IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v. Case No. 3:02cv403/LAC

CENTENNIAL IMPORTS, INC.,

Defendant.
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ORDER DENYING SUMMARY JUDGMENT

Pending before the Court are six separate motions for summary judgment and documents in support thereof (docs. 48-69) filed by Defendant. Plaintiff timely filed memoranda and evidentiary materials in opposition (docs. 77-83). The Court has taken summary judgment under advisement (doc. 70) and is now prepared to rule on Defendant's motions. For the reasons stated below, Defendant's motions for summary judgment are denied.

I. BACKGROUND

This cause of action was raised under Title VII by the United States Equal Employment Opportunity Commission (EEOC) against Defendant Centennial Imports, Inc. (Centennial), an automobile dealership. The EEOC claims that the five individual African-American claimants it represents, Willie D. Thomas, Oscar McAroy III, Stanley Olds, Alton Lee, and Frederick Cannon, were each subjected to racial harassment while employed in Centennial's detail shop.

The following facts are presented in a light most favorable to the EEOC and its claimants. The EEOC's allegations center upon the actions of Ron White, who also worked in the detail shop and, depending upon the viewpoints of the parties, may or may not have been a supervisor over the claimants. Particularly during the summer of 2000, White is alleged by each of the claimants to have engaged in a daily pattern of racial remarks to each of them while at the detail shop. White frequently used epithets such as "nigger", "grape ape", "spook" and "bush baby" when addressing or talking about one of the claimants and frequently told jokes disparaging blacks. Some of White's comments were of a threatening nature, such as his comment that the nearby Blackwater River was so named because there were dead black persons at the bottom of the riverbed and that the Ku Klux Klan still recruits in the nearby town of Milton. More directly, White told Olds that he wanted to take him hunting or fishing, kill him and then claim it was an accident; White later told both Lee and Cannon that he had made this comment to Olds. White also suggested to Lee that he would

be subjected to racial violence if he were to be found in Milton after dark, and he mentioned to Cannon that he had a gun in his car which he would use if anyone gave him trouble. White made a specific threat regarding McAroy that he "would not hesitate to put a bullet in his crybaby nigger ass" (doc. 83 at 33) and later repeated that statement to Thomas.

Moreover, on a few occasions during the summer of 2000, each of the claimants observed White openly fashioning a noose from a piece of rope in the detail shop. On one occasion, White walked around Olds with a noose while Olds was washing a car, and on another, White stood behind Lee and waved a noose while Lee was talking with Olds. On still another occasion, White ran behind Cannon attempting to put a noose around his neck, telling Cannon he wanted to see how long it took before he turned red. Finally, on September 20, 2000, after White had hung a noose in Olds' work area in the shop, Olds and Lee reported the incident to the Escambia Pensacola Human Relations Commission, and an investigation was commenced. When Centennial learned of the investigation and the reasons behind it, White was swiftly terminated. White admitted that he was a racist and verified that he had made racial comments and played with a noose at the shop. Other employees at the shop corroborated some of the incidents.

Well before the official investigation commenced, management at Centennial had been informed about White's behavior. As far back as 1998, McAroy had informed General Manager John Mobley[1] regarding White's use of racial comments, and during 1999 Thomas

[1] It was Centennial's policy for employees to report acts of harassment to a supervisor, and Centennial does not contend that it was inappropriate for the claimants to have met with the

had regularly complained to Service Manager William Evans regarding White's racist behavior, and specifically a statement from White regarding blacks being at the bottom of the Blackwater River. In April or May of 2000, Thomas again met with Evans, this time with McAroy and two other employees present, to discuss White's continued racial slurs and unfair work practices, and the two other employees stated their opinion that White was a racist. After White's threatening remark in July of 2000 about shooting McAroy, Thomas and McAroy again met with Evans about the incident. Evans allegedly responded that he would speak with White and take care of the matter. McAroy had commented numerous times to Office Manager Karen Box regarding racial matters in the shop. After the incident in which White waved a noose behind Lee, Olds reported to Evans that White was playing with "a rope" and making racial comments, and Evans said he would look into the matter. On another occasion in which White was playing with a noose, Olds similarly complained, and on yet another occasion while White was fixing a noose in Evans' presence, and Evans walked away. Additionally, V. Freeman, a Caucasian coworker, complained twice to Evans about White tying a noose in the detail shop, and K. Freeman complained once to Evans about White's racial comments. Shortly before the September 20 noose-hanging incident which resulted in White's firing, McAroy and Thomas had met with Box because McAroy was upset over the lack of respect he was receiving in the detail shop. In the face of these numerous meetings with supervisory staff, none of the claimants or other employees report

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supervisors mentioned herein.

any sort of tangible action having been taken to remedy the situation, and White's racial harassment continued until his firing.

II. MOTION TO STRIKE

As a preliminary matter, Centennial moves to strike portions of the statements of fact and the related deposition excerpts (doc. 94) filed by the EEOC in response to the summary judgment motion. The EEOC has responded (doc. 101). First, Centennial contends that the EEOC failed to comply with Local Rule 56.1(A), ostensibly the provision requiring that each statement of fact reference the particular deposition, affidavit or other evidence from which it draws its source, "sufficient to permit the court to readily locate and check the source." Centennial identifies several instances where no citation to the record accompanies a particular statement of fact. In many of these instances, however, the EEOC had identified the source in its response to the summary judgment motion, and Plaintiff otherwise provides the pinpoint citations in the response to the motion to strike. Although the Court expresses chagrin at the EEOC's repeated "inadvertent" omissions in the statement of facts, nonetheless, the record is now satisfactory.

Centennial also contends that some of the statements of fact should be stricken because counsel's representations of the related deposition testimony are misleading or based upon leading questions posed during the depositions. Regardless of the merit of Centennial's arguments as to each contested statement of fact, the Court finds no basis for striking the

testimony. Rather, Centennial's assertions amount more to argument regarding the meaning or the inferences to be drawn from the testimony.[2] In this regard, Centennial's motion more resembles a reply memorandum than a motion to strike.[3]

Finally, Centennial asserts that some of the EEOC's statements of fact are based upon inadmissible hearsay and therefore should not be considered during summary judgment review. A statement that is inadmissible hearsay may be considered on a motion for summary judgment only if it is capable of being later submitted at trial in admissible form. *See Macuba v. Deboer*, 193 F.3d 1316, 1322-24 (11th Cir. 1999); *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996), *aff'd on other grounds*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997).

Statements regarding employment matters made during the course of an employment relationship may be excepted from the definition of hearsay. *See Zaben v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1456 (11th Cir. 1997) (citing Fed.R.Evid. 801(c)). Equally, such statements may be excepted if they constitute direct evidence of discrimination. *Id.* (citing *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir.1989)). In hostile work environment claims in particular, statements directed at those other than the plaintiff may be admitted if relevant to the general perception that a hostile environment existed. *See*

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[2] The Court notes that counsel for the EEOC in one instance has admitted to representing that a certain deposition statement concerned, among other things, racial slurs when it in fact did not. Counsel for the EEOC has therefore withdrawn that particular assertion. Doc. 101 at 27.

[3] Furthermore, Local Rule 7.1(c)(2) requires that leave of Court be obtained before a reply memorandum may be filed.

McCowan v. All Star Maintenance, Inc., 273 F.3d 917, 925-26 (10th Cir. 2001); *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 n.3 (8th Cir. 1999); *Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997); *Hudson v. Norfolk Southern Ry. Co.*, 209 F. Supp.2d 1301, 1326-27 (N.D. Ga. 2001); *see also*, *Vance v. Southern Bell Tel.*, 863 F.2d 1503, 1511 & n.5 (11th Cir. 1989), *overruled on other grounds*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

Centennial largely complains about deposition statements made by the claimants regarding what other claimants or other employees had told them regarding racial comments or actions made by Ronald White. Although these statements could amount to double hearsay, they meet the exceptions stated above because they are statements against interest and because they are verbal acts denoting a hostile work environment. Additionally, the hearsay nature of many of these statements may be later cured at trial through more direct examination of the declarants. Therefore, the Court finds as a whole that these statements are admissible at this stage of the proceedings.

III. MOTION FOR SUMMARY JUDGMENT

A. Standard

Summary judgment is appropriate where "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 a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317,

322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). "[T]he substantive law will identify which facts are material" and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A genuine issue exists only if sufficient evidence is presented favoring the nonmoving party for a jury to return a verdict for that party. *See id.* at 249, 106 S. Ct. at 2510–11; *see also Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993) (finding that a court must view all the evidence, and all factual inferences reasonably drawn from the evidence, "in the light most favorable to the non-moving party" when determining whether a genuine issue exists).

The party moving for summary judgment bears the initial burden "of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). Only when the moving party has discharged this initial burden does the burden shift to the nonmoving party to demonstrate there is a genuine issue of material fact precluding summary judgment. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160–61, 90 S. Ct. 1598, 1610, 26 L. Ed. 2d 142 (1970); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). If the nonmoving party satisfies its burden of production and creates a genuine issue of material fact, then summary judgment must be denied. *See* FED. R. CIV. P. 56(c).

B. Discussion

As the Eleventh Circuit has held:

> Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. S 2000e- 2(a)(1). A hostile work environment claim under Title VII is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). This court has repeatedly instructed that a plaintiff wishing to establish a hostile work environment claim show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as [race]; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability.

Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

SEVERITY

Centennial first contends, under the fourth element of proof identified above, that the alleged harassment of each of the claimants was not severe enough to constitute a Title VII violation. The Court readily rejects this argument. The racial epithets alone, allegedly spoken on a daily basis and laced with intimidation and physical threats, were sufficient to meet the Title VII threshold. *See Miller*, 277 F.3d at 1276-77; *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-59 (11th Cir. 1982). Even if one or more of the claimants did not receive the brunt of the comments or threats (and the Court does not so find), it is enough

that the comments were made in their presence or in such a manner that they would readily learn of them. *See Walker*, 684 F.2d at 1359 n.2. The Court notes significant "overlap" in this case as each of the claimants either witnessed or appeared well aware of the abuse being levied upon the others, and at times more than one of the claimant would meet with one of the supervisors to discuss the harassment. Moreover, the frequency of events notwithstanding, the "noose" incidents alone were of such severity to meet the standard, and again, all the claimants to varying degrees witnessed White's behavior in this regard. *See Vance v. Southern Bell Tel.*, 863 F.2d 1503, 1510-11 (11th Cir. 1989), *overruled on other grounds*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

Centennial appears to contend that the claimants did not subjectively[4] perceive the harassment as severe because there was no evidence of injury such as missed work or psychological troubles. Even though the Court finds some evidence of this type of injury, none is necessary. As the Supreme Court has explained,

> Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work

[4] In order to meet the fourth prong of the Title VII harassment standard, the harassment must result in an environment that is objectively severe, and it must be perceived by the victim to be abusive. *See Miller*, 277 F.3d at 1276; *Johnson v. Booker T. Washington Broadcasting Serv., Inc.*, 234 F. 3d 501, 509 (11th Cir. 2000). In this regard, Centennial is seen to attack the subjective portion.

> environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.
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> . . .
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> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris, 510 U.S. at 22-23, 114 S.Ct. 367, 370-71 (citations omitted). After examining all these factors as they relate to the facts of this case, the Court concludes that each claimant found the detail shop environment to be severely abusive.

NOTICE

Centennial next challenges whether it received adequate notice of the harassment such that it should be found liable. In this regard, the parties disagree whether White should be considered a supervisor; the Court, however, does not find this distinction to be determinative. It is true that, if the harassment is conducted by a supervisor and results in tangible employment action such as termination or some other significant change in the terms of employment, then the employer is strictly liable. *See Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1296-97(11th Cir. 2000). However, it is not alleged in this case that the harassment resulted in any tangible employment action. Centennial may therefore assert its affirmative defense that 1) the claimants failed to follow its promulgated procedures for reporting harassment and 2) it acted reasonably to prevent or correct any harassment. *See id.*

On the other hand, if White is simply a coworker, the EEOC must show that Centennial had notice and failed "to take immediate and appropriate corrective action." *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003). Furthermore:

> Actual notice is established by proof that management knew of the harassment. When an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment and the complaining employee follows those procedures, actual notice is established.

Id. (citation omitted).

The Court finds these standards quite similar and in any event finds that the EEOC has met its burden under each of them. As detailed above, notice was clearly provided to management at the dealership, as was the lack of tangible action taken in response. In fact, Centennial does not assert lack of notice in relation to claimants McAroy and Thomas but only the remaining three. Centennial evidently considers that each claimant must provide his own notice in order to perfect his claim, but this is not the case. Notice of harassment need not come directly from the victim, and in fact notice of harassment to someone other than the victim can be sufficient so long as the harassment is closely related to the victim's own. *See Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 402 (1st Cir. 2002); *Sims v. Health Midwest Physician Servs. Corp.*, 196 F.3d 915, 921 (8th Cir. 1999); *Davis v. U.S. Postal Service*, 142 F.3d 1334, 1342 (10th Cir. 1998); *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 783-84 (10th Cir. 1995). This is especially true in this case because of the clear "overlap" of harassment, knowledge among the claimants that one of them had met with management, and the overall sense that the claimants as a group were being harassed. What

is important is that Centennial received sufficient notice to require it to act, not any piecemeal findings regarding each claimant's individual efforts concerning each incident or circumstance.

Moreover, the EEOC has provided sufficient evidence to controvert that Centennial's anti-harassment policy was effectively implemented. An employer's failure to investigate and reasonably act to rectify harassment renders its policy ineffective, and the employer is therefore liable for any harassment pervasive enough to confer constructive knowledge upon it. *See Watson*, 324 F.3d at 1260-61 (citing *Farley v. American Cast Iron Pipe*, 115 F.3d 1548, 1553-54 (11th Cir. 1997)). In this case it is abundantly clear that the claimants' notification bore little or no tangible result; while White was terminated, it was only after the claimants sought the help of an outside agency.

CONCILIATION

Finally, Centennial contends that summary judgment in its favor should be granted because of the EEOC's failure in its statutory duty to fairly attempt to conciliate this matter before filing suit. As stated by the Eleventh Circuit:

> To satisfy the statutory requirement of conciliation, the EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer. *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). In evaluating whether the EEOC has adequately fulfilled this statutory requirement, "the fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances." *Id*.

E.E.O.C. v. Asplundh Tree Expert Co., 340 F.3d 1256, 1259 (11th Cir. 2003).

The parties contest nearly every factual issue relating to this motion. Centennial contends that the EEOC conducted its on-site investigation of Centennial in an intimidating fashion and did not allow Centennial sufficient time to answer to the charges before issuing its Letters of Determination finding reasonable cause for Title VII violations. The EEOC denies that it took any intimidating actions during the investigation. During the conciliation process, EEOC sent a proposed Conciliation Agreement to Centennial, the terms of which included a $35,000 payment to each of the claimants and a provision that Centennial participate in a news media conference regarding the case. Centennial counter-offered that it would pay each claimant $1,000 and that it did not wish to participate in any news conference. The EEOC rejected the counter-offer but allegedly agreed to strike the news conference requirement from the agreement; thus, according to the EEOC, the only remaining hurdle to settlement was the disparity in the payment award, which it saw as significant. Centennial disagrees, contending that the EEOC never backed off on the news conference issue, which from Centennial's viewpoint was a pivotal issue that precluded it from further negotiating the monetary issue. According to Centennial, the EEOC refused to budge from its $35,000 demand and then unilaterally terminated the conciliation while Centennial was still actively pursuing negotiations. However, the EEOC contends that Centennial was unwilling to increase its $1,000 offer, resulting in the EEOC's declaration that conciliation would cease, which was done with Centennial's knowledge and assent. While Centennial claims it was never informed of the factual information underlying the

EEOC's $35,000 demand, the EEOC states that it fully informed Centennial of the relevant facts.

The EEOC's alleged failure to fairly conciliate does not meet the standard set out in *Asplundh Tree*, which presented a more compelling case against the EEOC. In *Asplundh Tree*, the court found that the EEOC 1) did not provide the defendant with sufficient time to respond to the conciliation proposal before filing suit; 2) refused to confer with defendant's counsel during conciliation; 3) failed to identify for defendant a legal theory under which it may be held liable, in a situation in which the defendant likely had no inkling that it would be charged; and 4) demanded a remedy that was national and far-reaching in scope, and demanded one form of relief that was impossible for the defendant to provide. *Id*.at 1260-61. The court thus concluded that the EEOC had set up a *fait accompli* situation where conciliation was doomed to fail. By contrast, none of the facts in the case at bar suggest the sort of egregious conduct present in *Asplundh Tree*, especially when viewed under summary judgment review in a light most favorable to the EEOC, nor is there present the sense that conciliation was doomed from the start. Rather, the instant facts suggest only that the parties reached an impasse in the details of the agreement, perhaps hastily and with the attendant stubbornness on both sides.

Since each party champions its own willingness to flexibly negotiate a settlement in this case but accuses the other side of being too rigid, it would seem that this case is ripe for a successful mediation. It is therefore ironic, and some cause for consternation by the Court,

that the parties mutually agreed and successfully moved that mediation should be postponed in this case until after the Court ruled upon the instant summary judgment motions. *See* doc. 21 at 3. Nonetheless, the Court will by separate order direct the parties to commence mediation.

IV. SUMMARY

The Court's ruling in this matter may be summarized as follows, and IT IS HEREBY ORDERED:

1. Defendant's motions to strike (docs. 90, 92, 94) are **DENIED.**

2. Defendant's motions for summary judgment (docs. 48, 51, 54, 57, 60, 67) are **DENIED.**

ORDERED on this 21st day of July, 2004.

s/*L.A. Collier*
Lacey A. Collier
Senior United States District Judge