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.	§	
Defendants.	§	

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT THEREOF

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DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT THEREOF

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 Reply to Plaintiff's Response to Defendants' Second Motion for Summary Judgment, and in support thereof, would respectfully show the Court as follows:

I. INTRODUCTION

On September 19, 2003, Defendants filed their Second Motion for Summary Judgment on Plaintiff's claims for hostile work environment, failure to promote, and discriminatory and retaliatory discharge under Title VII. On October 9, 2003, Plaintiff, the Equal Employment Opportunity Commission, ("Plaintiff" or "the Commission") filed its Response to Defendants' Motion. In its responsive Brief, the Commission has failed to meet its burden of establishing a *prima facie* case of

discriminatory failure to promote, discriminatory termination or retaliatory termination. Plaintiff has further failed to demonstrate that the Dealership's legitimate, non-discriminatory reason for the decision not to promote the Charging Parties, Barnett and Jackson, to the position of Assistant Parts Manager in July 1999 is pretextual. In addition, the Commission has wholly failed to demonstrate that the legitimate, non-discriminatory reason for the Charging Parties' termination of employment, *i.e.,* the closing of the Bledsoe Dodge Dealership, is a pretext for discrimination.

Plaintiff has also failed to show that there is a genuine issue of material fact as to its claim for hostile work environment race harassment by either co-workers or a supervisor, because the Charging Parties' evidence of alleged discrimination does not amount to a severe and pervasive working environment which affected a term, condition or privilege of employment. In addition, Defendants have satisfied their affirmative defense to a claim of supervisor harassment. Finally, Plaintiff has not produced evidence to show that AutoNation, Inc. is a proper Defendant to this lawsuit under a theory of joint employer liability. Therefore, Defendants' Motion for Summary Judgment should be granted in its entirety.

II.
PLAINTIFF'S STATEMENT OF "FACTS" REFERENCES DISPUTED FACTS

Plaintiff's "facts," unlike Defendants', are hotly disputed, and Plaintiff's representation that these "facts" are all material to this case is erroneous and unsupported by the "evidence" of these "facts." On the other hand, in setting forth their Statement of Facts in their summary judgment Brief, Defendants attempted to state all ***undisputed*** facts. Although Plaintiff complains in its responsive Brief that "[t]he majority of Defendants' 'facts' do not refer the Court to a citation" to Defendants' Appendix, Plaintiff fails to inform the Court as to which, if any, of Defendants' facts Plaintiff does

not agree. Defendants assume, however, that Plaintiff does not disagree with the majority of Defendants' facts, including the dates of the respective Charging Parties' employment, their supervisory chain of command, their promotions and pay raises throughout their employment (which are also listed in Plaintiff's "facts"), the fact that Karey Martin was promoted to the position of Assistant Parts Manager in July 1999 and the Charging Parties were not promoted to the position until December 1999, or the fact that the Dealership closed its doors in June of this year. All disputed facts which are discussed throughout Defendants' summary judgment Brief have citations to Defendants' Appendix, which is comprised of competent summary judgment evidence.

III.
NO GENUINE ISSUE OF MATERIAL FACT AS TO CLAIM OF DISCRIMINATORY FAILURE TO PROMOTE

A. No Genuine Issue of Material Fact As to Plaintiff's Failure to Establish a *Prima Facie* Case.

The Commission has wholly failed to establish a *prima facie* case of race-based employment discrimination and failure to promote. *See Aikens v. Banana Republic, Inc.*, 877 F.Supp. 1031, 1038 (S.D. Tex. 1995). Even if Plaintiff has evidence (the Charging Parties' own self-serving testimony) that Barnett and Jackson "applied" for the job of Assistant Parts Manager in July 1999, by expressing an "interest" in the position, summary judgment is proper because the Charging Parties have not presented sufficient evidence that they were qualified for the position of Assistant Parts Manager or, more significantly, that they were more qualified for the position than Karey Martin ("Martin"), the individual who received the promotion.[1] *See Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503

[1] In addition to Martin, a white female, and the Charging Parties, there were several white males employed within the Parts Department in July 1999. None of these individuals were even considered for the position of Assistant Parts Manager.

(5th Cir. 1988).

In fact, the evidence is undisputed that, despite their longevity with the Parts Department, and in spite of the fact that they had received extensive company-paid training opportunities, the Charging Parties were unable to prepare the necessary reports for use in the department. *See Defendants' Second Motion for Summary Judgment (MSJ) Appendix (App.), pp. 454-459.* Therefore, even if Martin could not prepare all of these reports when she was promoted, she was not less qualified in this area than the Charging Parties. In addition, in its responsive Brief, Plaintiff failed even to address Defendants' evidence of the disciplinary issues, including Jackson's repeated tardiness, which also rendered these two individuals unqualified for the position or less qualified than their co-worker. *See Defendants' MSJ App., pp. 429 & 447-450.* Therefore, the Charging Parties were not "facially" more qualified than Martin for the position of Assistant Parts Manager, as asserted by the Commission, if they were qualified at all.

B. No Genuine Issue of Material Fact That Defendants' Legitimate, Non-Discriminatory Reason for the Promotion of a Female Co-Worker Over the Two Charging Parties Is Pretextual.

Even more importantly, Plaintiff has no controverting evidence to refute Defendants' evidence that the Charging Parties' managers at Bledsoe Dodge ***believed*** Martin to be the better qualified candidate.[2] Plaintiff's "evidence" that the Charging Parties were qualified for the position of Assistant Parts Manager in July 1999, based primarily on the number of years each of the Charging Parties was employed with the Dealership, does not establish that they were more qualified than Martin, and certainly does not constitute evidence of falsity. As both Parties have noted, the

[2] Since there was no written job description at the time, there was no "written standard" upon which the Dealership could base its decision.

individual who ultimately made the decision regarding Martin's promotion in July 1999, Mark Morgan, the former Parts Manager, is deceased. Neither the Dealership's final General Manager, Sam Tater, nor his predecessor, Mehdi Bonakdar, were involved in the decision to promote Martin. Therefore, the only individual who can speak to the true reasons for Martin's promotion is Morgan's supervisor, Joe Meador.[3] Contrary to what Plaintiff would have this Court believe, 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 by his deposition testimony.[4]

Plaintiff has focused on the fact that Meador expressed some confusion during his deposition over the meaning of a question concerning his "input" into the decision to promote Martin to the position of Assistant Parts Manager in July 1999. Meador's confusion, however, does not negate the fact that he clearly had knowledge of Martin's qualifications for the position, as she had represented to the Dealership on her resume and otherwise, in comparison to those of the Charging Parties during the relevant time period. *See Defendants' MSJ App., pp. 454-460, Paragraph 5.* The evidence shows that Martins' supervisors believed her to have the superior knowledge and expertise needed for the position. *App., pp. 454-460, Paragraph 6.* This evidence is uncontradicted.

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[3] Defendants note that Meador is not an "interested party," because he was no longer employed at the Dealership at the time he gave his deposition.

[4] As noted in Defendants' Motion, 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.*

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).

The Commission has clearly failed to establish that Defendants' stated reason for Martin's promotion is pretextual. In fact, the only "evidence" Plaintiff has that Defendants' stated reason is false, other than Meador's confusion over a single question, is: (1) the fact that the Charging Parties are African-American; (2) the fact that the Charging Parties had been employed at the Dealership longer than Martin; and (3) the Charging Parties' own personal beliefs that they were more qualified than Martin (as well as each other) for the position, and were entitled to the position simply because of their longevity. As the Court is well aware, these facts, as well as the Charging Parties' own personal beliefs, no matter how genuinely held, are not sufficient evidence to establish that Defendants' asserted reason is a pretext for discrimination. *See, Baltazor v. Holmes*, 162 F.3d 368, 377, n. 11 (5th Cir. 1998); *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).

IV.
NO GENUINE ISSUE OF MATERIAL FACT AS TO CLAIM OF RACIAL HARASSMENT/HOSTILE WORK ENVIRONMENT HARASSMENT

A. No Genuine Issue of Material Fact: The Alleged Harassment Was Neither Severe or Pervasive.

The Charging Parties have alleged that, over the course of their 13 years of employment, they were subjected to a number of racial slurs and racially offensive incidents. In recounting these incidents in its responsive Brief, the Commission has misstated and/or overstated its "evidence,"

which consists entirely of the Charging Parties' own self-serving testimony.[5] For example:

(1) The only evidence that Mark Payne referred to Anthony Stone, a co-worker of the Charging Parties' as a "boy" and a "gorilla" is Jackson's hearsay evidence that Stone told him about these comments. This is not competent summary judgment evidence. *See Plaintiff's Statement of Facts, Paragraph 15.* More importantly, these comments allegedly made to Stone occurred outside of the workplace, and were not addressed to or even heard by either of the Charging Parties. Thus, these alleged comments could not be part of a pattern of severe or pervasive harassment in Barnett's and Jackson's workplace.

(2) There is no evidence that the environment was "permeated" with racially offensive graffiti. Rather, there was only one incident of racial graffiti in the men's restroom which was recounted by the Charging Parties. Both Barnett and Jackson admitted that the graffiti was promptly and properly addressed by the General Manager, who removed the graffiti and posted a notice of the disciplinary action to be taken against anyone found to be defacing the Dealership's property, up to and including termination. Jackson testified that there had been no such graffiti on the men's room walls since this memo was posted in early 2000. *Defendants' MSJ App., p. 200, l. 25, p. 201, l. 1-2.* Therefore, not only was the graffiti cited by Plaintiff not pervasive, the problem was promptly and properly addressed by management.

(3) The alleged "noose" (which was never described as a "hangman's noose" by either Charging Party) was, according to Barnett and Jackson, a looped shoestring which hung over the desk of Assistant Parts Manager Billy Gilbreath for some period of time in 1994 or 1995. Plaintiff has presented absolutely no evidence that this shoestring constituted a "racial symbol," and the Charging Parties were unable to testify to any comments or statements by Gilbreath to connect the shoestring to their race or even to them specifically. (This is the only incident of "racial harassment" alleged by the Charging Parties which involved Gilbreath.)

(4) Barnett never stated that the white bag or cloth which Larry Moody placed over his head on one occasion, when he made a reference to the movie, "Undercover Brother," resembled "a hood worn by the KKK." *See Plaintiff's Statement of Facts, Paragraph 22.* Rather, Barnett stated that he did not think Moody should be "coming out from under the counter with a white sheet over [his] head like you in the KKK member [sic]." *See Plaintiff's App., p. 22; Defendants' App., p. 126, pp. 256-257.*

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[5] Defendants note that, despite the fact that the Commission has conducted numerous depositions in this case, Plaintiff has failed to establish any corroborating evidence whatsoever for the Charging Parties' self-serving and conclusory deposition testimony regarding their alleged racial harassment.

Further, as set forth in Defendants' MSJ Brief, the evidence shows that the incident was reported to the Human Resources Representative for the Dealership, and was properly investigated and dealt with. *Defendants' MSJ App., pp. 126-127, pp. 258-261, pp. 327-336.* (This is the only incident of "racial harassment" alleged by the Charging Parties which involved Moody.)

(5) Barnett's testimony regarding the alleged isolated threat by a co-worker to "drag him with a chain" does not constitute evidence of pervasive conduct, particularly since, contrary to Plaintiff's assertions, Barnett testified during his deposition that he reported the threat to his supervisor, that immediate and appropriate action was taken, and that the employee twice apologized to him for the incident. *See Defendants' MSJ App., pp. 85-88.*

(6) There is no evidence, other than Barnett's speculation, that the alleged use of the term "power control monkey" on one occasion by Barnett's co-worker was intended as a "racial slur" against him.

(7) The evidence is totally insufficient to support Plaintiff's assertion that the Charging Parties' co-workers freely used the racial slur "nigger," particularly since the Charging Parties both testified that the term has never been used in reference to them. *See Defendants' MSJ App., p. 90, l. 8-25, p. 91, l. 1-1-25, p. 92, l. 1-25, p. 96, l. 16-18.*

(8) Contrary to Plaintiff's recounting of the "facts," Barnett testified in his deposition that his reference to "racial slurs" in his Charge of Discrimination referred only to the alleged use of the term "Buckwheat" in reference to him. *App., p. 62, l. 5-15, p. 65, l. 9-25, p. 66, l. 1-25, p. 67, l. 1-3*).

See also, generally, discussion at pages 21-23 of Defendants' Brief in Support of Second Motion for Summary Judgment.

Throughout this case, Plaintiff has attempted to create a false and negative image of the Dealership's workplace by using inflammatory words such as "noose" and "hood" to refer to, respectively, a shoestring (from 1994) and a mirror cover. The *evidence*, however, simply does not establish that the alleged harassment against Barnett and Jackson was severe and pervasive over the course of the 13 years each of the Charging Parties was employed at the Dealership. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Although the incidents alleged by the Charging

Parties seem numerous in the aggregate and as recounted by Plaintiff, the fact that the incidents, even if they did all occur, were spread throughout several years, coupled with the fact that most of the alleged incidents involved co-workers and were never complained about by the Charging Parties, clearly belies the "pervasiveness" of the conduct as alleged by Plaintiff. Further, even if true, a number of the harassing incidents recounted by Barnett and Jackson are so remote in time, that they are beyond judicial consideration even under *National Railroad Passenger Corp. v. Morgan,* 536 U.S.101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), since they do not establish a continuing pattern of discriminatory conduct. Simply put, the evidence fails to show that the Charging Parties' workplace was permeated with discriminatory behavior sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment and alter the conditions of their employment.

B. No Genuine Issue of Material Fact: No Case of Supervisor Harassment.

Plaintiff has clearly failed to show that the Dealership knew or should have known of the incidents of alleged harassment and failed to take prompt remedial action, so as to establish a claim for co-worker harassment. *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999). Plaintiff relies on the alleged use of the term "spearchunker" by Mark Morgan in reference to Jackson,[6] to try to establish a claim for supervisor racial harassment which resulted in a tangible employment action. The law is clear that, in order for comments in the workplace to provide sufficient evidence of discrimination, they must be proximate in time to the adverse action and related to the employment

[6] Defendants note that Plaintiff has no corroborating evidence for this assertion, other than the testimony of Barnett. Defendants also note that there is no evidence *whatsoever* of the use of a racial slur against ***Barnett*** by any supervisory employee.

decision at issue. *Krystek v. Univ. of Southern Miss.*, 164 F.3d 251, 256 (5th Cir. 1999). There is no evidence that any reference by Morgan to Jackson as "spearchunker," even if it did occur, was proximate in time to the decision to promote Martin over Jackson, or was, in any way related to the decision. Therefore, there is no evidence that a tangible employment action was related to or resulted from Morgan's alleged use of the term "spearchunker" in reference to Jackson, even if Morgan made such a remark. *See Boyd v. State Farm Ins.*, 158 F.3d 326, 329 (5th Cir. 1998) (no evidence of causal connection between stray racial epithet and defendant's failure to promote plaintiff).

Defendants are, therefore, entitled to summary judgment on the *Faragher/Ellerth* affirmative defense based on the evidence which conclusively establishes that: (1) the Dealership exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the Charging Parties unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Dealership. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

C. No Genuine Issue of Material Fact: The Dealership's Preventive and Corrective Measure Were Effective and Enforced.

Defendants' evidence clearly shows that the Dealership maintained effective complaint procedures which could be utilized to report any acts of discrimination or harassment. *See Defendants' MSJ App., pp. 372-421 & 431-438.* In complaining that the Dealership's complaint procedures were defective, Plaintiff focuses on Defendants' "Do the Right Thing!" training, which, it claims, was instituted only after the Charging Parties filed their Charges of Discrimination with the Commission. This limited focus completely ignores Defendants' evidence of other existing and

effective complaint procedures about which the Charging Parties clearly had knowledge much earlier in their employment. *See Defendants' MSJ App., pp. 414-416 & 431-433.* Further, Plaintiff claims that the fact that the Human Resources Manager was located off-site somehow created a barrier to the Charging Parties lodging a complaint of discrimination. This is despite the fact that both Barnett and Jackson had actual knowledge of how to contact this individual (and did so in relation to the incident involving Larry Moody). It is also in spite of the fact that the Dealership posted information concerning its Alert-Line complaint procedure, which gave the Charging Parties another avenue to complain of discrimination, in a prominent place in the Dealership. *See Defendants' MSJ App., pp. 394-395 & 398.* The evidence is also clear that the Dealership maintained an open door policy, which was established by Bledsoe Dodge's Employee Handbook well prior to the Dealership's acquisition by AutoNation's subsidiary. In fact, the Charging Parties testified that they felt free to go to both Bonakdar, the General Manager prior to November 1999, and Matt Bledsoe, the Dealership's original owner, with other complaints they had in the workplace.

Plaintiff's assertion that the Charging Parties made "numerous complaints of racial harassment" is flatly contradicted by their own deposition testimony. Further, the four complaints set forth on page 19 of Plaintiff's responsive Brief are the only complaints Barnett and Jackson testified that they made, despite their long list of alleged harassing incidents and the notes they diligently kept (after they filed their Charges of Discrimination) pertaining to alleged incidents of harassment in the workplace.

The evidence also shows that, when the Dealership actually became aware of an incident of alleged harassment, whether through a complaint by the Charging Parties or otherwise, it took

prompt remedial action to remedy the situation. For example, Plaintiff's assertion that the use of the term "nigger-rigged" by Cameron Birney was never addressed by the Dealership is absolutely false and completely controverted by both the Charging Parties' testimony and Defendants' documentary evidence. *See Defendants' MSJ App., p. 82, l. 4-25, p. 83, l. 1-11, p. 458-460.* Defendants' evidence of the disciplinary action which was taken to address other racially inappropriate comments about which the Dealership became aware, such as Mark Newman's use of the term "nigger," is also uncontroverted. *See Defendants' MSJ Brief, pp. 20-21 & 26.* Accordingly, Plaintiff clearly cannot prevail on a claim of hostile work environment racial harassment against the Charging Parties under either a supervisor or a co-worker theory of liability.

V.
NO EVIDENCE THAT THE CHARGING PARTIES' LAY-OFF FOLLOWING THE CLOSING OF THE DEALERSHIP WAS DISCRIMINATORY OR RETALIATORY

A. No Genuine Issue of Material Fact Regarding a Causal Connection Between the Charging Parties's Protected Activity and Their Lay-offs From the Defunct Dealership.

Plaintiff alleges that the termination of the Charging Parties' employment with the Dealership in June 2003, when the Dealership ceased operations in June of this year, constituted retaliation against Barnett and Jackson for engaging in protected activity and/or was discriminatory based on their race. It is undisputed that the Charging Parties engaged in protected activity, as defined by Title VII. If, however, Barnett's and Jackson's lay-offs from the Dealership when it closed constitute an adverse employment action, there is no competent summary judgment evidence to establish a causal connection between the protected activity and the adverse employment action. The fact that: (1) the Charging Parties' employment was terminated; and (2) one other employee in the Parts Department

who held a comparable position to Barnett and Jackson was offered a position at another dealership, is the only evidentiary support for Plaintiff's claim that their lay-off from a defunct business was retaliatory in nature. This evidence, which is undisputed, is simply insufficient to establish a causal connection between the Charging Parties' protected activity and their termination.[7]

Initially, Defendants note that the Dealership did not "relocate its operations" to Bankston, as alleged by Plaintiff. Rather, the Dealership was shut down and its operations ceased. The evidence cited by Plaintiff in its Brief does not contradict this fact. *See Plaintiff's Brief, p. 34.* When the Dealership closed, in an attempt by management to try to minimize the loss of jobs at the Dealership, several employees were offered available positions with another dealership, Bankston Chrysler/Jeep ("Bankston"), which acquired the Dealership's inventory. The Dealership had absolutely no obligation, however, to seek out positions for their employees at other AutoNation-affiliated dealerships.[8] In fact, the vast majority of employees at the Dealership, including the General Manager, Sam Tater, and the Parts and Service Director, Larry Moody, both white males, lost their jobs when the Dealership closed. Only three Parts Department employees, including the Parts Manager, were offered positions at Bankston.

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[7] The dearth of evidence to establish a claim for retaliation is also lacking with regard to a claim for discriminatory termination. There is simply no evidence, direct, circumstantial or otherwise, to establish a *prima facie* case of discriminatory discharge, and Defendants' competent summary judgment evidence clearly establishes the legitimate, non-discriminatory basis for the Charging Parties' termination of employment, which Plaintiff has failed to show is pretextual.

[8] Defendant AutoNation had even less of a responsibility for finding jobs for the Dealership's employees, as this entity did not employ those individuals. Contrary to what Plaintiff appears to believe, AutoNation had no duty to examine the operations at the other 21 dealerships in the Dallas North District of AutoHolding Group, to find positions for the Dealership's misplaced employees. *See Defendants' MSJ App., p. 471.*

The criteria for choosing the employees to whom the available positions were offered was neutral and based on productivity. This evidence is undisputed. In responding to Defendants's Motion, Plaintiff argues that the spreadsheets Tom Calloway ("Calloway"), the Director of Fixed Operation for AutoNation North Texas Management, L.P., relied on in choosing the employees to whom to offer the available positions: (1) does not specifically reference the year to which the productivity figures reflected therein pertain (although the documents are all dated June 16, 2003); and (2) contains dates which are contrary to the dates Calloway testified in his deposition (when he did not have the documents in front of him) that he considered, *i.e.*, the calendar year instead of June 2002 to June 2003. These assertions are simply "red herrings" set forth by the Commission. Plaintiff has no evidence whatsoever to show that the spreadsheets produced by Defendants, and which have been properly authenticated and explained by Calloway, pertain to anything other that what has been represented.[9]

In addition, the fact that Calloway may have forgotten the exact time period encompassed within the spreadsheets from the time he made the decision until the time he gave his deposition in this case (particularly considering that he had a multitude of details to which to attend in closing the Dealership) does not negate the fact that the productivity records reflected in the spreadsheets constituted, in fact, the objective, reasonable and non-discriminatory basis for offering the positions to individuals within the Parts Department other than the Charging Parties. This "conflict in the evidence," as argued by Plaintiff, does not raise a genuine issue of material fact that Calloway's

[9] In fact, even if the spreadsheets pertain to dates other than the most recent calendar year, which is denied, this fact would be irrelevant, so long as the criteria used was objective and non-discriminatory.

testimony regarding the decision-making criteria he utilized is false.

Furthermore, it is important to note that Calloway had no involvement whatsoever in making any employment decisions regarding the Charging Parties, or in defending this lawsuit, prior to the closing of the Dealership and the lay-off of the majority of employees. In fact, Calloway was not implicated in this lawsuit in any way prior to the closing. In its Brief, Plaintiff asserts that Calloway and Jose Colmenares, the Director of Human Resources, discussed the Charges of Discrimination and this pending lawsuit during the decision-making process. *See Plaintiff's Brief, p. 32.* This is a mischaracterization of the deposition testimony of these two individuals. An examination of the actual testimony clearly shows that both of these individuals had only a passing knowledge (which Calloway received from Defendants' attorneys) of the protected action pursued by the Charging Parties. *See Plaintiff's App., pp. 189-191 and 205-207.* More importantly, there is no evidence to create a genuine issue of material fact that this knowledge played any part whatsoever in the decision to offer other employees, and not the Charging Parties (or the other remaining employees in the Parts Department who also lost their jobs), the available positions at Bankston. Indeed, it appears unlikely, and quite tenuous, that Calloway would focus on or even consider the protected activity of two employees in attending to the wide-scale and massive project of shutting down operations at the Dealership.

In short, there is simply no evidence that "'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)). *See Plaintiff's Brief, p. 32.* Indeed, it is absurd to argue that the fact that the three

individuals[10] who were offered positions at Bankston ***had not*** filed Charges of Discrimination against the Dealership establishes a causal connection between the Charging Parties' own protected activity and the fact that they were not offered positions at Bankston. In fact, the majority of employees who ***lost*** their jobs when the Dealership closed had likewise ***not*** filed Charges against the Dealership.

Finally, it is important to note that the Charging Parties first filed their Charges of Discrimination, and thus, first engaged in protected activity, in October 1999, ***almost four years prior to their lay-off.*** After filing the Charges, the Charging Parties were not only ***not*** retaliated against, they were both promoted and both received pay increases. In addition, after their Charges were filed, Barnett and Jackson made complaints of discriminatory conduct in the workplace (see discussion in previous section), and suffered no retaliatory action as a result of those complaints. It simply defies logic to assert that the Dealership would wait almost four years, until the time it is actually shutting its doors, to choose to retaliate against the Charging Parties.

B. No Evidence to Refute Defendants' Evidence of a Legitimate, Non-Discriminatory Reasons for the Adverse Employment Action; Therefore, No Genuine Issue of Material Fact.

Of the three available positions in the Parts Department at Bankston, one was for a Parts Manager, a role Wes Rogers had already assumed, one was for a Parts Stock Clerk, and only one was for a Parts Counterperson. It is undisputed that there were no open positions for an Assistant Parts Manager at Bankston when the Dealership closed. Further, the Commission does not argue that the

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[10] Again, only one of these individuals held a position comparable to that held by the two Charging Parties.

Charging Parties should have been given the position of either Parts Manager or Stock Clerk. Instead, Plaintiff argues that either one or both (it is not clear) of the Charging Parties should have been transferred to the one available Parts Counterperson position at Bankston.

Plaintiff again mischaracterizes the evidence in stating in its Brief that Wes Rogers witnessed Calloway offer positions to both Brian Mathis ("Mathis") and Lonny Wade ("Wade"). *See Plaintiff's Brief, p. 36.* Rather, Rogers testified that Calloway told Wade that he was "being considered" for an offer for a position at a dealership other than Bankston. *See Plaintiff's Appendix, p. 214.* There is no evidence that such a position ever materialized or that an offer was ever extended to Wade. In fact, Defendants' evidence establishes otherwise. The actual decision-maker, Calloway, testified that Wade was not offered a position elsewhere, and further, that Wade was not paid the two weeks severance which was paid to the two Charging Parties and all other terminated employees. *See Defendants' MSJ App., p. 500, l. 22-25, p. 501, l. 1-3, pp. 461-464.* In addition, however, even if Wade was considered for, or even offered, a position at another dealership, Defendants' authenticated and uncontroverted evidence shows that he was the second highest producer (after Mathis, the employee who was actually offered the position at Bankston) among the Parts counter employees for the preceding calendar year. *See Defendants' Appendix, pp. 461-470.*

As set forth above, the criteria used by Calloway in offering the vacant position to Mathis was legitimate and non-discriminatory. The Commission has relied solely on the Charging Parties' seniority with the Dealership to argue that Barnett and Jackson should have been promoted to Assistant Parts Manager in July 1999. Likewise, Plaintiff relies solely on this one factor to argue that, regardless of whoever else lost their jobs as a result of the Dealership's closing, the Charging

Parties should have been guaranteed a transfer to a new dealership. Indeed, as set forth in Defendants' Motion, the Dealership was not required to choose the criteria for making the three job offers which the Commission deemed the most desirable or expedient to their case or the Charging Parties. The only requirement is that the criteria used by Defendants be objective, reasonable and non-discriminatory or retaliatory. Defendants have clearly established that requirement. The Charging Parties 13 years of employment with the Dealership did not entitle them to employment for life, or another specific period of time, regardless of what happened to the Dealership's operations.[11]

In addition, in setting forth its evidence regarding the legitimate, non-discriminatory reasons for offering the Parts Department's highest producing Counterperson, Mathis, the position at Bankston, Defendants did not make reference to any "problems" with the Charging Parties' sales productivity or performance. Instead, the basis for the decision was the simple fact that Mathis was ***more*** productive than either of the Charging Parties. There is no genuine issue of material fact that Defendants' legitimate, non-retaliatory reasons for Calloway's decision to offer the Parts Counterperson position at Bankston to Mathis is a pretext for retaliation or discrimination against the Charging Parties.

VI.
NO EVIDENCE THAT DEFENDANTS OPERATED AS A SINGLE INTEGRATED ENTERPRISE

As stated in Defendants' Motion, Defendant AutoNation is not a proper Defendant to this

[11] Surely it is not the Commission's position that Barnett and Jackson could *never* be terminated from their employment with the Dealership once it filed a lawsuit against these Defendants.

lawsuit because this entity never employed the Charging Parties. As Defendants' evidence shows, the Dealership was owned by corporate entity other than AutoNation, Inc. *See Defendants' MSJ App., p. 471.* Furthermore, despite Plaintiff's argument that Defendants operated as a single integrated enterprise, there is absolutely no evidence that AutoNation (which was a parent of the parent over Bledsoe Dodge) had any control over hiring, disciplining, promoting, demoting, or taking any other adverse action against employees, including the Charging Parties, within the Dealership's workplace. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997). In fact, Calloway, the decision-maker with regard to offering positions to employees as another dealership when the Dealership closed, was not employed by AutoNation, Inc., but by a different corporate entity. *See Defendants' MSJ App., p. 461.*

In addition, there is absolutely no evidence that AutoNation had "complete financial control" over the Dealership, as alleged by Plaintiff. For example, in his deposition, Sam Tater, General Manager for the Dealership prior to its closing, testified that AutoNation had no control over establishing pay plans or performance evaluation.[12] *Plaintiff's MSJ App., p. 85.* Plaintiff simply cannot satisfy the four part test for a single integrated enterprise set forth in *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983). Therefore, summary judgment as to AutoNation is proper.

VI.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants ask the Court to grant Defendants'

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[12] The Commission again mischaracterizes the evidence in this case by asserting that Tater testified that "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." Instead, Tater testified that he simply sought counsel from an AutoNation attorney as to how to proceed.

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

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been mailed by certified mail, return receipt requested, to counsel for the Commission, Ronetta J. Francis, Dallas District Office, Equal Employment Opportunity Commission, 207 South Houston, 3rd Floor, Dallas, Texas 75202 on this 24th day of October, 2003.

Connie K. Wilhite