John P. Boggs (State Bar No. 172578)
David A. Hosilyk (State Bar No. 191274)
FINE, BOGGS & PERKINS LLP
2450 S. Cabrillo Highway, Suite 100
Half Moon Bay, California 94019
Telephone: (650) 712-8908
Fax: (650) 712-1712

Attorneys for Defendants
LEXUS OF SERRAMONTE,
SONIC AUTOMOTIVE, INC. and
FIRST AMERICA AUTOMOTIVE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **LEXUS OF SERRAMONTE, SONIC AUTOMOTIVE, INC., AND FIRST AMERICA AUTOMOTIVE,** **Defendants.**	**Case No. C-05-0962 SBA** **DEFENDANTS' TRIAL BRIEF** **Date : Oct. 2, 2006** **Time: 8:30 a.m.** **Judge: Armstrong**

1. Facts and Contentions

A. Introduction

The federal Equal Employment Opportunity Commission ("EEOC") brought this Title VII action on behalf of Annie Wei, a former sales employee of defendant Lexus of Serramonte ("Lexus"), an automobile dealership located in Colma, California. The EEOC and Wei claim that between December 2001 and November 2002, Wei's male co-workers and managers subjected her to a hostile work environment based on her sex. Among other things, Wei claims her manager and other sales employees made sexually-tinged comments to her about her body. Wei also claims one co-worker tried to pull down her skirt during work. Wei claims that the alleged harassment was such that she had no reasonable alternative but to quit her job.

The EEOC also brought this action on behalf of other similarly situated women, however in the three plus years the agency has been investigating and prosecuting this case, the only other claimant that has been identified by the agency at this time is Salma Rashid, another former sales employee who worked for the dealership from May 2001 to April 2002. Rashid claims that a co-worker slapped her on the buttocks and that other co-workers looked at pictures of naked women on their computer screens.

The alleged individual perpetrators of the harassment deny they engaged in any of the unlawful conduct alleged by Wei or Rashid. Further, defendants maintain that neither Wei nor Rashid ever complained to management about the alleged harassment. At the time of the alleged harassment, defendant Lexus of Serramonte had in place a policy prohibiting unlawful harassment, which informed employees about how to report claims of harassment to management. Both Wei and Rashid knew about the policy. Wei says she complained to management, but she admitted she never used the words "sexual harassment" in her complaint and does not even remember what she said in her complaint. Rashid simply did not complain to

management about the alleged harassment.

The EEOC is seeking compensatory and punitive damages on behalf of the claimants, as well as injunctive relief.

B. Summary of Key Facts

1. Wei's Initial Complaint Had Nothing to Do With Sexual Harassment.

Annie Wei was hired by Lexus of Serramonte (or "dealership") on December 18, 2001 as an Internet Sales Representative working for the Fleet Sales Department. She reported to Bob Fraley, Fleet Sales Manager.

On November 1, 2002, Wei approached the dealership's Controller, Jan Tobin, complaining about the behavior of Fraley. Wei claimed that Fraley had been abusive toward her and that she was stressed out about it. Tobin treated this complaint seriously and regarded it as a potential complaint of harassment. Tobin asked various managers to come to her office to discuss the situation with Wei. In addition to Wei and Tobin, the following managers were present: Huck Hibbard, the newly-hired General Manager; Steve Dessy, the General Sales Manager; and Stephanie Bliss, the Human Resources representative.

During this meeting, Wei was given the floor to air any and all issues or complaints she had with Fraley. Wei stated that she and Fraley had enjoyed a good working relationship for a long period of time, but that in the last several months, Fraley had become "abusive" and she felt she could no longer work with him. Management asked Wei for specific details regarding her complaint. Wei stated she had received a phone message from Fraley where he allegedly asked Wei, "Where the fuck are you?" Wei also mentioned an incident where Fraley allegedly threw his keys at a window of his office trying to get Wei's attention, as she was standing outside on the other side of the window.

During this same conversation, however, Wei mentioned that she was having personal

problems. For example, she said she was experiencing stress that was unrelated to work. She said she had a heart condition and that she was feeling depressed. She also talked about problems she was having with her boyfriend and that she was seeing a psychologist.

During the November 1 meeting, Steve Dessy, the General Sales Manager, offered Wei a sales position on the sales floor where she would make considerably more money than her current position and would not be working for Fraley. Wei declined this offer saying there were additional stress factors in her life. She said she needed at least a week off from work to sort out her troubles. Management agreed and let her take a week off with pay while they looked into her allegations against Mr. Fraley. Management specifically told Wei they would talk to Fraley and counsel him, if necessary. Dessy asked Wei to contact him in the following days to let him know how she was doing.

Significantly, at the end of this meeting, Jan Tobin (female) approached Wei and told her that if she felt uncomfortable talking about anything in front of the male managers, that she could voice any concerns to either her or Stephanie Bliss, and that their doors were always open. Despite this invitation to expand on any potential complaints she may have had, Wei declined. She said she had nothing more to report. Wei was placed on paid leave as discussed in the meeting.

In the following days, management discussed Wei's complaint with Fraley, who admitted that on one occasion he threw his keys at a window that was near his desk. Fraley explained that he was on a telephone call with a customer, and the other phones were ringing as well. Wei was standing outside the window smoking and chatting with someone and Fraley needed Wei to answer the phones. Because Fraley was on the phone with a customer, he threw his keys at the window to get her attention.

With respect to the voice-mail message, Fraley admitted that he left a message on Wei's

voice mail that contained profanity. Fraley explained that he was very frustrated with Wei and wanted to know her whereabouts. Fraley explained that Wei had a tardiness problem – she was often late to work, sometimes up to an hour late. In addition, Wei had been absent where she failed to show up for work and failed to call the dealership to report her absence, in violation of company policy. Although management understood that Fraley was frustrated with Wei, it did not condone his behavior toward Wei. In fact, Fraley was given a written warning about his behavior.

Despite her claim that she planned to return to the dealership after her paid leave of absence, Wei never returned. Instead, on or about November 19, 2002, Wei, through her attorney, sent letters to the dealership asking for her personnel records and informing the dealership that she had been constructively terminated and that she had been subject to a sexually hostile work environment. Wei never raised these allegations with the dealership before this point. Even after Wei's resignation, the dealership asked for her cooperation with its investigation of her newly-raised complaints of sexual harassment. Wei refused.

2. The EEOC's Lawsuit and Wei's New Allegations.

When Wei filed her charge of discrimination and when the EEOC filed its lawsuit, Wei's allegations about the work environment at Lexus had taken on a whole new dimension. Wei now claims that one of the Sales Managers, Rod Helaire, frequently commented on her buttocks, touched her inappropriately on the neck and waist, and made comments to her about "hooking up" outside of work. Wei also claims Helaire would summon Wei to the dealership's showroom floor so he could simply look at her.

In addition, Wei claims a male employee named Israel blew kisses at her, told her she was beautiful, and that he was going to leave his wife for her.

Wei also claims that her direct supervisor, Bob Fraley, occasionally showed her pictures

of nude or semi-nude women on his computer and referred to Wei as "cute." Wei further alleges that Fraley once told her that she "had the face of an angel but the mouth of a trucker." Wei claims this was sexually offensive because Fraley should not have invoked her face in his comment about Wei having a dirty mouth. Curiously, Wei admits she used profanity, such as the "F-word," on a regular basis when she worked at the dealership.

Wei also alleges that the dealership's Finance Director, Francis Chang, shoved a piece of cake in her face at a company function, and that she found that to be sexually offensive. Wei claims Chang also pulled her skirt down to her mid thigh in front of unknown witnesses, and that Chang once told Wei that he had dreamt about having sex with her.

Finally, Wei alleges that a male salesperson, Yan Epshtein, touched her on the buttocks and made sexually inappropriate comments to her.

3. Rashid's Allegations.

Rashid claims that on one occasion, Francis Chang slapped her on the buttocks with a file folder. She also claims Helaire and Fraley made sexually inappropriate comments about her looks. Although Rashid cannot recall very many specifics about the alleged comments, she testified that Fraley once told her to wear shorter skirts.

2. Legal Issues

A. Wei and Rashid Will Have a Difficult Time Proving They Were the Victims of Severe and Pervasive Conduct of a Sexual Nature.

With the exception of Fraley's admission that he threw keys at his office window to get Wei's attention and used profanity in a voice-mail message to Wei, the allegations of sexual harassment in this case are disputed.

To establish liability in a case of hostile environment sexual harassment, the claimants will have to prove that: (1) they were subjected to unwelcome sexual advances; (2) the harassment was based on sex; and (3) the harassment was "so severe and pervasive" as to "alter

the conditions of the victim's employment and create an abusive working environment." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405-2406 (1986). Claimants alleging constructive discharge must prove the working conditions were intolerable – that a reasonable person in the claimant's shoes would have felt compelled to resign. Pennsylvania State Police v. Suders, 542 U.S. 29, 124 S. Ct., 2342, 2354-2355 (2004).

While the material allegations of sexual harassment are disputed, there are indications that Wei and Rashid were not harassed as they claim. For example, Wei and Rashid point to each other as witnesses of the harassment, but other than themselves, nobody has come forward thus far in this case to support their allegations.

Moreover, Rashid never complained to management about any alleged sexual harassment, and she admitted that she only got involved in this case when she was solicited to do so by Wei's attorney. Prior to that point in time, Rashid was not even thinking about any alleged sexual harassment at Lexus of Serramonte.

Wei now claims she told management about the harassment, but in her deposition admitted that she never once used the words "sexual harassment." In addition, defendant Lexus of Serramonte's management-witnesses that met with Wei before she left the dealership will testify that Wei never complained of sexual harassment, even though she had every opportunity to do so. For example, Jan Tobin and Stephanie Bliss, neither of whom work for the dealership any longer, will both testify that Wei never complained about sexual harassment in the November 1, 2002 meeting about Fraley's behavior.

In addition, both Wei and Rashid received the dealership's policy prohibiting unlawful discrimination and harassment, which provided all employees with multiple ways of reporting a harassment problem. For example, under the policy, an employee could complain to his or her manager, the General Manager of the dealership, the Human Resources department, or a

confidential 800 number reporting service. Given all these options, neither Wei nor Rashid complained.

Moreover, both Wei and Rashid have some serious credibility problems. Wei repeatedly lied in her deposition about a number of issues, including medications she was taking for her health conditions. Wei also testified that she could not even remember looking for a job after leaving the dealership, but she did recall that she would not consider working for other automobile dealerships because they were "male-dominated" work environments. Curiously, Wei then admitting taking a job at the Gold Club, a strip joint in San Francisco, a male-dominated work environment that exposed Wei to female nudity every time she worked and a male-dominated environment Wei said she eventually got used to. The evidence at trial will also show that Wei has a tattoo on the small of her back that says "Bliss," that she has no problem using profanity on a regular basis, that she talked openly about sex, and that she is not really offended at all by give-and-take sexual banter. Wei simply does not make a very credible, likable, or sympathetic witness.

Similarly, Rashid lied on numerous occasions in her deposition, including her steadfast denial that she had ever been involved in a lawsuit other than this action – until, that is, she was given a copy of the other lawsuit she had been involved with. In addition, the evidence will show that Rashid never complained to management about the alleged harassment. However in Rashid's case, she did not even want to give the company a chance to correct any alleged harassment. Like Wei, Rashid does not make a very compelling witness.

B. Neither Wei Nor Rashid Complained of Harassment and Both Unreasonably Failed to Avoid Harm Otherwise.

If the claimants cannot prove they suffered "tangible employment actions" as a result of the alleged harassment, and defendants show they exercised reasonable care to prevent the harassment and that the claimants unreasonably failed to take advantage of any preventive

opportunities by defendants or unreasonable failed to avoid harm otherwise, they cannot prevail on their Title VII claims. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-765 (1998); Faragher v. City of Boca Raton, 424 U.S. 775, 807-808 (1998).

Accordingly, both Wei and Rashid should be precluded from brining these allegations in that they unfairly denied the employer the chance to address their concerns. This is especially true given that the dealership gave Wei every opportunity to make a complaint and specifically offered her the chance to discuss any complaints she might have had with just Jan Tobin or Stephanie Bliss, without involvement by any other male manager. Instead, Wei actually impeded the dealership's attempt to investigate the allegations raised in her EEOC charge and later in the EEOC's complaint.

C. The Alleged "Class" of Claimants Consists Only of Wei and Rashid. In Any Event, the Putative "Class" Could Potentially Only Include Individuals Who Could Have Filed Charges Within 300 Days of the Charge In This Case.

After years of investigating and litigating this matter, only two claimants have been identified by the EEOC as part of its so-called "class" case. At this stage of the proceedings, Annie Wei and Salma Rashid make up the "class" the EEOC purports to represent. In any event, even if the agency could have identified other class claimants, the class would have to be limited in scope.

In California, a charging party seeking relief under Title VII who has also filed with the DFEH must file a charge of discrimination within 300 days of the alleged conduct giving rise to the charge. Sosa v. Hiraoka, et al., 920 F.2d 1451, 1455 n.1 (9th Cir. 1990). An EEOC Title VII suit – like a private suit – must be based on a timely EEOC charge. See, e.g., EEOC v. Pierce Packaging Co., 669 F.2d 605, 607 (9th Cir. 1982).

The EEOC claims that more than 30 days prior to the filing of this lawsuit, Annie Wei filed a charge of discrimination. The EEOC also claims that potential claimants need not have actually filed timely charges of discrimination in order for the agency to seek relief on their

behalf. Defendants do not dispute these general contentions.

However, the EEOC may not seek relief on behalf of claimants who *could not* have filed charges of discrimination within 300 days of the charge in this case. Only those claimants who could have filed a charge at or after the time the earliest charge was filed by the class representative can be included in the class. Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980). This doctrine is referred to as the "single filing rule," which has also been adopted by other federal courts. See EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 839-840 (6th Cir. 1994); accord Logan v. West Coast Benson Hotel, 981 F. Supp. 1301, 1312-1313 (U.S. Dist. Or. 1997).

Thus, claimants who could not "piggy-back" onto Wei's EEOC charge and therefore utilize the single filing rule exception to the administrative prerequisites and statutes of limitations under Title VII cannot be members of the class the EEOC purports to represent.

D. Lexus of Serramonte is the Only Proper Employer Before the Court.

Trying to maximize potential damages (see 42 USC § 1981a(b)(3)(A)-(D) for damage caps applicable in Title VII actions based on the size of the employer), the EEOC has sued three separate corporate entities in this case, alleging that all three constitute the claimants' "employer" under Title VII. The EEOC is wrong.

Lexus of Serramonte employed both Wei and Rashid. Neither Sonic Automotive, Inc. nor First America Automotive, Inc. should be deemed an employer in this case.

First, defendant First America Automotive, Inc. was never named as a potential defendant in Wei's charge of discrimination with the EEOC. Under Title VII the EEOC may sue only a "respondent … named in the charge." Sosa, supra, 920 F.2d at 1458. Ms. Wei's EEOC charge names only "Lexus of Serramonte and Sonic Auto" as respondents. Similarly, EEOC's "Notice of Charge of Discrimination" was directed only to "Lexus of Serramonte and Sonic Auto."

Accordingly, First America Automotive, Inc. should not be deemed an employer in this action.

Second, the three defendants are substantially different such that they should not be deemed a single employer. Defendant Lexus of Serramonte was a wholly-owned subsidiary of defendant First America Automotive, Inc. ("FAA"), a holding company, which was and still is a completely separate corporation. In 1999, Sonic Automotive, Inc. ("Sonic") purchased the stock of FAA, and therefore became the indirect owner of Lexus of Serramonte.

In a Title VII action, the standard used to determine whether consolidation of separate potential employing entities is proper is: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379, 1382-1383 (9th Cir. 1983). Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379, 1382-1383 (9th Cir. 1983). Under Childs, common management is but one factor to determine whether potential employers are substantially related. Similarly, common ownership is simply one factor in the analysis.

Moreover, there is a strong presumption that a parent corporation is not the employer of its subsidiary's employees. Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993). Defendant Lexus of Serramonte was a wholly-owned subsidiary of defendant FAA, a holding company, which was and still is a completely separate corporation. In 1999, Sonic purchased the stock of FAA, and therefore became the indirect owner of Lexus of Serramonte. The dealerships indirectly owned by Sonic are similar to McDonald's franchises in that while Sonic may provide the dealerships with generic employee handbooks, Human Resources services, personnel forms, or negotiated group benefits, the individual dealerships operate as separate corporate entities where the General Managers of each dealership manage the day-to-day operations without any input from either defendants Sonic or FAA. In addition, each store is required to pay a fee for the

aforementioned administrative services provided by defendant Sonic.

Further, Sonic does not employ the employees that work for the dealerships. Among other factors indicating the independence of the dealerships from either Sonic or FAA, the General Managers of each dealership are responsible for hiring and terminating employees; each dealership is individually responsible for its own financial obligations including payroll, benefits, and litigation costs; and each dealership produces its own financial reports based on each particular automobile manufacturer's requirements without input or control by defendants Sonic or FAA. Similarly, the dealerships owned by Sonic are franchised new car dealerships that are franchised by a particular automobile manufacturer. They are not franchised by defendants FAA or Sonic.

Accordingly, the only proper employer before the court is Lexus of Serramonte.

E. Damages Issues

1. According to The EEOC and Wei, Wei Allegedly Suffered Only "Garden Variety" Emotional Distress.

Wei testified that the only emotional distress she suffered after leaving Lexus of Serramonte stemmed from a discussion she had with her father about her employment at the dealership and an EEOC-orchestrated public relations news interview announcing Wei's lawsuit. Moreover, Wei never took any medications for her alleged emotional distress and never sought treatment from a psychologist or psychiatrist as a result of the alleged harassment.

2. Any Claims for Loss of Future Earnings or Front Pay by Wei Should Not Be Allowed. Similarly, Any Claims For Backpay Should Be Limited.

Loss of future earnings or "front pay" is an equitable remedy that may be awarded in the discretion of the trial court. EEOC v. W&O, Inc., 213 F.3d 600, 618 (11th Cir.). So-called "front pay" is simply money awarded for lost compensation in lieu of reinstatement and is intended to be a transitional remedy that is temporary in nature and measured by the employee's projected earnings and benefits over the period of time until the employee is likely to become reemployed.

Williams v. Pharmacia, Inc., 137 F.3d 944, 954 (7th Cir. 1998).

However, an award of front pay "does not contemplate a plaintiff will sit idly by and do nothing, because the duty to mitigate by seeking employment elsewhere significantly limits the amount of front pay available. Cassino v. Reichhold Chemicals, Inc., 817, f.2d 1338, 1347 (9th Cir. 1987).

Moreover, front pay awards should be limited to the period of time reasonably necessary for a plaintiff to secure alternative comparable employment, as awards for lengthy periods of time are inherently speculative. See Peyton v. DiMario, 287 F.3d 1121, 118 (D.C. Cir. 2002). Further, front pay is not an appropriate remedy where the employer could have terminated the employment of the plaintiff under the "after-acquired evidence" doctrine, *i.e.*, where, after termination, the employer discovers the employee had engaged in wrongdoing justifying termination. See McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362, 115 S. Ct. 879, 886 (1995).

In this case, Wei testified that she cannot even remember what she did to find employment after resigning from Lexus of Serramonte. In addition, Wei also admitted that she made the voluntary choice to live with her ailing grandmother after leaving the dealership, and did not look for work for some time. Moreover, there is evidence in this case that Wei engaged in misconduct while working for Lexus of Serramonte that would have justified her termination. In any event, Wei should not be awarded front pay.

Similarly, any claims for back pay should also be limited under the "after-acquired evidence" doctrine. See McKennon, supra, 513 U.S. at 361, 115 S. Ct. at 886.

3. Damages Awards Under Title VII Are Subject To Statutory Caps.

The total that may be awarded in a Title VII action for compensatory and punitive damages may not exceed $50,000 in the case of an employer with 15 to 100 employees. The

evidence will show that the only employer in this case is Lexus of Serramonte, and that the dealership did not employ more than 100 employees during the relevant time periods.

Dated: September 5, 2006

Respectfully submitted,
/ s /
John P. Boggs
FINE, BOGGS & PERKINS, LLP
Attorneys for Defendants