IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KIMBERLY W. PARKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17cv1147
	)	
OS RESTAURANT SERVICES LLC d/b/a OUTBACK STEAKHOUSE, BLOOMIN' BRANDS, INC. d/b/a OUTBACK STEAKHOUSE, REUBEN HENSON, and MARK STEVEN OGLESBY,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

THOMAS D. SCHROEDER, District Judge.

Plaintiff Kimberly W. Parks brings this action alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., wrongful discharge in violation of North Carolina public policy, and assault and battery. (Doc. 2.) Defendants OS Restaurant Services, LLC, Bloomin' Brands, Inc. ("Corporate Defendants"), and Reuben Henson (collectively, "Moving Defendants") move to dismiss the third cause of action of Parks's complaint alleging claims of assault and battery against them pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 6.)[1] Parks has not filed a response. For the reasons set forth

[1] The complaint also alleges claims of assault and battery against Defendant Mark Steven Ogelsby, who appears not to have been served with the summons and complaint. (See Doc. 12.)

below, the motion will be granted.

I. BACKGROUND

The allegations of the complaint, which are accepted as true for purposes of the present motion, show the following:

Between January 2012 and September 2016, Parks worked at an Outback Steakhouse restaurant in Salisbury, North Carolina. (Doc. 2 at 2-3.) At some point prior to September 2016, Olgesby became an employee at the restaurant. (Id.) The Corporate Defendants employed Parks and Oglesby as restaurant workers, while Henson served as the proprietor and managing partner of the restaurant during the relevant period in question. (Id. at 1.) During the course of his employment at Outback, Oglesby made disparaging remarks and engaged in inappropriate behavior toward Parks and other female employees. (Id. at 2.)

On September 17, 2016, Oglesby made disrespectful comments toward Parks and at one point verbally threatened her while they were working at the restaurant. (Id. at 2-3.) Parks informed Oglesby's supervisor, Henson, about Oglesby's inappropriate behavior, but he failed to take any action. (Id. at 3.) Oglesby's verbal attacks escalated, and he threw a container at Parks, which struck her in the face and injured her lip. (Id.) Parks's co-workers immediately grabbed her and removed her from the building, while Oglesby was permitted to remain in the building and continue his shift. (Id.) Shortly after the altercation, Parks was

terminated for fighting with an employee, but Oglesby was not terminated until the following day. (Id.)

On November 13, 2017, Parks filed this lawsuit in North Carolina Superior Court in Rowan County (id. at 1), and Defendants timely removed it to this court (Doc. 1). Moving Defendants now contend that Parks's third cause of action alleging assault and battery fails to state a claim against them. Parks, who is represented by counsel, was provided notice of her failure to respond to the motion and was advised that the motion would be referred to the court as unopposed. (Doc. 11.)

II. ANALYSIS

The purpose of a motion under Rule 12(b)(6) is to "test[] the sufficiency of a complaint" and not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). In considering a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint," Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citations omitted), and all reasonable inferences must be drawn in the plaintiff's favor, Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997). To be facially plausible, a claim must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable" and must demonstrate "more than a sheer possibility that a defendant has

acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)). While "the complaint, including all reasonable inferences therefrom, [is] liberally construed in the plaintiff's favor," Estate of Williams-Moore v. All. One Receivables Mgmt., Inc., 335 F. Supp. 2d 636, 646 (M.D.N.C. 2004) (citing McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir. 1996)), this "does not mean that the court can ignore a clear failure in the pleadings to allege any facts [that] set forth a claim," id. Mere legal conclusions are not accepted as true, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Even though the motion is unopposed and can ordinarily be granted on that basis, see Local Rule 7.3(k), the court nevertheless must satisfy itself that the motion is merited, Gardendance, Inc. v. Woodstock Copperworks, Ltd., 230 F.R.D. 438, 449 (M.D.N.C. 2005).

Moving Defendants seek dismissal of Parks's claims of assault and battery against them. As to the Corporate Defendants, Defendants argue that the assault and battery claims are subject to the exclusivity provision of the North Carolina Worker's Compensation Act. (Doc. 8 at 4.) As to Henson, Defendants argue that Parks fails to allege any factual allegations that support a claim of assault or battery, which was allegedly perpetrated by Oglesby. (Id. at 5.)

With respect to a corporate employer, North Carolina's Worker's Compensation Act provides the exclusive remedy for incidents of battery and assault by a co-worker, unless the tortfeasor was acting as the alter ego of the company. Herring v. F.N. Thompson, Inc., 866 F. Supp. 264, 267 (W.D.N.C. 1994) (citing Daniels v. Swofford, 55 N.C. App. 555, 561, 286 S.E.2d 582, 585–86 (1982)); see N.C. Gen. Stat. § 97-10.1. A plaintiff must allege actual intent to injure on the part of the corporate employer to give rise to an actionable claim for an intentional tort. See Daniels, 55 N.C. App. at 286 S.E.2d at 585–86; Andrews v. Peters, 55 N.C. App. 124, 129, 284 S.E.2d 748, 751 (1981). Here, Parks alleges that the Corporate Defendants are vicariously liable for Oglesby's tortious actions because "Defendant Oglesby acted as an employee and agent of [Corporate Defendants]." (Doc. 2 at 6.)[2] As the Moving Defendants note, however, the complaint contains no allegations that Oglesby acted as the Corporate Defendants' alter ego, "nor is there any reason to believe that an hourly employee at one restaurant could ever be deemed to be acting in that capacity under these circumstances." (Doc. 8 at 5.) Parks does not allege that the Corporate Defendants acted with intent to

[2] The complaint alleges in relevant part that "Defendant Oglesby committed battery on Plaintiff during the course of his employment" and Corporate Defendants "had knowledge of and ratified the intentional acts of Defendant Oglesby by failing to investigate prior instances of harassment, failing to correct this unlawful conduct, and because their managing employees participated in and failed to report the unlawful conduct." (Doc. 2 at 6.)

injure her, but rather that they subsequently ratified Oglesby's tortious actions. (Doc. 2 at 6.) Therefore, the complaint fails to state a claim against the Corporate Defendants as to the alleged assault and battery.

The Worker's Compensation Act does not preclude an employee injured during the course of employment from bringing suit against a co-worker for intentional torts. Pinckney v. Van Damme, 116 N.C. App. 139, 143, 447 S.E.2d 825, 828 (1994) (citing Andrews, 55 N.C. App. at 130, 284 S.E.2d at 752). "The elements of assault are intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury." Hawkins v. Hawkins, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), aff'd, 331 N.C. 743, 417 S.E.2d 447 (1992). "To state an actionable claim for civil assault, Plaintiff must plead an 'overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another.'" Perry v. W. Marine, Inc., 805 S.E.2d 544 (N.C. Ct. App. 2017) (unpublished table decision) (quoting Dickens v. Puryear, 302 N.C. 437, 445, 276 S.E.2d 325, 331 (1981)). "The display of force or menace of violence must be such to cause the reasonable apprehension of immediate bodily harm." Id. (quoting Dickens, 302 N.C. at 445, 276 S.E.2d at 331). To state a claim for battery, a plaintiff must establish "intent, harmful or

offensive contact, causation, and lack of privilege." Hawkins, 101 N.C. App. at 533, 400 S.E.2d at 475.

Apart from the conclusory allegation that the Corporate Defendants' "managing employees participated in and failed to report the unlawful conduct" (Doc. 2 at 6), the complaint makes no allegation that Henson engaged in an overt act that placed Parks under any imminent threat of injury or physically contacted her in any way. Thus, Parks fails to state a claim of assault or battery against Henson, where the complaint alleges that Henson was, at most, a bystander to the alleged assault and battery by Oglesby.

Moving Defendants' motion to dismiss will therefore be granted, as the complaint fails to state a claim of assault or battery against any of the Moving Defendants.

III. CONCLUSION

For the reasons stated,

IT IS ORDERED that Moving Defendant's motion to dismiss (Doc. 6) is GRANTED, and the third cause of action alleging assault and battery is DISMISSED as against Defendants OS Restaurant Services, Bloomin' Brands, and Henson.

/s/ Thomas D. Schroeder
United States District Judge

May 11, 2018