**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**TEXARKANA DIVISION**

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| **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,** | § | |
| | § | |
| **Plaintiff,** | § | |
| | § | **CIVIL ACTION NO. 5:05-CV-180** |
| **v.** | § | |
| | § | |
| **VALOR TELECOMMUNICATIONS OF TEXAS, L.P.,** | § | |
| | § | |
| **Defendant.** | § | |

**ORDER**

Before the Court is the Plaintiff's Motion in Limine (Doc. No. 47). Also before the Court is Defendant's Motion in Limine (Doc. No. 46). These matters came to be heard before the Court on November 6, 2006. After considering the parties' arguments and briefing the Court denies the defendant's motion in limine with respect to the issues of Mr. Brady's derogatory race and gender related statements as well as the defendant's job posting for an Area Manager position in its New Mexico Division. The Court grants the parties' motions in limine in all other respects.

In paragraph 4(d) of its motion in limine, the defendant moves the court to exclude, pending a favorable ruling by the Court at a later date, any reference that "would be an impermissible attempt to inject inadmissable character evidence into the case." Doc. No. 46 at 3. Within its request, the defendant specifically notes that "[c]omments by a supervisor toward third parties who were not the alleged object of the discriminatory animus are inadmissible to show such a discriminatory animus against the plaintiff." *See id.* The plaintiffs, however, has made the Court aware of their desire to mention such matters to the jury during voir dire. The defendant urges the Court to grant its motion and preclude any mention to the jury.

In support of its position, the defendant draws the Court's attention to *Palasota v. Haggar*

*Clothing Co.*, which states, "[a]fter *Reeves* . . . so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent." *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 578 (5th Cir. 2003). Relying on this statement, the defendant argues that Mr. Brady's remarks in this case are merely "stray remarks" which are not probative because there is no other evidence of pretext. However, Mr. Brady's remarks are probative in this case, and the Court finds the plaintiff may properly comment on these remarks. First, *Palasota* itself explicitly explains that the "stray remark doctrine" is now applied more cautiously following the Supreme Court's *Reeve* decision. *See id*. at 578. Further, the stray remark doctrine is less likely to apply in this case given the Fifth Circuit's express assertion that "[w]hen a person or persons with decision making authority evinces racial animus that may constitute direct evidence of discrimination." *Jones v. Robinson Property Group, L.P.*, 427 F.3d 987, 993 (5th Cir. 2005). *Jones* and other cases making the same finding are informative in the present case because several of the defendants' employees allegedly used racial epithets. By contrast, the authority relied on by the defendant involves age-related remarks. *See Palasota*, 342 F.3d at 577. This distinction is important because Fifth Circuit case law is clear that racially derogatory terms may be direct evidence of racial discrimination. *See Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858, 862 (5th Cir. 1993) (citing, for the same proposition, *EEOC v. Alton Packaging Corp.*, 901 F.2d 920 (11th Cir. 1990); *Brewer v. Muscle Shoals Bd. of Educ.*, 790 F.2d 1515 (11th Cir. 1986); *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985)). Given the case law on this subject, and that the remarks in this case were not confined to merely one or two discrete incidents, the Court cannot accept the defendant's argument that Mr. Brady's remarks are merely "stray remarks" that do not reflect any probative view point. Thus, the Court ORDERS that paragraph 4(d) of the defendant's motion in limine is DENIED.

The second issue now before the Court involves the mention of job postings by the defendant for an Area Manager position in its New Mexico Division. While no portion of the defendant's

motion expressly seeks to exclude comment on this topic during voir dire, the plaintiff has made the Court aware of its desire to do so. The defendant, however, argues that the job posting is inadmissable because it involved a position which differed from the one in this case. The defendant argues that while the New Mexico Division position did require an associate college degree, the Texarkana Area Manager position did not. On the other hand the plaintiff responds that the posting is relevant to show that the required qualifications for the job were lowered by the defendant in order to hire a white male. The Court finds that the parties' arguments relating to the job postings focus on the credibility of the evidence, not the admissibility. It is clear that credibility determination is a function of the jury, not the judge. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). As a result, the Court denies the defendant's motion with regard to its New Mexico Division job posting. The Court ORDERS the defendant's motion in limine, to whatever extent it includes this matter, is DENIED.

In all other respect, the Court ORDERS that the parties' respective motions in limine are GRANTED. The parties are ORDERED not to mention nor bring before the jury, either directly, indirectly, upon voir dire, or during presentation of the case or argument, any matters set forth in the motions unless such matter is first called to the Court's attention out of the presence of the jury and a final ruling in favor of the party is obtained. Counsel for both parties are instructed to inform all witnesses not to mention or otherwise disclose to the jury any matter covered by this order. It is so ORDERED.

**SIGNED this 7th day of November, 2006.**

DAVID FOLSOM
UNITED STATES DISTRICT JUDGE