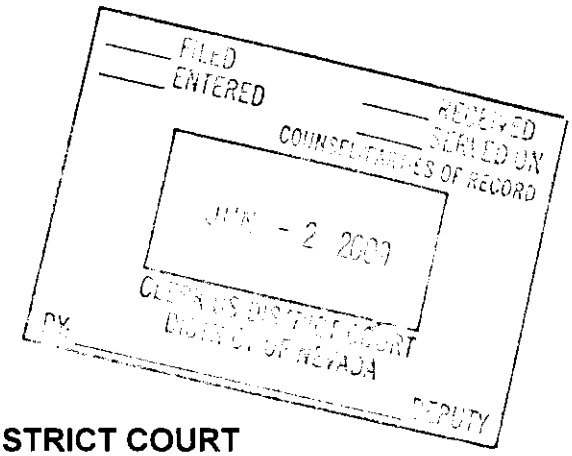

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

U.S. EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Plaintiff,

vs.

GNLV CORP., d/b/a/ GOLDEN NUGGET HOTEL AND CASINO, and DOES 1-10 Inclusive,

Defendants.

2:06-CV-01225-BES-PAL

ORDER

Presently before the Court is Defendant GNLV Corp., d/b/a Golden Nugget Hotel and Casino's ("GNLV") Motion for Summary Judgment on Plaintiff EEOC's Pattern or Practice Claim (#61) filed December 12, 2008. Plaintiff U.S. Equal Opportunity Employment Commission ("the EEOC") filed its Opposition (#89) on January 30, 2009. GNLV filed its Reply (#100) on February 27, 2009.

Also before the Court is GNLV's Motion for Summary Judgment on the Issue of Punitive Damages (#62) filed December 12, 2008. The EEOC filed its Opposition (#80) on January 30, 2009. GNLV filed its Reply (#101) on February 27, 2009.

Also before the Court is GNLV's Motion for Summary Judgment Regarding the Merits of Class Member Robert Royal's Claims (#63) filed December 12, 2008. The EEOC filed its Opposition (#78) on January 30, 2009. GNLV filed its Reply (#99) on February 27, 2009.

Also before the Court is GNLV's Motion for Summary Judgment Regarding the Merits of Class Member Susie Fein's Claims (#64) filed December 12, 2008. The EEOC filed its

Opposition (#79) on January 30, 2009. GNLV filed its Reply (#97) on February 27, 2009.

Also before the Court is GNLV's Motion for Summary Judgment Regarding the Merits of Class Member Ervin Nixon's Claims (#65) filed December 15, 2008. The EEOC filed its Opposition (#81) on January 30, 2009. GNLV filed its Reply (#102) on March 2, 2009.

Also before the Court is GNLV's Motion for Summary Judgment Regarding the Merits of Class Member Eddie Mae Hunter's Claims (#66) filed December 15, 2008. The EEOC filed its Opposition (#82) on January 30, 2009. GNLV filed its Reply (#98) on February 27, 2009.

Also before the Court is the EEOC's Motion for Summary Judgment on Defendant's First, Second, Third, Fourth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Sixteenth, Twentieth and Twenty-First Affirmative Defenses (#67) filed December 15, 2008. GNLV filed its Opposition (#75) on January 30, 2009. The EEOC filed its Reply (#103) on March 2, 2009.

Also before the Court is GNLV's Motion for Summary Judgment Regarding the Merits of Class Member Dorothy Blake's Claims (#68) filed December 15, 2008. The EEOC filed its Opposition (#83) on January 30, 2009. GNLV filed its Reply (#105) on March 2, 2009.

Also before the Court is GNLV's Motion for Summary Judgment on the Issue of the EEOC's Failure to Meet the Administrative Prerequisites for Claims Pertaining to Tequella Candice Smith (#69) filed December 15, 2008. The EEOC filed its Opposition (#84) on January 30, 2009. GNLV filed its Reply (#96) on February 27, 2009.

Also before the Court is GNLV's Motion for Summary Judgment Regarding the Merits of Class Member Tequella Candice Smith's Claims (#70) filed December 15, 2008. The EEOC filed its Opposition (#85) on January 30, 2009. GNLV filed its Reply (#104) on March 2, 2009.

Finally, before the Court is the EEOC's Motion to Strike the Affidavit of Philip Bouthillier, Portions of Defendant's Motion for Summary Judgment on Plaintiff EEOC's Pattern or Practice Claim, Exhibits Relating to Philip Bouthillier's Affidavit, and Purported Numerical Analysis (#106) filed April 14, 2009. GNLV filed its Opposition (#107) on May 4, 2009. The EEOC filed its Reply (#108) on May 12, 2009. The Court held hearing on all of these motions on May 18,

2009.

I. BACKGROUND

This matter arises out of allegations by the employees of GNLV of racial and gender discrimination and retaliation. On September 29, 2006, the EEOC filed a complaint against GNLV on behalf of Robert Royal ("Royal") and a class of similarly situated individuals employed by GNLV, on the basis of racial and sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964. The charging party, Royal, and several other individuals allege that GNLV engaged in a pattern and practice of condoning and tolerating racial and sexual harassment and retaliation directed at its employees. Specifically, the EEOC alleges that GNLV supervisors and managers ignored or stifled complaints by its employees of harassment by customers, failed to follow its procedures for handling harassment complaints, and fostered an environment where sexual and racial harassment of employees by customers, coworkers and managers was tolerated and ignored. The EEOC's theory is that GNLV created and maintained a sexually and racially hostile work environment at its Las Vegas location because it tolerated individual acts of sexual and racial harassment both by its employees and by customers, and by its alleged refusal to take notice of, investigate, and/or discipline workers or customers who subjected its employees to sexual or racial harassment. Upon further investigation, the EEOC found five more class representatives, Ervin Nixon, Jr. ("Nixon"), Susie Fein ("Fein"), Dorothy Blake ("Blake"), Eddie Mae Hunter ("Hunter"), and Tequella Candice Smith ("Smith"). All of the class members are or were table games dealers at GNLV, except for Smith, who worked in the stewarding department.

II. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party.

Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Martinez v. City of Los Angeles, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. Lynn v. Sheet Metal Workers Int'l Ass'n, 804 F.2d 1472, 1483 (9th Cir. 1986); S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982).

If the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, then the respondent must show by specific facts the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." British Airways Board v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978); see also Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993) ("[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free . . . to grant summary judgment."). Moreover, "[i]f the factual context makes the non-moving party's claim of a disputed fact implausible, then that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial." Blue Ridge Insurance Co. v. Stanewich, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing Cal. Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

III. Discussion

A. The EEOC's Motion to Strike

Before reaching the parties' various motions for summary judgment, the Court must first address the EEOC's objections to GNLV's evidence submitted in support of GNLV's motion

for summary judgment on the EEOC's pattern or practice claim (#61). The EEOC filed a motion to strike the affidavit of Philip Bouthillier ("Bouthillier"), portions of GNLV's motion for summary judgment on the pattern or practice claim, and exhibits relating to Bouthillier's affidavit regarding the number of workers employed at GNLV.[1] The EEOC objects to this evidence on the grounds that Bouthillier was never identified in GNLV's pretrial disclosure statements under Fed.R.Civ.P. 26. The EEOC also objects under Fed.R.Civ.P. 37 on the grounds that it previously asked for this information in an interrogatory, and GNLV improperly objected to the interrogatory as over-burdensome and never supplemented its responses. (Pl.'s Mot. (#106) 5-9). In addition, in its reply brief, the EEOC argues that the Court should grant its motion because GNLV's Opposition was not timely filed.[2]

The Court finds the EEOC's argument regarding pretrial disclosures under Fed.R.Civ.P. 26 unpersuasive. The purpose of pretrial disclosures is to provide the names of those individuals likely to have discoverable information so that the opposing party may depose them in advance of trial. Bouthillier appears to have no information regarding any alleged harassment or discrimination in this matter. His affidavit appears to have been submitted solely for summary judgment purposes to show the relatively small number of complaints compared with GNLV's entire workforce. Bouthillier did not provide any expert statistical analysis of these numbers, he simply performed the clerical function of identifying how many individuals were employed by GNLV during the period in question. His affidavit is based upon his personal knowledge as GNLV's information systems manager, and Fed.R.Civ.P. 56(e)(1) permits a party to submit such affidavits with a summary judgment motion. Even if GNLV's

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[1]As discussed in more detail below, GNLV argues that there is no evidence of a pattern or practice of discrimination because there are only 10 people who chose to be involved in this lawsuit. GNLV argues that because such a small number of people allege discrimination out of a pool of thousands of GNLV employees, the EEOC cannot prove that the discrimination and harassment were part of GNLV's standard operating procedure. (Def.'s Opp'n (#107) 13-15).

[2]In its reply, the EEOC makes much of the fact that GNLV's Opposition was filed on May 4, 2009, which, under local rule 7-2(b), was five days after the deadline to submit its opposition, April 29, 2009. (Pl.'s Rep. (#108) 3-4). However, a review of the docket indicates that the Court Clerk set the deadline for GNLV's response at May 2, 2009, which was a Saturday and GNLV submitted its response on the following business day, Monday May 4, 2009. Given the Clerk's entry of the deadline for May 2, 2009, and the fact that the EEOC suffers no prejudice, the EEOC's timeliness argument is without merit.

failure to disclose Bouthillier was a violation of Rule 26, the EEOC could have requested under Rule 56(f) to depose him. The EEOC made no such request, and therefore the Court will not strike the affidavit on these grounds.

The EEOC also argues that this evidence should be stricken because the EEOC requested information regarding GNLV's workforce during discovery and GNLV allegedly improperly objected to the request as overly broad. In the EEOC's Interrogatory No. 8, it requested information for "every person employed at [GNLV] since January 2001 through the present" including each employee's name, date of birth, last known address and telephone number, social security number, dates of employment, reasons for separation, departments and positions worked, and names of immediate supervisors. (Def.'s Opp'n (#107) 8). GNLV objected to this request as overly broad, and the EEOC agreed to limit this interrogatory. The parties agreed to limit these disclosures to dealers only. Id. GNLV then supplemented its response with a list of dealers employed by GNLV during the relevant time period. Id. at 9. Based on the foregoing, this Court does not believe GNLV acted improperly by objecting to the EEOC's voluminous interrogatory request. The record indicates that the EEOC never actually requested the number of GNLV employees. Instead, the EEOC focused its interrogatory on other, more detailed information, and later agreed to limit that request to dealers. Therefore, this Court will not strike the affidavit or numerical evidence on these grounds either because GNLV never improperly refused to disclose the total number of GNLV employees.

Finally, the Court notes that the EEOC did not object to this evidence in its original opposition to GNLV's motion for summary judgment. In fact, the EEOC appears to have designated the numerical evidence as undisputed and relied on it in its opposition. While the Federal Rules of Civil Procedure do not prescribe a specific time period during which a party must move to strike an affidavit, the trial court must exercise its discretion in deciding whether a party has timely objected to or waived its right to object to an affidavit. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Siliconix Inc., 726 F.Supp. 264, 268 (N.D. Cal. 1989). Because the EEOC did not timely object to this evidence and relied on it in its opposition, the Court believes

the EEOC has waived any objections at this point. Based on the foregoing, the EEOC's motion to strike (#106) is denied.

B. Defendant GNLV's Motion for Summary Judgment on Plaintiff EEOC's Pattern or Practice Claim

Turning to GNLV's first motion for summary judgment, GNLV argues that the EEOC cannot, as a matter of law, establish a pattern or practice of discrimination and/or harassment by the company. Specifically, GNLV argues that the EEOC cannot show anything more than "isolated, accidental, or sporadic" discriminatory acts, and that, taken together, these acts do not amount to a pattern and practice of discrimination by GNLV. (Def.'s Mot. (#61) 21). GNLV submits several statistical figures which, it argues, show that there are no genuine issues of material fact regarding the issue of whether GNLV engaged in a pattern or practice of condoning and tolerating racial and sexual harassment and retaliation directed at its employees. Specifically, it argues that because the EEOC was only able to identify ten current and former employees that were subjected to harassment over the course of six years and because there is no evidence to indicate there are additional class members or complaints yet-to-be uncovered, it cannot demonstrate as a matter of law that discrimination and harassment are a pattern and practice of GNLV. Id. at 22. In its opposition, the EEOC argues that, viewed in the light most favorable to the EEOC, substantial evidence exists from which a jury could find that GNLV "repeatedly and regularly tolerated racial and sexual harassment and failed to take appropriate company-wide preventative or remedial action." (Pl.'s Opp'n (#89) 9).

Neither the Ninth Circuit nor the Supreme Court have spoken as to whether and how a pattern-or-practice action for sexual and racial harassment can be tried and proven. For purposes of this motion, the Court will assume that the EEOC can bring a pattern-or-practice action for hostile work environment sexual and racial harassment given that several district courts have so held. See EEOC v. CRST Van Expedited, Inc., – F.Supp.2d –, No. 07-CV-95-LRR, 2009 WL 1175169 (N.D.Iowa April 30, 2009); EEOC v. Int'l Profit Assoc., No. 01-C-4427, 2007 WL 3120069 (N.D.Ill. Oct. 23, 2007); EEOC v. Scolari Warehouse Markets, Inc., 488 F.Supp.2d 1117, 1129 (D.Nev. 2007); EEOC v. Carrols Corp., No. 5:98-CV-1772, 2005

WL 928634 (N.D.N.Y. 2005); EEOC v. Dial Corp., 156 F.Supp.2d 926, 946 (N.D.Ill. 2001); EEOC v. Mitsubishi Motor Manufacturing of America, 990 F.Supp. 1059, 1070-71 (C.D. Ill. 1998). Those courts have determined that pattern-or-practice cases should be tried in two phases based on the model provided in Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 (1977). At Phase I (the "liability phase") the courts above have determined that the EEOC must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." Id. at 336. It must prove, by a preponderance of the evidence, that the harassment was GNLV's "standard operating procedure - the regular rather than the unusual practice." Id. A finding in the EEOC's favor in Phase I would allow the court to award prospective relief under Teamsters, and the court should then proceed to Phase II (the "remedial phase").[3] See id. at 361. However, "the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination." Id.

In the specific context of a hostile work environment pattern or practice claim, the EEOC must prove, by a preponderance of the evidence: (1) that the harassment that occurred at GNLV during the relevant time period, taken as a whole, was so severe or pervasive that a reasonable person of similar background would find the work environment to be hostile and abusive, and (2) that GNLV knew or should have known that regular or systematic harassment was occurring among its workforce but did not take adequate steps to address the problem. See Mitsubishi, 990 F.Supp. at 1073.

In determining whether an environment is sufficiently hostile or abusive, the court must look at "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). However, as the Supreme Court has pointed out,

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[3]Phase II requires an inquiry into the discrimination or harassment suffered by the individual claimants, and allows the court to address the issue of monetary damages with respect to each individual claimant. See Teamsters, 431 U.S. at 361. Because GNLV's first motion for summary judgment (# 61) deals only with the pattern-or-practice issue, and its subsequent motions address each individual claimant, the Court need only consider the Phase I analysis at this point.

"the mere utterance of an...epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1992). Indeed, the objective aspect of the hostile work environment test is meant to "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." Faragher, 524 U.S. at 788. "Simple teasing, off-hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Id.

GNLV argues that the evidence EEOC provides does not establish a triable issue of fact that the harassment that occurred at GNLV was so severe and pervasive that it became "standard operating procedure." GNLV focuses on the total number of claimants (ten total - four were stricken due to the EEOC's late disclosures), versus the total number of GNLV employees (9,265), dealers (986), table games department employees (848) and kitchen stewards (270) employed by GNLV from January 1, 2002 to August 31, 2008. (Def.'s Mot. (#61) 17-22). GNLV argues that because the EEOC, over a six-year period, has only been able to locate and identify ten potential class members that allegedly suffered discrimination, the EEOC cannot, as a matter of law, demonstrate that discrimination was part of GNLV's "standard operating procedure." Id. at 22.

The Supreme Court has noted that "'statistical analyses have served and will continue to serve an important role' in cases where the existence of discrimination is a disputed issue." Teamsters, 431 U.S. at 339. However, while statistics are one method by which a pattern or practice claim may be proven, the Supreme Court has cautioned that they "are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." Id. at 339-40.

Even assuming that each of the ten potential claimants has set forth facts sufficient to constitute valid, individual claims for sexual harassment, and even viewing the facts in the light most favorable to the EEOC, the Court finds it impossible to ignore the critical, undisputed fact that the EEOC has only presented this Court with complaints from ten people out of a pool of

9,265 GNLV employees over a six-year period (0.1 %). While the Court cannot articulate a specific threshold for the number of claims required to establish a pattern or practice of harassment or retaliation, the numbers indicate that the EEOC's allegations fall well short of showing any "standard operating procedure" of allowing or condoning discrimination.

In two recent cases, district courts have granted summary judgment against the EEOC on pattern-or-practice claims where only a small percentage of the workforce made allegations of harassment or discrimination. See CRST Van Expedited, 2009 WL 1175169 at *26 (granting summary judgment on pattern-or-practice claim where the EEOC presented a total of 146 allegations of sexual harassment by female drivers out of a total of 2,701 (5.4%)); Carrols Corp., 2005 WL 928634 at *4 (granting summary judgment on a pattern-or-practice claim where 333 out of 90, 835 employees (.367%) at a total of 206 distinct restaurants had alleged actionable sexual harassment). The same analysis applies here with equal force. Notably, in this case, the incidence of harassment is lower than that in both Carrols and in CRST. While this Court recognizes that bare statistics can be refuted, allegations by a total of 0.1 % of GNLV's workforce over the span of six years does not, without more, amount to "systemic, company-wide discrimination," or "an objectively verifiable policy or practice of discrimination" by GNLV against its employees. Mitsubishi, 990 F.Supp. at 1070. Moreover, the EEOC has not presented any tangible evidence to dispute the fact that not even a substantial minority of GNLV employees experienced harassment or retaliation during the relevant time period.

The EEOC attempts to downplay this statistical evidence by citing Scolari. In Scolari, this Court noted that the fact that there were only 17 claimants out of a total of 5,200 employees solicited was not dispositive of a pattern-or-practice claim for sexual harassment given the surrounding circumstances in that case. Scolari, 488 F.Supp.2d at 1130. Specifically, the Court noted that the EEOC, in that case, had received more than 500 complaints by women and men attesting to the hostile work environment at Scolari and the company's failure to remedy the harassment. Id. The Court concluded that based on these surrounding facts and circumstances, there were likely more than 17 claimants out there, and that given the allegations of retaliation, many current employees were likely afraid to step

forward. See Scolari, 488 F.Supp.2d at 1131.

In this case, the EEOC argues that these ten claimants are merely the "tip of the iceberg," and that the number of claimants does not necessarily reflect the number of occurrences of actual harassment. (Pl.'s Opp'n (#89) 3). However, this statement is speculative and, unlike in Scolari, the EEOC has not presented this Court with any evidence to indicate that there are a large number of unnamed claimants out there. In addition, pursuant to this Court's order, the EEOC may not expand its class of claimants beyond the six named claimants as discovery in this case has concluded. Hence, the total possible number of claimants the EEOC can use to support its pattern-or-practice claim in this case is limited to six individuals. While the Court recognizes that often statistics do not reveal the entire story, in this case, even accepting all six claimants and all four stricken claimants' allegations over a six-year period as true, the relatively few instances of harassment and retaliation which the EEOC presents do not add up to the finding that harassment was widespread at GNLV, or that permitting or condoning it was GNLV's standard operating procedure.[4]

Aside from the statistics in this case, the Court notes that of the several alleged incidents of harassment involving the six claimants, it is undisputed that many were either unreported or addressed if they were reported. For example, Royal admits that during the years of 1999-2002, he heard several customers make racist remarks but he never reported them. (Def.'s Mot. (#61) Ex. 15, 171-172, 183-84, 232). Fein also admits that she never complained to her supervisors or to Human Resources regarding any alleged instances of customer or supervisor harassment. Id. Ex. 21, No. 37-38. As to Nixon, he admits that no racial remarks were ever directed at him nor stated in his presence. Id. Ex. 19, 42. The failure

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[4]In its Opposition, the EEOC relies heavily on the deposition testimony of Alex Zakalyk for the proposition that it was GNLV's "standard practice" to tolerate harassment of its dealers by high-roller customers. (Pl.'s Opp'n (#89) 6). Mr. Zakalyk did testify that there were some customers who were not ejected when they engaged in inappropriate conduct towards the dealers. (Zakalyk Dep. (#77) Ex. J, 40-41). Specifically, Mr. Zakalyk recalled one particular customer who was abusive towards the dealers, shouted at them, and the supervisors approached the customer and spoke with him, but he was not ejected. Id. at 116. Even viewing this evidence in the light most favorable to the EEOC, as this Court is required to do, it does not show that GNLV regularly tolerated harassment by customers towards its dealers on a global scale. Mr. Zakalyk's testimony may demonstrate that some customers who behaved inappropriately were not ejected, however it does not demonstrate that GNLV failed to take corrective action on a regular basis when inappropriate conduct was reported. Therefore, Mr. Zakalyk's testimony does not create a genuine issue of material fact as to whether allowing harassment to occur was GNLV's standard operating procedure.

of these alleged victims to report the harassment to supervisors or Human Resources is significant because it reveals that, in many of these instances, GNLV was not given an opportunity to respond to any allegedly harassing behavior. These undisputed facts weaken the EEOC's contention that GNLV allowed or fostered a hostile work environment on a widespread or systematic basis.

Additionally, of the alleged instances where the claimants did complain, the undisputed evidence shows that GNLV took action. For example, Royal admits that in several instances where customers made racial comments in his presence, he reported those incidents to his supervisors, and the supervisors either asked the customer to leave, called security, or monitored Royal's table.[5] Id. Ex. 15, 184-98, 207, 211-13, 284, 288. Blake admits that when she reported to her supervisor the full extent of the sexually inappropriate language a customer used towards her, the supervisor came to her table and stood watch, after which the customer refrained from making such comments. Id. Ex. 23, 93-94. Finally, as to Hunter, she admits that after reporting an incident where a customer referred to another African-American customer as a "monkey," the supervisor gave that customer a bad rating. Id. Ex. 24, 96-97. Again, these undisputed facts further serve to weaken the EEOC's contention that GNLV created a permissive workplace by regularly failing to respond properly to alleged harassment.

Finally, the Court notes that at all relevant times, GNLV has had a facially valid anti-discrimination policy, which it distributed to its employees. Furthermore, it ensured its supervisors and employees received specific training on its anti-discrimination and harassment policies. The policy is specific and detailed and provides potential claimants with multiple

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[5]The EEOC argued in its Opposition and at the hearing that the customers' use of the "n-word" alone shows that the harassment that allegedly took place at GNLV was severe. (Pl.'s Opp'n (#89) 17). This Court recognizes that this particular racial slur is highly offensive and demeaning, and, in the words of the Ninth Circuit, is "perhaps the most offensive and inflammatory racial slur in English...a word expressive of racial hatred and bigotry." McGinest v. GTE Service Corp., 360 F.3d 1103, 1116 (9th Cir. 2004). Royal admits that on several occasions when customers used this word, he reported the conduct to his supervisors who then asked the customers to leave. See (Def.'s Mot. (#61) Ex. 15, 165-69, 284-85. In several other instances where customers used the word, Royal did not report the comments to anyone. Id. at 171-71, 232. Royal testified that in June 2002, one customer directed this epithet at Royal while at his table. (EEOC Exhibits in Support of Opp'n (#78-2) Ex. A, 219-221). Royal then called his supervisor to the table and the customer left. Id. at 221. However, Royal felt the situation was handled inappropriately because the customer was not ejected from the casino. Id. at 222. While this Court agrees that these instances of customer harassment were certainly severe and abusive, the severity of these instances alone does not establish GNLV's pattern or practice of tolerating harassment, particularly where it responded promptly and effectively in most cases.

avenues to report harassment or discrimination by coworkers, supervisors and customers alike. This undisputed fact also weighs against a finding that it was GNLV's standard operating procedure to tolerate harassment among its workforce.

Given that the universe of possible claimants in this case is limited to six, and given that the universe of possible incidents the EEOC may use to support its pattern-or-practice claim is limited by the claimants' failures to report or by GNLV's corrective action, this Court concludes that the EEOC has not shown that there is a genuine issue of material fact as to whether a pattern or practice of retaliation or hostile work environment sexual or racial harassment existed at GNLV. Based upon the record presently before the Court, a reasonable jury could not find that it was GNLV's standard operating procedure to tolerate harassment or to retaliate against employees who complained. The EEOC has presented the Court with anecdotal evidence that some of GNLV's customers and employees behaved inappropriately, and that some supervisors may have occasionally failed to deal appropriately with employee complaints of harassment. However, the EEOC has presented insufficient evidence to show that this was the "regular rather than the unusual practice." Even viewing all the evidence in the light most favorable to the EEOC, the Court cannot find that these relatively few instances of alleged harassment during the relevant time period show that there was so much harassment and retaliation that GNLV must have been tolerating it on a widespread basis. In addition, the undisputed facts do not support the EEOC's contention that GNLV knew or should have known that regular or systematic harassment was occurring or that it repeatedly took inadequate steps to address any problems. Accordingly, GNLV's Motion for Summary Judgment on Plaintiff EEOC's Pattern or Practice Claim (#61) is granted.

Because the Court grants GNLV's Motion for Summary Judgment on the EEOC's pattern-or-practice claim, GNLV's motions for summary judgment regarding the issue of punitive damages and regarding the merits of the individual class members' claims have been rendered moot and the Court will not address them here. See Teamsters, 431 U.S. at 361 (stating, "the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination"). In addition, the EEOC's motion for summary judgment regarding various affirmative defenses has also been

rendered moot and the Court will not address it here.

IV. CONCLUSION

IT IS HEREBY ORDERED that Plaintiff EEOC's Motion to Strike Affidavit of Philip Bouthillier, Portion's of Defendant's Motion for Summary Judgment on Plaintiff EEOC's Pattern or Practice Claim, Exhibit's Relating to Philip Bouthillier's Affidavit, and Purported Numerical Analysis (#106) is DENIED.

IT IS FURTHER ORDERED that Defendant GNLV's Motion for Summary Judgment on Plaintiff EEOC's Pattern or Practice Claim (#61) is GRANTED.

IT IS FURTHER ORDERED that Defendant GNLV's Motion for Summary Judgment on the Issue of Punitive Damages (#62) is DENIED as moot.

IT IS FURTHER ORDERED that Defendant GNLV's Motions for Summary Judgment Regarding the Merits of the Individual Claimants (#63, 64, 65, 66, 68, 69, 70) are DENIED as moot.

IT IS FURTHER ORDERED that Plaintiff EEOC's Motion for Summary Judgment on Defendant's First, Second, Third, Fourth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Sixteenth, Twentieth, and Twenty-first Affirmative Defenses (#67) is DENIED as moot.

The Clerk of the Court shall enter Judgment in favor of Defendant GNLV and against Plaintiff EEOC accordingly.

DATED: This 2nd day of June, 2009.

UNITED STATES DISTRICT JUDGE