UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1656

SUMMER SOWASH,

Plaintiff – Appellant,

v.

MARSHALLS OF MA, INC., d/b/a Marshalls; DAVID HUGHES,

Defendants – Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Michael F. Urbanski, Chief District Judge. (7:19-cv-00361-MFU-RSB)

Argued: May 4, 2022 Decided: June 23, 2022

Before THACKER, HARRIS, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished opinion. Judge Harris wrote the opinion, in which Judge Thacker and Judge Quattlebaum joined.

ARGUED: Terry Neill Grimes, TERRY N. GRIMES, ESQ., PC, Roanoke, Virginia, for Appellant. Raymond Charles Baldwin, SEYFARTH SHAW LLP, Washington, D.C., for Appellees. **ON BRIEF:** Christine Costantino, SEYFARTH SHAW LLP, Washington, D.C., for Appellees.

PAMELA HARRIS, Circuit Judge:

Summer Sowash, who worked at a Virginia department store, brought a lawsuit alleging that she was sexually harassed by a coworker in violation of Title VII of the Civil Rights Act of 1964 and Virginia's law of assault and battery. Sowash's claim centered around allegations that over a period of several months, her coworker repeatedly hugged her and stroked her arm, once kissed her on the cheek, and complimented her appearance. The district court granted summary judgment to the defendants, concluding that the conduct at issue, while inappropriate, did not rise to the level of "severe or pervasive," as required for Title VII liability, and likewise was not actionable assault or battery under Virginia state law. We agree, and for the reasons given by the district court in its opinion, we affirm its judgment.

I.

A.

Summer Sowash began working at Marshalls department store in Roanoke, Virginia, in 2010. After starting as a cashier, Sowash was promoted to "key carrier and coordinator," supervising an area of the sales floor. She remained in that position during the period relevant to this appeal, though she several times expressed interest in a further promotion to assistant store manager.

In October 2017, David Hughes started work at the Roanoke Marshalls as an assistant store manager. Hughes is openly gay and married to a man. Though Hughes was not her direct supervisor, Sowash took issue with his leadership style, and she registered

her first complaint in a February 2018 email to a Marshalls human resources representative. In that email, she expressed her frustration at being passed over for the assistant manager position filled instead by Hughes and complained about his leadership style. She also described a recent encounter in which Hughes accused her of lying and yelled at her, making her "dread going to work." J.A. 134.

The conduct directly at issue in this case began in March 2018 when, according to Sowash, Hughes started "hovering around" her on the sales floor, hugging her and touching her arm. J.A. 64. Specifically, as Sowash described the encounters, Hughes would put one arm around her shoulders and "stroke his fingers up and down [her] arm," J.A. 68, for about a minute. The touching was not accompanied by any sexual comments. As for frequency, Sowash at one point characterized Hughes's hugs as "continuous," occurring "almost every day" between March and June of 2018. J.A. 58. But when asked for specifics, she could say only that there were more than ten such hugs; she was unable to recall whether there were more than 20, or the date on which any occurred. Sowash reported Hughes's behavior to her direct supervisor and the store manager, though she did not raise it with Hughes himself.

The next event relevant to Sowash's complaint occurred at the end of April 2018, when Sowash returned to work from an unrelated medical leave of absence. Upon her return, Hughes hugged Sowash and kissed her on the cheek, saying that he was glad to have her back at work. The interaction lasted for "a couple of seconds." J.A. 85.

At around the same time, Marshalls sent a corporate team to its Roanoke store to assess the workplace environment and employee morale, in light of unrelated complaints

about the store manager. Sowash was interviewed twice as part of that process. In her first interview, records indicate that she did not complain about Hughes's unwelcome touching. Other employees interviewed at the same time, however, did bring Hughes to the attention of the corporate representative, describing him as inappropriately "touching female associates," using "rude language," and "refer[ring] to his personal lifestyle by calling himself Queen bitch" and other homophobic names. J.A. 103. In her second interview, in June 2018, Sowash reported Hughes's kiss upon her return from leave.

In June 2018, a summary report validated the complaints against Hughes, finding that he had inappropriately touched coworkers on their arms, given Sowash an unwanted kiss on the cheek, and used unprofessional and inappropriate language. In response, Marshalls issued Hughes a written warning, and the Roanoke store manager met with Hughes to discuss corrective procedures, review antidiscrimination and harassment policies, and set up weekly meetings to monitor his behavior.

According to Sowash, Hughes did not touch her again after the June 2018 investigation. But Sowash alleges that in July 2018, Hughes complimented her appearance, telling her that she looked "pretty" in a yellow shirt and that she should not "take that offensive." J.A. 96. Hughes had given her similar compliments in the past, Sowash alleged, but this was the only one she described with specificity. Sowash reported the July 2018 comment to her supervisors. That was the last incident complained of in this case, and the following year, in September 2019, Hughes was transferred to another Marshalls location.

B.

Sowash filed a complaint in federal court against Marshalls and Hughes, alleging Title VII sex discrimination and tortious assault and battery under Virginia law. After discovery, the defendants moved for summary judgment. In May 2021, in a carefully reasoned opinion, the district court granted the defendants' summary judgment motion in its entirety. *Sowash v. Marshalls of MA, Inc.*, No. 7:19-CV-361, 2021 WL 2115359, at *9 (W.D. Va. May 25, 2021).

The court began with Sowash's Title VII claim, recognizing that "[s]exual harassment that creates a hostile environment in the workplace may constitute sex discrimination" actionable under Title VII. *Id.* at *4 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986)); *see* 42 U.S.C. § 2000e-2(a). A hostile work environment claim based on sex discrimination has four elements, the court explained, only two of which were in dispute here: Sowash was required to show that the harassment was based on her gender, and that it was "sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive or hostile environment." *Sowash*, 2021 WL 2115359, at *4 (citing *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313 (4th Cir. 2008)).[1]

The district court rested its decision on the "severe or pervasive" element, concluding that Sowash could not establish that Hughes's behavior – inappropriate as it

[1] The first element – requiring the plaintiff to show that the conduct in question was unwelcome – was evidenced, the court noted, by Sowash's complaints to management about Hughes's behavior. *Sowash*, 2021 WL 2115359, at *4 n.3. And the defendants did not dispute, for purposes of summary judgment, that there was a basis for imputing liability for Hughes's conduct to Marshalls, as required by the fourth element.

was – "cross[ed] the threshold of severe or pervasive conduct under Title VII." *Id.* at *5. As the district court explained, whether alleged harassment is objectively "severe or pervasive" turns on the totality of the circumstances, including the frequency and severity of the conduct; whether it is physically threatening or humiliating, or merely an "offensive utterance"; and whether it unreasonably interfered with the employee's work performance. *Id.* at *4 (paraphrasing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).[2] The court recognized that whether alleged harassment is sufficiently severe or pervasive is generally a question for a jury. *Id.* But here, the court determined, the record evidence, viewed in the light most favorable to Sowash, could not support a finding of "severe or pervasive" harassment creating a hostile or abusive work environment. *Id.* at *5.

"Considered in the light most favorable to Sowash," the court determined, "the facts of this case" were as follows: Hughes hugged Sowash and touched her arm "more than ten times from March to June 2018." *Id.* There was one kiss on the cheek, on the day Sowash returned from medical leave. *Id.* And while Sowash had made "vague assertions" of compliments to her appearance, she could recall only one specific incident: the July 2018 encounter in which Hughes said she looked pretty in yellow. *Id.*; *see also id.* at *4 (explaining that "conclusory allegations with no specific evidentiary support" are insufficient to satisfy elements of Title VII claim (citing *EEOC v. Xerxes Corp.*, 639 F.3d 658, 676 (4th Cir. 2011))). And those facts "considered in [their] totality," the court

[2] The "severe or pervasive" requirement also has a subjective component, as the district court explained. *Sowash*, 2021 WL 2115359, at *4. Again, that requirement was satisfied, the court determined, by Sowash's reports of Hughes's conduct. *Id.* at *4 n. 4.

concluded, did not "rise to the level of severe or pervasive harassment" as a matter of law. *Id.* at *5.

The court canvassed other sexual harassment cases, distinguishing those relied on by Sowash because they involved "vulgar sexual innuendos" and propositions, derogatory name-calling, sexual touching, and office "pranks" such as locking an employee into her work area or hitting her with a box. *Id.* at *6 (discussing *Williams v. Gen. Motors Corp.*, 187 F.3d 553 (6th Cir. 1999), and *McKinley v. Salvation Army*, 192 F. Supp. 3d 678 (W.D. Va. 2016)). Here, by contrast, there was no allegation of any sexual comment or proposition; there were no so-called office "pranks"; and Hughes's demeaning statements were aimed only at himself, not at Sowash. *Id.* at *6. Instead, the court concluded, this case was similar to others in which courts had found that non-sexual touching – even on multiple occasions, as here – did not constitute "severe or pervasive" harassment creating an abusive work environment. *See id.* at *6–7 (discussing, inter alia, *Byers v. HSBC Fin. Corp.*, 416 F. Supp. 2d 424 (E.D. Va. 2006)).

In sum, the court determined, Hughes's "non-sexual hugs and touching, compliments on Sowash's appearance, and one kiss on the cheek are insufficient to prove severity or pervasiveness." *Id.* at *6. Construing the evidence in Sowash's favor, Hughes hugged Sowash and stroked her arm "a number of times," but not in a "sexual manner," and without any sexual commentary. *Id.* *6–7. Hughes's "most egregious behavior" – the kiss on the cheek – was "an isolated incident." *Id.* at *6. And while several employees had complained about Hughes's management style, "general workplace grievances cannot

underpin a sex discrimination claim" under Title VII.[3] *Id.* at *7. Because no reasonable jury could find Hughes's conduct sufficiently severe or pervasive, the district court concluded, the defendants were entitled to summary judgment on Sowash's Title VII claim.[4]

Similarly, the district court held, the record evidence could not support a finding that Hughes's conduct amounted to assault or battery under Virginia law. *See id.* at *7–9. For assault, the court explained, Sowash would have to prove an act "intended" to cause harm or offense, *see id.* at *7 (citing *Koffman v. Garnett*, 574 S.E.2d 258, 261 (Va. 2003)); and for battery, that Hughes's behavior was not only objectively "offensive" but also "done in a rude, insolent, or angry manner," *see id.* at *8 (citing *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 411 (4th Cir. 2013) (applying Virginia law)). Because there

[3] For that reason, the district court did not include the February 2018 office encounter between Hughes and Sowash – in which Hughes allegedly yelled at Sowash – in its review of the evidence supporting Sowash's Title VII claim. *See Sowash*, 2021 WL 2115359, at *5 n.6 (treating incident as "ordinary workplace dispute" that does not support a claim of sexual harassment (quoting *Dortch v. Cellco P'ship*, 770 F. App'x 643, 646 (4th Cir. 2019))). Nor does Sowash rely on that incident on appeal.

[4] Given this determination, the court noted, it was not required to decide whether Sowash could satisfy the second element of her Title VII claim by showing that Hughes's alleged harassment was based on or "because of" her sex. *See Sowash*, 2021 WL 2115359, at *7 n.7. The court did explain, however, in reviewing the elements of a sexual harassment claim, that "[h]arassment because of sex need not be motivated by sexual desire," and may be shown if a harasser displays hostility to women in the workplace or by comparative evidence of differential treatment of men and women. *Id.* at *4. Neither Hughes's sexual orientation nor the absence of any "sexual solicitation," in other words, would preclude a plaintiff like Sowash from prevailing on this prong or on her Title VII claim, *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998) (recognizing same-sex harassment claim under Title VII), and we do not understand the defendants to have argued otherwise.

was no evidence that Sowash told or otherwise indicated to Hughes that she found his non-sexual hugs or single kiss unwelcome, the court reasoned, she could not establish the intent element of her assault claim. *Id.* And because Hughes's conduct – "non-sexual touching on the arm, one arm hugs, and a welcome-back kiss" – could not be found "rude, insolent, or angry" and did not defy prevalent "social usages," it could not support a battery claim. *Id.*; *see Balas*, 711 F.3d at 411 (applying same standard to episode in which supervisor hugged employee after she gave him Christmas gift and finding no liability for battery).

Sowash timely appealed.

II.

We review de novo the grant of summary judgment to the defendants, applying the same standard as the district court. *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Like the district court, we view the evidence and all reasonable inferences to be drawn from it in the light most favorable to Sowash, as the non-moving party. *Id.* And as the district court recognized, summary judgment is appropriate only if no reasonable jury could find for Sowash on the evidence so viewed, so that the defendants are entitled to judgment as a matter of law. *Sowash*, 2021 WL 2115359, at *4; *see Henry*, 652 F.3d at 531. Under that standard, and for substantially the same reasons given by the district court, we affirm the district court's judgment.

Title VII makes it unlawful for an employer 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). Because an employee's work

environment is a term or condition of employment, a hostile work environment based on sex may violate Title VII. *See Sunbelt Rentals*, 521 F.3d at 313–15. But that will be so only where harassing conduct is "sufficiently severe or pervasive" that it amounts to an actual change in the conditions of the plaintiff's employment, creating an objectively abusive work environment. *Id.* at 314–15; *see Harris*, 510 U.S. at 21 (Title VII prohibits a "workplace [] permeated with discriminatory intimidation, ridicule, and insult"). As we have explained, this is a "high bar," separating out non-actionable "rude treatment by coworkers" from actionable conduct "aimed to humiliate, ridicule, or intimidate, thereby creating an abusive atmosphere." *Sunbelt Rentals*, 521 F.3d at 315–16 (cleaned up).

We agree with the district court that Sowash cannot meet that "high standard" here. *See Sowash*, 2021 WL 2115359, at *5 (internal quotation marks omitted). We see no error in the district court's assessment of the evidentiary record before it: As the district court summarized, that record, viewed in the light most favorable to Sowash, would support findings that Hughes hugged her and touched her arm, without any sexual commentary or innuendo, on more than ten occasions over the course of several months; kissed her on the cheek once, when she returned from medical leave; and complimented her appearance at least once, saying she looked pretty in yellow. *Id.* And for the reasons given by the district court, considering the totality of the circumstances, neither the number nor the nature of those contacts is sufficient to meet the "severe or pervasive" threshold. *See id.* at *5–7. Like the district court, we do not doubt that Hughes's conduct was unprofessional and inappropriate, or that it caused Sowash genuine distress. But as a matter of law, this was not the kind of "extreme" conduct that creates a workplace so objectively hostile or abusive

that it constitutes a change in the terms and conditions of employment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *see also Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 773 (4th Cir. 1997) (noting that Title VII was "not designed to create a federal remedy for all offensive language and conduct in the workplace" (internal quotation marks omitted)).

On appeal, Sowash emphasizes that whether alleged harassment is sufficiently "severe or pervasive" to meet the Title VII standard is "quintessentially a question of fact" for the jury. *Hartsell*, 123 F.3d at 773 (internal quotation marks omitted). That is true, as the district court recognized. *See Sowash*, 2021 WL 2115359, at *4. But it is not an invariable rule, as we have explained: When no reasonable jury – even if it credited all the plaintiff's evidence and drew all reasonable inferences in her favor – could find harassment rising to the level of "severe or pervasive," summary judgment is appropriately awarded to the defendant. *See Hartsell*, 123 F.3d at 773; *see also, e.g.*, *Perkins v. Int'l Paper Co.*, 936 F.3d 196, 209–11 (4th Cir. 2019).

Sowash also suggests on appeal that the district court erred by failing to consider, in its assessment of her workplace environment, incidents involving Hughes reported by other employees – Hughes's alleged use of homophobic slurs and profanity to refer to himself in conversation with those employees, and one incident in which he reportedly chased an employee around the store. We have made clear, however, that "experiences of third parties about which a plaintiff was unaware should not be considered in evaluating a hostile work environment's severe or pervasive requirement." *Perkins*, 936 F.3d at 210.

And nothing in the record indicates that Sowash was aware of these alleged events when they transpired, or at any time when she and Hughes worked together at Marshalls.

Similarly, on this evidentiary record, Sowash cannot make out a claim for assault or battery under Virginia law, again for the reasons explained by the district court: There is no evidence from which a jury could find the intent to cause harm or offense required for assault, or the "rude, insolent, or angry" conduct, outside the norm of "social usages," required for battery. *See Sowash*, 2021 WL 2115359, at *8. On appeal, Sowash addresses only her battery claim, arguing primarily that the district court relied unduly on this court's decision in *Balas* in rejecting it. We disagree.

In *Balas*, as the district court explained, we considered a battery claim against an employer who had hugged his supervisee without her consent after she gave him a Christmas gift. *See* 711 F.3d at 411. Applying Virginia's law of battery, we affirmed a grant of summary judgment to the employer, explaining that under the circumstances, no battery had occurred as a matter of law. *Id.* Not surprisingly, the district court emphasized *Balas* in its decision, analogizing its facts to the incident in which Hughes greeted Sowash with a "welcome-back hug and kiss on the cheek after returning to work from surgery." *See Sowash*, 2021 WL 2115359, at *8. But contrary to Sowash's suggestion, the district court did not overlook the fact that her case, unlike *Balas*, involved more than a one-time celebratory hug or kiss. Instead, the court made clear that it was considering *all* "the conduct in this case – non-sexual touching on the arm, one arm hugs, *and* a welcome-back kiss" – in concluding that Hughes's behavior was "insufficiently rude, insolent, or angry to constitute common law battery" under Virginia case law. *See id.* (emphasis added).

The district court properly applied Virginia law to the totality of the circumstances before it, and we have no basis for disturbing its judgment.

III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED