IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	**Case No. RWT-07-CV-2612**
BLOCKBUSTER INC.,	)	
Defendant.	)	

PLAINTIFF EEOC'S MEMORANDUM IN OPPOSITION TO DEFENDANT BLOCKBUSTER INC.'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC") files the instant Memorandum In Opposition to Defendant Blockbuster Inc.'s Motion For Summary Judgment (Paper No. 100) and Cross-Motion For Partial Summary Judgment in the above-styled and numbered action. Contrary to Defendant's arguments in its brief, there are genuine issues of material fact in this matter precluding judgment as a matter of law regarding the objectively hostile discriminatory work environment at Blockbuster, its discriminatory motivation for the adverse employment actions it took against the class members, and the propriety of punitive damages.

Moreover, there are no genuine issues of material fact, and EEOC is entitled to judgment as a matter of law, regarding the issues of whether Blockbuster may avoid imputation of liability for a hostile work environment by proving its affirmative defense to supervisory harassment liability, as well as the issue of EEOC's class members' status as employees of Blockbuster under Title VII of the Civil Rights Act of 1964, as amended.

For the reasons set forth below, EEOC respectfully requests that the Court deny Defendant's Motion and grant EEOC's Cross-Motion.

II. FACTUAL DISCUSSION

1. Defendant's facility and operations, EEOC's class members, and the terms of their temporary employment with Defendant

Defendant Blockbuster opened its Gaithersburg Distribution Center for its on-line rental service in November 2004. Employees who work in the Distribution Center are responsible for receiving, tracking, inspecting, packaging and shipping rental DVD's. These facts are undisputed. The Title VII violations at issue occurred at the Gaithersburg Distribution Center (hereinafter referred to as "the Warehouse") from December 1, 2004 until August 26, 2005.

EEOC's class members in this action consist of seven temporary employees who worked as Warehouse Distribution Clerks during the aforementioned period. *See* Exb. 1 at pg. 94-97 (Collen Dep.) (describing duties of the temporary employees placed through Express). Lolita Gonzalez, Dolores Gonzalez, Elizabeth Ledesma, and Lita Zubiate are Hispanic (Peruvian) women. As discussed *infra*, they were subjected to egregious sexual harassment and retaliation for resisting that harassment, as well as national origin/race harassment and discrimination directed at Hispanic workers as a class. Niema Fields, Michelle Despertt, and LaQuanta Brinson are African-American women. As discussed *infra*, they were also subjected to highly egregious sexual harassment and retaliation for resisting that harassment.

During the period December 1, 2004 until August 26, 2005, the Warehouse was run by Blockbuster Distribution Center Manager Lincoln Barrett,[1] who was responsible for overall management and supervision of all workers at the Warehouse, *see* Exb. 1 at pg. 29-30, 103 (Collen Dep.), and by Blockbuster Warehouse Group Leads Thomas A. Johnson[2] and Kofi TuTu, who reported to Barrett and were responsible for first-line supervision of all of the Warehouse workers, called "Distribution Clerks" by Blockbuster, *see* Exb. 1 at pg. 27, 66-67, 91-92, 103 (Collen Dep.); Exb. 2 at pg. 57, 66-67 (Francis Dep.). As Distribution Center Manager, Barrett was the highest ranking Blockbuster official at the Warehouse, and under Defendant's policies he was responsible for receiving and acting on complaints of sexual, racial and other harassment and discrimination and ensuring a non-discriminatory work environment. *See* Exb. 2 at pg. 46-48 (Francis Dep.); Exb. 1 at pg. 64-65 (Collen Dep.). Barrett delegated

[1] It is undisputed that Lincoln Barrett was known to the workers as "Linc." References to "Linc" in the exhibits refer to Barrett.

[2] It is undisputed that Thomas Johnson was known to the workers as "TAJ." References to "TAJ" or "Taj" in the exhibits refer to Johnson. In places, he is also misidentified as "Thomas Smith."

authority for functions such as disciplining or sending home class members and other temporary employees to Johnson and TuTu. *See* Exb. 2 at pg. 171-72 (Francis Dep.).

Barrett reported to Scott Collen, Blockbuster Director of Regional Operations who was based at Defendant's headquarters in Dallas. *See* Exb. 1 at pg. 63 (Collen Dep.). The Blockbuster human resource personnel assigned to assist the Warehouse with harassment complaint investigations were Jennifer Fitzgerald, who was also based in Dallas, and Barry Francis, who was based in North Carolina and substituted for Fitzgerald on several relevant occasions. *See* Exb. 3 at pg. 21-23 (Fitzgerald Dep.); Exb. 2 at pg. 34-35, 44-45 (Francis Dep.).

The Distribution Clerks at Defendant's Warehouse - including all of EEOC's class members - were temporary employees assigned through an agency called Express Personnel ("Express"). *See* Exb. 4 at pg. 40-41, 162-64 (Brown Dep.); Exb. 5 (Brown Dep. - Exb. 17). The Express manager who monitored the Warehouse account was Cinnie Brown, who was based in Towson. *See* Exb. 4 at pg. 34, 39-40 (Brown Dep.). As reflected in pleadings filed in this matter, Express was a subcontractor of former Third-Party Defendant Venturi Staffing, which contracted with Blockbuster to provide workers to staff the Warehouse. Venturi's account with Blockbuster was overseen by Venturi manager June Davis. *See* Exb. 6 at pg. 12-13 (Davis Dep.). Brown did not maintain an office at Defendant's Warehouse, and while she tried to visit briefly once per week, sometimes she would only stop by for a brief visit every two weeks. *See* Exb. 4 at pg. 56-57 (Brown Dep.) Davis was based at Blockbuster's corporate offices in Dallas and never visited the Warehouse. *See* Exb. 6 at pg. 11-13, 29 (Davis Dep.).

All of the temporary Distribution Clerks placed at Defendant's Warehouse were employees of Defendant. In this regard, there are a number of key, salient facts:

Defendant exercised sole control of the class members' daily work and activities at the Warehouse. *See* Exb. 1 at pg. 103 (Collen Dep.); Exb. 4 at pg. 229-31 (Brown Dep.) (testifying that workers were on the payroll of Express but were "employed physically" by Blockbuster). Defendant's managers and supervisors - Barrett, Johnson and TuTu - supervised the class members; determined and assigned all of the class members' daily duties and assignments; controlled the manner of work performance; set the workers' schedules; gave them permission to take time off; evaluated their work performance; authorized their breaks and lunches; and tracked their work hours, time in and out (including signing their time sheets), and productivity. *See* Exb. 1 at pg. 103-05, 107 (Collen Dep.); Exb. 4 at pg. 41, 179-80 (Brown Dep.); Exb. 7 at EEOC 130 (Francis Dep. - Exb. 9); Exb. 8 at pg. 21-22, 111 (Despertt Dep.); Exb. 9 at pg. 33-36, 54-55, 94-95 (D. Gonzalez Dep.); Exb. 10 at pg. 34-35 (Ledesma Dep.); Exb. 11 at pg. 84 (L. Gonzalez Dep.); Exb. 12 at pg. 22-23 (Zubiate Dep.). Express had no authority to direct the workers' activities. *See* Exb. 1 at pg. 107 (Collen Dep.). Express also lacked any authority to take disciplinary action against Blockbuster managers and supervisors, such as Barrett, Johnson and TuTu, for sexual, racial or other harassment, as they were not even on Express's payroll and the Warehouse was under Blockbuster's control. *See* Exb. 4 at pg. 231-32 (Brown Dep.).

Defendant also exercised sole control of the duration of the class members' and other temporary employees' assignments at the Warehouse. It was Defendant - not Express or Venturi - that made all decisions to terminate the class members and other temporary workers. *See* Exb. 4 at pg. 169-72, 178-79, 216 (Brown Dep.) The purported reasons for termination that Defendant directed Express to communicate to those discharged were not different from those common to any employment relationship. *See id.* at pg. 169-79; Exb. 16 at EEOC 00127-00129 (Francis Dep. - Exb. 9) (listing reasons for termination per instructions of Defendant). When Blockbuster

so directed, Express was required to comply and to communicate the firing to the worker; Express had no authority to terminate or remove workers from the facility on its own initiative. *See* Exb. 4 at pg. 232-33 (Brown Dep.). Indeed, in many instances Defendant's supervisors fired class members and other temporary employees on the spot (or threatened to fire them) without using Express as a conduit for their decisions. *See* Exb. 13 at pg. 31-34 (Fields Dep.); Exb. 9 at pg. 102 (D. Gonzalez Dep.).

Blockbuster – not Express or Venturi - trained the class members to perform their duties, s*ee* Exb. 1 at pg. 103 (Collen Dep.); Exb. 4 at pg. 40-41 (Brown Dep.), and furnished the facility and equipment to perform the work, s*ee* Exb. 1 at pg. 101-03 (Collen Dep.).

Blockbuster personnel directly hired one of the seven class members (Johnson hired Despertt directly) and directed Express to screen other candidates identified by Defendant for possible hiring. *See* Exb. 8 at pg. 17-19 (Despertt Dep.); Exb. 4 at pg. 53 (Brown Dep.).

The class members and other temporary employees at the Warehouse were paid by the hour, not by the job like an independent contractor would be. *See* Exb. 11 at pg. 39 (L. Gonzalez Dep.); Exb. 14 at pg. 15-16 (Brinson Dep.); Exb. 13 at pg. 24 (Fields Dep.). Contrary to Defendant's assertion, the class members did not receive benefits from Express. *See* Exb. 14 at pg. 16 (Brinson Dep.); Exb. 13 at pg. 24-25 (Fields Dep.); Exb. 8 at pg. 22-23 (Despertt Dep.).

The type of work performed by the class members and other temporary employees, Distribution Clerk duties, was an integral part of Defendant’s business. Indeed, when Defendant's officials first met with Cinnie Brown of Express to discuss selection of workers, they gave her a Blockbuster job description for permanent Distribution Clerks and told her to follow it as a guideline for the duties and qualifications of the temporary's jobs. *See* Exb. 4 at pg. 162-64 (Brown Dep.); Exb. 5 (Brown Dep. - Exb. 17). In his testimony, Collen admitted that the

temporary workers were in all respects functioning as permanent Blockbuster Distribution Clerks. *See* Exb. 1 at pg. 94-97 (Collen Dep.).

The workers' assignments at the Warehouse were of extended duration, not the typical short-term temporary assignment, and their work for Blockbuster was their only work assignment obtained through Express. *See* Exb. 16 at EEOC 00127-00129 (Francis Dep. - Exb. 9) (listing duration of temporary employees' employment at Gaithersburg warehouse); Exb. 11 at pg. 34 (L. Gonzalez Dep.); Exb. 12 at pg. 20 (Zubiate Dep.); Exb. 13 at pg. 24 (Fields Dep.). In other words, the class members were hired specifically for Defendant's Warehouse.

Moreover, beginning at the inception of its contract with Venturi/Express, Defendant intended to convert the best workers to permanent Blockbuster payroll employees, and eventually it did so, converting at least five temporary employees to permanent status. *See* Exb. 1 at pg. 97-99 (Collen Dep.); Exb. 4 at pg. 166-68, 173-76 (Brown Dep.); Exb. 15 at EEOC 56 (Brown Dep. - Exb. 3); Exb. 16 at EEOC 00127-00129 (Francis Dep. - Exb. 9) (listing temporary employees who were "hired" as permanent employees by Defendant). As Express's manager Cinnie Brown testified, the temporary workers were initially hired as "evaluation to hire" workers, meaning that Blockbuster informed her that it intended to convert some to permanent status and would be evaluating all of the workers for possible conversion throughout their tenures at the Warehouse. *See* Exb. 4 at pg. 164-66 (Brown Dep.). In this regard, Distribution Center Manager Lincoln Barrett told workers that if they performed well they may be converted to permanent employees. Exb. 9 at pg. 126 (D. Gonzalez Dep.) Thus, at all relevant times Express viewed the workers as prospective permanent employees of Defendant, and Defendant viewed the workers as being placed on a track for conversion to permanent payroll employee status.

2. Defendant, acting through its managers and supervisors, subjected EEOC's class members to unlawful harassment, retaliation and other discrimination

a. *Niema Fields is subjected to sexual harassment and retaliation*

Defendant's course of harassment and discrimination against the class members began soon after operations commenced at the Warehouse in November 2004. Niema Fields began her employment at the Warehouse on November 26, 2004. *See* Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Fields' Warehouse employment dates). Beginning one week after her employment commenced and continuing until Defendant fired her on December 23, 2004, Defendant's Warehouse Group Lead Thomas Johnson subjected Niema Fields to the following pattern of conduct on a *daily* basis: (a) he stared at and touched her buttocks; (b) he stared at her breasts; (c) he told her that her mother must look good based on the way her buttocks looked; (d) on at least four occasions he offered to pay her money for sex; (e) he often moved his body inappropriately close to Fields, invading her personal space and causing her to feel highly uncomfortable; (f) he made other daily sexual comments to her and to others - including class member Lolita Gonzalez - while in her presence; and (g) after she complained about sexual harassment, he frequently screamed at her and threatened her job. *See* Exb. 13 at pg. 31-32, 39-53, 56-60 (Fields Dep.) In addition, Fields heard Johnson making sexual comments to co-workers Lolita Gonzalez and Yasmina Assoumanou about their buttocks and breasts, and co-worker Emetem Nkwetta told her he was making comments about Nkwetta's buttocks and breasts. *See* Exb. 13 at pg. 59-65 (Fields Dep.)

In December 2004, Fields reported the aforementioned harassment to both Lincoln Barrett and Cinnie Brown on multiple occasions. *See* Exb. 13 at pg. 41-44, 47-55 (Fields Dep.). Defendant's own business records as well as those of Express show that Defendant was aware of Fields' sexual harassment complaints against Johnson. *See* Exb. 17 (Collen Dep. - Exb. 5)

(noting Fields complaint in section styled "Previous Corrective Action"); Exb. 4 at pg. 152-56 (Brown Dep.); Exb. 18 at pg. 10-12 (Brown Dep. - excerpts from Exb. 4). Defendant has produced no competent evidence that Barrett, any other Defendant official, or Express conducted *any* investigation of sexual harassment at the facility in response to Fields' complaint, and Defendant has failed to produce any evidence that it took *any* disciplinary action against Johnson regarding the Fields complaints. *See* Exb. 13 at pg. 50-55 (Fields Dep.).

Moreover, neither Blockbuster nor Express even asked Fields for the names of any witnesses or other victims. *See* Exb. 13 at pg. 80-81 (Fields Dep.) After Fields' sexual harassment complaints against Johnson, he continued that harassment unabated. *See* Exb. 13 at pg. 50-52 (Fields Dep.).

It is clear that Barrett informed Johnson of Fields' complaints because two days after her second complaint, Johnson screamed at her about the fact that she had complained - accusing her of "snitching" - and then immediately fired her. *See* Exb. 13 at pg. 31-32, 52-53 (Fields Dep.). When Fields complained to Barrett about being fired, he initially stated she was not fired to his knowledge but he would look into it. However, in a subsequent conversation Barrett told Fields that she could not return, saying he was going to "stand by his manager whether he believes he's right or wrong." *See* Exb. 13 at pg. 35-36 (Fields Dep.).

b. *LaQuanta Brinson is subjected to sexual harassment and retaliation*

After Defendant failed to take corrective action regarding the Fields complaints, Thomas Johnson - emboldened by that failure - continued his sexual harassment of existing victims and also found new ones, turning his attention to temporary employee LaQuanta Brinson.

For a period of several weeks in February 2005, Johnson subjected temporary Distribution Clerk LaQuanta Brinson to at least the following daily conduct: (a) he asked her out

on dates and for drinks, including using sexual language and asking her to go to a hotel and night clubs with him; (b) he put his arm around her on a daily basis, placing his hands in close proximity to her breasts, and frequently brushed his body against hers; (c) he deliberately touched her breast; (d) he repeatedly asked her to have sex with him - including specifically requesting oral sex and intercourse - and questioned her about her sexual relationships; (e) after she declined to go out with him, he frequently referred to her as a "dike," telling her she just hadn't "met the right man," and giving her extra work; (f) he made daily sexual comments to her, such as asking her to simultaneously have sex with him and another woman and saying words to the effect of, "You know you want it. Everything will be okay if you just do what I say"; (g) leering at her body and standing too close to her; and (h) when she rejected his sexual advances, he became angry and abusive. *See* Exb. 14 at pg. 17-18, 21-31, 38-40 (Brinson Dep.); Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Brinson's Warehouse employment dates).

After rejecting his advances, Johnson assigned extra work to Brinson three days per week and sent her home early on several occasions. *See* Exb. 14 at pg. 32-34 (Brinson Dep.). Johnson specifically told Brinson her workload would be lightened if she complied with his demands for sex. *See* Exb. 14 at pg. 27-28 (Brinson Dep.). When Brinson complained about it to Barrett, Johnson angrily declared that she would do whatever he directed her to do, said, "Come on outside and fight me like a man," and also stated he would "beat [her] ass and make [her] want to go back to a man." *See* Exb. 14 at pg. 22, 31, 37-40 (Brinson Dep.). On February 22, 2005, shortly after this threatening comment, Brinson resigned due to Johnson's threat to her physical safety. *See* Exb. 14 at pg. 40 (Brinson Dep.); Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Brinson's resignation date).[3]

[3] Brinson had every reason to fear for her safety. In addition to the aforementioned comment, Elizabeth Ledesma overheard Johnson say that he was going to hit Brinson. *See* Exb. 10 at pg. 104-05 (Ledesma Dep.).

Prior to her resignation, on at least four occasions Brinson reported Johnson's sexual harassment and discrimination to Lincoln Barrett. *See* Exb. 14 at pg. 25-26, 29, 32-34, 41 (Brinson Dep.). Barrett took no action in response to Brinson's complaints, instead making excuses for Johnson's conduct, telling Brinson he thought Johnson's sexual touching was accidental and regarding the sexual comments stating, "You know he's just playing. He's not being serious . . . ." *See* Exb. 14 at pg. 26 (Brinson Dep.). Defendant has failed to adduce any competent evidence that it conducted an investigation of Brinson's complaints or took any corrective action against Johnson.

c. *Express and Venturi inform Defendant of other allegations of sexual harassment experienced by temporary employees at the Warehouse*

Fields and Brinson were not alone. Express's Brown testified that at one time or another most of the women working at the Warehouse had told her that Johnson or TuTu made sexual remarks, that she communicated those complaints to June Davis of Venturi, and that no one from Blockbuster ever asked her for her records concerning those complaints. *See* Exb. 4 at pg. 212-16 (Brown Dep.) Moreover, June Davis of Venturi testified that prior to March 8, 2005, she spoke to Jennifer Fitzgerald of Blockbuster HR and personally visited Collen at Blockbuster's headquarters to inform them of other allegations of sexual harassment against Johnson that were conveyed to her by Brown. *See* Exb. 6 at pg. 39-43, 47-48, 55-56 (Davis Dep.). Defendant has failed to adduce any competent evidence that it acted on this information.

d. *Michelle Despertt is subjected to sexual harassment and retaliation*

Further emboldened by Blockbuster's failure to correct Johnson's harassment against Fields, Brinson, and the others, Johnson next focused his attention on Michelle Despertt.

Despertt was employed from February 2, 2005 to March 3, 2005. *See* Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Despertt's Warehouse employment dates); *See* Exb. 8 at pg. 17-18 (Despertt Dep.). During this period Warehouse Group Lead Johnson subjected Despertt to at least the following daily conduct: (a) he approached her from behind and put his hands on her breasts; (b) he pushed her up against a wall and holding her there said, “I want you”; (c) he trapped her in a room, grabbed her hips from behind and began to “pump” her - simulating sexual intercourse - then refused to stop despite being told to do so numerous times; (d) on a daily basis he made offensive sexual comments to Despertt and to other female employees (such as Lolita Gonzalez and Emetem Nkwetta) while in her presence, such as asking them how they liked to have sex and what sexual positions they preferred, stating the sexual positions and types of sex he liked, stating he liked performing oral sex on women and describing how he liked his body touched during sex, asking Despertt if she wore a push up bra and commenting on her breast size, telling another Blockbuster manager that Despertt was "fine" and that he was "trying to get that," and asking co-worker Say Wing if she ever had any “big Black dick”; (e) he frequently touched female temporary employees' shoulders; (f) he sat in front of Despertt and other women and stared under a table between legs as they worked, commenting it was “the best seat in the house”; and (g) he flicked his tongue at her in a sexual manner. *See* Exb. 8 at pg. 25-26, 28, 35-36, 41-49, 63-64, 100-03, 122-23 (Despertt Dep.).

Consistent with his past pattern of behavior, Johnson also retaliated against Despertt for rejecting his advances. Without any explanation, Johnson sabotaged her work by misfiling DVD’s that she had previously filed away and taking stacks of DVD's from her to make her production look smaller than it actually was. *See* Exb. 8 at pg. 31-32 (Despertt Dep.). The same day that Johnson took stacks of DVD's from Despertt's production, Despertt complained to

Distribution Center Manager Barrett about it, and Barrett commented to her about the need to increase her production to the required level. *See* Exb. 8 at pg. 50-54, 62-63 (Despertt Dep.). Later that day Cinnie Brown of Express informed Despertt that she had been terminated. *See id.* In her deposition, Brown confirmed that the reason given by Defendant for Despertt's discharge was failure to meet production numbers. *See* Exb. 4 at pg. 75-76, 216 (Brown Dep.). Prior to this incident, Lincoln Barrett intended to hire Despertt as a permanent Blockbuster employee. *See* Exb. 8 at pg. 60-62 (Despertt Dep.).

On March 3, 2005, on her last day of work, Despertt reported Johnson's sexual harassment to Cinnie Brown, and then followed up with a written complaint via e-mail several days later that was forwarded to Defendant's Regional Director Collen. *See* Exb. 4 at pg. 75-76 (Brown Dep.); Exb. 19 (Collen Dep. – Exb. 2 and Despertt Dep. - Exb. 3); Exb. 1 at pg. 31, 47-48 (Collen Dep.); Exb. 8 at pg. 53 (Despertt Dep.). In the e-mail, Despertt reported that Say Wing was also being sexually harassed by Johnson. See Exb. 19 at EEOC 00616 (Collen Dep. – Exb. 2). Brown reported the complaint to Barrett, Collen, and June Davis of Venturi. *See* Exb. 4 at pg. 78-79 (Brown Dep.); Exb. 20 at EEOC 00057 (Brown Dep. – Exb. 3).

As was the case with the Fields complaint, Defendant failed to conduct any meaningful investigation of the Despertt complaint. The following facts are undisputed: (a) neither Blockbuster nor Express interviewed Despertt about her complaint. *See* Exb. 8 at pg. 122 (Despertt Dep.). Indeed, Blockbuster officials declined to speak to her because she was a temporary worker, *see* Exb. 1 at pg. 36-39 (Collen Dep.); (b) no one asked Despertt for the names of any other victims or witnesses, *see* Exb. 8 at pg. 122 (Despertt Dep.); (c) Defendant failed to interview any of the temporary workers - not even Say Wing - because of their status as temporary employees. Regional Director Collen claims he interviewed the permanent

Blockbuster employees at the facility, but it appears at the time the only permanent employees were the managers and supervisors (Johnson and Barrett), *see* Exb. 1 at pg. 31-33, 37, 53 (Collen Dep.); (d) to the extent Defendant interviewed anyone at the facility, Collen and others did not ask any questions related specifically to Despertt's allegations or even sexual harassment generally, *see* Exb. 1 at pg. 33-34, 50-52 (Collen Dep.); and (e) Cinnie Brown testified that Express did not conduct an investigation and that it was her understanding Defendant would perform that task. *See* Exb. 4 at pg. 80-83 (Brown Dep.).

Moreover, to the extent Collen erroneously believed that Express had interviewed Despertt and he was relying on that belief in reaching his conclusions, he did not ask how long the interview lasted, what questions she was asked, what her specific responses were, or even whether Express deemed her credible. *See* Exb. 1 at pg. 37-39 (Collen Dep.). Defendant cannot even identify - and did not even know or ask at the time - who may or may not have been interviewed by Express. *See* Exb. 1 at pg. 49-50 (Collen Dep.).

Notwithstanding its utter failure to reasonably investigate, and the past complaints against Johnson, Defendant - acting through Collen - concluded that Despertt's sex harassment complaint against Johnson was unsubstantiated. *See* Exb. 1 at pg. 43-44, 56 (Collen Dep.). As a result of this conclusion, on March 28, 2005, Collen caused Barrett to issue a mild written warning to Johnson in which Blockbuster simply stated that Johnson had been accused of conduct that "could be construed" as sexual harassment and that he should not engage in such conduct in the future. *See* Exb. 17 (Collen Dep. - Exb. 5); Exb. 1 at pg. 78-79 (Collen Dep.). Incredibly, this weak warning referenced the Fields complaint against Johnson. *See id.* Collen also issued a warning to Barrett which referenced the need to prevent sexual harassment in the workplace but took no further action. *See* Exb. 21 (Collen Dep. - Exb. 6); Exb. 1 at pg. 78-79 (Collen Dep.).

In late June 2005, Despertt followed-up on her complaint with an e-mail to Cinnie Brown, which Brown forwarded to Collen. In the e-mail Despertt inquired about the status of her complaint and reported being told by "contacts" at the facility that Johnson ("Tage") was still engaging in sexual harassment. *See* Exb. 22 (Collen Dep. - Exb. 3). Collen declined to initiate any additional investigation. *See* Exb. 1 at pg. 69-70, 73 (Collen Dep.). Instead, Collen responded to Brown and others by questioning whether Despertt was "serious." *See* Exb. 22 at BBL001593, 001611.

e. *Temporary employee Say Wing reports being sexually harassed*

Consistent with Despertt's account of Johnson's sexual harassment against Say Wing, in April 2005 Defendant - through Collen and Fitzgerald - received an e-mail that Say Wing had complained that she was inappropriately touched by one of the Warehouse Group Leads. *See* Exb. 23 (Collen Dep. - Exb. 9); Exb. 1 at pg. 120-23 (Collen Dep.); Exb. 4 at pg. 79-80 (Brown Dep.). Defendant has failed to produce any evidence that it conducted an investigation of Wing's complaint of being sexually touched, beyond a cursory interview done in the context of an investigation of another complaint and without an interpreter present (Wing was limited English proficient at the time) almost one month after her complaint, an interview discussed *infra*. *See* Exb. 1 at pg. 52 (Collen Dep.); Exb. 2 at pg. 106-07, 163, 168-69, 215 (Francis Dep.). There is no evidence of any corrective action taken in response to Wing's complaint.

f. *Lolita Gonzalez is subjected to sexual harassment and the first instances of retaliation for rejecting Johnson's advances*

During the same period that Johnson was harassing Fields, Brinson, Despertt, Wing, and numerous other women that they saw being harassed, Johnson was also sexually harassing Lolita Gonzalez, who was employed at the Warehouse from November 26, 2004 until July 1, 2005. *See* Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Gonzalez's employment dates).

Over the course of her employment, including both before and after she complained of harassment and discrimination, Johnson subjected Gonzalez to at least the following conduct: (a) he asked her out on dates daily (at least 100 times) despite Gonzalez telling him she was not interested each time; (b) he told her that he wanted to have sex with her from the first time he saw her; (c) he made comments to her and her female co-workers about the size of his penis; (d) he frequently made statements to her about sex, including describing his sexual encounters with other women; (e) he told Lolita and Dolores that he wanted to marry Lolita; (f) he stared at her buttocks; (g) he brought his face in very close proximity to her face on a number of occasions; and, ominously, (h) he told her that if she and her father wanted to keep working for Blockbuster, she had to do sexual "favors" for Johnson. *See* Exb. 11 at pg. 69-71, 73-74, 83-85, 92-94, 108-09, 125-26, 155 (L. Gonzalez Dep.).

On one occasion, Johnson pointed to a black DVD cover and asked Gonzalez if she liked men of that color, to which Gonzalez replied that she liked everyone but preferred relationships with Hispanic men. *See* Exb. 11 at pg. 69-71 (L. Gonzalez Dep.). Thereafter, Johnson began telling other employees that Gonzalez was a racist. *See id.* Johnson also accused Gonzalez of sabotaging other employees' work and screamed at her. *See* Exb. 11 at pg. 117-120 (L. Gonzalez Dep.).

In addition, Gonzalez was well-aware of Johnson's sexual harassment of other women. For example, she saw Johnson touching Niema Fields and "always" asking her out, advances that Fields rejected. *See* Exb. 11 at pg. 127-28 (L. Gonzalez Dep.). Gonzalez witnessed Johnson firing Fields. *See id.* Gonzalez also saw Johnson fondling other female temporary employees' breasts and genitalia, making sexual comments about them, and rubbing his penis against them. *See* Exb. 11 at pg. 109-10, 132-33 (L. Gonzalez Dep.). In addition, supervisor Kofi TuTu asked

Gonzalez, Ledesma and other women if they had shaved their legs and if they were menstruating. *See* Exb. 11 at pg. 75 (L. Gonzalez Dep.).

Gonzalez verbally complained of the sexual and other harassment to Lincoln Barrett on numerous occasions, beginning in January 2005, and Barrett responded with laughter. *See* Exb. 11 at pg. 65-72, 74-75 (L. Gonzalez Dep.). Gonzalez verbally complained of the sexual harassment to Cinnie Brown in February 2005. *See* Exb. 11 at pg. 95 (L. Gonzalez Dep.).

g. *Elizabeth Ledesma is subjected to sexual harassment and retaliation*

During the course of her seven-month employment from December 2004 to July 2005, *see* Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Ledesma's Warehouse employment dates), Thomas Johnson subjected Elizabeth Ledesma to at least the following conduct: (a) Johnson "frequently" asked her to marry him, took her by the hand and asked her to go out on dates and to go to his apartment, and several times he asked her how long it had been since she last had sex; (b) Ledesma learned from co-worker Fernando Holquin that Johnson told him he was having sexual fantasies about her; (c) Johnson leered at her, looking at her body up and down while licking his lips; (d) she heard Johnson making statements about his penis size on three occasions, and on one occasion, he pointed to scratches on his hands and boasted that they were a result of having sex on a carpet; (e) Kofi TuTu asked her and two female co-workers questions about their menstruation and whether she shaved her legs and underarms; (f) she witnessed Johnson fondling female co-worker Yasmina Assoumanou on her breasts and genitalia on a daily basis and rubbing his penis against female co-worker Emetem Nkwetta's buttocks through her clothes and proclaiming that Nkwetta’s vagina “stunk”; (g) she heard Johnson comment that class member Dolores Gonzalez had a "nice" and "well put together" body for her age; (h) she learned from Lolita Gonzalez that Johnson had been making sexual comments about

Lolita; (i) she saw Johnson directing physical threats toward LaQuanta Brinson after Brinson complained to Barrett about Johnson; and (j) after Johnson asked her out on a date and she refused to go out with him, he began regularly shouting and screaming at her. *See* Exb. 10 at pg. 44-48, 52, 54-63, 95-97, 99, 104-05, 109-11, 118-19, 128 (Ledesma Dep.)

Ledesma frequently made complaints to Barrett and Brown about Johnson's harassment as it was occurring, but there is no evidence of any corrective action taken in response to those complaints; Barrett just laughed. *See* Exb. 10 at pg. 46-48, 56-57, 96, 103-04, 128.

h. *Dolores Gonzalez is extensively exposed to the sexually hostile work environment at the Warehouse*

Throughout her employment, Dolores Gonzalez was forced to endure various sexually harassing acts of Johnson and Tutu either though direct observation, by co-workers interpreting statements made by Johnson and TuTu into Spanish, or by being told of sexual harassment that they did not observe first hand. Dolores Gonzalez observed Johnson staring at her daughter's (Lolita Gonzalez's) buttocks, frequently pressing his body against other women in a sexual manner, fondling another female employee's breasts, his sexual comments about his penis, his shouting at Lolita and Elizabeth Ledesma after they declined to date him, TuTu's comments about menstruation and leg/arm shaving, and she was informed by Lolita that Johnson had been asking her out. *See* Exb. 9 at pg. 51-52, 86-88, 114-15, 119, 130-31 (D. Gonzalez Dep.).

i. *Lolita Gonzalez, Elizabeth Ledesma, Dolores Gonzalez, Lita Zubiate and other Hispanic temporary employees are subjected to national origin and race harassment and discrimination*

Lolita Gonzalez, Elizabeth Ledesma, Dolores Gonzalez, Lita Zubiate and other Hispanic temporary employees were also subjected to pervasive race/national origin discrimination.[4]

[4] Dolores Gonzalez was a temporary employee at the Warehouse from December 6, 2004 to July 1, 2005. *See* Exb. 16 at EEOC 00127 (Francis Dep. - Exb. 9) (identifying Gonzalez's Warehouse employment dates). Lita Zubiate was

Johnson treated Black employees, particularly African-American workers, much more favorably. He was abusive to the Hispanic employees. Johnson is African-American. Some examples of this conduct include at least the following:

Johnson made racist comments and engaged in other racially-motivated behaviors. On one occasion class member Dolores Gonzalez heard Johnson say "he was going to fire 'the whole bunch of damn Latinos.'" *See* Exb. 9 at pg. 106-07 (D. Gonzalez Dep.). Johnson also made threats to fire temporary employees on a daily basis, threats that were only directed at the Hispanic workers. *See* Exb. 9 at pg. 132-33 (D. Gonzalez Dep.). He referred to Hispanic workers as "damn Latinos." *See* Exb. 11 at pg. 134-35 (L. Gonzalez Dep.). Johnson repeatedly wore a Black power t-shirt and made loud, overt references to race such as, “Jesus is Black” or statements like telling Gonzalez, “You and *your people* can go on break.” *See* Exb. 10 at pg. 129-30 (Ledesma Dep.); *See* Exb. 11 at pg. 118-20, 123-24, 155-56 (L. Gonzalez Dep.). Lolita Gonzalez saw Johnson making fun of Hispanic temporary employee Victor Ruiz's accent, imitating him. *See* Exb. 11 at pg. 145-46 (L. Gonzalez Dep.) Moreover, Barrett, Johnson and TuTu directed Ledesma and other Hispanic workers to refrain from speaking Spanish. *See* Exb. 10 at pg. 124-26 (Ledesma Dep.). In this regard, LaQuanta Brinson heard Johnson and Barrett make statements about an unidentified group of employees such as, “They're dirty” and “They'll do anything for nothing.” *See* Exb. 14 at pg. 42-43 (Brinson Dep.).

Whenever Johnson sent employees home early in the afternoon due to decreased work availability - which caused them to lose work hours - he first selected Hispanic workers to go home early, not Black workers. *See* Exb. 8 at pg. 116 (Despertt Dep.); Exb. 24 at pg. 24 (Despertt Dep. - Exb. 6); Exb. 9 at pg. 53-55, 64, 69-70 (D. Gonzalez Dep.); Exb. 12 at pg. 29.

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employed from January 5, 2005 to January 26, 2005. *See* Exb. 16 at EEOC 00129 (Francis Dep. - Exb. 9) (identifying Zubiate's Warehouse employment dates).

Black employees were given longer lunch breaks than Hispanic employees and, unlike Hispanic employees, could arrive at work late without consequence. *See* Exb. 8 at pg. 112-13 (Despertt Dep.); *See* Exb. 11 at pg. 95-96 (L. Gonzalez Dep.); Exb. 9 at pg. 61-63, 69-71, 102 (D. Gonzalez Dep.); Exb. 12 at pg. 47-48 (Zubiate Dep.).

Johnson forced Hispanic workers to complete their work earlier than the Black workers and made Hispanic workers help the Black workers finish their work as well. *See* Exb. 9 at pg. 65-66 (D. Gonzalez Dep.).

Johnson openly yelled at Hispanic employees daily, while not displaying a hostile attitude toward Black or White employees (unless they were female and rejected his sexual advances). Johnson also sat in front of Lita Zubiate and co-worker Milagros Ledesma and watched them closely, hitting the table in front of Zubiate with his hand "a lot," and he stared at Ledesma while she worked. *See* Exb. 9 at pg. 51-53, 99-100 (D. Gonzalez Dep.); Exb. 11 at pg. 71-72, 79-81, 102-04, 115-19, 124-25 (L. Gonzalez Dep.); Exb. 12 at pg. 22-23, 29-31, 45-46 (Zubiate Dep.); Exb. 10 at pg. 103-04, 113-14 (Ledesma Dep.).

Hispanic workers were singled out for increased monitoring of their work. He also searched the Gonzalez's and Ledesma's bags when they left the facility. In this regard, Lolita Gonzalez was informed by a Black co-worker that Barrett called African-American and African employees into his office, and asked them about whether they had seen Lolita Gonzalez, Elizabeth Ledesma and other Hispanics stealing DVD's. Black employees were not treated in like manner. *See* Exb. 9 at pg. 53-54, 61-63, 93-94 (D. Gonzalez Dep.); Exb. 11 at pg. 55-57, 95-98, 107-08, 115-19 (L. Gonzalez Dep.); Exb. 10 at pg. 90-92 (Ledesma Dep.).

Lolita Gonzalez complained to Lincoln Barrett about the race/national origin harassment and discrimination. *See* Exb. 11 at pg. 115-16 (L. Gonzalez Dep.). In March-April 2005 Dolores

Gonzalez complained to Barrett three times about the differences in treatment between Black and Hispanic employees, and Barrett responded by denying any differences in treatment. *See* Exb. 9 at pg. 54-55, 81-83, 108 (D. Gonzalez Dep.). Elizabeth Ledesma also complained about Johnson's discriminatory shouting. *See* Exb. 10 at pg. 47-48 (Ledesma Dep.). There is no evidence of any corrective action taken by Defendant in response to these verbal complaints.

3. The April 2005 written complaint and Blockbuster's reckless and ineffective response

In addition to their prior verbal complaints in the preceding months, which were never acted upon, Lolita Gonzalez and Elizabeth Ledesma submitted a written complaint of sexual harassment and race/national origin harassment/discrimination to Cinnie Brown of Express on April 15, 2005, a complaint forwarded to Scott Collen of Blockbuster. *See* Document No. 100 at pg 15-16 (Defendant's brief) and Def's Exb.'s J & K cited therein.

Blockbuster waited almost one month after these complaints to initiate an investigation. On or about May 12, 2005, Collen and Human Resource Manager Barry Francis met with Express manager Cinnie Brown and owner Drew Lenear to discuss how the investigation would be conducted. At the start of this meeting, Brown again informed Collen and Francis of the past complaints of sexual harassment leveled against Johnson by Fields, Despertt, and Wing and provided a written agenda for the meeting that identified those past complaints. *See* Exb. 4 at pg. 126-27, 130-34 (Brown Dep.); Exb. 1 at pg. 117-20 (Collen Dep.); Exb. 25 (Brown Dep. - Exb. 14, also marked as Collen Exb. 8). In response, as Collen admitted in his deposition, Collen made a conscious, explicit decision to disregard evidence of past complaints of sexual harassment made against Johnson by temporary employees no longer working at the Warehouse. *See* Exb. 4 at pg. 104-05, 126-27, 130-34 (Brown Dep.); Exb. 1 at pg. 179-81 (Collen Dep.) This despite the fact that Blockbuster Human Resource official Barry Francis knew, and has admitted,

that past allegations of a similar nature by former employees against the same alleged perpetrator are, of course, relevant to future investigations. *See* Exb. 2 at pg. 180-81, 196-97 (Francis Dep.).

Thus – astonishingly – the investigation went forward with Blockbuster decision-making officials deliberately casting a blind-eye to a pattern of prior sexual harassment complaints against Johnson. Blockbuster then decided to conduct joint interviews of temporary employees at the Warehouse on May 13th, with Francis and Brown performing the interviews. *See* Exb. 4 at pg. 136-37, 190-91 (Brown Dep.); Exb. 2 at pg. 143-44 (Francis Dep.).

The interviews suffered from at least the following deficiencies: (a) Francis and Brown did not ask any of the witnesses any questions specifically concerning reported race or national origin discrimination, such as differences in treatment between Hispanic and Black workers, *see* Exb. 2 at pg. 188-89 (Brown Dep.); (b) two of the witnesses interviewed were limited English proficient complainants (Ledesma and Wing), but there was no interpreter present and significant communication problems, and Francis didn't even know what language they spoke, *see* Exb. 4 at pg. 57-60, 110-11, 223-24 (Brown Dep.); Exb. 2 at pg. 94-96,145-46 (Francis Dep.); Exb. 10 at pg. 19 (Ledesma Dep.); (c) in this regard, since Blockbuster and Express did not have an interpreter present they could not interview most of the limited English proficient Hispanics who had complained, such as Dolores Gonzalez, because their English skills were too poor to permit communication. *See* Exb. 4 at pg. 59-60 (Brown Dep.). Of course, these were also the witnesses most likely to have knowledge of the anti-Hispanic discrimination, as reflected *supra*; (d) Francis and Brown only interviewed workers who happened to be at work that day. Thus, there were no interviews of workers who were not on shift, or former employees (who were less likely to fear retaliation on the job), or the women who had previously complained, *see* Exb. 4 at pg. 137, 211 (Brown Dep.); Exb. 2 at pg. 195-96 (Francis Dep.), and (e) it appears from notes produced by

Express that the questioning was perfunctory and formulaic, with little or no follow-up and no questioning tailored to the specific types of harassment and discrimination allegations being investigated, *see* Exb. 2 at pg. 144, 181-83 (Francis Dep.); Exb. 26 (Francis Dep. - Exb. 8).

This is not to say that the interviews failed to cast light on the complaints. The evidence shows that Blockbuster's legal department destroyed, discarded or lost almost all of Francis's interview notes related to the May 2005 investigation, *compare* Exb. 26 (Francis Dep. - Exb. 8) (containing interview notes for two witnesses) *and* Exb. 2 at pg. 126-36, 181-86 (Francis Dep.) (describing record-keeping practices related to interview notes and investigative files, disposition of May 2005 records and authenticating two May 2005 interview notes) *with* Exb. 16 (Francis Dep. - Exb. 9) (listing 12 witnesses interviewed) *and* Exb. 4 at pg. 189-207 (Brown Dep.) (confirming Francis's presence and note- taking during all interviews).

Nevertheless, Brown retained her notes of the interviews, and during her deposition she gave a much more detailed account of those interviews. According to Brown, she and Francis interviewed 12 witnesses, and of those 12 at least five (Emetem Nkwetta, Say Wing, Monique Spears, Julian Carter - a male, and Lolita Gonzalez) reported being subjected to (or witnessing) commonplace sexual harassment by Johnson and TuTu, including staring at women’s buttocks, sexual jokes, sexual comments, and other matters. *See* Exb. 4 at pg. 173-74, 189-207 (Brown Dep.); Exb. 16 at pg. EEOC 00137 - EEOC 00139, EEOC 00147, EEOC 00149, EEOC 00155 (Francis Dep. - Exb. 9).

Blockbuster's response was to again conclude that the allegations of sexual harassment and discrimination were unsubstantiated, but on June 3, 2005 it issued another weak written warning to Barrett (and allegedly to Johnson) about management style, general non-discriminatory mistreatment of all workers, and Barrett's delegation of authority to Johnson and

failure to properly supervise him. *See* Exb. 27 (Collen Exb.'s 13 & 14); Exb. 1 at pg. 135-39, 143-44, 151-57 (Collen Dep.); Exb. 2 at pg. 234-37 (Francis Dep.). The warning purportedly issued to Johnson by Barrett was not signed by Barrett - which is required under Blockbuster policy to show the warning has actually been administered to the employee - and it is in all material respects *identical* to the warning issued to Johnson two months earlier in connection with the Despertt sexual harassment complaint. *See* Exb. 1 at pg. 151-56.

Brown testified that when she inquired of Collen about Blockbuster's intended corrective action, she was astounded to learn that Johnson and Barrett would not be fired. Based on the past complaints and the witnesses' statements to Barry Francis of Blockbuster and herself during the May 2005 investigation interviews, Brown testified that she believed the allegations of sexual harassment had been substantiated and that Johnson and Barrett should have been discharged, and she specifically communicated this conclusion to Collen, also telling him, "*Don't you think you have enough to go on from the interviews to terminate?*" *See* Exb. 4 at pg. 84-86, 207-10 (Brown Dep.).

Indeed, based on the results of the interviews, Blockbuster initially intended to fire Johnson and Barrett. In an e-mail sent by Francis to Collen, Francis recommended a final written warning. However, in his reply, Collen stated his intention to fire Johnson and Barrett. *See* Exb. 28 (Collen Dep. - Exb. 11); Exb. 1 at pg. 146 (Collen Dep.). Ultimately, however, Blockbuster decided to issue yet another written warning.

4. Blockbuster's retaliatory discharge of Lolita and Dolores Gonzalez

As of March 21, 2005, Barrett told Express's Brown that he intended to hire Lolita Gonzalez as a permanent Blockbuster employee, and he had previously commented that she was an excellent worker. *See* Exb. 4 at pg. 164-69 (Brown Dep.); Exb. 15 at EEOC 00056 (Brown

Dep. - Exb. 3). On April 15, 2005, Brown visited the Gaithersburg facility and spoke with Gonzalez, obtaining her complaint related to sexual harassment and national origin discrimination. *See* Document No. 100 at pg 15-16 (Defendant's brief) and Def's Exb.'s J & K cited therein. Twelve days later, on April 27, 2005, Barrett complained to Brown for the first time about Gonzalez being absent from work for two days after being sent home by Blockbuster. *See* Exb. 4 at pg. 235-36 (Brown Dep.); Exb. 15 at pg. 7 (Brown Dep. - Exb. 3). There was no stringent attendance policy in place at that time, and Brown generally did not hear complaints about attendance from Barrett prior to the May 13th investigation. *See* Exb. 4 at pg. 162-64 (Brown Dep.)

As reflected above, on May 13, 2005, Defendant and Express conducted interviews regarding the Gonzalez complaint, and on June 3, 2005, Defendant gave Barrett a final written warning in response to the investigation.

On July 1, 2005, Barrett directed Brown to fire Lolita and Dolores Gonzalez. *See* Exb. 4 at pg. 169-70 (Brown Dep.). In its brief Defendant asserts that Lolita was terminated for alleged interpersonal conflicts with co-workers and Dolores was terminated for three absences, contrary to Barrett's purported attendance policy.

Dolores Gonzalez became ill about a week before her discharge and was out of work for two days. *See* Exb. 9 at pg. 66-67 (D. Gonzalez Dep.).

Regarding the absences, the Gonzalez's co-workers were not similarly treated. Blockbuster records show that during the same week that Dolores Gonzalez was absent for two days, Takara Hughes-Martin was absent the entire week while in Florida with her husband, who was being transferred there, but Barrett stated he would allow her to return to work. *See* Exb. 4 at pg. 174, 180-82 (Brown Dep.); Exb. 16 at EEOC 00130 (Francis Dep. - Exb. 9). Co-worker Shon

Evans was frequently late and also out of work for at least three days but he was not discharged. *See* Exb. 11 at pg. 102 (L. Gonzalez Dep.); Exb. 10 at pg. 68 (Ledesma Dep.); Exb. 9 at pg. 66-67 (D. Gonzalez Dep.). Other employees also frequently came to work late without any consequences. *See* Exb. 10 at pg. 70 (Ledesma Dep.); Exb. 9 at pg. 61-63, 69-71 (D. Gonzalez Dep.). In addition, Dolores Gonzalez saw Barrett order co-worker Fernando Holquin home one day for showing up to work visibly drunk and vomiting, *see* Exb. 9 at pg. 64-65 (D. Gonzalez Dep.), yet on July 23, 2005 he was eventually hired as a permanent Blockbuster employee by Barrett, *see* Exb. 16 at pg. EEOC 00128 (Francis Dep. - Exb. 9); Exb. 4 at pg. 167-68 (Brown Dep.).

Regarding interpersonal conflicts, co-workers were also not similarly treated. Approximately one week before her termination co-worker Takara Hughes-Martin threw DVD's at Lolita Gonzalez and criticized her work. Gonzalez complained to Barrett. Barrett reacted by telling Gonzalez that no one liked her and that he did not believe anything she said. *See* Exb. 11 at pg. 76-78 (L. Gonzalez Dep.). There is no evidence of any disciplinary action against Hughes-Martin for this incident, and her employment continued for one and one-half months thereafter. *See* Exb. 16 at pg. EEOC 00128 (Francis Dep. - Exb. 9). Moreover, as previously discussed Barrett was aware of multiple harassment complaints against Johnson from female temporary employees, yet it is undisputed that Barrett never terminated Johnson.

5. Blockbuster finally acts, discharging Johnson and Barrett in late August 2005

As Defendant states in its brief, in late August 2005, long-after the class members were no longer employed at the Warehouse, Blockbuster fired Johnson and Barrett after more allegations of sexual harassment and national origin discrimination surfaced. Scott Collen, who was one of the decision-makers, testified that Johnson and Barrett were fired for management

style deficiencies and general mistreatment of employees, not for sexual or other harassment or discrimination of any kind. *See* Exb. 1 at pg. 166-67, 193-95 (Collen Dep.); Exb. 30 (Collen Dep. - Exb.'s 19, 20). However, Fitzgerald admitted that sexual harassment was one basis for Johnson's discharge. *See* Exb. 3 at pg. 97-98 (Fitzgerald Dep.).

6. Defendant's negligent and reckless anti-harassment and other EEO practices

According to the class members, and as admitted by Defendant, Defendant failed to provide any of the class members with any information regarding Blockbuster anti-harassment/EEO policies or related complaint procedures, and indeed Defendant considered its complaint procedures inapplicable to temporary employees such as the class members. *See* Exb. 3 at pg. 30-31 (Fitzgerald Dep.); Exb. 1 at pg. 110-11 (Collen Dep.); Exb. 8 at pg. 121-22 (Despertt Dep.); Exb. 13 at pg. 41, 78-79 (Fields Dep.); Exb. 14 at pg. 63-64 (Brinson Dep.).[5]

Moreover, Blockbuster has produced no evidence that it ever trained supervisors Johnson and TuTu regarding harassment/EEO, other than handing them a copy of company policy and possibly a three to four minute orientation video segment. *See* Exb. 3 at pg. 28-30 (Fitzgerald Dep.); Exb. 1 at pg. 111-13 (Collen Dep.). Also, Defendant has failed to demonstrate that Barrett was trained how to handle internal harassment complaints (though it appears he did attend a brief harassment and discrimination training at Blockbuster and so would have been aware of the legal prohibitions against harassment, *see* Exb. 1 at pg. 88-90 (Collen Dep.)), and it has not demonstrated the extent and subject matter of such training.

Most significantly, as discussed above, Defendant has failed to demonstrate any investigation or, even when it did investigate in a few instances, adequate corrective action in

[5] In its brief Defendant references an ethics hotline poster allegedly posted in the Warehouse. However, it has not shown that the hotline was an effective mechanism for registering harassment complaints. Moreover, it has not shown that the class members - some of whom did not read English - knew about the hotline. *See* Exb. 9 at pg. 87; Exb. 11 at pg. 116; Exb. 13 at pg. 79; Exb. 14 at pg. 41.

response to numerous verbal and written complaints and witness reports of egregious sex, race and national origin harassment that it received over a six month period from December 2004 until May 2005.

III. ARGUMENT

1. The class members in this action were subjected to an objectively hostile work environment because of sex, race/national origin, and retaliation

a. *The work environment at the Warehouse was discriminatorily hostile and abusive*

Defendant contends that summary judgment is warranted because, in its view, none of the class members were subjected to harassment that was sufficiently severe or pervasive to be deemed hostile by a reasonable person, and there is insufficient evidence that the non-sexual harassment to which Hispanic class members were subjected was motivated by their race/national origin. Defendant is incorrect, ignoring much of the evidence taken by the parties in this case as well as black letter law in this area.

Under *Harris v. Forklift Systems*, 510 U.S. 17 (1993), and its progeny, discriminatory harassment is actionable where it is sufficiently severe or pervasive that a reasonable employee under the circumstances would deem the work environment hostile or abusive, taking into account a number of factors, with no single factor required: (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) the effect on the employee's psychological well-being. *Id.* at 21-23.

As a threshold matter, Defendant inaccurately applies this standard by disaggregating the harassment into separate categories by type of motivation (e.g., sex harassment v. race/national origin harassment) and then analyzes each category of harassment as a separate work environment as to the four Hispanic female class members who were subjected to it (Gonzalez,

Gonzalez, Ledesma and Zubiate). This is an artifice and contrary to case law. The work environment must be analyzed in its *totality,* and in this regard all reasonably-related harassing incidents, regardless of type of unlawful motivation, should be aggregated for purposes of evaluating whether the harassment was sufficiently severe or pervasive to satisfy the Harris objectively-hostile standard. *See, e.g., Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1416 (10th Cir. 1987) (holding race and sex harassment should be aggregated to determine pervasiveness of harassment); *Ghassomians v. Ashland Independent School Dist.*, 55 F. Supp.2d 675, 687 n.8 (E.D. Ky. 1998) (aggregating sex and national origin harassment); *Rivera v. Domino's Pizza, Inc.*, NO. CIV. A. 95-1378, 1996 WL 53802, at *4 n.3 (E.D. Pa., Feb. 9, 1996) (unpublished) (aggregating national origin and disability harassment). *Cf. Conner v. Schrader-Bridgeport Intern., Inc.*, 227 F.3d 179, 193-94 (4th Cir. 2000)(discussing totality of circumstances analysis and requiring aggregation of overtly sex-based incidents with sex-neutral incidents for *Harris* analysis); *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir.1994) ("[W]here two bases for discrimination exist, they cannot be neatly reduced to distinct components."); *Jeffers v. Thompson*, 264 F.Supp.2d 314, 326 (D. Md. 2003) (same holding). Aggregation across types of harassment is particularly appropriate in this case, where the sex, retaliatory and race/national origin harassment are factually-intertwined. The same supervisor perpetrated virtually all of the harassment during the same time frame against the same four individuals.

Moreover, even if each motivation-based category of harassment were improperly analyzed separately under *Harris* standards, the evidence still shows an objectively hostile work environment because of sex and also because of race/national origin.

Regarding the sex harassment, Defendant makes a conclusory argument that some of the class members did not work at the Warehouse for very long and, therefore, could not have

experienced a work environment that was subjectively hostile to women. This argument is meritless. Not surprisingly, Defendant fails to cite any case law for the proposition that duration of employment, standing alone, somehow defeats a hostile work environment claim. This is because the proposition is untenable. Under *Harris*, the question of whether harassment is actionable turns on the type, quantum and consequences of the harassment an individual experiences, not how many days it took for the person to experience that harassment.

In this regard, the sex harassment that Blockbuster supervisors perpetrated against the three employees Defendant references - Fields, Brinson, and Despertt - was highly frequent, quite severe, physically threatening, humiliating, and interfered with their work. Blockbuster Warehouse Group Lead Johnson subjected Fields, Brinson and Despertt to a daily barrage of groping and other touching of their intimate body areas, offensive sexual propositioning and comments, leering, similar conduct toward others in their presence, as well as yelling and screaming and retaliatory employment actions. *See supra* at pg. 10-15. Johnson groped Fields' buttocks and humiliated her by repeatedly offering her money for sex, thus treating her as if she were a prostitute; he threatened Brinson with actual violence when she refused to accede to his obscene sexual demands; and he repeatedly physically/sexually assaulted Despertt. *See id.*

The physical nature of the threats and harassment and the fact that the unwanted touching involved intimate body areas renders it particularly severe. *See, e.g., Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001) (discussing increased severity of unwanted touching of body and noting that even single incidents of sufficient severity can create hostile work environment); *Hanna v. Boys and Girls Home and Family Services, Inc.*, 212 F.Supp.2d 1049, 1053-55, 1060-61 (N.D. Iowa 2002) (finding fact issue regarding whether objectively hostile work environment existed involving harassment primarily occurring over two-week period and less severe than instant

case). Defendant's argument that this daily conduct does not constitute a hostile work environment to women is astonishing and begs the question: if these actions are not sufficient to create a hostile work environment, what is?

Similarly, Defendant focuses on Lita Zubiate's duration of employment. She worked at the Warehouse for about three weeks. But every day during that period Zubiate endured a racially charged atmosphere of hostility and discrimination toward Hispanics which included Johnson screaming at Hispanic workers multiple times throughout the day and threatening to take away their livelihoods; racial slurs; discriminatory scheduling (with Hispanics sent home early and thereby losing pay), breaks, and work volume and monitoring. He also frequently watched her work closely and struck the table in front of her with his hand as she worked, which is physically intimidating and naturally caused her distress. *See supra* at pg. 21-23. The cases cited by Defendant are distinguishable on that ground as well as others.

Dolores Gonzalez experienced all of aforementioned anti-Hispanic animus on a daily basis and, contrary to Defendant's assertion, she also frequently experienced sexually harassing incidents, including having to observe Johnson sexually harassing Lolita Gonzalez, *her own daughter*, as well as openly fondling other women in front of her. *See supra* at pg. 20-21. Most of these incidents are not, as Defendant has characterized them, second-hand, meaning Gonzalez heard someone else's account of the events. To the contrary, Gonzalez was physically present and personally observed them. In its totality, this conduct establishes that Gonzalez was subjected to an actionable hostile work environment.

Defendant asserts that Elizabeth Ledesma was not subjected to a hostile environment because she chose to go back to work at the Warehouse about two months after she resigned in protest of firings of Lolita and Dolores Gonzalez. This is a non-sequitur, and Defendant omits a

key fact. Ledesma began her second period of employment at the Warehouse on August 30, 2005, after Johnson and Barrett had already been fired. *See* Exb. 16 at EEOC 00128; Exb. 10 at pg. 37-38 (Ledesma Dep.). Thus, the fact she chose to return to work at the Warehouse has no bearing on whether she regarded the work environment to be subjectively hostile, setting aside any other, real-life reasons why an employee might chose to return to work.[6]

b. *The harassment and other disparate treatment employment actions that Johnson directed toward Hispanic employees were motivated by their race and national origin*

Defendant argues that the non-sexual harassment and discrimination that Johnson perpetrated against the Hispanic class members was not motivated by their race and national origin. In so doing, Defendant simply chooses to ignore the evidence of motive that it finds inconvenient to its argument.

For example, Defendant fails to point to the evidence of overtly discriminatory remarks that Johnson made about Hispanics, such as "damn Latinos" and that "he was going to fire the whole bunch of damn Latinos." *See supra* at pg. 21. The racial motivation for such comments is patent and creates a strong inference of race and national origin based motivation for employment decisions that Johnson made concerning the Hispanic employees. Defendant also ignores testimony that Johnson mocked a Hispanic employee for his accent and told Hispanics to not speak Spanish. *See id.* Johnson's motives for other racialized statements, expressions of racial identity, and negative treatment of Hispanic workers must be viewed in this context.

[6] It appears that Defendant does not question whether Lolita Gonzalez was subjected to an objectively hostile environment based on sex, presumably in light of the fact that she was employed at the Warehouse for about seven months. Nevertheless, to the extent Defendant raises a challenge on that issue, the evidence is more than sufficient to establish that Defendant subjected Gonzalez to very frequent (daily) harassment of a type that clearly establishes a hostile work environment, such as Johnson asking her out over 100 times despite being rejected each time, threats to her and her family members' jobs if she did not accede to Johnson's sexual demands, sexual comments, attempting to brand her as a racist in front of co-workers, and other offensive acts. *See supra* at pg. 18-19, 21-23.

In addition, Defendant ignores the unambiguous testimony of multiple witnesses, including Black witnesses, that Hispanics were singled out for abuse in the form of daily yelling, screaming and threats, and for disadvantageous treatment in important terms and conditions of employment such as being sent home early/work hours, duration of breaks, and work pace and volume. *See supra* at 21-23. Defendant's response to this evidence is to point to the fact that other non-Hispanic class members, such as Fields and Brinson, were also abused or were not given the same privileges as other Black employees. Of course, as the factual discussion of Fields and Brinson shows, they were subjected to abuse and disparate treatment for other discriminatory reasons, viz., because they were female and they rejected Johnson's sexual advances and reported it, *see supra* at pg. 10-13, so their treatment is hardly an effective rebuttal. Simply put, Johnson discriminated against both sets of employees, but for different unlawful reasons. One illegal motive does not cleanse another.[7]

To the extent Defendant points to any testimony that suggests the lack of disparity between Black and Hispanic employees as to certain conditions of employment, such testimony creates, at best, a conflict in the evidence that is for a fact-finder to resolve.

2. Defendant's challenge to certain disparate treatment claims in this case fails, as those claims involve actionable adverse employment actions

a. *The disparate treatment experienced by the Hispanic class members constitutes actionable adverse employment actions under Section 703 of Title VII*

Defendant asserts that the fact that the Hispanic employees at the Warehouse were given shorter breaks than Black workers and singled out for excessive monitoring were not adverse

[7] In its brief Defendant criticizes the class members' testimony as vague in the sense that they do not identify the "dates, times or circumstances" of each and every instance of disparate treatment and is unsupported by records, though Defendant does not identify what records exists or that have even existed that would possibly support or refute their testimony. *See* Document No. 100 at pg. 26. There is certainly no legal requirement that EEOC present testimony with that unrealistic degree of precision, especially given the gravamen of their testimony that the practices they identify were not isolated events but were commonplace, frequent occurrences over the course of their employment. *See supra* at pg. 21-23. Essentially, in the context of summary judgment Defendant seeks to induce the Court into weighing their unambiguous testimony on these issues and reject it on credibility grounds.

employment actions under Title VII. Presumably, Defendant would also take that view regarding certain other discrimination that the Hispanic employees were subjected to, such as being forced to work faster than Black employees and then help complete the Black employees' work or not being permitted to arrive at work late like Black employees. Defendant is incorrect. The federal courts have held that conditions of employment such as break duration, difficulty of work assignments, and discipline or lack thereof for arrival at work late are adverse employment actions. *See Baker v. John Morrell & Co.*, 382 F.3d 816, 830 (8th Cir. 2004) (holding supervisor decision to limit bathroom and other breaks constituted materially adverse action under Section 703 of Title VII); *Lopez v. Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp.2d 914, 943 (N.D. Iowa 2006) (holding easier job duties and extended breaks for employees were adverse employment actions). Indeed, the fact that the Fair Labor Standards Act regulates break duration speaks to its importance to the employment relationship.

Moreover, the question to be answered under Section 703 analysis is whether the terms and conditions of employment have been altered. Thus, as is true of a hostile work environment analysis, one should look to the cumulative effect of the disparate treatment experienced by Hispanic workers at the Blockbuster Warehouse to determine the significance of its effect on the employment relationship. *See Kim v. Nash Finch Co.*,123 F.3d 1046, 1060 (8th Cir. 1997). The cumulative effect of the aforementioned disparate treatment was substantial.

b. *Defendant constructively discharged LaQuanta Brinson*

Defendant asserts that Zubiate, Ledesma and Brinson were not subjected to constructive discharge. As a threshold matter, EEOC will not assert constructive discharge claims at trial regarding Zubiate and Ledesma. Accordingly, that portion of Defendant's Motion is moot.

However, the evidence demonstrates that Defendant - acting through Warehouse Group Lead Johnson and Distribution Center Manager Barrett - did constructively discharge LaQuanta Brinson. In support of its argument, Defendant merely cites Brinson's testimony that she quit. And she did. That is the essence of a constructive discharge, but it fails to answer the relevant question for purposes of constructive discharge analysis: Why did she quit? The answer is in the testimony Defendant chose not to cite. Johnson subjected Brinson to a pattern of daily sexual touching, sexual propositions, comments and gender stereotyping epithets, threats, and tangible employment actions in retaliation for rejecting his advances. *See supra* at pg. 12-13. When she complained to Lincoln Barrett about Johnson's sexual harassment, he deliberately refused to help her, instead making excuses for Johnson. *See supra* at pg. 13. After Johnson found out about Brinson's complaints, he threatened her with physical violence. *See supra* at pg. 13. There can be no doubt that in these circumstances, a reasonable person would have seen no hope for assistance or abatement of the harassment, would have feared for her safety, and would have felt compelled to resign due to Defendant's deliberate action. *See, e.g., Holsey v. Armour & Co.,* 743 F.3d 199, 209 (4th Cir. 1984) (affirming finding of employer deliberate conduct causing constructive discharge where management officials knew of harassment and failed to correct it).

3. Defendant subjected Lolita and Dolores Gonzalez to retaliatory discharge

Defendant also asserts that it is entitled to judgment as a matter of law regarding EEOC's claims for retaliatory discharge of Lolita and Dolores Gonzalez because EEOC cannot demonstrate that the reasons Defendant has asserted for their terminations are pretextual. Of course, Defendant's argument necessarily assumes that it has adduced admissible evidence of its alleged non-discriminatory reasons for the Gonzalez's discharges. But Defendant has failed to do that. It is undisputed that the Defendant official who made the decision to terminate the

Gonzalez's was Lincoln Barrett. Defendant has not offered Barrett's testimony or any other competent evidence of the reasons for the discharges, instead offering inadmissible hearsay in the form of testimony from Lolita Gonzalez regarding what she was told by Barrett and e-mail between Cinnie Brown and Lincoln Barrett. *See* Document No. 100 at pg. 16-17, 29 (Defendant's brief). This evidence is clearly inadmissible hearsay when offered by Defendant (as opposed to Defendant's party opponent) for its truth, and, in addition, the e-mails have not been authenticated. EEOC objects to Defendant's evidence on those bases. Given that Defendant has failed to offer admissible evidence of any alleged legitimate non-discriminatory reasons for its discharge of the Gonzalez's, EEOC is not required to show a fact issue as to pretext, and Defendant's Motion necessarily fails on that issue.

Moreover, even if Defendant's Motion were properly supported with admissible evidence, the evidence establishes a genuine issue of material fact regarding Defendant's retaliatory motive for discharging the Gonzalez's. The Gonzalez's were discharged approximately one month after Barrett was given a final written warning in connection with the May 2005 discrimination investigation, which was precipitated by a complaint made by Lolita, Dolores's daughter, and echoed complaints that Dolores made to Barrett on at least three prior occasions. There is evidence showing that numerous other employees without connection to that investigation or protected activity had engaged in conduct of comparable or greater severity and were not discharged. *See supra* at pg. 27-28.

Moreover, as the extensive factual discussion regarding prior complaints shows, Barrett had previously shown a pattern of ignoring complaints about Johnson's sexual and race/national origin harassment and condoning it, chuckling at complaints. Indeed, Barrett ratified Johnson's decision to retaliate against Niema Fields by discharging her and telling her he would support

Johnson "whether he believes [Johnson's] right or wrong," and Barrett discharged Despertt on the same day that she complained to him about retaliation by Johnson. *See supra* at pg. 10-15. The federal courts have long-recognized that an environment where unlawful harassment is condoned increases the likelihood of retaliation and is probative of retaliatory motivation. *See, e.g., Quinn v. Consolidated Freightways Corp.*, 283 F.3d 572, 577-79 (3d Cir. 2002); *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 155-56 (8th Cir. 1990); *Ruffino v. State Street Bank and Trust Co.*, 908 F. Supp. 1019, 1040 n.38 (D. Mass. 1995). "[A]n employer's past discriminatory policy and practice may well illustrate that [its] asserted reasons for disparate treatment are pretext . . . . [A]n atmosphere of condoned [discrimination] in a workplace increases the likelihood of retaliation for complaints in individual cases." *Hawkins*, 900 F.2d at 155-56.

4. There is a strong basis for imputing harassment liability to Defendant, and it cannot establish its Faragher/Ellerth affirmative defense to such liability

The evidence shows that Johnson, TuTu and Barrett were supervisors. *See supra* at pg. 5-7. This case therefore involves *supervisory* sexual harassment, which is governed by the Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Those decisions provide that employers are vicariously liable for harassment perpetrated by a supervisor, but the employer may avoid imputed liability by meeting its burden of proving an affirmative defense consisting of two elements, *both of which* must be demonstrated: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807. Moreover, an employer is precluded from invoking the affirmative defense when the harassment culminates in tangible employment action. *See id.*

EEOC moves for summary judgment regarding this issue, as there is no genuine issue of material fact. Defendant's tangible employment actions against the class members preclude it from invoking the *Faragher/Ellerth* affirmative defense, and in any event it cannot satisfy its burden of proving both elements of that defense.

Defendant's harassment of the class members culminated in multiple tangible employment actions. As previously discussed, Johnson discharged Fields the same day he screamed at her about complaining of his sexual harassment to Barrett, a decision ratified by Barrett. *See supra* at pg. 10-11. Johnson assigned additional work to Brinson - explicitly conditioning her work load on her willingness to have sex with him - and he sent her home early, causing her to lose hours, because she resisted his advances. Johnson subsequently confirmed his retaliatory animus by physically threatening Brinson after she complained to Barrett. *See* supra at pg. 12. Johnson sabotaged Despertt's work for resisting his advances, causing her to be discharged. *See supra* at pg. 14-15. As discussed, Barrett discharged Lolita and Dolores Gonzalez in retaliation for their complaints about harassment and association. As Hispanic employees, the Gonzalez's, Ledesma and Zubiate were all subjected to tangible employment actions in the form of denial of work opportunities when they were sent home early, discriminatory breaks, and other actions. The *Faragher/Ellerth* defense is unavailable.

Furthermore, even assuming the *Faragher/Ellerth* defense were theoretically available in this case, Defendant cannot meet its burden of proof as to either component of the defense. Defendant cannot demonstrate that the class members unreasonably failed to take advantage of preventive or corrective opportunities provided by Blockbuster. None of the class members were provided with Defendant's harassment policy or complaint procedure. Nevertheless, as discussed at length, *supra*, with the exception of Zubiate all of the class members complained multiple

times about the sex and race/national origin harassment, reporting Johnson's conduct to Barrett, who was the highest ranking manager at the Warehouse and whose job duties under Defendant's policies included receiving complaints of harassment and ensuring a harassment-free work environment. Barrett's knowledge was imputed to Defendant. *See, e.g., Haugerud v. Amery School Dist.,* 259 F.3d 678 (7th Cir. 2001) (notice imputed to employer when employee follows employer's complaint procedure); *Miller v. Kenworth of Dothan, Inc.,* 277 F.3d 1269, 1279 (11th Cir. 2002) (holding knowledge of on-site manager imputed to employer where on-site manager was only one of two managers at facility). The class members' complaints to Barrett were repeatedly ignored. Nevertheless, the class members persisted by repeatedly reporting the harassment to Cinnie Brown of Express. Despertt, Lolita Gonzalez and Ledesma went even further and made written complaints that Venturi/Express routed to Defendant's corporate headquarters officials. In sum, the class members acted reasonably under the circumstances. Defendant cannot meet its burden.

Finally, Defendant cannot demonstrate that it exercised reasonable care to prevent and correct promptly any discriminatory harassing behavior. As stated, the class members repeatedly complained, and Defendant took no reasonable corrective action in response to those complaints. Defendant declined to act on multiple complaints to Barrett from almost all the class members. And while those who complained were aware of other victims and witnesses, Defendant never asked them for that information.

Of the two investigations that were allegedly conducted, Defendant only interviewed its own permanent employees in the first one (the March 2005 Despertt complaint) as opposed to the temporary workers, who were the potential victims. In that first investigation Defendant disregarded multiple past sexual harassment complaints about Johnson from various sources,

such as Fields, Brinson, and persons whose complaints were communicated to Collen by June Davis. The so-called corrective action Defendant took was exceedingly weak – a mere written warning that did not even directly rebuke him for sexual harassment - despite Defendant's knowledge of complaints of exceedingly severe harassment, up to and including daily sexual propositioning, threats of violence, and sexual assault. *See, e.g., Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2d Cir.2001)("The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims.").

In Defendant's second flawed investigation (the May 2005 investigation), it further disregarded multiple past and contemporaneous complaints and witness statements corroborating the allegations against Johnson; it ignored relevant witnesses and did not secure necessary interpreter services; it failed to ask any questions specific to complaints of race/national origin discrimination; and then it may or may not have issued an exceptionally weak written warning to Johnson that was essentially identical to the warning issued two months earlier despite the cumulative evidence against him and the numerous reports of very severe harassment within its knowledge. In short, Defendant failed to take any meaningful corrective action reasonably calculated to end the harassing conduct.[8]

True enough, Defendant eventually terminated Johnson and Barrett – *eight months after the first in a long line of harassment complaints.* Too late. Under *Faragher/Ellerth* the

[8] It appears from its factual discussion that Defendant seeks to rely, in part, on investigative efforts undertaken by Express and the fact that it had its own, perfunctory anti-harassment policy that was distributed to many of the class members. Defendant's reliance is misplaced on a number of levels. First, its legal duty to exercise reasonable care to protect employees from harassment cannot be delegated to a third-party with no authority to correct the work environment. To do so is plainly negligent. Moreover, Defendant has failed to demonstrate through competent evidence that any of Express's investigative efforts were reasonable. Finally, regardless of Express's investigative efforts, Defendant has failed to demonstrate that it took reasonable corrective action against the perpetrators in light of what Express learned in any investigation it allegedly conducted. Express wanted Blockbuster to fire the perpetrators. Blockbuster declined.

employer must act "promptly" to end the harassing conduct. Defendant had an affirmative duty to act more forcefully much earlier to protect its workers from an obscene, violent, unrepentant, repeat offender. It failed to do so, and its temporary employees paid the price. Moreover, as Collen testified, it is not even clear whether Johnson and Barrett were discharged for discriminatory harassment or just general management style issues.

Defendant's utter failure to take reasonable corrective action in response to complaints also constituted failure to take reasonable *preventive* action regarding all new harassment that occurred, and all new victims who Johnson harassed, after those earlier complaints. *See, e.g.*, *Alexander v. Alcatel NA Cable Sys., Inc.*, No. 01-2077, 2002 WL 31302227, at *7 (4th Cir., Oct. 15, 2002) (unpublished) ("In certain circumstances, an employer, whose tepid response to valid complaints emboldens would-be offenders, may be liable if a vigorous response would have prevented the abuse."); *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989)("W]e will impute liability to an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to *prevent* such harassment. An employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct"), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990).

As Defendant's managers have admitted in this litigation, Defendant failed to distribute its harassment policies or complaint procedures to the class members or any temporary employees. Defendant's complaint procedures do not even apply to temporary workers who, according to Scott Collen, must go to Express as their exclusive remedial avenue for harassment,

this despite the fact that it is undisputed that Express had no power at all to discipline the harassers (who were Blockbuster personnel) or otherwise change the work environment. Defendant has failed to adduce competent evidence that Johnson or TuTu were ever trained on anti-harassment or EEO principles. Defendant has also failed to adduce evidence that Barrett was ever provided with anti-harassment or EEO training of a type and quantum consistent with his duties to receive and act on complaints of harassment and to monitor the work environment.

In light of the above evidence, Defendant's anti-harassment policy fails, as a matter of law, to establish reasonable preventive action. *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001) ("[T]he 'mere promulgation' of an anti-harassment policy, no matter how well-conceived, will not suffice to show the requisite level of care where the employer has administered the policy in bad faith or has rendered it ineffectual by acting unreasonably.") Fourth Circuit case law, as well as the case law of every other Circuit, has authorized findings of employer harassment liability in less compelling circumstances than these. *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 187-88 (4th Cir. 2001) (manager downplayed complaint and gave weak warning to harasser); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 244-46 (4th Cir. 2000); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319-21 (4th Cir. 2008). EEOC is entitled to summary judgment on this issue.

5. Punitive damages are warranted and supported by the evidence in this matter

Defendant contends that EEOC cannot demonstrate that it acted with malice or reckless disregard for the Title VII rights of the class members. Defendant is incorrect. Defendant's egregious actions reflected in the foregoing discussion of the *Faragher/Ellerth* defense clearly demonstrate reckless disregard for, and in some cases malice against, the rights of the class members. It has long been held that knowledge of a substantial risk may be inferred from its

obviousness, *see, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), and it was quite obvious under the circumstances that Defendant's response to the harassment was grossly inadequate. Moreover, the relevant decision-makers who failed to correct or prevent the hostile work environment and, in some cases, retaliated against the class members, e.g., Barrett and Collen, all possessed basic knowledge of Title VII rights. *See* Document No. 100 at pg. 35 and exhibits cited therein; Exb. 1 at pg. 21, 88-90, 112 (Collen Dep.). Thus, a reasonable jury could find that Defendant acted with reckless indifference to the class members' rights under Title VII. *See, e.g., EEOC v. Federal Express Corp.*, 513 F.3d 360, 372-73 (4th Cir. 2008) ("[W]e have heretofore found evidence sufficient to support a jury finding of a perceived risk in cases where the employer's managerial agent had 'at least a rudimentary knowledge" of the import of a federal anti-discrimination statute.") (citation omitted); *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 460 (4th Cir. 2002) (concluding jury entitled to find that supervisor who saw EEOC poster warning against sexual harassment perceived risk of violating Title VII).

Defendant also asserts that it is entitled to judgment as a matter of law on punitive damages because it allegedly exercised good faith efforts to comply with Title VII. It is Defendant's burden to establish that it has engaged in a good-faith effort to comply with Title VII such that it may avoid punitive damages for conduct by one its managers or supervisors that might otherwise warrant submission of punitive damages to a jury. *See, e.g., Golson v. Green Tree Financial Servicing Corp.*, 26 Fed.Appx. 209, 214 (4th Cir. Jan. 10, 2002). Defendant claims that the mere fact it had a harassment policy insulates it from punitive damages liability.

Defendant's argument clearly fails on the facts and disregards controlling law. "The good-faith defense rests on the notion that the existence *and enforcement* of an anti-discrimination policy shows that the employer itself 'never acted in reckless disregard of

federally protected rights.' " *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 443 (4th Cir. 2000) (*quoting Kolstad,* 119 S. Ct. at 2129) (emphasis added). Defendant cannot avoid liability for punitive damages merely because it can point to the existence of a policy on harassment. The Fourth Circuit has clearly held that the mere existence of a written policy or training on EEO matters does not automatically satisfy *Kolstad's* good faith requirement. *Lowery,* 206 F.3d at 443("… [S]uch a policy is not automatically a bar to the imposition of punitive damages"). "[A]n employer maintaining such a compliance policy must also take affirmative steps to ensure its implementation." *Federal Express Corp.*, 513 F.3d at 374. As the First Circuit noted:

> [A] written statement, without more, is insufficient to insulate an employer from punitive damages liability. A defendant must also show that efforts have been made to implement its antidiscrimination policy, through education of its employees and active enforcement of its mandate. Although the purpose of [federal EEO law] is served by rewarding employers who adopt anti-discrimination policies, it would be undermined if those policies were not implemented, and were allowed instead to serve only as a device to allow employers to escape punitive damages . . . .

Romano v. U-Haul International, 233 F.3d 655, 670 (1st Cir. 2000) (internal citation omitted).

As discussed in the foregoing discussion of Defendant's inability to prove the *Faragher/Ellerth* defense, Defendant did not provide its policies to the class members, did not even consider complaint procedures applicable to the class members, and repeatedly failed to enforce its policies. Therefore, under *Lowery* and other decisions, Defendant has not demonstrated that it is entitled to judgment as a matter of law regarding its good faith defense.

6. Defendant was the Title VII "employer" of the class members

In an attempt to evade responsibility for the aforementioned violations, Blockbuster has denied that the temporary workers at its Warehouse were its "employee[s]" within the meaning of Title VII. Blockbuster's argument is meritless. In light of the uncontested evidence in this

case and controlling case law, it is clear that the temporary workers at Blockbuster's warehouse were its employees under Title VII. EEOC moves for summary judgment regarding this issue.

In the Fourth Circuit, courts are required to employ a multi-factor test to determine whether an employer/employee relationship exists under Title VII. Exercise of control over the worker by the enterprise is considered the most important factor – though not necessarily dispositive. *E.g., Garrett v. Phillips Mills, Inc.,* 721 F.2d 979, 982 (4th Cir. 1983).

A non-exhaustive list of other factors to be considered in addition to control includes: (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties. *Id.*

The uncontested facts clearly establish Blockbuster's status as the employer and that EEOC is entitled to summary judgment on this issue. Most significantly under the controlling case law, Blockbuster exercised sole control of the workers' daily activities and all conditions and manner of work at the Warehouse, with Express only occasionally visiting. Blockbuster exercised sole control of the duration of the temporary workers' assignments at the Warehouse. Blockbuster – not Express - provided the means of work performance, training the workers to perform their duties and furnishing the facility and equipment to perform the work. Blockbuster

personnel directly hired at least one class member and directed Express to interview others of Defendant's choosing. The workers were paid by the hour, not by the job, and performed a type of work that is usually supervised and was supervised by Blockbuster management in this case, and did not require special skills (Blockbuster provided training). The type of work performed by the temporary workers was an integral part of Blockbuster's business. They performed jobs that were a permanent Blockbuster position. At the point of hiring Blockbuster intended to convert the best workers to permanent Blockbuster payroll employees, and eventually it did so, converting at least five temporary workers to permanent status. Blockbuster viewed the workers as on a track for conversion to permanent payroll employee status. *See supra* at pg. 6-10.

Under circumstances highly analogous to this case, the Fourth Circuit, a number of district courts within the Fourth Circuit, and other federal courts have consistently applied the "joint employer" and "loaned servant" doctrines to hold that temporary workers are considered the legal employees of the client enterprises that direct and use their labor, regardless of any relationship they may also have with the employment agencies that placed them. *See, e.g., Maynard v. Kenova Chemical Co.*, 626 F.2d 359, 361-62 (4th Cir. 1980); *Mullis v. Mechanics & Farmers Bank*, 994 F. Supp. 680, 684-85 (M.D.N.C. 1997); *Magnuson v. Peak Technical Svs., Inc.*, 808 F. Supp. 500, 508-10 (E.D. Va. 1992), *aff'd mem.*, 40 F.3d 1244 (4th Cir. 1994); *Willis v. Grimes Aerospace Co.*, 988 F. Supp. 925, 934-36 (D.S.C. 1997); *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 980-83 & n.3 (10th Cir. 2002); *Freeman v. Kansas*, 128 F. Supp.2d 1311, 1315-16 (D. Kan. 2001); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344, 348-49 (S.D.N.Y. 1984). Indeed, the Fourth Circuit and other courts have found genuine issues of material fact as to employee status in far less compelling circumstances than these. *See, e.g., Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d

211, 221-22 (4th Cir. 1993) (fact issue as to volunteer fire fighter's status as Title VII employee due to benefits conferred by state - not by defendant); *U.S. v. City of New York,* 359 F.3d 83, 93-97 (2d Cir. 2004) (fact issue as to whether welfare-to-work program participants were Title VII employees).[9] EEOC is entitled to summary judgment on this issue.

7. The uncontested evidence establishes that Defendant violated Title VII record-retention requirements

Under 29 C.F.R. § 1602.14, which was promulgated pursuant to EEOC's authority under 42 U.S.C. § 2000e-8(c), employers are required to retain personnel and employment records for one year, and personnel and employment records relevant to a charge must be retained until final disposition of the charge or any proceeding related to the charge. *See id.* Defendant failed to retain records of its May 2005 investigation, including Blockbuster HR official Barry Francis's interview notes for 10 out of 12 witnesses. *See supra* at pg. 25.

Defendant's sole challenge to EEOC's Title VII record-retention claim concerning these documents is that it had no obligation to retain records concerning the temporary workers at the Warehouse because they were not employees of Blockbuster. *See* Document No. 100 at pg. 36-37 (Defendant's brief). As discussed above, Defendant's argument fails because it was the temporary workers' employer for purposes of Title VII. And in any event, those records relate to the employment of Johnson – who was indisputably an employee of Defendant and the subject of

[9] Moreover, even if Blockbuster were not the Title VII employer, it would still be liable. This Court has specifically recognized that discriminatory interference by an employer with the employment relationship existing between a worker who is not its employee but is employed by a third-party is actionable under Title VII where the employer, though not the employer of the worker, exercises significant control over the worker's access to employment with the third-party. *See Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp. 670, 694-97 (D. Md. 1979). *See also Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973). The federal courts have found that an employer could be held liable under Title VII for interference with an employment relationship between a worker and a third-party under circumstances similar to, or even less compelling than, those presented here. *See Amarnare*, 611 F. Supp. At 349; *King v. Chrysler Corp.*, 812 F. Supp. 151, 152-53 (E.D. Mo. 1993).

the investigation - and would have to be retained regardless of the status of the temporary workers. Regarding this issue, Defendant's Motion therefore must fail.

IV. CONCLUSION

For the reasons set forth above, Plaintiff EEOC respectfully requests that the Court deny Defendant's Motion For Summary Judgment regarding all issues raised therein and grant EEOC's Cross-Motion For Partial Summary Judgment regarding issues of Defendant's status as employer of the class members and the unavailability of the *Faragher/Ellerth* defense.

Respectfully submitted,

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