United States District Court,
D. Colorado.
Joseph A. GOODEN, Plaintiff,
v.
TIMPTE, INC., and Harold Crabtree, Defendants.
No. Civ.A. 99 N 795.

June 29, 2000.

Amy Farr Robertson, Timothy P. Fox, Fox & Robertson, P.C., Denver, CO, for Plaintiff.

Darin L. Mackender, Todd Arthur Fredrickson, Otten, Johnson, Robinson, Neff & Ragonetti, P.C., Denver, CO, for Defendants.

ORDER AND MEMORANDUM OF DECISION

NOTTINGHAM, J.

***1** This is an employment-discrimination case. Plaintiff Joseph A. Gooden alleges that he was discriminated against on the basis of his race while employed by Defendant Timpte, Inc. ("Timpte"), in violation of title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994), *as amended by* the Civil Rights Act of 1991, 42 U.S.C.A. § 1981a, [hereinafter "title VII"], and 42 U.S.C.A. § 1981 [hereinafter "section 1981"]. Gooden also asserts state-law claims for ethnic intimidation and intentional infliction of emotional distress. This matter is before the court on: (1) "Defendant Timpte, Inc.'s Motion for Summary Judgment" filed January 24, 2000; and (2) "Plaintiff's Motion for Partial Summary Judgment" filed January 24, 2000. Jurisdiction is based on 28 U.S.C.A. §§ 1331 (West 1993 & Supp.1999), and 42 U.S.C.A. §§ 2000e-5(f)(3).

FACTS

1. General Background

In April 1998, Timpte hired Gooden, an African-American, as a mechanic/welder at Timpte's Commerce City facility. (Br. in Supp. of Def. Timpte, Inc.'s Mot. for Summ. J., Statement of Undisputed Material Facts ¶ 1 [filed Jan. 24, 2000] [hereinafter "Def.'s Summ. J. Br."]; *admitted at* Pl.'s Am. Br. in Opp'n to Def. Timpte, Inc.'s Mot. for Summ. J., Resp. to Statement of Undisputed Material Facts ¶ 1 [filed Feb. 22, 2000] [hereinafter "Pl.'s Am. Resp."].) [FN1] Gooden left Timpte's employ in early August 1998. (*Id.,* Statement of Undisputed Material Facts ¶ 58; *admitted at* Pl.'s Am. Resp., Resp. to Statement of Undisputed Material Facts ¶ 58.) At the time of his hiring, Gooden was the only African-American employee among the approximately sixty-five employees at the Commerce City facility. (Pl.'s Am. Resp., Statement of Additional Disputed and Undisputed Facts ¶ 9; *admitted at* Reply in Supp. of Timpte's Mot. and Br. for Summ. J., Resp. Concerning Disputed Facts ¶ 9 [filed Apr. 3, 2000] [hereinafter "Def.'s Summ. J. Reply"].) At the time that he left Timpte's employ, he was one of two African-Americans at the Commerce City facility. (*Id.,* Statement of Additional Disputed and Undisputed Facts ¶ 9; *admitted at* Def.'s Summ. J. Reply, Resp. Concerning Disputed Facts ¶ 9.)

FN1. On February 16, 2000, Gooden filed his original response to Timpte's summary-judgment motion. (Pl.'s Br. in Opp'n to Def. Timpte, Inc.'s Mot. for Summ. J. [filed Feb. 16, 2000].) Plaintiff's original response weighed in at a whopping forty-one pages, more than double the page limit provided for in this court's Hearing, Conference, and Trial Procedures. On February 22, 2000, having had this error pointed out by opposing counsel, Gooden's counsel filed a motion for leave to exceed the page limit or, alternatively, to file an amended brief. (Pl.'s Mot. for Leave to Exceed the Page Limit or in the Alternative for Leave to File an Am. Br. in Opp'n to Def.'s Mot. for Summ. J. [filed Feb. 22, 2000].) Gooden's motion shall be granted in part and denied in part. The motion shall be granted to the extent that it seeks leave to file an amended response brief, and shall be denied in all other respects.

a. Gooden's Employment with Timpte

Shortly after Gooden began his employment, co-worker David Rodriguez told Gooden that Mickey Ford, another co-worker, had asked Rodriguez "how was his little nigger boy working out" in the presence of Harold Crabtree, who held a management position directly supervising all welders and mechanics at the Commerce City facility, including Gooden. (Def.'s Summ. J. Br., Statement of Undisputed Material Facts ¶ 7; *admitted in pertinent part at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of

Undisputed Material Facts ¶ 7.) Rodriguez also reported the exchange to Ryan Cofer, Crabtree's immediate supervisor. (*Id.,* Statement of Undisputed Material Facts ¶ 8; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 8.) While the parties dispute whether Cofer actually spoke with Crabtree regarding Rodriguez's complaint, Rodriguez testified that Cofer told him that he would speak with Crabtree and, later that day, informed Rodriguez that he had done so. (*Id.,* Attach. [Rodriguez Dep. at 43-44].) Following Rodriguez's complaint to Cofer, Rodriguez did not hear Ford use such racial slurs again. (*Id.,* Statement of Undisputed Material Facts ¶ 10; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 10.) Gooden neither directly heard Ford's comment, nor did he complain about the event to other Timpte personnel or management. (*Id.,* Statement of Undisputed Material Facts ¶ 10; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 10.) Sometime later, co-worker Harvey Donahue remarked to Gooden while Gooden washed his hands that "that's your skin, that don't come off ." (*Id.,* Statement of Undisputed Material Facts ¶ 13; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 13.) Gooden did not report this incident to anyone at Timpte. (*Id.,* Statement of Undisputed Material Facts ¶ 14; *admitted in pertinent part at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 14.)

***2** In mid-July 1998, Crabtree, who as noted above was Gooden's immediate supervisor, told Gooden about two nooses which had been found in the Timpte shop in the past. (*Id.,* Statement of Undisputed Material Facts ¶ 15; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 15.) Crabtree told Gooden that one noose had been in the shop a long time ago, and that a second, more recent noose had been a joke related to the O.J. Simpson trial. (*Id.,* Statement of Undisputed Material Facts ¶¶ 15-16; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 15-16.) The second noose apparently was a piece of string tied in a loop which his son-in-law had given him as a "Justice for O.J. Simpson" ribbon. (*Id.,* Statement of Undisputed Material Facts ¶ 19; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 19.) Crabtree told Gooden that he was looking for the "Justice for O.J. Simpson" noose but had been unable to locate it and that, if Gooden found it first, Crabtree would "appreciate it if it didn't offend him." (Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 20.) Crabtree began looking for the "Justice for O.J. Simpson" noose at the Timpte shop after reading several newspaper articles about how similar nooses found at other companies had been perceived as racial statements. (Def.'s Summ. J. Br., Statement of Undisputed Material Facts ¶ 20; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 20.) Crabtree found and destroyed the "Justice for O.J. Simpson" noose, and Gooden never complained to anyone at Timpte regarding the incident, although the parties vigorously dispute whether Gooden viewed the incident as harassing. (*Id.,* Statement of Undisputed Material Facts ¶¶ 20-21; *admitted and disputed at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 20-21.)

After this encounter with Crabtree, Ruben Benevidez, an Hispanic co-worker of Gooden's, told Gooden that Benevidez had been referred to on the Timpte workshop floor as a "beaner." (*Id.,* Statement of Undisputed Material Facts ¶ 22; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 22.) After hearing this, Gooden recalled that, in mid-April 1998, he had heard Cofer refer to a particular tool in the Timpte shop as a "beaner beater," although he did not realize at the time that the term contained a derogatory reference to Hispanics. (*Id.,* Statement of Undisputed Material Facts ¶ 23; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 23.) In all, Gooden heard references to the term "beaner beater" about four or five times, including once each by supervisors Crabtree and Cofer, but did not complain to anyone at Timpte regarding the use of the term. (*Id.,* Statement of Undisputed Material Facts ¶¶ 24-25; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 24-25.)

***3** On July 13, 1998, Rodriguez and two other unidentified employees told Gooden that co-worker Tom Quinn had called Gooden a "lazy nigger or something like that...." (*Id.,* Statement of Undisputed Material Facts ¶ 26; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 26.) Rodriguez told Gooden that Crabtree was present during the exchange between Rodriguez and Quinn, and that Crabtree had told both employees to get back to work. (*Id.,* Statement of Undisputed Material Facts ¶ 26; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 26.) Two days later, Gooden complained to Lynda Smittkamp, Timpte's human resources manager, and she involved Gary Manley, a Timpte vice president. [FN2] (*Id.,* Statement of Undisputed Material Facts ¶ 26; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 26.) Gooden related the incident to Manley, and Manley responded that he would "handle it." (*Id.,* Statement of Undisputed Material Facts

¶ 30; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 30.) Gooden indicated to Manley that he did not wish to make a big deal out of the incident, and that he wished to keep the incident "kind of confidential...." (*Id.,* Attach. [Pl.'s Dep. at 137].) Manley told Gooden that, while he could not control how his employees thought, he could control how they behaved in the workplace, and indicated that, whether Gooden wanted him to do something about it or not, Manley was obligated to respond to the situation. (*Id.,* Statement of Undisputed Material Facts ¶ 31.) [FN3]

FN2. Manley was the general manager of Timpte's Commerce City facility from 1987 until October 1999, when Timpte sold this facility to non-party Truck Parts, Inc. (Br. in Supp. of Pl.'s Mot. for Partial Summ. J., Statement of Undisputed Material Facts ¶¶ 1-2 [filed Jan. 24, 2000] [hereinafter "Pl.'s Partial Summ. J. Br."]; *admitted at* Def. Timpte's Resp. to Pl.'s Mot. and Br. for Partial Summ. J., Resp. to Statement of Undisputed Material Facts ¶¶ 1-2 [filed Feb. 16, 2000] [hereinafter "Def.'s Partial Summ. J. Resp."].)

FN3. In certain instances, Gooden denies one of Timpte's offered undisputed fact but offers citation to evidence in the record which is unresponsive to the factual assertion. In such circumstances, Timpte's offered undisputed fact is deemed admitted for purposes of this order, and I cite only to Timpte's brief.

Manley then went to the shop, found Cofer, and Cofer and Manley proceeded to confront Quinn. (*Id.,* Statement of Undisputed Material Facts ¶ 32; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 32.) Although Quinn denied that he had directed his comment at Gooden, Manley told him that it did not matter because the word was unacceptable at Timpte and would not be tolerated under any circumstances, and that Quinn's employment could be terminated if the conduct were repeated. (*Id.,* Statement of Undisputed Material Facts ¶ 33; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 33.) Thereafter, Cofer told Gooden that he and Manley had spoken to Quinn, that conduct such as Quinn's would not be tolerated, and that if Gooden experienced further problems that he should raise them with Cofer. (*Id.,* Statement of Undisputed Material Facts ¶ 34; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 34.) Gooden asked whether Quinn would be suspended for the incident, but Cofer responded that he did not expect any further problems from Quinn. (*Id.,* Statement of Undisputed Material Facts ¶ 34; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 34.)

***4** On August 7, 1998, Gooden arrived at his workspace at Timpte, opened his tool cabinet, and discovered a nude Black doll with a noose around its neck hanging from the top of the cabinet. (Br. in Supp. of Pl.'s Mot. for Partial Summ. J., Statement of Undisputed Material Facts ¶ 34 [filed Jan. 24, 2000] [hereinafter "Pl.'s Partial Summ. J. Br."]; *admitted at* Def. Timpte's Resp. to Pl.'s Mot. and Br. for Partial Summ. J., Resp. to Statement of Undisputed Material Facts ¶ 34 [filed Feb. 16, 2000] [hereinafter "Def.'s Partial Summ. J. Resp."].) Gooden pointed out the doll to co-worker Cory Martinez, who paged Crabtree and asked him to come to the area. (Def.'s Summ. J. Br., Statement of Undisputed Material Facts ¶ 37; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 37.) Before Crabtree arrived, Gooden grabbed the doll and showed it to two other co-workers. (*Id.,* Statement of Undisputed Material Facts ¶ 38; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 38.) When Crabtree arrived, Gooden showed him the doll in the locker. Crabtree reacted by grabbing the doll and placing it behind his back. (*Id.,* Statement of Undisputed Material Facts ¶ 39; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 39.) Gooden demanded to see the doll again, and, while Crabtree refused to show it to him initially, Crabtree ultimately relented and gave Gooden the doll. (*Id.,* Statement of Undisputed Material Facts ¶ 39; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 39.) Gooden then confronted Crabtree and other employees with the noose and doll in order to see whether any of the employees acted in a guilty fashion. (*Id.,* Statement of Undisputed Material Facts ¶ 40; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 40.) Crabtree told Gooden that he could go home for the weekend, and that they would talk about the incident the following Monday. (*Id.,* Statement of Undisputed Material Facts ¶ 41; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 41.)

Crabtree immediately contacted Smittkamp and informed her of what had taken place and brought her the noose and doll. (*Id.,* Statement of Undisputed Material Facts ¶ 43; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 43.) Smittkamp telephoned Gooden that morning and discussed the incident with him.

(*Id.,* Statement of Undisputed Material Facts ¶ 45; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 45.) In the course of this conversation, Smittkamp told Gooden that Timpte would investigate the incident, apologized, and told him that Timpte wanted Gooden to return to work the following Monday. (*Id.,* Statement of Undisputed Material Facts ¶¶ 46-47; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 46-47.)

***5** Manley and Smittkamp also met to discuss the noose and doll incident, and Manley contact the Commerce City Police Department to report the incident. (*Id.,* Statement of Undisputed Material Facts ¶ 44; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 44.) Manley decided that, in addition to assisting the Commerce City Police Department with a criminal investigation, Timpte should conduct an internal investigation and, to that end, he and Smittkamp compiled a list of employees who had worked at the Commerce City facility the day before and the day of the incident. (*Id.,* Statement of Undisputed Material Facts ¶ 44; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 44.) During the afternoon, Manley and Smittkamp began to interview shop employees regarding their knowledge of the incident. (*Id.,* Statement of Undisputed Material Facts ¶¶ 49-50; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 49-50.) Manley then went through the shop again to attempt to obtain any additional information. (*Id.,* Statement of Undisputed Material Facts ¶ 51; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 51.) No information was immediately forthcoming. Smittkamp eventually received a lead, but did not pursue it after she determined that the individual named probably had not worked at Timpte for three years prior to the noose and doll incident. (Def.'s Summ. J. Reply, Attach. [Smittkamp Dep. at 113].)

Manley and Smittkamp then held a meeting with all employees to review Timpte's policy against harassment and discrimination. (Def.'s Summ. J. Br., Statement of Undisputed Material Facts ¶ 53; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 53.) At this meeting, Smittkamp and Manley discussed the noose and doll incident and the fact that no information had yet surfaced, and offered the employees a $500 reward for such information. (*Id.,* Statement of Undisputed Material Facts ¶ 53; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 53.) Additionally, Timpte revised its discrimination and harassment policy and distributed it at this meeting. (*Id.,* Statement of Undisputed Material Facts ¶ 54; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 54.) Neither Gooden nor Timpte ever discovered who had planted the noose and doll in Gooden's locker. (*Id.,* Statement of Undisputed Material Facts ¶ 56; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 56.)

b. Timpte's Employment Policies and Work Environment

During Gooden's employment, Timpte maintained a policy which had gone into effect August 25, 1993, entitled "Company Policy Subject: Sexual Harassment" ("1993 Policy"). (*Id.,* Attach. [Manley Dep ., Ex. B (1993 Policy)].) The 1993 Policy defines sexual harassment, states management's position that the conduct defined in the 1993 Policy will not be tolerated, and sets forth a procedure for employees to follow for making complaints. (*Id.,* Attach. [Manley Dep., Ex. B (1993 Policy)].) The 1993 Policy states that it "applies to all employees of Timpte, Inc. in accordance with Federal and State regulations, and is written to inform you of your right to a harassment free work environment and what management at Timpte will do to insure you that we will do our best to protect our employees." (*Id.,* Attach. [Manley Dep., Ex. B (1993 Policy)].) The 1993 Policy further provides that federal discrimination laws extend to race, color, religion, gender, national origin, age, and disability discrimination. (*Id.,* Attach. [Manley Dep., Ex. B (1993 Policy)].) The 1993 Policy was posted on several employee bulletin boards throughout the Timpte's Commerce City facility. (*Id.,* Statement of Undisputed Material Facts ¶ 4; *admitted in pertinent part at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 4.) In addition, Smittkamp informed Timpte employees of their ability to raise problems or complaints directly with her or Manley at employee orientation. (*Id.,* Statement of Undisputed Material Facts ¶ 4.) Timpte also distributed an employment-law newsletter, the *Manager's Legal Bulletin,* to its managers and discussed issues related to discrimination in meetings. (*Id.,* Statement of Undisputed Material Facts ¶¶ 5-6; *admitted in pertinent part at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 5-6.)

***6** On August 27, 1998, ostensibly in response to the doll and noose incident, Timpte revised the 1993 Policy ("Revised Policy"). (*Id .,* Statement of Undisputed Material Facts ¶ 54; *admitted at* Pl.'s Am. Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 54.) The Revised Policy makes clear that prohibited

harassment includes harassment based upon the individual's race. (*Id.,* Attach. [Manley Dep., Ex. D (Revised Policy)].) Specifically, the Revised Policy provides that it is Timpte's policy "that all employee are entitle to work in an environment free from all forms of discrimination and harassment including sexual and racial harassment." (*Id.,* Attach. [Manley Dep., Ex. D (Revised Policy)].) In addition, Timpte changed the subject line that appeared on the 1993 Policy from "Company Policy: Sexual Harassment" to "Company Policy: Discrimination" on the Revised Policy. (*Id.,* Attach. [Manley Dep., Ex. D (Revised Policy)].) The Revised Policy further: (1) provides that Timpte will not tolerate jokes or slurs directed at someone's race, color, or membership in any other protected class; (2) includes examples of conduct which may create a hostile work environment; (3) states that an employee engaging in such conduct will be subject to immediate disciplinary action, up to and including termination of employment; and (4) sets forth a procedure for employees to make complaints. (*Id.,* Attach. [Manley Dep., Ex. D (Revised Policy)].)

In spite of the policies in place at the time of Gooden's employment, it is undisputed that certain racially related remarks had bandied about Timpte's shop both prior to and during Gooden's employment. For example, Timpte admits 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." (Pl.'s Partial Summ J. Br., Statement of Undisputed Material Facts ¶ 4; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 4.) In addition, Cofer, a Timpte manager, testified that he heard terms such as "nigger-rigged," "beaner beater," and "afro-engineered," as well as other slang works for race, both before and after becoming a supervisor, without ever telling anyone at Timpte that these terms were unacceptable. (*Id.,* Statement of Undisputed Material Facts ¶ 5; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 5.) Cofer further testified that he observed swastikas drawn as graffiti in the men's restroom at Timpte and that swastika graffiti has "been in and out of [the restroom] for years." (*Id.,* Statement of Undisputed Material Facts ¶ 11; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 11.) Cofer most recently observed swastikas in the men's restroom more than one year but less than two years prior to October 1999. (*Id.,* Statement of Undisputed Material Facts ¶ 11; *admitted in pertinent part at* Def.'s Partial Summ. J. Resp. ¶ 11.) Manager John Condon advised one employee who displayed the swastikas that "it was inappropriate to have them around," and Timpte management told employees that they should not be writing graffiti in the men's restroom. (Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 11.) In addition, various former Timpte employees testified that they heard and/or used the word "nigger" or "nigger-rigged" a varying numbers of times over their employment. (*Id.,* Statement of Undisputed Material Facts ¶¶ 8-10; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 8-10.) Finally, as discussed above in some detail, two nooses had appeared at Timpte prior to the noose and doll which Gooden discovered in his locker.

2. Procedural History

***7** On April 22, 1999, after exhausting his administrative remedies, Gooden filed his complaint in this court naming Timpte, Crabtree, and "Defendants Does 1 through 10" as defendants. (Compl.¶¶ 4-6.) On August 18, 1999, Gooden filed an amended complaint. (Am. Compl. [filed Aug. 18, 2000].) Gooden alleges that Defendants Does 1 through 10 [hereinafter "unidentified defendants"] are "employees, supervisors[,] and/or managers of Timpte whose identity is unknown to [Gooden] at this time." (*Id.* ¶ 6.) Gooden asserts the following claims: (1) constructive discharge and hostile-environment racial discrimination in violation of title VII against Timpte ("first claim"); (2) intentional interference with his right to make and enforce contracts as defined in 42 U.S.C.A. § 1981 against all defendants ("second claim"); (3) a state-law claim for ethnic intimidation in violation of Colo.Rev.Stat. §§ 18-2-121(2) and 13-21-106.5 (1999) against all defendants ("third claim"); and (4) intentional infliction of emotional distress against the unidentified defendants ("fourth claim").[FN4] (*Id.*)

> FN4. In open court on June 23, 2000, at the hearing on the parties' summary-judgment motions, plaintiff's counsel represented to the court that plaintiff was abandoning all claims against the unidentified defendants. Counsel also represented that plaintiff was abandoning his fourth claim for intentional infliction of emotional distress. Based upon the representations of counsel in open court, it is therefore ordered that (1) plaintiff's third claim is dismissed insofar as that claim is asserted against the unidentified defendants, and (2) plaintiff's fourth claim is dismissed.

On January 24, 2000, Timpte moved for summary judgment as to all of Gooden's claims. (Def. Timpte, Inc.'s

Mot. for Summ. J. [filed Jan. 24, 2000].) Timpte contends that it is entitled to summary judgment as to Gooden's first and second claims because: (1) the environment at Timpte was insufficiently racially hostile as a matter of law for purposes of both Gooden's first and second claims; and (2) to the extent that Timpte's work environment was racially hostile, there is an insufficient basis upon which to hold Timpte liable for that environment. (Def.'s Summ. J. Br. at 10-15.) Timpte further contends that it is entitled to summary judgment as to Gooden's third claim for ethnic intimidation because: (1) Gooden cannot establish the elements of an ethnic intimidation claim; and (2) even if he can, Timpte cannot be held vicariously liable for the acts of its employees. (*Id.* at 16-18.) Finally, Timpte seeks summary judgment that Gooden is not entitled to punitive damages for either his first or second claim as a matter of law. (*Id.* at 18-20.) Also on January 24, 2000, Gooden moved for partial summary judgment on his first and second claims for racial harassment. (Pl.'s Mot. for Partial Summ. J. [filed Jan. 24, 2000].) Gooden contends that he is entitled to summary judgment on his first and second claims because the noose and doll incident was sufficiently severe as a matter of law to constitute actionable racial harassment. (Pl.'s Partial Summ. J. Br. at 13.)

ANALYSIS

1. Legal Standard for Summary Judgment

Under rule 56(c), the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Concrete Works, Inc. v. City & County of Denver,* 36 F.3d 1513, 1517 (10th Cir.1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc.,* 36 F.3d at 1518 (citing *Celotex Corp.,* 477 U.S. at 325, 106 S.Ct. at 2554). The nonmoving party may not rest solely on the allegations in his or her pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.,* 477 U.S. at 324, 106 S.Ct. at 2553; Fed.R.Civ.P. 56(e). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co.,* 756 F.2d 1467, 1474 (10th Cir.1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.,* 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,* 912 F.2d 1238, 1241 [10th Cir.1990]).

2. Hostile Environment Harassment-First and Second Claims

a. Timpte's Motion for Summary Judgment

***8** Timpte contends that it is entitled to summary judgment because the conduct of which Gooden complains was not severe or pervasive enough as a matter of law to create an actionably hostile work environment. (Def.'s Summ. J. Br. at 10-15.) Alternatively, Timpte contends that it is entitled to summary judgment because there is an insufficient basis upon which to hold Timpte liable under title VII for its employees' actions. I address each argument separately.

i. Severity and Pervasiveness of the Conduct

Although title VII does not explicitly mention hostile-environment race-based harassment, it is well established that a victim of a work environment which is hostile or abusive because of the plaintiff's race may bring a cause of action pursuant to title VII.[FN5] *Bolden v. PRC, Inc.,* 43 F.3d 545, 550 (10th Cir.1994). The Tenth Circuit has held that "[f]or a hostile environment claim to survive a summary judgment motion, 'a plaintiff must show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." ' *Penry v. Federal Home Loan Bank of Topeka,* 155 F.3d 1257, 1264 (10th Cir.1998) (quoting *Davis v. U.S. Postal Serv.,* 142 F.3d 1334, 1341 [10th Cir.1998]). In determining whether the conduct complained of was sufficiently severe or pervasive to have affected a term, condition or privilege of employment, a court must consider all pertinent circumstances. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295; *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1413 (10th Cir.1987). Among the factors appropriately considered are (1) whether the discriminatory conduct is frequent or severe, (2) whether it is physically threatening or humiliating, or a mere

offensive utterance, and (3) whether it unreasonably interferes with an employee's work performance. *Penry,* 155 F.3d at 1264. The court also considers the context in which the conduct occurred. *Smith v. Norwest Fin. Acceptance, Inc.,* 129 F.3d 1408, 1413 (10th Cir.1997). Not only must the conduct be sufficiently severe or pervasive to create a work environment that is objectively hostile or abusive, but it must also be perceived subjectively as abusive by the victim. "[I]f the victim does not subjectively perceive the environment as abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris,* 510 U.S. at 21-22, 114 S.Ct. at 370. Not all workplace incivility violates title VII: general harassment, if not based upon gender, race, or national origin, is not actionable. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49; *see also Bolden,* 43 F.3d at 551 ("[G]eneral torment and taunting if not racially discriminatory [is] not actionable."). Finally, the Tenth Circuit has noted that "the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact." ' *O'Shea v. Yellow Tech. Servs., Inc.,* 185 F.3d 1093, 1098 (10th Cir.1999) (quoting *Beardsley v. Webb,* 30 F.3d 524, 530 [4th Cir.1994] [citation omitted]). With these principles in mind, I turn to Gooden's hostile-environment claims.

FN5. Section 1981 "affords a federal remedy against discrimination in private employment on the basis of race[,]" *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975), as does title VII, 42 U.S.C.A. § 2000e-2(a)(1). In 1975, the Supreme Court approved the prosecution of both causes of action by the same plaintiff based upon the same set of facts. *Johnson,* 421 U.S. at 459-62, 95 S.Ct. at 1719-21. Because the court applies the same standards and burdens to a plaintiff's claims regardless of whether they arise under title VII or section 1981, *Aramburu v. Boeing Co.,* 112 F.3d 1398, 1403 n. 3 (10th Cir.1997), I shall discuss Gooden's first and second claims together.

***9** In order to withstand Timpte's summary-judgment motion, Gooden must show the existence of an issue of fact that the harassment which he suffered was both subjectively and objectively severe. Timpte contends that the conduct of which Gooden complains was not sufficiently severe from a subjective standpoint as a matter of law because Gooden did not view most of the incidents as harassing. (*Id.* at 12.) Specifically, Timpte relies on the following statements in Gooden's deposition: (1) Gooden did not take Ford's "little nigger boy" remark seriously and that it was "one of the first incidents that [he] looked the other way on," although he was angry, frustrated, and "kind of nervous" in response to the comment, (Def.'s Br., Attach. [Pl.'s Dep. at 183-84]); (2) Gooden "downplayed" the incident with Donahue, (*id.,* Attach. [Pl.'s Dep. at 76-77]); (3) Gooden failed to complain about the conversation with Crabtree regarding the two nooses which had previously been at Timpte. (*id.,* Attach. [Pl.'s Dep. at 188]); (4) Gooden never complained about hearing his Hispanic co-workers being referred to as "beaners," (*id.,* Attach. [Pl.'s Dep. at 196-97]). I am thoroughly unpersuaded. It does not follow from the fact that Gooden attempted to overlook some of the earlier remarks that he did not subjectively view the environment at Timpte as racially hostile on the whole. Indeed, Gooden testified that he downplayed some of the earlier incidents because he was trying to keep his job, because he hoped that the harassment would stop, and because he did not wish to get someone fired. (App. to Pl.'s Br. in Opp'n to Def. Timpte, Inc.'s Mot. for Summ. J., Ex. 1 [Pl.'s Dep. at 31-32, 77, 137] [filed Feb. 16, 2000] [hereinafter "Exs. to Pl.'s Summ. J. Resp.].) In addition, Gooden testified that, following various incidents, he felt frightened, disgusted, angry, nervous, and frustrated. (*Id.,* Ex. 1 [Pl.'s Dep. at 33, 152, 161-62, 183-84].) Thus, there is, at a minimum, an issue of fact as to whether Gooden felt subjectively harassed.

More importantly, Timpte's argument is really an invitation to the court to examine Gooden's reaction to each "incident" in isolation, rather than consider whether Gooden subjectively viewed the environment as racially hostile as a whole. The question is not whether Gooden felt subjectively harassed in response to each individual instance, but, rather, whether he subjectively perceived that the environment was hostile or abusive under all the circumstances. *See Harris,* 510 U.S. at 23, 114 S.Ct. at 371 ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."); *see also Jackson v. Quanex Corp.,* 191 F.3d 647, 660 (6th Cir.1999) ("Under the totality of the circumstances approach, a district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode.") (internal quotation and citation omitted). " 'A hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits.... [T]he totality of the circumstances necessarily includes the severity, as well as the number, of incidents of harassment." ' *Hansel v. Public Serv. Co. of Colo.,* 778 F.Supp. 1126, 1132 (D.Colo.1991) (quoting *Vance v. Southern Bell Tel. & Tel.*

Co., 863 F.2d 1503, 1511 [11th Cir.1989], *overruled on other grounds, Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363 [1989]). Because Gooden has produced evidence that he felt subjectively harassed overall while at Timpte, I conclude that Timpte is not entitled to summary judgment on this basis.

***10** Next, I turn to the question of whether the harassing conduct was "sufficiently severe that a reasonable person would find the work environment hostile or abusive." *Smith,* 129 F.3d at 1413. Timpte argues that it is entitled to summary judgment because: (1) the remarks of which Gooden complains were "merely offensive utterances"; (2) Gooden downplayed the significance of the incidents occurring prior to the noose and doll incident, and, thus, those incidents should be disregarded; and (3) the only truly harassing incident was the noose and doll incident, which is insufficient as a matter of law to create an objectively hostile environment. (Def.'s Summ. J. Br. at 11-12.) Again, I am thoroughly unpersuaded. As discussed above, it is inappropriate for the court to parse out each and every alleged incident and consider each incident in a vacuum in order to determine whether a given incident was "severe." *See Harris,* 510 U.S. at 23, 114 S.Ct. at 371; *Jackson,* 191 F.3d at 660. Thus, the earlier remarks cannot be disregarded and must, instead, be considered along with the noose and doll incident in assessing whether a reasonable jury could find that Timpte's workplace was racially abusive or hostile.

Timpte also argues that, because many of the remarks were not made directly to Gooden, the severity of the harassing effect of the remarks is lessened. While some of the remarks may have originally been made outside of Gooden's hearing, it is undisputed that Gooden's co-workers made him aware of these remarks and, thus, the remarks are relevant to both the subjective and objective hostility of the Timpte workplace. *See Miller v. Regents of the Univ. of Colo.,* No. 98-1012, 1999 WL 506520, *9 (10th Cir. July 19, 1999) (holding that the court should consider all conduct of which plaintiff was aware in considering the hostility of the workplace); *see also Hurley v. Atlantic City Police Dep't,* 174 F.3d 95, 111 (3d Cir.1999) (holding that evidence of sexist remarks made outside of female workers' hearing was admissible to show "motive behind harassment, which may help the jury interpret otherwise ambiguous acts," and to demonstrate the "pervasive sexism" present in workplace), *cert. denied,* 528 U.S. 1074, 120 S.Ct. 786, 145 L.Ed.2d 663 (2000). In addition, the racial slurs directed at Timpte's Hispanic employees of which Gooden was aware are relevant to the existence of a hostile work environment.[FN6] *See Hirase-Doi v. U.S. West Communications, Inc.,* 61 F.3d 777, 782 (10th Cir.1995) ("[E]vidence of a general work atmosphere, including evidence of harassment of other [minority members], may be considered in evaluating a claim."); *see also Cruz v. Coach Stores, Inc.,* 202 F.3d 560, (2nd Cir.2000) ("Remarks targeting members of other minorities, for example, may contribute to the overall hostility of the working environment for a minority employee."); *Schwapp v. Town of Avon,* 118 F.3d 106, 111-12 (2d Cir.1997) (finding that harassment of other minorities relevant to whether a black police officer experienced a racially hostile or abusive working environment). Moreover, even if Gooden himself were not present or were not the target of some of the racial remarks that he was aware of, a jury plausibly could find that the persistently offensive conduct created an overall "hostile or abusive environment" which exacerbated the effect of the harassment Gooden experienced personally. *Id.* (citing *Harris,* 510 U.S. at 21, 114 S.Ct. at 371).

> FN6. In Gooden's partial summary judgment motion, he also lists incidents of other racial remarks made or overheard by various members of Timpte's management and Timpte employees. (Pl.'s Partial Summ. J. Br., Statement of Undisputed Material Facts ¶¶ 4-14.) There is absolutely no indication, however, that Gooden was aware of any of these instances prior to discovery in this case. Because the severity-pervasiveness standard is a test aimed at determining whether Gooden experienced an abusive environment, I consider only that conduct of which Gooden was aware during his employment. *Miller,* 1999 WL 506520, *9 n. 10 (citing *Hirase-Doi,* 61 F.3d at 782. This is true whether I am evaluating the evidence from Gooden's subjective viewpoint or the reasonable person's objective viewpoint because "[e]ither way the focus remains on the conduct experienced by the plaintiff." *Id.* (citations omitted).

***11** Timpte next contends that the noose and doll incident is insufficient to create an triable issue of fact regarding a hostile environment at Timpte because there is no evidence that the incident was racially motivated. (Def.'s Summ. J. Br. at 12.) Timpte may make that astonishing argument to a jury. In light of the undisputed fact that a nude Black doll-as opposed to a doll of some other race-was found hanging from a noose in the locker of an African-American man, it would not require a jury to make a herculean leap of logic to conclude that the noose and doll incident was racially motivated.

Finally, Timpte contends that the conduct complained of was insufficient as a matter of law to constitute pervasive harassment because of the relatively small number of instances and the relatively short period of time during which Gooden was subject to the harassment.[FN7] (*Id.*) Timpte is correct that isolated instances of harassment, while inappropriate and offensive, generally do not constitute pervasive harassment. *See, e.g., Witt v. Roadway Express,* 136 F.3d 1424, 1432 (10th Cir.1998) (holding two incidents in a two-year period insufficient to create abusive work environment), *cert. denied,* 525 U.S. 881, 119 S.Ct. 188, 142 L.Ed.2d 154 (1998); *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1366 (10th Cir.1997) (holding five separate incidents over a span of approximately sixteen months not sufficiently pervasive to create abusive work environment); *see also Griffin v. Pinkerton's, Inc.,* 173 F.3d 661, 665 (8th Cir.1999) (holding five incidents over period of approximately one year not sufficiently pervasive to constitute abusive work environment). Nevertheless, " 'there is neither a threshold "magic number" of harassing incidents that gives rise, without more, to liability as a matter of law, nor a number of incidents below which a plaintiff fails as a matter of law to state a claim." ' *Richardson v. New York State Dep't of Correctional Serv.,* 180 F.3d 426, 439 (2nd Cir.1999) (quoting *Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668, 674 [7th Cir.1993]). In this case, the record reflects several statements over the four months of Gooden's employment with Timpte, culminating with a mock lynching of a nude Black doll in Gooden's locker. In addition, the record taken in the light most favorable to Gooden establishes that these incidents were not sporadic in nature but, rather, occurred steadily over the course of his employment. Consequently, I conclude that a reasonable jury could find that these incidents were sufficiently pervasive, given the relatively short time span over which they occurred, to create a racially hostile environment. Accordingly, I conclude that Timpte is not entitled to summary judgment on this basis.

> FN7. As the Tenth Circuit has noted, the test for hostile environment is a disjunctive one, "requiring that the harassing conduct be sufficiently pervasive or sufficiently severe to alter the terms, conditions, or privileges of [p]laintiff's employment." *Smith,* 129 F.3d at 1413. Because I have concluded that there exist triable issues of fact with regard to the severity of the harassment, I only touch briefly on its pervasiveness.

Viewing the totality of the circumstances, including the general work atmosphere at the Timpte shop while Gooden was employed there and the specific conduct directed at Gooden and others, I conclude that a reasonable jury could find that Timpte's workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of Gooden's employment and create an abusive working environment. A reasonable jury could find from the evidence in this case, when viewed in the light most favorable to Gooden, that there existed at Timpte a patently offensive pattern of both direct and indirect abuse directed at Gooden and Timpte's Hispanic employees which meets the standard which the Tenth Circuit has established for hostile environment claims. *Bolden,* 43 F.3d at 551. Gooden has produced sufficient evidence from which a jury could reasonably infer that the racial epithets were more than just occasional utterances. Although Gooden has not cited a great number of instances of racial epithets directed towards him personally, he has cited other instances of racial epithets and other abusive conduct that he has witnessed directed toward other co-workers. This course of conduct culminated with Gooden's discovery of a nude, Black doll hanging from a noose in his locker. *Hirase-Doi,* 61 F.3d at 781-82 (evidence of a general work atmosphere, including evidence of harassment of others, may be considered in evaluating a claim) (citing *Hicks,* 833 F.2d at 1415-16). These incidents-of which the noose and doll incident is particularly appalling-have absolutely no place in our society, and a reasonable jury could find that these incidents created a "working environment [ ] so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Meritor Sav. Bank,* 477 U.S. at 66, 106 S.Ct. at 2405. *See also Allen v. Michigan Dep't of Corrections,* 165 F.3d 405 (6th Cir.1999) (holding plaintiff made out case of racial harassment because he was, among other things, repeatedly subjected to racial epithets by supervisors and co-workers and received a note on departmental forms which used racial slurs, threatened his life, was signed by the "KKK" and depicted a stick figure with a noose around its neck). Accordingly, Timpte's motion for summary judgment on the basis that the harassment was not severe as a matter of law is denied.

ii. Employer Liability for Workplace Harassment

***12** Timpte next argues that, even if a rationale jury could find that the Timtpe workplace is racially hostile, Timpte is nevertheless entitled to summary judgment because it cannot be held liable for its employees' conduct. [FN8] (Def.'s Summ. J. Br. at 13-15.) Where the harasser is a co-worker,

an employer may be liable on a claim of racial harassment for its own negligence in "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." *Hirschfeld v. New Mexico Corrections Dep't,* 916 F.2d 572, 577 (10th Cir.1990) (setting forth standard in sexual harassment context). The court must make two inquiries in determining the liability of the employer for the racial harassment of a co-worker: "first, into the employer's actual or constructive knowledge of the harassment, and second, into the adequacy of the employer's remedial and preventive responses to any actually or constructively known harassment." *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 673 (10th Cir.1998).

> FN8. Different standards governing employer liability for hostile environment harassment exist for harassment undertaken by the victim's supervisors as opposed to the victim's co-workers. Because the parties are in agreement that the standard for co-worker harassment applies, I address only that standard.

Timpte contends that there is no basis upon which a reasonable jury could find that Timpte "acted negligently or recklessly in failing to deal with the alleged harassment of Gooden." (Def.'s Summ. J. Br. at 14 [citation omitted].) Specifically, Timpte contends that it took adequate preventative measures to avoid harassment as a matter of law by: (1) maintaining and posting the 1993 Policy; (2) informing employees at orientation of their ability to raise problems with Timpte management; (3) training managers though the use of the *Manager's Legal Bulletin* and in discussion during management meetings; and (4) entering a collective bargaining agreement with the union which prevented discrimination and harassment on the basis of union membership. (*Id.*) Timpte further contends that its responses to the harassment which Gooden suffered were also reasonable as a matter of law. (*Id.*)

Timpte's argument appears to be based upon the incorrect assumption that an employer is under no duty to address an allegedly hostile work environment unless and until the harassed employee formally complains. In this case, it is undisputed that Timpte did react quickly in responding to Quinn's remarks and the noose and doll incident. The question, however, is whether the employer failed to "remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable case should have known" *Adler,* 144 F.3d at 673. Thus, the operative date for assessing the employer's response to the hostile environment is date that the employer discovered or should have discovered the hostile environment-not necessarily the date upon which the employee actually complained. In cases where there is evidence suggesting that a company's supervisors and management had knowledge of an openly hostile work environment prior to the time that a plaintiff made complaints, yet took no action to intercede and address the hostile environment, courts have denied summary judgment, concluding that a genuine issue of material fact existed as to whether the employer took prompt and effective remedial actions once the employer became aware of the hostile work environment. *See, e.g., Jackson,* 191 F.3d at 664 (holding that plaintiff had raised issue of fact as to whether employer should have known of hostile environment where there was evidence, *inter alia,* that employer was slow to eliminate racially offensive graffiti and language which a supervisor knew of); *Hurley,* 174 F.3d at 111 (citing *West v. Philadelphia Elec. Co.,* 45 F.3d 744, 752 [3d Cir.1995]) (holding that "[e]vidence of other acts of harassment is extremely probative as to whether the harassment was sexually discriminatory and whether [the defendant employer] knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy."); *Jackson v. T & N Van Serv.,* No. Civ. A 99-1267, 2000 WL 562741, at *9 (E.D.Pa. May 9, 2000) (denying summary judgment despite employer's quick response to plaintiff's complaint where there existed question of fact as to whether employer should have know of racially hostile environment before complaint made); *Carney v. City of Shawnee,* 38 F.Supp.2d 905, 910 (D.Kan.1999) (denying summary judgment where disputed facts existed regarding effectiveness of employer's anti-harassment/non-discrimination policy and whether employer should have known of hostile environment before employee's complaint). In addition, evidence of other acts of racial harassment is probative of whether an employer knew or should have known that racially discriminatory behavior was occurring in the workplace. *See Kunin v. Sears Roebuck & Co.,* 175 F.3d 289, 294 (3rd Cir.1999) (holding that employer can be liable even without a formal complaint from employee "where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it").

***13** Although Gooden himself did not report each instance of racially related conduct to Timpte's management, there is evidence from which a reasonable jury could conclude that Timpte should have know of the hostile environment

prior to Gooden's complaints. Specifically, Timpte has 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." (Pl.'s Partial Summ J. Br., Statement of Undisputed Material Facts ¶ 4; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 4.) In addition, Cofer, a Timpte manager, testified that he heard racially offensive terms both before and after becoming a supervisor. (*Id.,* Statement of Undisputed Material Facts ¶ 5; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 5.) Cofer, moreover, testified that he observed swastikas drawn in the men's restroom at Timpte and that the swastikas have "been in and out of [the restroom] for years." (*Id.,* Statement of Undisputed Material Facts ¶ 11; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶ 11.) Finally, various former Timpte employees testified that they heard and/or used word "nigger" or "nigger-rigged" a varying numbers of times over their employment. (*Id.,* Statement of Undisputed Material Facts ¶¶ 8-10; *admitted at* Def.'s Partial Summ. J. Resp., Resp. to Statement of Undisputed Material Facts ¶¶ 8-10.) Under the circumstances, a reasonable jury could find that Timpte should have discovered the allegedly racially hostile environment before Gooden made formal complaints.

Finally, I am unpersuaded by Timpte's attempt to absolve itself from liability on the basis of the 1993 Policy. While Timpte undisputedly had an explicit policy in place with regard to *sexual* harassment at the time of the events complained of, reasonable minds could differ as to whether the 1993 Policy effectively addressed the racial harassment at issue in this case. Indeed, the fact that Timpte revised the 1993 Policy immediately after the noose and doll incident in order to make crystal clear that racial harassment fell within the aegis of prohibited conduct in its workplace suggests that Timpte itself saw some ambiguity on the issue in the 1993 Policy.

Considered in the light most favorable to Gooden, there is evidence from which a reasonable jury could find that Timpte should have known of the allegedly hostile environment at its Commerce City facility prior to Gooden's complaints. There is evidence that Timpte's managers and employees alike were aware of various racial slurs being regularly circulated in the work place. In addition, there exist questions of fact as to the existence and efficacy of any policy towards racial harassment at Timpte during the relevant time period. Accordingly, Timpte is not entitled to summary judgment.

iii. Punitive Damages

***14** Timpte finally contends that, even if Gooden's first and second claims withstand its motion for summary judgment, Timpte is nevertheless entitled to summary judgment to the extent that Gooden seeks an award of punitive damages. (Def.'s Summ. J. Br. at 18-20.)

Both section 1981 and title VII provide a federal remedy for discrimination in private employment on the basis of race. *Johnson,* 421 U.S. at 460, 95 S.Ct. at 1720. A prevailing plaintiff in a cause of action under section 1981 is entitled to punitive damages under the common law "under certain circumstances." *Id.* at 460, 95 S.Ct. at 1716. Specifically, before a plaintiff may recover punitive damages, section 1981 requires that the plaintiff demonstrate "that the discrimination must have been 'malicious, willful, and in gross disregard of [plaintiff's] rights." ' *Jackson v. Pool Mortgage Co.,* 868 F.2d 1178, 1181 (10th Cir.1989) (quoting *EEOC v. Gaddis,* 733 F.2d 1373, 1380 [10th Cir.1984]). Until Congress passed the Civil Rights Act of 1991, however, a plaintiff could not recover punitive damages under title VII. *Kolstad v. American Dental Ass'n,* 527 U.S. 526,-, 119 S.Ct. 2118, 2123-24 (1999). In 1991, Congress added a provision permitting title VII plaintiffs to recover compensatory and punitive damages where the defendant "engaged in unlawful intentional discrimination" prohibited by title VII. 42 U.S.C.A. § 1981a(a)(1). "A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C.A. § 1981a(b)(1). Title VII provides that a plaintiff may only recover punitive damages under title VII if the plaintiff cannot recover punitive damages under section 1981.[FN9] 42 U.S.C.A. § 1981a(a)(1). As the Supreme Court noted in *Kolstad,* in adding the punitive damages provisions to title VII, Congress adopted a standard for punitive damages virtually identical to that which the Supreme Court had enunciated for cases brought pursuant to sections 1981 and 1982. *Kolstad,* 119 S.Ct. at 2124. Consequently, any case law construing the standard for punitive damages set forth in title VII is equally applicable to clarify the standard for punitive damages in a section 1981 claim. *Lowery v. Circuit City Stores, Inc.,* 206 F.3d 431, 441 (4th Cir.2000).

FN9. In other words, Gooden will only be able recover to punitive damages pursuant to title VII in the event that he does not prevail on his claim for punitive damages under section 1981.

Accordingly, I turn to the legal principles for assessing punitive damages in civil rights case. In order to be eligible for punitive damages, a plaintiff "must show that the [defendant] engaged in [a] discriminatory practice or practices with malice or with reckless indifference to federally protected rights. *Deters v. Equifax Credit Information Servs., Inc.,* 202 F.3d 1262, 1269 (10th Cir.2000) (citing 42 U.S.C.A. § 1981a[b][1]; *Knowlton v. Teltrust Phones,* n. 189 F.3d 1177, 1186 [10th Cir.1999]). The terms "malice" and "reckless indifference" "refer not to the egregiousness of the employer's conduct, but rather to the employer's knowledge that it may be acting in violation of federal law." *Id.* (citing *Kolstad,* 119 S.Ct. at 2124). More specifically, recklessness and malice are to be inferred when a manager responsible for setting or enforcing policy in the area of discrimination does not respond to complaints, despite knowledge of serious harassment." *Id.* (citing *Baty v. Willamette Indus., Inc.,* 172 F.3d 1241, 1244-45 [10th Cir.1999]).

***15** Timpte contends that there is no evidence that it acted with malice or reckless indifference. While it is a close question, construing the evidence in the light most favorable to Gooden, I conclude that there exist disputed issues of fact with regard to whether Gooden can obtain punitive damages should he prevail on either his first or second claim. As discussed above, there are disputed issues of fact as to: (1) when Timpte should have discovered the allegedly hostile nature of the work environment; (2) whether Timpte responded effectively once it knew of the harassment; and (3) the effectiveness of Timpte's anti-harassment policy and its application to Gooden's claim. *See T & N Van Servs., Inc.,* 2000 WL 562741, at *14 (concluding that employer not entitled to summary judgment on punitive damages in co-worker racial harassment case where there existed questions regarding effectiveness of employer's anti-harassment/nondiscrimination policy and whether employer should have known of hostile environment before employee's complaint).

Timpte next argues that, even if there is evidence of recklessness or maliciousness, liability for punitive damages may not be imputed to Timpte itself because the harassers were not managerial-level employees. (Def.'s Summ. J. Br. at 19.) As the Tenth Circuit has noted, however, "employer 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,...." *Deters,* 202 F.3d at 1270. The Tenth Circuit has explicitly held that the direct-liability theory is more appropriate where the employer fails to respond adequately to harassment of which management-level employees knew or should have known. *Id.* at 1270 n. 3. Thus, the relevant inquiry is not whether the conduct of Timpte's employees may be imputed to it under a theory of *respondent superior* but, rather, whether Timpte "had actual or constructive knowledge of the harassment, and whether its response was adequate." *Id.* (citations omitted). Again, as discussed above, there are disputed issues of fact as to the state of Timpte's knowledge about its allegedly abusive work environment and whether its response was adequate. Consequently, Timpte's motion for summary judgment as to Gooden's first and second claims to the extent the Gooden seeks punitive damages must be denied.

b. Gooden's Cross-Motion for Partial Summary Judgment

In addition to Timpte's motion for summary judgment, the court has before it Gooden's motion for partial summary judgment. Gooden contends that he is entitled to judgment as a matter of law that Timpte's work environment was racially abusive or hostile on the basis of the noose and doll he found in his locker. (Pl.'s Partial Summ. J. Br. at 14-15.) Gooden relies primarily on *Ford v. West,* No. 97-S-1631 (D.Colo. Mar. 18, 1999), a case which was before Judge Sparr of this court. (*Id.* at15.) In *Ford,* the plaintiff, an African-American man, discovered an empty noose hanging over a chair in an employee break room at Fitzsimmons Army Medical Center. (App. to Pl.'s Mot. for Partial Summ. J., Ex. 15 [Mem. Op. and Order in *Ford v. West,* No. 97-S-1631, at 3-4 (D.Colo. Mar. 18, 1999)] [filed Jan. 24, 2000] [hereinafter "Pl.'s Partial Summ. J. Exs."].) Believing the noose to be directed at him because of his race, the plaintiff reported the incident, and the Army conducted an investigation. (*Id.,* Ex. 15 [Mem. Op. and Order in *Ford v. West,* No. 97-S-1631, at 3-4 (D.Colo. Mar. 18, 1999)].) After conducting an investigation, the Army concluded the noose was not directed at the plaintiff, but, rather, was a practical joke directed at a co-worker based on comments made during a game of dominoes. (*Id.,* Ex. 15 [Mem. Opinion and Order in *Ford v. West,* No. 97-S-1631, at 3-4 (D.Colo. Mar. 18, 1999)] .) In the civil action, the plaintiff asserted that the hanging of the noose was racially motivated and intended to harass him. (*Id.,* Ex. 15 [Mem. Op. and Order in *Ford v. West,* No. 97-S-1631, at 4-5 (D.Colo. Mar. 18, 1999)].) The plaintiff brought claims for, *inter alia,* hostile-environment

harassment based upon the hanging of the noose. Upon the defendant's motion for summary judgment, Judge Sparr held that although "the connotations of a noose are sufficiently disturbing to create an actionable racially hostile work environment[,]" the defendant was entitled to summary judgment because the plaintiff had no evidence beyond his subjective belief that the noose was not a joke directed at a co-worker, as the investigator had concluded. (*Id.,* Ex. 15 [Mem. Op. and Order in *Ford v. West,* No. 97-S-1631, at 7-8 (D.Colo. Mar. 18, 1999)].)

***16** Gooden contends that Judge Sparr held that the hanging of a noose is always objectively severe and offensive as a matter of law for purpose of a hostile-environment claim. (Pl.'s Partial Summ. J. Br. at 15.) Gooden further contends that the noose and doll in this case is even more offensive because of the presence of the naked, Black doll. (*Id.*) Thus, he reasons, this court should enter judgment in his favor on his first and second claims for hostile environment insofar as these claims are based on the noose and doll incident because no reasonable jury could find that the work environment at Timpte was not subjectively and objectively racially hostile. (*Id.*) I am not persuaded. First, I do not read Judge Sparr's opinion as concluding that the presence of a noose will always create a racially hostile environment as a matter of law. To the contrary, I read Judge Sparr's opinion as accepting that the noose could be viewed subjectively and objectively as racially hostile before proceeding to the dispositive issue-namely, that there was a racially neutral explanation for the noose in that case for which the plaintiff had failed to produce evidence tending to rebut that explanation. Thus, I find that Judge Sparr's opinion is inapposite to the case before the court.

Second, construing the evidence in the light most favorable to Timpte, which I must do for purposes of Gooden's motion for summary judgment, I conclude that Gooden is not entitled to summary judgment on his hostile environment claim as it relates to the noose and doll incident. Although, as discussed above, a jury could quite permissibly infer that the noose and doll incident was racially motivated, I have concluded that it is impermissible to parse out each individual incident in order to assess the objective and subjective hostility of the Timpte workplace. This standard applies with equal force to Gooden's summary-judgment motion. " 'A hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits.... [T]he totality of the circumstances necessarily includes the severity, as well as the number, of incidents of harassment." ' *Hansel,* 778 F.Supp. at 1132 (quoting *Vance,* 863 F.2d at 1511). Ultimately, a jury should decide this issue.[FN10] Accordingly, Gooden's cross motion for partial summary judgment on his first and second claims is denied.

> FN10. At least one court has held that a plaintiff had failed to raise an issue of fact as to whether his work environment was objectively abusive and hostile by presenting evidence of seven instances of racially related remarks or conduct over three years, including a black doll hung on doorframe near plaintiff's workstation. *Stembridge v. City of New York,* 88 F.Supp.2d 276 (S.D.N.Y.2000). While I may disagree with that court's conclusion that this conduct was not hostile as a matter of law, the existence of such a holding buttresses my conclusion that reasonable minds could differ on the issue.

3. Third Claim: Ethnic Intimidation

Under Colorado law, a person may recover damages from any person, organization, or association which commits or incites others to commit the offense of ethnic intimidation. Colo.Rev.Stat. § 13-21-106.5. According to the relevant statute,

> (2) A person commits ethnic intimidation if, with the intent to intimidate or harass another person because of that person's actual or perceived race, color, religion, ancestry, or national origin, he or she:
>
> ...
>
> (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....

***17** Colo.Rev.Stat. § 18-9-121(2) (1999).[FN11] "A person acts ... 'with intent' when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial to the issue of specific intent whether or not the result actually occurred." Colo.Rev.Stat. § 18-1-501(5) (1999). "A person acts 'knowingly' ... with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result. *Id.* § 18-1-501(6).

FN11. The statute also provides that one commits ethnic intimidation when one knowingly causes bodily injury to another person or damage to or destruction of another person's property with the intent to intimidate or harass that person because of his race, color, religion, ancestry, or national origin. Colo.Rev.Stat. § 18-9-121(2)(a), (c). Because it is undisputed that Gooden did not suffer bodily injury or damage to or destruction of his property, further discussion of these provisions is not required.

Timpte contends that it is entitled to summary judgment on Gooden's third claim because Gooden cannot establish the elements of an ethnic intimidation claims as a matter of law. (Def.'s Summ. J. Br. at 16.) I agree. In order for Gooden to prevail on his ethnic intimidation claim against Timpte, he must show: (1) Timpte intimidated or harassed him; (2) Timpte intended to intimidate or harass Gooden because of his race; (3) Timpte knowingly placed Gooden in fear of imminent lawless action directed at him or his property by its conduct; and (4) Timpte did so knowing that such words or conduct are likely to produce bodily injury to Gooden or damage to his property. Colo.Rev.Stat. § 18-9-121(2)(b). Assuming *arguendo* that there exist issues of fact with regard to the first three elements of this claim, there is simply no evidence that Timpte engaged in this conduct knowing that "such words or conduct are likely to produce bodily injury to that person or damage to that person's property." Gooden neither argues otherwise, nor points to any evidence which would suggest that Timpte knowingly undertook words or conduct likely to produce injury to Gooden or damage to his property. Accordingly, Timpte is entitled to summary judgment as to Gooden's third claim against Timpte.[FN12]

FN12. In his response, Gooden only argues that Timpte may be held directly liable for ethnic intimidation. (Pl.'s Am. Summ. J. Resp. at 18-19.) He appears to concede that Timpte cannot be held vicariously liable for the conduct of its employees, if any, which meets the definition of ethnic intimidation. (*Id.*) Accordingly, Timpte is also entitled to summary judgment to the extent that Gooden asserts that Timpte is vicariously liable for the conduct amounting to ethnic intimidation undertaken by Timpte's employees.

4. Conclusion

Based upon the foregoing, it is therefore

ORDERED as follows:

1. Defendant's motion for summary judgment is GRANTED in part and DENIED in part. The motion is GRANTED to the extent that Timpte seeks summary judgment as to Gooden's third claim against Timpte for ethnic intimidation. The motion is DENIED in all other respects.

2. Gooden's motion for leave to exceed the page limit or, in the alternative, to file an amended brief is GRANTED in part and DENIED in part. The motion is GRANTED to the extent that Gooden seeks leave to file an amended response to Timpte's summary-judgment motion. The motion is DENIED in all other respects.

3. Plaintiff's motion for partial summary judgment is DENIED.

4. Plaintiff's claims against the unidentified defendants are hereby DISMISSED. Plaintiff's fourth claim is DISMISSED.

5. The court will hold a final pretrial conference in this matter at 2:30 o'clock p.m. on August 4, 2000.

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on June *28,* 2000, was served on June *29,* 2000, by hand delivery, where a "D.C." box number or asterisk is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

***18** Timothy P. Fox, Esq.

Amy F. Robertson

910 16th Street, Suite 610

Denver, CO 80202

Todd A. Fredrickson, Esq.

Otten, Johnson, Robinson, Neff & Ragonetti, P.C.

950 17th Street, Suite 1600

Denver, CO 80202

Magistrate Judge O. Edward Schlatter*