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.

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 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.

Introduction

Joseph A. Gooden worked at Timpte, Inc.'s Commerce City facility from April to August, 1998. For most of that time, he was the only African-American employee in a plant with over 65 employees; for the last month, he was one of two. It is undisputed that when he came to work on August 7, 1998 he discovered a naked Black doll with a noose around its neck hanging from the top of his tool cabinet – depicting the lynching of a Black man. Mr. Gooden is entitled to partial summary judgment against Timpte as to liability for racial harassment because:

- The discovery of a Black doll with a noose around its neck, standing alone, is sufficient to create an actionable hostile environment; and

- Timpte knew or should have known of this hostile environment and did not take sufficient measures to prevent it: although its supervisors were aware of and even used racist language at Timpte and were aware that swastikas and nooses had previously been displayed there, Timpte had no racial harassment policy and conducted no training on the subject of harassment of any kind.

Statement of Undisputed Material Facts

1. Joseph Gooden, an African-American, was hired by Timpte, Inc. ("Timpte") in April 1998 as a mechanic/welder at Timpte's Commerce City facility. Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendant Timpte, Inc. (Timpte Resp. to Igs.) No. 1 & Ex. 1 at 4 (Appx. Tab 12). Timpte builds truck bodies at this facility. In October, 1999, Timpte sold its Commerce City facility to Truck Parts, Inc. Manley Depo. at 35/13-19; 61/4-15 (Appx. Tab 1).

2. Gary Manley was the General Manager of Timpte's Commerce City facility from 1987 to the October, 1999, sale. Id. at 30/8-14. Lynda Smittkamp was the Human Resource Manager at Timpte's Commerce City facility. Timpte Resp. to Ig. No. 7.

3. Ryan Cofer and John Condon were managers at Timpte's Commerce City facility. Manley Depo. at 65/1-4. Mr. Cofer had been a manager since 1995, in charge of all mechanics and welders. Cofer Depo. at 11/8-14 (Appx. Tab 2). Harold Crabtree was the supervisor of the welders and mechanics at Timpte's Commerce City facility, a position he assumed in 1996. Crabtree Depo. at 13/5-20 (Appx. Tab 3). He reported to Mr. Cofer. Manley Depo. Ex. 13. As such, Mr. Cofer and Mr. Crabtree were Mr. Gooden's supervisors when he worked at Timpte. Mr. Condon had been a manager at Timpte since 1965. Condon Depo. at 8/19 - 10/10 (Appx. Tab 5). James Wellbrock was a supervisor who reported to Mr. Condon. Id. at 10/2-6.

4. In its interrogatory responses, Timpte admitted that "in the past, some [of its] employees used the term 'beaner beater' to refer to a particular tool, and used the terms 'nigger-rigged' and 'afro-engineered' to refer to a jerry-built project." Timpte Resp. to Ig. No. 12.

5. Manager Ryan Cofer heard the terms "nigger-rigged," "beaner beater" and "afro-engineered" as well as other slang words for race, for example "beaner" and "white trash," and for nationality and religion while at Timpte. Cofer Depo. at 18/15-20, 21/11-16; 22/10-12; 23/3-5. He "might" have used the term "nigger-rigged" himself. Id. at 20/15-19. While he heard these terms more when he was a mechanic, he had no reason to believe the use of these terms changed after he became a supervisor. Id. at 19/25 - 20/9; 22/22 - 23/2. He has never told anyone at Timpte those words were unacceptable. Id. at 20/10-14.

6. Manager John Condon has heard approximately five racial jokes in the past five years at Timpte, but never told Timpte employees not to tell them. Condon Depo. at 50/17 - 51/15.

7. Supervisor Harold Crabtree admitted in his interrogatory responses to having heard and used the terms "beaner beater," "afro-engineered," and "nigger-rigged." Response to Plaintiff's First Set of Interrogatories and Requests for Production of Documents to Defendant Harold Crabtree (Crabtree Resp. to Ig.) No. 8 (Appx Tab. 13). In his deposition, he admitted to using the first two terms but denied the last. Crabtree Depo. at 30/7-10; 33/22 - 34/9. Mr. Crabtree explained that "afro-engineered" meant "substandard workmanship," id. at 34/10-11, and that while "beaner beater" was used to refer to a block of wood used as a tool, the term "signifies something that you would use to hit someone of Hispanic descent." Id. at 30/7 -

31/13. He admitted that "beaner beater" was the term that was generally used to refer to that particular tool. Id. at 31/25 - 32/2. Mr. Crabtree does not consider that term to be a slur because "[i]t wasn't offensive to anyone," which he says he knows because "[n]o one complained." Id. at 33/5-10. Mr. Crabtree never told anyone not to use the term. Id. at 33/19-21.

8. David Bowland worked in the shop at Timpte from approximately 1996 to 1999. Bowland Depo. at 7/3-6 (Appx. Tab 8). During that time, he heard the word "nigger" used at Timpte "a couple thousand [times], easy," that is, "a couple times a day on average." Id. at 15/14 - 16/11. He used the word "nigger" himself many times, including in reference to fellow employees. Id. at 38/25 - 39/22. He heard the phrase "nigger-rig" at Timpte "quite a bit;" it was "a common statement around there," used more than the word "nigger" alone. Id. at 67/14-22. No one in Timpte management ever told him that racial slurs or comments were inappropriate at Timpte. Id. at 13/7-10.

9. Jeffrey Fenstemaker worked in the shop at Timpte from 1993 to 1998. Fenstemaker Depo. at 7/15 - 8/5 (Appx. Tab 9). During that time, he heard the phrase "nigger-rigged" at Timpte "all the time." Id. at 95/15-16. He himself used the term, which he understood was " a phrase used for substandard work." Id. at 99/3-14. No one in Timpte management ever instructed him not to use racial slurs. Id. at 22/11-15.

10. Boyd Lusinger worked in the shop at Timpte from 1993 to 1998. During that time, he heard the word "nigger" used at Timpte about 10 times, mostly in the 1997 to 1998 time period. Lusinger Depo. at 39/24 - 40/25 (Appx. Tab 10). He heard the word "nigger-rigged" used at Timpte about 20 times, mainly toward the end of his time there. Id. at 58/2-8. He heard

the word "spic" used at Timpte about 20 times. Id. at 52/16-23. He heard the word "beaner" about 20 times; the phrase "beaner beater" he heard "too many" times. Id. at 53/6-24. Timpte did not provide any formal training concerning racial harassment or the use of racial slurs or distribute any information that suggested that racial or ethnic slurs were inappropriate. Id. at 14/23 - 15/5.

11. Manager Ryan Cofer has observed swastikas drawn as graffiti in the men's bathroom at Timpte, and stated that these symbols have "been in and out of [the bathroom] for years." Cofer Depo. at 43/3 - 44/4. The most recent time he observed swastikas in the bathroom was over a year but less than two years prior to his deposition in October 1999. Id. at 44/5-9. He concedes that Timpte management has never discussed the swastikas with the workers. Id. at 44/10-14.

12. Supervisor Jim Wellbrock observed a noose hanging in the Timpte plant in approximately 1996. It consisted of a six-foot rope hanging from the ceiling of the woodshed, a building attached to the main plant that is used by "a lot of people." Wellbrock Depo. at 26/20 - 27/15; 28/22-24 (Appx. Tab 6). Mr. Wellbrock told manager John Condon about it. Condon Depo. at 36/25 - 37/9. Mr. Condon spoke with three or four employees about it but did not point out the possible racial overtones of the noose. Id. at 40/10-13, 46/1-4. Neither Mr. Wellbrock nor Mr. Condon reported the incident to Mr. Manley or Ms. Smittkamp. Id. at 40/14-22; Wellbrock Depo. at 30/9-14.

13. Supervisor Harold Crabtree brought a noose to work at Timpte sometime in 1994 or 1995 – during the trial of O.J. Simpson. Crabtree Depo. at 43/17. This was prior to the time

Mr. Crabtree was a supervisor. The noose was called "the O.J. Simpson Ribbon for Justice." Id. at 41/25 - 42/3; Crabtree Resp. to Ig. No. 7, and was "intended to symbolize dissatisfaction with the result of the trial of O.J. Simpson for the deaths of Nicole Brown Simpson and Ron Goldman." Crabtree Resp. to Ig. No. 9. The O.J. Simpson Ribbon for Justice was "a piece of string about eight inches long that resembled a noose, that was tied in a loop on the end." Crabtree Depo. at 43/11-13. Mr. Crabtree tied it to his clipboard at work "[t]o symbolize justice for O.J. ribbon, to display it." Id. at 45/20-21.

14. Although he was unaware of the "Justice for O.J." noose at the time Mr. Crabtree brought it to Timpte, General Manager Gary Manley did not find the "notion of a justice for O.J. ribbon in the form of a noose to be offensive," Manley Depo. at 110/10-12, and testified that it could be "appropriate to display your opinion on the trial of a black man through the display of a noose." Id. at 111/6-21.

15. 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. 11.

16. Timpte did not have a racial harassment policy in effect during Mr. Gooden's employment with that company. The only anti-harassment policy that was in effect during that time was a two-page "Sexual Harassment Policy" dated August 25, 1993. Manley Depo. at 138/2-14 and Ex. 15. The policy that was in effect prior to 1993 was a one-page memo on sexual harassment dated June 17, 1987. Timpte Resp. to Ig. 13 (referring to Bates No. TII000154, included in Appx. Tab 12).

17. Although Timpte apparently now claims that the Sexual Harassment Policy covers racial harassment as well, General Manager Gary Manley conceded that the Sexual Harassment Policy did not "define[ ] or give[ ] examples of racial harassment." Manley Depo. at 141/7-10; see also Crabtree Depo. at 78/20-23. It does not refer to slurs directed at race or jokes directed at race. Manley Depo. at 142/17-24. Mr. Crabtree could not think of anything that was "posted or in writing that . . . made specific reference to slurs." Crabtree Depo. at 72/1-2. And Human Resources Director Lynda Smittkamp conceded that race harassment is not clearly covered by Timpte's Sexual Harassment Policy. Smittkamp Depo. at 124/13-24.

18. Mr. Manley also claimed that Timpte's general rules and regulations addressed racial harassment but conceded that there was no explicit reference to racial harassment or racial slurs in that document. Manley Depo. at 171/8-16 and Ex. 21.

19. Although Timpte representatives also pointed to the collective bargaining agreement with the United Auto Workers as an anti-harassment policy, the language they relied on was a generic prohibition on discrimination, with no mention of harassment except on the basis of membership and participation in the union. Manley Depo. at 168-69 and Ex. 18 (collective bargaining agreement) at 24; see also Crabtree Depo. at 82/22 - 83/1; 83/18 - 84/7.

20. Timpte admitted in its responses to interrogatories that the only steps it took to prevent the noose and doll incident – that is, steps taken prior to that incident – were the distribution and posting of the Sexual Harassment Policy, the earlier one-page sexual harassment memo, the collective bargaining agreement and the verbal reprimand of a single employee for a single racial epithet. Timpte Resp. to Ig. 14 (incorporating by reference its Resp. to Igs. 11 and

13). None of the documents it relies on explicitly prohibit, refer to, describe or provide examples of racial harassment. See supra ¶¶ 17-19. Mr. Manley testified that the steps Timpte had taken to prevent noose and doll incident included those policies and the fact that "it's our culture." Manley Depo. at 136/23 - 137/21.

21. Timpte did not hire anyone to conduct training on harassment of any kind. Manley Depo. at 171/21 - 172/5; Smittkamp Depo. at 62/20 - 63/2.

22. Managers Ryan Cofer and Supervisor Harold Crabtree never received any training on harassment or discrimination. Cofer Depo. at 7/22 - 10/25; Crabtree Depo. at 74/9-12 and Crabtree Resp. to Ig. 10.

23. Prior to the incident described in paragraphs 30 through 32 below, Mr. Manley does not recall that he had ever "specifically told any Timpte employee that racial slurs were unacceptable at Timpte." Manley Depo. at 143/14-17.

24. Although Supervisor Harold Crabtree had, himself, brought a noose onto Timpte premises and had, in the summer of 1998, become aware that a noose could be offensive to African-Americans, he never told the men working for him that nooses "could have the possibility of being offensive" or "would be unacceptable on the premises at Timpte." Crabtree Depo. at 52/20 - 53/11.

25. At the time he was hired in April, 1998, Mr. Gooden was the only African American among the approximately 65 employees at Timpte's Commerce City facility. Respondent's Position Statement to the Colorado Civil Rights Division ("Pos. Stmt.") at 1-2 (Appx. Tab 14). That remained the case for three months until July 16, 1999, when one other

African-American individual was hired on a contract basis. Id. at 2. As such, on August 7, 1999, Mr. Gooden was one of two African-American workers in a facility that employed approximately 65 people. Timpte Resp. to Igs. Ex. 1.

26. During the years 1995 to 1999, four out of 257 or approximately 1.6% of Timpte's employees were African-American. Timpte Resp. to Ig 1 and Ex. 1. There had been no other African-American employee at Timpte in almost three years prior to Mr. Gooden's hire. Id. at 4, 8-9. Timpte has never had an African-American supervisor at its Commerce City facility. Manley Depo. at 84/6-8. Timpte has never had an African-American salesman at its Commerce City facility, a position that General Manager Gary Manley calls a "more visible position." Id. at 37/17 - 39/3.

27. After Mr. Gooden had worked at Timpte for several months, his supervisor, Harold Crabtree approached him and told him about the noose that Mr. Crabtree had brought to work several years before. He told Mr. Gooden that he had had a noose at Timpte, that it was a "justice for O.J. ribbon," and that he was looking for it but could not find it. Mr. Crabtree told Mr. Gooden that, if he found it first, "I'd appreciate it if it didn't offend him." Crabtree Depo. at 50/11 - 51/10.

28. Mr. Gooden recalls Mr. Crabtree discussing both of the earlier nooses – not just the "Justice for O.J." noose – and found the discussion threatening because it suggested "that it was repetitive, that this happened in the past more than once." Gooden Depo. at 33/21-22 (Appx. Tab 11).

29. At some point during Mr. Gooden's four months at Timpte, co-worker David Rodriguez told him that another co-worker by the name of Mickey Ford had used the word "nigger" to refer to him (Mr. Gooden). Specifically, Mr. Rodriguez told Mr. Gooden that Mr. Ford had asked him "how is his little nigger boy working out," referring to Mr. Gooden. Rodriguez Depo. at 45/1 - 46/8 (Appx. Tab 7); Gooden Depo. at 180/9-15. Although Timpte apparently disputes that Mr. Ford made this comment, they cannot dispute that Mr. Rodriguez told Mr. Gooden that Mr. Ford made the comment.

30. Mr. Rodriguez later told Mr. Gooden that co-worker Tom Quinn had called him a "lazy fucking nigger." Rodriguez Depo. at 68/4-15; Gooden Depo. at 117/21-24; 123/24 - 124/9.

31. Mr. Gooden reported this incident to Human Resources Director Lynda Smittkamp and General Manager Gary Manley. Gooden Depo. at 131/11 - 132/7; Smittkamp Depo. at 93/24 - 95/1; Manley Depo. at 95/23 - 96/19.

32. As a result, Mr. Manley and Mr. Cofer spoke with Mr. Quinn. Manley Depo. at 97/15 - 22. Mr. Quinn admitted to using the word "nigger." Id. at 97/23 - 98/1. Mr. Manley and Mr. Cofer gave Mr. Quinn a verbal warning. Id. at 98/10-16. This was the only time anyone at Timpte was disciplined for harassment of any kind or for the use of slurs of any kind. Timpte Resp. to Ig. 11.

33. Mr. Gooden also heard the term "beaner beater" used around the shop, including by manager Ryan Cofer and supervisor Harold Crabtree. Gooden Depo. at 192/19 - 193/11; 195/6-10.

34. On Friday, August 7, 1998, Mr. Gooden arrived at his workspace at Timpte, opened his tool cabinet and discovered a Black doll with a noose around its neck hanging from the top of the cabinet. Crabtree Depo. at 58/16 - 67/19 and Ex. 14 (photograph of the doll with the noose around its neck);[1] Gooden Depo. at 144/20 - 145/21.

35. This incident made Mr. Gooden feel "threatened" and "disgusted." Gooden Depo. at 152/14; 162/11. Mr. Gooden quit that same day because he "started getting spooked. [He] got scared and didn't want to go back to the shop another time." Id. at 161/19 - 162/4. When he got home, he called the Commerce City police. Id. at 166/25 - 167/10.

36. Mr. Manley understood that the noose and doll were "a representation of the lynching of a black person. . . . [N]o mistaking that." Manley Depo. at 115/20-24. When he saw the noose and doll, he found it very upsetting, and was "in shock," "very angry" and "quite distressed." Id. at 114/17 - 115/19.

37. Mr. Crabtree acknowledged that a threat to lynch someone is a death threat, Crabtree Depo. at 28/22 - 29/2, and that he found the noose and doll "repulsive," id. at 62/24, and "racially offensive." Id. at 63/2-3. He thought it was "likely that Mr. Gooden saw it as something that was pretty hostile." Id. at 63/4-5.

38. In response to the noose and doll incident, Timpte called the Commerce City police department, interviewed the workers in the Commerce City facility, offered a $500 reward

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[1] Exhibit 14 to the Deposition of Harold Crabtree is the doll with the noose around its neck. Plaintiff submits a photograph of this exhibit that was taken at Mr. Crabtree's deposition.

for information, redrafted their Sexual Harassment Policy to make reference to racial harassment and convened a half-hour-long company-wide meeting to discuss the incident and the new policy. Timpte Resp. to Ig. 14 (incorporating by reference Resp. to Ig. 10); see also Manley Depo. at 118/9 - 121/11; 126/8 - 128/8; 136/4-13; 141/19-20; Smittkamp Depo. at 104/17 - 105/19; 115/10-22; 118/8-10; Crabtree Depo. at 69/8-10; 70/15-18.

39. Although Ms. Smittkamp received a lead in response to the reward offer, she did not follow up. Smittkamp Depo. at 111/9 - 115/6.

40. Timpte did not do anything after the meeting at which the reward was offered. Manley Depo. at 136/19-22.

41. Even following the implementation of the new policy, which stated for the first time that racial harassment was prohibited, Timpte management remained ignorant of the meaning of the racist symbols that had been used at Timpte in the past:

a. Timpte's Human Resources Manager still did not know what a swastika or a lynching was, nor was she aware that there was "a history in the United States of gangs of white people chasing down and hanging a black person." Smittkamp Depo. at 83/23 - 84/7; 132/1-3.

b. Manager Ryan Cofer stated that he did not "really know what's meant by" a swastika. Cofer Depo. at 46/5-8.

c. Manager John Condon stated that he did not think the new policy would cover a swastika because "it's a symbol that was on the flag of a country at

one time" so "a swastika on a toolbox is the same as an American flag." Condon Depo. at 35/6-25.

42. 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 Depo. at 23/21 - 24/17; Wellbrock Depo. at 31/25 - 32/10; Timpte Resp. to Ig 1 and Ex. 1 at 5 (showing that Ryon Luscome started working at Timpte in November, 1998 - after the new policy was in effect). Although supervisor Wellbrock saw the swastikas, he did not do anything about them. Wellbrock Depo. at 32/15-16.

Argument

Joseph Gooden is entitled to summary judgment holding Timpte liable for race discrimination in employment pursuant to 42 U.S.C. §§ 1981 and 2000e- 2(a)(1) because the undisputed facts show (1) that the racial harassment he encountered at Timpte was sufficiently severe to alter the conditions of his employment and create an abusive working environment; and (2) that Timpte knew or should have known of this abusive environment and did virtually nothing to prevent the harassment Mr. Gooden encountered. There are, therefore, no genuine issues of material fact and Mr. Gooden is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

I. The Hanging Doll Incident Was Sufficiently Severe to Constitute Actionable Racial Harassment

Mr. Gooden's discovery of the simulated lynching in his tool cabinet – in and of itself – is sufficient to constitute racial harassment.

"To constitute actionable harassment, the conduct 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) (internal citations omitted).[2] In the case of racial harassment, the plaintiff must demonstrate that, "(1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus." Bolden, 43 F.3d at 551 (citing Meritor, 477 U.S. at 67). It is beyond question in the present case that the harassment – the planting of a Black doll with a noose around its neck – stemmed from racial animus.

"Pervasiveness and severity are independent and equal grounds" to support a claim of racial harassment. Witt, 136 F.3d at 1432 (citing Meritor, 477 U.S. at 67, and Smith v. Norwest Fin. Acceptance, Inc., 129 F.3d 1408, 1413 (10th Cir. 1997)). "[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). This Court has found a single noose – displayed in the workplace without a Black effigy – to satisfy this prong: "[T]he court accepts

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[2] Meritor was a sexual harassment case. It has long been recognized that the victim of a racially hostile or abusive work environment may bring a cause of action pursuant to both 42 U.S.C. § 1981 and § 2000e- 2(a)(1). See, e.g., Bolden v. PRC, Inc., 43 F.3d 545, 550 (10th Cir. 1994), cert. denied 516 U.S. 826 (1995) (§ 2000e- 2(a)(1)); Witt v. Roadway Express, 136 F.3d 1424, 1432 (10th Cir.), cert. denied 525 U.S. 881 (1998) (§ 1981).

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 (Appx. Tab 15).[3]

The hanging doll incident was severe from both an objective and subjective standpoint as required by Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993). Mr. Gooden presents undisputed evidence of subjective severity: He left the Timpte facility almost immediately after encountering the simulated lynching and did not return to work there because he "started getting spooked. [He] got scared and didn't want to go back to the shop another time." Gooden Depo. at 161/19 - 162/4. When he got home, he called the Commerce City police. Id. at 166/25 - 167/10.

The Ford holding suggests that a noose (again, even without the suggestion of a Black lynching victim) is, as a matter of law, objectively severe and offensive. Furthermore, even Mr. Gooden's white supervisor considered the hanging Black doll to be "repulsive" and "racially offensive" Crabtree Depo. at 62/24; 63/2-3, and it caused Mr. Manley to be "in shock," "very angry" and "quite distressed." Manley Depo. at 114/17 - 115/19. Where male co-workers found alleged sexual harassment directed at a female plaintiff to be "'sexually inappropriate,' 'offensive,' and 'intimidating,'" the Tenth Circuit held the objective test to be satisfied. Smith, 129 F.3d at 1413.

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[3] Judge Sparr ultimately held that there was no evidence that the noose in the Ford case – which was apparently not accompanied by a doll or other effigy – was racially motivated. Id., slip. op. at 8. In contrast, the noose at issue here contained a naked Black doll, removing any doubt of its racial nature and motivation.

In sum, as a matter of law and undisputed fact, the discovery of a simulated lynching constituted a racially-motivated, objectively and subjectively severe, actionably hostile work environment.

II. Timpte Is Liable for the Harassment to Which Mr. Gooden Was Subjected.

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 Mr. Gooden encountered. Timpte is therefore liable for that harassment, whether it was perpetrated by a co-worker, a supervisor or an outsider.

Timpte is liable for harassment committed by its supervisors unless it can show two things: "(a) that [it] exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at 807 (emphasis added). Thus, if Timpte did not use reasonable care to prevent the harassment Mr. Gooden undeniably encountered, it is liable for that harassment.

Timpte is liable for harassment by Mr. Gooden's co-workers or others if its negligence caused the actionable work environment. Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1241 (10th Cir. 1999) (holding employer liable for acts of co-workers); Lockard, 162 F.3d at 1074 (holding employer liable for acts of non-employees). An employer is negligent if it "'fail[s] 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.'" Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577 (10th Cir. 1990) (quoting EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989)); see also Baty, 172 F.3d at 1241-42 (holding that an employer is liable if "'it knew or should have known about the conduct and failed to stop it'" (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2267 (1998))). "In such instances, 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).

Timpte does not promote the objective of preventing harassment, Faragher, 524 U.S. at 806-07, by ignoring racist slurs and symbols – observed and even used by its management personnel – and waiting for its first African-American employee in three years to show up, experience harassment and then complain. Rather, Timpte had a legal obligation to take steps to ensure that Mr. Gooden would join a workplace free of such appalling conduct. Undisputed facts show that Timpte did not meet this standard:

- Timpte management was aware of the use of – and used – racist slurs and symbols.[4]

[4] Knowledge of racist slurs and symbols by any of Messrs. Cofer, Condon, Crabtree or Wellbrock is imputed to Timpte, Inc. "[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 had no racial harassment policy.

- Although Timpte claims that its sexual harassment policy was sufficient, management concedes that this policy did not define, give examples of or make reference to racial slurs, jokes or other harassment.

- Timpte provided no training on sexual or racial harassment to either workers or managers.

- Despite the known history of slurs and symbols, Timpte did not discipline anyone – or even tell its employees that such slurs were unacceptable at Timpte – until explicitly asked to do so by Mr. Gooden after he started working there.

Timpte did not take reasonable care to prevent the harassment Mr. Gooden encountered through the portrayal of a lynching in his tool cabinet. Its lack of effort is similar to that which the Supreme Court found inadequate as a matter of law in Faragher, 524 U.S. at 808 (the City had failed to disseminate a policy against sexual harassment and made no attempt to keep track of the conduct of the offending supervisors). In the context of holding an employer liable for punitive damages – a higher standard for the plaintiff to meet – the Tenth Circuit has stated that

> the extent to which an employer has adopted antidiscrimination policies and educated its employees about the requirements of the ADA is important in deciding whether it is insulated from vicarious punitive liability. [The defendant] certainly had a written policy against discrimination, but that alone is not enough. Our review of the record leaves us unconvinced that [the defendant] made 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). If the failure to educate its employees about the requirements of federal employment law is sufficient to subject an employer to punitive damages, it is certainly sufficient – as an initial matter – to subject Timpte to liability.

Timpte can present no evidence of steps it even intended would be effective at preventing the noose and doll incident. Indeed, Timpte's complete failure to take steps to prevent racial harassment – when viewed in light of the slurs and symbols of which its management was aware – can only be viewed as "adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." See Faragher, 524 U.S. at 789.

Conclusion

For the reasons set forth above, Plaintiff Joseph A. Gooden 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,

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