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.

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Joseph A. Gooden, by and through his counsel, Fox & Robertson, P.C., hereby submits this reply brief in support of his motion for partial summary judgment as to liability on his claims pursuant to 42 U.S.C. §§ 1981 and 2000e- 2(a)(1) for racial harassment.

Additional Undisputed Fact

Since the filing of Plaintiff's Motion for Summary Judgment, he has taken the deposition of Defendant's expert witnesses. The following additional undisputed fact is based on the deposition of Dr. Dorothie Clark, which occurred on February 22, 2000.

1. Dr. Dorothie Clark, who was designated by Defendant as an expert witness on the subject of prevention of and response to discrimination, when asked whether the hanging Black doll was racially hostile, replied, "Well, obviously. The doll was black. And whether you kill by noose or anything else, the threat was there. It was found in his box." Clark at 64/9-16 (attached hereto).

Response Concerning Disputed Facts

1. Undisputed but immaterial to the resolution of Plaintiff's Motion.

2. Defendant's additional statements do not dispute the accuracy of the concessions made by Manley and Crabtree in their depositions and by Timpte and Crabtree in their Responses to Interrogatories (quoted in paragraphs 16-18, 20 and 41) and cannot dispute the content of the Sexual Harassment Policy, which did not mention or provide examples of racial harassment. Manley Depo. Ex. 15.

3. Defendant's additional statements do not dispute the fact that Cofer, Crabtree and a number of employees testified that they did not receive training concerning racial harassment.

4. Defendant's additional statements do not dispute the testimony set forth in Plaintiff's Statement of Undisputed Facts.

5. Undisputed but immaterial to the resolution of Plaintiff's Motion.

6. To the extent these facts are disputed, the dispute is not relevant to the resolution of Plaintiff's Motion. It remains undisputed that Rodriguez told Gooden that Quinn called him a "nigger."

7. Undisputed but immaterial to the resolution of Plaintiff's Motion.

Argument

I. Plaintiff's Evidence is Relevant and Admissible

Plaintiff Joseph Gooden relies only on harassment of which he was aware to establish the hostility of the environment at Timpte's Commerce City facility. Evidence of the abundant use of racial slurs and racist symbols at Timpte is relevant to show both Timpte's knowledge of that

environment and to permit the finder of fact to understand the context of the harassment Mr. Gooden endured.

Timpte argues that the case of Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777 (10th Cir. 1995) limits Gooden to evidence relating to harassment of which he was aware. Timpte misreads Hirase-Doi and thus fails to recognize its distinction between evidence that, in and of itself, constitutes the hostile environment and evidence that goes to the defendant's knowledge of that environment. In addition, the Hirase-Doi court did not address a third type of admissible evidence: that which does not, in and of itself, constitute an incident of harassment but which is relevant, under Rule 401 of the Federal Rules of Evidence, to the context in which the harassment was committed and experienced.

The Hirase-Doi decision addressed both hostility and knowledge. In the section cited by Timpte, see Defendant Timpte's Response to Plaintiff's Motion and Brief for Partial Summary Judgment ("Def. Opp.") at 9, the court analyzed whether the environment at U.S. West was hostile. It held that the plaintiff could "establish the existence of a genuine issue of material fact as to whether she was subject to a hostile work environment based on evidence of [the harasser's] sexually offensive conduct towards herself and/or others in her office, provided she was aware of such conduct." Id. at 782 (emphasis added). Consistent with this holding, Gooden has argued in his motion for summary judgment that the hostile environment consisted, as a matter of undisputed fact, of the hanging Black doll he discovered in his tool cabinet.[1] There is no dispute that Gooden experienced this appalling harassment first hand.

[1] In his opposition to Defendant's motion for summary judgment, he relies on a number of other incidents that he personally experienced as well, but which may or may not be disputed by Defendant.

In a portion of its opinion separate from that cited by Timpte and headed "US West's Knowledge of the Hostile Work Environment," the Tenth Circuit addressed the question when the employer's knowledge of harassment was sufficient to impose a duty to prevent or correct. Id. at 783. In that section, the court held that the plaintiff could rely on two types of evidence to establish U.S. West's knowledge, neither of which was dependent on awareness by the plaintiff herself. She could rely on evidence of harassment that was "similar in nature and near in time" to that which she experienced or on evidence of the "overall pervasiveness" of the harassing conduct. Id. at 784. Because the question was the defendant's knowledge of harassment and its concomitant responsibility to prevent such behavior, the plaintiff's awareness was irrelevant.

Evidence of racist conduct not directly experienced by the plaintiff is also relevant to explain the conduct that he did experience. Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 110-11 (3d Cir. 1999). In Hurley, one of the questions explicitly before the court was the admissibility – in a sexual harassment case – of sexist comments made among male employees with no female employees present and harassment of other women that the plaintiff did not witness. Id. at 107. The district court had admitted the evidence based on Rules 401 and 403 of the Federal Rules of Evidence and had issued a limiting instruction so that it would not be considered as part of the hostile environment. Id. at 109. The Third Circuit affirmed, holding that, "A plaintiff's knowledge of harassment or pervasively sexist attitudes is not . . . a requirement for admitting testimony on those subjects in a harassment suit." Id. at 110.

> Evidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether the [defendant] knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy. Neither of these questions depends on the plaintiff's knowledge of incidents; instead, they go to the motive behind the

> harassment, which may help the jury interpret otherwise ambiguous acts, and to the employer's liability. This kind of evidence is particularly important given the [defendant's] main defenses at trial, which were that the incidents of abuse [plaintiff] suffered were trivial horseplay to which both men and women were subjected and that its written sexual harassment policy was sufficient to insulate it from liability. Contrary to the [defendant's] position, it is implausible in the extreme that [plaintiff] was somehow immune from the pervasive sexism at the [defendant's workplace] as it was described by both female and male officers.

Id. at 111.

In the present case, the undisputed evidence that Timpte managers knew of and used racial slurs and symbols, see infra at 8, demonstrates that Timpte was aware of racist conduct at its Commerce City facility and that it had a duty to prevent further such conduct. This same evidence reinforces the conclusion – required by the presence of the Black effigy in the noose – that the simulated lynching was motivated by racial animus.

Timpte also complains about evidence that Gooden was the only African-American employee at Timpte when he started and one of two such employees the day he discovered the simulated lynching. This evidence is part of "all [of] the circumstances" surrounding the harassment that the Supreme Court has instructed must be examined. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993)("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."). While virtually nothing could reduce the hostility of what Gooden saw on August 7, 1998, the fact that he had been the only African-American employee for most of his tenure, and one of two such employees for the preceding three weeks, vastly increases the feelings of isolation and threat. This court has considered such evidence – at least as part of the background – in assessing sexual harassment. See Hansel v. Public Svc. Co. of Colorado, 778 F. Supp. 1126, 1128 (D. Colo. 1991) (noting that, when the

plaintiff was hired, "there was only one other woman employed [in her position] and there were no women in higher job categories within the operations department").

Finally, Timpte complains that the previous two nooses that were found at its Commerce City facility are not relevant because they were not harassment. These nooses – which supervisors were or became aware of prior to Gooden's discovery of the simulated lynching – are relevant to the state of Timpte's knowledge and lack of action. The motive of the employees who displayed the nooses and the presence or absence of African-American employees when they were displayed are irrelevant to this question.[2]

II. The Undisputed Facts Demonstrate That Timpte Is Liable for the Hostile Environment at its Commerce City Facility.

A. The Hanging Black Doll Incident Constituted Actionable Racial Harassment.

Timpte acknowledges that severity is an independent ground for establishing a violation of Title VII and that a single incident of physically threatening conduct may constitute an abusive environment. Def. Opp. at 10. It argues, however, that the discovery by an African-American worker of a Black doll hanging by a noose in his tool cabinet is not subjectively or objectively hostile.

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[2] Although it is not directly at issue in this Motion – which relies only on the hanging Black doll as undisputed harassment – Crabtree's discussion with Gooden of the "Justice for O.J." noose is also part of the hostile environment that Gooden experienced, which environment is to be evaluated from his perspective and from "the perspective of a reasonable person in the plaintiff's position." Oncale v. Sundowner Offshore Svcs, Inc., 523 U.S. 75, 81 (1998). Crabtree's motives in raising this topic are not as relevant as the thoughtless way in which he did it and the way in which it was, as a result, perceived.

Gooden's initial brief presented sufficient evidence of subjective hostility. Timpte rejects as "conclusory" Gooden's testimony that he was "scared," and recites the testimony of a co-worker quoting Gooden as saying he was not going to let the incident affect him and wanted to continue working. Timpte ignores most of Gooden's testimony about his reaction to the simulated lynching, see Gooden Depo. at 152/14, 161/19 - 162/11 (the incident made Gooden feel "threatened" and "disgusted;" he quit that same day because he "started getting spooked" [and] "got scared and didn't want to go back to the shop another time") as well as the fact that Gooden did not, in fact, continue working but went home, called the police and never returned to work at Timpte. This is sufficient to demonstrate subjective hostility.

Timpte's argument that the size of the rope used to form the noose distinguishes this case from Ford v. West, Civil Action No. 97-S-1631 (D. Colo. Mar.18, 1999), borders on absurd. This court's holding that "the connotations of a noose are sufficiently disturbing to create an actionable racially hostile work environment" did not rely on the size of the noose or its ability to inflict harm but rather on its "connotations." Id., slip. op. at 7-8. There is no question that a threat of death can be conveyed using words or symbols that cannot, themselves, cause death. See, e.g., Demby v. Preston Trucking Company, Inc., 961 F. Supp. 873, 878 n.9 (recognizing that swastika and words "woch [sic] your back nigger" were "on [their] face a direct threat of physical injury").

Timpte misinterprets the "objectively hostile" standard to require a showing of motive or intent and claims to be off the hook because the perpetrator of the simulated lynching has not been identified. Def. Opp. at 11. There is no logical connection. The question is not what the perpetrator was thinking but whether the event was, from the perspective of reasonable person in

the plaintiff's circumstances, hostile and abusive. 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"). That we do not know who put the objects in Gooden's tool cabinet does not change the fact that they consisted of a Black doll arranged so as to simulate death by lynching. There can be no doubt that this was an act of racial animus (the Black doll) that was hostile (the simulation of death). Dr. Dorothie Clark, who was designated as an expert witness by Defendant, when asked whether the hanging Black doll was racially hostile, replied, "Well, obviously. The doll was black. And whether you kill by noose or anything else, the threat was there. It was found in his box." Clark at 64/9-16. And, again, the fact that even Gooden's white supervisor found it "repulsive" and "racially offensive," Crabtree 62/24 - 63/2-3, demonstrates that the objective prong is satisfied. See Smith v. Norwest Fin. Acceptance, Inc., 129 F.3d 1408, 1413 (10th Cir. 1997).

B. Timpte Is Liable for the Harassment Gooden Encountered.

Timpte's misreading of the Hirase-Doi case infects its analysis of its liability for the harassment Gooden encountered. Citing that case and arguing that the hanging Black doll incident was the only incident of which Plaintiff was aware, Timpte asserts that its response to that single incident was sufficient to insulate it from liability. Def. Opp. at 12-13. The question of Timpte's liability turns on its knowledge of more than just those incidents reported to it by Plaintiff. Rather, as set forth in detail above, see supra at 2-5, Timpte's liability may be premised on its awareness of incidents "similar in nature and near in time" to the harassment experience by Plaintiff and on the "overall pervasiveness" of the harassing conduct. Hirase-Doi, 61 F.3d at 784. Because Timpte admits its managers knew of and used racial slurs, see Def. Opp. at 1 (¶¶

1-6), knew that swastikas had been "in and out of [the bathroom] for years," id. at 3 (¶ 11), and knew that nooses had been displayed at Timpte in the past, id. (¶ 12-13), and that use of racial epithets was widespread among at least some employees, id. at 2 (¶¶ 8-10), it had an obligation to prevent the racial harassment Gooden encountered after he started working at the Commerce City facility.

Timpte's reliance on Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 673 (10th Cir. 1998) and Creamer v. Laidlaw Transit, Inc., 86 F. 3d 167 (10th Cir. 1996) – both sexual harassment cases – is similarly misplaced, as in neither of those cases was there evidence of sexist conduct prior to the harassment experienced by the plaintiff analogous to the awareness of racial slurs and symbols to which Timpte has admitted. See generally Adler, 144 F.3d at 669-70, Creamer, 86 F. 3d at 169. In contrast to those cases, Timpte's legal obligation to prevent harassment arose long before Gooden's first complaint.

Finally, although Timpte attempts to demonstrate that it took adequate preventive measures through general references to policies that prohibit "harassment," see Def. Opp. at 13, it cannot point to a single policy that was in effect prior to Gooden's discovery of the hanging Black doll that explicitly prohibited racial harassment, racial slurs, or racist symbols. It is not sufficient to promulgate a "Sexual Harassment Policy" with a general reference, in the final paragraph, to race discrimination and then sit back and hope your employees take it upon themselves to read and understand the caselaw that brings harassment within the purview of discrimination and then to deduce that such harassment can include words they have grown accustomed to using and to hearing their supervisors use. While there may be no "magic words," Def. Opp. at 13, that constitute a racial harassment policy sufficient to insulate an employer from

liability, the complete absence of such a policy in light of the undisputed evidence of racist language and conduct falls short, as a matter of law, of Timpte's duty of prevention.

Conclusion

For the reasons set forth above and in the Brief in Support of Plaintiff's Motion for Partial Summary Judgment, Plaintiff respectfully requests that this Court grant partial summary judgment in his favor, finding Defendant Timpte, Inc. liable under 42 U.S.C. §§ 1981 and 2000e- 2(a)(1) for the harassment encountered by Mr. Gooden at Timpte.

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 28, 2000

Attorneys for Plaintiff

Certificate of Service

The undersigned hereby certifies that on February 28, 2000, the foregoing **REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was served by first-class mail, postage prepaid, on:

Todd A. Fredrickson, Esq.
Otten, Johnson, Robinson, Neff & Ragonetti
950 17th Street, Suite 1600
Denver, CO 80202

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