UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

Chapter 11

Metro Affiliates, Inc., et al.

Case No. 02-42560(PCB)

Debtors.

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Objection to Claim No. 987,
Patricia Brown

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APPEARANCES:

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With copy to:

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MEMORANDUM DECISION GRANTING DEBTOR'S MOTION FOR SUMMARY JUDGMENT EXPUNGING CLAIM NO. 987 AND DENYING CLAIMANT'S MOTION FOR ADDITIONAL DISCOVERY

Amboy Bus Co. (the "Debtor"), one of the debtors (collectively the "Debtors") in these consolidated Chapter 11 cases, objected to the allowance of the claim of Patricia Brown ("Brown"), Claim No. 987 (the "Claim"), and has moved for summary judgment disallowing the Claim. Brown has opposed the motion for summary judgment and has also moved for additional discovery. Based on the findings of fact and conclusions of law which follow, the Court grants the motion of the Debtor and denies Brown's motion.

Statement of Facts[1]

1. The Debtors, approximately 160 corporations in all, filed petitions for reorganization under Chapter 11 of the Bankruptcy Code (the "Code")[2] on August 16, 2002. The Debtors are one of the largest providers of school bus transportation in the United States, servicing one hundred and forty nine school districts in nine states. The Debtors operate seventy-three facilities, with a fleet of approximately 6,800 vehicles. Schlenker Aff. at 21.[3] The Debtors employed over 8,500 people including 6,600 drivers nationally at the time the petitions were filed. Schlenker Aff. at ¶ 23.

[1] Both the Debtor and Brown filed a Statement of Material Facts ("D/SMF" and "C/SMF" respectively) as required by Local Bankruptcy Rule 7056-1. The Statement of Facts in this decision includes the pertinent portions of the D/SMF and C/SMF as well as certain additional facts.

[2] All references to the Code are to the Code as in effect prior to the amendments made effective to cases filed on and after October 17, 2005.

[3] The affidavit of Nathan Schlenker (the "Schlenker Affidavit") was submitted at the beginning of the Chapter 11 proceedings as required by Local Rule 1007-2. It contains the background facts of which this court is taking judicial notice. See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991), cert. denied , 503 U.S. (1992).

2 . The particular Debtor which employed Brown as a driver pre-petition provides school bus transportation services principally to the New York City Board of Education. The seventeen contracts with the New York City Board of Education accounted for approximately thirty-four percent of all of the Debtors' total annual revenue. Schlenker Aff. at ¶ 18-19.

3. Brown's employment with the Debtor began when she was hired as a bus driver on October 13, 1998. C/SMF ¶ 2-3. She was terminated pre-petition on March 22, 2000. C/SMF ¶ 3. Shortly after her termination and on March 27, 2000, Brown filed an unfair labor practice claim with the National Relations Board (the "NLRB") alleging harassment and retaliatory discharge. Brown Dep., Ex. 4. The NLRB found insufficient evidence of a violation and dismissed her claim. Id.

4. Thereafter, Brown filed a discrimination charge with the New York State Division of Human Rights on April 24, 2000, claiming that the Debtor denied her equal terms, privileges and conditions of employment based on her race and sex. Brown Dep., Def. Ex. 2. The New York State Division of Human Rights found no probable cause to believe the Debtor discriminated against Brown. Her charge was dismissed. Brown Dep., Def. Ex. 3.[4]

5. About a year later, but over a year before these cases were filed, Brown filed a *pro se* lawsuit against the Debtor in the Federal District Court for the Eastern District of New York on June 7, 2001. See Brown v. Amboy Bus Co., 2001 CV 4764 (ERK)(LB) (the

[4] Brown also filed a complaint with the United States Department of Labor for the failure of the Debtor to pay her overtime in violation of the Fair Labor Standards Act (the "FSLA"). The Department of Labor found that the Debtor had not violated the FSLA with respect to overtime pay. Brown Dep., Def. Ex. 5. Overtime pay is not at issue in this case.

"Federal Case"). Her complaint in the Federal Case asserted discrimination based on race and sex as an African-American female under Title VII of the Civil Rights Act of 1964. The Debtor deposed Brown in the Federal Case pre-petition.[5] Certain other discovery also occurred.

6. Upon the Debtor filing for bankruptcy, Brown's Federal Case was stayed by virtue of the automatic stay imposed by Code § 362. Prior to the bar date and on March 19, 2003, Brown filed the Claim.[6] The Claim is based on the Federal Case.

7. The Debtor objected to Brown's Claim in its Second Omnibus Objection on November 14, 2003.[7] See ECF Doc. No. 821.

8. Just over two years after objecting to Brown's Claim, the Debtor filed a motion for summary judgment on November 30, 2005. See ECF Doc. No. 1271. In response to the Debtor's motion, on January 6, 2006 Brown filed a motion seeking additional discovery and a continuance on the Debtor's motion for summary judgment. See ECF Doc. No. 1273. A week later the Debtor filed an opposition to Brown's motion and asserted that Brown was required to oppose the motion for summary judgment in addition to seeking an extension of time to take additional discovery. See ECF Doc. No. 1272.

9. Brown did not file her opposition to the Debtor's motion for summary judgment until October 17, 2007. See ECF Doc. No. 1392.

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[5] This deposition predates the Debtor's chapter 11 filing. In the excerpts from that deposition which follow, Q refers to the attorney for the Debtor and A to Brown.

[6] The original amount of the Claim was $101,000,000. Subsequently, the amount of the Claim was reduced by stipulation to $5,000,000. See ECF Doc. No. 935.

[7] The Second Omnibus Objection objected to all of the "litigation claims" against the Debtor on the grounds the Debtor had disputed liability as to those creditors in the pre-petition litigations.

10. Brown was initially hired by the Debtor[8] as a "casual driver"[9]. Brown Tr. 41:12-23. As a casual driver, Brown's job was to cover for drivers unable to drive their assigned route on a particular day.[10] As a casual driver, Brown would report to work at the posted time and wait to see if she would be assigned to a route. If she drove a morning route, she would then return to the facility and wait to see if she was needed for an afternoon route.[11] At some point prior to her termination Brown became a shape driver. Brown Tr. 44:21-45:2.

11. Brown was originally hired to work out of the Debtor's facility located in Ridgewood, New York ("Ridgewood"). At her request and for her own convenience, Brown was later transferred to the Shore Parkway, New York facility ("Shore Parkway").

12. Brown was a member of Local 1181 Amalgamated Transit Union (the "Union"). Her pay and other work terms were specified in the Union's collective bargaining agreement ("CBA") with the Debtor.

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[8] Brown has at times denied that she worked for the Debtor and stated she worked directly for the New York City Board of Education. See Brown Tr. 64:14-16. However, if she did work for the Board of Education, the Debtor would not be the proper entity to bring this cause of action against**.** See Brown Aff. ¶ 2. It is evident that Brown was an employee of the Debtor even though the Debtor's drivers were subject to Board of Education rules because of the Debtor's contracts with the Board of Education.

[9] A casual driver is an employee who does not have a specifically assigned route. Every driver that is hired begins as a casual driver. Casual drivers are maintained on a seniority list and entitled to become a "shape" driver on the basis of seniority when a shape position becomes available. CBA §V(b). Shape drivers have their own regular route or routes.

[10] In order to ensure that it have sufficient drivers to cover all required routes, the Debtor is required to have on hand drivers in excess of the minimum number required to cover all routes since one or more drivers may be out on a given day.

[11] Brown was expected to remain in the drivers' waiting room until she was needed or dismissed. She was paid the same whether she drove a route or remained in the drivers' waiting room. Brown Tr. 49:16-19.

13. The Debtor's company structure at each facility consisted of three levels: management, office staff and drivers. Drivers without permanent routes were given route assignments by the dispatchers who were part of the office staff. The office staff and the drivers reported to facility managers, who in turn reported to the general manager of the Debtor's local facilities, Charles Butera ("Butera"). Pollack Decl., Ex. 2. In addition, the Union had representatives ("shop stewards") at the Debtor's facilities. Shop stewards were employed by the Debtor but handled all Union related employee grievances.[12]

14. It is uncontradicted that Brown was the only African-American female driver at the Shore Parkway facility. Brown Tr. 90:5-10.[13] However, she has not shown that there were no other female drivers at that facility or that there were no other African-American, albeit male, drivers. As the only African-American and female driver at the location Brown was unique.

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[12] Although there was a clear hierarchy in place at the Debtor's facilities, Brown took the untenable position in her deposition that she did not have a supervisor or boss at either of the facilities at which she worked:

"Q: Sal Ingoglia [the Union shop steward] was your boss at Ridgewood?
A: If you are using the word supervisor or boss, but we don't have supervisors and bosses. If you have a problem or anything happens, the shop steward is who you go to. Brown Tr. 67:6-12.
***
Q: The dispatcher is your supervisor?
A: No, not in the way, like, if you're working here in a law firm, there are supervisors, because you work here in the firm – we do not work for the company. We are not staff. There is a difference. They are staff and we are not staff. Brown Tr. 66:25-69:12.
***
Q: How about Charles Butera. Is he your supervisor?
A: No, the general manager.
Q: Does that mean that he" is your supervisor?
A: I don't go by his rules. Brown Tr. 62:24-63:3.

[13] However, she was far from being the only African-American driver employed by the Debtor. At the time Brown was terminated, more than five hundred of the Debtor's drivers were African-American, more than three hundred and seventy five were female and more than fifty were both African-American and female. Butera Decl. ¶ 7.

15. Malika Henderson ("Henderson") and Kevin Dukes ("Dukes") were the dispatchers and managers at the Ridgewood facility, where Brown first worked. Henderson is an African-American female. Dukes is an African-American male. Pollack Decl., Ex. 2. The shop steward at the Ridgewood facility was Thomas Salerno ("Salerno"), a white male. Pollack Decl., Ex. 2.

16. The shop steward at the Shore Parkway facility was Sal Ingoglia ("Ingoglia"). Pollack Decl., Ex. 2. Ingoglia is a male whose race has not been stated. Sylvia Salcedo ("Sylvia") was a dispatcher at the Shore Parkway facility. Butera Decl., Ex. A. Sylvia is a white female. John Ayad ("Ayad"), a white male, was a fellow driver at the Shore Parkway facility. Butera Decl., Ex. E. Ayad had seniority over Brown. Butera Decl. ¶ 12.

17. If the Debtor was unhappy with the job performance of one of its employees, it had multiple avenues of taking disciplinary action including written warnings, disciplinary hearings, and as a final resort, termination. The Union played an integral role in the disciplinary process for drivers.

18. During her employment with the Debtor, Brown was the subject of multiple disciplinary actions. D/SMF ¶ 9-10. Brown alleges that all of the disciplinary actions taken against her were motivated by race and sex discrimination. C/SMF ¶ 9-10.

19. On March 15, 1999 Brown received her first of seven written warnings. This warning stated that Brown had reported to work an hour late and had returned late after driving her morning route so that she was unable to complete an afternoon route. Additionally, it stated that she disregarded her supervisor's request to remain in the driver's waiting room

in case an afternoon route needed coverage. She ignored her supervisor and left without permission even though she was still on the pay clock. D/SMF ¶ 10; C/SMF ¶ 10.

20. By letter dated March 25, 1999 Butera requested a Union hearing regarding Brown's alleged absenteeism, lateness and failure to report a vehicle defect. Brown Dep., Def. Ex. 7. On April 15, 1999, that hearing resulted in the dismissal of vehicle defect claim but a warning was issued regarding future tardiness and absenteeism. At the hearing Brown successfully requested overtime pay allegedly due to her. Butera Decl., Ex. C.

21. On July 6, 1999, Brown received a written warning for "no call no show"[14]. C/SMF ¶ 10; D/SMF ¶ 10. Brown was posted to report to work at 5:00 a.m. but instead arrived at 5:45 a.m. without having called her supervisor first to state that she would be late. D/SMF ¶ 10. Brown claims that she was late on this occasion because she was distraught over the drowning death of her nephew the day before. Due to this "no call no show", Brown was suspended for two days. Brown alleges that her suspension was motivated by discrimination although she provides nothing to support the allegation. Brown Tr. 315:23-24.

22. Brown received a third written warning on August 26, 1999 because she again arrived late to work. C/SMF ¶ 10; D/SMF ¶ 10.

23. On September 2, 1999, Brown received a written warning for arriving to her destination late, hanging up the telephone on her supervisor and abandonment of her job. C/SMF ¶ 10; D/SMF ¶ 10. On this particular day, instead of driving a route, Brown and other

[14] "No call no show" is a term used by the Debtor to indicate that the employee did not call to state he or she would not come to work and that the employee then either appeared tardy to work or did not attend work at all for the day.

casual drivers were asked to drive buses to a facility on Long Island, New York. Brown admits that she was not treated differently than other drivers in receiving this assignment. Brown Tr. 192:16-193:10. However, she does allege that due to her race and sex, the other drivers intentionally "lost" her so that she did not arrive at the Long Island facility on time. In describing the incident, on one occasion Brown stated that she was not given directions to the Long Island facility while another driver was. Brown Dep., Def. Ex. 11. On another occasion, Brown stated to the contrary that she was in fact given directions. Brown Dep., Def. Ex. 12.

24. The second Union disciplinary hearing against Brown occurred on September 9, 1999. At this hearing the Debtor alleged that Brown arrived late at a pick up location, abandoned her job, was repeatedly "no call no show" and that her general conduct on the job was unsatisfactory. Butera Decl, Ex. B. At the hearing, the Debtor moved to terminate Brown. However, upon the Union's objection to her termination, a decision was made to give Brown a final warning and to suspend her for one week. Id.[15]

25. After two disciplinary hearings and multiple written warnings, Brown received a fifth warning on February 1, 2000 for "no call no show". C/SMF ¶ 10; D/SMF ¶ 10. The following excerpts are from Brown's deposition regarding the February 1, 2000 "no call no show" warning:

"Q: The next one is dated February 1st, 2000. Did you ever see this?
A: This was when I had the diarrhea *** I came to work.
Q: Did you come later than 7:30?

[15] Brown alleges that the Union's objection and the negotiations that followed were illegal and made without her consent. C/SMF ¶ 11. However, the legality of the Union's actions are not material to the present motions.

A: Yes, but I spoke on the phone. She [Sylvia] knew I was sick and had to go back home. Brown Tr. 285:16-286:2.
***
Q: Did Silvia call you or did you call Silvia?
A: No, she called me. I was about to pick up the phone. I just got out of the tub. I was about to pick up the phone and the phone rang. I explained to her. Brown Tr. 286:7-12.
***
Q: Was it about 7:30 that she called you?
A: No – maybe, maybe it was. I don't remember. I need the memo.
Q: I am just going through it at this point?
A: You want answers. I am trying to give you the right answer. You want time? I don't remember, I have to look it up for you. February 1st, 7 a.m. I was due in, became ill on the way to work, returned home to bathe and to call. I was ill. I was just about to call you. She didn't have any drivers to cover the run then, too. Brown Tr. 286:20-287:10.
***
Q: You came in after that, correct?
A: I arrived at 7:45.
Q: You were 45 minutes late to work that day?
A: I was sick. " Brown Tr. 287:19-23.

26. The sixth written warning occurred on March 16, 2000 because Brown arrived late to her pick up destination for her afternoon route. C/SMF ¶ 10; D/SMF ¶ 10. As a result the school wrote the Debtor a complaint letter. Butera Decl., Ex. A. Brown claims that there were multiple reasons for her inability to inform her supervisor of the lateness. First, she alleges that she needed to make preparations for her uncle's funeral which caused her to be late. Second, she alleges that she could not call her supervisor because her cell phone died and she ran out of money to use a pay phone. Third, Brown alleges that she was unable to get through to her supervisor from the radio of a school bus because "somebody's playing with the radio, interrupting, pressing the button so the office can't hear me." Brown Tr. 294:16-18. When asked if her radio transmission was interrupted because she was an African-American woman she responded: "I guess I have to say

maybe because I am a black woman*** they had to hear my voice*** Everybody knew I was black*** They know I am a woman." Brown Tr. 295:6-13. Lastly, Brown claims that she was late to the school because she was "set up by [the Debtor] to fail in that they gave her a field trip on the other side of Brooklyn for 9:30 a.m. when they knew that her regular run for that morning ended at 9:30 a.m." C/SMF ¶ 20.

27. On March 17, 2000, Brown was called into her supervisor's office to discuss her March 16th late arrival. At the meeting, she informed the Debtor that she would be unable to drive her afternoon run that day. After being told she had to work that afternoon, she refused and took the rest of the day off. Brown Tr. 58:24-59:5. This led to the seventh and final warning for insubordination and refusal to speak or listen to her supervisor. C/SMF ¶ 10; D/SMF ¶ 10. In regards to her early departure from work on March 17th, Brown stated at her deposition:

"A: I gave them notice. I only have to give one hour's notice. Brown Tr. 299:18-19.
***
Q: You took off the afternoon?
A: I went to work ill. I –
Q: Did you take off –
A: I am answering your question. You are throwing another question at me.
Q: Did you take off the afternoon of March 17th, 2000?
A: I went to the funeral on the afternoon of March 17th after giving notice, two hours' notice that I would not be able to work that afternoon because I had an emergency.
Q: Despite the fact that your dispatcher said she had no drivers to cover the runs?
A: Despite the fact as per the usual there was no coverage for Patricia, the black female driver." Brown Tr. 301:11-302:4.[16]

[16] The CBA states that "drivers unable to report to work by reason of illness or other sufficient cause shall notify Employer at least sixty (60) minutes before their scheduled hour of work." CBA § XX.. "Other sufficient cause" is not defined in the CBA. The CBA does not state how many sick or personal days, if any, Brown is afforded per year. The Court notes that because the job required working during the school year that drivers had school vacations off from work but were nonetheless paid for those days. Additionally, the Court notes that depending on a driver's seniority they might also have the

28. At a Union disciplinary hearing on March 22, 2000, Brown was terminated from her position with the Debtor. Butera Decl, Ex. A. Brown alleges that her termination was motivated by race and sex discrimination. C/SMF ¶ 3. The Debtor alleges her termination was "for cause" due to reoccurring insubordination, tardiness, absenteeism and basic failure to perform her job. D/SMF ¶ 3. Brown alleges that the Debtor could only terminate her for failure to pay her Union dues or initiation fees. Brown Tr. 169:15-170:3; 171:9-173:4. However, the CBA states that a Union member can be terminated from their job after a Union disciplinary hearing where "just cause" is found for termination. Brown Dep., Def. Ex. 8. Brown also alleges that the Debtor violated Board of Education policies when she was terminated but she does not identify which policies her termination violated. Complaint ¶ 8. Nor has she supplied the Court with any Board of Education regulations or shown that the regulations applied to her. The Union did not challenge Brown's termination.

30. According to the CBA, the Debtor was required to give all drivers a one-hour lunch break between the hours of 11:00 a.m. and 2:00 p.m. See CBA XX(e). Brown alleges that she was not afforded a one-hour lunch break on all occasions because she was an African-American female. Brown testified at her deposition that on at least ten occasions she was asked to go to the bank to cash the paychecks of certain office employees during her lunch hour. In particular she alleges that Henderson discriminated against her by asking Brown to cash other employees' checks during her lunch hour. C/SMF ¶ 67. However, she fails to demonstrate how these errands could not have been completed in a time frame

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summer off entirely.

that would also have allowed her to have lunch for a full hour within the 11:00-2:00 time period. Nor does she indicate that she did not also need to go to the bank to cash her own paycheck or to go out for some other reason.

"Q: How many times were you not afforded a one-hour lunch period between the hours of 11 and two?
A: More than ten times.
Q: Did you ever complain to the union about that?
A: No, I didn't know about it. I just received this contract with Mr. Cordiello Sr.
Q: Was it because you are a black woman that you were not allowed to get lunch?
A: Well, if I didn't get lunch and I was black and you got lunch because you are a white male or female. I would say yes, that's discrimination.
Q: Is it your testimony no female black driver was allowed to take lunch between 11 and 2, and every other driver was?
A: I didn't say that. I said Patricia.
Q: Patricia Brown?
A: Who is a black female Afro-American female, Latino female, was not allowed to take her lunch – with American Indian and Chinese in her, was not allowed to take lunch. Let's say Patricia Brown, who was not white, was not allowed." Brown Tr. 214:12-215:17.[17]

31. Brown also alleges that she was "forced" to work during the summer while other similarly situated non-African-American employees were not.[18] The Debtor states that Brown had to work during the summer due to her low seniority and Brown has not effectively disputed this. D/SMF ¶ 45.

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[17] Brown's claim is that she was discriminated against because she was an *African-American female*. When asked why she signed a statement stating she is "black" she responded that she didn't have to write all of her races and ethnicity and that "you [deposing attorney] are assuming [I am] black because I speak English". Brown Tr. 218:15-16.

[18] The CBA states in regard to summer furloughs that "in the event an insufficient number of employees have agreed to cover the remaining work not affected by the [summer] layoff, then such employees shall be required to perform the work and not be permitted to waive the right to employment, in order to cover the runs that must be performed. This shall be done in inverse order of seniority." CBA Section VI(g). Nowhere does Brown demonstrate that prior to accepting summer work she challenged her seniority or assignment in order to allow her to avoid summer work.

32. Brown alleges that several fellow employees made discriminatory remarks. C/SMF ¶ 54.

She alleges that both Salerno and Ingoglia called her "Sunshine". Brown Tr. 97:10-12.

Brown testified:

"Q: Did you ever complain to the union about that fact that Tommy Salerno and Sal had called you Sunshine?
A: No, because I didn't know what it meant. Brown Tr. 98:18-22.
***
Q: Was it once or was it twice?
A: More than once, but I don't remember.
Q: Was it less than five times?
A: I will say yes, less than five times, but I don't remember.
Q: Do you remember when it happened?
A: I have to look at my notes.
Q: Do you have them here?
A: I didn't bring those. That's why I asked you if you had yours that I gave you. Brown Tr. 99:4-15.
***
Q: Talk about Sal. We said Sal said it between one and five times?
A: It was each time I went to check on the overtime, if it was coming through or not, and it wasn't coming through. One time, for instance, why don't you split the overtime with Sylvia. I said no, why would I want to split my overtime, I worked hard. He said well, Sunshine, you need to split the overtime. You are not going to get the money*** Brown Tr. 100:7-17.
***
Q: It was always in the circumstance of inquiring about overtime?
A: Or a complaint about something else. That's the only reason I had to go into his office, because of a complaint.
Q: How about Tommy. How many times did Tommy call you Sunshine?
A: I believe it was twice, and that was in relation to overtime also.
Q: The same general type of situation?
A: The same general type of situation, and always with a smile, but I didn't know what it meant. I thought Sunshine means you are a happy person. That's the way I would take it to mean, but I'm sure that's not what it meant now. Brown Tr. 101:8-23.
***
Q: What do you think it means as we sit here today?
A: I think it is derogatory as we sit here today.
Q: On what do you base that?
A: Because you wouldn't answer my question when I asked you do you know what it means.

Q: Up until June 27th, 2002, you did not take their calling you Sunshine to be discriminatory?
A: No, I didn't take it to be discriminatory*** But my name is not Sunshine. My name is Patricia, so I wasn't happy with being called Sunshine either." Brown Tr. 102:10-103:4.

33. Brown claims that Sylvia called her a "nigger" (hereinafter the "N-word"). Brown testified:

"Q: When did you come to the conclusion that the reason Silvia was mistreating you was because you were a black woman?
A: When she called me a black woman.
Q: She called you the N word? It starts with an N and ends with an R?
A: What word is that?
Q: [the N-word]?
A: It is in your vocabulary.
Q: It is in yours, too. You are playing games.
A: I have never used that word. It is not in my vocabulary.
Q: Is that the word she used? That's all I am asking? Is that the word she used?
A: That is the word she used.
Q: On how many occasions?
A: I have no idea, ask her. Brown Tr. 325:24-326:18.
***
A: Now I am leaving since that word is in your vocabulary.
Q: Are you refusing to finish this deposition, Ms. Brown?
A: I am refusing. You just used the word. I didn't use it.
Q: Thank you.
A: Which makes you a racist, too. Brown Tr. 326:25-327:8.
***
Q: We'll continue. I guarantee you we'll continue.
A: I guarantee you we'll continue. [The N-word], you know what [the N-word] means, the word that you used?
Q: You used it, didn't you, the N word?
A: You know why, because of the fact that you know the meaning of the word. It does not relate to black people or people of color. It means any person. It doesn't matter, but she used it in a derogatory way because I am black." Brown Tr. 330:7-19

Brown refused to state at her deposition in what context or how many times the N-word was used by Sylvia. Brown Tr. 330:22-333:10.

34. Brown alleges that Ayad was given certain privileges because he was white. C/SMF ¶ 71. Brown has not specified what those privileges were.

35. Brown asserts that she was discriminated against because Henderson would not allow her to use the bathroom reserved for office employees. There was a separate bathroom for female drivers that Brown was entitled to use. C/SMF ¶ 66. Lastly, Brown alleges that as a result of discrimination Henderson ignored Brown's request to turn on the heat in the drivers' waiting room when Brown complained of being cold. D/SMF ¶ 69; C/SMF ¶ 69.

36. Brown further alleges that the Debtor refused to give her a letter of recommendation following her termination and a copy of her employee records. She claims that her employee files were altered in furtherance of the discrimination. C/SMF ¶ 51-52.

37. At no point prior to her termination did Brown report or complain of any of the above allegations of racial or gender discrimination.

Discussion

This is a contested matter to which Bankruptcy Rule ("B.R.") 7056 applies. See B.R. 9014(c). B.R. 7056 incorporates Federal Rule of Civil Procedure ("F.R.C.P.") 56, the summary judgment rule.

Two intertwined motions involving F.R.C.P. 56 have been made. The Debtor has moved under F.R.C.P. 56(c) for summary judgment in its favor. In addition to opposing the motion for summary judgment, Brown has made a motion under F.R.C.P. 56(f) seeking additional discovery prior to the consideration of the motion for summary judgment.

F.R.C.P. 56(f) "provides a mechanism to delay [consideration of a motion for summary] judgment and obtain discovery." Weeks v. N.Y. State Div. of Parole, 78 Fed.Appx. 764, 766 (2d Cir. 2003). F.R.C.P. § 56(f) provides that:

> "If a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order."

To successfully use a F.R.C.P. 56(f) motion to oppose a motion for summary judgment, a party must "submit an affidavit explaining, among other things, what facts are sought and how they are to be obtained; *** what efforts the affiant has made to obtain those facts; and why those efforts were unsuccessful." Williams, 199 F.Supp.2d at 179 (quoting National Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., 265 F.3d 97, 117 (2d Cir. 2001)). Notwithstanding the fact that the party has submitted sufficient affidavits, the court may deny additional discovery "if it deems the request to be based on speculation as to what potentially could be discovered." Williams, 199 F.Supp.2d at 179 (quoting Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994).

Brown's affidavit which accompanied her F.R.C.P. 56(f) motio, is replete with discovery requests that are speculative, strained and tenuous at best. Brown requests "additional deponents, who are witnesses to the prejudicial events and discriminatory treatment that Plaintiff complains of." Brown Aff. ¶ 6. However, nowhere does Brown tell the Court who those additional witnesses are even those who were in Brown's presence or that Brown knew were present. Moreover, Brown asks to depose "employees who are similarly situated in the work place" as Brown. Brown Aff. ¶ 9. Yet Brown, who has personal knowledge of the facts, fails to

identify any employee who repeatedly came late to work, was absent, left early or was insubordinate who was not subject to disciplinary action. No similarly situated employee has been identified.

Additionally, even if Brown had directed this Court to specific persons from whom she needed discovery, she has not advised the Court on how that discovery would reasonably create a genuine issue of fact. All her affidavit states is that she "anticipates that discovery will lead to facts establishing a hostile work environment*** [that] shows disparate treatment." Brown Aff. ¶ 13. This statement falls short of the specificity required to fulfill her burden under the statute, especially since her Federal Claim was one for discrimination based on race and sex and not one based on a hostile work environment.

Brown's affidavit states that she has not "received any responses to our discovery and deposition requests." Brown Aff. ¶ 4. Although Brown has not taken any depositions, she has acknowledged receipt of substantial documentary discovery. Brown Aff.¶ 5. Brown has submitted the deposition subpoenas from the Federal Case, but she has *never* asked *this* Court to compel the deposition of Butera or anyone else. Brown alleges that she was not allowed to conduct discovery in the Federal Case as a result of the automatic stay following the filing of this chapter 11 case. However. Brown has not shown that she attempted to continue her discovery efforts after the Chapter ll filings. Even before the objection to her claim was made Brown could have sought to take examinations of the Debtor's employees or others under Bankruptcy Rule 2004. See, e.g., In re Johns-Manville Corp. et al., 42 B.R. 62 (Bankr. S.D.N.Y. 1984) (pursuant to B.R. 2004 "examinations of witnesses having knowledge of the debtor's conduct is proper and

the inquiry may cut a broad swath through the debtor's affairs, those associated with him and those who might have had business dealings with him").

Following the Debtor's objection to her claim, Brown could also have availed herself of the explicit discovery opportunities provided under B.R. 9014(c) but did not do so. For example, under B.R. 7030, which incorporates F.R.C.P. 30, Brown could have noticed and taken depositions of co-workers or others. In the two years following the objection to her Claim she made no effort to take any discovery by deposition, interrogatory or otherwise even though she was well aware from the pre-petition history of discovery in the Federal Case that the Debtor aggressively opposed her Claim. It was not until Brown was faced with the Debtor's motion for summary judgment that she attempted to stall the adjudication of her Claim by requesting discovery.

Given Brown's failure to articulate who she seeks to depose, apart from Butera, and how the depositions of the unnamed persons or the documents will assist her in proving her case, she has not justified her need for discovery. See Byerly v. Ithaca College, 113 Fed.Appx. 418, 420 (2004) (F.R.C.P. §56(f) request denied because plaintiff failed to identify what documents or depositions she wanted if given the opportunity to continue discovery). Additionally, Brown has failed to offer any explanation for her delay in trying to take discovery in the bankruptcy court.[19] Therefore, this Court will proceed to consider the merits of the Debtor's motion for summary judgment.

[19] It would be no excuse to argue either that she was unfamiliar with bankruptcy procedure or that the objection had not been actively pursued by the Debtor. Once an objection was made to her claim, she could not and would not receive any plan distribution unless and until her claim was allowed. Thus, it was in her interest to press for the adjudication of the objection.

It is appropriate to grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.R.C.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court's function is to review the record taken as a whole to determine whether there exists any genuine issue of a material fact to be tried, and not to resolve any factual disputes.[20] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see also Elliott v. British Tourist Authority, 172 F.Supp.2d 395, 398 (S.D.N.Y. 2001). The Court must view all reasonable inferences and resolve all ambiguities in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The evidence favoring the non-moving party must be more than merely colorable, Anderson, at 249, and a summary judgment motion will not be defeated merely on the basis of conjecture or surmise. Bryant v. Maffucci, 923 F.2d 979, 982 (2d. Cir. 1991), cert. denied, 502 U.S. 849 (1991). If Brown "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof" then the Debtor is entitled to a judgment as a matter of law. Celotex, at 323; see also Elliott, 172 F.Supp.2d at 398 (plaintiff's pleading was insufficient to prove her prima facie case because it was filled solely with vague facts).

[20] "The existence of disputed facts that are immaterial to the issues at hand is no impediment to summary judgment." Western World Insur. Co. v. Stack Oil, Inc., 922 F.2d 188, 121 (2d Cir. 1990).

Brown's claim is one for racial[21] and sexual discrimination under the Civil Rights Act of 1964, Title VII ("Title VII"). Title VII states that "it shall be an unlawful employment practice for an employer *** to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color*** [or] sex." 42 U.S.C. § 2000e-2(a)(1). "An unlawful employment practice is established when the complaining party demonstrates that race, color *** [or] sex *** was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m); see also, Holocomb, at 137-138 ("an employment decision then, violates Title VII when it is 'based in whole or in part on discrimination'") (citing Feingold v. New York, 366 F.3d 138, 152 (2d Cir. 2004) (quoting Stern v. Trs. of Columbia Univ., 131 F.3d 305, 312 (2d Cir. 1997))).

At the summary judgment stage in a Title VII case, the Court's role is to determine "whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 38 (2d Cir. 1994). However, it is not for this Court to resolve questions of fact in its quest to determine whether a fact finder could infer discrimination. Elliott, 172 F.Supp.2d at 399. The inquiry into motive is premised on the fact that there "will seldom be 'eyewitness' testimony as to the employer's mental processes." U.S. Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983); see also Holcomb, 521 F.2d at 137 ("Where an employer has acted with discriminatory intent, direct evidence of that intent will

[21] Brown identified her claim as one for racial discrimination in her action in the Federal Case. This court will assume that in this case the term race also includes color. Brown asserted in her deposition that she is of mixed ancestry, however, she never claimed mixed ancestry in her proof of claim or her Federal Case complaint. See Statement of Facts ¶ 6-7.

only rarely be available, so that 'affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination") (citing Gallo, 22 F.3d at 1224).

The Second Circuit has expressed reluctance to grant summary judgment to an employer where there is an issue as to the employer's intent. Holcomb v. Iona College, 521 F.3d 130, 137 (2d Cir. 2008) (citing Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997); Gallo v. Prudential Residential Servs., Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985)); see also Graham v. Long Island R.R., 230 F.3d 34 (2000). However, the Second Circuit has found summary judgment appropriate when the non-moving party only puts forth conclusory allegations unsubstantiated by fact. See Holocomb, 521 F.2d at 137; see also Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997).

A court faced with a summary judgment motion in a discrimination case based on circumstantial evidence must analyze the existence, or lack thereof, of a genuine issue of material fact under the McDonnell Douglas Corp. v. Green framework. 411 U.S. 792 (1973).[22] The McDonnell Douglas framework is a three-step burden-shifting analysis. In the first step the claimant must establish a prima facie case of discrimination. Id.

[22] Neither party has asked this Court to analyze the alleged discrimination claims under the Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), framework for mixed-motive cases. Mixed-motive cases occur where there are allegations of both legitimate and illegitimate reasons that motived the employer's adverse employment action. Id. Under Price Waterhouse a claimant has the burden of establishing that the action was motivated by discrimination. Once the claimant does so the burden shifts to the employer to prove that they would have made the decision notwithstanding the prohibited discriminatory reason. Id. Because neither party has requested an analysis under the Price Waterhouse framework and Brown has not produced evidence of "smoking gun" discrimination, this Court will only look to the McDonnell Douglas framework. Raskin v. The Wyatt Co., 125 F.3d 55, 61 (2d Cir. 1997).

If the claimant can sustain this burden it creates a presumption of discrimination and the burden of production then shifts to the employer to establish that the employment action was based on a "legitimate, clear, specific and non-discriminatory reason." Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995). The employer's burden is one of production, not persuasion and cannot involve an assessment of credibility. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000). The Court's role at this stage is to ask whether the employer "has introduced evidence that, 'taken as true, would permit the conclusion that there was a non-discriminatory reason'." Holcomb, 521 F.3d at 141 (quoting St. Mary's, 509 U.S. at 113); see also Rajcoomar and Smith v. TJX Companies, Inc., 319 F.Supp.2d 430, 437 (S.D.N.Y. 2004) (employer must proffer both a legitimate and non-discriminatory reason). If the employer carries this burden it serves as a rebuttal to the presumption of discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the employer meets this burden, it is entitled to summary judgment unless the claimant can point to evidence that supports a finding of discrimination. Pesok v. Hebrew Union College- Jewish Institute of Religion, 235 F.Supp.2d 281, 286 (S.D.N.Y. 2002). The claimant then has the "full and fair opportunity to demonstrate" by a preponderance of the evidence that the employer's "legitimate" reason was simply a pretext for discrimination. Id. at 256; see also Williams v. R.H. Donnelley Inc., 199 F.Supp.2d 172, 176 (2002). In establishing pretext, the Court may still consider the evidence that the employee presented in establishing her prima facie case.[23] Reeves, 530 U.S. at 143.

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[23] The employee need not prove that the employer's reasons were not legitimate. However, "proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 517 (1993). "A prima facie case plus pretext evidence may be enough to reach a

As the claimant, Brown maintains the burden to establish her prima facie case under the McDonnell Douglas framework**.** Brown must show that (1) she is a member of a protected class; (2) was qualified for her position and was performing her duties satisfactorily ; (3) she suffered an adverse employment action; and (4) the employment action occurred under circumstances giving rise to an inference of discriminatory intent. See McDonnell Douglas, 411 U.S. at 802; see also Holcomb, 521 F.3d at 138 (citing Feingold, 366 F.3d at 152). While this last burden is *de minimis*, a "plaintiff must proffer some admissible evidence of circumstances that would be sufficient to permit an inference of discriminatory motive." Bennett v. Watson Wyatt & Co., 136 F.Supp.2d 236, 246 (S.D.N.Y. 2001).

It is presumed that Brown fulfilled her burden for the first and third elements of her prima facie case because she is an African-American female and termination is an adverse employment action. Reeves, 530 U.S. at 141. However, in order for Brown to create a presumption of discrimination, she must also fulfill her burden with regard to the second and fourth elements as well.

In this case there can be little question that Brown was facially qualified to be a driver because she already held the job and she had the required licenses. However, the court must take the analysis one step further to see whether she has offered evidence that she was satisfactorily doing her job. Thornley v. Penton Publ'g, Inc., 104 F.3d 26, 30 (2d Cir. 1997) ("plaintiff complaining of discriminatory discharge shows 'qualification' by demonstrating satisfactory job

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jury but is not always sufficient to do so." Elliot, 172 F.Supp.2d at 402 (citing Schnabel v. Abramson, 232 F.3d 83, 90-91 (2d Cir. 2000)). Notwithstanding the fact that the burden shifts between the parties as described above, the burden to persuade the trier of fact that the employer intentionally discriminated at all times remains with the claimant. St. Mary's Honor Center, 509 U.S. at 507.

performance in accordance with the particular employer's criteria for satisfactory job performance").

It is Brown's burden to produce evidence, read in the light most favorable to her, that shows she was performing her job satisfactorily. Brown's pleadings and briefs baldly state that she was doing her job satisfactorily. She asserts that because she "had a clean safety record, never abused or injured a child, and passed every written and road test given to her" that she must have had satisfactory job performance. Brown's Opposition to the Motion for Summary Judgment, p. 5. However, Brown's understanding of what constitutes satisfactorily doing her job is misguided. She has obviously overlooked that among the basic requirements of her job were that she arrive at her job site at the appointed time and that she treat her superiors with respect. See Elliott, 172 F.Supp.2d at 400 (plaintiff was unable to state a prima facie case where he offered only his own affidavit comprised of mere conclusory statements).

The fact is that Brown admits to most, if not all, of the Debtors's evidence of her unsatisfactory work in regards to tardiness and insubordination. Brown does not deny receiving all of the written warnings against her or that she was the subject of multiple disciplinary hearings. See C/SMF ¶ 9-22. These admissions show that she was tardy, absent and insubordinate, none of which indicate satisfactory job performance. Bennett v. Watson Wyatt & Co., 136 F.Supp.2d 236, 246 (S.D.N.Y. 2001) (quoting Bennett v. Morgan Stanley & Co., Inc., 1999 WL 165713, at *4 (S.D.N.Y. 1999) (plaintiff's continuous lateness rendered him unqualified for the position because he did not satisfy his employer's job performance expectations)). These disciplinary actions resulted in Brown's termination. Statement of Facts ¶¶ 16-28.

In order to prove the fourth element of her prima facie case, an inference of discrimination, Brown must show she was treated differently than others who were similarly situated at the Debtor's facilities. Elliot, 172 F.Supp.2d at 401 ("Circumstances from which invidious discrimination may be inferred include preferential treatment given to employees outside the protected class")(quoting Howley v. Town of Stratford, 217 F.3d 141, 150 (2d Cir. 2000). Brown alleges that she was the subject of these disciplinary actions solely because she was an African-American female.

While the question of whether an employee is similarly situated to the claimant is usually a question of fact for the jury, Graham, 230 F.3d at 39 (citing Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679, 684 (2d Cir. 1998), the Second Circuit has articulated a similarly situated standard to be used during the summary judgment phase of a Title VII case. Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997). Under the Second Circuit's analysis in Shumway, a claimant must show that an employee outside of her protected class was engaged in similar conduct but received a different punishment or result. Shumway, 118 F.3d at 63 (former female employee unable to show an inference of discrimination because she could not establish that "a man similarly situated was treated differently"); Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 95 (2d Cir. 1999)(non-white employee did not establish prima facie case because she failed to show that white nurses were similarly situated).

The claimant must state specifically who was similarly situated and what the different treatment was in order to raise a genuine issue of material fact. Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965). Conclusory allegations regarding similar situated employees will not suffice. Id. ("numerous *male* supervisory employees" was

not specific enough to fulfil claimant's burden (emphasis added)); see also Bennett v. Watson Wyatt & Co., 136 F.Supp.2d 236, 244 (S.D.N.Y. 2001) (quoting Bickerstaff v. Vasser Colll, 196 F.3d 435, 452 (2d Cir. 1999) ("statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment").

Brown cannot defeat summary judgment because she has failed to show specific facts that would allow a reasonable fact finder to infer racial or gender discrimination led to her termination. Elliott, 172 F.Supp.2d at 403[24] (summary judgment granted for defendant where plaintiff's affidavit "fails to include a detail so basic as the identity of the alleged younger female replacement worker, and is replete with legal conclusions. In these circumstances, plaintiff's affidavit provides no more support for his claim than does his pleading."); but see Danzer v. Norden Sys., 151 F.3d 50, 57 (2d Cir. 1998) (summary judgment denied where plaintiff's affidavit was "detailed" and "in-depth"). Brown fails to identify by name any drivers who were white females or African-American men that were allegedly treated preferentially to her. Statement of Facts ¶¶ 31, 35. The only employee that Brown does mention by name is Ayad, a white male, who was more senior than Brown, but she fails to identify what privileges he was given. Statement of Facts ¶ 34. Brown opted to assert only a conclusory statement of discriminatory treatment unsubstantiated by any specific facts with respect to all other employees.

[24] The court in Elliott explained that F.R.C.P. 56(e) supported granting the employer's motion for summary judgment because the rule provides that the adverse party cannot "rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Elliot, 172 F.Supp.2d at 403 (quoting F.R.C.P. 56(e)).

The various incidents she has identified are insufficient proof of sex or race discrimination. For example, a policy that applies to all drivers cannot be discriminatory as it applies to all of them in the same manner. Therefore, not allowing Brown, a driver, to use a restroom reserved for office staff is not prohibited discrimination, but, rather, is an established office policy. Statement of Facts ¶ 35. Likewise requiring her to remain in the waiting area assigned to all drivers when not working is not such discrimination. Statement of Facts ¶ 19; see supra, fn 11.

Other events she describes do not reflect race or sex discrimination, although they may be indicative of bad manners on the part of one or more of the Debtor's employees. For example, denial of her request to leave early in connection with the death of her uncle, an action she variously describes as a need to plan the funeral or to attend the funeral, may reflect no more than the employer's view that her manner of or timing in making the request was inappropriate.. See Statement of Facts ¶ 26.[25] The CBA does not grant leave to drivers for family members such as uncles and nephews. CBA § XIX. While the union contract may not account for all familial situations, it applies to all union employees equally, irrespective of their race or sex.

Additionally, Brown has not alleged any facts showing that her fifth written warning stemming from a "no call no show" due to an illness on her way to work was in any way due to racial or gender discrimination. See Statement of Facts ¶ 25. Her supervisor may very well have been unsympathetic in writing up Brown but a trier of fact cannot impute its own business judgment onto the Debtor. The Debtor's policy was that if you do not show up to work at the

[25] The single incident she describes in which she believes certain companion drivers deliberately lost her on one single trip to deliver buses is insufficient to evidence racial or sex bias by her employer, the Debtor. See Statement of Facts ¶ 23.

scheduled time and you have not called in to report that you would be absent, you receive a "no call no show" warning. See supra, fn. 15. Brown does not allege that she called an hour before her scheduled start time as is required by company policy.

Brown appears to believe the her statements about name-calling establish a prima facie case of racial or gender discrimination. However, she is in error for several reasons. There is a total lack of specificity about the time and circumstances of use of the N-Word, something that was within her own personal knowledge. With respect to the use of the word Sunshine, Brown herself failed to identify it as a term of opprobrium when used by Ingoglia and Salerno prior to her deposition. Moreover, she identified the few occasions on which it was used by them as times when she asked about her overtime pay. While one of the meanings of the word is someone who has a happy disposition[26], in the circumstances described it appears that it was being used ironically to indicate that Brown was being a complainer.[27] Only at her deposition, after being asked by the Debtor's counsel what she took the word to mean, did Brown decide that the word sunshine must be derogatory by the very fact that counsel posed the question to her. If Brown did not feel the term Sunshine offensive originally, she is unable to backtrack now and state that the use of Sunshine was evidence of discrimination. Cf. Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 707 (2d Cir. 1989) ("A party *** cannot advance one version of the facts in [his] pleadings, conclude that [his] interests would be better served by a different version, and amend [his] pleadings to incorporate that version, safe in the belief that the trier of

[26] In the 2006 movie "Little Miss Sunshine" the title referred to a beauty pageant contestant ironically as she was anything but the traditional smiling pageant girl. "Good morning sunshine" is commonly used as an endearing greeting and the song "You are the Sunshine of My Life" is likewise a song about someone's endearment for another.

fact will never learn of the change of stories." (quoting U.S. v. McKeon, 738 F.2d 26, 31 (2d Cir. 1984). In any event, the word on its face is not discriminatory with respect to race or sex, being concerned solely with disposition and the stated circumstances of its use do not evidence racial or sex bias.

In support of her race discrimination case, the only evidence Brown puts forth is her statement that Sylvia used the N-word. She provides no context in which Sylvia used the word. Indeed at her pre-chapter 11 deposition, Brown was equivocal about whether she knew the word or whether it had a negative meaning.[28] Statement of Facts ¶ 33 (Brown stated "[the N-word] does not relate to black people or people of color"). Brown's attempt to explain her deposition testimony by stating that she was unrepresented by counsel at that time is unpersuasive, particularly since she was the plaintiff in the action and bore the burden of proof.[29] Moreover, Brown fails to put forth any evidence showing that Sylvia's stray use of the N-word amounts to an inference of discrimination in the decision making process, particularly since nowhere is it alleged that Sylvia was a decision maker with respect to Brown's termination as opposed to someone with personal knowledge of certain of the incidents. Abdu-Brisson v. Delta

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[28] The website Dictionary.com indicates that the N-word is considered highly offensive under most, but not all, circumstances. See text and definitions 1 and 2.

[29] Brown argues that her deposition testimony taken in the Federal Case should be given less weight because at the time she was a *pro se* litigant. The Court views Brown's decision to proceed pro se as her chosen specific litigation strategy. Generally, litigants are bound by the litigation strategies they choose to employ even if those choices are later viewed as unwise. Mendoza v. Ashcroft, 79 Fed. Appx. 337, 334 (9th Cir. Cal. 2003). Further, this Court is not "aware of any precedent holding that a *pro se* litigant gets a mulligan on his prior testimony***." Root v. Watkins, 2007 WL 5029118, at *4 (D.Colo. Aug. 28, 2007) (citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991) ("[A] pro se plaintiff requires no special legal training to recount the facts surrounding his alleged injury***")). There is no indication that Brown did not understand the "significant legal consequences" surrounding the questions that were asked at her deposition. Root v. Watkins, 2008 WL 793513, at *2 (D.Colo, Mar. 19, 2008). Furthermore, the Court is unaware of any authority that enables a litigant to withdraw comprehensible sworn testimony simply because she later retains counsel. Id.

Airlines, Inc., 239 F.3d 456, 468 (2d Cir. 2001) ("stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination"); Adams v. Master Carvers of Jamestown, Ltd., et. al, 91 Fed. Appx. 718, 723 (2d Cir. 2004) ("In order for remarks to be deemed significant the plaintiff must show their nexus to the adverse employment decision")(quoting Abdu-Brisson, 239 F.3d at 468).

The evidentiary failures described above regard information that is within Brown's personal knowledge and it was her burden to present the Court with this information. Brown's burden of establishing a prima facie case of race or sex discrimination is not an unduly onerous one. This Court finds that Brown has not met her burden. Even after a careful scrutiny of Brown's affidavit and deposition, there is no proof that, if believed, would establish race or sex discrimination.

Moreover, the Debtor has established a legitimate and non-discriminatory reason for terminating Brown as it presented a multitude of facts, including written warnings and hearing documentation establishing insubordination and lateness, that constitute a legitimate and non-discriminatory reason for terminating Brown. Since Brown bears the burden of proving pretext, and she is unable to even establish a prima facie case of discrimination, it would be impossible for her to establish that the legitimate reasons put forth by the Debtor were pretextual. See R.H. Donnelley Inc., 199 F.Supp.2d at176 (employee bears the burden of proving the employer's legitimate reason was merely a pretext for discrimination).

Conclusion

The Court grants the Debtor's motion for summary judgment. The Court denies Brown's motion.

Settle Appropriate Order.

Date: New York, New York
August 26, 2008

_/s/ Prudence Carter Beatty_____
United States Bankruptcy Judge