IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-N-795

JOSEPH A. GOODEN,

Plaintiff,

v.

TIMPTE, INC.,

Defendant.

PLAINTIFF'S AMENDED BRIEF IN OPPOSITION TO DEFENDANT TIMPTE, INC.'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Joseph A. Gooden, by and through his counsel, Fox & Robertson, P.C., hereby submits this brief in opposition to Defendant Timpte, Inc's, motion for summary judgment.

Introduction

Plaintiff Joseph Gooden is entitled to prevail on his claims for racial harassment and ethnic intimidation because he was subjected to a course of racially hostile conduct at Defendant's facility that culminated in his discovery of a naked Black doll hanging by a noose from the top of his tool cabinet. Timpte is liable for this harassment and intimidation because its managers knew of and participated in racially hostile acts and Timpte took no reasonable steps to prevent or correct such conduct. Gooden is entitled to recover punitive damages because Timpte acted at all times with malice and/or reckless indifference for his federally protected rights.

Response to Statement of Undisputed Material Facts

1. Admit.

2. Admit that Gooden was a member of United Automobile Workers. Admit that his employment was covered by a collective bargaining agreement that prohibited discrimination but only prohibited harassment based on membership or participation in the union. Def. Ex. A. at 24.

3. Deny that Timpte had an anti-harassment policy that covered anything other than sexual harassment. Def. Ex. B; Manley 141/7-10; Crabtree 78/20-23; Smittkamp 124/13-24.

4. Admit that the Sexual Harassment Policy was posted. Deny that it was disseminated to employees at orientation. Gooden 101/9-14; Smittkamp 39/5-46/20; 133/2-135/18.

5. Admit that Timpte may have disseminated certain issues of Manger's Legal Bulletin at staff meetings. Deny that racial harassment was discussed at such meetings and deny that this would have constituted "training." Manley 72/2-4; Smittkamp 79/3-9. The staff meetings were limited to upper-level management. Manley 70/4-16. Cofer and Crabtree never received training on harassment or discrimination. Cofer 7/22-10/25; Crabtree 74/9-12 and Resp. to Ig. 10.

6. Admit that some issues of Manager's Legal Bulletin "touched on" racial harassment and discrimination issues. Deny that they were circulated among Timpte managers. See Def. Ex. C.

7. Deny that Gooden's claims are based only on six isolated incidents. His claim is that the environment in which he worked was racially hostile. See infra 4-7. Admit that David Rodriguez told Gooden that Mickey Ford had said words to the effect of, "how [is your] little nigger boy working out" and that Harold Crabtree was present for these words.

8. Unknown; admit for the purposes of this Motion.

9. Deny that Ryan Cofer spoke with Crabtree about the event. Cofer did not counsel or advise any employees concerning racial language or racial harassment other than Tom Quinn,

Cofer 30/19-24, and never told anyone that racist language was unacceptable. Id. 20/10-14.

Paragraphs 10 through 13: Admit.

14. Admit that Gooden did not report the incident to anyone at Timpte. Deny that the incident was not covered by that Charge. Charge of Discrimination at 2.

Paragraphs 15 through 19: Admit.

20. Admit that Crabtree testified that he went looking for the "Justice for O.J." noose in 1998 after reading articles in the Rocky Mountain News. Admit that Crabtree told Gooden that he was looking for the "Justice for O.J." noose, that he couldn't find it, and that "if he found it first, that [he'd] appreciate it if it didn't offend him." Crabtree 50/15-25. Admit that Crabtree found and destroyed the "Justice for O.J." noose.

Paragraphs 21 through 30: Admit

31. Deny. Gooden 87/23-25.

Paragraphs 32 and 33: Unknown; admit for the purposes of this Motion.

34. Admit.

35. The paragraph as phrased is vague. Admit that Gooden received no further reports of Quinn referring to him as a "nigger."

Paragraphs 36 and 37: Admit

38. Admit that Gooden showed the doll to Robert Marshall and several other employees. Gooden 145/13-14.

Paragraphs 39 through 51: Admit.

52. Deny. Lynda Smittkamp received a lead in response to the reward offer, but did not follow up. Smittkamp 111/9-115/6.

Paragraphs 53 through 58: Admit.

Statement of Additional Disputed and Undisputed Facts

1. Over the past five years, Timpte employees often used a variety of racial slurs, at times in the hearing of supervisors and managers. Timpte Resp. to Ig. No. 12; Crabtree Resp. to Ig. No. 8; Cofer 18/15-23/5; Crabtree 30/7-10; 33/22-34/9; Bowland 7/3-6; 8/11-10/8; 15/14-16/11; 38/25-39/22; Lusinger 39/18-40/25; 52/16-58/8; Marshall 9/23-25; Fenstemaker 7/15-12/24; 95/15-99/14; 139/7-141/21; Rodriguez 26/13-17; 76/14-20.

2. Timpte managers and supervisors used racial slurs. Bowland 11/2-4; 37/18-22; 47/3-14; 55/18-56/20; Fenstemaker 16/16-17/5; 98/20-104/22; Lusinger 9/11-13; Rodriguez 30/7-31/15; 39/23-40/14.

3. Neither Gary Manley, Cofer nor Crabtree ever told anyone at Timpte those words were unacceptable. Manley 143/14-17; Cofer 20/10-14; Crabtree 33/19-21. Timpte management did not instruct its employees that the use of racial slurs was inappropriate. Fenstemaker 22/11-23/3; Bowland 13/7-10; Lusinger 15/2-5; 78/10-79/12; Rodriguez 121/9-10.

4. The men's restroom at Timpte contained racist graffiti, including swastikas, "KKK," "die nigger," "nigger," and a drawing of a "hooded guy." Bowland 11/5-22; Lusinger 10/18-11/3; 69/5; Marshall 12/17-19. Cofer has observed the swastikas in the men's restroom and stated that these symbols have "been in and out of [the restroom] for years," most recently over a year but less than two years prior to his deposition in October 1999. Cofer 43/3-44/9.

5. Jim Wellbrock observed a noose – consisting of a six-foot rope hanging from the ceiling – in the woodshed at Timpte, a building used by "a lot of people." Wellbrock 26/20-27/15; 28/22-24. Wellbrock told John Condon about it. Condon 36/25-37/9. Crabtree brought a noose to work at Timpte sometime in 1994 or 1995 – during the trial of O.J. Simpson – called "the O.J. Simpson Ribbon for Justice." Crabtree 41/25-42/3; 43/17; Crabtree Resp. to Ig. No. 7.

6. Despite this history of racial slurs and racist symbols, Timpte has only disciplined an employee for the use of a racial slur on one occasion – at the explicit request of Plaintiff Joseph Gooden in July, 1998. Timpte Resp. to Ig. No. 11.

7. Several employees testified that they either did not receive a copy of the 1993 Sexual Harassment Policy, that they did not recall it or that Timpte did not review it. Lusinger 15/6-17. Fenstemaker 24/3-5; Rodriguez 103/2-7; 109/11-21; Marshall 30/5-20.

8. Timpte did not conduct training on racial harassment. Manley 171/21-172/5; Smittkamp 62/20-63/2; Bowland 14/12-17; Lusinger 14/23-15/1; Marshall 15/18-24; Rodriguez 102/7-20. Cofer and Crabtree never received any training on harassment or discrimination. Cofer 7/22-10/25; Crabtree 74/9-12; Crabtree Resp. to Ig. No. 10.

9. At the time he was hired, Gooden was the only African-American among the approximately 65 employees at Timpte's Commerce City facility. Position Statement at 1-2. On August 7, 1999, Gooden was one of two such employees at the facility. Timpte Resp. to Ig. Ex. 1.

10. Gooden did not receive the collective bargaining agreement. Gooden 90/13-91/11. He does not recall seeing Timpte's Sexual Harassment Policy and did not think that Timpte had a harassment or discrimination policy. Id. 101/20-108/8. Although he thought he could report such matters to Smittkamp, he did not know what the company would do. Id. 109/13-110/7.

11. In addition to hearing that others had referred to him as a "nigger" on at least two occasions, Gooden also learned from a co-worker about the use of the words "beaner" and "nigger-rig" at Timpte. Id. 190/21-25. When Gooden related that Rodriguez had told him that Quinn had called him a "nigger," the co-worker explained, "'that's just the way it is. They say things like that around here all the time. They call me a beaner.'" Id. 191/17-24.

12. Gooden felt "shunned" and "avoided" by his co-workers at Timpte, a feeling that

grew worse throughout his time at Timpte. Id. 27/2-23; 73/2-74/10. A number of workers expressed to Rodriguez that they did not want Gooden working near them, saying, "Keep the little nigger over there on your side." Rodriguez 20/20-25/13. Gooden did not receive help or training when he requested it. Gooden 26/15-17; 154/8-25; 156/6-18; Rodriguez 19/6-9.

13. Gooden got the sense from his discussion with Crabtree about nooses that Crabtree was "taunting" him and that Timpte "promoted or just let slide" this type of thing. Gooden 186/6-16. He felt that this was "a subtle type of threat" because "We're talking about a noose. We're talking about these are things that people got hung by in the past." Id. 186/20-187/18.

14. Gooden downplayed some of the earlier incidents because he was trying to keep his job, because he hoped the harassment would stop, and because did not want anyone to give him trouble because he had gotten someone fired. Id. 31/4-32/23; 77/13-19; 137/9-13. When Gooden first heard that Quinn had called him a "nigger," he did not tell Crabtree because "he was present when it happened." Id. 131/2.

15. Following the various incidents of harassment, Gooden felt frightened, disgusted, spooked, frustrated, angry and nervous. Gooden 33/7-25; 152/14; 161/19-162/11; 182/24-183/19. He felt a threat of "bodily injury." Id. 214/9-16. Following the hanging Black doll incident, he called the Commerce City police because he "didn't feel that Timpte was going to do anything about it as a company." Id. 166/25-167/10; 175/7-17.

16. Manley found the hanging Black doll very upsetting, and was "in shock," "very angry" and "quite distressed." Manley 114/17-115/19. Crabtree acknowledged that he found the noose and doll "repulsive," and "racially offensive." Crabtree 62/24-63/3.

17. Following the implementation of the new policy and its alleged promulgation to Timpte employees, employee Ryon Luscome displayed swastikas at his jobsite at Timpte.

Condon 23/21-24/17; Wellbrock 31/25-32/10.

18. Following his experience at Timpte, Gooden does not feel like the person he once was, is unsure of himself, is more uncertain about race relations, has lost self-esteem, and is not as confident as he was and has trouble making friends. He feels depressed a lot. Gooden 48/22 - 50/6; 219/5-221/7. Gooden has been diagnosed with post-traumatic stress disorder and social phobia. Report of Robert L. Atwell, Psy. D. (filed under seal at Tab 20).

Argument

I. Timpte Is Liable for the Racially Hostile Environment at its Commerce City Facility.

Because the "'primary objective'" of Title VII is to "prevent" harm, and one of its "basic policies" is to "encourag[e] forethought by employers," the Supreme Court has "recognize[d] the employer's affirmative obligation to prevent violations." Faragher v. City of Boca Raton, 524 U.S. 775, 806-07 (1998). Timpte management had been aware for years of the use of racist slurs and symbols at Timpte and took virtually no steps to prevent the appalling conduct Gooden encountered. Timpte is therefore liable for that harassment.

A. The Work Environment Gooden Encountered at Timpte Was Racially Hostile.

For harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (citations omitted). The environment must be hostile or abusive from both an objective and subjective perspective. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

1. The Harassment Gooden Encountered at Timpte Was Sufficiently Severe to Constitute a Cause of Action under Title VII.

"Pervasiveness and severity are independent and equal grounds" to support a claim of

racial harassment. Witt v. Roadway Exp., 136 F.3d 1424, 1432 (10th Cir.), cert. denied 525 U.S. 881 (1998)(citations omitted). "[A] single incident of physically threatening conduct can . . . be sufficient to create an abusive environment." Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998). While the harassment Gooden encountered was both severe and pervasive, the indisputably severe harassment he encountered in the form of the hanging doll is, in and of itself, sufficient to support a cause of action under Title VII.

Joseph Gooden's discovery of the mock lynching constitutes a hostile environment as a matter of law. Timpte's unsupported assertion to the contrary, Def. Br. at 12-13,[1] cannot overcome the conclusion that, "the connotations of a noose are sufficiently disturbing to create an actionable racially hostile work environment." Ford v. West, Civil Action No. 97-S-1631 (D. Colo. Mar.18, 1999), Slip. Op at 7-8 (Tab 17). "The grossness of hanging an object resembling a noose at the work station of a black female is self-evident." Vance v. Southern Bell Tel. & Tel., 863 F.2d 1503, 1511 n.4 (11th Cir. 1989), rev'd on other grounds, 983 F.2d 1573 (11th Cir. 1993).

2. The Harassment Gooden Encountered at Timpte Was Sufficiently Pervasive to Constitute a Cause of Action under Title VII.

The harassment suffered by Gooden started long before he discovered the hanging Black doll. Among other things:

- Gooden was the only African-American employee at Timpte when he started – and was Timpte's first African-American employee in three years.
- From the moment he arrived at Timpte, he felt ostracized by his co-workers and did

[1] Timpte appears to rely on the fact that the mock lynching was anonymous to argue that it could not have created a hostile environment. There is, however, no logical connection between the knowledge of the perpetrator's identity and the harm the incident caused. In any event, as one court has held with respect to an anonymous hate-crime, "a reasonable fact finder could readily conclude [it] was an 'inside job' perpetrated by a co-worker in the relatively small workplace." Demby v. Preston Trucking Company, Inc., 961 F. Supp. 873, 880 (D. Md. 1997).

not receive proper training or responses to job-related inquiries.

- He learned that others were referring to him in the grossest racial terms – in the presence of his supervisor – that his supervisor did nothing in response, and that such references were not unusual at Timpte.

- He heard other workers and his supervisors use an offensive ethnic slur in commonly referring to a tool used around the shop.

- His supervisor advised him that nooses had been found at Timpte – including one he himself had brought in – that the latter was "a joke" and that he would appreciate it if Gooden did not take offense.

These circumstances must be considered together with the mock lynching. "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." Harris, 510 U.S. at 23. It is not appropriate, as Defendant has done, to examine each incident of harassment separately. Jackson v. Quanex Corp., 191 F.3d 647, 660 (6th Cir. 1999); West v. Philadelphia Elec. Co., 45 F.3d 744, 756 (3d Cir. 1995). The Tenth Circuit has held that racist and sexist incidents may be aggregated in determining whether an environment is hostile. Smith v. Norwest Fin. Accept., Inc., 129 F.3d 1408 (10th Cir. 1997). That court held that an environment in which a woman had been subjected to three actionable sexist comments and one actionable racist comment was hostile. "The aggregate sexual and racial animus directed toward Plaintiff emphasizes our point: The cumulative evidence of severity was sufficient for the court to conclude that a reasonable person would find Plaintiff's work environment hostile or abusive." Id. at 1414.

Evidence of racist language used out of Gooden's hearing is relevant to the atmosphere of racism at Timpte and to the motive behind the conduct that Gooden experienced first hand. See Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 111 (3d Cir. 1999), cert. denied, 68 U.S.L.W. 3429 (2000) (holding that evidence of sexist statements made among male workers outside the

hearing of female workers was admissible to show the "motive behind the harassment, which may help the jury interpret otherwise ambiguous acts," and to demonstrate the "pervasive sexism" in the defendant's workplace.) For example, Rodriguez's testimony that co-workers were regularly disparaging Gooden in racist terms and actively working to ensure that they did not have to work with or near him, see supra at 7, helps us understand Gooden's feeling that he was being ostracized and shunned. Furthermore, "'the fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor can impact the work environment." Jackson, 191 F.3d at 661 (citations omitted). Viewed together, this harassment was sufficiently pervasive to alter Gooden's working conditions.

3. The Environment at Timpte Was Objectively Hostile

The Ford case suggests that a noose – in that case, lacking even the suggestion of a Black lynching victim – is, as a matter of law, objectively severe and offensive. That Timpte's white management considered the hanging Black doll to be "repulsive" and "racially offensive," Crabtree 62/24-63/3, see also Manley 114/17-115/19, demonstrates objective hostility. See Smith, 129 F.3d at 1413 (Holding objective test satisfied where male co-workers found alleged sexual harassment to be offensive). The remainder of the harassment listed above – which must be considered together with the mock lynching, Harris, 510 U.S. at 23 – would be sufficient to alter the employment conditions and create an abusive working environment for a reasonable person in Gooden's circumstances: the first African-American employee in three years at the facility and one of only two when he discovered the noose. See Oncale v. Sundowner Offshore Svcs, Inc., 523 U.S. 75, 81 (1998) ("the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position").

4. The Environment at Timpte Was Subjectively Hostile.

Gooden presents undisputed evidence of the subjective severity of the harassment at Timpte. See supra at 8-9. Timpte argues that Gooden's attempts to ignore the racism and hostility he was encountering and get his job done are evidence that he did not find the conduct subjectively hostile. This is, as an initial matter, an improper attempt to analyze each "incident" separately and to separate the mock lynching from the other hostility he encountered. In addition, given the ostracism he faced at Timpte, Gooden had a Hobson's choice: report all indicia of harassment and face further isolation; or buckle down and try to work in spite of his fears. The law should not ignore harassment that occurred at Timpte while Gooden was trying to fit in – before it had become apparent that the harassment and hostility were a part of the Timpte culture.

The Tenth Circuit rejected a similar approach in Davis v. United States Postal Svc., 142 F.3d 1334 (10th Cir. 1998), holding that

> The trial court's implicit conclusion -- that a plaintiff who otherwise enjoys her work, is successful, and testifies that she hopes to continue that employment cannot as a matter of law "subjectively perceive the [work] environment to be abusive," -- is erroneous.

Davis, 142 F. 2d at 1341 (quoting Harris, 510 U.S. at 21). Similarly, the fact that a plaintiff ignores the initial signs of a hostile environment and tries to get his work done should not be construed to preclude the subjective perception that the environment is hostile. See Hansel v. Public Svc. Co. of Colorado, 778 F. Supp. 1126, 1129 (D. Colo. 1991) (recognizing that a plaintiff may keep quiet in the hopes that co-workers will eventually accept her and the harassment, cease.)

B. Timpte Is Liable for the Harassment Gooden Encountered.

The standard to which Timpte is held in its failure to prevent or remedy co-worker or third-party harassment is negligence. See Def. Br. at 14. Timpte is liable because it "'fail[ed] to

remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.'" Lockard, 162 F.3d at 1074 (citations omitted). "In evaluating claims for negligence, proximate cause and foreseeability are typically employed to determine the scope of an employer's duty." Hirase-Doi v. U.S. West Comms, Inc., 61 F.3d 777, 783 (10th Cir. 1995)(citations omitted). At a workplace that had experienced two nooses – one explicitly racial – and a gallery of swastikas and other racially offensive graffiti, that had had no African-American employees for three years and many of whose employees were in the habit of referring to African-Americans in racist terms, it is entirely foreseeable that the next African-American employee to join the workforce will encounter racist language and racists symbols. See Demby, 961 F. Supp. at 880 (suggesting that a racist "hate-crime" involving the painting of a swastika on the desk of an African-American employee "was a foreseeable consequence of the employer's seeming tolerance of bigoted behavior at the plant.")

Timpte attempts to evade its responsibility to prevent racial harassment in its workplace by asserting that it is only liable if it "failed to respond in a reasonable manner." Def. Br. at 13. But one of the principal cases on which it relies for this proposition makes clear that, "employer negligence is "'failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.'" Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998) (emphasis added). Timpte – which both knew and should have known of the racially hostile environment at its facility – took no reasonable measures to correct this environment and virtually no measures to prevent it. Although there were no African-American employees present at Timpte during much of the time the racist language and symbols were being used and displayed, this does not diminish Timpte's knowledge of racist conduct nor its obligation, at the very least, to prepare the shop for the arrival

of its first African-American employee in three years by announcing and enforcing a policy that such conduct would no longer be tolerated.

1. Timpte Knew or Should Have Known of the Racially Hostile Environment at its Commerce City Facility.

Timpte had actual knowledge of the use of racial slurs and racist symbols at Timpte. Managerial personnel both used and witnessed the use of racial slurs at Timpte. See supra at 4. The knowledge of Cofer, Crabtree, Condon and Wellbrock is attributable to Timpte. "[A]n employee who is a 'low-level supervisor' may also be a management-level employee for purposes of imputing knowledge to the employer when he is titled supervisor and has some authority over other employees." Wilson v. Tulsa Junior College, 164 F.3d 534, 542 (10th Cir. 1998) (citation omitted). Timpte asserts, without support, that "[a]ctual knowledge exists where the plaintiff reports harassment to management-level employees." Def. Br. at 13. Knowledge of racist conduct – like all other knowledge – can arise through observation or participation as well.

Timpte had constructive knowledge of the use of racial slurs and racist symbols at Timpte. "If the harassment complained of is so open and pervasive that the employer should have known of it, had it but opened its corporate eyes, it is unreasonable not to have done so, and there is constructive notice." Sharp v. City of Houston, 164 F.3d 923, 930 (5th Cir. 1999), see also Wright-Simmons v. City of Oklahoma City, 155 F.3d 1264, 1270-71 (10th Cir. 1998). The use of racial slurs and racist graffiti was sufficiently pervasive to put Timpte's management on constructive notice. See supra at 4. If management had but opened its eyes and ears, it would have been fully aware of the extensive use of racist language and racial symbols at Timpte.

2. Timpte Had an Obligation to Prevent and Correct the Racially Hostile Environment of Which it Was Aware

"Title VII affords employees the right to work in an environment free from discriminatory

intimidation, ridicule, and insult." Meritor, 477 U.S. at 65. Timpte argues that its obligation to provide such an environment arose only when Gooden first complained. The Tenth Circuit has rejected this standard and held that an employer may be placed on notice of workplace harassment before the plaintiff complains by harassment that does not involve the plaintiff. In Hirase-Doi, that court held that an employer is on notice if it knows of harassment that is "similar in nature and near in time to" the harassment suffered by the plaintiff or if the plaintiff can demonstrate that "the harassment was 'so pervasive that employer awareness may be inferred.'" Id., 61 F.3d at 784 (quotation omitted). Gooden has provided evidence that satisfies both standards. The swastikas that were drawn on the restroom walls constitute harassment similar in type to the mock lynching – racist symbols on display in the workplace – and were present during the time Gooden worked at Timpte. The racist language that was ongoing before and during Gooden's tenure was similar in type to the racist language that contributed to the hostile environment he experienced. Beyond these events that were "similar in nature and near in time," Gooden has provided evidence of racist conduct so pervasive that Timpte's awareness may be inferred. See supra at 4.

Timpte appears to argue that its duty to respond to racism at its Commerce City facility arose only upon receipt of a complaint. See Def. Br. at 14-15. The Tenth Circuit has explicitly rejected this approach, Wright-Simmons, 155 F.3d at 1270-71, and it is logically inconsistent with the constructive knowledge standard. Furthermore, "Title VII imposes on employers an affirmative duty to seek out and eradicate a hostile work environment. . . . An employer simply cannot sit back and wait for complaints. The very nature of sexual harassment inhibits its victims from coming forward because of fear of retaliation." Hansel, 778 F. Supp. at 1133 (citations omitted); see also Nelson v. Foster-Wheeler Constructors, Inc., No. 97 C 4658, 1998 U.S. Dist. LEXIS 17923 at *18 (N.D. Ill. 1998) (holding that while the employer's "complaint procedure is

relevant as to whether it reasonably attempted to prevent harassment, it does not absolve it from liability if it knew or should have known about harassing conduct, yet failed to do anything about it.") (Tab 18.)

3. Timpte Took No Reasonable Steps to Prevent or Correct the Racially Hostile Environment at its Commerce City Facility.

Timpte did not take steps to prevent racial harassment. Timpte had no racial harassment policy. Although it attempts to rely on its Sexual Harassment Policy, see Def. Br. at 2, 14, that policy did not "define[ ] or give[ ] examples of racial harassment," Manley 141/7-10, or refer to slurs directed at race or jokes directed at race. Id. 142/17-24. The collective bargaining agreement did not make reference to racial or sexual harassment, but only to harassment on the basis of membership or participation in the union. Def. Ex. A at 24. A policy that does not mention racial harassment cannot satisfy Timpte's obligation to prevent racial harassment.

Although it claims to have provided "training" to management through the use of legal bulletins, the General Manager could not point to one that mentioned racial harassment, Manley 143/22-145/18; 185/4-190/20, and Cofer and Crabtree testified that they never received any training on harassment or discrimination. Cofer 7/22-10/25; Crabtree 74/9-12. Timpte did not provide any training to its employees on harassment of any kind or instruct them that racist language was inappropriate at Timpte. See supra at 5.

These efforts fall so far short as to be insufficient as a matter of law. Because failure to take adequate measures to prevent racial harassment is, alone, sufficient to subject Timpte to liability, see Fall v. Indiana Univ. Bd of Trustees, 12 F. Supp. 2d 870, 881 (N.D. Ind. 1998)

(holding defendant liable for failure to prevent harassment where its efforts to correct the problem had been sufficient), Plaintiff is entitled to summary judgment. See generally Brief in Support of Plaintiff's Motion For Partial Summary Judgment (filed January 24, 2000). In the single paragraph in which Defendant describes its efforts at prevention, it cites no cases in support of its position that its efforts were sufficient. For example, it has no legal support whatsoever for the proposition that it can satisfy its obligation to prevent racial harassment without adopting a racial harassment policy or in any other way communicating to its employees that racial epithets and symbols are unacceptable. Def. Br. at 14.

On the other hand, many cases hold that – even after adopting a relevant anti-harassment policy – an employer may be liable for failure to prevent harassment if the policy is not well-promulgated or enforced. The Tenth Circuit has held an employer liable where it adopted a policy and posted it on a bulletin board but conducted no training, Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1239 (10th Cir. 1999), and where, as here, a defendant had a policy that did not require a supervisor with knowledge of harassment to report the incident. Wilson, 164 F.3d at 541-42 (quotation omitted). Timpte's efforts to discuss harassment with upper management in staff meetings were also insufficient. See Savino v. C.P. Hall Co., 988 F. Supp. 1171, 1189 (N.D. Ill. 1998) (holding that distribution of policy to managers and supervisors and posting at defendant's facilities, while "better than having no policy at all," was still "lacking"). An employer is liable where, as here, it has a policy but the policy is not well-known to employees. Nuri v. PRC, Inc.. 13 F. Supp. 2d 1296, 1305 (N.D. Ala. 1998).

Timpte's attempts to remedy or correct racial harassment were insufficient to defeat liability. Although it is sufficient to impose liability on Timpte that plaintiff demonstrate, as he has above, that that company failed to take adequate measures to prevent racial harassment,

Timpte's corrective measures also fell short. Timpte's tepid response was not sufficient to avoid liability. As one court has held, following a racist "hate-crime" not unlike the one at Gooden encountered at Timpte, an employer's "random and informal questioning of employees, following, and in light of, [a manager's] episodic and ineffectual warnings to employees on the use of racial epithets in the workplace, were not measures that were reasonably likely to curtail the possibility of similar (or more egregious) future occurrences." Demby, 961 F. Supp. at 881.

Indeed, the only two cases relied on by Timpte in fact demonstrate a level of response far higher than it achieved. In Adler, following the first reported harassment – with no apparent prior history – the relevant supervisor immediately got the word out that harassment would not be tolerated and would have consequences. Many employees then apologized to the plaintiff. Id. 144 F.3d at 669. Individual incidents of harassment resulted in discipline with records in the harassers' files and the requirement that the harasser apologize to the plaintiff. Id. Most important, all of this discipline was pursuant to an actual sexual harassment policy, see id. at 669-70, so the harassers received a consistent message that such harassment would not be tolerated. In Jeffries v. Kansas, 147 F. 3d 1220 (10th Cir. 1998), a not-necessarily unwelcome hug became the subject not only of reprimand of and apology by the alleged harasser (at which point the plaintiff offered a "make-up hug"), but also of countless "interpersonal relations group" meetings with plaintiff, the harasser, their supervisor and another co-worker. Id. at 1225. The supervisor's employer later investigated the investigation and reprimanded the supervisor for its inadequacy. Id. at 1227. Again, in contrast to Timpte, this process occurred pursuant to an existing policy.

The best evidence of the inadequacy of Timpte's response to Ford and Quinn was the hanging Black doll itself – an act that might have been prevented if Timpte had taken a strong, consistent, public stand against racial harassment even at the late date of the Tom Quinn incident.

> [U]nlike the dog of legal lore, which is said to be entitled to one free bite, unreconstructed bigots in the modern American workplace are not entitled to one unsanctioned act of racial bigotry. . . .

Denby, 961 F. Supp. at 881. In light of the fact that it "essentially condoned . . . a regime [of racial bigotry]," id., at its Commerce City facility, it is liable for the results of that regime.

II. Timpte Is Liable for the Ethnic Intimidation Suffered by Gooden.

A "person, organization, or association who commits or incites others to commit the offense of ethnic intimidation as defined in section 18-9-121(2), C.R.S." is civilly liable to the victim "for the actual damages, costs, and expenses incurred in connection with said action." C.R.S. § § 13-21-106.5(1). A person, organization or association commits the offense of ethnic intimidation "if, with the intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin, he: (a) Knowingly causes bodily injury to another person; or (b) By words or conduct, knowingly places another person in fear of imminent lawless action directed at that person or that person's property and such words or conduct are likely to produce bodily injury to that person or damage to that person's property." C.R.S. § 18-9-121(2).

Timpte argues that Gooden cannot demonstrate that anyone intended to intimidate or harass him or that their conduct was "practically certain to cause" bodily injury, the applicable knowledge standard. Def. Br. at 16. To the contrary, it is virtually certain that whoever placed the hanging Black doll in Gooden's tool cabinet intended to place him in fear of imminent lawless action and cause bodily harm. The effigy is the representation of the death by hanging of a Black man, placed in the workspace of a Black employee. It is an unambiguous, racist death threat. Furthermore, Timpte's inaction in the face of its history of racist language and racially threatening symbols such as swastikas and nooses and its managers' participation in many of these events

makes it liable as an "organization or association" that has "incite[d]" the commission of ethnic intimidation. As the Supreme Court has stated in the context of harassment, where employers have actual knowledge of harassing action and do nothing to stop it, "the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." Faragher, 524 U.S. at 789 (1998)(emphasis added). Given Timpte's history, it is at least a question of fact whether its inaction can be held to have "authorized affirmatively" or "incited" the placement of the hanging Black doll in Gooden's workspace.

III. Timpte Is Liable to Gooden for Punitive Damages

The parties agree that, to recover punitive damages, Gooden must show that Timpte engaged in discriminatory conduct with malice or reckless indifference his federally-protected rights. 42 U.S.C. §1981a(b)(1); see Def. Br. at 18. Defendant's argument on this point, however, applies the wrong standard to evaluate an employer's liability for punitive damages for racial harassment. The Tenth Circuit has recently clarified the difference between vicarious liability for punitive damages – the standard applied by Defendant, see Def. Br. at 19 – and direct liability.

> [E]mployer malice or reckless indifference in failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew or should have known is premised on direct liability, not derivative liability, according to the doctrine of respondeat superior.

Deters v. Equifax Credit Information Svcs. Inc., No. 97-3340, 2000 U.S. App. LEXIS 1209 at *14 (10th Cir. Feb. 1, 2000)(Tab 19). Gooden alleges that Timpte failed to remedy or prevent the hostile work environment of which it knew or should have known, that is, that Timpte is directly liable for punitive damages. The list of factors Defendant sets up and knocks down on page 19 of its Brief are thus not relevant to the punitive damages inquiry in this case. See Deters at *20.

Punitive damages are appropriate here because Timpte management was aware of and engaged in racially offensive conduct that Timpte took virtually no steps to curtail. In the face of the racially offensive language and conduct demonstrated by the attached deposition excerpts, see supra at 4-5, it is at the very least reckless indifference to fail to promulgate a policy against racial harassment and to make no efforts to inform employees that such conduct will not be tolerated. The Tenth Circuit reversed a directed verdict dismissing a claim for punitive damages in a sexual harassment case in which, prior to the plaintiff's complaint, management was aware that its environment "was rife with foul language, sexual innuendo, and sexual advances which could reasonably be labeled as sexual harassment." Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1187 (10th Cir. 1999).

Even if the good faith defense did apply in the present case, Timpte has not satisfied it. The mere existence of an anti-harassment policy is not sufficient; rather the employer must make "a good faith effort to educate its employees about the ADA's prohibitions." EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248-49 (10th Cir. 1999). Timpte, again, had no policy against racial harassment and made no effort to educate its employees that such conduct was illegal.

Conclusion

Plaintiff respectfully requests that Defendant's motion for summary judgment be denied

Respectfully submitted,

FOX & ROBERTSON, P.C.

Timothy P. Fox
Amy F. Robertson
910 - 16th Street
Suite 610

Denver, CO 80202
(303) 595-9700

Dated: February 22, 2000

Attorneys for Plaintiff