IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. BLOCKBUSTER, INC., Defendant.	Civil Action No.: 8:07-cv-02612-RWT

DEFENDANT BLOCKBUSTER INC'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Blockbuster, Inc. ("Blockbuster" or "Defendant") hereby respectfully moves this Court for summary judgment on the EEOC's claims in the above-captioned action for the reasons stated in the accompanying Memorandum in Support of Blockbuster's Motion for Summary Judgment.

Respectfully Submitted,

/s/ Grace E. Speights

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	Civil Action No.: 8:07-cv-02612-RWT
BLOCKBUSTER, INC.,	)	
Defendant.	)	

DEFENDANT BLOCKBUSTER INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Equal Employment Opportunity Commission ("EEOC" or "Plaintiff"), on behalf of 7 female and/or Hispanic workers ("class members") alleges violations of Title VII based on claims of: (1) hostile work environment based on race, national origin; (2) race and/or national origin disparate treatment discrimination; and (3) sexual harassment. The EEOC's claims, however, should not withstand summary judgment. As will be set forth more fully herein, there is insufficient record evidence to establish a claim of hostile work environment or disparate treatment based on race or national origin. The claims of sexual harassment should also fail because: (1) the alleged harassment was neither severe or pervasive; (2) the class members never complained to Blockbuster and Blockbuster was therefore unable to take prompt remedial action; (3) to the extent that the class members complained to Express Personnel, their employer, Express failed to timely bring the alleged incidents to the attention of Blockbuster; and (4) when Blockbuster learned of the complaints, it investigated and took prompt remedial action. Finally, the EEOC's claim that Blockbuster failed to maintain personnel and employment records should

also fail because Blockbuster was not the employer of the class members and thus was not responsible for maintaining employment and personnel records for the class members.

II. STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

A. BLOCKBUSTER'S GAITHERSBURG FACILITY

In November 2004, Blockbuster opened a warehouse facility in Gaithersburg, Maryland dedicated to shipping and distributing DVDs to Blockbuster customers who rented movies through Blockbuster Online. Collen Dep. 14:20-15:2 (attached as Y1); Fitzgerald Dep. 22:2-6 (attached as Y2). In late 2004, Blockbuster used temporary workers to staff the Gaithersburg facility. Fitzgerald Dep. 24:8-13. Blockbuster contracted with Venturi Staffing Partners ("Venturi") to provide clerks for the warehouse. Fitzgerald Dep. 24:14-17. Venturi subcontracted with another staffing agency, Express Personnel ("Express"), to place individuals to work as distribution clerks at the warehouse. Fitzgerald Dep. 24:21-25:11. Blockbuster paid Venturi for its services in accordance with a Services Agreement between the two parties. *See* Exhibit A, Partnership Services Agreement. The class members were and have never been employees of Blockbuster. Davis Dep. 64:20-65:6 (attached as Y3); Brown Dep. 53:4-21 (attached as Y4).

B. THE CLASS MEMBERS' EMPLOYMENT

Between November 2004 and September 2005, each of the class members was hired by Express, at Venturi's direction, to work at Blockbuster's Gaithersburg facility. Brinson Dep. 14:14-16 (attached as Y5); Despertt Dep. 17:22-18:3 (attached as Y6); D. Gonzales Dep. 30:10-12 (attached as Y7); L. Gonzales Dep. 34:4-6 (attached as Y8); Fields Dep. 20:3-11 (attached as Y 9); Ledesma Dep. 30:21-31:2 (attached as Y10); Zubiate Dep. 19:8-10 (attached as Y11). Cynthia Brown ("Ms. Brown"), an Express employee, recruited, interviewed, and hired individuals to work as distribution clerks at the Gaithersburg facility. Brown Dep. 34:14-19,

53:4-21. The hiring process involved Ms. Brown doing a phone interview with the prospective worker and then an in-person interview. Brown Dep. 53:12-21; Brinson Dep. 15:8-19; D. Gonzales Dep. 30:21-31:1; L. Gonzales Dep. 36:16-21; Ledesma Dep. 32:5-8. When Express hired workers, Ms. Brown reviewed the application for employment and the Express handbook with them. *See* Exhibit B, Express Personnel Handbook; Brown Dep. 42:6-19; Exhibit C – Handbook Acknowledgements of L. Gonzales and D. Gonzales. Blockbuster did not participate in the recruiting, hiring, or screening of the workers hired by Express. Brown Dep. 53:4-21. Express provided and collected time cards from each worker, paid wages, and provided benefits to them. *See* Brown Dep. 230:5-10.

Blockbuster trained each worker at the facility on the proper way to perform their duties in the warehouse. Brown Dep. 41:3-42:1. Warehouse group leaders, who were employees of Blockbuster, directed the daily tasks of the clerks, but were not responsible for hiring or terminating the clerks. Collen Dep. 66:11-67:4. The distribution center manager, Lincoln Barrett, was responsible for the daily operation of the warehouse. Collen Dep. 103:3-21.

C. THE SEVEN CLASS MEMBERS

The EEOC brought this action on behalf of seven class members who allege sex, race and/or national origin. The class members, and their claims, are as follows:

Name	**Race/National Origin**	**Claim**
LaQuanta Brinson	African-American	Harassment based on sex; retaliation
Michelle Despertt	African-American	Harassment based on sex; retaliation
Ni'ema Fields	African-American	Harassment based on sex; retaliation
Dolores Gonzales	Hispanic/Peruvian	Harassment based on sex; discrimination and harassment based on race and national origin; retaliation

Lolita Gonzales	Hispanic/Peruvian	Harassment based on sex; discrimination and harassment based on race and national origin; retaliation
Elizabeth Ledesma	Hispanic/Peruvian	Harassment based on sex; discrimination and harassment based on race and national origin; retaliation
Lita Zubiate	Hispanic/Peruvian	Harassment based on sex; discrimination and harassment based on race and national origin; retaliation

D. BLOCKBUSTER'S ANTI-HARASSMENT POLICIES

Blockbuster is an equal opportunity employer and prohibits discrimination against employees or applicants for employment based on race, sex, religion, national origin, age, disability, or any other category protected by law. *See* Collen Dep. 17:23-18:2. Blockbuster's Equal Employment Opportunity Policy ("EEO Policy") is distributed to all Blockbuster employees at the commencement of their employment. Fitzgerald Dep. 30:7-15; Francis Dep. 88:13-18 (attached as Y12); Collen Dep. 110:11-111:2. All Blockbuster employees, including warehouse managers and warehouse group leaders, are subject to Blockbuster's EEO policy. *See* Exhibit D, Blockbuster Harassment Policy Acknowledgements of L. Barrett, T. Johnson and K. Tutu. In addition to Blockbuster's EEO Policy, Blockbuster has an ethics hotline that any worker can call to report harassing or discriminatory conduct. Fitzgerald Dep. 117:6-11. Notices of Blockbuster's EEO Policy and its ethics hotline were posted on bulletin boards in the break room of the Gaithersburg facility. Fitzgerald Dep. 117:6-11.

Blockbuster employees are subject to a progressive discipline policy which is intended to provide coaching and counseling to employees whose performance is not up to Blockbuster's standards. *See* Exhibit E, Blockbuster Progressive Discipline Policy. The progressive discipline policy provides for an escalating series of corrective action beginning with a verbal warning. *Id.* The next actions are a written warning, a final written warning, and finally termination. *Id.*

As employees of Express, the class members were subject to its anti-harassment policy, which was included in its employee handbook. Brown Dep. 43:7-10; Exhibit C – Handbook Acknowledgements of L. Gonzales and D. Gonzales. Ms. Brown distributed and reviewed the employee handbook with each of the Express employees that were assigned to Blockbuster's Gaithersburg facility. Brown Dep. 43:11-20. Express' anti-harassment policy instructed its employees to contact their Express Staffing Consultant if they were exposed to harassing conduct. *See* Exhibit B, Express Handbook pg. 3; Brown Dep. 44:18-45:3.

E. THE CLASS MEMBERS' RACE/NATIONAL ORIGIN DISCRIMINATION AND HARASSMENT ALLEGATIONS

The EEOC alleges that Hispanic workers were subject to a hostile work environment and treated differently based on their race. Complaint ¶ 20. Specifically, the EEOC alleges that Supervisor Thomas Johnson ("Mr. Johnson") yelled at the Hispanic class members, Lolita Gonzales, Dolores Gonzales, Ledesma, and Zubiate, monitored their work, threatened their jobs, and treated the African-American employees more favorably than them because of their race. Complaint ¶ 20.

However, the testimony of the class members shows that Mr. Johnson's actions were not based on race. While Mr. Johnson may have frequently raised his voice with employees, the testimony of class members reveals that his behavior was not limited to Hispanic employees. In fact, non-Hispanic class members testified that they too were yelled at by Mr. Johnson and Warehouse Manager Lincoln Barrett. *See* Fields Dep. 32:11-14, 68:5-19; Despertt Dep. 104:19-107:2. Non-Hispanic class members also testified that employee monitoring was not specific to any group of employees and occurred when employees were new or when it appeared that specific employees were not performing adequately. S*ee* Despertt Dep. 108:3-109:7, 115:2-5; Brinson Dep. 46:21-47:21.

None of the Hispanic class members during their depositions recounted any insults that were specific to their race and/or national origin. Moreover, Elizabeth Ledesma testified that LaQuanta Brinson, a class member and African-American employee, was not treated well and was insulted. Ledesma Dep. 105:1-12. Ni'ema Fields testified that Johnson threatened to fire her. Fields Dep. 47:10-18. Ms. Brinson also testified that Johnson allegedly threatened her. Brinson Dep. 31:8-13. Both Ms. Fields and Ms. Brinson are African-American.

The Hispanic class members further allege that they were not allowed to sit down while performing their tasks and that African-American workers were allowed to sit down. D. Gonzales Dep. 41:1-3; Ledesma Dep. 45:4-13.; L. Gonzales Dep. 80:4-9; 81:1-3. However, the deposition testimony of class members revealed that, in fact, older clerks and employees with disabilities, such as Dolores Gonzales and Ms. Despertt, who were unable to stand for long periods of time, were permitted to sit. Ms. Gonzales, a Hispanic employee, testified that "[t]he Latino group, the Latinos, there were three older ones of us, we could be sitting down when we worked, but the younger ones were not allowed to sit down." D. Gonzales Dep. 64:2-5, 74:18-19. Ms. Despertt testified that "[a]nyone who had any types of problems with their back and couldn't stand or any physical that they weren't able to stand for a long time, we were allowed to sit. And like I said, since I had muscle damage to my lower back, I was allowed to sit." Despertt Dep. 29:11-21. Ms. Despertt further testified that Dolores Gonzales and another co-worker were also allowed to sit. Despertt Dep. 30:1-14.

Further, the class members allege that African-American workers were allowed to take longer breaks than Hispanic workers and to violate the attendance policy. D. Gonzales Dep. 62:17-63:1; Ledesma Dep. 68:16-22; L. Gonzales Dep. 95:21-96:16. Ms. Fields testified that lunch breaks were only 30 minutes long and that she doubts that she ever took a longer break.

Fields Dep. 69:19-22. Although Ms. Despertt testified that some African-American employees were allowed to take longer lunch breaks, she also stated that lunch breaks were only thirty minutes long and that employees rarely came back from lunch late. Despertt Dep. 111:10-112:11.

Other allegations by the class members that they claim are indicative of race and/or national origin discrimination include an instance where Mr. Johnson wore a shirt with a black fist on it and discussions by Mr. Johnson that Jesus was Black. L. Gonzales Dep. 119:3-9.

F. THE CLASS MEMBERS SEXUAL HARASSMENT ALLEGATIONS

The EEOC has also alleged that the class members were subject to sexual harassment to the extent that the alleged harassment changed the terms and conditions of the clerks' employment. Complaint ¶ 9-8. The class members' sexual harassment allegations primarily revolve around the actions of Mr. Johnson and Kofi Tutu ("Mr. Tutu"), both of whom were former Warehouse Group Leaders at Blockbuster's Gaithersburg facility. Complaint ¶ 9-8. The EEOC also alleges that Mr. Johnson and Mr. Tutu sexually harassed the class members by asking them out on dates, making sexual comments, asking about their sexuality, and asking questions regarding personal and sexual matters. Complaint ¶ 9-8. The EEOC further alleges that Mr. Johnson and Mr. Tutu harassed class members by leering at them, standing too closely to them, sending certain class members home from work early, and assigning certain class members more work. Complaint ¶ 9-8. Two class members, Ms. Despertt and Ms. Brinson, testified that Mr. Johnson touched them inappropriately. Despertt Dep. 35:11-36:19; Brinson Dep. 23:19-24:12.

G. BLOCKBUSTER'S INVESTIGATIONS OF SEXUAL HARASSMENT, AND RACE/NATIONAL ORIGIN DISCRIMINATION COMPLAINTS

1. December 2004 Allegations

Class member Ni'ema Fields alleged that she reported sexual harassment to Cynthia Brown and Mr. Barrett in December 2004 when Mr. Johnson leered at her, stared at her buttocks, and made sexual comments. Fields Dep. 50:16-55:22. She also alleged that Mr. Johnson screamed at her and threatened to fire her after she complained. Fields Dep. 32:3-5, 58:20-59:3. Mr. Barrett verbally reprimanded Mr. Johnson about his behavior, and although Mr. Barrett failed to notify Blockbuster's upper management at the time, this incident was ultimately addressed in subsequent discipline for Mr. Johnson. *See* Exhibit F, March 17, 2005 Corrective Action Record of Thomas Johnson.

2. March and April 2005 Allegations and Investigations

In February 2005, Ms. Brown heard about complaints related to the Gaithersburg facility, but was unable to convince employees to discuss the issues with her. Brown Dep. 76:18-77:17. Nonetheless, Ms. Brown informed June Davis of Venturi that some of the workers had complained of sexual comments. Brown Dep. 77:18-78:4. Ms. Davis informed Blockbuster's Director of Regional Operations, Scott Collen, of the complaints in March 2005. *See* Collen Dep. 48:1-14; Davis Dep. 56:9-17. Mr. Collen promptly conducted an investigation of the complaints. *See* Collen Dep. 31:3-5; Exhibit G, March 17, 2005 E-mail to S. Collen from J. Fitzgerald. Mr. Collen then directed Mr. Barrett to issue a written reprimand to both Mr. Johnson and Mr. Tutu based on the accusations of sexual harassment and their demeanor toward employees and temporary workers, in accordance with Blockbuster's progressive discipline policy. *See* Exhibit G, March 17, 2005 E-mail to S. Collen from J. Davis; Exhibit F, March 17, 2005 Corrective Action Record of Thomas Johnson. Scott Collen also issued a written

reprimand to Mr. Barrett pursuant to Blockbuster's progressive discipline policy, based on Mr. Barrett's failure to properly manage and supervise group leaders. *See* Exhibit F, March 17, 2005 Corrective Action Record of Lincoln Barrett. As part of the reprimand, Mr. Collen directed Mr. Barrett to more closely supervise the workers in the warehouse and warned him that failure to meet expectations would result in further disciplinary action up to and including termination. *See* Exhibit H, Corrective Action Record of Lincoln Barrett.

In April 2005, Ms. Brown performed an investigation on behalf of Express and Venturi and spent an afternoon in Gaithersburg. *See* Brown Dep. 117:1-5. On that afternoon, she interviewed Lolita Gonzales, and also spoke with alleged aggrieved clerk Say Wing regarding her allegation of sexual harassment. *See* Exhibit I, April 15 E-mail from C. Brown to D. Dupuis; Brown Dep. 117:1-8. Ms. Wing allegedly told Ms. Brown that she was harassed, but was unwilling to confirm her allegation in writing. *See* Brown Dep. 79:18-80:21. Ms. Brown also met with Lolita Gonzales and Elizabeth Ledesma. *See* Brown Dep. 117:1-8. Ms. Brown had received an email from Ms. Gonzales and Ms. Ledesma regarding alleged racial and/or national origin harassment. Ms. Brown notified June Davis, Staffing Manager for Venturi, who in turn forwarded Ms. Brown's e-mail to Collen. *See* Exhibit J, April 18, 2005 e-mail from C. Brown to J. Davis; See Exhibit K, April 22, 2005 e-mail from J. Davis to S. Collen.

In April 2005 Mr. Barrett informed Ms. Brown of interpersonal problems between Ms. Wing and Ms. Gonzales. *See* Exhibit L, April 19 E-mail from C. Brown to L. Barrett. Specifically, Ms. Wing accused Ms. Gonzales of sabotaging another employee's work. *Id.* Mr. Barrett investigated the allegations, but was unable to form a conclusion because Ms. Wing and Ms. Gonzales did not get along with each other. *See* Exhibit L, April 19 E-mail from C. Brown to L. Barrett.

3. May 2005 Allegations and Investigations

Based in part on Ms. Brown's April 2005 investigation, Mr. Collen and Barry Francis, Blockbuster's Regional Human Resources Manager, met with Drew Lenear, owner of Express' Timonium, Maryland franchise, and Ms. Brown regarding alleged sexual harassment and discrimination complaints and interviewed several distribution clerks at the Gaithersburg, Maryland facility. *See* Brown Dep. 127:1-128:9; Collen Dep. 77:18-20. Mr. Francis and Ms. Brown conducted interviews regarding Lolita Gonzales' complaints. Brown Dep. 128:10-129:19. Mr. Francis also interviewed Mr. Johnson, who claimed that he did not yell at staff or sexually harass anyone. *See* Exhibit M, May 15, 2005 E-mail from B. Francis to S. Collen. At the conclusion of the investigation, Mr. Johnson and Mr. Barrett both received a final written warning, pursuant to Blockbuster's progressive discipline policy. *See* Exhibit M, May 15, 2005 E-mail from B. Francis to S. Collen; Exhibit N, May 17, 2005 Corrective Action Record of L. Barrett; Exhibit O, May 17, 2005 Corrective Action Record of T. Johnson. Mr. Barrett was placed on a thirty-day action plan due to poor leadership and the environment in the warehouse. *See* Exhibit P, Action Plan for L. Barrett.

4. Personnel Issues in June 2005

In late June 2005, Lincoln Barrett terminated Kofi Tutu for a number of attendance issues. *See* Exhibit Q, Employee Separation form for K. Tutu. At the same time, Dolores Gonzales missed several days of work due to an undocumented illness. *See* Exhibit Q, June 27, 2005 E-mail from C. Brown to. L. Barrett. Mr. Barrett had previously informed Ms. Brown that he intended to end Dolores Gonzales' assignment with Blockbuster because her third sick day caused her to have three "occurrences" which, under Blockbuster's policy, was cause to end her assignment. *See* Exhibit R, June 27, 2005 E-mail from C. Brown to L. Barrett. On July 1, 2005, Ms. Brown informed Dolores Gonzales of her termination. *See* Exhibit S, July 1, 2005 E-mail

from C. Brown to L. Barrett. Ms. Brown also terminated Ms. Lolita Gonzales as a result of ongoing issues with her poor demeanor at work. L. Gonzales Dep. 31:16-18; 42:6-13; 43:12-44:9.

5. August 2005 Investigation

In August 2005, another investigation was undertaken regarding behavior at the Gaithersburg facility. Collen Dep. 116:6-21. At the request of Mr. Collen, Ms. Brown conducted associate interviews on August 19, 2005 with a number of temporary workers, including Victor Ruiz, Grisel Nunez, Alphonso Sutton, Fernando Holquin, and Emetem Nkwetta, regarding possible inappropriate sexual behavior in the workplace and disparate treatment of Hispanic and African workers. *See* Exhibit T, Client/Prospect Memo.

Less than a week after Ms. Brown's initial interviews, Barry Francis interviewed clerks and toured the Gaithersburg facility with Mr. Johnson. *See* Exhibit U, August 24, 2005 E-mail from S. Collen to B. Francis. Mr. Francis also interviewed several distribution clerks during his visit to the facility, including Collen Carmelo, Kevin Malloy, Alphonso Sutton, Sarah Nkwetta, Grisel Nunez, Emetem Nkwetta, and Say Wing. *Id.* At that time, Mr. Francis recommended the immediate termination of both Mr. Johnson and Mr. Barrett. *Id.* Mr. Johnson was ultimately terminated because of multiple complaints of favoritism, inappropriate behavior, and intimidation tactics. *Id.* Blockbuster subsequently terminated Mr. Barrett for his failure to properly manage the Gaithersburg facility and ensure a proper work environment. *See* Exhibit V, Employee Separation Form of T. Johnson; Exhibit W, Employee Separation Form of L. Barrett.

III. ARGUMENT

A. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where there is "no genuine issue of material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Evans v. Techs. Applications & Serv. Co*., 80 F.3d 954, 958 (4th Cir. 1996). A genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The evidence presented must be viewed "in the light most favorable to the nonmoving party." *Samuels v. City of Baltimore*, No. RDB 09-458, 2009 U.S. Dist. LEXIS 96228, at *8 (D. Md. Oct. 15, 2009). However, the Fourth Circuit has emphasized that district courts have an "affirmative obligation…to prevent 'factually unsupported claims' …from proceeding to trial." *Felty v. Graves-Humphreys Co*., 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Celotex*, 477 U.S. at 323-24).

To survive a motion for summary judgment on an employment discrimination claim, plaintiff bears the ultimate burden of proving that the employer intentionally discriminated against him or her. *See, e.g. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). Blockbuster is not required to offer evidence to negate or disprove matters on which plaintiff has the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323; *White v. Washington Gas*, Civ. No. DKC 2003-3618, 2005 U.S. Dist. LEXIS 3461, at *14 (D. Md. March 4, 2005). The EEOC cannot avoid summary judgment by mere conclusory statements or speculation. *See White*, 2005 U.S. Dist. LEXIS 3461, at *7 ("If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."). The "mere existence of a scintilla" of evidence is insufficient to survive a motion for summary judgment. *Anderson*, 477 U.S. at 252. Applying this standard, all of the EEOC's claims must fail as a matter of law.

B. THE EEOC CANNOT DEMONSTRATE THAT THE CLASS MEMBERS HOSTILE WORK ENVIRONMENT

Plaintiff's claims of hostile work environment have no merit because the acts which the class members consider racial or national origin harassment do not rise to the requisite level of discrimination nor were they sufficiently severe and pervasive to change the terms and conditions of the class members' employment as alleged by the EEOC.

To state a prima facie claim for hostile work environment, a plaintiff must allege that: (1) he or she experienced unwelcome harassment, (2) the harassment was based on his or her race (or national origin), (3) the harassment was sufficiently severe and pervasive to alter conditions of employment and create an abusive atmosphere, and (4) there is some basis for imposing liability on the employer. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

1. The Conduct About Which The EEOC Complains Was Not Based On Race or National Origin

To satisfy the second element of a hostile work environment claim, the EEOC must demonstrate that the harassment is based on race and/or national origin. *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998). Specifically, the EEOC must "set forth specific evidence to show that the incident was not merely negative or motivated by dislike . . . but that it was motivated improperly by race." *Nicole v. Grafton Sch., Inc.*, 181 F. Supp. 2d 475, 483 (D. Md. 2002). The EEOC alleges that: (1) Hispanic employees were yelled at; monitored; insulted; searched; threatened, and intimidated; (2) Mr. Johnson made comments about getting rid of some of the class members and getting new employees; and (3) Mr. Johnson made a statement that "Jesus is black" and wore a t-shirt with a black power symbol. However, as noted above, the record evidence shows that non-Hispanic clerks were subject to much of the same conduct, regardless of race and/or national origin. *See Wright v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir.

1996) (a plaintiff must show that, but for her membership in a protected class, she would not have been subject to harassment); *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 WL 2333460, at *9 (D. W. Va. Sept. 25, 2005) (dismissing Plaintiff's claims where there was no evidence that the harassing conduct was related to his race); *see also Abouzied v. Mann*, No. 97-CV-7613(FB)(CLP), 2000 WL 1276635 at *5 (E.D.N.Y. Aug. 30, 2000) (finding no prima facie case of national origin hostile work place condition where the plaintiff alleged that his supervisor yelled at him, unfairly reprimanded him and gave him more difficult assignments as a result of his nationality)..

There is nothing about any of these allegations that suggests that racial and/or national origin animus was involved. To the contrary, non-Hispanic class members testified that they too were yelled at by Mr. Johnson and Mr. Barrett. *See* Fields Dep. 32:11-14, 58:20-59:7, 68:5-19; Despertt Dep. 104:19-107:2. The allegations that Hispanic class members were monitored are also not unique to Hispanic employees. Non-Hispanic employees testified that monitoring of employees was not specific to any racial or national origin group. Brinson Dep. 46:21-47:21. Rather, new employees were watched to make sure that they were performing tasks correctly, and it appeared as though under performing employees who were not doing their jobs were also targeted. *See* Despertt Dep. 108:3-109:7; 115:2-5; Brinson Dep. 46:21-47:21.

The Hispanic class members' allegations that they were insulted are also not specific to their race. First, none of the Hispanic employees recounted during their depositions any insults that were related specifically to their race and/or national origin. Second, the testimony of the class members establishes that non-Hispanic employees were also "insulted." Ms. Ledesma testified that Ms. Brinson, a class member and African-American employee, wasn't treated well

and was insulted. Ledesma Dep. 105:1-12. This conduct, while inappropriate, is not based on the Hispanic employees' race and/or national origin and is not actionable under Title VII.

Similarly, the EEOC's allegation that Hispanic employees were threatened or intimidated because of their race and/or national origin is also without foundation. Ms. Fields testified that Mr. Johnson threatened to fire her. Fields Dep. 47:10-18. Ms. Brinson testified that Johnson allegedly threatened her. Brinson Dep. 31:8-13. Both Ms. Fields and Ms. Brinson are African-American and, therefore, Mr. Johnson's abhorrent behavior was clearly not directed to any specific race or national origin.

Finally, the EEOC has provided no factual support for its allegation that Mr. Johnson allegedly made statements such as "You and your people can go on lunch," "I'm sick of this s**t," "Jesus is black." Neither the class members nor the EEOC has identified why or how these statements relate to the race and/or national origin of the Hispanic class members. Indeed other courts have found that such comments are not race-based. *See, e.g., Pineda v. Phila. Media Holdings LLC*, 542 F. Supp. 2d 419, 428-29 (E.D. Pa. 2008) (finding comment that plaintiff had to represent "his people" was not race-based); *Lawton v. Sunoco, Inc.*, Civ. A. No. 01-2784, 2002 WL 1585582, at *8 (E.D. Pa. July 17, 2002) (granting summary judgment to employer and finding that references to "you people" and "thief" were not race-based).

The other incidents of which the EEOC complains, that Mr. Johnson's wore a t-shirt with a "black power fist and that he was going to "get rid of these damn people"," are insufficient to constitute an actionable claim for harassment on the basis of race. Moreover, these allegations are based exclusively on Ms. Gonzales' personal feelings. L. Gonzales Dep. 119:3-9; 155:18-156:5. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 787 (1998) (To be actionable under Title VII, however, the conduct cannot merely generate "offensive feelings in a employee.").

The conduct of Johnson, while perhaps inappropriate, was not unique to the Hispanic employees and is not violative of Title VII. *See Faragher*, 524 U.S. at 787 ('[D]iscourtesy or rudeness should not be confused with racial harassment' and ... 'a lack of racial sensitivity does not, alone, amount to actionable harassment'") (quoting 1 B. Lindemann & P. Grossman, *Employment Discrimination Law* 349, nn. 36-37 (3ed. 1996)); *see also Anderson v. G.D.C., Inc.*, 281 F.3d 452, 459 (4th Cir. 2002*)* (noting that Title VII "is not designed to purge the workplace of vulgarity") (internal quotation omitted); *E.E.O.C. v. R & R Ventures,* 244 F.3d 334, 339 (4th Cir. 2001) ("Boorish behavior may exist apart from any propensity to discriminate."). Because the EEOC cannot establish that the conduct of which it complains is based on race and/or national origin, its claim that Hispanic employees were subjected to a hostile work environment based on race and/or national origin must fail.

2. The Alleged Conduct Was Not Severe or Pervasive

The EEOC also cannot establish that the conduct was sufficiently "severe or pervasive" to rise to the level of an actionable hostile work environment. The Supreme Court has made clear that the standard for judging hostility in the workplace is "demanding" in order to "ensure that Title VII does not become a general civility code." *Faragher*, 524 U.S. at 788 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). It is only "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" that liability for an employer can attach. *Oncale,* 523 U.S. at 78 (quoting *Harris v. Forklift Systems,* 510 U.S. 17, 21 (1993)). Isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Faragher*, 524 U.S. at 788.

To determine whether harassment is severe enough to create a hostile work environment, a court should consider (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; (4) whether it unreasonably interferes with an employee's work performance; and (5) whether it resulted in psychological harm. *Harris,* 510 U.S. at 23; *Conner v. Schrader-Bridgeport, Int'l, Inc.,* 227 F.3d 179, 193 (4th. Cir. 2000); *see also Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 753 n.4 (4th Cir. 1996). The severity and pervasiveness of the conduct must be measured both objectively and subjectively. *Faragher*, 524 U.S. at 787. In order to meet the objective standard, the environment must be one that a reasonable person would find hostile or abusive. *Id.*

Applying this standard, the class members' allegations plainly do not rise to the level of actionable conduct. Plaintiffs have asserted no more than a few isolated allegations over the course of their employment for which they have provided no actual evidence. This patchwork of isolated allegations does not establish the "frequency" or the severity needed to support a hostile work environment claim. Stray comments and one t-shirt are not ample evidence of an atmosphere in which racially hostile comments are severe or pervasive. *Nicole,* 181 F. Supp. 2d at 484 (granting motion to dismiss Title VII hostile environment claim in part because alleged racial slur was not sufficiently "continuous and prolonged"); *Jackson v. State of Maryland,* 171 F. Supp. 2d 532, 542 (D. Md. 2001) (holding that plaintiff's allegations of "loosely related actions that she perceived to be hostile to her based on her race" are insufficient to meet the "heavy burden" required to prove hostile environment).

C. ZUBIATE AND DOLORES GONZALES COULD NOT HAVE BEEN SUBJECT TO A HOSTILE WORK ENVIRONMENT BECAUSE THEY WERE UNAWARE OF THE ALLEGEDLY OFFENSIVE COMMENTS

Both Dolores Gonzales and Ms. Zubiate have severely limited English speaking and comprehension skills and thus could not have understood the comments that were allegedly

directed toward them because of their race and/or national origin. In fact, both Ms. Zubiate and Dolores Gonzales repeatedly testified they needed daily Spanish-to-English translations and that they learned of alleged comments through translations by Lolita Gonzales, Dolores' Gonzales' daughter, and Ms. Ledesma. D. Gonzales Dep. 26:9-12, 33:8-10, 39:15-40:1, 51:19-21, 53:13-16, 55:9-11, 82:6-9, 85:2-9, 94:14-95:1, 105:4-7, 106:8-12, 133:7-11, 134:1-135:8; Zubiate Dep. 23:11-14, 25:12-15, 26:10-11, 28:5-7, 39:4-13. Second-hand harassment, although relevant, is less objectionable than harassment directed at the plaintiff. *Moser v. Ind. Dep't of Corr.*, 406 F.3d 895, 903 (7th Cir. 2005). In *White v. Fed. Express Corp.*, the Fourth Circuit rejected the plaintiff's race-based hostile work environment claim where it rested on a racially offensive exchange not directed at plaintiff. *White v. Federal Express Corp.*, 939 F.2d 157, 161 (4th Cir. 1991); s*ee also Hopkins*, 77 F.3d at 754 (upholding summary judgment where, among other things, most of the incidents comprising the plaintiffs' hostile work environment claims took place in group settings and were not directed at the plaintiff.) Thus, the statements that Dolores Gonzales and Zubiate heard through others should not be considered when determining whether they were subject to a hostile work environment.

D. PLAINTIFFS HAVE NOT ESTABLISHED AN ISSUE OF MATERIAL FACT WITH RESPECT TO THEIR DISPARATE TREATMENT CLAIMS

1. The Standard for Disparate Treatment Claims

The EEOC has alleged that African-American employees were treated more favorably than Hispanic class members with respect to general treatment and lunch breaks. Disparate treatment discrimination occurs where an employer intentionally treats a member of a protected class less favorably than others with respect to the terms and conditions of employment because of his membership in a protected class. *See Ingraham v. Giant Food, Inc.*, 187 F. Supp. 2d 512, 514-15 n.4 (D. Md. 2002). Under the *McDonnell Douglas* burden-shifting framework, a plaintiff

in a Title VII case relying on indirect evidence establishes a prima facie case of discrimination by showing the following: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was performing her job duties at a level that met her employer's legitimate expectations at the time of the adverse employment action; and (4) the position remained open or was filled by similarly qualified applicants outside of the protected class. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cir. 2004).

If a plaintiff establishes all of the elements required for a prima facie case, the burden then shifts to the employer, who must produce a legitimate, non-discriminatory reason for its decision. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Once the employer has articulated a legitimate business reason for the decision at issue, any presumption of discrimination disappears, and the plaintiff then must prove by a preponderance of the evidence that the alleged reasons proffered by the employer were not its true or real reasons, but a pretext for discrimination. *Reeves*, 530 U.S. at 143; *St. Mary's Honor Ctr.*, 509 U.S. at 515-16. In other words, a plaintiff must prove that intentional discrimination was the real reason for the employer's decision, and that race "'actually played a role in [the employer's decision-making] process and had a determinative influence on the outcome.'" *Reeves*, 530 U.S. at 141 (internal quotation omitted); *see also E.E.O.C. v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005) (applying the *McDonnell-Douglas* burden shifting framework to Plaintiff EEOC).

2. The EEOC Cannot Establish That African-American Employees Were Treated More Favorably Than Hispanic Employees

A plaintiff's vague claims of differing treatment are insufficient to demonstrate disparate treatment. *See Jackson*, 171 F. Supp. 2d at 541 (D. Md. 2001) (citing *Causey*, 162 F.3d at 801 (recognizing that the plaintiff's conclusory statements of differential treatment of similarly situated employees, without specific evidentiary support, cannot support an actionable claim for

harassment); *Carter v. Ball*, 33 F.3d 450, 461-62 (4th Cir. 1994) (holding that general allegation that a supervisor reprimanded African-American plaintiff publicly but spoke with his white co-workers in private does not establish an actionable claim of harassment without substantiation by accounts of specific dates, times or circumstances). The EEOC alleges that (1) Hispanic class members were not allowed to talk during work; (2) non-Hispanic employees were allowed to take longer breaks; and (3) Hispanic class members were not allowed to sit down while working. The class members' allegations of being treated less favorably than African-American employees is nothing more than vague and conclusory allegations with no record support other than the mere allegations of Hispanic class members. Moreover, the testimony of other class members clearly shows that they were not treated differently or more favorably.

Class member Despertt testified that none of the employees were allowed to talk during work hours, because they "were all so busy it never was much time for chitchat." Despertt Dep. 96:17-19. Ms. Despertt further testified that Blockbuster was very strict on the time limits to do certain things. And "[they] weren't allowed to talk or cohabitate or whatever it is except during lunch." Despertt Dep. 96:20-97:1. Ms. Despertt is not a Hispanic employee and her testimony clearly demonstrates that the work environment was strict and that all employees were unable to talk during work hours.

The Hispanic class members' complaints that African-American employees were allowed to take longer lunch breaks is inconsistent with the testimony of other class members. Ms. Fields testified that lunch breaks were only 30 minutes long and that she doubts that she ever took a longer break. Fields Dep. 69:19-20. Although Ms. Despertt testified that some African-Americans employees were allowed to stay at lunch longer, she testified that lunch breaks were

only thirty minutes long and that it was rare that anyone came back from lunch late. Despertt Dep. 111:10-112:11.

As to sitting down while working, at least one of the Hispanic class members testified that she, along with other Hispanic employees, **was** allowed to sit down while working. Class member Dolores Gonzales testified that "[t]he Latino group, the Latinos, there were three older ones of us, we could be sitting down when we worked, but the younger ones were not allowed to sit down." D. Gonzales Dep. 64:2-5, 74:18-19. This testimony, in combination with testimony by one of the African-American class members, makes it clear that the ability to sit down while working had nothing to do with the race and/or national origin of employees. As Ms. Despertt testified: "Anyone who had any types of problems with their back and couldn't stand or any physical that they weren't able to stand for a long time, we were allowed to sit. And like I said, since I had muscle damage to my lower back, I was allowed to sit." Despertt Dep. 29:11-20. Despertt further testified that class member Dolores Gonzales and another worker were allowed to sit. Despertt Dep. 30:1-14. The class members' allegations are nothing more than vague and conclusory assertions and cannot stand as evidence of disparate treatment. Accordingly, the EEOC's claims that African-American employees were treated more favorably should be dismissed as a matter of law.

3. The Work Policies And Alleged Disparity The EEOC Complains About With Respect To The Hispanic Class Members Are Not Adverse Employment Actions

Examples of adverse tangible employment action include "discharge, demotion, or undesirable reassignment." *Faragher,* 524 U.S. at 808*; Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765 (1998). Although actions short of termination may constitute adverse employment action within meaning of Title VII, not everything that makes an employee unhappy is an actionable adverse action. *Settle v. Baltimore County,* 34 F. Supp. 2d 969, 989 (4th Cir. 1999).

The work policies and alleged disparity about which the Hispanic class members complain – not being able to sit down while working, monitoring of their work activity, not being able to talk while working and allegedly having shorter work breaks – are not adverse employment actions. *See Munday v. Waste Mgmt., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) (noting that "[i]n no case in this circuit have we found an adverse employment action to encompass a situation where the employer has instructed employees to ignore and spy on an employee who engaged in a protected activity."); *Settle,* 34 F. Supp 2d at 995-996 (holding that monitoring plaintiffs and lowering their performance appraisals were not adverse employment actions); *Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) ("[T]erms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment polices or exemption from ... disciplinary procedures.").

4. Ms. Ledesma and Ms. Zubiate Did Not Suffer Adverse Employment Actions

Class members Ledesma and Zubiate voluntarily resigned their employment and thus did not suffer an adverse employment action. Ledesma Dep. 35:21-36:5 (testifying that she quit because L. Gonzales and D. Gonzales were terminated); Zubiate Dep. 22:2-3 (acknowledging that she quit her employment). Because an actionable retaliation claim requires an adverse employment action, a cognizable claim does not exist where, as here, the plaintiff voluntarily resigns. *See Hartsell v. Duplex Prods., Inc.*, 123 F.3d 766, 775 (4th Cir. 1997*); Shealy v. Winston*, 929 F.2d 1009, 1012-13 (4th Cir. 1991*); Evans v. Davie Truckers, Inc.*, 769 F.2d 1012, 1014 (4th Cir. 1985). "[W]hen an employee voluntarily quits under circumstances insufficient to amount to a constructive discharge, there has been no 'adverse employment action.'" *Hartsell*, 123 F.3d at 775. Accordingly, neither Ms. Ledesma nor Ms. Zubiate suffered an adverse employment action.

5. Blockbuster Had a Legitimate Non-Discriminatory Reason For Discharging Class Members Dolores and Lolita Gonzales

The EEOC claims that Dolores and Lolita Gonzales were discharged because of their race/national origin and in retaliation for their complaints. Even if the EEOC was able to establish a prima facie case on these claims, which it cannot, there are legitimate non-discriminatory reasons for the discharge of the class members.

Blockbuster notified Express that it no longer required the services of Dolores Gonzales because of her repeated and knowing violations of Blockbuster's attendance policy. There is no dispute that Blockbuster notified Express in June 2005 that if Ms. Gonzalez had one more occurrence related to her attendance at work, Blockbuster would no longer need her services. *See* Exhibit R; Cf. *Cross v. Bally's Health & Tennis Corp.*, 945 F. Supp. 883, 887 (D. Md. 1996) (finding that plaintiff's four absences in violation of defendant's attendance policy constituted a legitimate, non-discriminatory reason for his discharge). Lolita Gonzales cannot dispute that she had interpersonal issues with other distribution clerks, including other members of the class, and was terminated for her failure to maintain a productive working relationship with her coworkers. *See* L. Gonzales Dep. 31:16-18; 42:6-13; 43:12-44:9; Exhibit L, April 19 E-mail from C. Brown to L. Barrett. Notwithstanding the class members' completely unsupported complaints that one African-American employee, Takara Martin, was allowed to miss work, the EEOC has failed to identify any other similarly situated non-Hispanic employees who: (1) repeatedly violated the company's attendance policy (2) failed to appear for work as scheduled, and (3) failed to notify Blockbuster that they would be unable to appear for work, yet were not terminated. Because the EEOC cannot demonstrate that this legitimate, non-discriminatory reason is pre-textual, its retaliatory discharge claims must fail as a matter of law.

E. EEOC CANNOT DEMONSTRATE THAT BLOCKBUSTER EITHER HAS OR AS A MATTER OF POLICY TOLERATES AN ALL-PERVASIVE ATMOSPHERE OF GENDER/SEXUAL HARASSMENT IN ITS WORKPLACE

In order to prove a claim for sexual harassment based on hostile work environment, a plaintiff must show that (1) the conduct to which she was subjected was unwelcome, (2) the harassment was based on plaintiff's sex, (3) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) there is some basis for imposing liability on the employer. *See Lack v. Wal-Mart Stores, Inc.*, 240 F.3d 255, 259 (4th Cir. 2001) (citations omitted) (stating the elements to sustain a sexual harassment claim based upon a hostile or abusive work environment); *Spicer v. Va. Dep't of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995) (stating that to establish a claim for sexual harassment, a plaintiff must prove that conduct was unwelcome; it was based on sex of plaintiff; it was sufficiently severe or pervasive to alter plaintiff's conditions of employment and to create abusive work environment; and it was imputable on some factual basis to employer); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313-14 (4th Cir. 2008) (stating that the EEOC must establish that the evidence viewed in its favor-would allow a reasonable jury to conclude that the harassment was (1) unwelcome, (2) based on the plaintiffs' gender or race, (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive atmosphere, and (4) imputable to the employer). The EEOC cannot establish the elements of a hostile work environment claim based on sex.

1. The Sexual Harassment Allegations Were Neither Severe Nor Pervasive

As stated above, the Supreme Court has made clear that the standard for judging hostility in the workplace is "demanding" in order to "ensure that Title VII does not become a general civility code." *Faragher*, 524 U.S. at 788. It is only "[w]hen the workplace is permeated with

discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" that liability for an employer can attach. *Oncale*, 523 U.S. at 78 (quoting *Harris*, 510 U.S. at 21). Here, the EEOC cannot satisfy its burden of proving that the work environment at Blockbuster's Gaithersburg facility was so permeated with discriminatory acts that it changed the terms and conditions of the class members' employment.

Both Dolores Gonzales and Ms. Zubiate testified that no one sexually harassed or touched them inappropriately. D. Gonzales Dep. 106:4-12; Zubiate Dep. 24:18-25:11. And, as stated more fully in Section II.C *supra*, both Dolores Gonzales and Ms. Zubiate were only subjected to comments that were translated by Lolita Gonzales and Ledesma. D. Gonzales Dep. 26:9-12, 33:8-10, 39:15-40:1, 51:19-21, 53:13-16, 55:9-11, 82:6-9, 85:2-9, 94:14-95:1, 105:4-7, 106:8-12, 133:7-11, 134:1-135:8; Zubiate Dep. 23:11-14, 25:12-15, 26:10-11, 28:5-7, 39:4-13. Thus, Dolores Gonzales and Ms. Zubiate did not understand or experience any of the comments that were part of the alleged hostile work environment.

Moreover, most of the class members did not work at the Gaithersburg facility long enough to be subject to a pervasive environment of harassment, especially given the kinds of acts that have been asserted as the basis for the pervasive environment of harassment. Ms. Zubiate worked for only three weeks before she quit. Zubiate Dep. 21:8-13. Ms. Brinson only worked at Blockbuster for approximately **two weeks**. *See* Exhibit X, Venturi/Express Personnel Records re: Associates who worked at Blockbuster. Ms. Fields worked at the Gaithersburg facility for less than a month. *See* Exhibit X. Michelle Ms. Despertt worked at Blockbuster's facility for a little over one months. *See* Exhibit X.

Notably, Ms. Ledesma, who quit because Lolita and Dolores Gonzales were terminated, felt comfortable enough to return to work at the Gaithersburg facility approximately two months after quitting. *See* Ledesma Dep. 35:21-36:5; 38:11-17; Exhibit X, Express Personnel Records re: Associates who worked at Blockbuster. Indeed, this is certainly not an action attributed to a person who sincerely believes that she has been subjected to an intolerable hostile work environment.

2. Liability Should Not Be Imputed To Blockbuster Because The Class Members Failed To Avail Themselves Of Blockbuster's Complaint Procedures

Most of the class members failed to avail themselves of Blockbuster's anti-discrimination policies and failed to take advantage of any preventive or corrective measures made available by Blockbuster. Employees have a duty to report harassment so that an employer may take remedial action. "A generalized fear of retaliation does not excuse a failure to report sexual harassment." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001). Many of the class members made their initial complaints to Ms. Brown, an employee of Express, who is not an agent of Blockbuster. She did not bring the complaints to the attention of Blockbuster until months later in March 2005, when she informed June Davis of the complaints, who then alerted Blockbuster. Collen Dep. 48:1-14; Davis Dep. 56:9-17. Not one of the class members placed a call to Blockbuster's ethics hotline or submitted complaints to Blockbuster about the actions of Lincoln Barrett, Thomas Johnson, and/or Kofi Tutu.

Once Blockbuster was made aware of the complaints of the class members in March 2005, Blockbuster promptly undertook investigations and issued disciplinary action under its progressive discipline policy against the alleged harassers. *See* Section II.F.2, *supra.* After Blockbuster management learned of complaints by some of the class members in May 2005, Blockbuster immediately began an investigation which continued over the next several weeks,

until relevant and willing witnesses could be interviewed. *See* Section II.F.3, *supra.* Blockbuster conducted a thorough investigation and took steps to correct the actions of Thomas Johnson by issuing him a reprimand for his behavior. *See* Section II.F.3, *supra.* Blockbuster also reprimanded Lincoln Barrett for his failure to properly supervise Mr. Johnson. *See* Section II.F.3, *supra.* **No problems with the work environment were reported between May 2005 and August 2005.** When incidents occurred in August, Blockbuster again thoroughly investigated and interviewed and solicited information from class members, and took appropriate disciplinary and corrective action by terminating both Mr. Johnson and Mr. Barrett. *See* Section II.F.5, *supra.* Based on the thorough investigations and steps taken by Blockbuster in accordance with its progressive discipline policy, liability cannot be imputed to Blockbuster.

3. EEOC'S Constructive Discharge Claims

The EEOC has alleged that female employees were constructively discharged because they were subjected to a hostile work environment. A plaintiff alleging constructive discharge must prove two elements: (1) deliberateness of the employer's action, and (2) intolerability of the working conditions. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985); *see also see also Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993). "Intolerability of working conditions ... is assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign.... An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. She is not, however, guaranteed a working environment free of stress." *Bristow*, 770 F.2d at 1255.

None of the facts offered by EEOC rise to the level of objective intolerability sufficient to prove an adverse employment action through constructive discharge. As explained more fully above, Lolita and Dolores Gonzales were terminated for interpersonal conflicts with other

employees and failure to adhere to attendance standards set by Blockbuster. Ms. Brinson, Ms. Zubiate, and Ms. Ledesma voluntarily resigned their employment. Ms. Ledesma was not constructively discharge because she did not quit as the result of an allegedly intolerable work environment, rather she testified that she quit because Lolita and Dolores Gonzales were terminated. Ledesma Dep. 35:21-36:5. Ms. Zubiate claims that she quit because of the way she was treated, because Johnson smacked a rolled up newspaper or piece of cardboard in his hands, shouted out, and walked around "like a military officer." Zubiate Dep. 22:10-15. Zubiate acknowledges that she did not understand the allegedly hostile comments that were made and that those comments had to be translated for her. Zubiate Dep. 22:2-23:4. The translation she received stated that Johnson told the employees to "get to work." *Id.* Even if Johnson allegedly performed these acts, they do not rise to the level of objective intolerability sufficient to prove an adverse employment action. Similarly, Ms. Brinson resigned voluntarily. *See* Brinson Dep. 17:2-9.

F. EEOC IS NOT ENTITLED TO RECOVER PUNITIVE DAMAGES

Even if this Court finds that EEOC's claims withstand summary judgment, Blockbuster is entitled to summary judgment on the EEOC's claims for punitive damages. Interpreting 42 U.S.C. 1981a, the Supreme Court has held that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 535 (1999). Accordingly, the Court held that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 536. Punitive damages are "an extraordinary remedy" and "not every lawsuit under section 1981 calls for submission of this extraordinary remedy to a jury." *Stephens v. S. Atl. Canners, Inc.,* 848 F.2d 484, 489-90 (4th Cir. 1988). The Fourth Circuit has held that distributing an anti-

harassment policy and conducting training seminars "preclude the award of punitive damages." *Bryant v. Aiken Reg'l Med. Ctrs., Inc.,* 333 F.3d 536, 549 (4th Cir. 2003).

The EEOC has not presented any evidence that Blockbuster acted with malice or reckless indifference toward the class members. Even if the EEOC could show that the managers and supervisory personnel at Blockbuster's Gaithersburg facility acted in such a manner, Blockbuster should not be subject to punitive damages because it took good faith efforts to comply with Title VII by distributing an anti-harassment policy to employees and providing multiple avenues in which an allegedly aggrieved employee could notify Blockbuster of her complaints. Fitzgerald Dep. 117:6-11. An employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII. *See Kolstad,* 527 U.S. at 545 (internal quotation marks and citation omitted). Here, Blockbuster made a good faith effort to comply with Title VII in a number of ways. Blockbuster has an anti-harassment policy in place that prohibits discrimination against employees or applicants for employment based on race, sex, religion, national origin, age, disability, or any other category protected by law. *See* Collen Dep. 17:23-18:2. Blockbuster's EEO Policy is distributed to all Blockbuster employees at the commencement of their employment, including warehouse managers and warehouse group leaders. *See* Fitzgerald Dep. 30:7-15; Francis Dep. 88:13-18; Collen Dep. 110:11-111:3. In addition to Blockbuster's EEO Policy, Blockbuster has an ethics hotline in place that any worker can call to report harassing or discriminatory conduct anonymously. Fitzgerald Dep. 117:6-11. Notices of Blockbuster's EEO Policy and its Ethics Hotlines were posted on bulletin boards in the break room of the Gaithersburg facility. Fitzgerald Dep. 117:6-11. The EEOC is not entitled to the punitive damages they seek, and their claim should be dismissed as a matter of law.

G. The EEOC CANNOT ESTABLISH THAT BLOCKBUSTER FAILED TO MAINTAIN RECORDS

In its Amended Complaint, the EEOC alleges that Blockbuster failed to preserve records, investigation files, and various personnel and employment records that Blockbuster should have kept in violation of Title VII and the EEOC's regulations. Under Title VII, employers are required to "make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed." 42 U.S.C. § 2000e-8(c). The EEOC's record keeping regulations require that employers retain applications and other documents related to hiring for a period of one year. 29 C.F.R. § 1602.14. Additionally, if a charge of discrimination has been filed, an employer is required to retain all relevant personnel records until the final disposition of the charge. *Id.*

Here, the class members were employed by Express Personnel, a temporary services agency, which was operating as a subcontractor to Venturi and they were not Blockbuster employees. Davis Dep. 64:20-65:6; Brown Dep. 53:4-21. Express interviewed and hired the class members and kept the applications and other personnel records related to the employment of the class members. Brown Dep. 34:14-19. Express was also responsible for EEO orientation and investigation of discrimination complaints. Brown Dep. 43:7-20; Brown Dep. 44:18-45:3. Accordingly, Blockbuster does not have any applications, resumes, or personnel files for that relate to the class members. As to employment records relevant to whether an unlawful employment action has been committed, Blockbuster provided all of the non-privileged documentation it had about its investigations of discrimination to the EEOC during discovery.

Because Blockbuster was not the employer and had no duty to create records for the temporary employees, the EEOC's 709(c) claim must fail.[1]

IV. CONCLUSION

For all the reasons discussed above, Blockbuster respectfully requests that this Court grant Blockbuster's Motion for Summary Judgment, and dismiss the EEOC's claims in their entirety.

Respectfully Submitted,

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[1] The EEOC is not entitled to damages on its 709(c) claim. *See E.E.O.C. v. Autozone, Inc.*, No. CV-06-1767-PCT-PGR, 2008 WL 4280174, at *1 (D. Ariz. Sept. 15, 2008) (holding that EEOC is not entitled to damages on 709(c) claim; *Lombard v. MCI Telecomms. Corp.*, 13 F. Supp. 2d 621, 627-28 (N.D. Ohio 1998) (holding that an employee may not sue an employer for damages as a result of the employer's failure to maintain records as required by 29 C.F.R. § 1602.14.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served, via ECF, a copy of the foregoing on the 8th day of March 2010 on the following counsel:

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