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United States District Court, N.D. Illinois.

Ronald MASSEY and Dwayne Blackmon, individually, and on behalf of all others similarly situated, Plaintiffs,
v.
ZEMA SYSTEMS CORPORATION, a Delaware corporation, d/b/a Chicago Beverage Systems, Inc., and Coors Distributing of Illinois, Defendants.

No. 95 C 3504. | Sept. 30, 1998.

Opinion

MEMORANDUM OPINION AND ORDER

WILLIAMS, J.

***1** Plaintiffs Ronald Massey and Dwayne Blackmon claim that Defendant Zema Systems Corp. ("Zema") d/b/a Chicago Beverage Systems, Inc. ("CBS") and d/b/a Coors Distributing of Illinois ("CDI") discriminated against them on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* Title VII of the Civil Rights Act of 1964 (as amended 1991), 42 U.S.C. § 1981, and the Illinois Human Rights Act, 775 ILCS 5/1–101 *et seq.*[1] Defendant Zema moves for summary judgment against both Plaintiffs with respect to all four claims, under Rule 56 of the Federal Rules of Civil Procedure and also moves to strike several of plaintiffs' exhibits. For the reasons stated below, the court: (1) denies defendant's motion to strike in its entirety; (2) grants defendant's motion for summary judgment as to Plaintiff Blackmon on all claims; (3) grants defendant's motion for summary judgment as to Plaintiff Massey on the Illinois Human Rights Act claim; and (4) denies defendant's motion for summary judgment as to Massey on both, the Title VII disparate treatment and disparate impact claims and § 1981 claim.

Background

Zema sells and distributes beer and other malt beverage products wholesale.[2] CBS is the exclusive wholesale distributor of Miller Brewing Company products within a territory which includes most of the City of Chicago. (Am.Compl.¶ 10.) In 1985, Christopher Reyes, the President of Zema, his brothers and Ray Wright, an African–American, purchased Thomas Distributing company (later named Illinois Beverage Inc. ("IBI")), which had the right to distribute Miller Brewing Company products on parts of the east side and south side of Chicago. (Def.12(M) ¶ 4.) At the time of the purchase, substantially all of the employees of Thomas Distributing company were African–American. Two years later, the acquired company moved its entire operations to the same facility as CBS, but all business functions of the two companies were kept separate. Employees of CBS were predominately Caucasian and Hispanic and were primarily housed on the west side of the facility, while employees of IBI who were predominately African–American were officed on the east side of the building. In 1991, IBI was formally merged into CBS and employees of IBI became employees of CBS. (Def.12(M) Stmt. ¶ 9.) Following the merger, while certain functions were immediately consolidated, such as accounting and inventory, employees of the once separate companies remained in the offices they occupied prior to the merger. Some years later, a consolidated sales force area was constructed that houses all CBS sales people.

Plaintiffs Dwayne Blackmon ("Blackmon") and Ronald Massey ("Massey") are African–American males who were hired by CBS. Massey was hired as a sales supervisor in June of 1992 and was subsequently laid off from his position in the winter of 1994. (Am.Compl.¶ 7) Blackmon was hired by Defendant as a driver's helper in May of 1989. (Am.Compl.¶ 7–8.) He was dismissed in January of 1997. (Def 12(M) Stmt. ¶ 2.) The following facts in regards to both Massey and Blackmon are in dispute.

Plaintiff Dwayne Blackmon

***2** CBS initially hired Dwayne Blackmon as a helper on a draft barrel route.[3] In November of 1993, defendant transferred Blackmon from the position of helper on a barrel route to helper on a package route which required attainment of a Class A driver's license. (Def.12(M) Stmt. ¶ 6.) Between December 3, 1991 and early 1997, when he was terminated, Blackmon was suspended three different times and received nine different corrective action notices. (Def.12(M) Stmt. ¶¶ 26–35.) Finally, in January of 1997, Zema terminated Blackmon for cause after allegations that he verbally abused a customer. (Def.12(M) Stmt. ¶ 2.)

Prior to his termination, Blackmon complained that he was wrongly reassigned to a package route where pay is based on commission rather than salary. (Pl.12(N) Stmt. ¶¶ 11, 51.) According to Blackmon, Caucasian employees were given the choice of either accepting or rejecting reassignments such as the one he received. (Pl.12(N) Stmt. ¶ 58.) Zema denies this. Defendant maintains that Blackmon's reassignment was a promotion and not an employment decision adversely affecting him. (Def. 12(M Stmt. ¶ 6, 21). On November 30, 1993, Plaintiff Blackmon timely filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Zema discriminatorily demoted him by reassigning him to a less favorable work assignment because of his race.

On August 4, 1994, Blackmon submitted an additional EEOC charge alleging that Zema discriminated against him in retaliation for his filing the first charge of discrimination. In it, he contended that in retaliation against him, Zema did not pay him for his hours worked (Pl.Am.Compl.Ex. C), unfairly reassigned him to lower paying positions (Pl.Am.Compl.Ex. C), allowed him to be subjected to verbal abuse and threats by his supervisor (Pl.12(N) Stmt. ¶¶ 52, 60 (Add'l Facts)), wrongfully suspended him and denied him promotions (Pl.12(N) Stmt. ¶ 41), and overtime opportunities (Pl.12(N) Stmt. ¶ 50). Blackmon also filed a written charge asserting race discrimination with the IHRC at this time.

Blackmon filed these charges with the EEOC within 300 days from the respective dates that he alleges Zema discriminated against him. On April 28, 1995, he received his "Right to Sue" letter from the EEOC authorizing him to commence a private cause of action against defendant Zema. In June of 1995, Blackmon joined Massey and they filed this suit for themselves and on behalf of all others similarly situated.

Plaintiff Ronald Massey

Ronald Massey worked as sales supervisor for defendant. In January of 1994, CBS Vice President of Sales, Leon Johnson ("Johnson") informed Massey that he was being laid off due to cut-backs. (Def.12(M) Stmt. ¶ 7; Massey Dep. 95.) James Doney ("Doney"), CBS Vice President and General Manager, made the decision to eliminate both Massey's route and his position. (Def.12(M) Stmt. ¶ 11; Doney Aff. 110.) Doney has stated that his decision to take these measures was based upon a need to eliminate the route and his belief that Massey had been involved in the 1993 theft of company neon signs. (Def.12(M) Stmt. ¶¶ 10, 20, 25; Doney Aff. ¶ 110–11; Johnson Dep. ¶ 96.) Massey disputes this and denies being involved in the theft. (Def.12(M) Stmt. ¶ 17.) Another employee, a Caucasian, who was also questioned regarding the theft was not terminated (Def.'s Resp. Pl. 12(N) Stmt. ¶ 55.) Although one employee, an African–American, admitted that he committed the theft, he resigned.

***3** According to Doney, at the time he made his decision to eliminate both Massey's route and position, Massey worked only one route, Route 35. (Def.12(M) Stmt. ¶ 8) Massey asserts that some months prior to his termination, he worked two routes (Route 33 and 35) and that both the routes and the accounts on those routes were combined prior to his termination, leaving him with only one route, but the same number of accounts (Route 33). (Pl.12(N) Stmt. ¶ 8.) According to defendant, Route 33 still exists, Route 35 does not. (Pl.12(N) Stmt. ¶ 50, Add'l facts.) After Massey's termination, Zema redistributed all Route 35 accounts to other south side routes. Zema did not rehire Massey on another route.

Massey's various supervisors, Sam Bryant, Leon Johnson and James Doney offered reports on Massey's job performance which vary in their conclusions from one another and from Massey's personnel evaluations, which consistently show satisfactory to excellent marks. (Pl.12(N) Stmt. ¶ 48; Pl.Ex. 39; Bryant Dep. 49–50; Doney Dep. 92; Pl.Ex. 16–20.) According to Massey, he and other African–Americans received lower pay than their Caucasian counterparts. (Pl.12(N) Stmt. ¶ 31.) He also states Zema refused to extend discounts to customers on the south side but did offer discounts to customers on the north side, enabling sales employees serving those customers to more readily meet requirements necessary to receive benefits from certain bonus programs. (Pl.12(N) Stmt. ¶ 32; Pl. 12(N) Stmt. ¶ 31–32 (Add'l Facts).)

On September 23, 1994, Massey filed a written charge asserting race discrimination by Defendant with both the Equal Employment Opportunity Commission ("EEOC") and the Illinois Human Rights Commission ("IHRC"). (Am.Compl.¶ 13.) In April of 1995, Massey received a right to sue letter from the EEOC authorizing him to commence a private cause of action against defendant. (Am.Compl.¶ 14.) Upon receipt of that letter on April 17, 1995, Massey, along with Blackmon and on behalf of all others similarly situated filed this suit within ninety (90) days as required by law.

Plaintiffs Blackmon and Massey initiated this suit charging that Zema intentionally discriminated against African–American employees by: (1) segregating its business territory and assigning a disproportionate share of its African–American workers to the south side territory and most Caucasian workers to the north side territory; thereby denying African–American employees the benefits and superior working conditions associated with working on the north side territory. (Am.Compl.¶ 37–40,42); (2) segregating its corporate offices along racial lines and posting advancement and other employment opportunities only in offices housing mostly Caucasian employees (Am.Compl.¶ 36, 41); (3) paying Caucasian workers a higher wage than what is paid to African–American workers in substantially similar positions with similar tenure and responsibilities (Am.Compl.¶ 43); (4) failing to hire or promote African–American employees on the basis of race; (5) subjecting African–American employees to racial slurs; and (6) terminating or otherwise demoting qualified African–American workers because of their race, without legitimate cause or in retaliation for allegations of race discrimination. (Am.Compl.¶ 33–34, 44–46).

Class Certification

***4** Plaintiffs have attempted to bring this action on their own behalf and on behalf of all others similarly situated under the provisions of Rules 23(a), 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. (Am.Compl.¶ 18.) Defendant opposed plaintiffs' motion for class certification and argued that the named plaintiffs do not adequately represent the class. (Def. Answer to Am .Compl. ¶ 18.) On June 23, 1997, plaintiffs submitted a motion to set a briefing schedule on class certification. The court denied the motion without prejudice with the understanding that the issues of class certification would be resolved, if necessary, after a ruling on defendant's summary judgment motion. (*See* July 21, 1997 Minute Order.) Thus, the court will review defendant's motion for summary judgment solely as it relates to the claims of individual plaintiffs Massey and Blackmon.

Motion to Strike

Defendant filed a motion to strike several of plaintiffs' exhibits and affidavits on December 12, 1997. Zema submits that plaintiffs' Exhibits 1–11, 20–26, 27–30, 31 and the Affidavits of Leon Johnson (Pl.Resp.Ex. 42, 60), Keith Johnson (Pl.Resp.Ex. 43), Guy Henry (Pl.Resp.Ex. 44), Richard Rampich (Pl.Resp.Ex. 45), Johnnie Haymore (Pl.Resp.Ex.46), Angel Marquez (Pl.Resp.Ex. 47), and the Sworn Statements of Willie Gardner, Thomas Marbury, Willie Smith, and Keith Johnson (Pl.Resp.Ex. 52–55) are inadmissible.

Plaintiffs' Exhibits 1–11 are maps showing Zema's sales territories for all sales department employees by race. Exhibits 20–26 contain listings of Zema's sales department average salaries for the years 1993–1995 by race and by race and tenure. In Exhibits 27–30, plaintiffs present tables of Plaintiff Blackmon's salary as compared to Caucasian employees of similar tenure for 1993–1995 and Plaintiff Massey's salary as compared to Caucasian employees of similar tenure for 1993. Exhibit 31 contains additional salary figures and ranks yearly salary of sales supervisors in 1993.

Citing a variety of perceived flaws in plaintiffs' calculation of employee salary data and representation of delivery and customer account routes, Zema asks the court to exclude each of these exhibits for lack of proper foundation. The court finds each of defendant's arguments unpersuasive. The fact that proof contains flaws goes only to the weight of the evidence, not its admissibility. *United States v. Dombrowski,* 877 F.2d 520 (7th Cir.1989). Zema claims that both the maps and salary data are based on inaccurate information obtained from Leon Johnson. Plaintiffs' state that both the maps and salary data have been calculated on the basis of information provided by defendant itself. Plaintiffs' have properly attempted to authenticate this information by consulting Zema's former sales department head. To the extent that this evidence is flawed, defendant has ample opportunity to address those flaws during cross-examination. As such, the court denies defendant's motion to strike Exhibits 1–11, 20–26, 27–30 and 31.

***5** Defendant also claims that affidavits and sworn statements submitted by the former Zema Vice President of Sales and Marketing and other Zema employees (Exhibits 42, 60, and 43–47, 52–55) contain impermissible conclusory assertions and thus cannot be facts based upon personal knowledge as Rule 56(e) requires.[4] Former Vice President of Sales and Marketing, Leon Johnson's Affidavit, (Exhibit 42) and Sales Manager Richard Rampich's Affidavit (Exhibit 45) include statements regarding various alleged policies and practices at Zema. In their affidavits, Keith Johnson and Guy Henry, two Zema sales supervisors, present statements regarding their refusal to sign a document opposing Plaintiffs Blackmon and Massey's discrimination lawsuit. The Affidavit of Johnnie Haymore (Exhibit 46) as well as those affidavits in Exhibits 47 and 52–55 contain statements from current and former Zema employees regarding both alleged Zema policies and practices as well as alleged instances of verbal abuse and use of racial slurs by members of Zema management.

In *Resolution Trust Corp. v. Jurgens,* the Seventh Circuit held that affidavits may not include conclusive assertions of ultimate fact or law. *Resolution Trust Corp. v. Jurgens,* 965 F.2d 149, 152 (7th Cir.1992). The court in, *Drake v. Minnesota Mining & Manufacturing Company,* a recent Title VII race discrimination case, affirmed the lower court's decision to exclude portions of plaintiffs' affidavits. The court found that while the Rule 56(e) personal knowledge requirement for affidavits does permit a plaintiff to assert inferences and opinions, those inferences must be substantiated by specific fact. *Drake v. Minnesota Mining & Manufacturing Company,* 134 F.3d 878, 887 (7th Cir.1998). It held that statements such as "Management ... took a scapegoat approach in dealing with employee problems and generally tended to cover up matters" were "exactly the type of conclusory allegations that Rule 56 counsels should be disregarded on summary judgment." *Id.*

A number of the affidavits and sworn statements contain assertions similar to those rendered inadmissible by the court in *Drake.* Statements such as "I have been denied promotions at the company because I am African–American" (Pl. Resp. Ex. 43, Keith Johnson Aff. ¶ 17) or "Positions on the north side of Chicago have always been filled by white or Hispanic employees" (Pl. Resp. Ex. 44, Guy Henry Aff. ¶ 14) make general conclusions regarding Zema's actions without reference to specific facts. "Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter, rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted." *Id.* (citing *Hadley v. County of DuPage,* 715 F.2d 1238, 1243 (7th Cir.1983)).[5] To the extent that affidavits in question contain statements like those cited above, the court has disregarded them. Yet the court declines to strike the affidavits in their entirety. Where plaintiffs' affidavits recounted factual instances, based upon personal knowledge, demonstrating a policy or practice of Zema's, the court considered those statements. As such the court denies defendant's motion to strike affidavits and sworn statements.

***6** Next, defendant asks the court to exclude both Keith Johnson and Guy Henry's affidavits (Exhibits 43–44) because plaintiffs' violated Rule 56(e) when they failed to attach the petition both Johnson and Henry refused to sign. In relevant part, Rule 56 requires that "copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Fed.R.Civ.P. 56(e). In their response, plaintiffs argue that neither Johnson nor Henry ever possessed those documents and thus could not attach them to their affidavits. The Seventh Circuit has held that "the requirements of Rule 56(e) are set out in mandatory terms and the failure to comply with those requirements makes the proposed evidence inadmissible during the consideration of the summary judgment motion." *Friedel v. City of Madison,* 832 F.2d 965, 970 (7th Cir.1987). However, the court is reluctant to exclude evidence on such narrow procedural grounds. Plaintiffs have actually submitted the document in question, as well as the Johnson and Henry affidavits, to the court as an exhibit for a different motion. (*See* Plaintiffs' Emergency Motion for a Protective Order, Ex. A.) Because plaintiffs did supply and the court had the opportunity to the review the necessary supporting documents on an earlier motion, the court will deny defendant's motion to strike Exhibits 43 and 44.

In addition, Zema insists that the sworn statements offered in Exhibits 52–55 are not proper evidentiary material. Plaintiffs have offered proof that statements were made under oath. (See Pl. Resp. to Mot. to Strike, Ex. L.) As such, the court denies defendant's motion to strike as to Exhibits 52–55. Therefore, the court finds that each of the exhibits in question do comport with the requirements established by Rule 56(e) of the Federal Rules of Civil Procedure. The court therefore denies Zema's motion to strike in its entirety.

Motion for Summary Judgment

Defendant moves the court to enter summary judgment on its behalf under Rule 56 of the Federal Rules of Civil Procedure. The court will render summary judgment only if the factual record shows "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." *Bratton v. Roadway Package Sys., Inc.,* 77 F.3d 168, 173 (7th Cir.1996) (quoting Fed.R.Civ.P. 56(c)). The court will not render summary judgment if "a reasonable jury could return a verdict for the nonmoving party." *Sullivan v. Cox,* 78 F.3d 322, 325 (7th Cir.1996)(citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In ruling on a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party. *Bratton,* 77 F.3d at 171 (citation omitted); *Sullivan,* 78 F.3d at 325 (citation omitted).

On a motion for summary judgment, the moving party "bears the initial burden of showing that no genuine issue of material fact exists." *Hudson Ins. Co. v. City of Chicago Heights,* 48 F.3d 234, 237 (7th Cir.1995) (citing *Celotex Corp. V. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The burden then shifts to the nonmoving party, which "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *accord, NLFC, Inc. v. Devcom Mid–America, Inc.,* 45 F.3d 231, 234 (7th Cir.1995) (citations omitted), *cert. denied,* 515 U.S. 1104, 115 S.Ct. 2249, 132 L.Ed.2d 257 (1995). Defendant Zema moves for summary judgment as to all four claims against Plaintiffs Massey and Blackmon. The court will determine the motion as it relates to each plaintiff in turn.[6]

Analysis

I. ***EEOC Charge***

***7** As a general rule, Title VII bars a plaintiff from bringing claims in a lawsuit that were not included in his EEOC charge. *Alexander v. Gardener–Denver Co.,* 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Cheek v. Western and Southern Life Insurance Co.,* 31 F.3d 497 (7th Cir.1994). This rule is a condition precedent with which Title VII plaintiffs must comply. The allegations in the charge must be "reasonably related" to the claims included in the complaint and the complaint claims must reasonably be expected "to grow out of" an EEOC investigation of express allegations listed in the charge. If they are not, claims included in a Title VII complaint, but not included in the EEOC charge must be excluded from consideration. *Id.*

Plaintiff Blackmon

Defendant asserts that a number of the claims in plaintiffs' complaint, as they pertain to Blackmon, must be barred. Blackmon included charges of discriminatory reassignment and retaliatory discrimination in compensation, continued reassignment/demotion, work conditions, and promotion and overtime opportunities in his two original EEOC charges. Defendant argues that all remaining allegations included in the Amended Complaint are not directly related or do not grow out of the EEOC claims. The court agrees.

Blackmon's initial Charge with the EEOC reads, in pertinent part,

> On or about November 15, 1993, I was reassign[ed] to a less favorable work assignment, and as a result, my salary was reduced ... I believe I have been discriminated against because of my race (black) in violation of Title VII of the Civil Rights Act of 1964, as amended, in that less senior non-Black employees were not reassigned.

(Am.Compl.Ex. C.) Blackmon's second EEOC charge reads, in relevant part,

> Since filing [the November 30, 1993] charge I have not been paid according to the hours I have worked, my assignments have been changed resulting in less pay, I have been yelled at and physically threatened and on August 1, 1994 I was suspended. I have also been denied promotions most recently in June, 1994 and denied overtime opportunities throughout the summer of 1994 ...
>
> I believe that I have been discriminated against because of my race, Black, and in retaliation for filing a previous charge of employment discrimination in violation of Title VII of the Civil Rights employment discrimination Act, as amended, in that I had not been treated in the above manner prior to the filing of the previous charge; other, non-Blacks with less seniority have been promoted and given greater overtime opportunities; and other non-Black employees have engaged in worse conduct that I was accuse[sic] of and have not been suspended. (Am.Compl.Ex. C.)

The charges in plaintiffs' amended complaint that defendant segregated and classified employees in ways that discriminated against Blackmon in his job reassignments, suspensions and compensation are not sufficiently related to Blackmon's EEOC charges. The court finds no logical connection between Blackmon's EEOC charges of discriminatory demotion and retaliatory discrimination and the claims of segregation and classification of African–American employees found in the complaint. The court in *Cheeks* notes that "claims are not alike or reasonably related just because they both assert forms of [race] discrimination. The claims are not alike unless there is a factual relationship between them. This means that the EEOC charge and the complaint must, at minimum, describe the same conduct and implicate the same individuals." *Cheeks,* 31 F.3d at 501. No such factual connection between the segregation claims in the complaint and Blackmon's specific EEOC charges exist. It is unlikely that an EEOC investigation into Blackmon's reassignment or Zema's alleged retaliatory conduct would uncover such a connection either. As such, in its examination of defendant's summary judgment motion, as it refers to Plaintiff Blackmon, the court will consider only those claims relating to Blackmon's initial reassignment or demotion and his charges of retaliation.

Plaintiff Massey

***8** Defendant also argues that because Massey included only allegations of discriminatory discharge, discriminatory hiring and wage discrimination in his original EEOC charge, Title VII bars any other claims of racial discrimination plaintiffs have asserted. This time, the court finds defendant's argument unpersuasive. The absence of an explicit assertion of such charges does not bar the plaintiff from bringing them in a Title VII action. *Harper v. Godfrey Company,* 45 F.3d 143, 147–48 (7th Cir.1995); *Cheek v. Western & S. Life. Ins. O.,* 31 F.3d 497, 500 (7th Cir.1994).[7] So long as the claims in a plaintiff's complaint are "like or reasonably related" to the EEOC allegations and reasonably can be expected to grow out of an EEOC investigation of the charges, the court must consider them.

> Massey's Charge with the EEOC reads, in pertinent part, The Respondent segregates the sales department into Black and White. In addition, in October 1992, I found [out] that Non–Black Sales Supervisors are hired earning [a] higher salary than Black Sales Supervisors ...
>
> > On January 3, 1994, I was laid off from my position. To my knowledge, I was the only Sales Supervisor subjected to the lay off. I requested to be allowed to step down, but my request was denied. A few weeks later I found out that the Respondent hired about 6 new sales supervisors, all non-Black. My territory was assumed by other Black sales supervisors.
> >
> > I believe that I have been discriminated against on the basis of my race, Black in violation of Title VII of the Civil Rights Act of 1964, as amended, in that I was paid lower salary than similarly situated non-Black co-workers and I was laid off from my position.
>
> (Am.Compl.Pl.Ex. B.)

In their amended complaint, plaintiffs' allege discrimination in hiring, promoting, firing, working conditions and compensation of African–American employees as well as segregation and classification of employees that affects working conditions, job assignments, hiring, firing, promotion, and compensation for African–Americans at Zema, including Massey and Blackmon. Massey's EEOC charge refers specifically to his belief that he and other African–American employees suffered from defendant's policy of segregation for the sales department. The court agrees with plaintiffs that allegations of unlawful segregation and classification by race contained in the complaint follow from this EEOC charge and are not barred.

Therefore, the court will consider Plaintiff Blackmon's Title VII claims and § 1981 claims of race discrimination in job assignment and retaliatory discrimination and Plaintiff Massey's claims that Zema discriminates on the basis of race in hiring, firing, and compensation of African–Americans and that it segregated its sales department by race.[8]

II. *Title VII Disparate Treatment and § 1981 Claims*[9]

The court must determine whether a triable issue of fact exists as to whether Zema intentionally discriminated against either Blackmon or Massey. Title VII makes it "an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of an individual's race ... [or] color." 42 U.S.C. § 2000e–2(a)(1). The law also states it will be an unlawful employment practice for an employer "to limit, segregate, or classify his employees or

applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.*

***9** There are two ways to prove a violation of Title VII. First, a plaintiff could present direct or circumstantial evidence of an illegal motive. Second, a plaintiff could present indirect proof. *McDonnell Douglas Corp. V. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The McDonnell Douglas approach is also known as the burden-shifting method. *Kormoczy v. Secretary, Dept. Of Housing & Urban Dev.,* 53 F.3d 821, 823–24 (7th Cir.1995). Plaintiffs present no direct or circumstantial evidence of illegal motive in support of Blackmon's claims.[10] As such, the court will apply the McDonnell Douglas approach to each of his claims. Conversely, Massey presents both direct and indirect evidence in support of his wage discrimination and segregation claims. He advances only indirect evidence in support of his discriminatory termination and hiring claims. The court will first utilize the burden shifting method in reconsidering his segregation and wage discrimination allegations and examining his wrongful termination charge. The court will then use the direct evidence approach in considering Massey's wage discrimination and segregation claims.

Plaintiff Blackmon

1. Reassignment/Demotion

Under the McDonnell Douglas burden-shifting approach, to establish a prima facie case, an employee must prove that: (1) he is a member of a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action from his employer; (4) the employer treated similarly situated employees outside the protected class more favorably. *Carson v. Bethlehem Steel Corporation,* 82 F.3d 157, 158 (7th Cir.1996). After the plaintiff has made a prima facie case, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment action. *McDonnell Douglas Corp. V. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A legitimate reason is one that provides a reasoned justification for what the employer did. *Cianci v. Pettibone Corp.,* No. 97–2115, 1998 WL 498544 (7th Cir. Aug.19, 1998). Once the employer meets this burden, the employee must demonstrate that the employer's proffered reason was pretextual. *McDonnell Douglas,* 411 U.S. at 804.

Blackmon fails to make the prima facie case that Zema violated Title VII when it transferred him from a barrel route to a package route position. The evidence plaintiffs presented does not indicate that Blackmon suffered an adverse employment action. Defendant provided evidence that Blackmon's transfer is in actuality a promotion, not a demotion. Further, Blackmon has presented no convincing evidence to the court that his reassignment from barrel helper on a draft route to helper on a package route was anything but a promotion. Webster defines promotion as "an advancement in responsibility or rank." *Webster's II New Riverside University Dictionary,* 942. All indications suggest that the move from draft route to package route was an advancement in position. Zema required Blackmon to obtain additional training for the position. In addition, Blackmon had to acquire a higher grade driver's license in order to retain the package route position.

***10** Blackmon's contention that this job reassignment was not a promotion because he was paid less money also holds little water. The fact that Blackmon actually received less money as helper on a package route does not necessarily mean that the transfer was in fact a discriminatory demotion. Zema has little incentive to discriminate against employees paid on commission. "A transfer that has the effect of reducing the employee's sales and hence commissions is an unlikely candidate for discrimination, since the employer in such a case [would be] hurting the employee only by hurting itself through a reduction in sales." *Williams v. Bristol Myers Squibb Co.,* 85 F.3d 270, 274 (7th Cir.1996). Furthermore, Zema offers a more likely explanation of why Blackmon earned less money on the package route. Since the package route position is based primarily on commission, it is more susceptible to seasonal fluctuations in sales than an hourly wage. (Pl.Ex. A, Collective Bargaining Agreement, Art. XII (Wages)).

The court concludes that Blackmon's transfer from barrel route to package route was a promotion, not a demotion. Blackmon did not suffer the adverse employment action required to make a prima facie case of discrimination under the McDonnell Douglas test. Since all four elements of the prima facie case must be established to successfully assert a Title VII claim under the burden shifting approach, the court need not discuss whether Blackmon performed his job satisfactorily, nor if Zema treated Caucasian employees differently. The court grants defendant's motion for summary judgment on this claim.

2. Retaliatory Discrimination

Blackmon claims that in retaliation for filing the initial EEOC charge, Zema: 1) denied him future promotions and overtime opportunities; 2) continued to demote him through reassignments; 3) wrongfully disciplined him with suspensions; 4) did not compensate him for hours worked; and 5) allowed him to be subjected to verbal abuse and physical threats. (Am.Compl. Ex C.) To make out a prima facie case of retaliatory discrimination a plaintiff must show three things: 1) plaintiff engaged in statutorily protected activity; 2) he suffered an adverse action; and 3) there is a causal link between the protected activity and the adverse action. *Essex v. United Parcel Service, Inc.,* 111 F.3d 1304 (7th Cir.1997).

The issue before the court is whether Blackmon offered sufficient evidence of a connection between the adverse employment actions he suffered and his statutorily protected activity. Filing an EEOC charge of race discrimination in good faith is a statutorily protected activity. (See Civil Rights Act of 1964, 42 U.S.C.2000e–4; and EEOC Procedures, 29 C.F.R. § 1601.7 (1998).) Defendant does not dispute that demotion, employee suspension and denial of promotion and overtime[11] are adverse employment actions.[12] Having satisfied the first two elements for a prima facie case, the court must then consider whether there is actually a causal link between the protected activity and the adverse action. The only possible link between Zema's alleged adverse actions and Blackmon's EEOC charge is that a number of the actions took place after Blackmon's initial filing. Blackmon filed his first EEOC charge on November 30, 1993. He claims that Zema failed to promote him in June of 1994. Zema reassigned Blackmon in 1994 and again in 1995. Two of Blackmon's suspensions occurred prior to his EEOC filing (Def.12(M) Stmt. ¶¶ 26, 30) and one occurred afterwards (Def.12(M) Stmt. ¶ 31). He charges that Zema intentionally paid him inaccurately following his filing as well. (Def.12(M) Stmt. ¶¶ 42, 45.) To support an inference of causation between the two events, Zema's adverse employment actions need to have occurred much more closely in time to Blackmon's protected activity. *Collins v. Illinois,* 830 F.2d 692, 702 (7th Cir.1987). Many of the adverse actions took place several months following his EEOC filing. Two of Blackmon's suspensions even occurred prior to the 1993 filing. Plaintiff has presented no other evidence suggesting a causal relationship between the different adverse actions and Blackmon's EEOC filing. As such, the court concludes that no causal link exists.

***11** Even assuming that a causal link could be drawn, Blackmon's claim of retaliatory discrimination still fails. Where a prima facie case of retaliatory discrimination is shown, the employer must offer a legitimate, nondiscriminatory reason for its actions. *Pafford v. Herman,* 148 F.3d 658 (7th Cir.1997). The court finds that Blackmon's claims of retaliatory discrimination must fail because Zema has presented a legitimate justification for each action taken. Plaintiff admits that he did not formally apply for a promotion nor is he sure whether or not he told his supervisors that he was interested in obtaining an advanced position. (Pl.12(N) Stmt. ¶¶ 22, 48.) Thus, the main reason Blackmon did not receive a promotion seems clear. He simply did not apply for one. The subsequent reassignments Blackmon faced after his initial transfer to a package route resulted because Blackmon repeatedly failed the driving test he needed to pass in order to obtain a Class A license required for the new position. (Pl.12(N) Stmt. ¶ 15.) Although it is clear the number of disciplinary actions Blackmon received increased following his initial EEOC filing, each suspension and corrective action notice provides a detailed justification for the adverse action. (Def.12(M) Stmt. ¶¶ 26–35; Nino Aff. Ex. 1–10.) Blackmon offers no evidence that the difference in pay he received was anything but an inadvertent error. Finally, even when considered in a light most favorable to plaintiff, more than one incident of verbal abuse is necessary to give rise to a Title VII claim of retaliatory discrimination. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Crady v. Liberty National Bank and Trust Company,* 993 F.2d 132, 136 (7th Cir.1993).

The court, therefore, finds that Blackmon has failed to create a genuine issue as to whether he was discriminated against on the basis of race or in retaliation for his filing an EEOC charge. Thus, in regards to Blackmon's Title VII disparate treatment and § 1981 claims, the court grants Zema's motion for summary judgment.

Plaintiff Massey

1. Termination and Refusal to Hire

Also utilizing the McDonnell Douglas burden shifting framework, the court will consider Massey's claims that Zema discriminated against him by: 1) eliminating his route and terminating him and 2) refusing to hire him in another position. Massey has established a prima facie case of discrimination. *Carson,* 82 F.3d at 158. He is a member of a protected racial group. Overall, Massey appears to have been working to his employer's legitimate expectations. Both parties have presented evidence regarding Massey's job performance. Massey's supervisors varied in their assessment of his work. (Doney Dep. 92; Pl.Ex. 39, Johnson Dep. 115; Bryant Dep. 48–50) A review of his performance evaluations, however, reveals regular ratings of satisfactory or better, with only occasional remarks on areas for improvement or criticisms. (Pl.Resp.Ex. 16–19.) Yet Massey was discharged and not given another route. Furthermore, no other routes or positions were eliminated at that time.

***12** Zema maintains that because General Manager, James Doney, believed eliminating Massey's route was "in the best interest of the Company" and because he suspected Massey of theft, Zema has articulated a legitimate and non-discriminatory reason for Massey's discharge. However, while this burden is "merely a burden of production" *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 463 (7th Cir.1986), defendant's justification must be able to withstand charges by plaintiff that it is insincere.

The court believes that a reasonable trier of fact would likely question Doney's representation that eliminating Route 35 was in Zema's best interest. To sufficiently show pretext, plaintiffs must present evidence that defendant's "proffered reason for the dismissal is unworthy of credence, thus raising the inference that the real reason is discriminatory." *Essex v. United Parcel Service,* 111 F.3d 1304, 1310 (7th Cir.1997)(citing *Johnson v. City of Fort Wayne,* 91 F.3d 922, 931 (7th Cir.1996)). A significant question remains as to whether Massey worked one or two routes prior to his termination. Massey contends that even if one route was eliminated, he maintained responsibility for the same number of accounts. After his termination, Zema did not close accounts previously served on Route 35. (Doney Aff. ¶ 9.) Other employees covered his accounts. (Doney Aff. ¶ 9.) Thus it is unclear exactly what benefit resulted from eliminating Massey's route besides Massey's discharge.

Doney's claim that his belief that Massey was involved in a theft of Company property led him to terminate Massey's position and not rehire him raises additional questions. While Doney may have honestly believed that Massey was involved in the theft, Massey was not terminated until months after another employee confessed to stealing Company property. (Pl.Ex. 32, Doney Dep. 86.) In addition, another employee, a Caucasian, was implicated in being involved in the theft, but was not terminated. (Pl. Resp. Ex. 36, Bryant Dep. 51–52; Def. Resp. Pl. 12(N) Stmt. ¶ 22.) Massey was. Given the circumstantial evidence tending to show that both justifications Doney submitted for terminating Massey were pretextual, the court finds that a genuine issue as to whether Massey's termination was discriminatory exists. Accordingly, the court denies Zema's motion for summary judgment on this claim.

For the same reasons as articulated above, the court denies defendant's motion for summary judgment on the issue of whether Zema's failure to hire Massey on another route was discrimination on the basis of race. Massey has raised a genuine issue of fact regarding his job performance and regarding the veracity of Zema's proffered reason for not hiring him in another position. Therefore, the court denies defendant's motion for summary judgment as to both Massey's discriminatory termination and hiring claims.

2. Wage Discrimination.

Plaintiffs purport to present evidence of disparate treatment under both the direct and burden-shifting methods of proof in support of Massey's individual claims. Under the direct method, the plaintiff must "show, through direct or circumstantial evidence, that the employer's decision to take an adverse job action was motivated by an impermissible purpose." *Pafford,* 148 F.3d at 665. Offensive remarks and evidence of discrimination against other employees serve as circumstantial evidence of intentional discrimination. *Id.* at 666 (citing *Troupe v. May Dep't Stores Co.,* 20 F.3d 734, 736 (7th Cir.1994)). Where proposed direct evidence is insufficient to establish discrimination, the court may consider it as proof of pretext under the burden shifting method. *Pafford,* 148 F.3d at 666.

***13** Plaintiffs offer much of their direct evidence in support of the claim Zema compensated Massey and other African–Americans at a rate lower than similarly situated Caucasian employees. To establish unlawful wage discrimination under the Title VII direct evidence approach, Massey must show that Zema's compensation decisions were motivated by race. *Loyd v. Phillips Brothers, Inc.,* 25 F.3d 518, 522 (7th Cir.1994).[13] To show improper motive, plaintiff may present direct evidence, such as documents or statements revealing that an employer's decision making was based on race. *Id.* at 521. Plaintiff may offer statistical evidence that defendant offers unequal pay for equal work between *individuals* of different classes, as plaintiffs alleging an Equal Pay Act violation must do. *County of Washington v. Gunther,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).[14] In addition, a court may infer illegal motivation on the part of employers where plaintiff proves that persons from different *classes* perform work that is equal and receive unequal rates of pay. *EEOC v. Sears, Roebuck & Co.,* 839 F.2d 302 (7th Cir.1988). However, statistical comparisons showing that one group, on average, earns less than employees in another group, do not in and of themselves, create such an inference. *Bush v. Commonwealth Edison Co.,* 990 F.2d 928, 931 (7th Cir.1993). Where plaintiff successfully creates an inference of improper motive in compensation, defendant may answer by proving that any resulting salary differences can be attributed to a neutral, legitimate reason. *Beard v. Whitley County REMC,* 840 F.2d 405, 409 (7th Cir.1988).

Plaintiffs argue that by placing Massey on a south side route, defendant put him in a position where he would earn less than similarly situated employees. In support of this allegation, Massey offers evidence in the form of statistics that from 1992 to 1995, African–American employees at Zema generally earned less than Caucasians with similar tenure.[15] Defendant answers

this charge with a set of its own statistics. Zema claims that in 1993, Massey made more than some Caucasian sales managers at CBS and less than others.[16] Defendant also claims that Massey inaccurately based his calculations on wages of all Zema employees. Zema contends that only CBS employees should be considered for the purposes of determining wage discrimination.[17] (Def. Reply Brief, 9–10.) They also assert that Hispanics should be included as Caucasians in these calculations.[18] After receiving new numbers that exclude IDI and IB employee salaries, Massey incorporates tenure in the analysis and presents evidence that calls into question the reliability of Zema's numbers which show African–American sales supervisors, on average making more than their Caucasian counterparts. (Pl.Sur–Reply, 9.) The Seventh Circuit has held that "a pattern, in which blacks sometimes do better than whites and sometimes do worse, being random with respect to race, is not evidence of racial discrimination." *Bush v. Commonwealth Edison Co.,* 990 F.2d 928, 931 (7th Cir.1993). Thus, the court finds that neither party presented direct evidence sufficient, in and of itself, to prove the presence or absence of wage discrimination. Therefore, the court will consider the evidence presented under the burden shifting approach.

***14** Under the McDonnell Douglas approach, to establish a prima facie case of wage discrimination, plaintiff must prove that he was paid less than a similarly situated employee who was not a member of the plaintiff's protected class. *Johnson v. University of Wisconsin—Eau Claire,* 70 F.3d 469, 478 (7th Cir.1995); *Chambers v. American Trans Air, Inc.,* 17 F.3d 998, 1004 (7th Cir.1994). When a plaintiff succeeds in making a prima facie case, in its defense, defendant must assert a legitimate business reason for the difference in salaries. Plaintiff then bears the burden of proving that the legitimate business reason the defendant asserted is pre-textual. *Id.*

Upon a review of both parties' evidence on compensation, the court finds that the statistics offered by both parties create a significant question of material fact as to whether Zema paid Massey and other African–American sales supervisors less than similarly situated whites. In defense of its salary data, Zema contends that seniority plays only a small role in determining salary level and asks the court to ignore tenure as a factor that should influence compensation. (Def. Reply at 11.) The court, however, believes that to compare employee salaries without taking tenure into account would provide an incomplete picture from which to draw any reliable conclusion. Thus, the court denies Zema's motion for summary judgment as to the issue of Massey's wage discrimination as well.

3. Segregation

Plaintiffs also present direct evidence to prove that Zema unlawfully segregated and classified African–American employees as a part of company policy and which adversely affected them. Although defendant presents a lengthy explanation of Zema's corporate history and the need to maintain separate facilities, the court finds that plaintiffs have created a genuine issue of material fact as to whether Zema intentionally segregated its sales department staff, customer accounts and facilities in ways that tended to adversely affect Massey because of his race. The Seventh Circuit suggests that to be conclusive of intentional discrimination, circumstantial evidence should create "a convincing mosaic of discrimination against the plaintiff." *Troupe,* 20 F.3d at 737. The circumstantial evidence plaintiffs have gathered illustrates just such a picture.

While Zema denies that it designates delivery routes, customer accounts, work areas and staff on the basis of race, defendant admits that certain aspects of its sales operations have been segregated. Customer accounts were classified by race. (Pl. Resp. Ex .57–59.) "Most of [Zema's] African–American employees service south and west side accounts ... and most of its Caucasian and Hispanic employees service north side accounts." (Def. Reply Brief, 7.) And, for some time following the merger which brought in several African–American employees, most African–Americans worked in an area physically separated from Caucasians and Hispanics. (Doney Dep. 114–116.) A rational trier of fact could reasonably infer that Zema segregated its sales department in ways that adversely impacted Massey's ability to perform his duties and ultimately led to the elimination of his route and position. As such, the court denies defendant's motion for summary judgment as it pertains to Massey's claims of segregation under Title VII.

III. *Title VII: Disparate Impact Claim*

***15** Alternatively, plaintiffs argue that Zema adopted a set of segregation policies and classification practices which had a disproportionate adverse impact on Blackmon, Massey and Zema's other African–American employees.[19] Plaintiffs bring this claim under Title VII of the Civil Rights Act of 1964 (as Amended 1991) or a disparate impact theory.

To establish a prima facie case of disparate impact, plaintiffs must first "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities." *Vitug v. Multistate Tax Commission,* 88 F.3d 506 (7th Cir.1996) (citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)).

After identifying those employment practices, plaintiffs must then prove causation and must "offer statistical evidence sufficiently substantial to prove that the practice in question has caused" the adverse action plaintiff alleges. *Watson,* 587 U.S. at 979. Since the court has barred a consideration of all segregation and classification claims as they pertain to Blackmon's individual case, Blackmon's disparate impact claim must fail as well.

Plaintiffs basically argue that Zema subjected Massey and other African–American employees to a set of segregation policies and classification practices that had a disproportionately adverse impact on them. This court has already noted that a genuine issue exists as to whether Zema intentionally segregated African–American employees from others on the basis of race, in ways that deprived Massey of certain employment opportunities. However, under a disparate impact analysis the Supreme Court has already held that, "in certain cases, facially neutral employment practices that have a significant adverse effect on protected groups have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent." *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 986–87, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Thus where an employment practice in operation is "functionally equivalent to intentional discrimination" it will be unlawful under the disparate impact theory. *Id. at 987.*

Massey asserts that Zema's decision to eliminate his route and terminate him, its failure to rehire him on a north side account, and the wages that he and other African–American sales supervisors were paid can be attributed, in part, to Zema's practice of segregation. The questions of fact that exist regarding each of these individual allegations have been set forth above. Given the strength of the evidence presented by plaintiffs and given the facts viewed in a light most favorable to Massey, the court finds that plaintiff has created a genuine issue on the question of disparate impact and thus denies Zema's motion for summary judgment on this claim as it pertains to Massey.

IV. ***Illinois Human Rights Claim***

Defendant submits that state law does not permit plaintiffs to bring an Illinois Human Rights Act claim of unlawful discrimination before this court. Illinois Human Rights Act 775 ILCS 5/1–101 *et seq.* The court finds defendant's argument persuasive.[20] The Illinois Human Rights Act provides for judicial review only after the Human Rights Commission has issued a final order on a complaint. *Talley v. Washington Inventory Service,* 37 F.3d 310, 312–13 (7th Cir.1994). No independent judicial actions are permitted for the claims at issue in this case.[21] Thus the court grants the defendant's request for summary judgment on this claim as it pertains to both named plaintiffs.

Conclusion

***16** For the reasons stated above, the court: (1) denies defendant's motion to strike plaintiffs' exhibits and affidavits; (2) grants defendant's motion for summary judgment on all four of Blackmon's claims; (3) grants defendant's motion for summary judgment as to Massey's Illinois Human Rights Act claim; (4) denies defendant's motion for summary judgment as to Massey's Title VII disparate treatment, disparate impact and § 1981 claims. The court permits plaintiffs to file a motion to reconsider class certification with Massey as named plaintiff. Plaintiffs motion is to be filed on or before October 15, 1998. Defendant's response is due October 31, 1998.

Footnotes

1 Plaintiffs have also brought charges of discrimination on behalf of all others similarly situated.

2 The following facts in this section are undisputed and taken from the defendant's 12(M) Statement and plaintiffs' 12(N) Statement unless indicated otherwise.

3 Blackmon served as a helper delivering beer on either a package route or barrel route throughout most of his tenure there. In each of these positions he was a member of the union and was bound by the Collective Bargaining Agreement between CBS and the Union.

4 Defendant also asserts that each of the affidavits and sworn statements in question are not relevant to the particular discrimination claims made by Massey and Blackmon. Each of these affidavits present information relevant to Massey's allegation that Zema

unlawfully segregates its African–American employees and that it pays African–Americans less on the basis of race. In addition, proof of discrimination against other employees may be offered as direct evidence of discriminatory intent or that defendant's proffered explanation for an adverse employment action is pretextual. *Pafford v. Herman,* 148 F.3d 658, 666 (7th Cir.1997). To the extent that affidavits contain conclusory statements or irrelevant facts, the court has disregarded them. The court may disregard portions of an affidavit without dismissing it in its entirety. *Coleman Cable Systems, Inc. v. Shell Oil Company,* No. 92 C 1817, 1996 WL 514982 (N.D.Il., Sept.6, 1996) (citing *Prudential Ins. Co. of America v. Curt Bullock Builders, Inc.,* 626 F.Supp. 159, 164 (N.D.Ill.1985)).

[5] An example of such a concrete assertion of fact is included in many of the affidavits presented, "African–American sales supervisors were housed in an office separate from white sales supervisors at the company's headquarters." (Pl. Resp. Ex. 45, Rampich Aff. ¶ 6.) A number of the affidavits in question contain variations on this statement.

[6] Despite the court's ruling that the defendant's motion for summary judgment was to be considered as it relates to the two named plaintiffs and prior to a ruling on the plaintiff's motion to certify this matter as a class, plaintiff's counsel has submitted briefs which continue to speak in general terms and in regards to all African–American employees of Zema. The court has examined each claim as it relates to the named plaintiffs, Massey and Blackmon. To the extent that claims asserted by the plaintiff encompass the more general claims asserted on behalf of potential class members, the court will consider them. Where claims have been asserted on behalf of potential class members, but do not reflect claims that are "reasonably related to" or "grow out of" those claims arguably asserted by the named plaintiff, the court will not consider them.

[7] Given that most EEOC charges are completed by laypersons rather than lawyers, a Title VII plaintiff need not allege in an EEOC charge each and every fact that combines to form the basis of each claim in her subsequent report. *Cheek,* 31 F.3d at 500.

[8] The court, however, will not consider claims of discrimination in promotions and verbal abuse or working conditions as they pertain to Massey. Massey does not make any mention of these claims in his EEOC charge. The court read those charges from the amended complaint as pertaining to Blackmon alone.

[9] The elements and methods of proof of plaintiffs' Section 1981 and Title VII claims of racial discrimination are "essentially identical." *Von Zuckerstein v. Argonne Nat'l Laboratory,* 984 F.2d 1467, 1472 (7th Cir.1993); *McAlpine v. Foertsch,* 870 F.2d 409, 414 (7th Cir.1989).

[10] Plaintiffs in this case purport to present direct evidence of discriminatory intent. Yet much of the direct evidence presented refers solely to the charges of segregation and classification of African–American employees generally. Given that the court has ruled that it will not consider claims of discriminatory segregation and classification of employees as it relates to Blackmon's claims, the court will proceed as if no direct evidence of a Title VII violation has been presented in regards to Blackmon.

[11] Blackmon concedes that he was given overtime opportunities. (Blackmon Dep. 110–111.)

[12] Defendant suggests that the verbal abuse plaintiff alleges Zema subjected him to does not amount to a materially adverse action. Citing *Gibson v. American Library Association,* 846 F.Supp. 1330, 1338 (N.D.Ill.1993), defendant maintains that one instance of verbal abuse, does not in and of itself amount to a Title VII violation. The court agrees. *See Daniels v. Essex Group, Inc.,* 937 F.2d 1264, 1270–73 (7th Cir.1991). However, since Blackmon presented other valid, adverse employment actions, plaintiff has met the requirements for this element.

[13] The court agrees with plaintiffs that *Loyd* does not require direct evidence to prove wage discrimination under Title VII. In that case the Seventh Circuit expressly objects to such a conclusion. "We do not mean to imply that circumstantial evidence ... can never carry the day for a plaintiff alleging intentional wage discrimination under Title VII." *Loyd,* 25 F.3d at 525.

[14] However, unlike the *Equal Pay Act,* Title VII does not require proof of job equality in order to show wage discrimination. *County of Washington v. Gunther,* 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

[15] Plaintiffs offer exhibits comparing the average salary and average tenure of Caucasian, African–American and Hispanic sales managers, sales supervisors, drivers and assistant drivers at Zema. Data was compiled from years 1992 through 1995. In each year, African–American sales supervisors had an average tenure that was nearly the same or greater than Caucasian sales supervisors, but a salary that was lower. (Pl.Resp., Ex. 22–25.)

[16] Defendant asserts that in 1993, Massey ranked 17th in pay out of the 28 sales supervisors. They also state that six Caucasian supervisors made less than Massey, three of whom had more seniority than he did. (Doney Aff. Def. Ex. A.)

[17] The court agrees with plaintiff that Zema is the defendant in this case, but acknowledges that an issue remains as to whether salary data from International Brands ("IB") and Coors Distributing of Illinois ("CDI") should be included in statistics calculating average compensation for employees. Zema is "doing business as" CBS, CDI and IB. Each are beverage distributing companies and at one time or another each shared office space with CBS. (Def. Reply Brief. 2–3.) Defendant concedes that some information and employees were shared among these Zema held entities, yet wants the court to believe that each should be considered separate

for the purposes of salary comparisons under *EEOC v. Sears Roebuck & Co.,* 839 F.2d 302 (7th Cir.1988) (holding that nationwide salary data painted an inaccurate picture for comparison of salary among different classes of employees since "salary decisions at Sears were made at the local level and decision makers at that level had considerable discretion"). Even if the court found defendant's argument persuasive, Zema offers salary data on CBS employees only, but provides information regarding the tenure of these employees for only one year–1993. Plaintiffs offer salary data for years 1992 through 1995. Additionally, a reliable comparison cannot be made on average salary figures alone. Thus, in viewing the case in a light most favorable to plaintiffs, the court has considered all of the submitted data on employee salaries at Zema and at CBS alone.

[18] This court finds the attempt by defendant to lower the median and average salaries of their Caucasian employees, by classifying all Hispanics as Caucasians troubling. Defendant's reliance on the argument that "most Hispanics are Caucasian" is clearly misguided and the case cited in support of this proposition is simply too outdated to be persuasive. *Martinez v. Hazelton Research Animals, Inc.,* 430 F.Supp. 186 (D.Md.1977).

[19] Defendant argues in their reply brief that the court should ignore plaintiffs' disparate impact claim since plaintiffs did not explicitly identify which of the 25 allegations they contend had a disparate impact on African–American employees at Zema. The court finds this argument unconvincing. An examination of plaintiffs' amended complaint and briefs makes it clear which of the allegations are offered in support of the disparate impact claim. (*See* Pl. Am.Compl. ¶¶ 31–33, 37–43, 77.)

[20] Plaintiffs do not contest defendant's argument that the Illinois Human Rights Act is not applicable to their claims.

[21] To obtain independent judicial action under the Act, the claim must be an Article 3 civil rights violation arising out of a real estate transaction. See 775 ILCS 5/10–101 (A)(3).