IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 06-00607-KD-C**
AUTOZONE, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant's Motion for Summary Judgment (Doc. 53), Plaintiff's Response in Opposition (Doc. 70), Defendant's Reply (Doc. 75), Defendant's Motion to Strike Portions of Roderick Broughton's Affidavit (Doc. 76), Plaintiff's Response to Defendant's Motion to Strike (Doc. 81), and all evidentiary materials offered in support thereof. For the reasons stated below, the Defendant's Motion to Strike and Motion for Summary Judgment are due to be **GRANTED**.

I. Factual Background and Procedural History

Charging party Mr. Roderick Broughton was previously employed by Defendant AutoZone from March 2001 to January 30, 2004, with the exception of a few months in 2001. (Doc. 53, Broughton dep. at 38, 42-53). In early November 2003, Mr. Broughton voluntarily stepped down as Store Manager of Store #164 in Mobile, Alabama to assume a position as the Commercial Specialist. (Doc. 53, Broughton dep. at 63). Mr. David Walker then assumed the

position of Store Manager. (Doc. 53, Broughton dep. at 87-88). Initially, the relationship between Mr. Broughton and Mr. Walker was amicable. (Doc. 53, Broughton dep. at 91-93). However, that apparently did not last.

During the period of early November, 2003 through January, 2004, Mr. Broughton alleges that Mr. Walker's conduct and statements towards employees and customers were racially and sexually derogatory and harassing in nature.[1] (See generally Doc. 1; Doc. 53, Broughton dep.). Initially, Mr. Broughton alleges that he approached Mr. Walker two weeks after he assumed the position of Store Manager, and attempted to help Mr. Walker by suggesting that he not use allegedly derogatory terms when speaking to the customers and employees. (Doc. 53, Broughton dep. at 111-116).

In late November 2003, Mr. Broughton claims he wrote a letter to District Manager Mr. Tommy Welch in which he made his first request for a transfer to another AutoZone store. (Doc. 53, Broughton dep. at 104-111). Mr. Broughton claims he did not have a personal conflict with Mr. Walker at that time, but rather wrote to Mr. Welch that employees and customers were offended by the alleged racial comments by Mr. Walker. (Doc. 53 at Broughton dep. at 104-111). Mr. Walker then approached Mr. Broughton regarding the letter and was upset with Mr. Broughton that he "went over his head." (Doc. 53, Broughton dep. at 118-19).

In early December 2003, Mr. Broughton claims he wrote a second letter to Mr. Welch, again requesting a transfer because of an "unsafe work environment, it was hostile, that it was racial." (Doc. 53, Broughton dep. at 104-111, 125). Apparently, no action was taken regarding

[1] The specific comments that Mr. Broughton alleges Mr. Walker made during this time period will be discussed in detail below.

these transfer requests by Defendant. (Doc. 53, Broughton dep. at 129-30). Additionally, in the second week of January, 2004, Mr. Broughton claims that he visited Mr. Antonio Smith, AutoZone's Regional Human Resources Manager, at Store #377 in Mobile. (Doc. 53, Broughton dep. at 131-32). Mr. Broughton claims he told Mr. Smith about all of the alleged comments and "harassment" by Mr. Walker. (Doc. 53, Broughton dep. at 133-35).

On January 21, 2004, Mr. Smith visited AutoZone Store #164 and took a statement from Mr. Broughton for the "harassment investigation" that he was conducting. (Defendant's Exhibit 7 to Broughton dep.; Doc. 53, Broughton dep. at 169). Mr. Broughton was terminated by Defendant on January 30, 2004. (Doc. 53, Broughton dep. at 38). Mr. Broughton filed an Equal Employment Opportunity Commission ("EEOC") charge of discrimination on June 28, 2004, alleging that he was discriminated against in violation of Title VII because he "participated in a sexual harassment investigation that involved an employee in management." (Doc. 53, Defendant's Exhibit 12 to Broughton dep.).

Plaintiff filed this Complaint on September 29, 2006 (Doc. 1), alleging that Defendant, in violation of Title VII of the Civil Rights Act of 1964, discriminated against charging party Mr. Broughton by retaliating against him after he "opposed racial and sexually discriminatory employment practices." (Doc. 1 at 1). Defendant filed a Motion for Summary Judgment, alleging that because Mr. Broughton did not engage in protected activity under Title VII prior to his termination, he cannot maintain a retaliation cause of action and AutoZone is entitled to summary judgment as a matter of law. (Docs. 53; 53-2 at 1-3). Plaintiff filed a Response in Opposition to Defendant's Motion, arguing that issues of material fact exist regarding whether Mr. Broughton engaged in protected activity, and thus precluding summary judgment. (Doc.

70). In its reply, Defendant alleges that Plaintiff's supporting affidavit of Mr. Broughton is inconsistent with his sworn deposition, but even if the Court considers it, Defendant is nevertheless entitled to summary judgment because Mr. Broughton did not engage in protected activity. (Doc. 75 at 1-5).

Defendant also filed a Motion to Strike Portions of Mr. Broughton's Affidavit that contradict his prior sworn deposition testimony, or that are not based on personal knowledge, or are hearsay. (Doc. 76). Plaintiff filed a Response in Opposition to the Motion to Strike, arguing that the affidavit of Mr. Broughton should not be considered a "sham affidavit" because it is not inconsistent with his deposition, is not hearsay, and is based on personal knowledge. (Doc. 81).

II. Applicable Standard

Summary judgment should be granted only if "there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).[2] The party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The party seeking summary judgment always bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to

---

[2] Rule 56(c) of the Federal Rules of Civil Procedure, provides that summary judgment shall be granted:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c).

interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

If the nonmoving party fails to make "a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the moving party is entitled to summary judgment. Celotex, 477 U.S. at 317. "In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determination of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 999 (11th Cir. 1992), cert denied, 507 U.S. 911, 113 S.Ct. 1259, 122 L.Ed. 2d 657 (1993) (internal citations and quotations omitted). Thus, the court's role at the summary judgment stage is not to weigh the evidence or to determine the truth of the matter, but rather to determine only whether a genuine issue exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The mere existence of any factual dispute, however, will not automatically necessitate denial of a motion for summary judgment; rather, only factual disputes that are material preclude entry of summary judgment. Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804, 809 (11th Cir. 2004), cert denied, 534 U.S. 1081, 125 S.Ct. 869, 160 L.Ed.2d 825 (2005).

The Eleventh Circuit has expressly rejected the notion that summary judgment should be seldom used in employment discrimination cases because they involve issues of motivation and intent. See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079 (11th Cir. 2004). Rather, "the summary judgment rule applies in job discrimination cases just as in other cases. No thumb is to

be placed on either side of the scale." Id. at 1086 (citation omitted).

III. Analysis

Title VII prohibits employers from retaliating against employees who "oppose" conduct made unlawful by Title VII or "participate" in a charge, investigation, or proceeding under Title VII. See 42 U.S.C.A. § 2000e-3(a) (2007); 29 U.S.C.A. § 623(d) (2007). To establish a cause of action for retaliation under Title VII, a plaintiff must prove that he or she: (1) participated in an activity protected by Title VII; (2) suffered an adverse employment action; and (3) there is a causal connection between the participation in the protected activity and the adverse employment decision. Gupta v. Fla. Board of Regents, 212 F.3d 571, 587 (11th Cir., 2000). There are two types of conduct that are statutorily protected from retaliation by employers: (1) when the employee makes a charge, testifies, assists, or participates in an investigation, proceeding, or hearing under Title VII; "the participation clause;" and (2) when the employee opposes a practice by the employer made unlawful by Title VII; "the opposition clause." 42 U.S.C.A. § 2000e-3(a); Clover v. Total System Services, Inc., 176 F.3d 1346, 1350 (11th Cir., 1999).

A. "Participation Clause"

The "participation clause" protects employees who participate in "proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." Equal Employment Opportunity Commission v. Total System Services, Inc., 221 F.3d 1171, 1174 (11th Cir., 2000). Mr. Broughton cannot bring a retaliation cause of action under the "participation clause" because no EEOC proceeding was in progress when Mr. Broughton reported and was interviewed regarding Mr. Walker's alleged

statements and conduct, nor was there an EEOC proceeding prior to Broughton's termination.[3] (Doc. 53, Defendant's Exhibit 7 to Broughton dep.; Doc. 53, Broughton dep. at 169; Doc. 53, Defendant's Exhibit 12 to Broughton dep.).

B. "Opposition Clause"

The "opposition clause" protects employees who oppose any practice by their employer made an unlawful employment practice under Title VII. 42 U.S.C.A. § 2000e-3(a); Equal Employment Opportunity Commission v. Total System Services, Inc., 221 F.3d at 1174. The employee must have a "good faith, reasonable belief that [the] employer has engaged in unlawful discrimination." Clover, 176 F.3d at 1351. The employee must show both a subjective and an objective belief under this clause. Little v. United Technologies, Carrier Transicold Division, 103 F.3d 956, 960 (11th Cir., 1997). Thus a plaintiff must show both that "he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was *objectively* reasonable in light of the facts and record presented." Id. The plaintiff does not need to prove the underlying conduct was actually unlawful to overcome a motion for summary judgment, but that his belief was objectively reasonable. Id. Further, under this objectively reasonable belief requirement, a plaintiff is charged with knowing current law and his belief is "measured against existing substantive law." Clover, 176 F.3d at 1351.

In the present case, Mr. Broughton alleges that the conduct and statements of Mr. Walker

---

[3] It appears that Plaintiff asks the Court to follow the dissenting opinion of Equal Employment Opportunity Commission v. Total System Services, Inc., 240 F.3d 899 (11th Cir., 2001), in which Circuit Judge Barkett reasoned that the "participation clause" includes an employer's internal investigations. (Doc. 70 at 15-16). The Court rejects Plaintiff's argument and refuses to improperly ignore Eleventh Circuit precedent to merely find in favor of Plaintiff's individual case.

created a racially and sexually hostile work environment, and that Defendant AutoZone was liable for such conduct. (Doc. 1 at 1-3). A violation of Title VII is established by proving that illegal discrimination created a hostile work environment. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986). In order to establish a hostile work environment claim under Title VII an employee must show: (1) that he or she belongs to a protected group; (2) that the harassment was "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment"; and (3) a basis for holding the employer liable." Gupta, 212 F.3d at 582 (citing Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir.1999)). Harassment violates Title VII "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment ." ' Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)).

In evaluating the objective reasonableness of an employee's perception that conduct is severe and pervasive enough to alter the terms and conditions of employment, the Eleventh Circuit Court of Appeals has identified the following factors that should be considered: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Mendoza, 195 F.3d at 1246. Both the Supreme Court and the Eleventh Circuit Court of Appeals have held that the severity and pervasiveness of "harassing conduct" is judged "under the totality of the circumstances."

Dar Dar v. Associated Outdoor Club, Inc., 2006 WL 3006704 at *2; 201 Fed.Appx. 718 (11th Cir., October 23, 2006) (citing Mendoza, 195 F.3d at 1246). The alleged conduct must be "extreme" and the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a general civility code." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). 1. *Racial Harassment*

Allegations of a racially hostile work environment cannot be "mere utterance[s]" of an "epithet which engenders offensive feelings in an employee" but must be so severe and pervasive as to alter the terms of employment and implicate Title VII. Harris, 510 U.S. at 21. Additionally, "the statements and conduct must be of a [racial] nature . . . before they are considered in determining whether the severe or pervasive requirement is met." Washington v. Kroger Co., 218 Fed. Appx. 822, 825 (11th Cir., 2007) (quoting Gupta, 212 F.3d at 583). In the Eleventh Circuit the standard for severe and pervasive is quite high. See e.g. Barrow v. Ga. Pacific Corp., 144 Fed. Appx. 54, 57-58 (11th Cir., 2005)[4] (events occurring over a fourteen year period including displays of the rebel flag and the letters "KKK," a noose in another employee's locker, and the use of "nigger," and "black ass" by a superintendent and a supervisor were not sufficiently severe or pervasive to alter the terms of employment); Godoy v. Habersham Co., 211 Fed. Appx. 850, 854 (11th Cir., 2006) (holding that employee's claims that supervisor told him to "' [g]o back to his boat and sail to South America[ ] where he belongs,'" subjected him to racial slurs "'almost every shift,'" and received a threatening phone call, were not extreme and did not objectively alter the terms or conditions of his employment). In Washington, an African

[4]Pursuant to Eleventh Circuit Rule 36-2, "unpublished opinions are not considered binding precedent, but may be cited as persuasive authority."

American employee claimed, among other things, that his co-worker called him names such as "boy," told him he was "nothing," and allegedly hung a plastic figurine, meant to represent the employee, with a rope. 218 Fed. Appx. at 825. In affirming summary judgment for the defendant employer, the Eleventh Circuit held that the comments, "though demeaning, were not severe or extreme. Nor were they so pervasive that they altered Washington's conditions of employment because Dean was one employee . . . who made the comments over a relatively short period of time." Id. at 825.

Plaintiff alleges that Mr. Walker displayed "racial animus toward the store's Black employees and customers" through alleged racial statements and conduct. (Doc. 70 at 2). The evidence before the Court reflects the following incidents:

First, Mr. Broughton alleges that Mr. Walker used the term "crack head" to refer to both employees and customers. (Doc. 53, Broughton dep. at 97). Second, Mr. Broughton alleges that following a disagreement with a customer, Mr. Walker stated that he (meaning Mr. Walker) was from the "wrong side of the tracks." (Doc. 53, Broughton dep. at 113-15). These two statements are the only bases Mr. Broughton alleges during his deposition, when he was given at least fifteen opportunities to expand on any other incidents of a racial nature.[5]

---

[5] Mr. Broughton was asked consistently if he remembered any other alleged racially charged or harassing statements by Mr. Walker and each time Mr. Broughton did not provide anything further: "What do you remember specifically that those employees complained to you about?" (Doc. 53, Broughton dep. at 97); "Is there anything else that you can remember specifically that Mr. Walker said to someone else that the employees complained to you about?" (Broughton dep. at 100); "What else can you remember other employees telling you about things Mr. Walker had said that they felt uncomfortable about or they didn't like?" (Broughton dep. at 101); "Do you remember anything generally that they said to you about Mr. Walker. . . ." (Broughton dep. at 101); "Is there anything else you can remember?" (Broughton dep. at 102); "If you remember something else during the deposition will you tell me?" (Broughton dep. at 102); Question: "Are you talking about the crack head line?" Answer: "*Just the crack head*

Plaintiff also provides the Court with an affidavit of Mr. Broughton (Doc. 71-2) that contains additional alleged racially offensive comments from Mr. Walker, and other reasons for Mr. Broughton's belief that Mr. Walker's conduct constituted racial harassment. In the affidavit, Mr. Broughton alleges, among other things, that Mr. Walker also attributed:

> [W]hat he described as negative behavior by some Blacks, their choice of certain cars, big automobile rims, wearing 'flashy' jewelry, to all Blacks; using the word 'ghetto' when referring to what he described as negative behaviors, customs, or preferences of Blacks; referring to a Black employee as 'ghetto,' and calling a Black employee a 'thug' because he was a young Black male who wore a Black ethnic hairstyle called 'dreadlocks.'

(Doc. 71-2, Broughton Affidavit at ¶ 7). Defendant filed a Motion to Strike Portions of Mr. Broughton's Affidavit (Doc. 76), arguing, among other things, that the portions directly contradict the unambiguous prior testimony in an "obvious effort to avoid summary judgment." (Doc. 76 at 1-2). Plaintiff filed a Response in Opposition to the Motion to Strike (Doc. 81), arguing that Mr. Broughton's affidavit did not contain any contradictions because among other things, Mr. Broughton testified during his deposition that he could not remember all alleged incidents. (Doc. 81 at 5).

---

lines, right." (Broughton dep. at 110 (emphasis added)); Question: "And what terminology are you talking about?" Answer: "About the crack head comments." (Broughton dep. at 112); "Do you remember him referring to anything else other than the crack head line?" (Broughton dep. at 115); "Aside from you discussion with him where he said he didn't mean anything about the crack head comment, tell me everything you remember that happened between the time of the first letter and the second letter that made you think he had some sort of animosity towards you." (Broughton dep. at 118). "And the comments, you're talking about the crack head comments?" (Broughton dep. at 125); "Anything else comment-wise that you believe were related to race?" (Broughton dep. at 126); "And if you remember something during this deposition please tell me." (Broughton dep. at 126); "Now, you said something about the way he was treating us. What do you mean by that? Well, tell me exactly what you said in the letter." (Broughton dep. at 126); Question: "And racial terminology, are you referring to anything other than crack head?" Answer: "*No.*" (Broughton dep. at 180 (emphasis added)).

A district court may disregard an affidavit that is submitted solely for the purpose of opposing a motion for summary judgment and is directly contradicted by prior deposition testimony. McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1240 n. 7 (11th Cir., 2003). "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." Van T. Junkins and Associates, Inc. v. U.S. Industries, Inc., 736 F.2d 656, 657 (11th Cir., 1984); See also Clay v. Equifax, Inc., 762 F.2d 952, 955 n.3 (11th Cir., 1985); Tippens v. Celotex Corp., 805 F.2d 949, 953-54 (11th Cir., 1986); Fisher v. Ciba Specialty Chemicals Corp., 238 F.R.D. 273, 283-85 (S.D. Ala., 2006). In Van T. Junkins, "the fact that there was no condition attached to his purchasing the building was made crystal clear in three places in the deposition." 736 F.2d at 657. However, in his affidavit, Junkins stated that a condition did exist involving an application for a dealership. Id. The Eleventh Circuit Court of Appeals held that this affidavit contradicted the prior deposition testimony without any valid explanation, and thus the district court could disregard the affidavit as a "sham". Id. at 657-59.

As illustrated above, Mr. Broughton was given numerous opportunities to recall alleged racially offensive comments made by Mr. Walker. The additional comments that Mr. Broughton now alleges in his affidavit were never mentioned in his deposition or in any statement given to Mr. Smith during the internal investigation. (Doc. 53, Defendant's Exhibits 7, 8 to Broughton dep.). Even if Mr. Broughton could not remember all alleged racially offensive comments by Mr. Walker, as Plaintiff argues, Mr. Broughton's memory would presumably be most clear in 2004, at the time he gave statements to Mr. Smith. Additionally, Mr. Broughton testified in his

sworn deposition that he "didn't take it personally" when Mr. Walker asked him why "y'all put those big old wheels on those cars with those little tires?" (Doc. 53, Broughton dep. at 197-98). In direct contradiction to this testimony, Mr. Broughton alleges in his affidavit that he considered Mr. Walker's "attributing what he described as negative behavior by some Blacks, their choice of certain cars, big automobile rims. . . to all Blacks," racially offensive. (Doc. 71-2 at ¶ 7).[6]

Accordingly, the Court finds that the affidavit of Mr. Broughton filed by Plaintiff contradicts his prior sworn deposition testimony without any valid explanation. The affidavit of Mr. Broughton is therefore **STRICKEN** and will not be considered in this motion for summary judgment.

Returning to the two alleged comments by Mr. Walker of "crack head" and from "the wrong side of the tracks," while they may be "offensive utterances" to Mr. Broughton, they do not appear to have unreasonably interfered with Mr. Broughton's job performance or with the job performance of other employees. When compared to Eleventh Circuit precedent, these two alleged comments are not severe. Additionally, these comments were only allegedly made by Mr. Walker over a short period of time. See Washington, 218 Fed. Appx. at 825. Not only are the comments not severe and pervasive enough to support a hostile work environment claim, Mr. Broughton's belief that they were is not objectively reasonable in light of the facts and

[6] The Court also notes that in its pleadings, Plaintiff provides the Court with what appears to be incorrect citations and references. For example, on page one of Plaintiff's Response in Opposition to the Motion for Summary Judgment, Plaintiff alleges that Mr. Walker "regularly used the term 'nigger'" and refers the Court to the deposition of Mr. Walker. (Doc. 70 at 1). However, Mr. Walker testified in his deposition that "It's not a common - - commonly used word. I hardly ever say it." (Doc. 80, Walker dep. at 53).

record presented.

2. *Sexual Harassment*

Whether the conduct is sufficiently severe or pervasive is the requirement that "tests the mettle of most sexual harassment claims." Gupta, 212 F.3d at 583. It is well settled in this circuit that not all allegedly derogatory or harassing behavior constitutes actionable sexual harassment. See Gillis v. Georgia Dept. of Corrections, 400 F.3d 883, 888 (11th Cir.2005) (recognizing that Title VII is "neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace"). Although the conduct opposed need not "actually be sexual harassment . . . it must be close enough to support an objectively reasonable belief that it is." Clover, 176 F.3d at 1351 (holding that the alleged conduct of making frequent visits without any "business purpose," calls on personal beepers, and frequently asking an employee into the hall to talk, "*misses the mark by a country mile*." (emphasis added)); See also Henderson v. Waffle House, Inc., 2007 WL 1841103, *4 (11th Cir., June 28, 2007) (affirming summary judgment because alleged comments by a co-worker such as calling the plaintiff "Dolly," laughingly telling the plaintiff while looking at her new shirt "you just look like you're going to burst," telling the plaintiff they did not make aprons "big enough for people with boobs" like hers, telling the plaintiff not to stand to close to him because it made him nervous and "told her he would get in trouble if he said why," and pulling the plaintiff's hair and telling her it was greasy, were "insufficient to create a genuine issue of material fact as to whether harassment was sufficiently severe or pervasive so as to alter the terms and conditions of employment.").

In Mendoza, the alleged harasser told plaintiff that he was "getting fired up," rubbed his

hip against the plaintiff's hip while touching her shoulder and smiling, twice made a sniffing sound while looking at the plaintiff's groin area and once made a sniffing sound without looking at her groin, and constantly followed and stared at plaintiff in a "very obvious fashion." 195 F.3d at 1247. Similarly, in Gupta, the alleged harasser suggested lunch at Hooters, told the plaintiff that she was "looking very beautiful," called the plaintiff at her home, unbuckled his pants and tucked in his shirt in front of her, stared at her twice, touched her ring and kept asking her to lunch, placed his hand on her knee, and touched the hem of her dress. 212 F.3d at 584-86. In each of these cases the Eleventh Circuit concluded that the allegations were insufficient to state a prima facie case of harassment. Specifically, the court determined that the conduct about which the plaintiffs complained was not severe and pervasive such that it altered the terms and conditions of employment.

As an additional example of the standard in the Eleventh Circuit to be met for legally actionable sexual harassment, in Mitchell v. Pope, 189 Fed. Appx. 911 (11th Cir., 2006) the plaintiff alleged:

> Plaintiff contends that Overbey: (1) tried to kiss her after the 1999 Sheriff's Department Christmas party and called her a "frigid bitch" when she refused, (2) showed up at places Plaintiff was "staking out" in December 1999 and told her "you must be working out" and "you sure do look fine," (3) appeared several times in her driveway in January 2000, once drunk, when he told Plaintiff's son that he loved Plaintiff, (4) suggested she wear certain jeans and commented "your ass sure does look fine," (5) told her "you can just walk into the room and I'd get an erection," (6) stood on his tiptoes to look down her shirt, (7) rubbed up against her, whispered in her ear, and put his arm across her chest, (8) chased her around the CID office, (9) once picked her up over his head in the CID office, (10) asked her over the Sheriff's Department telephones if she was dressed or naked, (11) opened the door to the women's bathroom and turned the lights off and on when Plaintiff was inside, (12) simulated "humping" another female employee with that employee's consent, (13) made sexually derogatory remarks and gestures about a female magistrate judge, and (14) referred to Sheriff Pope as a "big eared pencil dick motherfucker." In March 2000, Plaintiff and Overbey attended a conference

> in Alabama. Overbey told Plaintiff that the hotel had made a mistake and that they would have to share a room. Overbey slept on the floor. The next night, after Overbey got his own room, he tried to convince Plaintiff to go to the hotel hot tub with him and other conventioneers. He called her a "frigid bitch" when she refused; when she confronted him the next morning and threatened to tell the Sheriff if Overbey did not leave the conference, Overbey cried, promised he would be "good," and left. And Plaintiff explained that, in June 2002, before she was scheduled to work security at a private golf tournament given by a strip club owner, Overbey told her and other officers about another golf tournament hosted by this owner where strippers acted as caddies. Overbey said that the owner directed the strippers to place golf balls into their vaginas and to squirt them onto the green.

Id. at 914, n. 3 In concluding that plaintiff failed to present a prima facie case of hostile environment sexual harassment the Court opined, in part:

> Although Overbey's reprehensible behavior only can be described as crass and juvenile, we accept that this behavior-given its relative infrequency-is not the kind of "severe" harassment necessary for liability to attach under Title VII. Overbey's conduct is more comparable to the conduct in Gupta v. Florida Bd. of Regents, 212 F.3d 571, 584-86 (11th Cir. 2000), and in Mendoza, 195 F.3d at 1247, which we concluded was not objectively severe or pervasive. And no evidence exists that Overbey's behavior unreasonably interfered with Plaintiff's job performance. To the contrary, the evidence indicates that Plaintiff's health problems were the greatest hindrance to her job performance and led to her ultimate confrontation with Pope and her subsequent resignation. In short, Plaintiff has not shown a claim of actionable hostile work environment under Title VII.

Id.

Here, Mr. Broughton alleges the following sexually harassing statements made by Mr. Walker: (1) In early November, 2003, Mr. Walker allegedly told Mr. Broughton (not the female employee) that Mr. Walker knew that Mr. Broughton hired female employee Adreia Locke "because she has nice breasts." (Doc. 53, Broughton dep. at 172; Doc. 53, Defendant's Exhibit 7 to Broughton dep.); (2) The week before Christmas 2003, Mr. Walker allegedly observed female

employee Erika Freeman bend over and stated "Wo! Looks like, a big head of cabbage." (Doc. 53, Defendant's Exhibit 7 to Broughton dep.; Doc. 53, Broughton dep. at 175); and (3) Mr. Broughton alleges that although he did not hear the statement, but rather Ms. Freeman reported it to him, Mr. Walker told Ms. Freeman, "I bet you wear sexy panties." (Doc. 53, Defendant's Exhibit 7 to Broughton dep.; Doc. 53, Broughton dep. at 177-78).

These comments would be categorized as "offhand comments" and "isolated incidents" that do "not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher, 524 U.S. at 788. Thus, while these comments may be offensive to some, when compared to Eleventh Circuit precedent, the inevitable conclusion is that these comments are not "close enough" to support an objectively reasonable belief that they constitute sexual harassment.

IV. Conclusion

Mr. Broughton has not shown that he possessed an objectively reasonable belief, measured against existing substantive law, that Defendant violated Title VII through an alleged racially and sexually discriminatory hostile work environment[7]. Thus, Mr. Broughton cannot show that he engaged in protected activity in order to sustain a retaliation cause of action against Defendant. Accordingly, Defendant's Motion for Summary Judgment is **GRANTED** and Defendant is entitled to judgment as a matter of law.

DONE this the 30th day of October, 2007.

[7] Because the Court ultimately finds that Mr. Broughton did not possess the requisite objective belief that AutoZone violated Title VII and therefore cannot survive the Motion for Summary Judgment, the Court need not address whether Mr. Broughton possessed the requisite subjective, good faith belief.

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE