

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION**

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
XERXES CORPORATION, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No. CCB-008-1882

**DEFENDANT'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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**I. INTRODUCTION:**

**A. Summary**

The Equal Employment Opportunity Commission (“EEOC”) has brought this action against Xerxes Corporation (“Xerxes”) on behalf of three Black current or former employees at Xerxes’ Williamsport, Maryland plant. The EEOC contends that those class members, Messrs. Bernard Pearson, Keith Wilson, and Gradian Graham, were subjected to racial discrimination, in the form of co-worker racial harassment, in violation of Title VII of the 1964 Civil Rights Act. Two of the three class members are no longer employed by Xerxes. Mr. Pearson resigned and Mr. Graham’s employment ended due to termination for attendance. The EEOC has not asserted any claim arising from their separations from Xerxes.

There is no dispute that Xerxes maintains detailed corporate policies strictly forbidding racially harassing conduct of any kind. Similarly, there is no dispute that in response to reports by class members, Xerxes undertook extensive investigative and remedial action including numerous employee interviews, severe disciplinary action against employees determined to have violated Xerxes policies, and repeated retraining of all supervisors and employees to reinforce Xerxes’ policies against racial harassment.

Summary judgment should be entered for Xerxes on two bases. First, Xerxes undertook prompt remedial action once it received allegations of racial harassment. As a result, liability may not be imputed against Xerxes. Xerxes’ preventive, investigative and remedial actions were extensive and effective. As a result, the Statement of Facts regarding these actions is, by necessity, lengthy and detailed. These facts compel the conclusion that reasonable minds cannot differ as to the sufficiency of Xerxes’ commitment to the principles of equal employment opportunity and Xerxes’ responsiveness to class members’ reports. Xerxes is therefore entitled to summary judgment.

Second, Xerxes is entitled to summary judgment as to the class members because the undisputed facts demonstrate that the conduct they claim to have experienced, although contrary to Xerxes' values, EEO standards, and policies which absolutely prohibit discrimination, including harassment, was not severe enough to be legally cognizable under Title VII.

**B. Xerxes Corporation Generally:**

Xerxes manufactures fiberglass underground storage tanks at plants in Texas, California, Iowa, and Williamsport, Maryland. Xerxes' main office is located in Minneapolis, Minnesota. Xerxes has policies, training initiatives, and other actions designed to advance Xerxes' commitment to providing every applicant and employee with a work environment free of unlawful discrimination, including prohibited harassment. Those policies and related training are more fully described below.

Xerxes' Williamsport plant employs approximately 84 employees. (Affidavit of Wayne Green ("Green Aff.") ¶ 2.) Wayne Green serves as the plant manager. (Green Aff. ¶ 2.) He supervises a small group of supervisors, who in turn supervise nonsupervisory production employees. (Green Aff. ¶ 2.) An organizational chart reflecting the plant's management structure is attached as Exhibit A to the Affidavit of Wayne Green. (Green Aff. ¶ 2.)

**C. Background Regarding the EEOC's Three Purported Class Members:**

The EEOC has brought this lawsuit against Xerxes on behalf of two former employees (Bernard Pearson and Gadian Graham) and one current employee (Keith Wilson).

Mr. Pearson began working at Xerxes' Williamsport plant initially as a temporary worker in April 2005. (Green Aff. ¶ 3.) In June, 2005, he became a Xerxes employee and he continued to work at Xerxes' Williamsport plant until he voluntarily resigned in February 2008 in order to work at a correctional facility. (Green Aff. ¶ 3.) When he resigned, he indicated to plant manager Wayne Green, via a voice-mail message, that:

Hello Wayne, this is Bernard. Tried to get in touch with you yesterday. I just wanted to call you and let you know I got a call from corrections to work for them this week. And I explained to them that I'm on a leave of absence from my job. But I'm going to go for the job and I just wanted to know if I didn't like it, you know, could I come back. I know I'll probably lose seniority, but I just wanted to talk to you about that. But I was going to go for it and I'll be in touch with you real soon. Bye.

(Green Aff. ¶ 4; Pearson Tr. at 429.)<sup>1</sup> (emphasis supplied).

Mr. Wilson began his employment with Xerxes in October 2005, and remains employed by Xerxes. (Green Aff. ¶ 3.)

Mr. Graham worked at the plant from August 2004 until Xerxes terminated his employment because of attendance on April 18, 2007. (Green Aff. ¶ 3.)

**D. Xerxes' Prohibition of Racial Discrimination and Harassment:**

Xerxes has a comprehensive set of policies and procedures which reflect its unequivocal opposition to and intolerance of racial discrimination and harassment. (*See generally* Affidavit of Ronald M. Bachmeier ("Bach. Aff.") ¶ 2, Ex. A.) Xerxes also has Equal Employment Opportunity ("EEO") Coordinators who have traveled from Xerxes' Minneapolis headquarters, to Williamsport, Maryland to thoroughly investigate and respond to Messrs. Pearson and Wilson's reports of racial harassment. (Bach. Aff. ¶ 3.) Xerxes' intolerance of and aggressive response to racially offensive conduct is perhaps best illustrated by Xerxes' termination of a white employee who told one racially offensive "joke" to two other white employees in August 2007. (Green Aff. ¶ 5, Ex. B.) Due to Xerxes' training, the white employees tried to stop the "joke" before it was completed. (Green Aff. ¶ 5.) The employee continued. (Green Aff. ¶ 5.) Xerxes terminated his employment once the white employees who heard the "joke" reported it to plant manager Wayne Green. (Green Aff. ¶ 5.) No Black or minority employees were present

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<sup>1</sup> The relevant pages of all deposition transcripts cited herein are indexed and included in Exhibit 1 to this Memorandum.

when the employee told the “joke.” (Green Aff. ¶ 5.) Xerxes has consistently taken aggressive disciplinary action against employees who have made even arguably racially offensive remarks. (Bach. Aff. ¶ 4.) Xerxes has also regularly conducted training and re-training of supervisory and non-supervisory employees alike, in order to emphasize its absolute commitment to providing every employee with a work environment free of unlawful discrimination and racial and other harassment. (Bach. Aff. ¶ 4.)

**E. Summary of Xerxes’ Preventative and Remedial Measures:**

Xerxes has taken comprehensive, on-going, timely and appropriate measures to deter racial discrimination, including racial harassment, as well as to respond to allegations or reports of conduct which may constitute racial harassment. Xerxes’ undisputed preventive and remedial measures at its Williamsport plant include the following:

1. Xerxes has adopted, promulgated, and repeatedly provided training for all employees regarding Xerxes’ opposition to racial discrimination, including racial harassment (Bach. Aff. ¶ 5);
2. Xerxes has systematically conducted training for all employees at their time of hire, on an annual basis, and in the course of responding to particular reports of racial harassment (Bach. Aff. ¶ 6);
3. Xerxes has explicitly encouraged plant employees to contact the plant manager, Xerxes’ Corporate Compliance Committee, or Xerxes’ EEO Coordinator, if employees have any concern regarding racial discrimination or harassment which they feel has been unsatisfactorily addressed by lower level supervision (Bach. Aff. ¶ 7);
4. When Xerxes EEO Coordinators have learned of reported harassment, those individuals have promptly traveled from Minneapolis to the Williamsport plant, for the purpose of conducting comprehensive, on-site investigations, including extensive employee interviews regarding reported harassment, and to then implement further remedial actions, such as discipline or discharge (Bach. Aff. ¶ 8);
5. Xerxes has entered into a collective bargaining agreement with the Union which represents its non-supervisory employees, which prohibits racial discrimination, and provides that employees, including the class members, could grieve and ultimately arbitrate claims of racial discrimination. The

Union has acknowledged Xerxes' commitment to the principles of EEO, and has acknowledged the severity of the disciplinary sanctions which Xerxes has imposed upon employees who have violated Xerxes' EEO standards (Bach Aff. ¶ 9; Perkins Tr. at 47-48);

6. Xerxes has taken aggressive disciplinary action against employees who it has determined to have violated its standards which prohibit racial discrimination and harassment. Xerxes has taken disciplinary measures which have included the termination of an employee who made a racially offensive "joke" regarding a hypothetical Black person to two white employees, has issued final warnings and unpaid disciplinary suspensions, written disciplinary warnings, and confirmed verbal warnings to employees, depending upon the nature of their conduct, and other relevant factors (Bach. Aff. ¶ 10);
7. Xerxes has notified local law enforcement officials regarding reported acts of racial harassment, and has cooperated with that law enforcement agency's investigative efforts (Green Aff. ¶ 6);
8. Xerxes has held all plant meetings to remind employees regarding its prohibition of racial harassment, and to warn employees regarding disciplinary measures, including termination from employment, which Xerxes would undertake, and has undertaken, in the event of substantiated reports of racial harassment (Green Aff. ¶ 7);
9. Xerxes has advised employees who have complained that they are protected against retaliation, and that they are to apprise Xerxes if they have any concerns regarding retaliation (Bach. Aff. ¶ 11);
10. Xerxes has apprised class members regarding its remedial actions, and has regularly communicated with them in an effort to identify and respond to any subsequent concerns. (Bach. Aff. ¶ 12.)

Xerxes' preventive and remedial actions should be measured against the following standard which Judge Davis has articulated:

When presented with the existence of illegal conduct, employers can be required to respond promptly and effectively, but when an employer's remedial response results in cessation of the complained conduct, liability must cease as well. Employers cannot be saddled with the insurmountable task of conforming all employee conduct at all times to the dictates of Title VII, or irrespective of their knowledge of such conduct or the remedial measures taken in response to such conduct.



*Bernard v. Calhoon MEBA Eng'g School*, 309 F. Supp. 2d 732, 741-42 (D. Md. 2004) (emphasis added).

With respect to Mr. Wilson, after his complaint in June 2007 regarding his discovery of the Stick Figure (described in detail below), he did not have another complaint for more than a year thereafter, and, as of his deposition, that was his most recent complaint. (Wilson Tr. at 128-129, 132-133.) With respect to Mr. Pearson, Xerxes' responses to his late June 2006 and 2007 complaints are reviewed in detail below. The effectiveness of Xerxes' responsive measures is perhaps best illustrated by Mr. Pearson's undisputed interest in returning to work at Xerxes if his new position at a correctional facility, which he pursued because it offered retirement benefits, proved unsatisfactory. (Pearson Tr. at 254.) Mr. Graham, whose employment ended after Xerxes terminated his employment due to unsatisfactory attendance and without dispute by either Mr. Graham or his Union, admitted not having complained to Xerxes' Corporate Compliance Committee, EEO coordinator, or plant manager, despite admittedly being aware of his right to do so. (Graham Tr. at 83-84.)

In short, the reasoning of Judge Davis in *Bernard v. Calhoon* suggests that Xerxes cannot properly "be saddled with the insurmountable task of conforming all employee conduct at all times to the dictates of Title VII, irrespective of [Xerxes'] knowledge of such conduct or the remedial measures taken in response to such conduct." *Id.* at 742.

Furthermore, the EEOC has tacitly, if not expressly, acknowledged that Xerxes has taken appropriate preventive and remedial measures. In its interrogatories, Xerxes asked the EEOC:

If it is your contention that Defendant failed to exercise reasonable care to prevent and correct promptly racial harassment or race discrimination, identify all actions that Defendant should have taken but did not that would have demonstrated an exercise of reasonable care to prevent and correct promptly racial harassment or race discrimination. Include in your description when you believe each such action should have been taken.

(Interrogatory and Response, Exhibit 2 to this Memorandum.) The EEOC simply, albeit inaccurately, replied:

Defendant has not effectively stopped or prevented racial harassment in its workplace.

(Interrogatory and Response, Exhibit 2 to this Memorandum.)

The EEOC has never factually replied regarding what actions it believes Xerxes should have, but failed, to take. The EEOC's answer is self-serving, conclusory, and altogether fails to provide facts regarding what more Xerxes could and should have done.

## **II. STATEMENT OF FACTS:**

### **A. Xerxes' Prohibition of Harassment:**

Xerxes has adopted, posted, and distributed a comprehensive "Prohibition of Sexual, Racial . . . Harassment" Policy. (Bach. Aff. ¶ 2, Ex. A.) That Policy provides in relevant part as follows:

**If you believe that you are being/have been subjected to or have observed any form of prohibited or objectionable conduct or harassment by an employee or non-employee (such as a customer, supplier or vendor) you MUST:**

**FIRST:** If comfortable doing so, tell the offender to stop. Then, immediately go to next step below.

**SECOND:** Immediately report the incident to your supervisor and plant manager or department head. Once we learn of the conduct which you have reported, we will investigate, and take timely and appropriate responsive action.

**Note:** If you or any other employee has a complaint about objectionable conduct or harassment regarding a plant manager or department head, you must immediately notify the company's EEO coordinator, Ronald M. Bachmeier, at (952) 887-1859.

**THIRD:** If you for any reason feel uncomfortable objecting to or reporting harassment or objectionable conduct to your supervisor or plant manager, or department head, immediately notify the company's EEO coordinator, Ronald M. Bachmeier, at (952) 887-1859, or in his absence Craig Peterson at (952) 887-1807, or in their absence Al Dorris at (952) 887-1886, regarding your concern.

**FOURTH: Immediately report any subsequent objectionable conduct or retaliation of any type to your plant manager or the company’s EEO coordinator Ronald M. Bachmeier, at (952) 887-1859.**

**Always immediately report any concern you may have regarding discrimination, harassment, or other unlawful conduct.**

(Bach. Aff. Ex. A.)

**B. Xerxes’ Corporate Compliance Policy:**

In the interest of advancing Xerxes’ commitment to Equal Employment Opportunity and the prohibition of unlawful discrimination and harassment, Xerxes also has a comprehensive Corporate Compliance Program and a Corporate Compliance Committee. (Bach. Aff. ¶ 13.) Copies of Xerxes’ current and former Corporate Compliance Guides (“Guides”) which the Williamsport plant provides to every employee, are also filed herewith. (Bach. Aff. ¶ 13, Ex. B.) The Guides clearly articulate the procedure which class members must follow in order to alert Xerxes’ Corporate Compliance Committee regarding concerns about alleged discrimination or harassment. (Bach. Aff. ¶ 13, Ex. B.) The Guides specifically provide, in relevant part:

	<b>POLICY SUMMARY</b>	<b>WATCH FOR</b>
<b>Non-Discrimination</b>	Xerxes’ policy is to provide equal opportunity in employment, training, compensation, and other Company programs without regard to race, gender, marital status, color, religion, national origin, age or disability, unless a bona fide qualification exists.	Negative or harassing comments based on race, gender, marital status, color, religion, national origin, age or disability.

(Bach. Aff. Ex. B.) The Guides provide specific instruction regarding how Xerxes employees should contact Compliance Committee members to express concern regarding racial and other harassment. (Bach. Aff. Ex. B.)

**C. Xerxes' Training Regarding its Prohibition of Discrimination, Including Harassment:**

Xerxes trains employees regarding its prohibition of racial discrimination and harassment on a regular basis. First, all employees undergo training regarding Xerxes' EEO standards, as embodied in its Compliance Program Guide, as to its prohibition of racial harassment when they are hired by Xerxes. (Bach. Aff. ¶ 14, Ex. A.) "Sign-In" sheets reflect the class members' attendance at various training sessions, as well as the attendance of other Xerxes employees. (Green Aff. ¶ 8, Ex. C.) Second, Xerxes conducts annual re-training of employees regarding its prohibition of discrimination and harassment, typically during the first quarter of a given year. (Bach. Aff. ¶ 14.) Finally, Xerxes conducts re-training for employees in the course of responding to allegations of harassment. (Bach. Aff. ¶ 14.) "Sign in" sheets again reflect employees' attendance at re-training sessions. (Green. Aff. ¶ 8, Ex. C.)

**D. UAW Representation of Xerxes Employees, and Absence of UAW or Class Member Grievances Regarding Alleged Racial Harassment:**

Xerxes Williamsport plant nonsupervisory employees are represented by Local No. 171, of the United Automobile, Aerospace and Agricultural Implement Workers of America (the "Union" or "UAW"). (Perkins Tr. at 19-20.) David Perkins serves as the President of Local 171 of the UAW. (Perkins Tr. at 12). He has served continuously as the President of that local since 2004. (Perkins Tr. at 15-16). Xerxes and the Union are parties to a comprehensive Collective Bargaining Agreement ("Agreement"). (Perkins Tr. at 31.) That Agreement prohibits unlawful racial and other discrimination, providing in relevant part, that:

The parties agree that there shall be no unlawful discrimination against employees on account of race, color, creed, national origin, religion, sex, sexual orientation, pregnancy, marital status, age, disability, or Union affiliation or any other legally protected class.

Agreement, Article 19.1 (p. 19). (Bach. Aff. ¶ 15, Ex. C) (emphasis supplied).

When asked by Plaintiff's counsel regarding the basis for his view that "Xerxes takes a strong stance against discrimination" (Perkins Tr. at 159), Perkins replied that:

The basis that I made that statement on was the fact that comparing it to other locations of which I have a direct knowledge. When an allegation is brought to them, they go through a very formal process, unlike other units and other facilities that I'm familiar with which, you know, I applaud them for that.

(Perkins Tr. at 159.) Perkins further testified that, "... they seem to respond very quickly whenever there are allegations that I'm aware of . . . ." (Perkins Tr. at 160.) With respect to Xerxes' "strong stance against racial discrimination," Mr. Perkins observed that, "On any instance in which I've been involved they seem to exert a lot of effort in trying to find out the facts of the case." (Perkins Tr. at 164.)

The parties' Agreement also reflects a comprehensive Grievance Procedure through which employees, including Messrs. Wilson, Pearson, or Graham, could have brought grievances including alleged violations of the Agreement's prohibition against racial discrimination. (Perkins Tr. at 31-39.) In fact, employees have an obligation to bring to the attention of their Union representative employer conduct that employees believe violates their Agreement. (Perkins Tr. at 173.) That Grievance Procedure is set forth in Article Three of the Agreement. (Perkins Tr. at 31.) Although Messrs. Wilson, Pearson and Graham had the right to file grievances alleging that Xerxes had violated their right to be free of unlawful discrimination, none of them filed such a grievance. (Perkins Tr. at 36-37.)

The Union holds periodic meetings with its members on both a monthly and quarterly basis for the purpose of discussing issues of interest to its members, including their welfare. (Perkins Tr. at 24, 26.) Members can place issues of concern on the agenda for those meetings and can contact the Union by phone at any time. (Perkins Tr. at 25-26.) As the President of the Union, Mr. Perkins typically visited the Xerxes Williamsport plant on at least a quarterly basis.

(Perkins Tr. at 28). While at the plant, he was available to meet with employees in the plant break room, or privately if necessary. (Perkins Tr. at 28-30.)

Mr. Perkins testified that, “I’ve never had a racial discrimination grievance filed, nor any grievance based on any other protected class . . . [w]ith respect to the Xerxes Corporation.” (Perkins Tr. at 37). Mr. Perkins testified that, “I know that they, from my perspective take a very strong stance when an issue [related to race discrimination and racial harassment] has come up.” (Perkins Tr. at 47.)

Mr. Perkins acknowledged that Xerxes had terminated a union-represented employee, James Davis, after Xerxes determined that Mr. Davis had made one racial “joke” in the plant break room. (Perkins Tr. at 176.) With respect to the Davis termination, Perkins testified that, “We ascertained that Xerxes did do a thorough investigation. We verified their findings that were given to us as far as the statements by our members against Mr. Davis and we informed Mr. Davis that we would not be processing a grievance on his behalf due to his termination . . . .” (Perkins Tr. at 46-47.)

None of the class members, Mr. Pearson, Mr. Wilson, and Mr. Graham, ever contacted the Union’s office or Mr. Perkins to report that Xerxes employees were discriminating against them, nor did any of them ever attend any Union meeting to express concern about racial discrimination or harassment at the Xerxes plant. (Perkins Tr. at 58-59, 63-65.)

**E. Class Member Allegations and Xerxes’ Remedial Measures:**

**1. Facts Regarding Gradian Graham**

Mr. Graham immigrated from Jamaica to the United States in 2001. (Graham Tr. at 18.) He began working at Xerxes on August 2, 2004. (Graham Tr. at 31.) When he began his employment at Xerxes, he underwent training regarding Xerxes’ prohibition of discrimination and harassment. (Graham Tr. at 69.) He signed an Acknowledgement that he had viewed

Xerxes' video programs regarding the Corporate Compliance Program and Sexual Harassment/Diversity training. (Graham Tr. at 72.) Mr. Graham understood that if he had a complaint, and he was dissatisfied with how plant management responded to the complaint, he could elevate that complaint to Xerxes' management, including its Corporate Compliance Committee. (Graham Tr. at 75).

Mr. Graham acknowledged having seen the Xerxes Compliance Program Guide, and that he carefully read that Guide. (Graham Tr. at 79.) Mr. Graham understood that if he made a complaint and nothing was done, he could take it to the next level, and that would have included the people identified in the Compliance Guide. (Graham Tr. at 81.) Mr. Graham also admitted having seen Xerxes' "Prohibition of Sexual, Racial, and Other Objectionable Conduct or Unlawful Harassment" policy. (Graham Tr. at 86.) However, Mr. Graham admitted that he never attempted to contact any of the members of the Xerxes Corporate Compliance Committee. (Graham Tr. at 83-84.) He also admitted that he never attempted to contact anybody at the Xerxes Corporate Office about what he now contends was racial harassment. (Graham Tr. at 85.) Mr. Graham conceded that although he knew he could contact [Xerxes EEO Coordinator] Ronald M. Bachmeier, he never did so. (Graham Tr. at 75.)

Mr. Graham also understood that the Union was his legal representative. (Graham Tr. at 94.) Nevertheless, he testified that after making one unsuccessful attempt to reach Union Representative Perkins, Mr. Graham made no further attempt to reach Mr. Perkins. (Graham Tr. at 94.) Mr. Perkins received no voicemail or other indication that this attempt to contact him was made by Mr. Graham. (Perkins Tr. at 64-65, 179.)

At his deposition, Mr. Graham alleged that nonsupervisory employee Robert Churchey "had used the N word a bunch of different times." (Graham Tr. at 97.) Mr. Graham was unable

to testify with any clarity regarding when Mr. Churchey allegedly made those remarks. (Graham Tr. at 98-99.) Mr. Graham never complained to the Xerxes Corporate Compliance Committee, or anybody at the Xerxes corporate headquarters regarding Mr. Churchey's alleged remarks. (Graham Tr. at 104.) Rather, he testified that he reported the remarks only to plant superintendent Greg Carty, and two nonsupervisory Union representatives. (Graham Tr. at 105.)

Mr. Graham also testified that he found another employee's use of the word "fuck" offensive. (Graham Tr. at 117.) Mr. Graham also believed that it was racially discriminatory or harassing when another employee (Carolyn Reed) referred to Mr. Bernard Pearson as "a lazy bum." (Graham Tr. at 122.) Mr. Graham testified that Ms. Reed did not say anything else that Mr. Graham thought was racially discriminatory or harassing. (Graham Tr. at 123.) Mr. Graham never complained to plant manager Green about Ms. Reed. (Graham Tr. at 125.)

At his deposition, Mr. Graham made other vague allegations of nonsupervisory employee conduct which bothered him and which he concluded was racially discriminatory. For example, he observed that another employee did not communicate with him. (Graham Tr. at 138.) Mr. Graham admitted that he never complained to his supervisor, plant superintendent, or plant manager about that lack of communication. (Graham Tr. at 138-139.) Additionally, Mr. Graham alleged that an employee "... would stay in the area across the beam from the tanks, when the tanks is in the beam, and he can stay over there and he is constantly over there just staring at you over the tank to your area." (Graham Tr. at 134-135). Nevertheless, Mr. Graham admitted that he never complained to his supervisor, plant superintendent, or plant manager, about the alleged staring. (Graham Tr. at 135-136.) Mr. Graham claimed at his deposition that he felt that his life had been threatened at Xerxes, because, "the way these guys would just, in one particular area, just stare at me across the floor as if -- I haven't done anything, but you



know, that's what it make me like I feel like and I have to, you know, be over there looking to make sure that my life is going to be okay." (Graham Tr. at 205.) Despite this supposed fear for his safety, Mr. Graham never notified the plant manager, superintendent, or anyone at Xerxes, nor any law enforcement officials, about his purported feeling that his life was threatened. (Graham Tr. at 206-207).

During the course of his employment, Mr. Graham received a series of disciplinary warnings because of his unsatisfactory attendance. (Graham Tr. at 144-177.) Mr. Graham never grieved any of those disciplinary warnings. (Graham Tr. at 180.) On March 8, 2007, plant manager Wayne Green issued Mr. Graham a Final Warning. (Graham Tr. at 169.) Mr. Graham did not grieve that Final Warning. (Graham Tr. at 169.) On April 18, 2007, Xerxes terminated Mr. Graham's employment because of his unsatisfactory attendance, according to Xerxes' attendance policy. (Graham Tr. at 182.) Mr. Graham did not grieve Xerxes' termination of his employment. (Graham Tr. at 182). He never communicated to the plant manager that he disagreed with any of his disciplinary warnings because he thought they were racially discriminatory. (Graham Tr. at 185.) Furthermore, Mr. Graham never went to the EEOC or the Maryland Commission on Human Relations to complain about his termination or racial discrimination. (Graham Tr. at 186.)

## **2. Facts Regarding Keith Wilson:**

Mr. Wilson acknowledged receipt of Xerxes' "Prohibition of Sexual, Racial, and Other Objectionable Conduct or Unlawful Harassment" policy, as well as Xerxes' Equal Employment Opportunity Policy. (Wilson Tr. at 56.) Mr. Wilson also acknowledged that those policies were posted near the time clock at the Xerxes plant. (Wilson Tr. at 67.)

With respect to racial harassment, Mr. Wilson contends that on two or three occasions, he discovered that his lunch had been discarded. (Wilson Tr. at 70.) Mr. Wilson alleged that he had

reported those incidents to supervisor Shifflett, but he never reported those alleged incidents to plant superintendent Carty or plant manager Green. (Wilson Tr. at 69-71.) When asked why he thought these incidents were racially discriminatory or represented racial harassment, Mr. Wilson speculated “because me and Bernard [Pearson] was the only minorities there and it wasn’t nobody’s lunches tampered with or anything.” (Wilson Tr. at 71.) He denied that there could have been any other explanation for why his lunch had been discarded. (Wilson Tr. at 71.)

Mr. Wilson alleges that he worked with a female employee who observed, while they were assembling a tank, “boy you don’t lay up no manway like that. And I was like, Boy? I said, your boy is at home sitting on the couch.” (Wilson Tr. at 77.) Mr. Wilson advised supervisor Shifflett of that incident, and Shifflett initiated a meeting with the employee who made that remark. With respect to her use of the term “boy,” non-supervisory employee Amber Gatrell explained that she referred to male employees as “boys,” just as male employees would greet her with the observation “Hey, girl what’s up?” (Gatrell Tr. at 40-49.) She did not refer to Mr. Wilson as a “boy” because he is Black. (Gatrell Tr. at 48.) Once supervisor Shifflett apprised Ms. Gatrell that Mr. Pearson and Mr. Wilson were upset with her use of the term “boy,” she apologized to them. (Gatrell Tr. at 47.) One of them replied to her that if she had used the term “boy” on the street, that she would get her ass kicked. (Gatrell Tr. at 56.) Ms. Gatrell observed, with respect to that statement, that “because I felt threatened, you know. I mean I - - I did - - you know, I felt if they took it the wrong way, I felt bad about it, and I was being nice by apologizing and I didn’t think I had to be threatened. (Gatrell Tr. at 57.)

Nevertheless, Xerxes placed Ms. Gatrell on a two-day unpaid suspension (Gatrell Tr. at 109), and gave her a written Final Warning. (Green Aff. ¶ 9, Ex. D.) Ms. Gatrell considered that two-day unpaid suspension to be punishment. (Gatrell Tr. at 111.) Ms. Gatrell did not think that

she had done anything wrong (Gatrell Tr. at 112), observing with respect to the warning that “. . . I didn’t really understand, you know, because I called everybody boy, besides the girls I called them girl. I didn’t think I really did anything wrong.” (Gatrell Tr. at 114.)

Another employee (Floyd Myers) said something to Mr. Wilson and Mr. Pearson to the effect that “boy, well I’ll see you outside, or something like that.” (Wilson Tr. at 78). With respect to that incident, for which Xerxes later disciplined him, Mr. Myers testified:

I can’t remember exact words, but it was just us three in there. They were talking amongst themselves. I can’t remember exactly what they were saying, but I thought it was being directed to me. So, there was words exchanged. I reported it to the supervisor. And then, that was pretty much it until the next day, Mr. Green and I had a meeting. Made me realize it was a misunderstanding. I went and apologized to both of them. We shook hands and I thought it was a done deal.

(Myers Tr. at 27.) With respect to the lunchroom incident, Myers observed that “it’s possible I did say; keep it up boys or you know, keep going boys, whatever it was. But as far as calling him boys I mean that’s just the way I talk.” (Myers Tr. at 33.) Mr. Myers testified that he did not use the term “boy” because Mr. Pearson and Mr. Wilson are Black, did not intend the word to be racially offensive, and did not restrict the use of that word only to Black people. (Myers Tr. at 78.) He observed that he used the term “boys” in addressing men, just as with respect to a group of women, “. . . could walk in here and you would all be ladies sitting here. And I will just say; Hey, what’s up guys. And then, you are all ladies. You know, it’s just the way I express myself.” (Myers Tr. at 82.)

Mr. Myers later apologized to Mr. Wilson and Mr. Pearson. (Wilson Tr. at 70.) Mr. Myers sustained two lost days of pay because of his disciplinary suspension. (Myers Tr. at 56.) With respect to Xerxes’ disciplinary action, Myers explained that he received a “two day suspension and a final notice, if it happens again, I’m terminated pretty much.” (Myers Tr. at 76.) He also underwent additional training. (Myers Tr. at 76.) He understands that Xerxes takes

its commitment to the prohibition of racial discrimination and harassment seriously. (Myers Tr. at 77.) When asked “why,” he observed “because I got my discipline and we have plenty of meetings.” (Myers Tr. at 77.) Since then, he has not, to his knowledge, used the term boys.” (Myers Tr. at 34.) He recalls having been told not to retaliate, he has not attempted to “get even” with Mr. Pearson, and has not been reprimanded since July 25, 2006. (Myers Tr. at 60-61.)

According Mr. Wilson, the foregoing incident occurred in January or February of 2006. (Wilson Tr. at 77-79.) After that incident, according to Mr. Wilson, Xerxes initiated a meeting with the entire second shift to talk about harassment. (Wilson Tr. at 79.) According to Mr. Wilson, during that meeting, plant manager Green advised employees that racial harassment was prohibited, that they were not to make offensive remarks to one another, and that if they did they would be disciplined. (Wilson Tr. at 80.)

In July, 2006, Xerxes EEO Coordinator, Ronald M. Bachmeier, learned of and investigated Mr. Myers’ use of the term “boy.” (Bach. Aff. ¶ 16.) Based upon that investigation, Xerxes took disciplinary action against Mr. Myers. (Green Aff. ¶ 10, Ex. E.)

Mr. Wilson testified that he discovered a “Stick Figure” in his locker on June 11, 2007. (Green Aff. ¶ 11, Ex. F.) According to Wilson:

I went back in there, I said, let me throw these papers away and a little paper dropped back on the floor. I picked it up and I unfolded it and I said whoa. And then I went and put it back in my locker and went straight to Mark Shaffer.

(Wilson Tr. at 111.) (Mark Shaffer was a nonsupervisory Union representative at that time.) The Sunday after he discovered the Stick Figure, Mr. Wilson conferred with his pastor (who was also a local officer with the NAACP) about what he should do about it. (Wilson Tr. at 114.) According to Mr. Wilson, his pastor told him that he should take it back and “go through the chain of command.” (Wilson Tr. at 114.) According to Mr. Wilson’s testimony, he then talked to Xerxes supervisor Robert Shifflett, who made a copy of the Stick Figure. (Wilson Tr. at 114.)

According to Mr. Wilson's testimony, Shifflett gave the Stick Figure back to Mr. Wilson. (Wilson Tr. at 114.) Then, according to his deposition testimony, Mr. Wilson called the EEOC. (Wilson Tr. at 114.) When asked, "Did Xerxes take any action in response to your communication with -- ," Mr. Wilson replied, contrary to the undisputed substance of a memo which Xerxes had given him and which he acknowledges having received, that:

I had a meeting with Wayne and I think he made a copy of it. And then after that, it was -- I didn't hear nothing else about it. It was just like, well, if you didn't have anything or anything else happen to you, come see me. This and that, but after a while, you get tired of hearing the same thing. So I was saying to myself well I'm not going to do go do nothing. I'm not even going to see Wayne or none of them because ain't nothing going to come out of it. So nothing from nothing leaves nothing. So, I just said, I'll just start talking to Regina [Andrew, EEOC attorney]. I'll just start faxing my stuff over to her.

(Wilson Tr. at 115-116.) When asked whether Xerxes took any other action in response to his report regarding the Stick Figure apart from Mr. Green telling Mr. Wilson to talk to him if anything else happened, Mr. Wilson replied, "Not that I know of." (Wilson Tr. at 116.) Incredibly, Mr. Wilson's testimony fails to acknowledge the undisputed, extensive remedial actions described below, which Xerxes took in response to Mr. Wilson's report of the Stick Figure. That remedial action is described in a memorandum dated August 30, 2007 provided to Mr. Wilson and which Mr. Wilson admitted having received. (Green Aff. ¶ 12, Ex. G; Wilson Tr. 165-166.)

Mr. Wilson did not report his discovery of the Stick Figure to any law enforcement agency. (Wilson Tr. at 119.) When asked if he could determine who created the Stick Figure, Mr. Wilson observed, "No. No. I don't -- No, I can't tell you who did it. I mean, anybody could have did it." (Wilson Tr. at 121.) When asked what he next did in the wake of his discovery of the Stick Figure, Mr. Wilson replied that "what you mean what next I did? I didn't do nothing. I just called Regina [Andrew] and went with the process." (Wilson Tr. at 122.)

The truth is, Xerxes took the following undisputed remedial action: Xerxes EEO Coordinator Mike Zais flew from the Corporate Office in Minneapolis, Minnesota to Williamsport, Maryland strictly to investigate Mr. Wilson's report regarding the Stick Figure. (Green Aff. ¶ 12, Ex. G.) Further, as part of Xerxes' investigation of Mr. Wilson's report, Xerxes notified the Washington County Sheriff's Office and asked them to investigate the Drawing. Xerxes also conducted its own investigation. (Green Aff. ¶ 12, Ex. G.)

Based upon that investigation, EEO Coordinator Zais prepared a memorandum dated August 30, 2007, which he forwarded to Mr. Wilson. (Green Aff. ¶ 12, Ex. G.) That memorandum provided a detailed review of Xerxes' remedial actions in response to Mr. Wilson's complaint about the Stick Figure, which included:

1. Conducted an extensive investigation through employee interviews;
2. Enlisted the assistance of the Washington County Sheriff's Office with respect to investigating who created the Drawing;
3. Conducted retraining for all supervisors;
4. Took strong disciplinary action towards three Williamsport employees who Xerxes concluded had made statements which violated its prohibition against discrimination and harassment;
5. Posted notices which reminded Williamsport employees regarding Xerxes' standards of conduct, prohibition of harassment, and prohibition of offensive conduct;
6. Advised nonsupervisory employees' Union representative that Xerxes will not tolerate racial discrimination or harassment, and that Xerxes would respond to such conduct with strong discipline, including the termination of employees when appropriate;

7. Spoke with individual employees regarding situations where their conduct may have been misunderstood or might arguably have offended another employee, in the interest of avoiding or resolving misunderstandings or misperceptions. (Green Aff ¶ 12, Ex. G.)

According to Mr. Wilson's deposition testimony, more than a year passed before another incident occurred which he considered to be racial harassment. (*See* Wilson Tr. at 128-129.) According to Mr. Wilson, in August 2008, another nonsupervisory employee, Tammy [Smith] was complaining to him about having to clean up after other employees. According to Mr. Wilson, "She said, I hope this does not offend you, but I'm not trying to be nobody's white nigger." (Wilson Tr. at 128.) According to Mr. Wilson, Ms. Smith has not done or said anything else, after the foregoing November incident, which he found racially or otherwise offensive. (Wilson Tr. at 132.)

Mr. Wilson did not report this alleged incident to the plant manager, plant superintendent, or Xerxes' Corporate Compliance Committee. (Wilson Tr. at 156-157.) Instead, he reported it to EEOC lawyers who then advised Xerxes' counsel Robert Castle regarding the alleged incident. (Green Aff. ¶ 13, Ex. H.) Plant manager Wayne Green nevertheless undertook an investigation. (Green Aff. ¶ 13.) During that investigation, Mr. Green interviewed both Mr. Wilson and Ms. Smith. (Green Aff. ¶ 13.) Ms. Smith denied having made the alleged remark. (Green Aff. ¶ 13.) On October 31, 2008, plant manager Green provided Mr. Wilson with a memorandum that reviewed the results of the investigation and reminded Mr. Wilson regarding the importance of promptly reporting allegations of racial harassment to him, plant superintendent Greg Carty, Xerxes' EEO Coordinator, or other members of the Xerxes Compliance Committee. (Green Aff. ¶ 13, Ex. H.)

3. **Facts Regarding Bernard Pearson:**

Bernard Pearson began working at Xerxes' Williamsport plant initially as a temporary worker in April 2005 and became a Xerxes employee in June 2005. (Green Aff. ¶ 3.) During 2005, Mr. Pearson informed Mr. Wilson of employment opportunities at Xerxes' Williamsport plant. (Wilson Tr. at 34.) Mr. Pearson told Wilson, with respect to working at Xerxes, that "he would like, it's a good job, they have good benefits, and it's a good place to work at. And you know, he was just, like, if you want to work there, he was telling me about the fiberglass and everything he had to say was good." (Wilson Tr. at 34) (emphasis supplied). When asked if Pearson told him anything that he (Pearson) did not like about working at Xerxes, Wilson replied, "He just said it was -- he didn't like working nights." According to Wilson, ". . . he [Pearson] didn't say nothing negative about the job." (Wilson Tr. at 35) (emphasis supplied). Wilson began working at the Xerxes Williamsport plant initially as a temporary worker, and was hired as an employee on October 17, 2005. (Wilson Tr. at 33.) Mr. Pearson and Mr. Wilson later regularly drove to work together. (Wilson Tr. at 37-38.) Nevertheless, according to Mr. Wilson, Mr. Pearson never communicated to him about his allegations of racial harassment at Xerxes. (Wilson Tr. at 39-40.)

In late June, 2006, EEO Coordinator Bachmeier learned from plant manager Green that Mr. Pearson had concerns about statements which nonsupervisory employees had made to him. (Bach. Aff. ¶ 17.) When EEO Coordinator Ronald M. Bachmeier learned of the issues raised by Mr. Pearson, he disrupted his personal and professional plans and obligations and immediately flew from Xerxes' corporate office in Minnesota to the Williamsport plant to investigate and respond to Mr. Pearson's concerns. (Bach. Aff. ¶ 17.) Mr. Bachmeier initially attempted to meet with Mr. Pearson on July 5, 2006. (Bach. Tr. at 161.) Mr. Pearson declined to meet with Mr. Bachmeier for more than a few minutes, despite Mr. Bachmeier's efforts to conduct the



investigation. (Bach. Tr. at 162.) Mr. Pearson was apparently unwilling to meet with Mr. Bachmeier until Mr. Pearson had spoken to his attorney. (Bach. Tr. at 161.)

On July 6, 2006, Mr. Pearson agreed to meet with Mr. Bachmeier. (Bach. Tr. at 163.) During the meeting, Mr. Pearson shared his concerns with Mr. Bachmeier. (Bach. Tr. at 169.) Mr. Bachmeier then proceeded to interview more than 15 other employees who were identified by Mr. Pearson as having knowledge or who might have knowledge regarding Mr. Pearson's allegations. (Bach. Aff. ¶ 17.) Interviewees either denied Mr. Pearson's allegations, explained that Mr. Pearson had taken their remarks out of context, indicated that they did not mean their remarks to be racially offensive, or had since apologized for those remarks, and explained that Mr. Pearson had himself engaged in interaction with other employees using profanity and the racially offensive term "N \_ \_ \_ \_ \_." (Bach. Aff. ¶ 17.)

Neither Mr. Pearson nor any other employee attributed any racially offensive remarks to any Xerxes supervisor. (Bach. Aff. ¶ 17.) Moreover, although Mr. Pearson contended that he had spoken with certain Xerxes supervisors regarding his concerns, those supervisors credibly disputed Mr. Pearson's contention that he spoke to them or Mr. Pearson's version of their communications. (Bach. Aff. ¶ 17.)

Given conflicting explanations, poor recollection of facts and timeframes, a general lack of corroborating information, and Mr. Pearson's failure to promptly complain about what he contended was objectionable conduct, Mr. Bachmeier developed and implemented a responsive plan to address past objectionable conduct and strongly deter such conduct in the future. (Bach. Aff. ¶ 18.) Xerxes responsive action is summarized as follows:

1. Xerxes concluded that nonsupervisory employee Floyd Myers had used the word "Boy" in the course of communicating with Mr. Pearson. After determining that

Mr. Myers had not been disciplined for any similar conduct during his fifteen years of employment at Xerxes, Xerxes responded to Mr. Myers' objectionable words with a written Notice of Disciplinary Suspension and Final Warning. That Warning imposed a two day unpaid suspension. The Warning required Myers to undergo retraining, to comply with Xerxes' standards, and warned of termination in the event of any future violations. (Bach. Aff. ¶ 18; Green Aff. Ex. E.) A Final Warning and suspension represented the most significant discipline that Xerxes could impose upon an employee, short of termination. (Perkins Tr. at 184-185);

2. Xerxes concluded that nonsupervisory employee Amber Gatrell had made a racially disparaging remark to Mr. Pearson. In the course of Mr. Bachmeier's investigation, Mr. Bachmeier learned that Ms. Gatrell had reportedly apologized for that remark. Mr. Bachmeier also found that she had used the word "N \_ \_ \_ \_" around Mr. Pearson, but could not confirm that it was directed at Mr. Pearson. Based on these findings, Xerxes issued Ms. Gatrell a Disciplinary Suspension and Final Warning. (Bach. Aff. ¶ 18; Green Aff. Ex. D);
3. Xerxes concluded that nonsupervisory employee Brian Bradley had referred to certain music as "jungle music." Mr. Bachmeier also concluded that Mr. Bradley had not made the remark with intent to disparage any employee's race, national origin, etc. Mr. Bachmeier also determined that Mr. Bradley had apologized to both Mr. Pearson and another employee regarding his remark. In view of the foregoing, and in light of Mr. Bradley's disciplinary record, which was free of prior such issues or related discipline, Xerxes issued Mr. Bradley a Written Disciplinary Warning. That Warning required that Mr. Bradley attend additional,

mandatory training regarding Xerxes' Equal Employment Opportunity Policy, Corporate Compliance Standards, Xerxes' prohibition of discrimination including harassment, and it warned of serious discipline in the event of a future violation. (Bach. Aff. ¶ 18; Green Aff. Ex. O);

4. Xerxes concluded that nonsupervisory employee Tammy Smith had used the term "Buckwheat," in the context of a conversation with another African-American employee. The term related to a show with which she was familiar. Ms. Smith credibly denied that she intended the remark to be in any way racially derogatory. In light of the nature of her remark, her explanation, and her credibility regarding the use and context in which she made the remark, Xerxes provided Ms. Smith with a verbal counseling. Xerxes confirmed the verbal counseling in a Memorandum, Green. Aff. Ex. I. That verbal counseling reminded Ms. Smith of her obligation to comply with Xerxes' Equal Employment Opportunity Policy, Corporate Compliance Program and related policies, and required that she undergo additional retraining. (Green Aff. Ex. I; Bach. Aff. ¶ 18);
5. On July 25, 2006, EEO Coordinator Ronald M. Bachmeier conducted retraining for Xerxes' Williamsport plant supervisors regarding Xerxes' prohibition of harassment, and their responsibilities with respect to the promotion of a work environment in which all employees are treated lawfully, with dignity and respect. Attendees also watched a video regarding Xerxes' prohibition on discriminating or harassing conduct and employee options for reporting incidents to Xerxes' EEO Coordinator or Corporate Compliance Committee to facilitate a response by

the company. (Bach. Aff. ¶ 18.) A copy of the sign in sheet for those supervisory training sessions is attached in Exhibit C to the Affidavit of Wayne Green;

6. On July 25, 2006, Mr. Bachmeier also conducted retraining for all plant employees regarding Xerxes' commitment to its Corporate Compliance Program, Equal Employment Opportunity Policy, and prohibition of discrimination and harassment. (Bach. Aff. ¶ 18.) A copy of the sign in sheet for those employee training sessions is attached in Exhibit C to the Affidavit of Wayne Green;
7. Finally, on July 25, 2006, plant manager Wayne Green gave Mr. Pearson a Memorandum which reflected Xerxes' appreciation for Mr. Pearson having come forward with his concerns, and which generally described Xerxes' response to those concerns. (Green Aff. ¶ 15, Ex. J.) More specifically, the Memorandum explained that certain employees would receive various levels of disciplinary action, that Xerxes would conduct retraining for all nonsupervisory employees, that Xerxes would conduct retraining for all supervisors, and that Xerxes would not retaliate against Mr. Pearson for having come forward with his concerns. Xerxes believed that Mr. Pearson was satisfied with the Company's response to his concerns. (Green Aff. ¶ 15, Ex. J.)

Mr. Pearson subsequently withdrew a Charge of discrimination which he had filed with the Maryland Commission on Human Relations. (Pearson Tr. at 221-223.) Xerxes remained committed to ensuring that he continued to work in an environment free of unlawful discrimination or harassment. (Green. Aff. ¶ 16.) Toward that end, Xerxes' Williamsport plant manager, Wayne Green, periodically checked with Mr. Pearson to ensure that he did not have any complaints regarding his work environment. (Green. Aff. ¶ 16.)

In mid April, 2007, Xerxes' Williamsport plant management learned that Mr. Pearson had found an item in his locker, which he would not at that time describe. (Green Aff. ¶ 17.) Shortly thereafter, plant manager Wayne Green sought out Mr. Pearson in an effort to learn what had been discovered. (Green. Aff. ¶ 17.) Mr. Pearson initially declined to tell Mr. Green what he found in his locker. (Green. Aff. ¶ 17.) Instead of cooperating with Mr. Green's inquiry, Mr. Pearson replied that he was going to contact his lawyer and would not discuss what he had discovered until he had spoken to and received direction from his attorney. (Green. Aff. ¶ 17.) Mr. Green was frustrated by Mr. Pearson's uncooperative posture, since Mr. Green was attempting to understand and respond to Mr. Pearson's concern. (Green. Aff. ¶ 17.) That item later turned out to be a 4"x 4" piece of clear laminated fiberglass with an offensive racist communication ("Fiberglass Piece"). (Green. Aff. ¶ 17, Ex. K.)

In order to aggressively respond to Mr. Pearson's concerns, particularly in light of the Fiberglass Piece which Mr. Pearson ultimately, but reluctantly, allowed Xerxes to photograph, Mr. Green asked the Washington County Sheriff's Office to investigate the Fiberglass Piece. (Green. Aff. ¶ 18.) Mr. Green informed the Sheriff's Office that although Xerxes' Williamsport plant employed other African American employees, none of those employees had reported receiving messages such as that reflected on the Fiberglass Piece. (Green. Aff. ¶ 18.)

On April 26, 2007, in response to plant manager Wayne Green's report to the Washington County Sheriff's Office, Deputy James Robert Grimm visited the Xerxes plant. (Green Aff. ¶ 19.) When the Sheriff's Office Investigator contacted Mr. Pearson, Mr. Pearson indicated that he had "kept the racial message for himself, but allowed plant management to photograph it for there (sic) investigation." (Green Aff. ¶ 19, Ex. L.) After Xerxes initiated the Sheriff's Office investigation, Xerxes continued to fully cooperate with the Sheriff's

investigation. (Green Aff. ¶ 19.) Xerxes made plant manager Wayne Green and Bernard Pearson available for interview at the Xerxes plant. (Green Aff. ¶ 19.) Xerxes would have further cooperated had the Sheriff's Office wanted to interview additional employees, or conduct further investigation. (Green Aff. ¶ 19.) The Sheriff's Office investigator indicated to Mr. Green that it could not be determined who had created the Fiberglass Piece. (Green Aff. ¶ 19.) The Sheriff's Office indicated that it would remain available to investigate any report of criminal conduct, but that otherwise, it did not think it could do more and it considered its investigation of Mr. Pearson's concern closed. (Green Aff. ¶ 19.) Mr. Green had by that point, in addition to invoking a Sheriff's Office investigation, interviewed several employees regarding Mr. Pearson's concern and held an all-staff meeting during which he provided re-training regarding Xerxes' EEO policies and prohibition of discrimination. (Green Aff. ¶ 20.)

A copy of the Sheriff's Office's Investigative Report narrative ("Report") is attached. (Green. Aff. Ex. L.) In the Report, the Sheriff's Office Investigator observed, in relevant part, that . . .

I asked Bernard Pearson if he has received any more threats from the "KKK" while at work, home, or on his cellular phone, and he stated no. I asked Bernard Pearson if he could provide any suspect information concerning this incident and he replied no particular person but stated that there were "clicks" (sic) in the workplace and a number of people could be responsible.

(Green. Aff. Ex. L.) The Report goes on to indicate that: "I advised Bernard Pearson that this would be reported as a criminal investigation and any further incidents that arose concerning the "KKK" or threats to him, to contact the Sheriff's Office directly." (Green. Aff. Ex. L.) Mr. Pearson has not notified the Sheriff's Office regarding any further incidents of alleged racial harassment. (Pearson Tr. at 369.)

Mr. Green took additional, significant actions in response to Mr. Pearson's April, 2007 concerns, beyond interviewing employees and initiating a Washington County Sheriff's Office

investigation. (Green. Aff. ¶ 21.) For example, on April 23, 2007, Mr. Green conducted an all-employees' meeting. (Green. Aff. ¶ 21.) The purpose of that meeting was to make absolutely clear to employees that:

1. Xerxes absolutely prohibits discrimination, including racial and other harassment;
2. Xerxes will not tolerate racial, sexual or other hostile communications in our workplace. That includes plant parking lots, restrooms, locker rooms, and production areas;
3. Xerxes had asked the Williamsport Police Department to investigate the Fiberglass Piece;
4. Once the Sheriff's Office investigation was complete, and once Xerxes had taken all appropriate steps to identify who was involved in creating and bringing the offensive communication to our plant, Xerxes would take additional appropriate steps, which would probably involve the termination of the employee or employees involved with the communication;
5. Xerxes would also encourage law enforcement officials to prosecute the individuals responsible for the communication, to the extent that their conduct violated any criminal laws;
6. Finally, Xerxes would conduct ongoing training, such as today's meeting, to make sure that every employee is clear about our policies and procedures.

(Green. Aff. ¶ 21.) A copy of Mr. Green's outline for that all-employees' meeting is attached as Exhibit M to the Affidavit of Wayne Green. Among other critical points, Mr. Green advised employees that "compliance with our prohibition of discrimination and harassment is a condition of employment; [and that] employees who we determine to have violated our standards will be disciplined and terminated as appropriate and necessary." (Green Aff. ¶ 21, Ex. M.)

In a further effort to emphasize the points which he made during his April 23, 2007 meeting, Mr. Green also posted a memorandum which provided employees with yet another reminder regarding Xerxes' prohibition of racially hostile communications. (Green Aff. ¶ 22, Ex. N.) That memorandum observes, in relevant part, that "Xerxes will continue to take

appropriate action in response to the offensive communication. Such action will likely include termination of the employee(s) who created the offensive communication.” (Green Aff. Ex. N.)

As part of his ongoing effort to continually check in with Mr. Pearson to ensure he was not subjected to unlawful discrimination or harassment in the workplace, on June 1, 2007, Mr. Green was walking through his plant’s assembly area and stopped by Mr. Pearson’s work area to check on how things were going. (Green Aff. ¶ 23.) Mr. Pearson indicated his approval of the Sheriff’s investigation. (Green Aff. ¶ 23.)

#### 4. **Facts Regarding Neville Haymans**

Neville Haymans is a Black male, born in 1951. (Haymans Tr. at 12, 29.) Although the EEOC has not identified Mr. Haymans as a class member, the Court should be aware of the undisputed facts regarding his employment with Xerxes. Mr. Haymans began working at the Xerxes Williamsport plant on May 15, 2006, and became a regular Xerxes employee in July, 2006. (Green Aff. ¶ 3.) Mr. Haymans has always worked as a nonsupervisory employee in the plant’s Assembly department. (Haymans Tr. at 18). According to Mr. Haymans’ sworn affidavit:

4. Since I began my employment with Xerxes, I have never been discriminated against or harassed because of my color or national origin;
5. During my employment with Xerxes, I have never seen racially hostile or offensive drawings, materials, or any type of communication at the Xerxes plant;
6. During my employment with Xerxes, no Xerxes employee has ever made a racially hostile, offensive, or threatening statement or other communication to me;
7. I know another Xerxes employee named Keith Wilson. Keith Wilson has never told me that he has felt that he has been discriminated against or harassed because of his race;



8. I know a former Xerxes employee whose name is Bernard Pearson. Mr. Pearson never told me that he felt he had been discriminated against or harassed because of his race;
9. Nobody at Xerxes has ever discriminated against or harassed me, or made me feel uncomfortable, because of my race. All of us employees get treated the same.

(Affidavit of Neville Haymans (“Haymans Aff.”) ¶¶ 4-9.)

Since Mr. Haymans signed his affidavit, he has not been subjected to any racial discrimination or harassment. (Haymans Tr. at 29.) During his deposition, Mr. Haymans testified that he understood what constitutes a racially hostile statement and further stated that nobody has ever used racial jokes in front of him, nor has he ever heard anyone use the “N \_ \_ \_ \_ \_” word at Xerxes. (Haymans Tr. at 44-45.)

### **III. ARGUMENT**

#### **A. Summary Judgment Standard**

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The Supreme Court has clarified that this does not mean that any factual dispute will defeat the motion. “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact.*” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248.

The party opposing a properly supported motion for summary judgment “may not rest upon the mere allegations or denials in [its] own pleadings,” but rather must “set forth specific facts showing that there is a genuine issue for trial.” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 525 (4th Cir. 2003) (citing Fed. R. Civ. P. 56(e)). When no genuine issue of material fact exists, trial judges in the Fourth Circuit have an affirmative obligation to prevent factually unsupported claims and defenses from proceeding to trial. *Drewitt v. Pratt*, 999 F.2d 774, 779 (4th Cir. 1993).

**B. Standard For Proving Hostile Work Environment Claim**

In *Bernard v. Calhoon MEBA Eng’g School*, 309 F. Supp. 2d 732, 743 (D. Md. 2004), Judge Andre Davis granted summary judgment, finding that the employer defendant was not liable for a nonsupervisory employee’s alleged racial harassment of a coworker. Judge Davis articulated the standards of proof applicable in this case. In order to survive summary judgment, the EEOC must produce evidence sufficient, if believed, to permit a reasonable fact finder to conclude by a preponderance of the evidence the following elements: (1) the conduct in question was unwelcome; (2) the harassment was based on race; (3) the harassment was sufficiently pervasive or severe to create an abusive working environment; and (4) some basis exists for imputing liability to the employer. *Id.* at 738 (citing *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998)). As Judge Davis acknowledged: “An employer may defeat a plaintiff’s case at the summary judgment stage by adducing substantial evidence that undermines the proof of any one or more of the above elements as a matter of law.” *Id.*

**1. No basis exists in this case to impute liability to Xerxes**

The class members in this case were not, and do not claim to have been, subjected to harassment by any supervisory or managerial employee of Xerxes. The allegations instead focus entirely on the alleged actions of the class members’ nonsupervisory coworkers. An employer is

liable for harassment by the alleged victim's coworkers only if, after acquiring actual or constructive knowledge of the allegedly harassing conduct, the employer takes no prompt and adequate remedial action to correct it. *Mikels v. City of Durham*, 183 F.3d 323, 329 (4th Cir. 1999). “[W]here an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred regardless of the specific motivation for the wrongdoing or the particular cause of action.” *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995). “Employers cannot be saddled with the insurmountable task of conforming all employee conduct at all times to the dictates of Title VII, irrespective of their knowledge of such conduct or the remedial measures taken in response to such conduct.” *Bernard*, 309 F. Supp. 2d at 741-42.

As the foregoing Statement of Facts demonstrates in detail, Xerxes undertook exhaustive investigation followed by swift and severe remedial action in response to reports of allegedly offensive or harassing conduct. It must be noted that Mr. Graham never reported any such conduct to Xerxes' plant manager, EEO Coordinator, or Corporate Compliance Committee prior to the start of this litigation. (Graham Tr. at 83-85.) Furthermore, he never filed any charge of discrimination with any administrative agency. (Graham Tr. at 185-186.) Rather, the EEOC apparently identified him as a class member based upon their review of documents regarding a dispute which he had with a supervisor and involved him in this action. The reports of Mr. Pearson and Mr. Wilson led to prompt investigations by plant management, Xerxes' EEO Coordinators Ronald Bachmeier and Mike Zais, and – in the case of the Stick Figure Drawing and Fiberglass Piece – the Washington County Sheriff's Office. These investigative actions were designed to identify individuals responsible for violating Xerxes' policies strictly forbidding harassment and to require serious remedial action and training to prevent future

violations. With respect to each instance of allegedly offensive or harassing conduct, Xerxes responded with investigative and remedial action, collectively including interviews of dozens of employees, retraining of all plant supervisors and all plant employees regarding Xerxes' commitment to its Corporate Compliance Program, issuance of serious disciplinary sanctions including disciplinary suspensions and final warnings to employees found in investigations to be responsible for violations of company policy, the posting of memoranda reminding employees that Xerxes prohibits racially hostile communications, and continued communication with Mr. Pearson and Mr. Wilson regarding Xerxes' attentiveness to their concerns. (Green Aff. ¶¶ 5-23, Bach. Aff. ¶¶ 8, 16-18.)

Under the precedent of this Court and in the Fourth Circuit, Xerxes' swift and thorough remedial action bars the imposition of liability on Xerxes. In granting summary judgment to the employer in *Elliott v. Maryland Dep't of Human Res.*, No. CCB-05-2867, 2007 WL 627864, at \*10 (D. Md. Feb. 22, 2007)<sup>2</sup>, this Court considered several key factors in the course of finding the defendant's response prompt and adequate, including: (1) involving the complainant in follow-up regarding the remedial action, (2) conducting workplace-wide sensitivity training and emphasizing company policies banning discrimination, and (3) responding promptly and effectively to each alleged incident.

Xerxes' investigative and remedial actions fully satisfy each of these criteria. Both Mr. Pearson and Mr. Wilson received detailed memoranda describing the investigations into their reported allegations, identifying the remedial action taken, and thanking them for reporting their allegations. (Green Aff. Exs. G, H, J.) Additionally, Xerxes' response to the alleged incidents was company-wide, including retraining of all employees emphasizing Xerxes' Prohibition of

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<sup>2</sup> A copy of this unpublished decision is attached as Exhibit 3 to this Memorandum.

Harassment, Corporate Compliance Policy and its absolute prohibition of harassing conduct, as well as the posting of materials visible to all employees. These remedial measures involved and were visible to all employees, including the class members.

While the class members may feel their complaints were not investigated and resolved rapidly enough, the facts demonstrate that when tangible allegations were brought forward, Xerxes sprang into action. For example, upon his discovery of the Stick Figure drawing, Mr. Wilson delayed substantially before even informing Xerxes management of its discovery, not coming forward until after he was urged to do so by his pastor. (Wilson Tr. at 114.) Xerxes promptly completed a comprehensive investigation conducted by its EEO Coordinator which resulted in substantial remedial action as documented in the memorandum provided to Mr. Wilson on August 30, 2007. (Green Aff. Ex. G.)

In reality, any delay in investigating and resolving the allegations of the class members were caused by the class members themselves. For example, Mr. Graham claims in this litigation that he was subjected to racial harassment (in the form of coworkers “staring at you over the tank to your area”) so severe he felt his life was in danger. (Graham Tr. at 205.) But prior to the initiation of this litigation, Mr. Graham never alerted *anyone* to this supposedly life threatening behavior – not plant management, not his Union, not a Xerxes Corporate Compliance Committee member, and not law enforcement. (Graham Tr. at 206-207.) Similarly, Mr. Pearson did not initially report discovering the Fiberglass Piece to any supervisor and initially refused even to tell plant manager Wayne Green what he had found. (Green Aff. ¶ 17.) The record in this case demonstrates that Xerxes took swift and decisive action once made aware of the complaints by the class members, consistent with the Court’s decision in *Eliott*.

Other decisions within this district and circuit demonstrate that Xerxes conducted legally sufficient “timely and adequate” corrective measures. In *Yancey v. Nat’l Ctr. on Inst. and Alternatives*, 986 F. Supp. 945, 954-55 (D. Md. 1997), Judge Davis granted summary judgment finding that in light of the defendant’s investigation as soon as specific allegations were raised, its confrontation of the alleged harasser, issuance of a written warning, and the remedial action taken, “reasonable minds could not disagree that [the defendant] took prompt and adequate remedial action designed to end the harassment when informed” of the allegations. Similarly, in *Mikels v. City of Durham*, 183 F.3d 323, 335 (4th Cir. 1999) the Fourth Circuit affirmed the entry of summary judgment in favor of the defendant and specifically approved the district court’s finding that the defendant’s investigation and remedial actions were sufficiently “prompt and adequate” in light of the prompt investigation into the allegations, the reprimand and warning to the alleged harasser, and the remedial action taken against him. *Id.* at 329-30. In *Mikels*, the court distinguished the defendant’s investigation from those conducted in cases like *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989), where the employer’s investigative and remedial actions were found to be “nothing more than a slap on the wrist or perhaps even an outright sham.” The exhaustive factual recitation above proves unequivocally that Xerxes’ investigation was not a “sham.” Xerxes took serious, comprehensive, and extensive action to remedy allegations of conduct that violated its corporate policies.

Typical of the effectiveness of Xerxes’ remedial actions is the case of Floyd Myers. Xerxes’ investigation determined that Mr. Myers – despite having no disciplinary record for similar conduct in more than fifteen years at the plant – had infrequently (and in his view without any intended racial animosity) used the term “boys.” (Green Aff. ¶ 10, Ex. E.)<sup>3</sup> As a result of

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<sup>3</sup> Specifically: “boy, well I’ll see you outside, or something like that.” (Wilson Tr. at 78).

this finding, Myers testified that he received a “two day suspension and a final notice, if it happens again, I’m terminated pretty much.” (Myers Tr. at 76.) He also underwent additional training. (Myers Tr. at 76.) Since July 25, 2006, when remedial action was taken against him, Mr. Myers has not used the term “boys” and has not been reprimanded. (Myers Tr. at 34, 60-61.)

Xerxes’ extensive investigation and remedial action in this case were sufficiently timely and adequate to bar the imputation of liability to Xerxes. In light of the extensive efforts undertaken and documented by the defendant in this case, reasonable minds cannot disagree with the sufficiency of Xerxes’ response and summary judgment should be entered.

**2. The conduct alleged by Mr. Graham and Mr. Pearson was not sufficiently severe to be recognizable under Title VII**

In order to be legally cognizable, alleged harassment must be both objectively and subjectively severe and pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). In determining whether conduct is sufficiently severe and pervasive, the courts look to the “totality of the circumstances” including: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening, humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee’s work performance. *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998).

Xerxes recognizes that the severity of alleged harassment is a fact-specific question not always conducive to resolution on summary judgment. However, with respect to Mr. Graham and Mr. Pearson, undisputed evidence demonstrates that summary judgment is appropriate.

**Gradian Graham**

While Mr. Graham claims to have been subjected to racially-motivated harassment, his deposition testimony demonstrates that all of the alleged conduct is innocuous, unrelated to race,

or so vaguely described and unsupported by evidence as to provide an insufficient basis to deny summary judgment. He alleges that he was offended when another employee used the word “fuck” (Graham Tr. at 117), annoyed when a fellow employee did not communicate with him (Graham Tr. at 138-39), and felt it was racially discriminatory when a fellow employee was “constantly over there just staring at you over the tank to your area.” (Graham Tr. at 134-35.) Mr. Graham also asserts that he heard another employee refer to Bernard Pearson as a “lazy bum” – a statement he believes was racially discriminatory despite admitting that the employee in question never said anything else that Mr. Graham considered racially discriminatory or harassing. (Graham Tr. at 122-23.) None of these alleged incidents is sufficiently severe to give rise to a cause of action. The “mere utterance” of an “epithet with engenders offensive feelings” of an employee “does not sufficiently affect the conditions of employment to implicate Title VII.” *Harris*, 510 U.S. at 22. The rare, innocuous, and non-threatening statements and actions of Xerxes employees complained about by Mr. Graham fail to rise to the level compensable under Title VII. Mr. Graham did claim in his deposition that he, subjectively, felt his life was in danger based on “the way these guys would just, in one particular area, just stare at me across the floor....” (Graham Tr. at 205.) However, whether alleged conduct is sufficiently severe to be cognizable is measured both subjectively and objectively. *Harris*, 510 U.S. at 21. Mr. Graham’s claim that employees looking at him was racial harassment of such severity he felt his life was in danger is objectively unreasonable and is inconsistent with the fact that Mr. Graham never reported the staring to his supervisor, the plant superintendent, plant manager, or any law enforcement officials. (Graham Tr. at 138-139, 206-207.)

The only additional allegation raised by Mr. Graham is that a nonsupervisory employee who also worked at the plant named Robert Churchey “had used the N word a bunch of different



times.” (Graham Tr. at 97.) However, at his deposition, Mr. Graham was unable to provide any clear testimony identifying when and in what context Mr. Churchey allegedly used that word.

Q: When did you hear Mr. Churchey use the N word?

A: Not one occasion, but I can’t say the exact dates of these.

Q: Tell me, to the best of your recollection, your best recollection of the dates when he used those words? That word or that phrase?

A: I cannot. Not off the back of my head. Because I don’t want to say this time and it’s not even close. It was my time of employment at Xerxes.

Q: That’s your best recollection, though?

A: Yes, sir.

Q: And tell me exactly what Mr. Churchey said.

A: I can’t get the exact statement he use, that he stated. I can’t remember the exact. Because it’s been a while. It’s been a long time.

(Graham Tr. at 98-99.) As such, the allegations are insufficient in this circuit to give rise to a hostile work environment claim. *Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994) (allegations were “not substantiated by accounts of specific dates times or circumstances. Such general allegations do not suffice to establish an actionable claim of harassment.”)

### **Bernard Pearson**

Two facts are essential to keep in mind about Mr. Pearson’s term of employment with Xerxes. First, his working experience during his first several months with the company was so good that he essentially *recruited* Keith Wilson to work for Xerxes. Mr. Wilson recalled being told by Mr. Pearson, while considering whether to work for Xerxes, that “it’s a good job, they have good benefits, and it’s a good place to work at ... he didn’t say nothing negative about the job.” (Wilson Tr. at 34-35.) Second, when Mr. Pearson resigned from Xerxes in February 2008 to take a job at a correctional facility because it offered a retirement plan, he left a voicemail with plant manager Wayne Green asking, “I’m going to go for the [corrections] job and I just

wanted to know if I didn't like it, you know, could I come back. I know I'll probably lose seniority, but I just wanted to talk to you about that." (Pearson Tr. at 429.)

Mr. Pearson's glowing review conveyed to Keith Wilson of his job at Xerxes and his interest in returning to Xerxes in the event he merely "didn't like it" at his new job demonstrate that Mr. Pearson's experiences at Xerxes did not cross the threshold to be actionably severe under Title VII. Notably, as he resigned from Xerxes while looking back to see whether he could still return, Mr. Pearson expressed concern only about a loss of seniority, not workplace harassment. "A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris*, 510 U.S. at 22. Here Mr. Pearson's job experience was apparently so satisfactory that he recruited another Black individual to work with him at Xerxes and inspired Mr. Pearson to try to keep the door open to returning to Xerxes even as he chose to take another job.

#### IV. CONCLUSION

For the foregoing reasons, Xerxes respectfully requests that summary judgment be entered in favor of Xerxes as to each claim asserted by EEOC.

Date: July 17, 2009

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