her first child will be dismissed based upon her failure to timely exhaust them.

describe specific instances of harassment, Plaintiff relayed an incident where there was an early out, or "EO," sheet available for employees wishing to leave work early to sign because the restaurant was slowing down to the point where it could afford to let one server leave early on certain days. *See id.* at 225. On one occasion when

Plaintiff signed the EO sheet first, she claims that some employees got upset that she had signed before a specific server, Kristin. *See id.* at 225–26. The employees allegedly threw the sheet away and made a new one without Plaintiff's name on it. *See id.* at 226. Because "[i]t became a big fuss over who was going to get cut early," manager Lee McCoy ("McCoy") decided that no one would be able to leave early. *Id.*

Plaintiff asserts that other servers harassed her by not wanting to "co-work on the floor" with her, meaning not working in sections next to hers, not assisting with her tables, and not sharing a credenza and computer with her. *See id.* at 227–28, 247–48. Plaintiff also complained about other servers' "verbiage," in that she believed they spoke to her in a negative way and made comments to her, or to others, about Plaintiff needing to take breaks to pump. *See id.* at 230–39, 243–51.

Plaintiff also testified that she believed that her general manager, Cormier, was trying to terminate her. *See id.* at 251. The basis of this belief was that a restaurant hostess, Jennifer Cress, told Plaintiff that another hostess named Lady had informed Cress about a group message among restaurant workers where an unidentified person stated that Cormier "was working on getting rid of [Plaintiff]." *Id.* at 252. In one audio recording Plaintiff has submitted, she can be heard speaking with someone whom she identifies in her Response [47] as Cress. *See* Ex. K

(conventionally file audio recording). Cress states on the recording that Lady saw the group message from a telephone number she did not recognize, but Cress herself was not on the group message and did not see it. *See id.*[2]

Plaintiff never saw these purported messages, and her knowledge of the statements by Cress is based on at least third-hand information from an anonymous source. *See id.*; Pl.'s Dep. [42-2] at 251–52. On the audio recording itself, Plaintiff asks Cress to write a statement on the matter, and Cress responds, "I can write something saying that's what I heard, but I don't know how true it is. I don't know who it came from. I don't have a name. I don't know nothing [sic]." Ex. K. Plaintiff agreed during her deposition that she had no other evidence that Cormier had actually made this comment. *See* Pl.'s Dep. [42-2] at 252. Nor did Plaintiff identify what reason Cormier would have had for purportedly "working on getting rid of" her. *Id.*

Plaintiff testified that she complained to human resources about not receiving her breaks and being harassed by the other employees and was directed to write a statement describing what she felt had occurred. *See id.* at 264–65. She "was told that investigations were being done and that nothing came of it." *Id.* According to the Declaration of Allison Smith Mitchell ("Mitchell"), who is Defendant's Vice-President of Human Resources,

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[2] Plaintiff cites additional audio recordings, but it is sometimes difficult to discern what is occurring during them and impossible to tell who is speaking with Plaintiff. *See* Exs. K, N, P, Q, & R. No transcripts of these conversations were provided, and it is unknown when these conversations occurred. Having reviewed the audio recordings, they are otherwise not sufficient to create a material fact question as to any of Plaintiff's claims.

Plaintiff complained to human resources on or about June 4, 2019, about not receiving breaks and experiencing harassment. *See* Ex. [42-1] at 6. Mitchell avers that human resources immediately investigated, but was unable to substantiate that Plaintiff was being prohibited from taking lactation breaks or that she was being harassed by her co-workers. *See id.*

Plaintiff maintained in her deposition that, "[r]ight when [she] was finally starting to actually get pump breaks at the times that [she] needed them, the harassment had gotten overwhelming." Pl.'s Dep. [42-2] at 267. "As pump breaks were getting better, the co-workers were getting worse on me," and "[a]t that point the work environment had gotten to a point where I felt there was no return" with "[t]he stress of being hated every day that I walked into work . . . ." *Id.* at 269. But when asked to give specific examples of any comments or any other conduct to substantiate these claims, Plaintiff said, "I can see it and I can feel it; but to say the exact words without a trigger to pull it, I cannot do that at this moment." *Id.* Plaintiff also referenced one occasion when she had to leave work early to take her child to the hospital, and other workers cheered that she was leaving. *See id.* at 270.

Ultimately, Plaintiff submitted a two-week notice of her resignation on June 28, 2019, see id. at 261-62; Ex. [47-19] at 1-2, and her last day of employment was in July 2019, see Ex. [42-5] at 4 (employee history).

B. Procedural History

Plaintiff filed a charge of discrimination with the EEOC on or about May 29, 2019, alleging harassment, sex discrimination upon her return from maternity leave in March 2019 due to being "denied the ability to take needed breaks and use a breast pump," and retaliation. Ex. [1-2]

at 9. Plaintiff filed a second charge with the EEOC on or about August 2, 2019, asserting retaliation and that she "was forced to quit [her] job at the Beau Rivage due to them refusing to allow [her] to take breaks to pump breast milk, along with harassment from [her] coworkers." *Id.* at 13.

On September 17, 2019, the EEOC issued Dismissals and Notices of Suit Rights with respect to both charges. *See id.* at 10, 14. Plaintiff filed suit against Defendant in the Circuit Court of Harrison County, Mississippi, Second Judicial District, on November 13, 2019, advancing claims for pregnancy and sex discrimination, harassment, and constructive discharge in violation of Title VII. *See* Compl. [1-2] at 4–8.[3] Defendant removed the case to this Court, invoking federal question jurisdiction. *See* Notice [1] at 1–3.

Defendant now seeks summary judgment on all of Plaintiff's claims. *See* Mot. [42]. Defendant argues that, to the extent any of Plaintiff's claims relate to her return to work in February 2017 following the birth of her first child, these claims are time-barred because Plaintiff did not file her first EEOC charge until May 2019. Def.'s Mem. [43] at 13–14. Defendant further asserts that Plaintiff cannot support her claims for discriminatory failure to accommodate, harassment or hostile work environment, or constructive discharge. *See id.* at 14–24. Plaintiff has filed a Response [47] in opposition to the Motion [42], and Defendant has filed a Reply [49].

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[3] Although Plaintiff's EEOC charges referenced retaliation, *see* Ex. [1-2] at 9, 13, she did not assert retaliation in her Complaint, nor has she briefed a retaliation claim in opposition to Defendant's request for summary judgment.

II. DISCUSSION

A. Relevant legal standards

1. Summary Judgement

Summary judgment is appropriate "if the movant shows that 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(a). If the movant carries this burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

To rebut a properly supported motion for summary judgment, the opposing party must show, with "significant probative evidence," that there exists a genuine issue of material fact. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam) (quotation omitted). "A genuine dispute of material fact means that evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Royal v. CCC&R Tres Arboles, L.L.C.*, 736 F.3d 396, 400 (5th Cir. 2013) (quotation omitted). In deciding whether summary judgment is appropriate, the Court views facts and inferences in the light most favorable to the nonmoving party. *See Certain Underwriters at Lloyd's, London v. Axon Pressure Prod. Inc.*, 951 F.3d 248, 255 (5th Cir. 2020).

2. Title VII and the Pregnancy Discrimination Act

Title VII provides that it is an unlawful employment practice

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or

> privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1). The reference to "terms, conditions, or privileges of employment" includes that it is unlawful for employers to require "people to work in a discriminatorily hostile or abusive environment." *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 325 (5th Cir. 2019) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

Title VII, as amended by the PDA, 42 U.S.C. § 2000e(k), further states that

> [t]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k). The Fifth Circuit has held that "lactation is a related medical condition of pregnancy for purposes of the PDA," *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013), and that "discriminating against a woman who is lactating or expressing breast milk violates Title VII and the PDA," *id.* at 430.

B. Analysis

1. Plaintiff's claims related to her first child

The Complaint alleges that following the birth of her first child, Plaintiff "experienced extreme difficulties in being allowed time to breast pump while at work," an that "[t]he issues became so bad that Plaintiff had to quit breast feeding and pumping and Plaintiff experienced issues of post-partem [sic] depression." Compl. [1-2] at 5. Defendant argues that this claim should be dismissed because Plaintiff did not timely file a charge of discrimination with the EEOC with respect to any claims relating to the birth of her first child. *See* Mem. [43] at 5, 13-14. Plaintiff did not address the exhaustion issue or any issues related to her first child in her Response [47] to Defendant's Motion for Summary Judgment; therefore, she is deemed to have abandoned any such claims. *See Smith v. Amedisys Inc.*, 298 F.3d 434, 451 (5th Cir. 2002).

In addition, before seeking judicial relief, Title VII plaintiffs are required to first exhaust their administrative remedies by filing a charge of discrimination with the EEOC within 180 days of the alleged discrimination. *See Davis v. Fort Bend Cty.*, 893 F.3d 300, 303 (5th Cir. 2018), aff'd, 139 S. Ct. 1843 (2019) (citing 42 U.S.C. § 2000e-5(e)(1)). "To exhaust, a plaintiff must file a timely charge with the EEOC and then receive a notice of the right to sue." *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 337 (5th Cir. 2021). Although a plaintiff's failure to exhaust does not constitute a jurisdictional bar, it is "a prudential prerequisite to suit." *Davis*, 893 F.3d at 305.

Plaintiff had her first child in November 2016, *see* Pl.'s Dep. [42-2] at 46, and returned to work in 2017, *see*

id. at 81–82. Plaintiff acknowledged that she did not file a charge of discrimination with the EEOC at that time, and it is undisputed that she did not file an EEOC charge until May 29, 2019. *See id.* at 48-49; Ex. [1-2] at 9. Because Plaintiff did not timely exhaust any claims related to her return to work in 2017 following the birth of her first child, any such claims should be dismissed. *See* Ernst, 1 F.4th at 339.

2. Plaintiff's failure-to-accommodate claims related to her second child

Plaintiff maintains that upon her return to work following the birth of her second child in 2019, Defendant did not reasonably accommodate her request for lactation breaks. *See* Compl. [1-2] at 5–7. Defendant argues that Plaintiff cannot establish a claim for discriminatory failure to accommodate. *See* Mem. [43] at 14–18. Plaintiff responds that while "[t]he law requires actual compliance and reasonable lactation break accommodations," Resp. [47] at 1, Defendant made "no real effort to accommodate lactation breaks," *id.* at 19. According to Plaintiff, "Defendant has not presented any evidence to support its contention that the restaurant was actually too busy to accommodate Ms. Bye's breaks on some days but not others." *Id.* at 3.

In substance it appears that Plaintiff is asserting a disparate-treatment claim for failure to accommodate under Title VII, meaning that her "employer intentionally treated a complainant less favorably than employees with the 'complainant's qualifications' but outside the complainant's protected class." *Young v. United Parcel Serv.*, Inc., 575 U.S. 206, 135 S. Ct. 1338, 1345 (2015) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). A plaintiff can prove disparate

treatment either with direct evidence, or with circumstantial evidence under the burden-shifting framework set forth in *McDonnell Douglas*, 411 U.S. 792 (1973). *See id.* Based upon the summary judgment record, Plaintiff has presented no direct evidence of discriminatory intent; therefore, she apparently relies upon circumstantial evidence to support her failure-to-accommodate claim.

Under Title VII, a plaintiff may make out a prima facie case of disparate treatment based upon circumstantial evidence by showing that: (1) she belonged to the protected class; (2) she sought accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work." *Id.* at 1354. If a plaintiff makes such a showing, the "employer may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation.". (quoting *McDonnell Douglas*, 411 U.S. at 802). If the employer satisfies this burden of production, the burden shifts to the plaintiff to demonstrate that the employer's proffered reasons are in fact a pretext for discrimination. *See id.*

In this case, Plaintiff has not presented sufficient evidence to support either the third or fourth elements of her prima facie case. First, the summary judgment record demonstrates that Defendant did attempt to accommodate Plaintiff, including increasing her two normal 30-minute breaks to 45 minutes each when she requested, in order to provide her more time to pump her breastmilk. *See* Pl.'s Dep [42-2] at 171–72, 177–78; Request [42-5] at 25–27. While Defendant could not offer

Plaintiff two breaks at exactly the times she had requested due to the nature of the restaurant's business and the way it handled server breaks, the record reflects that it offered her three reasonable, alternative options. *See* Pl.'s Dep. [42-2] at 190–94; Ex. [42-5] at 38. This is insufficient to show that Defendant failed to accommodate her.

Even if Plaintiff could establish that Defendant failed to accommodate her, she has presented no evidence to support the fourth element of a prima facie case, that Defendant accommodated others "similar in their ability or inability to work." *Young*, 135 S. Ct. at 1354. At no point has Plaintiff pointed to any competent summary judgment evidence, nor has she even alleged, that Defendant treated any similarly situated server, or any server at all, more favorably by allowing that server to break at specific times. *See id.*; *see also* Compl. [1-2] at 4–8; Pl.'s Resp. [47]. Plaintiff has simply not argued or presented evidence to support the proposition that any other employee was accommodated with the breaks that she sought. In sum, there is simply no evidence of a comparator in the record. Because Plaintiff has not identified any comparators, she has not made out a prima facie case of disparate treatment based upon failure to accommodate, and Defendant's request for summary judgment as to this claim should be granted. *See id.*; *see also Santos v. Wincor Nixdorf, Inc.*, 778 F. App'x 300, 304 (5th Cir. 2019) (holding that plaintiff did not establish her prima facie case on PDA claim and that summary judgment was properly granted because plaintiff did not present evidence that "a specific comparator or comparators were treated more favorably than [the plaintiff] under nearly identical circumstances").

Even if Plaintiff could support a prima facie case of disparate treatment under Title VII, Defendant has articulated legitimate, nondiscriminatory reasons for not giving her breaks at the exact times she desired. Defendant increased Plaintiff's breaks to 45 minutes each, but it has presented evidence that permitting her to take those breaks at exactly 10:00 a.m. and 1:00 p.m. "would interfere with continuity in service and the fairness and consistency provided with the Breaker schedule." Cobb Decl. [42-6] at 4. Management also expressed concern that it would be difficult to allow breaks precisely at the specified times because of

> unpredictable circumstances that could impact the ability to break at a specified time, including, staffing levels, increases in guest traffic, variances in the number of tables being serviced during the particular point in the day, variances in the number of tables assigned to the Breaker during the day, and kitchen disruptions.

Mitchell Decl. [42-1] at 5; *see also* Cobb Decl. [42-6] at 4.

Because Defendant has articulated legitimate, nondiscriminatory reasons for its actions, Plaintiff must demonstrate that the proffered reasons "were not its true reasons, but were a pretext for discrimination." *Young*, 135 S. Ct. at 1345 (quotation omitted). "[T]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination." *Id.* at 1354. Stated another

way, "[t]he plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.*

Plaintiff has presented no such evidence, nor has she otherwise presented sufficient evidence that casts doubt on Defendant's justification for its actions. *See id.* Plaintiff's mere subjective belief concerning pretext is insufficient to rebut Defendant's reasons, *see Guarino v. Potter*, 102 F. App'x 865, 868–69 (5th Cir. 2004), and summary judgment is warranted for this reason as well.[4]

3. Plaintiff's hostile work environment

Plaintiff alleges "harassment from managers and co-workers because of her need for extra break time to pump at work." Compl. [1-2] at 6. At the outset, "Title VII does not prohibit all harassment," *Gardner*, 915 F.3d at 325, and "does not set forth a general civility code for the

[4] Plaintiff argues that Defendant did not raise the "business necessity" defense in its Answer and that it presents no evidence of "business necessity." Resp. [47] at 1–2. Defendant did not use this term in its Motion, and "business necessity" is a defense to a Title VII disparate-impact claim, not a disparate-treatment claim. *See* 42 U.S.C. § 2000e- 2(k); *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 213 (2010). Plaintiff has not advanced a disparate-impact claim. Even if she had asserted such a claim, she has failed to present evidence showing a disparate impact of Defendant's break policies on a protected group under Title VII. *See Gonzales v. City of New Braunfels, Tex.*, 176 F.3d 834, 839 n.26 (5th Cir. 1999). This is simply not a disparate-impact case. *See Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1100 (5th Cir. 1985); *see also, e.g., Huston v. Tennessee State Bd. of Regents*, 83 F.3d 422, 1996 WL 196439, at *3 (6th Cir. 1996) (per curiam).

American workplace," *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (quotation omitted); *see also Newbury v. City of Windcrest, Texas*, 991 F.3d 672, 676 (5th Cir. 2021). "[O]rdinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" are not actionable under a theory of hostile work environment, and the United States Supreme Court has "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quotation omitted).

The Fifth Circuit has similarly held that "allegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation." *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818, 826 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020) (quotation omitted). Title VII is only violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule and insult' that is 'sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive working environment . . . .'" *Badgerow v. REJ Properties, Inc.*, 974 F.3d 610, 617 (5th Cir. 2020) (quoting *Harris*, 510 U.S. at 21).

In order to establish a hostile work environment claim involving co-workers, a plaintiff must show that: (1) she belonged to a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on the employee's protected class; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *See*

id.; *Woods v. Delta Beverage Grp., Inc.*, 274 F.3d 295, 298 (5th Cir. 2001). If the employee claims that a supervisor with immediate or successively higher authority harassed her, the employee need only satisfy the first four elements of this test. *Id.* at 298 n.2 (citing *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999)).

Viewing the summary judgment evidence in the light most favorable to Plaintiff, at a minimum the third and fourth elements are problematic for her. Plaintiff has not pointed to any competent summary judgment evidence, other that her own conclusory assertions or subjective beliefs, that tends to show that Defendant's employees' or managers' alleged harassment was related to her lactation breaks. Although Plaintiff did testify in her deposition about some comments that fellow servers made either to her or about her within her hearing about her taking breaks to pump and breastfeeding, no evidence has been submitted as to the frequency of these comments or the identity of the persons making them. *See* Pl.'s Dep. [42-2] at 230–39, 243–51. Nor could Plaintiff identify any of the particular comments any specific person had made. *See id.*

Plaintiff has also not pointed to any competent summary judgment evidence that establishes the fourth element, that the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *West v. City of Houston, Texas*, 960 F.3d 736, 741–42 (5th Cir. 2020) (quotation omitted). To be "sufficiently severe or pervasive," the conduct must be both objectively and subjectively offensive. *Badgerow*, 974 F.3d at 617. In determining whether a plaintiff's work environment is objectively offensive, a court must consider the totality of the circumstances, including "(1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is

physically threatening or humiliating, or merely an offensive utterance; and (4) whether it interferes with an employee's work performance." *Id.* at 618. "No single factor is determinative." *Id.*

Plaintiff attempts to establish objective offensiveness by stating the following in her Response:

> co-workers would clean out Ms. Bye's credenza, making it impossible for Ms. Bye to work. Jennifer Cress told Ms. Bye that there was group message where a manager was trying to get rid of Ms. Bye. Co-workers cheered and applauded when Ms. Bye had to leave early to take her child to the hospital. Another employee – Brett – tried to instigate issues between Ms. Bye and other workers. Breakers would chose [sic] to break other employees before Ms. Bye, and in some cases would just wait to break Ms. Bye [sic] until at least 30 minutes past the designated lactation break time. In addition, Ms. Bye would be in physical pain because of engorgement, a fact well known to everyone working with Ms. Bye.
>
> To recap, employees openly discussed wanting Ms. Bye to leave or be fired, managers were rude/disrespectful/humiliating, employees would clean out supplies from Ms. Bye's section and refuse to work with Ms. Bye, breakers would choose to break other people and cause Ms. Bye's breaks to be unreasonably delayed, and co-workers applauded and cheered when Ms. Bye had to take her child to the hospital.

Resp. [47] at 19.

Such vague and general allegations do not sufficiently address the frequency of this alleged conduct,[5] nor do they support a finding that the conduct was so severe that it affected a term, condition, or privilege of Plaintiff's employment, or that it was physically threatening or humiliating, as opposed to mere offensive utterances. *See Badgerow*, 974 F.3d at 618.

In sum, Plaintiff has not demonstrated that she suffered a hostile work environment in violation of Title VII. The most she has shown is that "her colleagues were sometimes offensive and boorish," which is insufficient. *West*, 960 F.3d at 743. Summary judgment is appropriate on this claim.

4. Plaintiff's constructive discharge claim

Plaintiff next alleges that Defendant constructively discharged her when she was not permitted to take lactation breaks as needed. *See* Compl. [1-2] at 7. Defendant argues that summary judgment is appropriate on this claim because Plaintiff's allegations are insufficient to raise a genuine issue of material fact that she was in fact constructively discharged. *See* Mem. [43] at 21–22.

In determining whether a reasonable employee was constructively discharged because she felt compelled to resign, the Fifth Circuit considers the following events relevant:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger

[5] The cases Plaintiff cites in her Response address whether isolated incidents may be sufficient, and her Response refers to a Ms. Coleman and some deputy clerks. *See* Resp. [47] at 18 n.1. These statements are not related to the present case.

> supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status . . . .

Brown v. Kinney Shoe Corp., 237 F.3d 556, 566 (5th Cir. 2001) (quotation omitted).

The only factor argued by Plaintiff is the alleged harassment she suffered. *See* Resp. [47] at 17–20. However, "[c]onstructive discharge requires a greater degree of harassment than that required by a hostile environment claim," and "[d]iscrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge . . . ." *Id.*

Plaintiff has not pointed to any evidence of badgering, harassment, or humiliation by Defendant that was calculated to encourage her to resign, *see id.*, and the Court has already determined that the harassment Plaintiff claims she experienced was not sufficiently severe or pervasive to support a hostile work environment claim. Because Plaintiff cannot support a hostile work environment claim, summary judgment is appropriate on her constructive discharge claim.

5. Fair Labor Standards Act Claim

For the first time in response to Defendant's Motion for Summary Judgment, Plaintiff argues that Defendant violated Section 7 of the Fair Labor Standards Act ("FLSA") by not accommodating her requests for breaks to express breast milk. *See* Resp. [47] at 15–17 (citing 29 U.S.C. § 207(r)(1)(A)). Defendant objects to this "eleventh hour" attempt to raise an FLSA claim, pointing out that "[t]he law is well settled that a plaintiff may not rely on

new claims raised for the first time in a response to a motion for summary judgment." Reply [49] at 12 (citing *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005)).

Where a new claim is raised for the first time in response to a motion for summary judgment, the Fifth Circuit has taken two different approaches: (1) a claim which is not raised in the complaint, but raised only in response to a motion for summary judgment, is treated as not properly before the court; or (2) the district court should treat the new claim as a request for leave to amend. *See Douglas v. Wells Fargo Bank, N.A.*, 992 F.3d 367, 373 (5th Cir. 2021). Plaintiff's FLSA claim is not properly before the Court, but even if it should be characterized as a request for leave to amend, such request should be denied.

A scheduling order may only be modified for good cause and with the judge's consent. *See* Fed. R. Civ. P. 16(b)(4). "Whether good cause exists depends on (1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 418 (5th Cir. 2021) (quotation omitted). If a plaintiff can demonstrate good cause, then the more liberal standard of Rule 15(a) applies to the request to amend. *See id.*

Plaintiff's Response was filed over one year after the deadline for amending pleadings. *See* Order [10] at 4 (setting a June 5, 2020, deadline). Plaintiff has not offered any explanation for failing to timely move to amend, nor has she explained the importance of the amendment. *See T.O.*, 2 F.4th at 418. Plaintiff has never pled damages consistent with those permitted under the FLSA. *See*

Compl. [1-2]; 29 U.S.C. § 216(b) (providing that an employer who violates § 207 is liable to an employee "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages"); *see also Barbosa v. Boiler House LLC*, No. 5:17-CV-340-DAE, 2018 WL 8545855, at *6 (W.D. Tex. Feb. 23, 2018) (finding on motions to dismiss that plaintiff's claim under § 207(r)(2) failed because she did not plausibly allege compensable damages consistent with the remedies permitted under § 216(b) for "unpaid minimum wages" or "unpaid overtime compensation") (quoting 29 U.S.C. § 216(b)). Nor has Plaintiff asserted that she suffered any other type of compensable injury under the FLSA. *See, e.g., McCowan v. City of Philadelphia*, No. CV 19-3326-KSM, 2021 WL 84013, at *17 (E.D. Pa. Jan. 11, 2021) (finding that plaintiff stated a plausible injury under § 207(r) when she was forced to use sick leave to pump).

This matter has been pending for nearly two years, is set for trial in less than two months, and the deadline for filing dispositive motions has long passed, such that Defendant would be prejudiced if an amendment were permitted at this very late date. *See T.O.*, 2 F.4th at 418. A continuance at this point would also be burdensome upon Defendant and the Court, and Plaintiff has not requested a continuance. *See id.* Based upon the record, the Court finds no good cause to permit the amendment of Plaintiff's Complaint in opposition to Defendant's summary judgment. *See* Fed. R. Civ. P. 16(b)(4). Any purported FLSA claim referenced in Plaintiff's Response to Defendant's Motion for Summary Judgment is not properly before the Court and will not be considered.

III. CONCLUSION

To the extent the Court has not addressed any of the parties' remaining arguments, it has considered them and determined that they would not alter the result. Summary judgment is appropriate on all of Plaintiff's claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, the Motion [42] for Summary Judgment filed by Defendant MGM Resorts International, Inc., doing business as Beau Rivage Resort and Casino, is GRANTED, and Plaintiff Bailie Bye's claims are DISMISSED WITH PREJUDICE. A separate final judgment will enter pursuant to Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED, this the 16th day of December, 2021.

/s/Halil Suleyman Ozerden

UNITED STATES DISTRICT JUDGE

APPENDIX C

In the Circuit Court of Harrison County Mississippi,
Second Judicial District

Civil No. A2402-2019-169

Bailie Bye,
Plaintiff,

v.

MGM Resorts International, Incorporated,
doing business as Beau Rivage Resort and Casino,
Defendant.

Filed: November 13, 2021

JURY TRIAL DEMANDED

COMPLAINT

This is an action to recover actual and punitive damages for pregnancy discrimination in violation of the

Title VII of the Civil Rights Act of l964 and sex discrimination. The following facts support the action:

1.

Plaintiff, Bailie Bye, is an adult resident citizen of Harrison County, Mississippi who maybe contacted through undersigned Counsel.

2.

Defendant, MGM RESORTS INTERNATIONAL, INC, is a foreign corporation licensed and doing business in Mississippi who may be served with process through its registered agent Corporation Service Company at 7716 Old Canton Road, Suite C, Madison, Mississippi 39110.

3.

This court has concurrent jurisdiction under 28 U.S.C. § 1331 and civil rights jurisdiction under 28 § 1343, for a cause of action arising under the Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. Venue is proper, because Defendant's employed in Plaintiff in Biloxi, Mississippi.

4.

Plaintiff has filed an EEOC charge attached here to as Exhibit "A" and has received a Right-to-Sue letter attached here to as Exhibit "B". Plaintiff filed a second EEOC charge attached here to as Exhibit "C" and has received a Right-to-Sue letter attached here to as Exhibit "D."

5.

Plaintiff was employed by the Defendant in Biloxi as a waitress for several years. Plaintiff did an excellent job and was even told by the casino CEO that she was an excellent employee. Prior to having her second child, out

of town management would often sit in Plaintiff's section at the restaurant because of the service the Plaintiff provided.

6.

Following the birth of Plaintiffs first child while working for the Defendant, Plaintiff experienced extreme difficulties in being allowed time to breast pump while at work. The issues became so bad that Plaintiff had to quit breast feeding and pumping and Plaintiff experienced issues of post-partem depression.

7.

Plaintiff's second child was born in early 2019 and Plaintiff returned from maternity leave in March of 2019. Again, Plaintiff attempted to pump so the she could breast feed her new baby. Plaintiff again began to experience difficulties from the Defendant in being allowed time at work to pump. This time however, the Plaintiff had learned that under Title VII and the pregnancy discrimination act that she was entitled to pump at work and Plaintiff went to her managers and human resources.

8.

Plaintiff was told that a room would be provided and that she would be allowed breaks to pump at work. The room was filthy, and Plaintiff had to complain to make sure that the room was cleaned up so that the room was sanitary to pump.

9.

Plaintiff began to experience harassment from managers and co-workers because of her need for extra break time to pump at work. Plaintiff's breaks were sporadic and Plaintiff had to beg her managers to allow

her to take breaks. Every time she needed a break the Plaintiff was questioned or told that she had to wait.

10.

Plaintiff's doctor even wrote a note stating that Plaintiff needed breaks at designated times, which the Defendant questioned and demanded more from the doctors. When Plaintiff was not given regular breaks, her breast became engorged from milk production and painful to the point that Plaintiff would be in unbearable pain at work.

11.

As an example, Plaintiff went to her managers because she needed her pump break, which was well past due. Plaintiff was told that she could not take a break until employees who had not taken their breaks yet had taken their breaks. Plaintiff was told that once the other employees took breaks, she could then take her pump break, which would have been hours past its required time.

12.

Plaintiff came to learn that at least one manager was trying to get Plaintiff terminated and that the manager had a group text message with all the staff except for Plaintiff. When this issue was brought up to the Defendant, no action was taken.

13.

Because of the Plaintiffs pumps breaks and complaints, co-workers began to harass Plaintiff. Plaintiff was often left without supplies for her station, while all other servers had their stations fully stocked. On one occasion, Plaintiff had to leave early because her child had to be taken to the hospital. As Plaintiff was leaving, co-

workers began yelling and cheering that Plaintiff was leaving early. Supervisors admitted that these co-workers should not behave in such a manner, but no action was taken by the Defendant.

14.

After Plaintiff made her initial Complaint to the EEOC, supervisors and out of town Defendant employees began to avoid sitting in Plaintiff's section. Supervisors began to avoid Plaintiff and co-workers began to harass and mistreat Plaintiff even more than before. The stress and anxiety became unbearable. Plaintiff continued to endure physical pain from not being allowed to take pump breaks. Plaintiff was forced to leave her employment because she could no longer endure the harassment and physical pain from not being allowed to take her pump breaks.

15.

The acts and omissions of the Defendant was in violation of Title VII. Plaintiff lost her employment because of her pregnancy and being female. Plaintiff's constructive discharge was a direct and proximate result of the Defendant's acts and omissions.

16.

Plaintiff is entitled to actual damages for mental anxiety and stress and lost income. Defendant's actions are outrageous such that punitive damages are due.

PRAYER FOR RELIEF

Plaintiff prays for actual, compensatory, special and punitive damages in the amount to be determined by a jury, reinstatement, and for reasonable attorney’s fees.

Dated this 11th day of November, 2019.

Respectfully submitted,
BAILIE BYE
PLAINTIFF

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APPENDIX D

Fed. R. Civ. P. 84, Form 13 (1940)

Form 13.—Complaint on claim for debt and to set aside fraudulent conveyance under Rule 18 (b).

A. B., Plaintiff
v.
C. D. and E. F., Defendants } *Complaint*

1. Allegation of jurisdiction.

2. Defendant C. D. on or about _____ executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on _____ the sum of five thousand dollars with interest thereon at the rate of _____ percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about _____ conveyed all his property, real and personal (or specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ten thousand dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

APPENDIX E

Fed. R. Civ. P. 84, Form 14 (1940)

Form 14.—Complaint for negligence under Federal Employer's Liability Act.

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at ------ and known as Tunnel No. ------.

3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ------ dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of ------ dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of ------ dollars and costs.