UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	§	
	§	
Plaintiff,	§	
	§	**EP-21-CV-00232-FM**
v.	§	
	§	
U.S. DRUG MART, INC. d/b/a FABENS PHARMACY,	§	
	§	
Defendant.	§	
	§	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the court are "Defendant's Motion for Summary Judgment" ("Motion") [ECF No. 15], filed June 13, 2022, by U.S. Drug Mart, Inc., doing business as Fabens Pharmacy ("Defendant"); "EEOC's Response in Opposition to Defendant's Motion for Summary Judgment" ("Response") [ECF No. 19], filed June 27, 2022, by Equal Employment Opportunity Commission ("the EEOC" or "Plaintiff"); and "Defendant's Reply Brief in Support of Motion for Summary Judgment" ("Reply") [ECF No. 23], filed July 11, 2022. The Motion is **GRANTED**.

I. BACKGROUND

A. Factual Background

This is a disability discrimination case stemming from an argument that occurred between Mr. David Calzada, a pharmacy technician employed at Fabens Pharmacy at the time, his supervisor, Ms. Anna Navarrette, and the Pharmacist-in-Charge, Mr. Steve Mosher.[1]

[1] "Complaint" ("Compl.") 3–4 ¶ 13, 16, ECF No. 1, filed Sept. 24, 2021; "EEOC's Response in Opposition to Defendant's Motion for Summary Judgment" ("Resp.") 3–4 ¶ 10, ECF No. 19, filed June 27, 2022.

Mr. Calzada has asthma.[2] On March 26, 2020, with the novel COVID-19 virus emerging, and days after a global pandemic was declared by the World Health Organization (WHO), he decided to wear a facemask to work.[3] Ms. Navarrette told him he could not wear the mask, however, because U.S. Drug Mart leadership would not allow it.[4] Mr. Calzada protested he was concerned about catching COVID-19 since having asthma put him at higher risk of severe illness.[5] Ms. Navarrette said he could either take the mask off or go home.[6] Mr. Calzada went home.[7] He returned to work the next day, but he had been taken off the schedule; he was told he would need to speak with Ms. Navarrette and Mr. Mosher before he could resume working.[8] Two days later, Mr. Calzada returned to Fabens Pharmacy and had a heated conversation with Ms. Navarrette and Mr. Mosher, which he recorded on his cellphone.[9]

The conversation began with Ms. Navarrette telling Mr. Calzada he would be permitted to wear a mask.[10] It quickly devolved, however, into an argument concerning the circumstances from March 26, whether Mr. Calzada should have been allowed to wear a mask, and whether Fabens

[2] Resp. at 3 ¶ 7.

[3] *Id.* at 4 ¶ 16.

[4] *Id.*

[5] *Id.* at 4, 12.

[6] *Id.* at 4 ¶ 18.

[7] *Id.*

[8] *Id.* at 5 ¶ 19.

[9] *Id.* at 5 ¶ 20.

[10] "Defendant's Motion for Summary Judgment" ("Mot."), ECF No. 15, filed June 13, 2022, "Transcription of Audio Recording" ("Tr.") 2, Ex. B.

Pharmacy had been taking adequate COVID-19 precautions.[11] Mr. Mosher eventually stepped in, accusing Mr. Calzada of showing "complete lack of respect for his superior," Ms. Navarrette.[12]

Thereafter, the topic turned to what Ms. Navarrette and Mr. Mosher saw as Mr. Calzada's insubordination on March 26. Ms. Navarrette complained that Mr. Calzada had come to work that day intent on "enforcing" his desire to wear a mask rather than following instruction.[13] Mr. Calzada countered that "if it's going to be my own protection, I'm going to take any [precaution] I can. I can't afford this."[14] As the argument escalated, Mr. Mosher reprimanded Mr. Calzada:

> You need to learn there's an attitude that comes from you that needs to be disciplined and controlled. We know that you're acting like a little kid, but we're not going to put with it. The thing is you're going to be treated like a little kid when you act like a little kid toward us. . . . You never go to your employer and tell them, basically, I don't care what you say. I'm doing whatever I want. That's what little kids do, and they usually get locked in their rooms for a while or even spanked. . . . your choice is to say, Okay. I won't wear [a mask]. [Or] I'll go home; I'll quit.[15]

They continued to argue. Mr. Mosher told Mr. Calzada "I would still fire your ass right now, but it's not up to me. . . . [Y]ou are a disrespectful, stupid little kid. . . . [Y]ou're stupid as can be. You're acting like a five-year-old child."[16] At some point, Mr. Calzada began crying.[17] Mr. Mosher eventually took a backseat as Mr. Calzada and Ms. Navarrette continued to debate Defendant's COVID-19 protocols and whether Mr. Calzada had comported himself appropriately

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[11] *Id.* at 3–5.

[12] *Id.* at 5.

[13] *Id.*

[14] *Id.* at 6.

[15] *Id.* at 7.

[16] *Id.* at 9.

[17] Although it is unclear when exactly. This detail is not captured in the audio transcription. But Ms. Navarrette recalls it happening. *See* Resp., "Oral Deposition of Anna Navarrette" ("Navarrette Dep.") 92, ECF No. 19-1, filed June 27, 2022.

on March 26.[18] The conversation wound down with Ms. Navarrette reminding Mr. Calzada he could wear a mask but that she "just want[ed his] attitude to be different."[19]

Mr. Calzada then returned to work until his lunch break, at which point he went home, told his parents about the confrontation, and again became tearful.[20] They told him what had happened "wasn't right."[21] He then went back to Fabens Pharmacy, gathered his things, and quit.[22]

B. Procedural Background

Mr. Calzada filed his Charge of Discrimination with the EEOC in July 2020 alleging Ms. Navarrette and Mr. Mosher failed to accommodate his disability by prohibiting him from wearing a mask, which forced him to resign.[23] The EEOC investigated, eventually determining Defendant "discriminated against [Mr. Calzada] because of his disability in violation of the ADA by denying him a reasonable accommodation and subjecting him to harassment because of his request for a reasonable accommodation, resulting in his constructive discharge."[24] The EEOC invited Defendant to participate in conciliation, but the parties' efforts were ultimately unsuccessful.[25]

[18] Tr. at 9–16.

[19] *Id.* at 16.

[20] Resp., "Videotaped Oral Deposition of David Calzada, Jr." ("Calzada Dep."), ECF No. 19-1, Appendix at 21, filed June 27, 2022.

[21] *Id.*

[22] *Id.*

[23] Resp., "Charge of Discrimination," ECF No. 19-1, Appendix at 97, filed June 27, 2022.

[24] Mot., "Determination Letter" 2, ECF No. 15, Ex. J.

[25] *Id.*; Resp., "Failure of Conciliation Letter," ECF No. 19-1, Appendix at 129, filed June 27, 2022

The EEOC commenced this action in September 2021, alleging Defendant subjected to Mr. Calzada "to a hostile work environment, resulting in his constructive discharge."[26] Discovery ended in May 2022, and Defendant moved for summary judgment shortly thereafter.

C. Parties' Arguments

Defendant argues it is entitled to summary judgment for two reasons. First, Plaintiff allegedly failed to exhaust its administrative remedies since 1) its hostile work environment and constructive discharge claims do not reasonably grow out of Mr. Calzada's initial failure-to-accommodate claim and 2) Plaintiff did not give Defendant the opportunity to respond to its claims before litigation.[27]

Second, Plaintiff has allegedly failed to establish the essential elements of either its hostile work environment or constructive discharge claims.[28] With respect to the former, Defendant argues the harassment Mr. Calzada experienced was not "due to" his disability, nor was it severe enough to affect the conditions of his employment.[29] Additionally, Defendant took remedial action, which precludes a hostile work environment claim.[30] With respect to the latter, Defendant contends Mr. Calzada resigned merely because he was unable to "get along with Mosher—not because of disability discrimination."[31]

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[26] Compl. at 1. Plaintiff did not allege a failure to accommodate claim, however.

[27] Mot. at 13; "Defendant's Reply Brief in Support of Motion for Summary Judgment" ("Reply") 4, ECF No. 23, filed July 11, 2022 (citing *Dao v. Auchan Hypermarket*, 96 F.3d 787, 789 (5th Cir. 1996).

[28] *Id*. at 18, 24.

[29] *Id*. at 20–22.

[30] *Id*. at 23.

[31] *Id*. at 25.

Plaintiff counters, first, that it did exhaust its administrative remedies by making Defendant aware of the hostile work environment and constructive discharge claims when it sought conciliation.[32] Second, with respect to the hostile work environment claim, Mr. Mosher's comments were, at a minimum, severe enough to raise a genuine issue of material fact.[33] Third, with respect to the constructive discharge claim, Plaintiff asserts Mr. Calzada undoubtedly resigned "because of the harassment by Mosher and Navarrete."[34] Finally, Plaintiff contends Defendant failed to exercise reasonable care to remedy the harassment.[35]

II. LEGAL STANDARD

Summary judgment is proper when a movant demonstrates there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[36] A dispute over a material fact is genuine "when there is evidence sufficient for a rational trier of fact to find for the non-moving party."[37] Substantive law defines which facts are material.[38] "Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case."[39]

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits demonstrating the absence of a genuine issue

[32] Resp. at 8–9.

[33] *Id.* at 14.

[34] *Id.* at 18.

[35] *Id.*

[36] FED. R. CIV. P. 56(a).

[37] *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 323 (5th Cir. 2002) (citation omitted).

[38] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[39] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

of material fact.[40] When considering only admissible evidence in the pretrial record,[41] the court will "view all facts in the light most favorable to the non-moving party" and draw all factual inferences in the nonmovant's favor.[42] If the moving party cannot demonstrate the absence of a genuine issue of material fact, summary judgment is inappropriate.[43]

Once the moving party has met its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a genuine issue for trial.[44] The nonmoving party's burden is not satisfied with "some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence."[45] The court does not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[46] When reviewing the parties' submissions, the court does not weigh the evidence or determine the credibility of the witnesses."[47] Once the nonmovant has had the opportunity to make this showing, summary judgment will be granted "if no reasonable juror could find for the nonmovant."[48]

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[40] *See id*.

[41] *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995).

[42] *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 582 (5th Cir. 2006) (per curiam) (citation omitted).

[43] *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995).

[44] *Celotex*, 477 U.S. at 324 (internal quotation marks and citation omitted).

[45] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam) (internal quotation marks and citations omitted).

[46] *Id.* at 1075 (emphasis removed).

[47] *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002) (citation omitted).

[48] *Id.*

Summary judgment is also proper in a Title VII action when a plaintiff—either a complainant or the EEOC—has failed to exhaust their administrative remedies. "[A] complainant must file a charge of discrimination with the EEOC to exhaust his administrative remedies."[49] If the EEOC finds evidence of discrimination, it must attempt conciliation with the complainant's employer before filing suit against that employer.[50]

III. DISCUSSION

Defendant asserts it is entitled to summary judgment since Plaintiff failed to exhaust its administrative remedies.[51] Even if the court disagrees, however, Defendant contends summary judgment is still proper since Plaintiff cannot establish all the elements of its hostile work environment and constructive discharge claims.[52]

A. Failure to Exhaust Administrative Remedies

Defendant argues Plaintiff failed to exhaust its administrative remedies as its hostile work environment and constructive discharge claims do not reasonably grow out of an investigation into Mr. Calzada's failure-to-accommodate claim.[53] Defendant also asserts it was given no notice of Plaintiff's hostile work environment and constructive discharge claims prior to litigation.[54]

[49] *Melgar v. T.B. Butler Publ'g Co., Inc.*, 931 F.3d 375, 378–79 (5th Cir. 2019).

[50] *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 487 (2015).

[51] Mot. at 6; Reply at 4.

[52] *Id*. at 18, 24.

[53] *Id*. at 6; Reply at 4–5.

[54] Mot. at 15–18.

a. Whether New Claims Grow Out of Plaintiff's Investigation

Defendant concedes that the EEOC may raise claims not alleged in a complainant's initial charge of discrimination.[55] Defendant asserts, however, that Plaintiff's claims of hostile work environment and constructive discharge did not "reasonably grow out of" its investigation as these new claims do not share a "common nexus" with Mr. Calzada's initial failure-to-accommodate claim.[56] Therefore, they fall "outside the scope of what the EEOC is allowed to bring in a civil suit."[57] In support, Defendant primarily relies on *E.E.O.C. v. Winn-Dixie, Inc.* ("*Winn-Dixie*").[58]

In *Winn-Dixie,* two men filed discrimination charges against their employer, alleging racial discrimination based on their discharge and denial of vacation pay.[59] After a "wide-sweeping" investigation, the EEOC also uncovered sex discrimination in the defendant's job classifications and maternity leave policy.[60] The court found this sex discrimination was not "reasonably related to the original charge" and therefore prohibited the EEOC from litigating it.[61] The court distinguished its conclusions from *E.E.O.C. v. Gen. Elec. Co.* ("*General Electric*"), which found the EEOC was permitted to litigate sex discrimination uncovered by its investigation into racial discrimination since both were related to General Electric's job applicant screening practices.[62]

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[55] Reply at 4.

[56] *Id.* (citing *E.E.O.C. v. Winn-Dixie, Inc*., No. 74-1897, 1976 WL 568, at *3 (E.D. La. Mar 15, 1976)).

[57] Reply at 5.

[58] Reply at 4–5; *see Winn-Dixie, Inc*., 1976 WL 568.

[59] *Winn-Dixie, Inc*., 1976 WL 568 at *3.

[60] *Id.*

[61] *Id.*

[62] *Id*. (quoting *E.E.O.C. v. Gen. Elec. Co*., 532 F.2d 359, 369 (4th Cir. 1976)).

Winn-Dixie—a forty-six-year-old, unreported case from another district court—is unpersuasive: *Winn-Dixie* preceded *Gen. Tel. Co. of the Nw., Inc. v. E.E.O.C.*, in which the Supreme Court cited *General Electric* favorably in holding "*[a]ny* violations that the EEOC ascertains in the course of a *reasonable* investigation of the charging party's complaint are actionable."[63] Thus, *Winn-Dixie* is inapposite. Further, its criticism of the EEOC's "wide-sweeping" investigation is reconcilable as merely finding the scope of that investigation unreasonable.

The question then is whether Plaintiff's investigation was reasonable. For its part, Defendant does not claim Plaintiff's investigation was too broad. The court, meanwhile, finds Plaintiff's investigation was reasonably confined to the circumstances that grounded Mr. Calzada's initial claim: all three claims (failure to accommodate, hostile work environment, and constructive discharge) revolve around two tightly-linked incidents, namely, Mr. Calzada's decision to wear a mask at work without permission and the argument that resulted.[64] Thus, Plaintiff's hostile work environment and constructive discharge claims could "reasonably be expected to grow out of" an investigation into Mr. Calzada's initial charge of failure to accommodate.[65]

b. Whether Plaintiff Failed to Give Notice

In order to comply with Title VII's conciliation provision, "the EEOC must inform the employer about the specific discrimination allegation . . . [and] must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory

[63] *Gen. Tel. Co. of the Nw, Inc. v. E.E.O.C.*, 446 U.S. 318, 331 (1980) (emphasis added).

[64] *See* Resp. at 2–3.

[65] *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 274 (5th Cir. 2008) (quoting *Sanchez*, 431 F.2d 455, 466 (5th Cir. 1970)) (internal quotation marks omitted).

practice."[66] Title VII does not, however, mandate "reciprocal duties of good faith."[67] Notice is enough, and "the EEOC alone decides whether in the end to make an agreement or resort to litigation: The Commission may sue whenever 'unable to secure' terms" acceptable to the EEOC.[68]

Defendant argues it had no opportunity to address Plaintiff's hostile work environment and constructive discharge claims during conciliation since Plaintiff failed to give notice that it was pursuing those claims.[69] This is plainly false. Defendant was made aware of the new hostile work environment and constructive discharge claims and offered the opportunity to pursue conciliation in Plaintiff's "Determination Letter" on April 26, 2021.[70] After some conciliatory negotiations, Defendant allegedly told Plaintiff it was "'not interested' in any of the injunctive relief proposed by the Commission beyond a one-hour training session on the ADA," which Plaintiff considered "patently insufficient to reach a successful conciliation."[71] Defendant, in short, was on notice.

B. Failure to Establish the Essential Elements of a Hostile Work Environment Claim

Next, Defendant argues it is entitled to summary judgment as Plaintiff cannot establish all the elements of its hostile work environment claim.[72] Summary judgment is proper when "one or more of the essential elements of a claim or defense before the court is not in doubt."[73]

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[66] *Mach Mining, LLC*, 575 U.S. at 481–82.

[67] *Id*. at 491.

[68] *Id.* at 492 (quoting 42 U.S.C. § 2000e-5(f)(1)).

[69] Mot. at 13–15.

[70] "Determination Letter at 1.

[71] Resp., "Joel Clark Letter" 2, ECF No. 19-1, Ex. 1.

[72] Mot. at 18.

[73] *Fontenot v. Upjohn Co*., 780 F.2d 1190, 1194 (5th Cir. 1986).

"To establish a hostile-work-environment claim under the ADA, [Plaintiff] must show that: (1) [Mr. Calzada] belongs to a protected group, (2) was subject to unwelcome harassment (3) based on his disability, (4) which affected a term, condition, or privilege of employment, and (5) [Defendant] knew or should have known of the harassment and failed to take prompt, remedial action."[74] That said, when the harassment is committed by an immediate supervisor, a plaintiff need only satisfy the first four elements.[75] Defendant does not dispute the first and second elements but instead argues Plaintiff's claim fails on the third, fourth, and fifth.[76]

a. Third Element: Harassment Based on Disability

Defendant contends that, whatever harassment Mr. Calzada experienced was merely because his supervisors were "upset about [his] attitude, not [his] alleged disability or his request for accommodation."[77] However, *why* his supervisors were upset with him is not the issue. Rather, Plaintiff need only show "some evidence that the alleged harassment was *connected to* [Mr. Calzada's] disability," either "implicitly or explicitly."[78]

Here, Mr. Calzada's request to wear a mask was based on his asthma disability.[79] He told his supervisors the request pertained to his disability.[80] And although the argument he later had

[74] *Thompson v. Microsoft Corp.*, 2 F.4th 460, 470–71 (5th Cir. 2021).

[75] *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

[76] Mot. at 18.

[77] *Id.* at18.

[78] *Collier v. Bernhard MCC LLC*, 2022 WL 806802, at *5 (W.D. La. Mar. 15, 2022) (citing *Byrnes v. City of Hattiesburg*, 662 Fed.App'x. 288, 290–91 (5th Cir. 2016)) (emphasis added); *Espinoza v. Brennan*, EP-14-CV-290-DB, 2016 WL 7176663, at *11 (W.D. Tex. Dec. 7, 2016) (quoting *Melson v. Chetofield*, No. 08-3683, 2009 WL 537457, at *5 (E.D. La. Mar. 4, 2009)).

[79] Compl. at 4 ¶ 14.

[80] *Id.*

with them primarily revolved around their frustration with what they saw as his insubordination, his disability was the central topic.[81] Absent his disability, there would have been no argument. Thus, a rational trier of fact could find that any harassment Mr. Calzada suffered during the argument was sufficiently connected to his disability. The court therefore cannot grant summary judgment in favor of Defendant to the extent it is based on this element.

b. Fourth Element: Harassment Affecting a Condition of Employment

"A hostile work environment exists 'when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[82] Courts "use an objective 'reasonable person' standard to evaluate severity and pervasiveness."[83] Whether a work environment is hostile "can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[84] But "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[85]

[81] *See, e.g,* Tr. at 6 ("MR. CALZADA: Because if it's going to be my own protection, I'm going to take any [precaution] I can. I can't afford this."), 9–10 ("MR. MOSHER: Your protection is to walk out the door and never come back. You don't have to come in here and wear a mask. That's obviously something that scares you to death, so why are you even here now?").

[82] *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002)).

[83] *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 453 (5th Cir. 2013).

[84] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

[85] *Faragher*, 524 U.S. at 788.

The argument here was admittedly "very heated."[86] Mr. Mosher called Mr. Calzada a "disrespectful, stupid little kid," saying he would "fire [his] ass right now."[87] He told Mr. Calzada he would be "treated like a little kid when [he] act[ed] like a little kid," that little kids "usually get locked in their rooms . . . or even spanked."[88] At one point Mr. Calzada began crying.[89] After the argument, he returned to his duties.[90] He went home at lunch, however, and tearfully told his parents what had happened.[91] They told him it "wasn't right."[92] He went back to Fabens Pharmacy, gathered his things, and quit.[93] He later described the argument as "scary," "humiliati[ng,]" and "degrad[ing]."[94] Mr. Mosher, meanwhile, admitted he had "subjected David Calzada to an intimidating verbal attack," the "point of which was to be threatening."[95]

Since the alleged harassment was an isolated event, the court analyzes it under the severe—as opposed to pervasive—prong,[96] and must assess whether it "alter[ed] the conditions of [Mr. Calzada's] employment and create[d] an abusive working environment.'"[97]

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[86] Navarrette Dep. at 92.

[87] Tr. at 9.

[88] *Id.* at 7–8.

[89] Navarrette Dep. at 92.

[90] Calzada Dep., Appendix at 26.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Calzada Dep., Appendix at 24, 27.

[95] Resp., "Oral Deposition of Steven Mosher" ("Mosher Dep.") 120, ECF No. 19-1, filed June 27, 2022.

[96] *See Morgan*, 536 U.S. at 116 (holding that discriminatory harassment, in the hostile work environment context, must be "sufficiently severe or pervasive" as to alter the conditions of employment).

[97] *Stewart*, 586 F.3d at 328 (internal citation and quotation marks omitted).

The court finds Plaintiff's allegations raise a question of fact ill-fitted for resolution at the summary judgment stage. Critically, Mr. Calzada's disability, and the harassment it was connected to, must be understood against the backdrop of COVID-19, which at the time was a new, frightening phenomenon. By March 2020, states and the federal government were aware of the danger the disease posed as they scrambled to secure personal protective equipment for health care professionals.[98] On March 11, 2020, fifteen days prior to the argument at Fabens Pharmacy, the WHO declared COVID-19 a pandemic, amplifying the country's fears and apprehensions.[99] At the time, the only known defense to this highly contagious virus was prevention.

For someone like Mr. Calzada, COVID-19 must have seemed exceedingly treacherous: as an asthmatic, he was part of a high-risk group; he was employed in a pharmacy, where infected individuals undoubtedly flocked; yet he could not, like so many others, work virtually—he had to show up, which greatly imperiled his health and safety. Thus, he was no eggshell complainant for fearing the virus and demanding the right to wear a mask.

The actions of Defendant, Ms. Navarrette, and Mr. Mosher must also be viewed in the context of the pandemic's alarming early days. Defendant's policy of prohibiting facemasks—allegedly because allowing them would stir up fear within the community[100]—was plainly contrary to the health and safety of Fabens Pharmacy employees, as was Ms. Navarrette's decision to enforce that policy. Mr. Mosher, meanwhile, taunted Mr. Calzada about his fear of COVID-19

[98] Michael Shields, Carl O'Donnell, Roxanne Liu, Anthony Deutsch, *As virus explodes, world races to mask up*, Reuters (Mar. 25, 2020, 10:26 AM), https://www.reuters.com/article/us-health-coronavirus-masks-insight-idUSKBN21C2PE.

[99] *CDC Museum COVID-19 Timeline*, Centers for Disease Control and Prevention, https://www.cdc.gov/museum/timeline/covid19.html.

[100] Mot. at 76, "EEOC Interview with Ms. Navarrette," Ex. I.

and later admitted he had aimed to intimidate and threaten Mr. Calzada.[101] Given the serious health risks Mr. Calzada faced, and the general societal tenor at that time, Mr. Mosher's words may have felt particularly intimidating and insulting.

The court is therefore convinced a trier of fact could find the harassment here sufficiently severe that it altered the conditions of Mr. Calzada's employment, created "an abusive working environment," and interfered with his "opportunity to succeed in the workplace."[102] Indeed, as other Courts of Appeals have noted, "[w]hether conduct is severe or pervasive is 'quintessentially a question of fact.'"[103] That Mr. Calzada still decided to quit even after Ms. Navarrette changed course and permitted him to wear a mask speaks to the severity of the argument.

Nevertheless, Plaintiff's day in court will not come since "[t]he legal standard for workplace harassment in this circuit is . . . high."[104] The Fifth Circuit has made clear that an isolated incident of verbal harassment must be extremely severe to change the terms and conditions of the victim's employment.

In *Septimius v. University of Houston*, a university employee was subjected to a "haranguing" by her supervisor for roughly two hours.[105] During the encounter, the plaintiff at times "sobbed uncontrollably."[106] She was mocked and made to feel "useless and incompetent."[107]

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[101] Tr. at 9–10 (COVID is "obviously something that scares you to death, so why are you even here now?"); Mosher Dep. at 120.

[102] *See Stewart*, 586 F.3d at 328, 330.

[103] *Jordan v. City of Cleveland*, 464 F.3d 584, 597 (6th Cir. 2006) (quoting *O'Shea v. Yellow Tech. Servs. Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999); *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 333 (4th Cir. 2011).

[104] *Gowesky v. Singing River Hosp. Sys*., 321 F.3d 503, 509 (5th Cir. 2003).

[105] *Septimius v. Univ. of Houston*, 399 F.3d 601, 605 (5th Cir. 2005).

[106] *Id.*

[107] *Id.* at 612.

Yet the complained-of conduct, though "boorish and offensive," was not sufficiently severe to support a hostile work environment claim.[108]

Similarly, in *Saketkoo v. Administrators of Tulane Educational Fund*, a professor claimed her supervisor had on several occasions yelled at, chastised, mocked, and degraded her.[109] Although the supervisor's conduct was undoubtedly abrasive, it was not sufficiently severe to state a claim for hostile work environment.[110]

In *Pennington v. Texas Department of Family and Protective Services*, this court addressed a case in which a supervisor "screamed and yelled at [the plaintiff], slammed files, doors, and was physically threatening towards [her]."[111] Still, these allegations were found "insufficient to show a hostile work environment in the Fifth Circuit,"[112] which that Court affirmed.[113]

In fact, the court is not aware of any case in which the Fifth Circuit upheld a hostile work environment claim based on a single instance of verbal harassment, except in the context of extraordinarily offensive racial epithets, which are not at issue here.[114] Other circuits agree that

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[108] *Id.* (internal quotation marks and citation omitted).

[109] *Saketkoo v. Adm'rs of Tulane Educ. Fund*, [109]31 F.4th 990, 1003–04 (5th Cir. 2022).

[110] *Id.* at 1004.

[111] *Pennington v. Tex. Dep't. of Family and Protective Servs.*, No. A-09-CA-287-SS, 2010 WL 11519268, at *11 (W.D. Tex. Nov. 23, 2010).

[112] *Id.*

[113] *Pennington v. Tex. Dep't. of Family and Protective Servs.*, 469 Fed. App'x. 332 (Mar. 29, 2012).

[114] *See Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) (acknowledging that, usually, "a single instance of a racial epithet does not, in itself, support a claim of hostile work environment," but holding plaintiff's allegation that his supervisor called him a "lazy monkey ass n*****" in front of fellow employees "state[d] an actionable claim of hostile work environment").

an isolated instance of verbal harassment is generally not sufficient to support a hostile work environment claim.[115] Particularly offensive sexual or racial language are the rare exceptions.[116]

In short, "cases in which a single incident was found to be sufficiently 'severe or pervasive' to support a hostile work environment claim are exceedingly rare."[117] This is because, "[f]or a claim to succeed solely on the 'severe' element, the harassment must be a single incident that was so unusual and inappropriate that the conditions of the workplace were altered."[118]

COVID-19 raised extreme and unusual challenges, and pandemic-era harassment against frontline healthcare workers, like Mr. Calzada, should be viewed in that context. But the court

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[115] *See, e.g., Brooks v. Grundmann*, 748 F.3d 1273, 1275–76 (D.C. Cir. 2014) (affirming summary judgment against plaintiff whose supervisor "yell[ed] at her in front of co-workers, insult[ed] and demean[ed] her, and flung a heavy notebook at her, finding these allegations insufficient to support a hostile work environment claim); *Holloway v. Maryland*, 32 F.4th 293, 297, 301 (4th Cir. 2022) (affirming dismissal of plaintiff's hostile work environment claim—based on an incident in which his supervisor yelled at and berated him, slammed documents on the table, said plaintiff was "beneath him," and demanded plaintiff address him as "sir"—because his complaint fell "considerably short of alleging an abusive working environment"); *Scaife v. United States Department of Veterans Affairs*, --- F.4th ---, 2022 WL 4481488, at *1, 4 (7th Cir. 2022) (holding plaintiff did not suffer a hostile work environment despite evidence her supervisor yelled at her "aggressively" on at least three occasions—one of which prompted a co-worker to ask plaintiff "if she needed help"—since the supervisor's conduct, was not sufficiently severe or pervasive); *Paskert v. Kemna-ASA Auto Plaza, Inc.*, 950 F.3d 535, 537–38 (8th 2020) (affirming summary judgment against plaintiff because her supervisor's behavior "was not so severe or pervasive as to alter the terms and conditions" of plaintiff's employment, even though he "ridiculed and screamed at his employees, . . . threw objects in the office," and treated women in a "demeaning, sexually suggestive, and improper" manner); *Morris v. City of Colorado Springs*, 666 F.3d 654 (10th Cir. 2012) (holding that an employee, who alleged her supervisor yelled at her, demeaned her, and told her to "get [her] ass in gear," was not subject to a hostile work environment).

[116] *See, e.g., Ayishi-Etoh v. Fannie Mae*, 712 F.3d 572, 575, 577 (D.C. Cir. 2013) (holding that a single incident—wherein plaintiff alleged he and his supervisor had a heated argument that ended with his supervisor yelling "Get out of my office n*****"—"might well have been sufficient to establish a hostile work environment"); *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000) (vacating grant of summary judgment because fact issue existed as to whether plaintiff—whose supervisor berated her "at length, loudly, and in a large group," telling her to "shut the f*** up, you f***ing whining c***"—was subjected to a hostile work environment); *Boyer-Liberato v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (holding that a fact issue precluded summary judgment against plaintiff since racial slur—"porch monkey"—shouted at her may have been sufficiently severe to support a hostile work environment claim).

[117] James Concannon, *Actionable Acts: "Severe" Conduct in Hostile Work Environment Sexual Harassment Cases*, 20 Buff. J. Gender L. & Soc. Pol'y 1, 12 (2012).

[118] David Roby, *Words That Are Beyond Opprobrious: Racial Epithets and the Severity Element in Hostile Work Environment Claims*, 8 Howard Scroll: The Soc. Justice L. R. 37, 54 (2005)

cannot escape the conclusion that, as a matter of law, the harassment here was not sufficiently severe to support Plaintiff's hostile work environment claim. Therefore, that claim must fail.

c. Fifth Element: Failure to Take Remedial Action

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[119] In other words, a plaintiff need not prove the final element of a hostile work environment claim. Here, Mr. Calzada was harassed by his supervisors.[120]

Therefore, Plaintiff need not show Defendant failed to take remedial action. Nevertheless, because Plaintiff has failed to establish that Mr. Calzada suffered sufficiently severe harassment, summary judgment is proper as to its hostile work environment claim.

C. Failure to Establish the Essential Elements of a Constructive Discharge Claim

Finally, Defendant argues Plaintiff has failed to establish the elements of its constructive discharge claim.[121] "Constructive discharge occurs when an employee has quit [his] job under circumstances that are treated as an involuntary termination of employment."[122] The ultimate question is "whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign."[123]

Like the harassment element discussed above, the court finds the evidence raises a genuine issue of fact as to whether a reasonable person in Mr. Calzada's position would have felt compelled

[119] *Faragher*, 524 U.S. at 807.

[120] Resp. at 9.

[121] Mot. at 24.

[122] *Haley v. All. Compressor LLC*, 391 F.3d 644, 649 (5th Cir. 2004).

[123] *Perret v. Nationwide Mut. Ins. Co*., 770 F.3d 336, 338 (5th Cir. 2014) (cleaned up and citation omitted).

to resign. However, hostile work environment is a "lesser included component" of the "graver" constructive discharge claim.[124] Therefore, because Plaintiff's hostile work environment claim must fail as a matter of law, so too must its constructive discharge claim.

IV. CONCLUSION

Accordingly, it is **HEREBY ORDERED** that "Defendant's Motion for Summary Judgment" [ECF No. 15] is **GRANTED**.

SIGNED AND ENTERED this **18th** day of **October 2022.**

FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

[124] *Penn. State Police v. Suders*, 542 U.S. 129, 149 (2004).