ORIGINAL

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.	§	

BRIEF IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

GIBSON, MCCLURE, WALLACE & DANIELS, L.L.P.
Ruth Ann Daniels
State Bar No. 15109200
Connie K. Wilhite
State Bar No. 00792916

8080 N. Central Expressway
Suite 1300, LB 50
Dallas, Texas 75206-1838
TEL: (214) 891-8040
FAX: (214) 891-8010

COUNSEL FOR DEFENDANTS
BLEDSOE DODGE, L.L.C. and
AUTONATION, INC.

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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 Defendants' 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. In July 2003, the EEOC amended its Complaint to add a claim of retaliatory discharge and/or discriminatory discharge based on race.

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; and (3) discriminatory or retaliatory discharge, because the Commission has insufficient evidence to raise a genuine issue of material fact regarding these asserted causes of action. In addition, even if Plaintiff can establish a *prima facie* case of discrimination or retaliation under Title VII, Defendants have produced competent, admissible evidence of the legitimate, non-discriminatory reasons for the failure to promote the Charging Parties to the position of Assistant Parts Manager in July 1999, and for the termination of the Charging Parties in June 2003, which Plaintiff cannot show are pretextual.

II.
STATEMENT OF FACTS

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

The Charging Parties were long-term employees of Bledsoe Dodge in the Parts Department. Barnett and Jackson were never employed by Defendant AutoNation. Jackson became employed at the Dealership in September 1989, voluntarily resigned for a brief period of time in 1992, and was rehired four months later. *App., pp. 280-281, 440.* Barnett was hired in May 1988, and was rehired on November 13, 1989, after voluntarily resigning his employment for a short time. *App., pp. 12-16, p. 422.* During the course of their employment, the Charging Parties received periodic raises and advances in the department. *App., pp. 422-428 and 440-446.* In December 1999, both of the

Charging Parties were promoted to the position of Assistant Parts Manager, a position held by both these individuals until the Dealership closed in June 2003.[1]

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"), the previous owner, was assisting in the transition of the ownership of the Dealership. In October 1999, Sam Tater ("Tater") assumed the job of the Dealership's General Manager. On or about December 16, 1999, Tater terminated Morgan, primarily for the latter's failure to control inventory.[2] In February 2002, Meador retired from Bledsoe Dodge and Larry Moody ("Moody") replaced him as the Parts and Service Director.

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,

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[1] 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.*

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

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. 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] Wes Rogers ("Rogers") was hired to replace Martin as Parts Manager.

In June 2003, the Dealership was closed for financial reasons and the majority of employees were terminated because their positions were eliminated. The closing of the Dealership was overseen by Thomas ("Tom") Calloway ("Calloway"), the Director of Fixed Operation for AutoNation North Texas Management, L.P. ("North Texas"). Calloway was assisted in this process by Jose Colmenares ("Colmenares"), the Director of Human Resources for North Texas. In closing Bledsoe Dodge, North Texas offered several employees available positions at another AutoNation-affiliated dealership, Bankston Chrysler/Jeep ("Bankston"). Calloway made the decisions regarding which employees received offers for these positions. The contingency of employees who were offered positions at Bankston included only three employees from Bledsoe Dodge's Parts Department, only one of which held a sales position comparable to that of the Charging Parties. The decision to offer the only available sales position to Brian Mathis ("Mathis"), a white employee, was based on the fact that he had the highest level of sales productivity within the Parts Department over the year 2002. Neither of the Charging Parties were offered position at another dealership because there were no available positions at any other AutoNation-related dealership, and in fact, the position

[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.

of Assistant Parts Manager does not even exist at Bankston. The Charging Parties, like the other terminated employees whose positions were eliminated, received termination letters and severance packages.

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).

IV.
APPENDIX TO SUMMARY JUDGMENT MOTION AND BRIEF

Concurrently with this Brief, Defendant has filed an Appendix of summary judgment evidence in support of Defendants' Motion and Brief, which complies with Local Rule 56.6(b)(3). The Appendix is incorporated in and 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. The 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 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.

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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).

2. Plaintiff Is Unable to Establish a Prima Facie Case of Race Discrimination Under Title VII 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 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 applied for or were even qualified for the job of Assistant Parts Manager in July 1999.

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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.*

[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.

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 each 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 not only that the Charging Parties did **not** apply for the position, but 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 Martin's promotion (although he claimed that he 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

[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.*

Cir. 1988).

It is clear that the Charging Parties could not perform the duties of the Assistant Parts Manager in July 1999. *App., pp. 454-460, Paragraph 5.* In contrast to the Charging Parties, 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 at the time of their depositions, **three years later**, Barnett was able only to prepare the daily report, and Jackson was unable to prepare *any* reports needed to operate the Parts Department.[8] *App., pp. 454-459.* Several disciplinary issues, 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 was repeatedly counseled for tardiness even up until the time the Dealership was closed, and Morgan warned Barnett in writing in January 1997 that he needed to work on his attitude and his work hours in order to move up within the Dealership. *App., p. 429 & 447-450.*[9]

Although the Charging Parties both testified in their depositions that they were qualified for the position of Assistant Parts Manager, **each also testified that he was more qualified than the**

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[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., pp. 101-106.*

[9] 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.*

other for the position. *App., p. 68, l. 20-25, p. 69, l. 1, p. 207, l. 2-14.*[10] In addition, Jackson testified that he believed he should have been given the job of Assistant Parts Manager simply because he had been employed in the Department the longest. *App., p. 206, l. 23-25, p. 207, l. 1.* Jackson also admitted in his deposition, however, that he had no experience in managing other employees or in performing many 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 not based so much on their work performances and abilities. Rather, the decision stemmed from a desire by the Dealership to bring some unity and cohesiveness to the Parts Department, and to give the Charging Parties an opportunity to gain the skills and abilities to perform the position, particularly in light of the fact that Bledsoe Dodge was aware by that point that the Charging Parties felt they had been discriminated against when Martin was promoted. *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. Plaintiff simply cannot establish a *prima facie* case of race discrimination in the failure to promote the Charging Parties in July 1999.

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

Only if Plaintiff can establish a *prima facie* case of failure to promote, do Defendants have the burden of articulating a legitimate, non-discriminatory reason for the adverse action. *See Board*

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[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.*

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).

Because Bledsoe Dodge was a small, family-owned dealership, there was no formal promotion process in place until sometime after AutoNation's subsidiary bought the Dealership. In 1999, job openings within the Parts Department were not posted. *App., pp. 364-365.*[11] In fact, during the relevant time period, promotions were handled by the respective department managers utilizing the Dealership's Equal Employment Opportunity and other non-discrimination policies and procedures. The Dealership made every effort to hire and promote from within Bledsoe Dodge.

The decision to promote Martin to the position of Assistant Parts Manager in July 1999 was based on the fact that Morgan and Meador believed she 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.* 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

[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.* Beginning in the year 2000, the Dealership now posts job vacancies. *App., pp. 254-259.*

dealership, a fact which she relayed to her supervisors at Bledsoe Dodge. *App., pp. 451-453, pp. 454-460, Paragraph 5.*[12]

The evidence clearly shows that the decision to promote Martin to the position of Assistant Parts Manager in July 1999 was based on the fact that her supervisors believed her to have the superior knowledge and expertise needed for the position. *App., pp. 454-460, Paragraph 6.*[13] Therefore, Defendants have satisfied their burden of establishing the legitimate, non-discriminatory reason for Martin's promotion over the Charging Parties. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).[14]

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[12] The evidence presented by Defendants 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 when they questioned management concerning the reasons Martin was promoted to Assistant Parts Manager. *Defendants' MSJ 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, l. 4-24.*

[13] In his deposition in this case, Meador exhibited some confusion in response to Plaintiff's counsel's questions regarding his "input" into the decision to promote Martin. This does not negate the fact that Meador had knowledge of Martin's qualifications for the position in comparison to those of the Charging Parties during the relevant time period. In fact, Meador's affidavit testimony regarding Martin's qualifications, and her supervisors' knowledge and opinions regarding those qualifications (including the resume Martin submitted to her employer which indicated she had previously held the position of Assistant Parts Manager at another car dealership), is not contradicted in any way by his deposition testimony.

[14] 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. 14-17, l. 25, p. 339, l. 1-4,* All three of these individuals served as Assistant Managers for approximately seven (7) months. During this time period, it became apparent to Meador and Tater that the Parts Department needed a single manager to be in charge of and oversee the entire department and to insure that all of the necessary duties were being performed. *App., pp. 341-342, pp. 454-459, Para. 6.* Therefore, Meador recommended to Tater that the Dealership appoint a Parts Manager. 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 Are 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. "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 v. Univ. of Southern Miss.*, 164 F.3d 251, 256 (5th Cir. 1999), quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*).

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. Plaintiff has absolutely no evidence to controvert Defendants' evidence of the factors which were considered in Martin's promotion to Assistant Parts Manager in July 1999. *App., p. 34, l. 21-25, p. 35, l. 1-9.* Indeed, the only "evidence" that the failure to promote either of the Charging Parties 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.[15]

Further, the evidence shows that the Charging Parties never utilized any of the Dealership's

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[15] The Charging Parties' longevity with the Dealership, not their work performance or productivity, is also the sole basis for Plaintiff's claim that their termination of employment when the Dealership closed was retaliatory or discriminatory in nature. *See discussion infra.*

complaint policies and procedures to complain that the promotion of Martin to Assistant Parts Manager in July 1999 was discriminatory in nature. For example, Barnett testified during his deposition that he approached Meador following Martin's July 1999 promotion and asked his supervisor why Martin had been promoted to the position. When Meador told him that Martin was chosen because she was the best qualified employee for the position, Barnett testified that he responded, "Okay, thank you, sir," and promptly left Meador's office. *App., p. 41, l. 3-25.* The Charging Parties' collective and individual failure to utilize the Dealership's complaint procedures demonstrates that, not only were the reasons given Barnett and Jackson by their supervisors for the promotion of Martin over them not false, the Charging Parties did not even believe them to be false at the time.

a. Stray Remarks Are 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 v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996). 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 this did occur, was in any way related to the decision to promote Martin over Jackson.

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

The Charging Parties obviously disagree with the actions taken against them, and believe they were better suited for the position of Assistant Parts Manager in July 1999. The law is clear, however, 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). Even if the promotion of Martin to the position of Assistant Parts Manager was, in hindsight, unwise or a poor business decision, the reason for this decision were legitimate and business-related, and the Charging Parties have no evidence to show that Martin's promotion over them was motivated by a purpose prohibited by Title VII.

c. The Charging Parties' Self-Serving, Conclusory Testimony Is Insufficient to Establish Evidence of Discrimination.

The Charging Parties' disagreement with their supervisors' decision to promote Martin to the position of Assistant Parts Manager does not constitute evidence of discrimination. *See App., p. 43, l. 21-25.* A plaintiff's personal beliefs, no matter how genuinely held, are not evidence on which a verdict may rest because they do not raise a genuine issue of material fact. *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985)*; 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).

The Charging Parties' deposition testimony regarding their claims of discrimination is riddled with hearsay, opinions, and speculation. For example, the testimony of the Charging Parties regarding Martin's qualifications for the job are based on their own speculation regarding the tasks she was able to handle when she first became employed in the Parts Department. *See, e.g., App., pp. 218-222.* Not only was Jackson unable to present any evidence of a discriminatory motive, he testified that Martin was promoted 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 most outrageous and unbelievable testimony of the Charging Parties regarding their personal beliefs that they were discriminated against is the statement made by Barnett during his deposition 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.* The Charging Parties' conclusory allegations, unsubstantiated assertions, and subjective beliefs are wholly 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.

The Charging Parties have nothing more than their own self-serving, conclusory testimony and personal opinions to support the allegations of discrimination under Title VII. 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).

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, supra,* 82 F.3d at 658. 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 is the same actor who rehired both of the Charging Parties after they left the Dealership, and further, who secured raises and promotions for Barnett and Jackson over the course of their employment.[16] *App., pp. 8-17, 422-428 & 440-446.* Indeed, Barnett admitted during his deposition that his rehire, as well as his raises and advances within the Parts Department, were all due to Morgan.[17] *App., p. 31, l. 10-14.* 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

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

[17] 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; see also App., p. 12, l. 17-25, p. 13, l. 1-10.*

1999.[18]

e. Defendants' Evidence of Legitimate, Non-Discriminatory Reasons Is Overwhelming.

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

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[18] 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.*

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.*

Although both Charging Parties were employed for over 13 years at the Dealership, in their depositions, they were able to identify only the following incidents of alleged "racial harassment:"[19]

1. Charging Parties' Evidence of Discrimination.

(a) Barnett testified that a co-worker, Bobby Hanson ("Hanson"), referred to him as "Buckwheat" during 1993-1995, as did other unidentified employees, including one named "Phillip." *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.*[20] Barnett also testified that Mark Payne ("Payne"), an outside vendor with the

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[19] Although a number of these incidents are either time-barred or not sufficiently probative as to outweigh any prejudice created by the evidence, Defendants have addressed all of the incidents of alleged 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 their work environment. Defendants also note that they have summarized the deposition testimony of the Charging Parties regarding these incidents, a task made somewhat difficult by the fact that the Charging Parties often contradicted themselves regarding this evidence during the course of their depositions.

[20] As with so many of the acts of alleged discrimination, there is no indication that Barnett made any complaint regarding these comments, except to the EEOC some four to six years later. *App., p. 111, l. 4-7.* Further, Barnett testified in his deposition that his reference to "racial slurs" in his Charge of Discrimination referred **only** to his co-workers alleged use of the term "Buckwheat." *App., p. 62, l. 5-15,*

company of Payne & Sons, called him "Buckwheat" on two occasions. *App., pp. 52-57.* In addition, Barnett 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.*

(b) 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.*[21] 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.*

(c) 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, although Plaintiff has been unable to locate any other witnesses to this alleged situation. *App., pp. 45-49, p. 60, l. 1-21, pp. 228-238.* The Charging Parties testified that they complained about this situation to Morgan, and Jackson stated that Morgan addressed it with Gilbreath. *App., p. 235.*

(d) 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.*

(e) 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 vague remark to anyone at Bledsoe Dodge. *App., p. 124, l. 22-24.*

(f) In his deposition, Barnett testified that another co-worker, Mark Newman

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p. 65, l. 9-25, p. 66, l. 1-25, p. 67, l. 1-3.

[21] There appears to be confusion between 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, p. 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.*

("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 in response. *App., p. 92, l. 17-25, p. 93, l. 1-11, p. 127, l. 10-25, p. 128, l. 1-11, pp. 283-285.*

(g) Barnett stated in his deposition that a 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.*[22] Barnett alleged that he told Meador about these remarks, and that Meador responded that he would "take care of it."

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

(i) According to both Charging Parties, Morgan allegedly referred to Jackson as "spear chunker" on a number of occasions, and generally "picked on" Jackson. *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 Morgan's alleged conduct. *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 for his conduct at the time of Morgan's termination. *App., p. 177, l. 13-17, p. 178-180, p. 192.*

(j) Barnett and Jackson testified that, on one occasion in 2001, Moody pulled a mirror cover over his head and made a reference to "Undercover Brother."[23] *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.*

(k) Both of the Charging Parties complained in their depositions about alleged racially derogatory graffiti on the walls of the men's restroom in the technician's area at the

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[22] Barnett's alleged complaints regarding these events were conspicuously absent from the detailed notes Barnett testified he kept of the alleged instances of discrimination against him.

[23] Although both of the Charging Parties apparently read a lot into Moody's reference to the movie "Undercover Brother," there is simply no evidence that his comment was racially motivated.

Dealership. *App., pp. 133-136, pp. 198-202.* They also testified, however, that the graffiti was immediately removed 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 subject to termination.[24] *App., p. 198, l. 21-25, p. 201, l. 10-25, p. 202, l. 1-3, pp. 312-317.* According to Jackson, he never witnessed any further racially derogatory graffiti after the memo was posted in early 2000. *App., p. 200, l. 25, p. 201, l. 1-2.*

2. No Genuine Issue of Material Fact Exists Regarding Plaintiff's 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 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).[25] 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,

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[24] 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.*

[25] 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.

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. There Was 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, 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")[26] and on one occasion from an outside

[26] 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

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 isolated incidents, and there is no evidence that 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 "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

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that management was privy to or had knowledge about this comment.

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 all of these documents, as well as AutoNation's "Do the Right Thing!" training, and the documentary evidence shows that they signed off for receipt of these policies and attended the training.[27] *App., pp. 119, l. 20-25, see pp. 249-254, 274-276, 410-421 and 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.*

Despite these facts, however, the Charging Parties admitted that they failed to utilize these policies and procedures to complaint of discrimination or harassment. *App., p. 111, l. 4-7, p. 150, l. 24-25, p. 151, l. 1-3, p. 157, l. 8-25, p. 158, l. 1-9, pp. 276-280.* In addition, Barnett also admitted that he **never told management at Bledsoe Dodge** about the majority of incidents about which he later complained in his deposition.[28] *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.* Thus, other than the incidents which were specifically addressed by management, there is no evidence that the Charging Parties' supervisors knew about the conduct now alleged by them. Therefore, Defendants were never given the

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[27] This documentary evidence shows that a number of the employees whom the Charging Parties have alleged made racially derogatory comments to them also attended the training.

[28] 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.

opportunity to address the alleged conduct and to insure that it did not occur again.

c. Appropriate Action Was Taken by Defendants in Response to Each and Every Complaint Received by the Dealership.

Further, even if the incidents alleged by the Charging Parties actually occurred, which is denied,[29] there is no absolutely no evidence that Defendants failed to take appropriate action concerning any complaints from the Charging Parties or any inappropriate actions of which the Dealership learned. For example, Barnett testified that Meador disciplined Birney, both verbally and in writing, for his use of the term "nigger-rigged," and indeed, the documentary evidence supports this. *App., p. 82, l. 4-25, p. 83, l. 1-11, p. 458-460.* Barnett also 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 made sure that White was not rehired.[30] *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 Retaliatory or Discriminatory Termination of the Charging Parties.

1. Plaintiff's Burden.

Plaintiff argues that the decision to terminate the employment of the two Charging Parties,

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[29] 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."

[30] 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.*

with severance, when the Dealership closed, was discriminatory and/or retaliatory. Retaliation claims based on circumstantial or indirect evidence are analyzed using the *McDonnell Douglas* burden-shifting framework. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121-22 (5th Cir. 1998). A *prima facie* case of retaliation has three elements: (1) the employee engaged in a protected activity; (2) the employer subjected the employer to an adverse employment action; and (3) a causal nexus exists between the plaintiff's participation in the protected activity and the adverse employment action. *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999); *Douglas v. DynDermott Petroleum Operations Co.*, 144 F.3d 364 (5th Cir. 1998); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir.), *cert. denied*, 522 U.S. 932, 118 S.Ct. 336, 139 L.Ed.2d 260 (1997).[31]

Although both of the Charging Parties engaged in protected activity and both were subjected to an adverse employment action, *i.e.*, termination, there is absolutely no evidence, either direct or circumstantial, of a causal connection between any protected activity and Plaintiff's termination. In a retaliation case under Title VII, the ultimate determination is whether "but for" the protected conduct, the employer would not have engaged in the adverse employment action. *Douglas v. DynDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998). To defeat a motion for summary judgment, a Title VII plaintiff must show that there is a "conflict in substantial evidence" on this ultimate issue. *Rhodes, supra,* 75 F.3d at 993, quoting *Boeing Co. v. Shipman*, 411 F.2d 365,

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[31] The standard for establishing a *prima facie* case of discriminatory termination, and the applicable burden-shifting analysis, is essentially the same as that set forth under the previous section concerning Plaintiff's claim of failure to promote. Under this analysis, Defendants would show that Plaintiff cannot establish a *prima face* case of discriminatory termination, and even if it can, Defendants have met their burden in this section of the Motion of establishing the legitimate, non-discriminatory reasons for the Charging Parties' termination of employment.

375 (5th Cir. 1969) (*en banc*). Evidence is "substantial" if it is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Boeing Co.*, 411 F.2d at 374; *Long, supra*, 88 F.3d at 308. It is "incumbent upon the non-moving party to present evidence – not just conjecture and speculation – that the defendant retaliated" against the plaintiff in violation of Title VII. *Grimes v. Texas Dep't. of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1079 (5th Cir. 1994) (*en banc*).

Once a plaintiff has established a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the alleged retaliatory action. *Long v. Eastfield College*, 88 F.3d 300, 304-05 (5th Cir. 1996). If the defendant is able to establish a legitimate, non-discriminatory reason for the action, the plaintiff is given the opportunity to show that the defendant's reason is a pretext for unlawful retaliation. *Id.* The evidence which establishes Defendants' legitimate, non-discriminatory reason for the Charging Parties' terminations also destroys the third element of Plaintiff's *prima facie* case.

2. The Legitimate, Non-Retaliatory, Non-Discriminatory Reasons for the Termination of the Charging Parties.

The legitimate, non-discriminatory reason for the Charging Parties' respective terminations is the fact that the Bledsoe Dodge Dealership where both Charging Parties were employed permanently closed its doors and went out of business. Accordingly, Defendant Bledsoe Dodge no longer exists,[32] and the positions held by the Charging Parties, as well as all other employees of the

[32] Plaintiff certainly has no evidence, and presumably would not argue, that the fact of the demise of the Dealership was in any way related to a desire on the part of Defendants to retaliate against the Charging Parties.

Dealership, were eliminated. In an effort to terminate as few employees as possible, North Texas offered to Bledsoe Dodge employees open, available positions at other AutoNation-affiliated dealerships, primarily Bankston. Plaintiff argues that, based solely on their seniority, the Charging Parties should have remained employed in some capacity at some other Dealership over any other employees in the Parts Department, including Mathis, the one parts sales employee who was transferred to the other dealership and who happened to be white. It is clear, however, that, in making the decision to transfer this one employee, the criteria utilized by the decision-maker, Calloway, was not seniority, but **productivity.**

In his deposition, Calloway testified that when the Dealership was closing, there were only three available slots in all of the AutoNation Dodge stores in the North Texas district, and that all three slots were at Bankston.[33] *App., p. 492, l. 15-25, p. 493, l. 1-7, p. 496, l. 22-25, p. 500, l. 3-10.* Calloway also testified that, in considering the location where to transfer any existing employees at the Dealership, Defendants considered only other Dodge dealerships, because Dodge was the area of knowledge and expertise (Dodge inventory, Dodge parts, etc.) shared by all such employees.[34] *App., p. 493, l. 11-25, p. 494, l. 1-19.* Calloway explained that only one of these transfers concerned a counter or sales position – the position held by Mathis at the Dealership, and that involved duties which were also performed by the Charging Parties, *i.e.*, both Charging Parties worked the Parts Department sales counter at the Dealership. Therefore, there was only one available sales position,

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[33] Calloway testified that Bankston was adding a Dodge franchise at the time of and as a result of the closing of Bledsoe Dodge. *See App., p. 493, l. 3-10.*

[34] Calloway also stated that his decision to limit transfers to only available slots at other Dodge dealerships was influenced in part by the limited time period for implementing the closure of the Dealershi and the transfer or termination of the employees. *See App., p. 494, l. 13-19.*

and **no Assistant Parts Manager positions available**.[35] Therefore, the fact that the Charging Parties were both employed as Assistant Parts Managers did not factor into the decision as to which employee should be transferred to the sales position at Bankston. *App., p. 513, l. 18-25, p. 514, l. 1-25, p. 85, l. 1-12.*

Calloway testified that he made the decision to transfer Rogers,[36] Mathis ("Mathis") and David Gentry ("Gentry"), all three white, to the available positions at Bankston, although he discussed this decision with Colmenares, who approved the decision. *App., p. 495, l. 1-13.*[37] Rogers took over the position of Parts Manager for the new Dodge store, while Gentry was transferred to the one available spot for a parts stocker.[38] *App., p. 500, l. 3-15.* These were the only other two available job openings at Bankston in the Parts Department. *App., p. 492, l. 15-25, p. 493, l. 1-7, p. 498, l. 23-35, p. 500, l. 3-17.*

Further, Calloway testified very clearly regarding the basis for his decision to transfer Mathis to the one available sales opening. *See App., pp. 498-504.* Calloway stated that he considered only two factors in making the decision to transfer employees to Bankston: (1) the number of positions

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[35] In fact, Calloway testified that the Bankston Parts Department does not have the sales volume to warrant the position of Assistant Parts Manager position. *App., p. 512, l. 17-25, p. 83, l. 1-13.* In addition, there were no open positions for Assistant Parts Manager for any AutoNation dealership in Texas' North District at the time the Dealership was closed. *App., p. 513, l. 14-17.* Title VII does not require Defendants to create a position, or, in this case, two positions, which does not exist in order to insure that the Charging Parties maintain employment.

[36] In fact, Rogers was already working part-time as Parts Manager for Bankston's new Dodge division, and to assist in the implementation of the new division, prior to the closing of Bledsoe Dodge. *See App., pp. 559-562.*

[37] Plaintiff acknowledged Calloway's role as the decision-maker in answer to Interrogatory No. 3 of Defendant's Third Set of Interrogatories. *See App., pp. 526-527.*

[38] These were the positions held by Rogers and Gentry, respectively, at Bledsoe Dodge.

available; and (2) the comparative sales performances of the employees who were available to fill the positions, *i.e.*, those who held the same position at Bledsoe Dodge. *App., p. 498, l. 9-22.* In making the decision, Calloway considered the sales totals of all of the parts sales/counter people for the past twelve (12) months, *i.e.*, June 2002 to June 2003. *App., p. 501, l. 18-22, p. 502, l. 1-15, pp. 461-470.* During this time period, Mathis was the top sales performer in the Parts Department. *App., p. 502, l. 12-15; pp. 461-470.* Based on this reasonable and objective criteria, Mathis was the lone Parts Department sales person transferred to Bankston.[39]

As its sole basis for the claim that the termination of the Charging Parties in lieu of transfer was discriminatory or retaliatory, Plaintiff argues that Barnett and Jackson had the most seniority in the Parts Department. *See App., p. 526-527, Plaintiff's Answer to Interrogatory No. 3 of Defendant's Third Set of Interrogatories.* Plaintiff also argues that, in making the decision regarding which employees to transfer to Bankston, Calloway did not consider the fact that the Charging Parties were Assistant Parts Managers. *Id.* Finally, Plaintiff complains that Lonnie Wade was not actually terminated, although the EEOC has no evidence that Wade was offered a position at another AutoNation dealership. *Id.*[40]

AutoNation is not required to utilize the criteria for transferring employees which Plaintiff deems most advantageous to the parties it represents, even if the EEOC has a pending lawsuit against

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[39] The other two employees who were not transferred, Lonnie Wade and Brian Jensen, are both Caucasian. *App., p. 497, l. 22-25, p. 498, l. 1-4, p. 499, l. 1-20.*

[40] Plaintiff also argues that the Charging Parties were assured by Rogers that they had "nothing to worry about" as far as a transfer to another AutoNation dealership was concerned. *See App., pp. 524-525, Plaintiff's Answer to Interrogatory No. 2 of Defendant's Third Set of Interrogatories.* Although there is no evidence that Rogers was responsible for making the decision to transfer employees to other dealerships, it is clear that his assurances to the Charging Parties, if true, are not evidence of retaliation or discrimination, but rather, just the opposite.

Defendants. Rather, AutoNation is a business with the autonomy to make decisions it deems most appropriate to the conduct of its business, as long as those decisions are not based on unlawful discriminatory motives. As discussed above, it is well established law in the Fifth Circuit that the courts are not in the business of second-guessing employer's decisions regarding how best to conduct their affairs. *See EEOC v. Louisiana Office of Community Servs.*, 47 F.3d at 1448. In fact, 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); *see also EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1329 (5th Cir. 1991) (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).

Calloway testified that, in making the decision to transfer Dealership employees to Bankston, he did not consider, and had no knowledge of, the seniority or tenure of the employees in the Parts Department. *App., p. 499, l. 21-25, p. 500, l. 1-2.* This was simply not the basis for the decision to transfer employees from the Dealership to the limited number of openings at Bankston. There is absolutely no evidence that Defendants' decision to utilize productivity, rather than seniority, as the criteria for offering available positions at other dealerships to Bledsoe Dodge employees, was in any way discriminatory or retaliatory. There is also no requirement that Defendants consider the Charging Parties' experience as Assistant Parts Manager in making the transfer decision, particularly when there is no indication that there was an opening for any such position. Finally, although Rogers testified that he would have liked to have taken Wade with him to Bankston,[41] there is no evidence

[41] Even if he had been transferred based on Rogers' desires, the evidence shows that Wade's productivity was better than that of both Charging Parties in the twelve months preceding the closure of

that he was ever offered a position there. In fact, Calloway testified that the reason Wade was not terminated was because the Dealership was aware that he intended to take a position with a competitor. *App., p. 495, l. 14-22, p. 500, l. 18-25, p. 501, l. 1-17.* Therefore, knowing that Wade intended to resign, AutoNation was able to avoid offering him the two weeks severance which was actually paid to the two Charging Parties and all other terminated employees. *App., p. 500, l. 22-25, p. 501, l. 1-3, pp. 461-464.*

Defendants' clear and undisputed evidence establishes the basis for the transfer of Mathis over the other four sales/counter employees in the Parts Department, including the two Charging Parties, to the lone sales/counter position at Bankston.[42] The reasons for this decision are legitimate, non-discriminatory, and non-retaliatory, and Plaintiff has absolutely no evidence, direct or circumstantial, to show that Defendants' stated reasons are false or pretextual.

D. 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 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

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the Dealership. *App., p. 502, l. 3-15, pp. 461-470.*

[42] *See also App., pp. 534-573.*

of the elements necessary to establish a claim for injunctive relief,[43] particularly since the Dealership is no longer in existence, the Charging Parties' positions no longer exist, and the evidence shows that there are no comparable positions in which to place them.

E. 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. *See App., p. 471.* 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, terminating, 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. Further, Plaintiffs' claims for injunctive relief should be denied as moot. 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'

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[43] Even prior to his termination, Jackson testified in his deposition that a number of changes have been made in the workplace, and further, that the Dealership had established a "zero tolerance" policy regarding acts of discrimination. *App., p. 196, l. 3-19, p. 197, l. 6-25, p. 198, l. 1-25.*

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.

By: _____

Ruth Ann Daniels
State Bar No. 15109200
Connie K. Wilhite
State Bar No. 00792916

8080 N. Central Expressway
Suite 1300, LB 50
Dallas, Texas 75206-1838
TEL: (214) 891-8040
FAX: (214) 891-8010

COUNSEL FOR DEFENDANTS
BLEDSOE DODGE, L.L.C. and
AUTONATION, INC.

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 19th day of September, 2003.

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Connie K. Wilhite