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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	§	
	§	
Plaintiff,	§	
	§	**Civil Action No. 3-02cv1373-G**
vs.	§	
	§	
BLEDSOE DODGE, LLC, and AUTONATION, INC.	§	
	§	
Defendant.	§	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COME NOW Bledsoe Dodge, L.L.C ("Bledsoe Dodge" or "the Dealership") and AutoNation, Inc. ("AutoNation") (collectively "Defendants"), Defendants in the above-entitled and numbered cause, and file this Brief in Support of Defendant's Motion for Summary Judgment, and in support thereof, would respectfully show the Court as follows:

I.
SUMMARY

Plaintiff, the Equal Employment Opportunity Commission ("EEOC" or "the Commission") brought this lawsuit on behalf of two Charging Parties, Anthony Barnett ("Barnett") and Barron Jackson ("Jackson") (collectively the "Charging Parties"). The EEOC has alleged that Defendants subjected the Charging Parties to a hostile work environment and failed to discipline employees who engaged in unwelcome racial remarks and graffiti. The Commission has also alleged that Defendants failed to promote the Charging Parties to the position of Assistant Parts Manager in July 1999,

because of their race, African-American.

Defendants are entitled to summary judgment on Plaintiff's claims both under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*, in their entirety, including the claims for (1) race discrimination and failure to promote; and (2) racial harassment, because the Commission has insufficient evidence to raise a genuine issue of material fact as to either of the asserted causes of action. Plaintiff cannot meet its burden of establishing a *prima facie* case of discriminatory failure to promote. In addition, even if Plaintiff can establish a *prima facie* case of discriminatory failure to promote under Title VII, Defendants have produced competent, admissible evidence of the legitimate, non-discriminatory reason for the failure to promote the Charging Parties to the position of Assistant Parts Manager in July 1999, which Plaintiff cannot show is pretextual. In addition, there is no genuine issue as to Plaintiff's claim for hostile work environment race harassment, because the Charging Parties' evidence of alleged discrimination does not amount to a severe and pervasive working environment which affected a term, condition or privilege of employment. Further, the Charging Parties failed to utilize the reasonable complaint procedures available to them to complain of discrimination, and the Dealership was unaware of most of the acts of the discriminatory conduct alleged by the Charging Parties. Finally, when the Charging Parties did utilize Defendants' complaint procedures, the Dealership took all necessary action to prevent and eliminate any instances of harassment.

II.
STATEMENT OF FACTS

Bledsoe Dodge is a Dodge-Chrysler automobile dealership located in Dallas, Texas. Prior to 1997, the Dealership was family-owned. Bledsoe Dodge was purchased by a subsidiary company of Defendant AutoNation, in 1997.

The Charging Parties are long-term employees of Bledsoe Dodge in the Parts Department. Barnett and Jackson are not now, nor have they ever been, employed by Defendant AutoNation. Jackson has been employed at the Dealership since September 1989. Although Jackson voluntarily resigned for a brief period of time in 1992, he was rehired a mere four months later, on October 5, 1992, and has been continuously employed by Bledsoe Dodge since that date. *App., pp. 280-281, 440.* Barnett was hired in May 1988, and was rehired on November 13, 1989. *App., pp. 12-16, p. 422.* Barnett has been continuously employed with Bledsoe Dodge for the past 13 years. During the course of their employment, the Charging Parties have received periodic raises and advances in the department. *App., pp. 422-428 and 440-446.* Both Barnett and Jackson currently hold the position of Assistant Parts Manager, the job to which they have alleged Defendants failed to promote them. In fact, both of the Charging Parties have held this position since December 1999.

In July 1999, Karey Martin ("Martin"), a white female, was promoted to the position of Assistant Parts Manager. The decision to promote Martin was made by the Parts Manager, Mark Morgan ("Morgan"), in consultation with, and with the approval of his supervisor, Joe Meador ("Meador"), the Parts and Service Director. *App., pp. 360, 366-367, 454-459, para. 5.*

At the time of Martin's promotion, Mehdi Bonakdar ("Bonakdar") was the General Manager for Bledsoe Dodge, and Matt Bledsoe ("Bledsoe") was under contract with the new owner to assist in the transition of the Dealership from a privately-owned company to a member of the AutoNation family. In October 1999, Bonakdar left Bledsoe Dodge when he purchased a Dealership in Houston. Sam Tater ("Tater") then assumed the role of the Dealership's General Manager, a position he has held continuously since October 1999. On or about December 16, 1999, soon after Tater became the Dealership's General Manager, he terminated Morgan, primarily for the latter's failure to control

inventory. Within two weeks following his termination, Morgan died of a sudden and unexpected illness.[1]

In December 1999, following Morgan's termination, Tater made the decision to promote both Barnett and Jackson to the position of Assistant Parts Manager. From December 1999 to July 2000, Barnett, Jackson and Martin all served as Assistant Parts Managers. In July 2000, upon Meador's recommendation, Martin was promoted to Parts Manager, while the Charging Parties remained Assistant Parts Managers. Barnett and Jackson have both been continuously employed in the position of Assistant Parts Manager since December 1999.[2]

In February 2002, Meador retired from Bledsoe Dodge and Larry Moody ("Moody") became the Parts and Service Director, and Moody has been continuously employed in that position since that date. In January 2003, Martin was terminated from the position of Parts Manager, due to financial shortages within the Parts Department over the prior year which were discovered during the annual audit of the Dealership.[3]

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[1] Therefore, Morgan is unavailable to rebut a number of factual allegations made by the Charging Parties. Defendants note, however, that there is a total lack of independent evidence to corroborate the Charging Parties' allegations against Morgan in this case. *See, e.g., App., pp. 320-323, p. 358.*

[2] Although Barnett testified during his deposition that he was demoted from the position of Assistant Parts Manager for approximately one month at some point following Martin's promotion to Parts Manager, there is absolutely no evidence, documentary or otherwise, to support this allegation. *App., p. 139, l. 4-17, p. 143, l. 3-25, p. 144, l. 1-25, p. 145, l. 1-25, p. 146, l. 1-25, p. 147, l. 1-23.* In fact, although Barnett testified during his deposition that he kept detailed notes of all of the incidents of alleged "discrimination" against him, he made no note of the "demotion" during the same time that he made note of the vacation of a fellow employee, Anthony Stone. In addition, Barnett could not recall for certain even the year when the "demotion" allegedly occurred. *App., p. 139, l. 11-17.* Further, Barnett admitted that there was no decrease in his pay as a result of the alleged "demotion." *App., p. 145, l. 10-11.* Barnett also testified that he was re-promoted to the Assistant Parts Manager position shortly after the "demotion." *App., p. 146, l. 1-25.*

[3] Although the Charging Parties, as management employees, certainly bear some responsibility for the financial losses within the Parts Department, they have not been terminated, and are still employed as Assistant Parts Managers for the Parts Department.

III.
STANDARD FOR SUMMARY JUDGMENT

Fed.R.Civ.P. 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 and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 301 (5th Cir. 1993).

The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. Once the movant has met this burden, the plaintiff may not rest on unsubstantiated allegations in the pleadings, but must produce competent, tangible evidence to survive summary judgment. *Id.* at 327. This requires the nonmoving party to do "more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Personal beliefs, no matter how genuinely held, are not evidence on which a verdict may rest because a plaintiff's personally-held beliefs do not raise a genuine issue of material fact. *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985). Instead, the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324.

IV.
APPENDIX TO SUMMARY JUDGMENT MOTION AND BRIEF

Concurrently with this Brief, Defendant has filed an Appendix containing competent summary judgment evidence in support of Defendant's Motion and Brief, the pages of which are numbered sequentially as required by Local Rule 56.6(b)(3). The Appendix is incorporated herein, and is referenced throughout this Brief in italics by the abbreviation *"App.,"* accompanied by citations to the relevant page numbers of the Appendix.

V.
ARGUMENT AND AUTHORITIES

A. No Genuine Issue of Material Fact With Regard to Plaintiff's Race Discrimination/Failure to Promote Claim Under Title VII.

1. Burden-Shifting Analysis.

Plaintiff has alleged a claim for disparate treatment, and specifically, failure to promote, under Title VII based on the Charging Parties' race. Under Title VII of the Civil Rights Act of 1964, as amended, an employer, as defined by the Act, may not discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2; *Grant v. Lone Star Co.*, 21 F.3d 649, 651 (5th Cir. 1994). A claim for unlawful discrimination may be proved either by direct evidence or circumstantial evidence. *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995).[4]

If a plaintiff relies on circumstantial evidence to establish a claim for discrimination, he must first establish a *prima facie* case that the defendant made an employment decision that was motivated

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[4] Direct evidence is evidence that, without requiring a fact finder to make any inferences or presumptions, proves that a person engaged in unlawful discrimination. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994). A statement is probative of an employer's discriminatory intent only if it directly and unambiguously indicates that an impermissible factor played a substantial role in the employment decision. *See Wyvill v. United Cas. Life Ins. Co.*, 212 F.3d 296, 304 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145, 121 S.Ct. 1081 (2001).

by a protected factor. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996); *Mayberry v. Vought*, 55 F.3d 1086, 1090 (5th Cir. 1995). Once a *prima facie* case is established, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the employer states a legitimate reason for its conduct which would support a finding that the challenged action was non-discriminatory, the inference of discrimination raised by the plaintiff's *prima facie* case drops from the case. *Id.* at 253-57, n.10. The burden of production then shifts again to the plaintiff to prove that the reasons asserted by the employer are pretextual. *Reeves v. Sanderson Plumbing,* 503 U.S. 133 (2000); *Burdine,* 450 U.S. at 254. The burden of persuasion always remains with the plaintiff. *Burdine,* 450 U.S. at 253.

2. *Plaintiff Unable to Estalish a Prima Facie Case of Race Discrimination Under Title VII as to Plaintiff's Claim That the Failure to Promote Barnett and Jackson in July 1999 Was Based on a Discriminatory Motive.*[5]

Plaintiff has no direct evidence to support the claim that the failure to promote the Charging

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[5] While the Commission has alleged that the failure to promote the Charging Parties in July 1999, and the promotion of Martin at that time, was discriminatory in nature, Plaintiff has made no such claim with regard to the promotion of Jesus Alvarez over the Charging Parties in 1998, or the promotion of Martin to Parts Manager over the Charging Parties in July 2000. In July 2000, Meador and Tater made the decision to promote Martin to the position of Parts Manager, while Barnett and Jackson remained Assistant Parts Managers. Although the EEOC has conducted discovery pertaining to the promotion of Martin to the position of Parts Manager in July 2000, as well as the promotion of Alvarez, the Commission's claim of failure to promote, as pled, is limited to the Dealership's failure to promote the Charging Parties to the position of Assistant Parts Manager in July 1999. Defendants would also show, however, that even had the Commission asserted a claim for failure to promote the Charging Parties to the position of Parts Manager in 2000 or Assistant Parts Manager in 1998, there is no evidence to support any allegation that this failure was motivated by a discriminatory motive. In addition, the summary judgement evidence produced by Defendants clearly shows the legitimate, non-discriminatory reasons for the promotion of Alvarez in 1998 and Martin in 2000. *See, e.g., App., pp. 457-458, Paragraphs 6 & 7.*

Parties to the position of Assistant Parts Manager in July 1999 was based on a racially discriminatory motive.[6] In order to established a *prima facie* case of race-based employment discrimination and failure to promote, a plaintiff must show: (1) he is a member of a protected class; (2) he applied for and was qualified for the position sought; (3) he was rejected despite being qualified; and (4) the posted job remained vacant or was filled by another individual after the plaintiff was rejected. *See Aikens v. Banana Republic, Inc.*, 877 F.Supp. 1031, 1038 (S.D. Tex. 1995), *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Plaintiff has no evidence to create a genuine issue of material fact that the Charging Parties ever applied for or were qualified for the job of Assistant Parts Manager.

a. No Evidence That the Charging Parties Applied for the Position.

There is no evidence, other than the Charging Parties' self-serving deposition testimony, that they ever applied for the position of Assistant Parts Manager in July 1999.[7] There is absolutely no documentary evidence to support this claim. In fact, all of the evidence in this case shows that the Charging Parties not only did not apply for the position, but rather, that all of the actions taken by Barnett and Jackson with regard to seeking the position of Assistant Parts Manager occurred *after* Martin's promotion in July 1999. For example, Barnett admitted during his deposition that he did not show any interest in the position prior to it being filled by Martin (although he claimed that he

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[6] Defendants note that the EEOC has never specified which of the two Charging Parties should have been promoted to the position of Assistant Parts Manager or indeed, who was the more qualified of the two for the position. Although both of the Charging Parties were ultimately promoted to the position, there is no evidence that more than one individual has ever held this position in the past.

[7] Jackson testified that he expressed an interest in "qualifying" for the position when it came open in 1998, and that Barnett told him (Jackson) that he was interested in the position at that time. *App., pp. 202-206.*

was not given the time or opportunity to express his interest). *App., p. 34, l. 1-5, p. 40. l. 16-25, p. 41, l. 1-15.* Jackson testified during his deposition that he expressed an interest in the position to Morgan and Bonakdar approximately one week prior to Martin's promotion, but there is no evidence that he pursued the position beyond a mere expression of interest. *App., pp. 216-218.*

b. No Evidence That the Charging Parties Were Qualified for the Position.

Further, and more importantly, there is no evidence that the Charging Parties were qualified for the position of Assistant Parts Manager in July 1999. The plaintiff in a Title VII case has the burden of proving his ability to perform in the position in question. *Sreeram v. Louisiana State Univ. Med'l. Ctr.-Shreveport*, 188 F.3d 314, 318 (5th Cir. 1999); *see also Waltman v. Int'l Paper Co.*, 875 F.2d 468 (5th Cir. 1989). Summary judgment is not precluded where the plaintiff presents no significant evidence that he is qualified. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988).

It is clear that the Charging Parties could not perform the duties of the Assistant Parts Manager, as sought by Morgan and Meador in July 1999. *App., pp. 454-460, Paragraph 5.* Rather, Martin had the knowledge and expertise to complete all of the daily, weekly and monthly reports necessary for the operation of the Parts Department. *App., pp. 454-460, Paragraph 5.* Despite their longevity within the Department, and in spite of the fact that they had been given the opportunity to learn how to prepare the reports, the Charging Parties were unable to prepare these necessary reports. In fact, even today, Barnett is able only to prepare the daily report, and Jackson is unable to prepare *any* reports needed to operate the Parts Department.[8] *App., pp. 454-459.* Several disciplinary issues,

[8] Further, despite the fact that Barnett is a management employee, he testified that he had no knowledge or information pertaining to the productivity or financial condition of his department. *App.,*

including Jackson's repeated tardiness, also prevented these two individuals from being qualified for the job of Assistant Parts Manager in July 1999. *See App., pp. 429 & 447-450.* In fact, Jackson had been repeatedly counseled for tardiness, and Morgan had warned Barnett in writing in January 1997 that this Charging Party needed to work on his attitude and work hours in order to move up within the Dealership. *App., p. 429 & 447-450.*[9]

Although the Charging Parties both testified during their depositions that they were both qualified for the position of Assistant Parts Manager, each also testified that he was more qualified than the other for the position.[10] *App., p. 68, l. 20-25, p. 69, l. 1, p. 207, l. 2-14.* Jackson also testified that he felt he should have been given the job of Assistant Parts Manager simply because he had been employed at the Dealership the longest. *App., p. 206, l. 23-25, p. 207, l. 1.* This testimony constitutes neither evidence that Jackson was qualified for the job, nor that his failure to be appointed to it was discriminatory in nature. Jackson also admitted during his deposition that he had no experience in managing other employees or in performing some of the other administrative duties within the Parts Department. *App., pp. 222-226.*

Finally, although the Charging Parties were promoted to the position of Assistant Parts Manager in December 1999, it is clear that this decision was based, not so much on their work performances and abilities, but on a desire by Tater to bring some unity and cohesiveness to the Parts

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pp. 101-106.

[9] In fact, it is clear that the Charging Parties disagreed with any negative employment actions against them, including their written disciplinary actions for violations of the Dealership's policies and procedures. *App., pp. 128-130, 152-156, and 270-274.*

[10] In fact, Barnett testified that he holds a higher position in the Parts Department than Jackson, that he handles more duties and responsibilities than Jackson, and in fact, supervises Jackson. App., *p. 5, l. 8-25, p. 6, l. 1-8.*

Department, and to give the Charging Parties an opportunity to demonstrate their skills and abilities to perform the position. *App., pp. 338-341, pp. 345-347, p. 349.* Therefore, the fact of the Charging Parties' promotions, in and of itself, does not establish that these individuals were qualified for the position in July 1999. Accordingly, Plaintiff cannot establish a *prima facie* case of race discrimination with regard to the failure to promote the Charging Parties to the position of Assistant Parts Manager in July 1999.

3. Legitimate, Non-Discriminatory Reasons for Promotion of Karey Martin to the Position of Assistant Parts Manager Over the Charging Parties.

If an employee establishes a prima facie case, then the employer has the burden of articulating a legitimate, non-discriminatory reason for the adverse action. *Burdine*, 450 U.S. at 254-55; *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 435 (5th Cir. 1995). The non-discriminatory rationale does not have to be proven by a preponderance of the evidence because the burden of persuasion remains with the plaintiff. *Burdine*, 450 U.S. at 254; *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1304, 1346 (5th Cir. 1988). A defendant in a Title VII case satisfies its burden at this stage when it sets forth reasons for its actions which "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). An employer is "entitled to judgment as a matter of law if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."

Because Bledsoe Dodge was a small, family-owned dealership, there was no formal

promotion process in place until sometime after AutoNation bought the Dealership. Further, because of the nature of the work performed, particularly within the Parts & Service Departments, positions must be filled quickly and without delay. Thus, during the relevant time period, promotions were handled by the respective managers within their own departments utilizing the Dealership's Equal Employment Opportunity and other non-discrimination policies and procedures. Even up to today, the Dealership makes every effort to hire and promote from within Bledsoe Dodge. In 1999, job openings within the Parts Department were not posted. *App., pp. 364-365.*[11] Beginning in the year 2000, the Dealership now posts job vacancies. *App., pp. 254-259.*

This decision to promote Martin to the position of Assistant Parts Manager in July 1999 was based on the fact that Morgan and Meador believed Martin to have the knowledge and expertise to complete all of the daily, weekly and monthly reports necessary for the operation of the Parts Department. *App., pp. 454-460, Paragraph 5.* In addition, these two supervisors felt that Martin had other relevant skills and experience which the Charging Parties lacked. For example, the evidence shows that Martin had previously been employed in a management position in a parts department at another dealership, a fact which she relayed to her supervisors at Bledsoe Dodge. *App., pp. 451-453, pp. 454-460, Paragraph 5.* The evidence presented by Defendants with this Motion and Brief in support of this legitimate, non-discriminatory reason for Martin's promotion is consistent with the testimony of the Charging Parties regarding what they were told each time they questioned management regarding the reasons Martin was promotion to Assistant Parts Manager. *App., 41, l. 3-15, 25, p. 42, l. 1-8, p. 71, l. 15-25, p. 72, l. 1-3, p. 73, l. 17-25, p. 74, l. 1-3, p. 97, l. 1-20. p. 241,*

[11] Barnett admitted during his depositions that there was no policy which required the posting of open positions within the Parts Department. *App., p. 21, l. 15-17.*

l. 4-24.[12]

The Charging Parties have no evidence to show that the promotion of Martin over them was based on a discriminatory motive. In fact, Plaintiff has absolutely no evidence of the factors that were considered in promoting Martin in July 1999. *App., p. 34, l. 21-25, p. 35, l. 1-9.* Indeed, the only "evidence" that the failure to promote the Charging Parties to Assistant Parts Manager in July 1999 was discriminatory in nature is the fact that the Charging Parties were employed in the Parts Department longer than Martin. This, standing alone, is not sufficient to create a genuine issue of material fact that the failure to promote the Charging Parties in July 1999 was somehow discriminatory in nature.

Further, the evidence shows that the Charging Parties never utilized any of the Dealership's complaint policies and procedures to complain that the promotion of Martin to Assistant Parts Manager in July 1999 (or the prior promotion of Jesus Alvarez to that position, or the subsequent promotion of Martin to Parts Manager) was discriminatory in nature. For example, Barnett testified during his deposition that he approached Meador following Martin's July 1999 promotion and asked him why she was had been promoted to the position. When Meador responded that Martin was the best qualified employee for the position, according to Barnett, he responded, "Okay, thank you, sir," and left Meador's office. *App., p. 41, l. 3-25.*

In December 1999, the Charging Parties were both promoted to the position of Assistant Parts Manager, the position also held by Martin at the time. *App., p. 137, pp. 167-175, p. 338, l. 14-*

[12] Barnett also testified that, when he questioned Morgan about Jesus Alvarez's promotion to the position of Assistant Parts Manager, Morgan told him that Alvarez would better handle the job and was better qualified for the position. *App., p.32, l. 6-10, p. 39, l. 9-25, p. 40, l. 1.*

17, l. 25, p. 339, l. 1-4 .[13] All three of these individuals operated as Assistant Managers for approximately seven (7) months, and the duties within the Parts Department were split amongst the three. During this time period, it became apparent to Meador, as well as Tater, that the Parts Department needed a single manager to be in charge of and oversee the entire department, as there were a number of duties that were not getting done. *App., pp. 341-342, pp. 454-459, Para. 6.* Therefore, Meador recommended to Tater that the Dealership again appoint a Parts Manager to oversee the Department. Once again seeking to promote from within Bledsoe Dodge and the Parts Department, Meador recommended that the candidate he felt was best qualified for the position, Martin, be appointed to the position, and Tater concurred. *App., pp. 343-344, 454-459, Para. 349-350.* Although Plaintiff has not alleged a claim for failure to promote with regard to this promotion of Martin, it is clear that there is absolutely no evidence of any discriminatory motive with regards to this promotion, as well. Indeed, the evidence is clear that this promotion was based on Meador's belief that Martin was the best qualified for the position, and there is no evidence to controvert this position. *App., pp. 454-460, Paragraph 6.*

4. Plaintiffs Unable to Show That Defendant's Legitimate Non-Discriminatory Reasons Are a Pretext for Discrimination.

If the employer in a Title VII case adequately articulates a non-discriminatory reason for the employment action in question, the burden shifts back to the employee to prove, by a preponderance of the evidence, that the reasons articulated by the employer for the adverse employment action was not its true reason but was, in fact, pretextual. *Reeves,* 503 U.S. 133; *Burdine*, 450 U.S. at 255-56.

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[13] Defendants note that, during his deposition, Jackson was somewhat confused regarding the time frame during which he became an Assistant Parts Manager.

Thus, in order for a plaintiff to prevail, he must (1) create a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer, *and* (2) create a reasonable inference that the plaintiff's membership in a protected class was a determinative factor in the actions of which the plaintiff complains. *Krystek v. Univ. of Southern Miss.*, 164 F.3d 251, 256 (5th Cir. 1999); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996). The plaintiff always carries the ultimate burden of proving discrimination. "The district court must therefore grant a motion for judgment as a matter of law 'if the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial.'" *Krystek*, 164 F.3d at 256, quoting *Rhodes*, 75 F.3d at 994. There is no competent, admissible evidence in this case that the reasons set forth by Defendants for the promotion of Martin over the Charging Parties in July 1999 is pretextual.

a. Stray Remarks Insufficient to Establish Evidence of Discrimination.

The Charging Parties have alleged that Morgan called Jackson "spearchunker" on a number of occasions, although this evidence has not been corroborated by any other witness in this case. *See discussion in Section B.1 below; see also App., pp. 320-323 & 358.* This testimony is the only "evidence" of a racially discriminatory comment made by any employee who has ever supervised the two Charging Parties at Bledsoe Dodge. Even if Morgan made this remark, which is denied, evidence of a supervisor's occasional or sporadic use of a slur directed at an employee's race, ethnicity, or national origin is generally not enough to support a claim under Title VII. *See Rogers v. Equal Employment Opportunity Commission*, 454 U.S. 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1266 (7th Cir. 1992). The law is clear that, "in order for comments in the workplace to provide sufficient evidence of

discrimination, they must be '(1) related [to the protected class of persons of which the plaintiff is a member]; (2) proximate in time to the termination [or other adverse action]; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue.'" *Krystek*, 164 F.3d at 256, quoting *Brown,* 82 F.3d at 655. Stray remarks alone will not overcome overwhelming evidence corroborating an employer's non-discriminatory rationale for an adverse employment action in a Title VII suit. *Sreeram, supra*, 188 F.3d at 320; *Brown*, 82 F.3d at 655. There is no evidence that any reference by Morgan to Jackson as "spearchunker," even if it did occur, was in any way related to the decision to promote Martin over Jackson.

b. Bad Business Decision Insufficient to Establish Evidence of Discrimination.

Plaintiff's claim of discrimination appears to stem primarily from the fact that the Charging Parties disagree with the actions taken against them. However, Barnett's and Jackson's disagreement with the business decisions of their supervisors is not a sufficient basis for a claim of discrimination under Title VII. The law is clear that the employment discrimination laws are "not intended to be a vehicle for judicial second-guessing of business decisions, nor . . . to transform the courts into personnel managers." *EEOC v. Louisiana Office of Community Servs.*, 47 F.3d 1438, 1448 (5th Cir. 1995), *citing Bienkowski*, 851 F.2d at 1507-08. A defendant need not be correct in its basis for taking a certain action against an employee to show that its actions were motivated for non-discriminatory reasons. *Jones v. Flagship Int'l*, 793 F.2d 714, 729 (5th Cir. 1986); *De Anda v. St. Joseph's Hospital*, 671 F.2d 850, 854, n. 6 (5th Cir. 1982); *Dickerson v. Metropolitan Dade County*, 659 F.2d 574, 581 (5th Cir. 1981). Title VII does not require that an employer take action against its employees only for good cause; the only inquiry is into the motive, not the merits, of the employer's decisions. *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 57 (5th Cir. 1992). An employer may defend

a disparate-treatment case by showing a nonbusiness, even a frivolous motive or purpose, so long as the proffered reason is the true purpose or motive and not a purpose or motive prohibited by Title VII. *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1329 (5th Cir. 1991). Even if the promotion of Martin to the position of Assistant Parts Manager was, in hindsight, unwise or a poor business decision, the legitimate reasons for this decision are well-documented and business-related, and the Charging Parties have no evidence to show that the actions of their supervisors in promoting Martin over them were motivated by a purpose prohibited by Title VII.

c. Disagreement With Decision and Self-Serving, Conclusory Testimony and Opinions Insufficient to Establish Evidence of Discrimination.

It is clear that the Charging Parties did not agree with their supervisors' decision to promote Martin to the position of Assistant Parts Manager. *App., p. 43, l. 21-25.* This disagreement, however, does not constitute evidence of discrimination. The Charging Parties have nothing more than their own self-serving, conclusory testimony and opinions to support the allegations of discrimination under Title VII. The law is clear that an employee's own subjective belief of discrimination, no matter how genuine, cannot serve as the basis for judicial relief. *See, e.g., Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996); *Dupont-Lauren v. Schneider*, 994 F.Supp. 802, 817 (S.D. Tex. 1998). Evidence of a plaintiff's subjective belief of discrimination is alone insufficient to create a jury question. *Baltazor v. Holmes*, 162 F.3d 368, 377, n. 11 (5th Cir. 1998).

The Charging Parties' deposition testimony regarding their claims of discrimination is riddled with hearsay, opinions, and speculation. For example, Barnett testified that if someone else is promoted and he is not, it is his automatic belief that this decision is based on race. *App., p. 79, l. 11-15.* In fact, the testimony of the Charging Parties regarding Martin's qualifications for the job

are based on their own speculation regarding the tasks Martin was able to handle only when she first became employed in the Parts Department. *See, e.g., App., pp. 218-222.* Further, not only was Jackson not able to present any evidence of discriminatory motive, he testified that Martin was promoted, he believed, because she was friends with Joe Meador. *App., p. 241, l. 21-24.* Even if this were the true reason for Martin's promotion, which is denied, this reason is not, in any way, discriminatory in nature or violative of Title VII. The Charging Parties' conclusory allegations, unsubstantiated assertions, and subjective beliefs regarding the reasons for the disciplinary actions taken against them are insufficient to support a discrimination claim. *See, Scrivner v. Socorro Indep. School Dist.*, 169 F.3d 969, 972 (5th Cir. 1999), *citing Grimes*, 102 F.3d at 139.

d. Same Actor Evidence Militates Against a Finding of Discrimination.

The same actor inference suggests that if the same person hired and fired (or took other adverse action) against an employee, the employer must have taken the adverse action for reasons other than discrimination. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). The Charging Parties have alleged that, because Morgan (who made the decision) and Meador (who concurred in the decision) failed to promote them in July 1999 to the position of Assistant Parts Manager, they were denied advancement within the Dealership, in violation of their rights. The evidence in this case clearly shows, however, that Morgan, the same actor Plaintiff has alleged wrongfully failed to promote the Charging Parties, is the same actor who rehired both of the Charging Parties after they left the Dealership, and further, who recommended Barnett and Jackson for raises (and in fact, secured raises) for them over the course of their employment.[14] *App., pp. 422-428 & 440-446.* For

[14] Somewhat incongruously, Jackson testified that Morgan did not like the fact that Martin was promoted to Assistant Parts Manager. App., p. 242-243.

example, Morgan rehired Barnett in November 1989, after Barnett had left the Dealership for other employment, from which he was subsequently terminated over accusations of theft. *App., pp. 8-13.* Barnett admitted during his deposition that his rehire, as well as his raises and advances within the Parts Department were all done by the Parts Manager, Morgan. *App., p. 31, l. 10-14.* The evidence also shows that Morgan was aware of Barnett's termination from this other employer when he rehired the Charging Party.[15] *App., p. 12, l. 17-25, p. 13, l. 1-10.* Morgan also promoted Barnett from a driver for the Parts Department to stock control and delivery to parts counterperson, all with a commensurate increase in wages. *App., pp. 13-17.*[16] The employment history of the two Charging Parties, including their promotions and wage increases instituted by Morgan, militates against a finding that the Dealership had a discriminatory motive in choosing not to promote the Charging Parties in July 1999.

e. Evidence of Legitimate, Non-Discriminatory Reasons Overwhelming.

There is no evidence, circumstantial or otherwise, to support Plaintiff's claims. However,

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[15] Barnett testified in his deposition that Morgan told him that he was "always welcome back" because he [Barnett] had done a "great job" for the Dealership. *App., p. 11, l. 4-6.*

[16] During his deposition, Barnett made various vague allegations that Morgan failed to "support him" because he gave raises on a more timely basis to other employees with less tenure that this Charging Party. *App., p. 19, l. 24-25, p. 20, l. 1-17.* Plaintiff has absolutely no evidence to support this allegation, however, and there is no evidence that Barnett (or Jackson) was treated unfairly in the allocation of wage increases, and Barnett admitted that he had no personal knowledge of the wages earned by any other employee within the Parts Department. *App., p. 23, l. 7-25, p. 24, l. 1-8.* In fact, all of the evidence in this case militates against such a finding. For example, Barnett also testified that he had heard Morgan tell Billy Gilbreath, a former Assistant Parts Manager who was white, that he would not get another raise, an incident which, according to Barnett, led to Gilbreath leaving the Dealership. *p. 22, l. 10-14.* Barnett also seemed to have some rather unrealistic expectations regarding raises and the wages he felt he should be earning. For example, Barnett testified that he should receive a raise at least once a year regardless of the productivity of the Parts Department, and further, that he had not been paid fairly at the Dealership for the past ten years, although he has made no attempt to locate other employment during that time frame. *App., p. 100, l. 19-25, pp. 101-106, p. 106, l. 10-21.*

even if circumstantial evidence of pretext is present in a Title VII case, summary judgment for the employer is still appropriate where the evidence overwhelmingly supports the employer's proffered non-discriminatory rationale. *Sreeram*, 188 F.3d at 320; *Brown*, 82 F.3d at 656. Thus, even if the Court finds that there is a modicum of circumstantial evidence to support Plaintiff's claims, Defendants' overwhelming evidence of the legitimate, non-discriminatory reasons for the promotion of Martin over the Charging Parties in July 1999 renders summary judgment proper in this case.

B. No Genuine Issue of Material Fact as to Plaintiff's Claim for Racial Harassment/Hostile Work Environment Harassment.

Plaintiff has alleged a claim for hostile work environment racial harassment on behalf of the Charging Parties. "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,' Title VII is violated." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (internal citations omitted). In determining whether an actionable hostile work environment claim exists, courts look to "all the circumstances," including "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." *Id.* at 23; *see also National Railroad Passenger Corp. v. Morgan*, --- U.S. ----, 122 S.Ct. 2061, 2074 (2002). The "'mere utterance of an . . .epithet which engenders offensive feelings in an employee,' does not sufficiently affect the conditions of employment to implicate Title VII.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57,67 (1986); *see also National Railroad, 122 S.Ct. at 2074.*

Over the course of their 13 years of employment,[17] the Charging Parties were able to identify only a few incidents of "racial harassment" or racially inappropriate conduct, as follows[18]:

1. Charging Parties' Evidence of Discrimination.

(1) Barnett testified in his deposition that a co-worker, Bobby Hanson ("Hanson"), referred to him as "Buckwheat" during the time period of 1993-1995, as did an unidentified employee named "Phillip" and other unidentified employees. *App., p. 44, l. 21-25, p. 45, l. 1, p. 58, l. 4-9, p. 64, l. 16-25, p. 65, l. 1-8.* Barnett also testified that Hanson called him a "good-for-nothing black boy" on one occasion. *App., p. 111, l. 11-25, p. 119, l. 15-19.* There is no indication that Barnett made any complaint regarding these incidents, except to the EEOC. *App., p. 111, l. 4-7.* (Barnett testified in his deposition that his reference to "racial slurs" in his Charge of Discrimination refers only to the alleged use of the term "Buckwheat" in reference to him. *App., p. 62, l. 5-15, p. 65, l. 9-25, p. 66, l. 1-25, p. 67, l. 1-3*).

(2) Barnett also testified that Mark Payne ("Payne"), an outside vendor with the company of Payne & Sons, called him "Buckwheat" on two occasions. *App., pp. 52-57.*

(3) Barnett testified that Payne made a comment to him, on one occasion during 1999, to the effect of, "I'm a nigger and you're not." *App., p. 74, l. 9-25, p. 98, l. 3-7.* (There appears to be confusion amongst the Charging Parties regarding this incident, as Jackson testified that this incident actually happened to him, *i.e.*, that Payne made the exact same statement to him on one occasion, and that he reported this incident to Morgan. *App., pp. 209-215, pp. 245-.*) Barnett testified that he told Bonakdar about this comment sometime after he filed his Charge of Discrimination with the EEOC, and that Bonakdar responded that he would get with Barnett's department manager about it. *App., p. 74, l. 9-22, p. 77, l. 15-18. p. 99, l. 10-13.* Barnett also testified that this was the only alleged conduct of racial harassment that he reported to Bonakdar. *App., p. 77, l. 7-14.* Once Tater was informed of Payne's alleged conduct, he sent a letter to Payne reminding him of the Dealership's policies and the expectation that he follow those policies in dealing with Bledsoe Dodge. *App., p. 311, l. 9-20.*

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[17] Although Defendants would show that a number of these incidents would be either time-barred or not sufficiently probative so as outweigh any prejudice created by the evidence at trial, Defendants have addressed all of the incidents of discrimination alleged by the Charging Parties, to show that all of these incidents, taken together, even if true, were not sufficiently severe or pervasive to alter the conditions of Barnett's and Jackson's work environment.

[18] Defendants note that they have summarized the deposition testimony of the Charging Parties regarding these incidents to the extent possible. This task was made somewhat more difficult by the fact that the Charging Parties often contradicted themselves during the course of their depositions.

(4) Both Charging Parties testified that Billy Gilbreath, a former Assistant Parts Manager, hung a "noose" made of shoe string over a light fixture in the Parts Department sometime during 1994 or 1995. *App., pp. 45-49, p. 60, l. 1-21, pp. 228-238.* Both Charging Parties testified that they complained about this situation to Morgan, and Jackson testified that Morgan addressed it with Gilbreath. *App., p. 235.*

(5) Barnett testified that, in February 2000, a new service technician named James White threatened to "drag [him] with a chain, and said the word "nigger" in front of him. *App., p. 83, l. 12-25, p. 84, l. 1-25, p. 85, l. 1-6, p. 87, l. 7-22, p. 88, l. 10-13, p. 107, l. 1-9, pp. 285-287.* Barnett testified that he reported the "dragging" threat to Martin, that immediate and appropriate action was taken, and that White twice apologized to him for the incident. *App., pp. 85-88.* Barnett also testified that he never reported White's use of the word "nigger," and that no management employees were present at the time. *App., p. 107, l. 9-25, p. 108, l. 1-25, p. 109, l. 1-25, p. 1-10, p. 118, l. 17-25, p. 119, l. 1-1-14.*

(6) According to Barnett, another co-worker, Marlon Tyler, called him a "power control monkey" on one occasion when they were discussing a "PCM" (which refers to a power control module). *App. 124, l. 10-21.* Barnett admitted that he never reported this remark to anyone at Bledsoe Dodge. *App., p. 124, l. 22-24.*

(7) In his deposition, Barnett testified that another co-worker, Mark Newman ("Newman"), stated to Martin on one occasion, in front of him and Jackson, "I'm not one of your niggers." *App., p. 92, l. 5-16, pp. 93-96, pp. 282-283.* Barnett further testified that Martin immediately went to Meador about this situation, although neither he nor Jackson had any knowledge regarding the action that was taken against Newman. *App., p. 92, l. 17-25, p. 93, l. 1-11, p. 127, l. 10-25, p. 128, l. 1-11, pp. 283-285.*

(8) Barnett also stated that another service technician named "Jeremy" called him "Kunta Kinte" on one occasion, while another unidentified employee named "Steve" called him a "runaway slave" on a single occasion. App., p. 131-133 Barnett alleged that he told Meador about these remarks, and that Meador responded that he would take care of it. Even if this occurred, which is denied,[19] there is no evidence that these incidents ever reoccurred.

(9) A co-worker told Jackson on one occasion that he used to be prejudiced against Blacks, but was no longer. *App., pp. 246-247.*

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[19] These alleged complaints were also omitted from the detailed notes Barnett kept of the alleged instances of discrimination against him.

(10) According to both Charging Parties, Morgan allegedly referred to Jackson as "spear chunker" on a number of occasions, and that he generally "picked on" Jackson (but not Barnett). *App., pp. 69-71, pp. 181-186, p. 193-195.* Barnett admitted that he never reported this conduct to anyone. *App., p. 71, l. 2-3.* Jackson testified that he reported this conduct to Bonakdar on one occasion during 1997, that Bonakdar stated that he would take care of it, and that Bonakdar addressed it with Morgan's supervisor, Meador, who then addressed it with Jackson. *App., pp. 186-188, p. 239.* Although Jackson alleged that the conduct continued, he admitted that he took no further steps to complain of the alleged behavior by Morgan. *App., pp. 190-191.* Jackson also speculated during his deposition that Morgan was fired for this conduct, and he stated that Morgan apologized to him at the time of Morgan's termination. *App., p. 177, l. 13-17, p. 178-180, p. 192.* This is the only allegation by the Charging Parties regarding racially insensitive remarks by a supervisory employee.

(11) Barnett and Jackson testified that, on one occasion, Moody pulled a mirror cover over his head and made a reference to "Undercover Brother."[20] *App., p. 126, pp. 256-257.* The evidence shows that the incident was reported to AutoNation's Human Resources Representative for the Dealership, and that the incident was properly investigated and dealt with. *App., pp. 126-127, pp. 258-261, pp. 327-336.*

(12) Both of the Charging Parties complained about racially derogatory graffiti on the walls of the men's restroom in the technician's area. *App., pp. 133-136, pp. 198-202.* They also testified, however, that this graffiti was removed from the walls once it was reported to management, and that a memo was posted in the restroom which stated that any employee caught defacing the restroom walls would be terminated.[21] *App., p. 198, l. 21-25, p. 201, l. 10-25, p. 202, l. 1-3, pp. 312-317.* According to Jackson, there has been no such graffiti on the men's room walls since this memo was posted in early 2000. *App., p. 200, l. 25, p. 201, l. 1-2.*

2. No Genuine Issue of Material Fact as to Racial Harassment Claim.

In cases where the harasser is a co-worker, as opposed to a supervisor, a plaintiff may establish a viable cause of action for hostile work environment harassment by establishing the following: (1) the employee belonged to a protected group; (2) the employee was subject to

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[20] Although both of the Charging Parties apparently read a lot into this incident, there is simply no evidence that it was racially motivated.

[21] Barnett also testified that his friend and fellow co-worker, Russ Wimberly, a white male, asked him on one occasion, " Don't brothers say 'what's up?,'" although he admitted he was not offended by this comment. *App., p. 122, l. 17-25, p. 123, l. 1, l. 14-20.*

unwelcome harassment; (3) the harassment complained of was based on membership in the protected group; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) the employer knew or should have know of the harassment and failed to take prompt remedial action. *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999).[22] Based on the foregoing evidence, and the applicable law, it is clear that Defendants are entitled to summary judgment because (1) this evidence does not amount to a severe and pervasive working environment which affected a term, condition or privilege of employment; (2) the Charging Parties failed to utilize the reasonable complaint procedures available to them to complain of discrimination, and the Dealership was unaware of most of the acts of discriminatory conduct alleged by the Charging Parties; and (3) when the Charging Parties did utilize Defendants' complaint procedures, the Dealership took all necessary action to prevent and eliminate any instances of harassment.

a. No Severe or Pervasive Discriminatory Behavior in the Workplace.

A hostile environment exists "when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment" and "alter the conditions of the [victim's] employment." *Harris v. Forklift Systems,*

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[22] In the case of supervisor harassment where there has been no tangible employment action, the employer may obtain summary judgment on the *Faragher/Ellerth* affirmative defense, by establishing (1) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The only evidence of supervisor harassment is the testimony of the Charging Parties that Morgan used the term "spearchunker" in reference to Jackson only. There is no evidence, however, that the use of this term was in any way related to any adverse action against Jackson. Therefore, Defendants are entitled to the application of the *Faragher/Ellerth* defense. The evidence which supports this defense is set forth in the next three sub-sections and is the same evidence which supports Defendants' defenses against a claim for co-worker harassment.

Inc., 510 U.S. 17, 21 (1993). In order to establish a hostile environment claim, a plaintiff must show that the working environment was objectively hostile or abusive -- *i.e.*, one which a reasonable person would perceive as hostile or abusive -- and that he or she subjectively perceived the environment to be hostile. *Id.* The conduct, *e.g.*, ethnic slurs, epithets, and derogatory remarks, must be sufficiently pervasive to permeate the work environment with discriminatory insult and ridicule. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 242-43 (5th Cir. 1993).

Even if the allegations made by the Charging Parties are true, they do not amount to the type of pervasive conduct sufficient to establish a claim of harassment based on race. For example, Barnett testified that, over the course of his 13 years of employment, there were four occasions on which Barnett heard the word "nigger" in the workplace, on three occasions from co-workers (Birney, Newman, and another employee named "David")[23] and on one occasion from an outside vendor (Payne), and that the slur was never directed at him or another employee. *App., p. 90, l. 8-25, p. 91, l. 1-1-25, p. 92, l. 1-25, p. 96, l. 16-18.* This is not the kind of severe or pervasive conduct contemplated by the courts as constituting a violation of Title VII. In fact, all of the comments and remarks alleged by the Charging Parties were nothing more than stray remarks, and isolated incidents, and there is no evidence that, over the course of the Charging Parties' employment, the workplace environment was permeated with discriminatory insult and ridicule.

b. The Charging Parties Failed to Properly Utilize Available Complaint Procedures.

In addition, in order to prevail on a claim for hostile work environment, Plaintiffs must show

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[23] Barnett testified that "David" used the term "nigger-rigged" on one occasion. *App., p. 91, l. 18-25, p. 92, l. 1-1-3.* There is no evidence, however, that Barnett ever complained about this incident or that management was privy to this comment.

"that complaints were lodged with higher management or that the harassment was so pervasive that the employer must have been aware of it" and failed to take any action to correct the situation. *Valdez v. Church's Fried Chicken*, 683 F.Supp. 596, 619 (W.D. Tex. 1988); *see also Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993).

The evidence shows that there were effective complaint procedures which the Charging Parties could have utilized to report any acts of discrimination or harassment, and they failed to do so. Prior to the purchase of the Dealership by AutoNation, Bledsoe Dodge had instituted policies and procedures, primarily contained within the Employee Handbook ("Handbook No. 1"), which included policies prohibiting discrimination and harassment. *App., pp. 374-381.* After the Dealership was acquired by a subsidiary of AutoNation, anti-discrimination policies and procedures developed by AutoNation, including a Compliance Program, an Alert-Line, and an Employee Handbook ("Handbook No. 2"), were implemented, and employees were required to attend annual anti-discrimination training, entitled "Do the Right Thing!" *App., pp. 382-409.* Information pertaining to the AlertLine, which allowed Defendants to make complaints through the use of a "1-800" number, was prominently posted in the workplace. *App., p. 398.*

Both of the Charging Parties testified that they received these documents and the "Do the Right Thing!" training, and the documentary evidence shows that they signed off for receipt of these policies, and that they attended the training (as did a number of the employees whom they have alleged made racially derogatory comments to them). *App., pp. 119, l. 20-25, pp. 249-254, pp. 274-276, pp. 410-421, pp. 431-439.* In addition, both of the Charging Parties testified that they were aware of the Alert-Line procedures which they could utilize to make a complaint of discrimination. *App.,p. 148, l. 11-25, p. 149, l. 1-25, p. 150, l. 1-23, p. 156, l. 23-25, p. 157, l. 1-7.* Barnett also

testified that, as a management employee, he had the responsibility to report incidents of discrimination which occurred in the workplace. *App., p. 120, l. 5-13, p. 121, l. 5-7.*

It is clear, however, that the Charging Parties failed to utilize and comply with these policies and procedures on a number of occasions. Both of the Charging Parties admitted in their depositions that they failed to comply with the Dealership's policies and procedures by failing to utilize the AlertLine to actually complain of discrimination. *App., p. 150, l. 24-25, p. 151, l. 1-3, p. 157, l. 8-25, p. 158, l. 1-9, pp. 276-280.* Barnett also testified that he never told management at Bledsoe Dodge about the majority of incidents about which he complained in his deposition.[24] *App., p. 78, l. 7-11, p. 80, l. 24-25, p. 81, l. 1-25, p. 82, l. 1-3, p. 111, l. 11-25, p. 124, l. 22-25, p. 125, l. 1-6.* Indeed, Barnett admitted that he failed to follow the Dealership's policies and procedures which required that he report incidents of discrimination. *App., p. 111, l. 4-7.*

In addition, other than the incidents which were specifically addressed by management, there is no evidence that the Charging Parties' supervisors knew about the conduct alleged by Barnett and Jackson. Therefore, Defendants were never given the opportunity to specifically address the alleged conduct and to insure that it did not occur again. In fact, neither the Charging Parties nor the EEOC gave Bledsoe Dodge an opportunity to address any of the incidents about which the Charging Parties complained in their deposition prior to filing Charges of Discrimination and filing a lawsuit against Defendants. This is surely not the role of the EEOC as envisioned by Title VII, the Supreme Court, and the Code of Federal Regulations.

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[24] Although Barnett gave a number of excuses during his deposition as to why he did not report several of the incidents of alleged racial remarks, there is no evidence that any adverse action was ever taken or would have ever been taken against Barnett for reporting incidents of discrimination. *App., pp. 112-116.* In fact, as discussed herein, the Dealerships policies required that he do so.

c. Appropriate Action Was Taken in Response to Every Complaint That Was Received by the Dealership.

Further, even if these incidents actually occurred,[25] which is denied, there is no evidence that Bledsoe Dodge failed to take appropriate action concerning any of the events for which this Defendant received notice. In fact, the evidence is clear that the Dealership responded promptly and appropriately to every complaint which it actually received from the Charging Parties, and to every incident about which it gained independent knowledge. For example, Barnett testified that Meador disciplined Birney, verbally and in writing, for his use of the term "nigger-rigged," and indeed, the documentary evidence supports the testimony. *App., p. 82, l. 4-25, p. 83, l. 1-11, p. 458-460.* Barnett testified that, not only was action taken in response to his complaint about James White, the technician who allegedly threatened to drag him with a chain, but that once Tater learned of this information when White was being considered for rehire, Tater informed Meador that White was not eligible for rehire, and White was not, in fact, rehired.[26] *App., p. 116, l. 10-25, p. 117, l. 1-25, pp. 336-337.*

C. No Genuine Issue of Material Fact to Support Plaintiff's Claim for Injunctive Relief.

In this lawsuit, Plaintiff is seeking injunctive relief against Defendants, asking the Court to enjoin Defendants from engaging in any employment practice which violates Title VII, and to order

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[25] The Charging Parties have nothing more than their own self-serving testimony to support their claims that these events actually occurred. For instance, not one of the witnesses who has been deposed in this case, including former employees who are no longer employed, and more specifically, one employee, Karey Martin, who was recently involuntarily terminated, have been able to corroborate the Charging Parties' claim that there was ever a "noose" which hung over in the work station of one employee in the Parts Department or that Morgan ever referred to Jackson as "spearchunker."

[26] It is clear from Barnett's testimony that his white co-worker, Russ Wimberly, insisted on an apology from White at the time of the incident, and instigated the conversation with Tater regarding his and Barnett's concerns about White's possible rehire. *See App., pp. 286-287.*

Defendants to institute and carry out policies, practices and programs which "eradicate the effects of its past and present unlawful employment practices." *Plaintiff's Amended Complaint, p. 3, Paragraph D.* To be entitled to injunctive relief, Plaintiff must show: (1) imminent harm; (2) irreparable injury; and (3) no adequate remedy at law. *Sampson v. Murray*, 415 U.S. 61, 88-89 (1974); *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). There is no evidence to support any of the elements necessary to establish a claim for injunctive relief. Not only have Defendants instituted the policies and procedures set forth in detail above, which are intended to eradicate and prevent any unlawful discrimination within the workplace, there is absolutely no evidence that there are any present unlawful practices within the Dealership. For example, Jackson testified during his deposition that a number of changes have been made in the workplace and that the Dealership now has a "zero tolerance" policy towards acts of discrimination. *App., p. 196, l. 3-19, p. 197, l. 6-25, p. 198, l. 1-25.* In addition, even if Defendants discriminated against the Charging Parties in failing to promote them to Assistant Parts Managers in July 1999, which is certainly denied, any such discrimination has been rectified by the promotion of these two to this position five months later.

D. No Evidence That Defendant AutoNation Ever Employed the Charging Parties.

Defendant AutoNation is not a proper Defendant to this lawsuit because this entity never employed the Charging Parties. There is no evidence that AutoNation and Bledsoe Dodge operate as a single integrated enterprise, or that AutoNation had any control over hiring, disciplining, promoting, demoting, or taking any other adverse action against the Charging Parties. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997). Therefore, the claims against this Defendant should be dismissed

VI.
CONCLUSION & PRAYER

Defendants would show that Plaintiffs have insufficient evidence to establish a *prima facie* case of discrimination under Title VII. In addition, even if Plaintiff can establish a *prima facie* case of discrimination, Defendant has demonstrated legitimate, non-discriminatory reasons for the failure to promote the Charging Parties, which Plaintiff cannot show is pretextual. In addition, there is no genuine issue as to Plaintiff's claim for hostile work environment race harassment, because the Charging Parties' evidence of alleged discrimination does not amount to a severe and pervasive working environment which affected a term, condition or privilege of employment. Further, the Charging Parties failed to properly utilize the reasonable complaint procedures available to them to complain of discrimination, but when they did, the Dealership took prompt remedial action to address each such complaint. Plaintiff also has no evidence to create a genuine issue of material fact as to the claim for injunctive relief. Finally, AutoNation is not a proper Defendant to this lawsuit, and the claims against this Defendant should be dismissed as a matter of law. Therefore, summary judgment on Plaintiff's claims in their entirety should be granted.

WHEREFORE, PREMISES CONSIDERED, Defendants ask the Court to grant Defendants' Motion for Summary Judgment and to enter judgment in favor of Defendants as a matter of law on Plaintiff's claims in their entirety. In the alternative, Defendants ask the Court to grant summary judgment as to Plaintiff's claims for injunctive relief, and as to Plaintiff's claims against Defendant AutoNation. Defendants pray for such other and further relief to which they may be justly entitled.

Respectfully submitted,

GIBSON, MCCLURE, WALLACE & DANIELS, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been mailed by certified mail, return receipt requested, to counsel for the Commission, Ronetta J. Francis, Nicholas Inzeo, Toby W. Costas, Suzanne M. Anderson, Dallas District Office, Equal Employment Opportunity Commission, 207 South Houston, 3rd Floor, Dallas, Texas 75202 on this 28th day of March, 2003.

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Connie K. Wilhite