ORIGINAL

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Plaintiff,	**CIVIL ACTION NO.**
v.	
BLEDSOE DODGE, LLC., and AUTONATION, INC.,	**3:02-CV-1373-G**
Defendants.	

PLAINTIFF'S BRIEF IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

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Dated, this the 9th day of October, 2003.

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PLAINTIFF'S BRIEF IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Equal Employment Opportunity Commission ("EEOC" or "the Commission") and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56, files this Brief in Support of its Response in Opposition to Defendants' Second Motion for Summary Judgment. Defendant has failed to meet its summary judgment burden on the issues of hostile work environment, disparate treatment and joint employer liability. EEOC asserts that summary judgment is inappropriate because sworn testimonial and documentary evidence show that there are genuine issues of material fact on these issues.

STATEMENT OF FACTS

EEOC objects to Defendant's "statement of facts." The majority of Defendants' "facts" do not refer the Court to a specific citation of its voluminous Appendix; thereby forcing the Court and the EEOC to glean through more than 570 pages to ascertain, which, if any of Defendants' "facts" can be supported by the record, and which statements are wholly without evidentiary support and are comprised of argumentative conjecture.[1] Further, EEOC offers the following material facts which preclude the granting of Defendant's Motion for Summary Judgment:

1. Charging Party Anthony Barnett testified that during his employment with the Defendant, his co-workers called him "Buckwheat." Buckwheat was a character on the 1950's television show: "The Little Rascals," who has often been used as a stereotype of a frightened Black man. (App. 7-8).

2. Mr. Barnett testified that he was called "Buckwheat" on a regular basis, beginning in 1994 through the date his charge of discrimination was filed with the EEOC. (App. 7-8).

3. Mr. Barnett testified specifically that Mark Payne called him "Buckwheat" during 1999. Barnett recalls specifically that Payne called him "Buckwheat" at least twice in early 1999. (App. 10-11).

4. Mr. Barnett's co-worker Bobby Hanson continued to call Barnett "Buckwheat"

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[1]In reviewing the Defendants' summary judgment evidence, "the Court has no duty to search the record for triable issues; rather, it need rely only on those portions of the submitted documents to which the nonmoving party directs its attention." *EEOC v. Café Acapulco, Inc.*, 2000 WL 306054 (N.D. Tex. March 23, 2000) (*citing Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 403 (6th Cir.1992)).

throughout his employment at the dealership. Hanson would come up to Barnett, squeeze his arm and say: "Come here Buckwheat, come here." (App. 12).

5. Charging Party Barron Jackson testified that he was called a "spear chunker" by Parts Manager Mark Morgan in the Bledsoe Dodge workplace. (App. 27-28). Jackson also testified that Morgan told him on several occasions: "You'll never be nothing." Barnett testified that he heard Morgan call Jackson "spear chunker" on several occasions. Barnett testified that it was said in front of several other employees, including Anthony Stone and John Moon. (App. 14).

6. Mr. Jackson complained about being called "spear chunker" to the General Manager Mehdi Bonakdar and to Bledsoe Dodge's former owner/General Manager, Matt Bledsoe. (App. at 198-199).

7. During Barnett's employment at the dealership, Payne also used the term "nigger" in front of Barnett. Barnett specifically recalls that Mark Payne was in the parts department one work day, and he pointed at Barnett and said: "I'm a nigger. Do you know the difference between me and you? I'm a nigger and you ain't." Mr. Barnett testified that this comment was made in 1999. (App. 15).

8. Mr. Barnett complained to General Manager Mehdi Bonakdar about Payne's use of the word "nigger." However, General Manager Bonakdar took no remedial action in response to his complaint. (App. 15).

9. Mr. Jackson also testified that Mark Payne called Jackson a "nigger." Jackson believes these slurs were made by Payne in 1996. (App. 30-31).

10. Even more recently during his employment, Barnett's co-workers continued to use the term "nigger." On one occasion after July 1999, Barnett's co-workers Tim McCloud and Cameron Burnie were talking about a clock on the wall that was broken. Cameron fixed it and said: "I just nigger-rigged the motherfucker." (App. 16).

11. Barnett testified that he complained to his department manager, Karey Martin, and Parts and Service Director Joe Meador about Cameron's statement. Martin took no remedial action in response to Barnett's complaint. (App. 16).

12. In approximately March 2000, Mark Newman used the term "nigger" in the presence of Barnett. Karey Martin, the department manager for both the Charging Parties and Newman, instructed Newman to return to work. Newman responded: "Karey, look, I ain't one of your niggers." Barnett testified that Newman repeated this phrase twice. (App. 19).

13. Barnett testified that in February 2000, mechanic Marion Tyler called him a "power control monkey." Barnett testified that they were looking at the power control modules when Tyler said: "That's just like you. You are just like a power control monkey." (App. 21).

14. Barnett testified that in September 2000, a newly hired mechanic named Jeremy called him "Kunta Kinte" (from Alex Haley's book "Roots"). Another mechanic whose name Barnett cannot remember called Barnett a "runaway slave." (App. 22a, 22b, 23).

15. Jackson also testified that Mark Payne called his co-worker Anthony Stone a "boy" and a "gorilla." (App. 33).

16. The Bledsoe Dodge workplace environment also had racial symbols in places where they were seen by the Charging Parties. Barnett testified that there was a hangman's

noose hanging over a light fixture in the parts department where Barnett and Jackson worked. Barnett and Jackson testified that the noose was hung by Billy Gilbreath, an Assistant Parts Manager. (App. 8-9).

17. Both Barnett and Jackson testified that they complained to Parts Manager Mark Morgan about the noose. The noose remained hanging in the parts department for 6 or 7 months. (App. 8, 9, 38-39).

18. In September 2000, graffiti was found on the men's bathroom wall. The graffiti included the following slurs: "nigger," "White power," and"Niggers are dumb and stupid." (App. 23).

19. Jackson testified that he also saw the graffiti in the men's bathroom, including the terms: "White power" and "I hate niggers." Jackson also testified that he saw the confederate flag on the bathroom wall. (App. 29).

20. Barnett also testified that he was threatened by a White employee in February 2000. James White, a mechanic for Bledsoe Dodge, told Barnett that he would go get a chain out of his truck and "drag his ass" down Northwest Highway. In June 1998, an African-American man, Thomas Byrd, was murdered in Jasper, Texas, when he was chained and dragged behind a truck by a White supremacist. (App. 17-18).

21. Barnett testified that he complained about this threat to his department manager Karey Martin. (App. 13).

22. In June 2002, Parts and Service Director Larry Moody put a white bag or cloth over his head, popped up from under the counter and said to Barnett: "What's up undercover

brother?" Barnett said that the white cloth looked like a hood worn by the KKK. (App. 22).

23. Anthony Barnett was hired by Defendants in May 1989 as a Parts Driver. In September 1990, Barnett was given a salary increase and was promoted to Stock Control and Delivery Manager. In 1992, Barnett received a pay increase with a performance evaluation indicating that his "attitude and attendance [are] excellent." From 1991 to 1993, Barnett occupied the position of Warranty Clerk. As part of the promotion, Barnett received a salary increase with the following work assessment: "Does really good work – very dependable and trustworthy. Applies himself." (App. 115-116, 136-138; Defendants' App. 422-428).

24. In 1993, Barnett was again promoted, this time to the position of Parts Advisor/Sales. In this position, Barnett was responsible for maintaining the retail and wholesale part counters and, in this job, he contributed to the increase in sales for the department. As such, his pay was changed from hourly to salary, including commission, and he received another pay increase with the following evaluation: "Really deserves it [$200 salary raise per month][.] [D]oes a great job with warranty and counter. Also Dailys, stock orders and everything." (Defendants' App. 426).

25. In November 1997, Barnett received another salary raise with the praise that he "has always done a very good job." (Defendants' App. 427).

26. In 1999, when the position of Assistant Parts Manager became available, Barnett expressed interest in being considered for the position. He was never contacted for an interview or asked to submit a written application. Instead, Barnett learned that Counter Person Karey Martin (White female) had been selected for the position. (App. 3-6, 20).

27. Barron Jackson was hired by Defendants in March 1989 as a Parts Counterman. In January 1990, Barron was awarded a pay increase and in April 1990, he received a performance evaluation with an Average-Good rating. In August 1991, Jackson was promoted to the position of Counterman and Warranty Control and received a pay increase as part of this promotion. Thereafter, he received several pay increases and was later promoted to the position of Wholesale Manager. (App. 36, 124-125, 151-154; Defendants' App. 440-446).

28. In 1999, when the position of Assistant Parts Manager became available, Jackson expressed interest in being considered for the position. He was never contacted for an interview or asked to submit a written application. Instead, Jackson was informed that the position had been filled by Parts Counter Person Karey Martin. (App. 30, 34-35).

29. When Barnett and Jackson filed their Charges of Discrimination with the Equal Employment Opportunity Commission, against both Bledsoe Dodge and AutoNation, Inc., complaining of the hostile work environment and the failure to promote, it was AutoNation, Inc. that responded to those Charges. (App. 115-130).

30. All actions pertaining to the personnel management of the employees at the Bledsoe Dodge dealership, ranging from hiring new employees, the mechanisms through which employees request vacation time to institution of corrective action, are conducted pursuant to the guidelines established by AutoNation, Inc. (App. 132, 134; Defendants' App. 430).

31. Bledsoe Dodge employees are compensated through negotiable instruments, which indicate that both Bledsoe Dodge and AutoNation, Inc. are the makers of the check. (App. 135).

32. AutoNation, Inc. provides human resources management to the Bledsoe Dodge dealership through Leslie Lee, its District HR Manager for Northern Texas. (App. 100).

33. Leslie Lee has human resources responsibilities for the Bledsoe Dodge dealership and approximately ten other AutoNation, Inc. dealerships within the Northen Texas district. (App. 101).

34. All 1300 employees within Leslie Lee's district are employees of AutoNation, Inc. (App. 103).

35. Leslie Lee trains each of the employees and managers within her district on AutoNation, Inc.'s policies and procedures that they are expected to follow, and explains the benefits that AutoNation, Inc. provides. (App. 102, 133).

36. Each employee is provided a copy of AutoNation, Inc.'s Associate Handbook and are required to sign an acknowledgment upon receipt. (App. 106, 107; Defendants' App. 417, 434).

37. On June 23, 2003, Defendants announced their decision to close the Bledsoe Dodge dealership and to relocate it operations to Bankston Chrysler-Jeep, another AutoNation, Inc. dealership, located in Frisco, Texas. (Defendants' App. at 463, 464).

38. As of June 23, 2003, the Parts Department at Bledsoe Dodge consisted of the following personnel: Wes Rogers (Parts Manager); Anthony Barnett (Assistant Parts Manager/Parts Sales); Barron Jackson (Assistant Parts Manager/Parts Sales); Brian Mathis (Parts Sales); Lonnie Wade (Parts Sales); David Gentry (Shipping and Receiving Clerk/Stocker); and Brian Jensen (Floater). (App. at 216-217).

39. Mr. Barnett and Mr. Jackson were the only African-American employees in the Parts Department at Bledsoe Dodge, and the only Parts Department employees who had ever filed Charges of Discrimination against either Bledsoe Dodge or AutoNation, Inc. (App. at 160-171).

40. On June 23, 2003, Tom Calloway, AutoNation, Inc. North Texas District Fixed Operations Director, Jose Colmenares, AutoNation, Inc. North Texas District Human Resource Director, and Wes Rogers, Bledsoe Dodge Parts Manager terminated the employment of both Anthony Barnett and Barron Jackson. (App. at 210-212; App. at 174, 177-178, 186-188).

41. On June 23, 2003, Defendants transferred Wes Rogers, Brian Mathis and David Gentry, all-Caucasian, to its new operations at the Bankston Chrysler Jeep dealership. (App. at 177).[2]

SUMMARY JUDGMENT IS NOT PROPER IN THIS CASE

Although summary judgment is a proper mechanism for resolving many forms of litigation, it is particularly ill-suited to discrimination cases which require a determination of intent and often require credibility determinations by a trier of fact following a full trial and the observation of witnesses and their demeanor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, (1986):

> "[Rule 56, F.R.C.P.] by no means authorizes a trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when] ruling on a motion for summary judgment. . .The evidence of the nonmovant is to be believed, and all justifiable

[2]Lonnie Wade declined Defendants' offer to transfer to the new dealership; he had already secured alternate employment. (App. at 214-15).

> inferences are to be drawn in his favor. (Citations omitted). Nor do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial. . ." (Internal citations omitted).

These statements have special force with regard to summary judgment motions in employment discrimination cases. "[B]ecause employment discrimination claims generally turn on questions of motivation and intent, summary judgment is rarely appropriate. [Citation omitted]. 'Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder.' " *EEOC v. General Elec. Co.*, 773 F. Supp. 1470, 1471 (D. An.1991).

Summary judgment is only appropriate when no issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Allstate Ins. Co. v. Brown*, 920 F. 2d 664 (10th Cir. 1990). The Court should view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F. 3d 664, 670 (10th Cir. 1998). The burden is on the Defendants to prove there are no controverted facts. *Id.* at 670. "Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." *Reeves v. Sanderson Plumbing,* 120 S.Ct. 2097, 2110 (2000)(citations omitted). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* Pursuant to this very appropriate standard, Defendants are not entitled to summary judgment on the EEOC's claims, and the motion should be denied.

Under Fed. R. Civ. P. 56, summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "A fact is 'material' if its resolution in favor of one party might affect the outcome of the suit under governing law." *Richards v. Seariver Maritime Fin. Holdings, Inc.*, 59 F. Supp.2d 616, 622 (S.D. Tex. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a finder of fact could return a verdict for the non-moving party. *See Anderson* , 477 U.S. at 248. A party seeking summary judgment always bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Thereafter, the nonmovant must come forward with evidence that would be admissible at trial showing a genuine issue of specific facts. *See Anderson*, 477 U.S. at 255; *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In reviewing a motion for summary judgment, the court must draw all inferences most favorable to the party opposing the motion. *See Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993).

The Commission asserts that the following are genuine issues of material facts; such that the resolution of any one of them in favor of either the Commission or the Defendant might affect the outcome of this litigation:

- whether Defendants subjected Anthony Barnett and Barron Jackson to a hostile work environment based upon their race, African-American;

- whether Anthony Barnett and Barron Jackson being subjected to co-workers and others use of such slurs as "nigger," "nigger-rigging," "Buckwheat," "Kunte Kinte," "power control monkey," the display of a noose, racially offensive graffiti in the restroom, one manager's frequent and repeated use of the term "spear chunker", and another manager's placing a white pointed hood over his head, while making a racially offensive statement was sufficiently severe or pervasive to alter the terms and conditions of their employment;
- whether Defendants conducted prompt and thorough investigations in response to Anthony Barnett and Barron Jackson's numerous complaints of racial harassment;
- whether Anthony Barnett and Barron Jackson were qualified for the position of Assistant Parts Manager in July 1999;
- whether Defendants' stated reason for selecting Karey Martin for the Assistant Parts Manager position in July 1999 is pretext for discrimination;
- whether Defendants unlawfully terminated the employment of Anthony Barnett and Barron Jackson because of their race, African-American;
- whether Defendants unlawfully terminated the employment of Anthony Barnett and Barron Jackson in retaliation for their engaging in activity protected under Title VII; and
- whether Defendants operate as a joint employer or integrated enterprise.

The above factual issues are material because the resolution of any one of them in favor

of either the Commission or the Defendants might affect the outcome of this litigation. Summary judgment can only be proper if there is no genuine issue as to any of the above material facts and if the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. The EEOC contends that it has presented sufficient evidence such that a trier of fact could return a verdict in its favor on each of the above material facts. Drawing all inferences in favor of the EEOC as the party opposing the motion for summary judgment, the presence of these genuine issues of material facts dictate that summary judgment is not appropriate in this case and that Defendants are not entitled to judgment as a matter of law. Accordingly, the EEOC respectfully requests this Court deny Defendants' motion for summary judgment.

ARGUMENT

I.

DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF HOSTILE WORK ENVIRONMENT

The Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII"), provides that it is unlawful for an employer to discriminate against an individual because of his race. Race discrimination means taking an employment action against a person because of his ancestry or ethnic characteristics, such as the shade of his skin color or on physical characteristics associated with a particular race. *Walker v. Secretary of Treasury, IRS*, 713 F. Supp. 403 (N.D. GA. 1989).

To be actionable under Title VII, harassment must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1049, n. 9 (5th Cir. 1996) In *Wallace*, the court assumed

arguendo that if there was specific evidence of "routinely [made] racist remarks," then a fact issue had been raised to prevent summary judgment. *Id.* at 1049.

An objectionable environment shall be both objectively and subjectively offensive. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The environment must be such that a reasonable person would find the environment hostile or abusive. *Id.* at 784. Whether an environment is hostile or abusive must be determined by looking at the "totality of the circumstances." *Id; see also, Harris v. Forklift Sys.*, 510 U.S. 17 (1993).

In determining whether a working environment is hostile or abusive, all circumstances must be considered, 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." *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871, 874 (5th Cir. 1999) The court should consider the cumulative effect of the harassment rather than carving the work environment into a series of discrete incidents. *Burns v. McGregor Elec. Indus. Inc.*, 955 F.2d 559, 564 (8th Cir. 1992)

In this case, taking in account the "totality of circumstances," the evidence shows that Barron Jackson and Anthony Barnett were subjected to unwelcome comments and conduct because of their race (African American). Specifically, the undisputed statement of facts above shows that they were personally called offensive names, including Buckwheat, (App. 7), nigger (App. 31, 32), spear chunker (App. 27, 28), Kunta Kinte (App. 22a, 22b, 23) and monkey (App. 21). Barnett and Jackson also were surrounded with a work environment where co-workers freely used the racial slur "nigger" and casually called another Black co-worker "boy" and a

"gorilla." (App. 16, 19, 33). Barnett and Jackson were also subjected to a workplace permeated by racial graffiti and a hangman's noose in their work area in the parts department. (App. 8, 9, 37). Even more significant is the fact that Barnett was directly threatened by a White co-worker, who threatened to get a chain and drag Barnett from the back of his pick-up truck. This threatened action, similar to the June 1998 murder of African American Thomas Byrd in Jasper certainly rises to the level of "severe" conduct, sufficient to defeat the Defendant's Motion for Summary Judgment.[3]

"[I]t is `quintessentially a question of fact' whether [the] harassment was severe or persuasive. *Beardsley v. Webb*, 30 F.3d 524, 430 (4th Cir.1994)." *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 949 F. Supp. 792, 799 (D. Kan.1996). *Ellison v. Brady*, 925 F.2d 872, 878 (9th Cir.1991) ("we believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim.").

In the Defendant's Brief in Support of its Motion for Summary Judgment, Defendants argue that Barnett and Jackson were not subjected to a hostile work environment because they were subjected some of the offensive comments and conduct early in their work for Bledsoe Dodge. However, for a working environment to be deemed sufficiently hostile, all of the circumstances must be taken into consideration; even discriminatory incidents occurring outside of the filing period may be relevant background information to current discriminatory acts. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977);

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[3]Courts have found that a single isolated incident -- while perhaps not pervasive -- may nevertheless be so severe as to amount to an actionable violation of Title VII." *Campbell v. Kansas State Univ.*, 780 F. Supp. 755 (D. Kan. 1991).

Rutherford v. Harris Co., 197 F.3d 173 (5th Cir.1999); *Hebert v. Monsanto Co.*, 682 F.2d 1111 (5th Cir.1982); *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir.1999). To underscore this point, the Supreme Court explained in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002), that a hostile work environment claim is still a single "unlawful employment practice" even though it is actually comprised of a series of separate, sometimes isolated acts. Therefore, as long as any act that is a part of the hostile work environment claim is timely, the trier of fact may consider all acts that occurred during the entire time period of the hostile environment. *Id.*

In its motion for summary judgment, the Defendant seeks to avoid liability for the hostile work environment at its Bledsoe Dodge facility under the affirmative defense established by *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct.2257 (1998). *Faragher* and *Ellerth* are important in the analysis of this case because some of the racially hostile conduct was actually done by supervisors, such as Parts Manager Mark Morgan, Assistant Parts Manager Billy Gilbreath and Parts and Service Director Larry Moody. In *Faragher,* the Court held "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 2293. In the present case, the acts of the supervisors resulted in the tangible employment action of the company's failure to promote Barnett and Jackson. Therefore, with respect to the acts of these supervisors, the *Faragher* and *Ellerth* affirmative defense is not available, and EEOC would seek to hold the Defendant vicariously liable for the harassment that resulted in the company's failure to promote Barnett and Jackson.

If this Court finds that the Defendants' action did not result in a tangible employment action, then the Defendants have the burden to prove the two-part affirmative defense under *Faragher* and *Ellerth.* The defense must show: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) that the plaintiff employee failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Writing further, the Court held that "while proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law," the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

In this case, the Defendants cannot meet its summary judgment burden of proof under either element of the *Faragher/Ellerth* affirmative defense. First, the undisputed facts show that the Defendants did not take reasonable care to prevent and correct harassment in the workplace. In its motion for summary judgment, the Defendants argue that their "Do The Right Thing" policy and training module is sufficient to prevent race discrimination and harassment. However, the "Do The Right Thing" policy and training was implemented and distributed at the Bledsoe Dodge facility only after the Charging Parties filed their charge of discrimination with the EEOC. (App. 89, 90; Defendants' App. 420, 436). Furthermore, courts have found that a harassment

policy and complaint procedure alone will not shield them from liability under *Faragher* and *Ellerth*. In *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541 (10th Cir. 1998), the Court determined that the presence of a sexual harassment policy will not shield an employer from liability. The *Wilson* case was decided under a negligence theory, placing the burden on the Plaintiff to prove that the employer's conduct was unreasonable. With the burden on the Plaintiff, the Court found that the sexual harassment policy in that case was deficient. One specific reason stated by the Court was that although the policy provided a way for a victim to bypass a harassing supervisor, and to report to another individual, that individual was located at a separate facility, thereby making the sexual harassment policy deficient. *Id.* at 542. In the present case, Bledsoe Dodge also failed to have a human resources person at the facility. Instead, Defendants' Human Resources representative Leslie Lee was located in North Dallas, with responsibilities for 11 Auto Nation facilities.

Generally, the negligence standard governs employer liability for co-worker harassment. *See Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999). An employer may be liable for harassment if it "knew or should have known of the harassment in question and failed to take prompt remedial action." *Williamson v. City of Houston*, 148 F.3d 462, 464 (5th Cir.1998). This standard was not disturbed by *Faragher* or *Ellerth*. "[A]n employer can be liable ... where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct but failed to stop it." *Ellerth* 118 S.Ct. at 2267.

Here, the Defendants also are not entitled to summary judgment on the issue of whether

they took steps to promptly correct and remedy discrimination in the workplace. The undisputed facts show that Barnett and Jackson complained about offensive conducts and comments on several occasions: (a) Barnett complained to Bonakdar about Payne's use of the word "nigger" (App. 15); (b) Barnett complained to his department manager, Karey Martin about Cameron's use of the word "nigger-rigged" (App. 16); (c) Barnett and Jackson complained to Morgan about the noose hanging in the parts department (App. 8, 38, 39); (d) Barnett complained to Martin about White's threat to drag him (App. 13); (e) Barnett complained about Moody's hood incident (App. 22). There is no summary judgment evidence that any prompt or effective remedial action was taken in response to these complaints. Therefore, summary judgment is inappropriate on this issue. *Dobrich v. Gen. Dynamics*, 106 F. Supp.2d 386, 394 (D. Conn. 2000)("The promptness and adequacy of an employer's response is generally a question of fact for the jury"); *Richardson v. NY State Dep't of Corr. Servs.*, 180 F.3d 426, 441 (2d Cir. 1999)("an employer is not entitled to summary judgment based on an affirmative defense that it responded to a complaint of discrimination if the evidence creates an issue of fact as to whether its action was effectively remedial and prompt); *Whidbee v. Garzarelli Food Specialties Inc.*, 223 F.3d 62, 72 (2d Cir. 2000)("If harassment continues after complaints are made, reasonable jurors may disagree about whether an employer's response was adequate.").

The Defendants are also liable for the harassment of Barnett and Jackson Parties by co-workers at the Bledsoe Dodge dealership. Employers are liable for a co-worker's harassment of a fellow employee only when the employer "knew, or should have known, about the hostile work environment and failed to respond in an appropriate manner." *See Wright-Simmons v. City of*

Oklahoma City, 155 F.3d 1264, 1270 (10th Cir. 1998); See also: Faragher, 524 U.S. at 799. The Defendants certainly knew or should have known about the hostile work environment because of the complaints made by Barnett and Jackson to company managers, including Parts Manager Mark Morgan, General Manager Mehdi Bonakdar and Assistant Parts Manager Karey Martin. Defendants also knew or should have known about the hostile work environment because of the racist symbols, the noose and the racist graffiti that were in plain sight in the workplace. Much of the conduct and the comments directed to Barnett and Jackson were done out in the open on the worksite, including Larry Moody's taunting of Barron Jackson with the white hood.

Therefore, the EEOC respectfully requests that this Court deny the Defendants' motion for summary judgment on the issue of hostile work environment because the Defendants have failed to meet their burden to prove that there are no genuine issues of material fact on this issue.

II.
EEOC HAS PRESENTED EVIDENCE OF TRIABLE FACT ISSUES ON ITS CLAIM FOR DISPARATE TREATMENT–FAILURE TO PROMOTE

A. The EEOC has presented sufficient evidence to satisfy the *prima facie* elements of its failure to promote claim.

To survive a motion for summary judgment, a Title VII plaintiff must first establish a prima facie case of discrimination by a preponderance of the evidence under *McDonnell Douglas*. *See Pratt v. City of Houston, Tex*, 247 F.3d 601, 606 (5th Cir. 2001). For a prima facie case of race discrimination on a failure to promote claim, a the EEOC must prove that (1) Anthony Barnett and Barron Jackson are members of a protected class; (2) they were qualified for the position; (3) they were not promoted; and (4) either the position was filled by someone not in the protected class, or that Barnett and Jackson were not promoted because of their race.

See Rutherford v. Harris Co., Texas, 197 F.3d 173, 179 (5th Cir.1999); *Shackelford v. Deloitte & Touche*, 190 F.3d 398, 404 (5th Cir.1999).

Because there is no dispute that both Barnett and Jackson are African-American, that neither was promoted to the Assistant Parts Manager position in July 1999, which was eventually filled by a White employee, Karey Martin, the only disputed question is whether Barnett and Jackson were qualified for the position they sought. The Commission contends that it has produced sufficient evidence of their qualifications; thereby, establishing each element of its *prima facie* case of discrimination. *See Pratt*, 247 F.3d at 606.

On the issue of being qualified for the Assistant Parts Manager position, Defendants admit that in July 1999, there was neither a written description of the position nor was there an advertisement for the position that outlined the specific requirements for the position. Interestingly, in their Motion for Summary Judgment, even though Defendants assert that each position within the Bledsoe Dodge dealership now has a written position description, Defendants have inexplicably failed to produce to the EEOC or this Court a copy of the description for the Assistant Parts Manager position, or to in any way outline the qualifying criteria, objective or otherwise, for the Assistant Parts Manager position. Absent its failure to provide a standard by which the Court could assess the Defendants' self-serving protests that Barnett and Jackson were not qualified for the Assistant Parts Manager position in July 1999, the Commission contends (and has produced sufficient proof thereof) that both Barnett and Jackson were indeed qualified.

As of July 1999, Mr. Barnett had worked in the Parts Department for the Defendants for more than 10 years. He began his employment with Defendants as a parts driver and worked his

way up through the department, being promoted to the following positions: Stock Control and Delivery Manager, Warranty Clerk, Parts Advisor/Sales for the wholesale and retail parts counters. Mr. Barnett had received routine pay increases and was often complimented on his attitude and his job performance. Mr. Barnett had also received numerous awards and other recognition for his achievements in the areas of Dealership Parts Operations, Customer Satisfaction and for completion of the Master Parts Training Program, and had attained the status of "Certified Professional" in 1996 (Bronze Star level of certification), 1997 (Bronze Star level of certification) and 1999 (Gold Star level of certification). (App. 139-148). Mr. Barnett had also taken a full slate of training courses, including several management courses, as offered through Defendants' DaimlerChrysler computerized training programs. (App. 149-150).

Regarding Mr. Jackson, in July 1999, he had been employed with Defendants for more than 13 years in the Parts Department. He started his employment as a Parts Counter person, later becoming the Wholesale Manager, responsible for the retail sales counter in the Parts Department and the supervision of the Parts Driver, Rebecca Moulton. (App. 36, 71, 151-154). Mr. Jackson had received routine pay increases and was often complimented on his attitude and his job performance. Mr. Jackson has also received numerous awards and other recognition for his achievements in the areas of Dealership Parts Operations, Customer Satisfaction and for completion of the Master Parts Training Program. (App. 155-159).

The objective evidence produced by the EEOC establishes both Barnett and Jackson were qualified for the Assistant Parts Manager position in July 1999. They each had extensive experience in the Parts Department, were well-acquainted with the product knowledge, and had

served in a managerial capacity, being responsible for several individuals within their department. Accordingly, the EEOC has produced sufficient evidence to prove its *prima facie* case.

B. Defendants' stated reason for refusing to promote Anthony Barnett and Barron Jackson to the Assistant Parts Manager position in July 1999 is pretext for unlawful discrimination.

Once this *prima facie* case has been established, there is a presumption of discrimination, and the burden shifts to the defendants to articulate some legitimate, non-discriminatory reason for the challenged employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). If such a showing is made, the burden shifts back to the plaintiff to demonstrate that the articulated reason was merely a pretext for discrimination. *Id.* When a Title VII case reaches the pretext stage, the question for summary judgment is whether a rational fact finder could find that the employer discriminated against the plaintiffs on the basis of race. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). "A prima facie case and sufficient evidence to reject the employer's explanation" may permit a trier of fact to determine that an employer unlawfully discriminated, and may therefore be enough to prevent summary judgment. *Reeves*, 530 U.S. at 148.

Witnesses for the Defendants have been unclear in stating exactly which managers participated in the hiring of Karey Martin for the position of Assistant Parts Manager. During his deposition, former Bledsoe Dodge General Manager Mehdi Bonakdar presumed that it was Mark Morgan who made the decision. (App. 46-48). Current General Manager Sam Tater testified that he didn't know who was responsible for Karey Martin's promotion to the Assistant Parts

Manager position. (App. 94).

Defendants' summary judgment motion and Appendix fail to clarify the issue. Defendants contend that the dealership's former Parts Manger Mark Morgan made the selection with the approval of Parts and Service Director Joe Meador. In its Motion, Defendants attempt to advance the "same actor inference" as a basis to avoid liability for its failure to promote Mr. Barnett and Mr. Jackson to the Assistant Parts Manager because of their race. However, the Fifth Circuit has expressly "declined] to establish a rule that no inference of discrimination could arise under such circumstances." *Haun v. Ideal Indus. Inc.*, 81 F.3d 541, 546 (5th Cir. 1996). Any evidence regarding the identity of the individuals responsible for hiring Mr. Barnett and Mr. Jackson or withholding a promotion for which they were well-qualified is not entitled to any presumptive value. *See Wexler v. White's Fine Furn., Inc.*, 317 F.3d 564, 573 (6th Cir. 2003) (*quoting Caldron v. SL Indus., Inc.*, 56 F.3d 491, 496 n.6 (3rd Cir. 1995)). Such evidence must be treated as all other admissible evidence, as a whole, in the determination of the ultimate issue: whether race was a factor in Defendants' decision not to promote Anthony Barnett and Barron Jackson to the Assistant Parts Manager position in July 1999. *See Haun* 81 F.3d at 546 (*citing Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-11 (1993)).

Unfortunately, Mr. Morgan died before this litigation was filed. This leaves Joe Meador as the only surviving individual with any information regarding Defendants' selection of Karey Martin to the Assistant Parts Manager position in July 1999. According to the affidavit of Joe Meador, attached to the Defendants' Motion for Summary Judgment, Ms. Martin "was chosen for the position because of her previous experience and job knowledge coupled with her

leadership ability, which included experience working in the Parts Department at another car dealership." (Meador Affidavit ¶ 5, Defendants' App. at 456). However, this affidavit testimony is in direct contrast to his sworn deposition testimony, given just ten days before he signed his affidavit.

In his deposition, Mr. Meador unequivocally testified that he had ***no input*** in the selection of Karey Martin or any individual for the Assistant Parts Manager position; that Karey Martin, along with Anthony Barnett and Barron Jackson were ***all*** appointed to the Assistant Parts Manager position ***at the same time*** in December 1999 ***by Matt Bledsoe***, the dealership's former owner. (App. 51-54). Conversely, Mr. Bledsoe testified in his deposition that he was ***not*** involved in the decision to promote Karey Martin to the Assistant Parts Manager position and that he ***did not*** appoint Anthony Barnett, Barron Jackson and Karey Martin to simultaneously serve as Assistant Parts Managers because "[it] doesn't make sense. Why would you need three Assistant Parts Managers?" (App. at 196-197).

Even though in his Affidavit, Joe Meador swore that Ms. "Martin had extensive knowledge of parts operations, including the preparation of daily, weekly and monthly reports . . ." and that she "did not require as much training to perform the duties of Assistant Parts Manager . . . ." (Meador Affidavit ¶ 5, Defendants' App. at 456), in his deposition, Mr. Meador testified that he had never reviewed Ms Martin's employment application, never looked at her resume, never checked her references, and had no knowledge of her prior experience before being hired by Defendants. (App. 53, 55). In fact, there is no evidence in the record that any management official ever reviewed Ms. Martin's employment application or resume or even

verified her past employment to confirm her relevant knowledge, skills or experience.

Not only is Joe Meador's attested assertion regarding Ms. Martin's knowledge and skills contradicted by his own deposition testimony, it is also belied by Ms. Martin's testimony regarding her transition into the position of Assistant Parts Manager. Ms. Martin testified that she was initially hired by Defendants in the position of Shipping and Receiving; that after approximately nine months, she was promoted to the Parts Advisor Position, the same position held by Barnett and Jackson; and that after approximately one year as a Parts Advisor, she was promoted to the Assistant Parts Manager position. (App. 60-64).

Ms. Martin further testified that ***after*** she became the Assistant Parts Manager, she had to be trained on every report generated by the Parts Department. Because in her capacity as Shipping/Receiving or Parts Advisor, Ms. Martin had never undertaken any of the duties associated with the Assistant Parts Manager position, former Parts Manager Mark Morgan had to instruct Ms. Martin on how to place daily orders through the computer, placing EOS orders, generating the wholesale compensation report, month-end reports and monthly forecast reports (App. 65-68). And that even after Mr. Morgan trained Karey Martin on nearly every aspect of her job, she required additional and continued instruction on how to generate these reports from Dennis Evans, the Parts Director for several of Defendants' dealerships in the North Texas District. (App. 69-70).

Moreover, even though Joe Meador attested that Barnett and Jackson were not selected for the Assistant Parts Manager position because they have no previous management or personnel management experience, (Defendants' App. 456), the record shows that Ms. Martin

also lacked this newly-identified requirement. (Defendants' App. 451-453). According to Ms. Martin, her 1 ½ -year stint as a Warehouse Manager at Grubbs Chrysler involved ***the same duties and responsibilities*** as the ***entry-level*** job for which she was hired at Bledsoe Dodge. (App. 72-73). She admitted that she did not have the title of Assistant Parts Manager while at the Grubbs dealership, but that she only filled in for the Parts Manager when she was occasionally absent (App. 75-76). More telling is the fact that Ms. Martin had not worked in the automotive parts industry for the 6-year-period prior to the start of her employment with Bledsoe Dodge. (App. 74). While Barnett and Jackson were busy working for Defendants in their Parts Department, Ms. Martin was either unemployed or working as a house cleaner. (App. 74). This 6-year gap in auto parts experience rendered any product knowledge she had obsolete.

Meador also attested that Anthony Barnett was not considered for the Assistant Parts Manager position because he had previously indicated that he did not want the job. (Defendants' App. 456-57). Mr. Barnett, however, denied that he had ever declined an offered opportunity to become an Assistant Parts Manager. (App. 20).

The issue of credibility is closely intertwined with the concept of pretext as a method of proving discrimination. It is clear that acceptance of Defendants' position that Karey Martin was the better qualified candidate for the Assistant Parts Manager position depends upon accepting the words of Joe Meador. However, Joe Meador's affidavit is insufficient to sustain a motion for summary judgment because his stated reason for selecting Karey Martin is contradicted by other summary judgment evidence, including his own deposition testimony.

Courts have stated that summary judgment is not proper when the essential issue is one of

credibility. *See Madison v. Desert Livestock Co.*, 574 F.2d 1027, 1036-37 (10th Cir. 1978): " . . . Affidavits are not a substitute for trial and a summary judgment is not proper where an issue turns on credibility. . . [I]nferences from circumstantial facts may frequently amount to full proof of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary. . . [M]ost importantly, a summary judgment should not be based on the deposition or affidavit of an interested party. . ."

There is no credible, independent evidence that any of the factors asserted by Joe Meador in his Affidavit that allegedly support Defendants' decision to promote Karey Martin to the Assistant Parts Manager position in July 1999 are truthful. Joe Meador's false reasons for failing to promote Anthony Barnett and Barron Jackson are enough to deny Defendants' motion for summary judgment. *Reeves*, 120 S. Ct. 2097 (2000). ("once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision . . . .") *Id.* at 2108.

The Fifth Circuit has continued to uphold the standard that summary judgment is inappropriate "if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [race] was a determinative factor in the actions of which plaintiff complains." *See Pratt*, 247 F.3d at 607 (*quoting Vadie v. Mississippi State Univ.*, 218 F.3d 365, 373 (5th Cir.2000)). Here, the EEOC established a *prima facie* case on behalf of both Barnett and Jackson. Further, both were facially more qualified for the Assistant Parts Manager position

than Karey Martin, the White employee who was selected. The Defendants asserted racially non-discriminatory reasons for the failure to promote either Barnett or Jackson; however, the EEOC produced evidence that the Defendants' stated reasons were both false and without evidentiary support. This evidence creates significant fact issues with regard to the Defendants' motivation for not promoting Barnett and Jackson. Given these facts, a jury could reasonably infer that the promotion process was manipulated, and that it was pre-ordained that the White candidate would be awarded the position over demonstrably better credentialed African-Americans.

Under these facts, it is for the jury to further decide the ultimate question of whether the Defendants denied Barnett and Jackson the promotion because of their race. *See Pratt*, 247 F.3d at 607. "If the district court judge is `faced with having to believe one party or the other' as to an issue of material fact, summary judgment is not appropriate." *Corbin v. Southland Int'l Trucks*, 25 F.3d 1545, 1548 (11th Cir.1994).

III.

EEOC HAS PRESENTED EVIDENCE OF TRIABLE FACT ISSUES ON ITS CLAIM FOR RETALIATION AND DISCRIMINATORY DISCHARGE[4]

A. Mr. Barnett and Mr. Jackson's opposition of Defendant's unlawful employment practices and participation in the Commission's investigation of the underlying Charges of Discrimination and in the resultant lawsuit is protected activity under Title VII.

[4]To satisfy the Plaintiff's prima facie case for its claim of discriminatory discharge, the evidence is clear and undisputed that the Charging Parties were African-American, qualified for the positions they held, they were terminated from those positions, while other Caucasian, similarly-situated co-workers were treated more favorably. The evidence and analysis supporting the Plaintiff's proof of pretext is the same as will be discussed, *supra*, in the retaliation section.

Section 704(a) of Title VII, the anti-retaliation provision, declares that an employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e- 3(a) (1994). The purpose of this provision is to ensure that individuals who participate in any proceeding pursuant to Title VII or who oppose unlawful employment discrimination are protected against retaliation. Otherwise, if retaliation for such protected activities were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings.

In *Long v. Eastfield College*, 88 F.3d 300 (5th Cir. 1996), the Fifth Circuit set forth the standard for evaluating claims of retaliation under Title VII in the summary judgment context. A plaintiff establishes a prima facie case of unlawful retaliation by demonstrating the following: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action." *Long*, 88 F.3d at 304.

The EEOC has presented sufficient evidence that satisfies the first element of its prima facie case. It is undisputed that Anthony Barnett and Barron Jackson engaged in protected activity. As set forth in Section I of this Brief, during their employment, both Mr. Barnett and Mr. Jackson complained about being subjected to racially hostile work environment in the Parts

Department at the Bledsoe Dodge dealership. Moreover, Mr. Barnett and Mr. Jackson complained to their superiors about being denied a promotion to the position of Assistant Parts Manager in July 1999. Further, both Mr. Barnett and Mr. Jackson filed separate Charges of Discrimination, alleging that the racially hostile work environment and Defendants' failure to promote them violated Title VII. Finally, Mr. Barnett and Mr. Jackson have actively participated in the Commission's lawsuit against their former employers, by providing deposition testimony, detailing the specifics of their hostile work environment and disparate treatment claims, and attending the mediation session in March 2003. Anthony Barnett and Barron Jackson's conduct constitutes protected activity to satisfy both the opposition and participation clauses of section 704(a) of Title VII.

B. Defendants' Termination of the Employment of Anthony Barnett and Barron Jackson Constitutes an Adverse Employment Action.

On the second element of the retaliation prima facie case, the EEOC has also presented uncontroverted evidence that Mr. Barnett and Mr. Jackson have suffered an adverse employment action. The Supreme Court defined a tangible employment action as "a significant change in employment status," and provided several illustrative examples thereof, including: hiring, **firing**, and reassignment with significantly different responsibilities. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (emphasis added). There is no dispute that Defendants' termination of the employment of Mr. Barnett and Mr. Jackson is sufficient to constitute an adverse action, thereby satisfying the second element of a prima facie case for retaliation.

C. Anthony Barnett and Barron Jackson's Engaging in Protected Activity is Causally Related to the Adverse Employment Action.

Turning to the third element of Plaintiff's retaliation case, the EEOC has produced sufficient and convincing evidence establishing the causal link between Mr. Barnett and Mr. Jackson's engaging in protected activity and the adverse employment action of their termination. The Fifth Circuit has determined that the "causal link" element is met if "'the employer's decision to terminate was based in part on knowledge of the employee's protected activity.'" *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 684 (5th Cir. 2001) (*quoting Sherrod v. American Airlines, Inc.*, 132 F.3d 1112 (5th Cir. 1998)). Further, the Court explained that the "causal link" element could also be met upon proof that the employment decision and protected activity are not "'wholly unrelated.'" *Id.* (*quoting Simmons v. Camden County Bd. of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985)).

In this case, it is undisputed that all management personnel involved in the decision to terminate the employment of Anthony Barnett and Barron Jackson affirmatively knew that they had either filed a Charge of Discrimination against their employer, had participated in this lawsuit, or both. (App. 173; 205-207; 218-220). Moreover, decision-makers Colmenares and Calloway actually discussed the fact that Mr. Barnett and Mr. Jackson had filed a Charge of Discrimination against their employer during their consideration of which employees in the Bledsoe Dodge Parts Department should be terminated. (App. at 189-191; 205-207). And none of the other employees that Defendants transferred to the new dealership, Wes Rogers, Brian Mathis and David Gentry, all Caucasian, had ever filed a Charge of Discrimination against either

Bledsoe Dodge or AutoNation, Inc. (App. at 192-193). It is further undisputed that Mr. Barnett and Mr. Jackson were present and actively participated in the mediation conference held between the parties before Mediator Silverberg on April 4, 2003, less than three months before Defendants unlawfully terminated their employment.

The Fifth Circuit has routinely recognized that the standard of proof necessary for the "causal link" element of the retaliation prima facie case is not as strict as the "but-for" analysis that arises when addressing the ultimate question of whether the employer unlawfully retaliated against its employee. *See Long*, 88 F.3d at 305, n.4. And, for purposes of summary judgment, a time lapse of up to three months has been found sufficient to satisfy the "causal link" element of a Title VII retaliation case. *See Weeks v. NationsBank, N.A.*, No. CIV. A. 3:98-CV-1352M, 2000 WL 341257 at *3 (N.D. Tex. 2000). The Fifth Circuit has gone even further. In *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409 (5th Cir. 2003), the "causal link" element of the former employee's retaliation claim had not been destroyed simply because there had been a six-year gap between the employee's filing a Charge of Discrimination with the EEOC and her termination. While reversing the trial court's grant of summary judgment in favor of the school district, the Court in *Fabela* reiterated that the trial court's role at the summary judgment stage is to determine whether a genuine issue for trial, rather than to take the place of the jury or to weigh the evidence and determine the truth of the matter. *Fabela*, 329 F.3d at 414, 416. Further, the trial court is prohibited from drawing negative inferences against the Commission, as the non-movant, based on the absence of specific evidence. *Id.* at 418, n.9. Even if additional evidence regarding the Commission's claims of retaliation might be preferable, the summary judgment

evidence in this case is sufficient to establish a genuine issue of material fact. Therefore, the EEOC requests that jury be allowed to review all the evidence, assess the credibility of the witnesses and render its conclusion on the question of whether a causal connection existed between Mr. Barnett and Mr. Jackson's protected activities and their dismissal.

D. Anthony Barnett and Barron Jackson Would not have Suffered an Adverse Employment Action But For Engaging in an Protected Activity.

Once the EEOC has satisfied the prima facie elements of its Title VII retaliation case, the burden of production shifts to Defendant to adduce evidence of a legitimate non-retaliatory reason for the Mr. Barnett and Mr. Jackson's termination. *See Long*, 88 F.3d at 305, 308. If Defendant satisfies this burden, then the Court must review the evidence in the light most favorable to the Plaintiff, as the nonmovant, to answer the ultimate question: Did Defendant unlawfully retaliate against Anthony Barnett and Barron Jackson? To permit the trier of fact to answer this question in the affirmative, the Commission must show that Defendant's proffered reason for the adverse employment action was pretextual, and that Mr. Barnett and Mr. Jackson would not have been terminated "but for" their engaging in activity protected under Title VII. *See Medina*, 238 F.3d at 685.

In its Motion for Summary Judgment, Defendant asserts that the basis for terminated Anthony Barnett and Barron Jackson was that the Bledsoe Dodge dealership "permanently closed its doors and went out of business." (Defendant's Motion at 28). However, this explanation conflicts with the testimony of Rogers, Colmenares and Calloway. According to these management officials, Defendants did not terminate the employment of all its personnel located at the Bledsoe Dodge dealership upon its closure. (App. at 179-183; 202-203; 212-214).

Therefore, the question becomes how and why Anthony Barnett and Barron Jackson were selected for termination. If Defendants' explanation is to be believed, the only criteria used to identify those employees slated for termination was the number of available positions and sales performance. (App. at 181). However, because an employer usually "refrains from expressly stating that an impermissible criterion influenced his decision to expose [an employee] to an adverse employment action," the Commission is faced with the task of proving that the facially-neutral explanation is really a pretext for unlawful retaliation. Accordingly, the Commission draws this court's attention to the conflicts in the evidence, which allegedly supports the Defendants' reasons for terminating Mr. Barnett and Mr. Jackson.

First, Defendants contend that when it ceased operations of the Bledsoe Dodge dealership in June 2003, there were only three vacant positions in the Parts Department of a Dodge-related dealership within AutoNation, Inc.'s North Texas District, which is currently comprised of approximately 21 dealerships. Defendants represented that all of the available Parts Department positions were at the Bankston Chrysler Jeep dealership in Frisco, Texas. (App. at 175-176). According to Calloway, these vacancies were for the following positions: Parts Manager, Parts Counter Sales, Stock person. (App. at 181). Calloway transferred Wes Rogers, Brian Mathis and David Gentry into the available positions, respectively. (App. at 183). Calloway did not offer or consider either Mr. Barnett or Mr. Jackson for any of the available positions. Because of the dissimilarity of the positions, the Commission takes no issue with the Defendants' transfer of Rogers, the Bledsoe Dodge Parts Manager, who had also been working as the pro tem Parts Manager at Bankston Chrysler Jeep, or David Gentry, the Bledsoe Dodge Stock Clerk. Where

this issue turns is with the Parts Counter Sales position. Although Mr. Barnett and Mr. Jackson were both Assistant Parts Managers in title, they continued to perform the functions, as they have for the better part of ten years, of Retail Counter Salespersons.

Calloway testified that there was only one available Parts Counter Sales position, to which he gave to Brian Mathis (App. at 181, 183); however, Wes Rogers personally witnessed Calloway offer a Parts Counter Sales position to **both** Brian Mathis and Lonnie Wade. (App. at 214). According to Rogers, Mr. Wade declined the opportunity to transfer to the Bankston Chrysler Jeep dealership; he had secured alternate employment. (App. at 214-215). Based on Rogers' testimony, a reasonable jury could believe that there were at least two Parts Counter Sales positions available at Bankston Chrysler Jeep. And if so, the question becomes: Why didn't Defendants offer this available sales position to another member of the parts sales team? Because the only members left were Anthony Barnett and Barron Jackson.

Second, even though Calloway further testified that after his review of the sales performance records from June 2002 to June 2003 for the Bledsoe Dodge Parts Department employees, he concluded that Brian Mathis was the top performer, the documentary evidence does not support this testimony. (App. at 185). The sales reports for the Bledsoe Dodge Parts Department, attached to Defendants' Second Motion for Summary Judgment at Appendix 465-470, do reflect a 12-month period, but there is no indication what year these figures are intended to represent. Further, the purported sales totals reflected in these reports are from January to December of some unknown year, rather than for the time period to which Mr. Calloway testified.

There is no dispute that Anthony Barnett and Barron Jackson were the most senior and experienced members of the Bledsoe Dodge Parts Department; Anthony Barnett with nearly 15 years service and Barron Jackson with nearly 19 years. There were no other Parts Department employees who had experience comparable to that of Mr. Barnett and Mr. Jackson. In *Ray v. Iuka Special Mun. Separate Sch. Dist., et. al.*, 51 F.3d 1246 (5th Cir. 1995), the court found support for the former principal's claim of retaliation for filing an age discrimination complaint when, after a merger of two school districts, defendants excluded him from consideration of any position and hired others with far less experience. However, Defendants noticeably and admittedly overlooked their positions, knowledge, skills or experience when deciding to terminate their employment.

Because of the conflicts in the evidence upon which Defendants are relying upon in support of their non-retaliatory reasons for terminating the employment of Mr. Barnett and Mr. Jackson, coupled with the fact that there is absolutely no evidence of problems with Mr. Barnett or Mr. Jackson's sales productivity or sales performance until AFTER the filing of the underlying Charges of Discrimination and the instant lawsuit, a reasonable jury could easily conclude that Mr. Barnett and Mr. Jackson would not have been terminated but for their involvement in activities protected under Title VII. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996); *see also Sherrod*, 132 F.3d at 1122; *see Medina*, 238 F.3d at 685 (ruling that an established "conflict in substantial evidence on the ultimate issue of retaliation" precludes the granting of summary judgment).

Based on the foregoing, the EEOC contends that there are genuine issues of fact in this

case as demonstrated by the existence of factual disputes as to its claim of retaliation and as to the issue of pretext, as well as the EEOC's claim of wrongful discharge. The resolution of these factual disputes, especially the issue of pretext, will depend largely on the credibility of the witnesses presented at trial. Therefore, summary judgment would be inappropriate in this case because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."*Anderson*, 477 U.S. at 255. Accordingly, the EEOC respectfully requests that the Court deny Defendant's Motion for Summary Judgment.

IV.

EEOC HAS PRESENTED EVIDENCE OF DEFENDANTS' LIABILITY AS A JOINT EMPLOYER OR INTEGRATED ENTERPRISE

Almost as a footnote to the Defendants' Motion for Summary Judgment, Defendant AutoNation, Inc. argues that it is entitled to summary judgment because it was never the employer of Barnett and Jackson. Defendants cannot expect to prevail on their faulty circuitous arguments: one, that they are not liable because Barnett and Jackson did not adhere to AutoNation, Inc.'s procedures for reporting complaints of harassment; and two, AutoNation, Inc. is not the employer of Barnett and Jackson. Moreover, this disingenuous and frivolous contention flies in the face of the overwhelming documentary and testimonial evidence to the contrary.

Courts have adopted a broad definition of the term "employer" such that it may include superficially distinct entities that are sufficiently interrelated so as to constitute a single,

integrated enterprise. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir.1997) (*citing Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir.1997). However, when it is necessary to determine whether a parent corporation should be considered the employer of a subsidiary's employee the four part test established in *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir.1983) should be employed. *See Schweitzer*, 104 F.3d at 763; *see also Torres v. Liberto Mfg. Co., Inc.*, 2002 WL 2014426 (N.D. Tex. Aug. 30, 2002).

The *Trevino* rule has emerged that superficially distinct entities may be exposed to liability upon a finding that they represent a single, integrated enterprise: a single employer. The factors considered in determining whether distinct entities constitute an integrated enterprise are (1) interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. *Trevino*, 701 F.2d at 404. "Traditionally, the second of these four factors has been considered the most important, such that courts have focused almost exclusively on one question: which entity made the final decisions regarding employment matters related to the person claiming discrimination." *See Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606, 617 (5th Cir.1999); *See also Vance v. Union Planters Corp.*, 279 F.3d 295, 301 (5th Cir.2002).

Here, there is no doubt that a genuine issue of material fact exists as to whether Defendant AutoNation, Inc. is the "employer" of Barnett and Jackson such to preclude the granting of its summary judgment motion. First, Sam Tater, the current General Manager and Dealer Principle of the Bledsoe Dodge dealership testified that he, himself, is an employee of AutoNation, Inc., and that he is directly supervised by the AutoNation, Inc. President of the

North Texas District. (App. 80, 81, 84). And as an employee of AutoNation, Inc, he is also bound by their policies and procedures. (App. 84). AutoNation, Inc. further directs how its various dealerships manage their employees by providing them training on the institution of its performance improvement process. (App. 85-86). AutoNation, Inc. also controls the inventory accounting procedures for its dealerships and conducts inspections of the premises, and was even responsible for the dealership's name changes. (App. 82-84, 87, 91-92). Tater even admitted that as the General Manager of the Bledsoe Dodge dealership, he could not even respond to the Charges of Discrimination filed by Barnett and Jackson until the AutoNation, Inc. attorney instructed him on how to proceed. (App. 93).

Further, the testimony of Leslie Lee, AutoNation, Inc.'s District Human Resources Manager for the North Texas District, proves that AutoNation, Inc. has an employment relationship with Barnett and Jackson. She testified that each of the approximately 1300 employees of the 11 various AutoNation, Inc. dealerships within the Northern District are all employees of AutoNation, Inc. (App. 103, 111). Moreover, each of these employees is provided with a copy of AutoNation, Inc.'s Employee Handbook, made to sign an acknowledgment form, and are expected to abide the policies and procedures contained therein. (App. 106-107; Defendants' App. 417, 434)

She further testified that part of her job duties is to serve as general counsel to the General Managers within her district, to resolve any issue that cannot be resolved locally, acknowledging that a dealership's failure to consult her is considered by AutoNation, Inc. as a "Litigation Landmine." (App. 100, 103-104, 108; Defendants App 408). Further, she confirmed that

AutoNation, Inc. provides all of the benefits, such as medical, dental, disability, life and independent life to the employees at the dealerships and that it is a part of her job to travel throughout North Texas to explain these benefits to the employees. (App. 101, 102, 133). She also provides training, as specified and directed by AutoNation, Inc.'s Corporate Office, to all of the employees and managers within her district. (App. 102-103). Ms. Lee is also responsible for investigating employee complaints that are lodged through AutoNation, Inc's AlertLine, and noted that local managers should contact her if they are uncomfortable investigating complaints. (App. 105, 109-110).

The documentary evidence also supports that AutoNation, Inc. considers each employee working throughout its dealerships to be one of its employees and even provides the dealerships with instructions on how to treat applicants in the hiring process. (App. 102-103; Defendants' App. 383). As case it point, it was AutoNation, Inc. that terminated the employment of Mr. Barnett and Mr. Jackson when it ceased operations of the Bledsoe Dodge dealership. (Defendants' App. at 463, 464).

The foregoing evidence establishes that although the Defendants facially appear to be separate entities, they, in fact, are not. AutoNation, Inc. controls nearly every aspect of how the Bledsoe Dodge dealership is operated: from complete financial control over the dealership; accounting for parts inventory; unannounced inspection of the dealership's premises; the compensation structure for the General Manager; management of employees at the Bledsoe Dodge dealership; provision of benefits to the employees; provision of training to the employees; the name of the dealership; and the decision to close the dealership completely. In considering

the determinative question of which entity made the final decisions regarding employment matters related to Barnett and Jackson, the evidence shows that AutoNation, Inc. definitely had an employment relationship with Joe Meador and Mark Morgan, in addition to General Manger Sam Tater, Anthony Barnett and Barron Jackson.

Therefore, the EEOC respectfully requests that this Court deny the Defendants' motion for summary judgment on the issue of hostile work environment because the Defendants have failed to meet their burden to prove that there are no genuine issues of material fact on this issue.

CONCLUSION

The undisputed evidence above shows that Anthony Barnett and Barron Jackson were subjected to a hostile work environment because of their race, African-American. The undisputed evidence also shows that Defendants failed to promptly and effectively remedy the harassment after Mr. Barnett and Mr. Jackson had repeatedly complained of the offensive conduct. Further, the undisputed evidence also shows that Barnett and Jackson were denied a promotion to the position of Assistant Parts Manager in July 1999 because of their race. The undisputed evidence also establishes that Defendants retaliated against Mr. Barnett and Mr. Jackson because they engaged in activities protected under Title VII and terminated their employment because of their race, African-American. Finally, the undisputed evidence reflects that Bledsoe Dodge, LLC, and AutoNation, Inc. operate as a joint employer or integrated enterprise, thereby exposing both entities to liability for the discriminatory conduct of its employees.

WHEREFORE, premises considered, the EEOC respectfully requests that this Court deny

Defendants' Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing has been served on all counsel of record for the Defendant at the address below via United States first class mail, postage prepaid, on this the 9th day of October, 2003.

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