

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL BAKER, et al.,	)	2:04-cv-0549-GEB-GGH
	)	
Plaintiffs,	)	<u>ORDER</u>
	)	
v.	)	
	)	
ARAMARK UNIFORM AND CAREER	)	
APPAREL, INC., et al.,	)	
	)	
Defendants.	)	
_____	)	

Defendants move for summary judgment or partial summary judgment on Plaintiffs' claims.<sup>1</sup> Plaintiffs oppose the motion.

BACKGROUND

Plaintiffs Eley, Andrews, Vargas, and Baker, former employees of Defendant Aramark Uniform and Career Apparel, Inc. ("Aramark"), bring this action against Aramark, and several of its employees, Defendants Bickerton, Clowes, Koch, Polifka, and Velasco. Plaintiffs assert claims against Aramark and its employees for race discrimination under 42 U.S.C. § 1981 ("§ 1981"). Plaintiffs also claim Aramark violated Title VII of the Civil Rights Act of 1964, 42

---

<sup>1</sup> Plaintiff Eley has withdrawn his 42 U.S.C. § 1981 claim against Defendant Lewis. (Pls.' Opp'n to Defs.' Mot. for Summ. J. ("Opp'n") at 35.) Plaintiff Vargas has withdrawn his § 1981 claim against Defendants Bickerton and Lewis. (Id. at 59.) As no claims remain against Defendant Lewis, he is dismissed from this action.

1 U.S.C. §§ 2000e et seq. ("Title VII"), by maintaining a hostile racial  
2 work environment, retaliating against Plaintiffs, and discharging  
3 and/or constructively discharging Plaintiffs for complaining about  
4 alleged race discrimination. Plaintiff Andrews also claims Aramark  
5 violated the Age Discrimination in Employment Act ("ADEA").

6 DISCUSSION<sup>2</sup>

7 Defendants argue that several of the alleged incidents of  
8 discrimination are "time-barred" and should not be considered in  
9 evaluating Plaintiffs' discrimination claims. (Defs.' Mot. for Summ.  
10 J. ("Defs.' Mot.") at 28.) Plaintiffs may only allege discrimination  
11 based on incidents that occurred within 300 days before the filing of  
12 a grievance with the Equal Employment Opportunity Commission ("EEOC").  
13 Sandoval v. Saticoy Lemon Ass'n, 747 F. Supp. 1373, 1384 n.10 (C.D.  
14 Cal. 1990); see also 42 U.S.C. § 2000e-5(e)(1). However,  
15 "consideration of the entire scope of a hostile [racial] work  
16 environment claim, including behavior alleged outside the statutory  
17 time period, is permissible for the purposes of assessing liability,  
18 so long as an act contributing to that hostile environment takes place  
19 within the statutory time period." Nat'l R.R. Passenger Corp. v.  
20 Morgan, 536 U.S. 101, 105 (2002). Further, otherwise time-barred  
21 incidents may be part of the claim where they are "part of one  
22 unlawful employment practice giving rise to a single claim." McGinest  
23 v. GTE Serv. Corp., 360 F.3d 1103, 1115 n.6 (9th Cir. 2004) (citation  
24 omitted).

---

25  
26 <sup>2</sup> "The standards applicable to motions for summary judgment  
27 are well known, see, e.g., Rodgers v. County of Yolo, 889 F. Supp.  
28 1284 (E.D. Cal. 1995), and need not be repeated here." Reitter v.  
City of Sacramento, 87 F. Supp. 2d 1040, 1042 (E.D. Cal. 2000).

1 I. Hostile Racial Work Environment

2 Defendant Aramark moves for summary judgment on Plaintiffs'  
3 hostile racial work environment claims brought under 42 U.S.C.  
4 § 2000e. "To prevail on a hostile workplace claim premised on . . .  
5 race . . . a plaintiff must show: (1) that he was subjected to verbal  
6 or physical conduct of a racial . . . nature; (2) that the conduct was  
7 unwelcome; and (3) that the conduct was sufficiently severe or  
8 pervasive to alter the conditions of the plaintiff's employment and  
9 create an abusive work environment." Vasquez v. County of Los  
10 Angeles, 349 F.3d 634, 642 (9th Cir. 2003). "When no tangible  
11 employment action is taken, a defending employer may raise an  
12 affirmative defense to liability or damages. . . . The defense  
13 [hereinafter referred to as the Faragher-Ellerth defense] comprises  
14 two necessary elements: (a) that the employer exercised reasonable  
15 care to prevent and correct promptly any . . . harassing behavior, and  
16 (b) that the plaintiff employee unreasonably failed to take advantage  
17 of any preventive or corrective opportunities provided by the employer  
18 or to avoid harm otherwise." Burlington Indus., Inc. v. Ellerth, 524  
19 U.S. 742, 765 (1998); see also Faragher v. City of Boca Raton, 524  
20 U.S. 775, 807 (1998). "Where a 'hostile environment' claim rests on  
21 . . . race-based comments, we think that the plaintiff, to show that  
22 he or she perceived the 'environment' as 'hostile,' must at least have  
23 been aware of those comments, even if the person making them did not  
24 make them directly to the plaintiff." Bradshaw v. Golden Road Motor  
25 Inn, 885 F. Supp. 1370, 1381 (D. Nev. 1995).

26 A. Eley

27 Aramark contends, "In Plaintiff Eley's case, . . . all of  
28 the elements of the Faragher-Ellerth affirmative defense are

1 satisfied." (Defs.' Mot. at 31.) Aramark argues, "Eley was never  
2 fired, never demoted, never had his salary reduced, never had his  
3 route changed or job duties altered, and never had any 'tangible'  
4 adverse employment action taken against him." (Id. at 31-32.)  
5 However, Eley declares he suffered adverse employment action because  
6 after he "called the company 800 number to complain about workplace  
7 violence," "Polifka called [Eley] into his office [and] proceeded to  
8 berate [him] and to tell [him] how stupid [he] was for calling the  
9 company 800 number."<sup>3</sup> (Eley Decl. ¶¶ 13-14; Pls.' Statement of  
10 Disputed Facts ("SDF") at ¶¶ 133-34.) Further, Baker declares that  
11 "Polifka . . . spoke to [him] about Eley's call to the company's 800  
12 number" and ordered Baker to "fire tha[t] nigger, now."<sup>4</sup> (Baker Decl.  
13 ¶¶ 19-20; SDF ¶ 137.) Baker declares that Polifka "made it clear that  
14 if [Baker] did not 'find something' on which to fire Eley, [Baker]  
15 would also be out of a job." (Baker Decl. ¶ 20; SDF ¶ 137.) Since,  
16 there is a genuine issue of material fact whether Eley was subject to  
17 tangible adverse employment action, the motion based on the Faragher-  
18 Ellerth affirmative defense is denied.

19 Aramark next argues that Eley's hostile racial work  
20 environment claims must be dismissed because none of the alleged  
21 harassing conduct was based on his race and the alleged incidents were  
22 not "sufficiently severe and pervasive so as to alter the conditions  
23 of employment and create a hostile working environment[.]" (Defs.'  
24

---

25 <sup>3</sup> Defendants object to the admissibility of this statement  
26 based on lack of foundation and hearsay. Eley alleges Polifka  
27 "yelled and screamed" directly at him, so Eley has personal  
28 knowledge. Polifka is a party-opponent so his statements are  
admissible under Federal Rule of Evidence 801(d)(2)(A). The  
objections are overruled.

<sup>4</sup> Defendants' hearsay objection is overruled. See id.

1 Mot. at 32-35.) "There were only two occasions on which Eley heard  
 2 anyone make any comment which he perceived as a slur or derogatory to  
 3 African Americans. . . ." (Id. at 35.) Eley counters that he "was  
 4 aware, from almost daily discussions with Baker, that he was routinely  
 5 referred to as a 'nigger' by branch manager Polifka and accounts  
 6 manager Greg Lewis." (Opp'n at 27.) Further, Russ Hall, a co-worker  
 7 of Eley, declares that he heard "Polifka calling Rich Eley a 'jungle  
 8 bunny.'" <sup>5</sup> (Hall Decl. ¶ 7; SDF ¶ 143.) Since Plaintiffs have shown a  
 9 genuine issue of material fact whether racially derogatory comments  
 10 were routine and whether Eley was aware of them, summary judgment on  
 11 Plaintiff Eley's hostile racial work environment claim is denied.

#### 12 B. Andrews

13 Aramark moves for summary judgment on Andrews's eighth claim  
 14 for hostile racial work environment, contending that the Faragher-  
 15 Ellerth affirmative defense bars the claim. Aramark argues it "had a  
 16 well-defined policy prohibiting and correcting any harassment as  
 17 outlined in the Employee Handbook, the Harassment Policy statement,  
 18 and the Unite! Collective Bargaining Agreement. Aramark also had an  
 19 Employee Hotline 800 number to report any unlawful conduct." (Defs.'  
 20 Mot. at 42; Defs.' Statement of Undisputed Facts ("SUF") ¶¶ 4-7.)  
 21 Aramark contends, "Andrews called the Company Employee Hotline . . .  
 22 but did not mention anything about his race . . . ." (SUF ¶ 133.)  
 23 Andrews avers that he "complained to Polifka about use of racial  
 24 remarks in the workplace," (SDF ¶ 100; Andrews Decl. ¶¶ 6, 11), and  
 25 that he "spoke on numerous occasions to district manager Baker. . . ."  
 26 (SDF ¶ 102; Andrews Decl. ¶¶ 5, 8.) Baker declares that he "spoke to

---

27  
 28 <sup>5</sup> Defendants' hearsay objection is overruled. See supra  
 note 3.

1 both Polifka and general manager Don Clowes about Bickerton's  
2 mistreatment of Andrews [and] reported the discriminatory conduct to  
3 both Nancy Meyers and Doug Battista of Human Resources."<sup>6</sup> (SDF ¶ 103;  
4 Baker Decl. ¶¶ 8-12, 55, 61.) Since Plaintiffs adequately aver that  
5 Andrews did not "fail[] to take advantage of any preventive or  
6 corrective opportunities provided by the employer or to avoid harm  
7 otherwise," Aramark's motion based on the Faragher-Ellerth affirmative  
8 defense is denied. Burlington Indus., Inc., 524 U.S. at 765.

9 Aramark argues, "Andrews['s] claim fails as a matter of law  
10 because he was not singled out or treated any differently in  
11 comparison to other Warehousemen." (Defs.' Mot. at 39.) Andrews  
12 counters, declaring that "Bickerton's conduct towards [him] was . . .  
13 extreme, and . . . much worse than how he treated the other  
14 warehousemen [and that while Bickerton] sometimes joked about with the  
15 other employees, he was consistently mean-spirited with [Andrews]."<sup>7</sup>  
16 (Andrews Decl. ¶ 4; SDF ¶ 90; see also SDF ¶¶ 91-94.) A genuine issue  
17 of material fact exists whether Andrews received different treatment.

18 Aramark argues, "Andrews'[s] discipline was legitimate and,  
19 thus, cannot constitute harassing behavior [to support a hostile  
20 racial work environment claim] . . . ." (Defs.' Mot. at 41.) It is  
21

---

22 <sup>6</sup> Defendants object to this evidence based on lack of  
23 personal knowledge and lack of foundation. The statement references  
24 Baker's declaration and is supported thereby. Baker has personal  
25 knowledge of his conduct and the foundation is proper. The  
26 objections are overruled.

27 <sup>7</sup> Defendants object to this evidence based on lack of  
28 foundation, hearsay, and impermissible opinion. Andrews has  
properly laid the foundation for his knowledge about Bickerton's  
conduct. Bickerton's statements are excepted from hearsay as  
admissions of a party-opponent under Federal Rule of Evidence  
801(d)(2)(A). Andrews's opinion about Bickerton's conduct is a  
proper lay opinion under Federal Rule of Evidence 701.

1 undisputed that "Bickerton assigned the task of locking the facility,  
2 the trucks, and the fence surrounding the trucks to the Warehouseman  
3 who was responsible for unloading the trucks and worked the last shift  
4 in the warehouse ('unloader')," and that "Andrews was an unloader at  
5 the new facility." (SUF ¶¶ 118, 120.) Bickerton declares that  
6 Andrews "failed [to] follow his job duties of locking the rear door  
7 and rear gate," "left a truck unlocked with the keys inside," and  
8 "left a depot door unlocked." (Bickerton Decl. ¶¶ 14, 18, 20, 22, 52;  
9 SUF ¶¶ 127-31.) Andrews counters, declaring that he "did not fail to  
10 follow his job duties."<sup>8</sup> (Pls.' Resp. to Defs.' SUF ¶¶ 127-31;  
11 Andrews Decl. ¶¶ 17-20.) Bickerton also declares, "Andrews [once]  
12 called in late to work, but never showed up to work at all," but  
13 Andrews counters that he "came into work."<sup>9</sup> (Bickerton Decl. ¶ 14;  
14 SUF ¶ 127; Andrews Decl. ¶ 7.) A genuine issue of material fact  
15 therefore exists as to whether the disciplinary actions against  
16 Andrews were legitimate.

17 Aramark also argues, "[a] single [racial] comment [heard  
18 directly by Andrews] over Andrews' [s] five years of employment with  
19 Aramark is not sufficiently severe, frequent, threatening, or  
20 humiliating and did not alter the conditions of Andrews' [s] employment  
21 to constitute harassment." (Defs.' Mot. at 41.) Andrews counters,  
22 declaring that "During the week before terminating [him], Mr.  
23 Bickerton . . . was cursing at [him], slamming and throwing pallets  
24

---

25  
26 <sup>8</sup> Defendants object that Plaintiffs have violated Local  
27 Rule 56-260(b) by failing to simply admit or deny whether the fact  
is undisputed. This objection is overruled.

28 <sup>9</sup> This objection is overruled. See id.

1 and saying, 'You cock-sucking black ass.'"<sup>10</sup> (Andrews Decl. ¶ 25; SDF  
 2 ¶ 123.) Further, Baker declares that, "On other occasions, when Baker  
 3 had gone to speak to Bickerton on Andrews' [s] behalf, Bickerton said  
 4 'fuck the nigger' in reference to Andrews and called him 'nigger'  
 5 [and] Baker informed Andrews about these remarks by Bickerton."<sup>11</sup>  
 6 (SDF ¶ 104; Baker Decl. ¶¶ 11, 37, 41-43, 46; Andrews Decl. ¶ 10.)  
 7 Since a genuine issue of material fact exists whether the alleged  
 8 conduct was harassing or sufficiently severe or pervasive, Aramark's  
 9 motion for summary judgment on Andrews's hostile racial work  
 10 environment claim is denied.

#### 11 C. Vargas

12 Aramark argues that Vargas's claimed incidents of hostile  
 13 racial work environment concerning racial name-calling,  
 14 reclassification to a non-commissioned driver, and employment  
 15 termination are not actionable. (Defs.' Mot. at 42-44.) Vargas  
 16 declares that he was "called names by Aramark management," including  
 17 "Vato," "Beaner," "Mexican," "wetback," "stupid Mexican," and "bean  
 18 dip,"<sup>12</sup> and that "[t]he name-calling went on constantly - almost every  
 19 day."<sup>13</sup> (Vargas Decl. ¶¶ 4, 6; SDF ¶¶ 158-62.)

---

21 <sup>10</sup> Defendants' hearsay objection is overruled. See supra  
 22 note 7.

23 <sup>11</sup> Defendants' hearsay objection is overruled. See supra  
 24 note 7.

25 <sup>12</sup> Defendants object based on hearsay. The objection is  
 26 sustained in part since the statements admitted are limited to  
 those made by party-opponents. See Fed. R. Evid. 801(d)(2)(A).

27 <sup>13</sup> Defendants object based on vagueness, but this is a  
 28 permissible lay opinion about the frequency of comments. See Fed.  
 R. Evid. 701. The objection is overruled.



1           Aramark argues, "Vargas' [s] participation in conduct similar  
2 to the allegedly harassing conduct precludes him from showing  
3 'unwelcomeness' or 'severity.'" (Defs.' Mot. at 43; see Scusa v.  
4 Nestle U.S.A. Co., 181 F.3d 958, 966 (8th Cir. 1999) (finding conduct  
5 not unwelcome where "undisputed evidence showed that [plaintiff]  
6 engaged in behavior similar to that which she claimed was unwelcome  
7 and offensive".) Vargas acknowledged, "At his deposition, McKinley  
8 [, a co-worker,] claimed Vargas also called him 'Mexican,' 'half-  
9 breed,' and 'spic,'" but declares that he "never called anyone racial  
10 names." (Vargas Decl. ¶¶ 10, 14; SDF ¶ 167.) A genuine issue of  
11 material fact therefore exists on whether Vargas participated in  
12 racial name-calling so as to foreclose his claim that racial name-  
13 calling was unwelcome.

14           Aramark next argues, "Vargas was reclassified [to a non-  
15 commissioned driver] after his sales declined, he refused to submit  
16 solicitation sheets and [he] claimed he did not have to sell."  
17 (Defs.' Mot. at 43-44; see SUF ¶¶ 147-54.) Vargas counters, declaring  
18 that "Koch told [him] he was on [his] way to being 'managed' out of  
19 . . . Aramark[; t]he ostensible reason for the demotion was a 'drop in  
20 sales' however other Aramark drivers' sales had dropped more than  
21 [Vargas's] and they were not demoted."<sup>14</sup> (Vargas Decl. ¶ 32; SDF

---

22  
23           <sup>14</sup> Defendants object to Koch's statements based on hearsay  
24 and to the statement about other drivers based on lack of  
25 foundation, impermissible lay opinion, and speculation. Because  
26 Koch is a party-opponent, the hearsay objection is overruled.  
27 Further, Andrews has laid the foundation to render an opinion  
28 about his co-workers and he gives an opinion that is: "(a)  
rationally based on the perception of the witness, (b) helpful to  
a clear understanding of the witness' testimony or the  
determination of a fact in issue, and (c) not based on scientific,  
technical, or other specialized knowledge within the scope of Rule

1 ¶ 186.) Vargas further declares that he "never said [he did] not have  
2 to sell."<sup>15</sup> (Vargas Decl. ¶ 31; Pls.' Resp. to Defs.' SUF ¶ 153.) A  
3 genuine issue of material fact exists whether Vargas's  
4 reclassification was legitimate.

5 Finally, Aramark argues "Vargas'[s] dishonesty prompted the  
6 circumstances and caused his employment termination. . . ." (Defs.'  
7 Mot. at 44; see SUF ¶¶ 161-67.) Aramark contends, "Vargas called in  
8 sick," but "Koch, Velasco, and Lewis went to the Bishop Manogue  
9 championship softball game" and "observed [Vargas] in a coach uniform,  
10 in the team dugout, and on the field during huddles." (SUF ¶¶ 163-  
11 165.) Vargas counters, declaring that he "did not . . . do any  
12 coaching whatsoever" and "[a]lthough [he] was feeling somewhat better,  
13 [he] was still too sick to drive [his] morning shift." (Vargas Decl.  
14 ¶¶ 44-45, 42; Pls.' Resp. to Defs.' SUF ¶ 165; SDF ¶ 197.) A genuine  
15 issue of material fact exists on these matters and whether his  
16 termination was discriminatory.

17 Since genuine issues of material fact exist as to all of  
18 Aramark's asserted non-discriminatory reasons for racial name-calling  
19 and adverse employment action, Aramark's motion for summary judgment  
20 on Vargas's hostile racial work environment claim is denied.

#### 21 D. Baker

22 Aramark moves for summary judgment on Baker's third claim  
23 for hostile racial work environment, arguing, "There is absolutely no  
24 evidence that the work environment at the Reno Depot was hostile to

25 \_\_\_\_\_  
26 702." Fed. R. Evid. 701. The objections are overruled.

27 <sup>15</sup> Defendants object that although Vargas did not say those  
28 exact words, he said something to that effect. This is a question  
of fact. The objection is overruled.

1 Caucasian employees. Baker thus cannot claim a hostile work  
2 environment based upon his race." (Defs.' Mot. at 44.) Baker  
3 acknowledges he "is a white male." (SDF ¶ 1.) Baker argues  
4 "harassment as retaliation" is actionable. (Opp'n at 77-78; see,  
5 e.g., Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).) Hostile  
6 work environment can constitute adverse employment action for a  
7 retaliation claim. Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878,  
8 886 (7th Cir. 1998). However, Baker has failed to show how the  
9 alleged adverse employment action constituted a hostile racial work  
10 environment. Therefore, Aramark's motion for summary judgment on  
11 Baker's hostile racial work environment claim is granted.

### 12 III. Retaliation and Discrimination

13 Aramark moves for summary judgment on Plaintiffs' claims of  
14 retaliation under 42 U.S.C. § 2000e. "To establish a prima facie case  
15 of retaliation under Title VII, '[t]he plaintiff must show (1) that  
16 [he] was engaging in a protected activity, (2) that [he] suffered an  
17 adverse employment decision, and (3) that there was a causal link  
18 between the protected activity and the adverse employment decision.'" Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 (9th Cir. 1997)  
19 (quoting E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1514 (9th Cir.  
20 1989)). Alternatively, "A plaintiff may establish a *prima facie* case  
21 . . . by presenting actual evidence, direct or circumstantial, of the  
22 employer's discriminatory motive. When a plaintiff . . . seeks to  
23 establish a *prima facie* case through the submission of actual  
24 evidence, very little such evidence is necessary to raise a genuine  
25 issue of fact regarding an employer's motive; any indication of  
26 discriminatory motive--including evidence as diverse as the  
27

1 defendant's reaction, if any, to plaintiff's legitimate civil rights  
2 activities . . . may suffice to raise a question that can only be  
3 resolved by a factfinder." Lowe v. City of Monrovia, 775 F.2d 998,  
4 1009 (9th Cir. 1985) (citation omitted). "If the plaintiff  
5 establishes a prima facie case, the burden then shifts to the  
6 defendant to articulate a legitimate nondiscriminatory reason for its  
7 employment decision. Then, in order to prevail, the plaintiff must  
8 demonstrate that the employer's alleged reason for the adverse  
9 employment decision is a pretext for another motive which is  
10 discriminatory." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th  
11 Cir. 1994).

12 A. Eley

13 Aramark argues, "Eley cannot establish . . . the elements of  
14 the requisite prima facie case." (Defs.' Mot. at 46.) Aramark  
15 contends "Eley cannot demonstrate that he engaged in any 'protected  
16 conduct.'" (Id.) Protected conduct is "oppos[ing] any practice made  
17 an unlawful employment practice by [Title VII]. . . ." 42 U.S.C.  
18 § 2000e-3(a). Aramark argues, "[Eley's] August 16, 2002 call to the  
19 Aramark Employee Hotline is not protected conduct because he was not  
20 complaining of any 'unlawful employment practice' and he admitted this  
21 call had nothing to do with his race or any perceived discrimination."  
22 (Defs.' Mot. at 46.) Aramark contends Eley's "only complaint . . .  
23 was about [a derogatory comment made by Defendant Lewis] on August 28,  
24 2002[; and that Eley's] "'opposition' to such remark is not protected  
25 conduct." (Id.) To be protected, "the opposition must be directed at  
26 an unlawful employment practice of the employer, not an act of  
27 discrimination by a private individual." Silver v. KCA, Inc., 586

1 F.2d 138, 141 (9th Cir. 1978). Aramark does not prevail on its  
2 argument, however, because Baker declares that when he spoke to  
3 Polifka and Clowes about Eley being extremely embarrassed, humiliated,  
4 and uncomfortable with an alleged racial remark made by Lewis, Polifka  
5 again told [Baker] that he must fire Eley or [Baker] would be  
6 fired.”<sup>16</sup> (Baker Decl. ¶¶ 54-55; SDF ¶¶ 139-40.) Therefore, a  
7 genuine issue of material fact exists as to whether Eley engaged in  
8 protected conduct.

9 Aramark argues, “Second, Eley cannot establish that he was  
10 subjected to any ‘adverse employment action’ within the statutory  
11 period.” (Defs.’ Mot. at 47.) Specifically, Aramark argues that  
12 “Eley cannot prove constructive discharge.” (Id. at 38.)  
13 “[C]onstructive discharge exists when ‘working conditions would have  
14 been so difficult or unpleasant that a reasonable person in the  
15 employee’s shoes would have felt compelled to resign.’” Nolan v.  
16 Cleland, 686 F.2d 806, 813 (9th Cir. 1982) (quoting Bourque v. Powell  
17 Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980). “A reasonable person  
18 would certainly resign employment after being ordered to leave.”  
19 Welch v. Univ. of Tex. & Its Marine Science Inst., 659 F.2d 531, 534  
20 (5th Cir. 1981). Aramark argues, “Eley went about an orderly process  
21 over a period of several months of inquiring about other employment  
22 [and there exists] no evidence of ‘intolerable’ conditions at the time  
23 of his resignation . . . .” (Defs.’ Mot. at 39; SUF ¶ 74.) Eley  
24 counters, arguing that “Polifka told [Baker] that he must fire Eley or  
25

---

26 <sup>16</sup> Defendants’ objection to Eley’s statement about being  
27 humiliated based on impermissible opinion is overruled since Eley  
28 is competent to render an opinion about his own feelings.  
Defendants’ hearsay objection is also overruled. See supra note 3.

1 [Baker] would be fired.”<sup>17</sup> (Baker Decl. ¶¶ 54-55; SDF ¶ 140.)  
2 Further, Eley declares, “Everyday [he] would go into work sick with  
3 worry [knowing that] any day at work could turn out to be [his] last  
4 [and feeling] there was nothing he could do to save his job.”<sup>18</sup> (Eley  
5 Decl. ¶ 33; SDF ¶ 151.) This threat of imminent termination may be  
6 tantamount to “being ordered to leave.” Welch, 659 F.2d at 534.  
7 Accordingly, a genuine issue of material fact exists as to whether “a  
8 reasonable person in [Eley’s] shoes would have felt compelled to  
9 resign” and as to whether Eley was subject to adverse employment  
10 action. Nolan, 686 F.2d at 813.

11 Aramark argues, “Eley cannot prove the final essential  
12 element of a prima facie case - causal connectedness between protected  
13 conduct and adverse action. . . . The passage of [seven and one-half  
14 months] between the protected conduct and the adverse action creates a  
15 presumption that no causal connection exists.” (Defs.’ Mot. at 47  
16 (citing Hughes v. Derwinski, 967 F.2d 1168 (7th Cir. 1992)).)  
17 However, “[T]he length of time, considered without regard to its  
18 factual setting, is not enough by itself to justify a grant of summary  
19 judgment.” Coszalter v. City of Salem, 320 F.3d 968, 977-78 (9th Cir.  
20 2003). Here the factual setting includes Polifka’s response to  
21 Baker’s bringing Eley’s complaint about the Randy Moss-watermelon  
22 comment to Polifka’s attention: “Polifka again told [Baker] that he

---

24 <sup>17</sup> Defendants’ hearsay objection is overruled. See supra  
25 note 3.

26 <sup>18</sup> Defendants object based on opinion, lack of personal  
27 knowledge, speculation, and lack of foundation. Eley has personal  
28 knowledge of his own feelings, has laid the foundation for them,  
and is competent to render an opinion thereof. This portion of the  
statement is not speculative. The objections are overruled.

1 must fire Eley or [Baker] would be fired.”<sup>19</sup> (SDF ¶¶ 139-40.) And,  
2 Eley declares that his “work environment became increasingly  
3 intolerable from the time that Baker told [him] he had to fire [him]  
4 and [he] learned [he] was being called racial names behind [his]  
5 back.”<sup>20</sup> (Eley Decl. ¶ 32; SDF ¶ 150.) Therefore, a genuine issue of  
6 material fact exists on whether there is a causal connection between  
7 Eley’s complaints and the hostile racial work environment that led to  
8 Eley’s constructive discharge.

9 Finally, Aramark argues, “Aramark has established  
10 legitimate, non-discriminatory/non-retaliatory reasons for the actions  
11 it took towards Eley” because, for example, “Eley admitted throwing a  
12 roll-towel and hitting Andrews in the back of the head.” (Defs.’ Mot.  
13 at 48.) However, Plaintiffs’ declarations regarding discriminatory  
14 motive discussed above, including Polifka’s direction to Baker to “get  
15 out on [Eley’s] route, and . . . find something to fire him,” are  
16 sufficient to raise a question of pretext.<sup>21</sup> (Baker Decl. ¶ 19; SDF  
17 ¶ 24). Where as here, “a plaintiff has established a prima facie  
18 inference of disparate treatment through . . . evidence of  
19 discriminatory intent, he will necessarily have raised a genuine issue  
20 of material fact with respect to the legitimacy or bona fides of the  
21 employer's articulated reason for its employment decision.” Lowe,

---

22  
23 <sup>19</sup> Defendants’ hearsay objection is overruled. See supra  
note 3.

24 <sup>20</sup> Defendants object based on opinion, speculation, and lack  
25 of foundation. Eley is competent to render an opinion about his  
26 work environment, and his opinion is not speculation. The  
objections are overruled.

27 <sup>21</sup> Defendants’ hearsay objection is overruled. See supra  
28 note 3.

1 775 F.2d at 1009. Since a genuine issue of material fact exists  
2 whether Aramark employees terminated Eley in response to his  
3 complaints about discrimination, Aramark's motion for summary judgment  
4 on Eley's claim for retaliation is denied.

5 B. Andrews

6 Aramark argues that Andrews "cannot establish a prima facie  
7 case of retaliation because the undisputed evidence shows he did not  
8 engage in any 'protected conduct' . . . ." (Defs.' Mot. at 49.)  
9 Aramark also argues even if "protected conduct" is involved,  
10 "[Andrews's] retaliation claim must still fail because he cannot  
11 establish a causal connection between any protected conduct and his  
12 termination." (Id.) Andrews counters that, "Any indication of  
13 discriminatory motive . . . may suffice to raise a question that can  
14 only be resolved by a factfinder." (Opp'n at 23 (quoting Lowe, 775  
15 F.2d at 1009).) Baker declares that when he went to speak to  
16 Bickerton on Andrews's behalf, "Bickerton said, 'fuck that nigger' in  
17 reference to Willie Andrews" and he "heard Polifka . . . and Bickerton  
18 . . . freely use the 'nigger' word about . . . Andrews."<sup>22</sup> (Baker  
19 Decl. ¶¶ 37, 46; SDF ¶ 104.) Since this evidence creates a genuine  
20 issue of material fact on whether a racially discriminatory motive for  
21 Andrews's termination existed, Aramark's motion for summary judgment  
22 on Andrews's retaliation claim is denied.

23 C. Vargas

24 Aramark seeks summary judgment on Vargas's eighteenth and  
25 nineteenth claims for discrimination and retaliation under 42 U.S.C.

---

26  
27 <sup>22</sup> Defendants' hearsay objection is overruled. See supra  
28 notes 3, 10.



1 § 2000e. Aramark argues, “[As to Vargas’s reclassification to a non-  
 2 commissioned position,] neither his grievance [with his Union] nor his  
 3 letters to Aramark . . . claim that he was being treated unfairly  
 4 ‘because of’ his race or national origin.” (Defs.’ Mot. at 57.)  
 5 Vargas counters declaring that “In late October 2003, Mike Baker filed  
 6 a complaint with the EEOC [and Vargas] was listed as a witness that  
 7 would be willing to give a statement and support him as a witness.”<sup>23</sup>  
 8 (Vargas Decl. ¶ 28; SDF ¶ 182.) Vargas further declares that “On or  
 9 about November 19, 2003, . . . Clowes came to the Reno office from  
 10 Sacramento and inquired how much [Vargas] was earning. When [Vargas]  
 11 told him, Clowes pronounced, ‘That’s too much money. Your route  
 12 should be cut.’”<sup>24</sup> (Vargas Decl. ¶ 29; SDF ¶ 184.) Vargas also  
 13 declares that “On or about November 21, 2003, . . . Koch summoned  
 14 [Vargas] into his office and presented [him] with a notice that [he]  
 15 would be demoted . . . .”<sup>25</sup> (Vargas Decl. ¶ 32; SDF ¶ 186.) Further,  
 16 the proximity of events can “support an inference of causation.”  
 17 Thomas v. City of Beaverton, 379 F.3d 802, 812 (9th Cir. 2004).  
 18 Therefore, a genuine issue of material fact exists as to whether  
 19 Vargas’s reclassification was related to his race.

---

21 <sup>23</sup> Defendants object based on relevance. Vargas’s listing as  
 22 a witness in a charge of discrimination is highly relevant because  
 23 Vargas suffered adverse employment action shortly thereafter. The  
 objection is overruled.

24 <sup>24</sup> Defendants’ hearsay and relevance objections are  
 25 overruled. Clowes’s statements are excepted from hearsay as  
 26 admissions of a party-opponent under Federal Rule of Evidence  
 801(d)(2)(A) and the statements are relevant evidence of adverse  
 employment action.

27 <sup>25</sup> Defendants’ hearsay objection is overruled. See supra  
 28 note 14.

1 Aramark also argues, "Vargas fails to demonstrate the  
2 requisite causal connection between his complaint of alleged  
3 discrimination in January 2004 and his termination four and one-half  
4 months later in May 2004." (Defs.' Mot. at 50.) However, Vargas  
5 filed a charge of discrimination with the EEOC only three months  
6 before his termination and filed this lawsuit roughly two months  
7 before his termination. (Opp'n at 56; SUF ¶ 12; Complaint (filed  
8 March 19, 2004); SDF ¶ 208.) "We have held that events occurring  
9 within similar intervals of time are sufficiently proximate to support  
10 an inference of causation." Thomas, 379 F.3d at 812 (citing Yartzoff  
11 v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (finding less than  
12 three months proximity sufficient evidence of a causal link)).

13 Further, Aramark argues that Vargas's "dishonesty in calling  
14 in sick" was an "intervening event [that] precludes any finding of a  
15 causal connection." (Defs.' Mot. at 50.) Vargas counters, declaring  
16 that he was "still too sick to work"<sup>26</sup> (Vargas Decl. ¶ 42; SDF ¶ 197),  
17 and that he "was never asked to provide verification from [his] doctor  
18 that [he] was sick."<sup>27</sup> (Vargas Decl. ¶ 50; SDF ¶ 208.) Since a  
19 genuine issue of material fact exists as to whether Vargas's  
20 termination for dishonesty was pretextual, Aramark's motion for  
21 summary judgment on Vargas's claims for discrimination and retaliation  
22 is denied.

---

23  
24 <sup>26</sup> Defendants' lack of foundation and improper lay opinion  
25 objections are overruled. Vargas has averred his substantial  
26 experience as a successful driver for Aramark and is competent to  
render an opinion about his ability to perform his job duties.

27 <sup>27</sup> Defendants' relevance objection is overruled. The  
28 statement is relevant to whether Aramark sought to prove Vargas's  
dishonesty, as required by the Collective Bargaining agreement.

1           D. Baker

2           Aramark argues, "Baker cannot demonstrate the existence of a  
3 causal connection between his alleged protected conduct and [his]  
4 termination, and, thus, cannot establish a prima facie case of  
5 retaliation." (Defs.' Mot. at 52.) Baker counters "the alleged  
6 retaliatory action 'can be inferred from timing alone' when there is a  
7 close proximity between the two." (Opp'n at 61 (quoting Thomas v.  
8 City of Beaverton, 379 F.3d 802, 812 (9th Cir. 2004)).) Baker  
9 declares that, "In or about March 2003, [he] again confronted Polifka  
10 regarding discrimination towards Eley, Andrews and Vargas" and  
11 "contacted Nancy Meyers in Human Resources regarding unfair write-ups  
12 from Polifka." (Baker Decl. ¶¶ 58, 61; SDF ¶¶ 63, 64.) Baker also  
13 declares he spoke with "Doug Battista, head of the regional Human  
14 Resources department" about "the racial comments and harassment of  
15 Eley, Andrews and Vargas." (Baker Decl. ¶ 61; SDF ¶¶ 63, 64.) Baker  
16 was terminated on April 11, 2003. (SUF ¶¶ 113-14; SDF ¶ 65.) Since  
17 Baker's termination occurred one month after these complaints, a  
18 genuine issue of material fact exists as to causation.

19           Moreover, Baker has presented sufficient evidence of  
20 discrimination to establish a prima facie case. Baker declares that  
21 in a conversation he had with Clowes, Clowes "made clear that, if  
22 Baker didn't follow Polifka's orders, [Baker] too could be 'managed  
23 out' of the company."<sup>28</sup> (Baker Decl. ¶ 55; SDF ¶ 60.) Baker also  
24 declares that Polifka told him to find a reason to fire Eley and "made  
25 [it] clear that, if [Baker] didn't follow Polifka's orders [to fire

---

26  
27           <sup>28</sup> Defendants object based on lack of foundation and  
28 hearsay. Foundation for the conversation has been laid.  
Defendants' hearsay objection is overruled. See supra note 24.

1 Eley and Vargas by any means necessary, he] could be 'managed out' of  
 2 the company."<sup>29</sup> (Baker Decl. ¶ 28; SDF ¶ 33.) Baker also declares he  
 3 "was notified by Polifka that [Baker] had 'failed' in [his] duty to  
 4 'get rid of' Eley and [Baker] would be put on a performance  
 5 improvement plan ("PIP")."<sup>30</sup> (Baker Decl. ¶ 48; SDF ¶ 53.) Later,  
 6 "Clowes terminated Baker with input from Polifka." (Pls.' Resp. to  
 7 Defs.' SUF ¶ 112.)

8 Aramark argues "there were several separate and independent  
 9 justifiable bases for Baker's termination." (Defs.' Mot. at 54.)  
 10 First, "Baker was falling short of the sales performance expected of  
 11 him by Clowes." (Id.; SUF ¶¶ 95-100.) Baker counters, declaring that  
 12 "The 'goals' were entirely arbitrary, as [Baker] was consistently  
 13 outperforming most other district managers."<sup>31</sup> (Baker Decl. ¶ 49; SDF  
 14 ¶ 54; Pls.' Resp. to Defs.' SUF ¶ 99.) Second, Aramark contends  
 15 "Baker admitted that the action plan he provided to Don Clowes  
 16 required him to make weekly visits to National Auto Repair, but that  
 17 \_\_\_\_\_

18 <sup>29</sup> Defendants object based on hearsay, lack of foundation,  
 19 speculation, and lack of personal knowledge. Defendants' hearsay  
 20 objection is overruled. See supra note 3. Foundation for the  
 conversation has been laid and is not speculative. The objections  
 are overruled.

21 <sup>30</sup> Defendants object based on hearsay, lack of foundation,  
 22 speculation, and lack of personal knowledge. Defendants' hearsay  
 23 objection is overruled. See supra note 3. Foundation is proper, the  
 statement is not speculative, and Baker has personal knowledge of  
 24 the conversation he had with Polifka. The objections are overruled.

25 <sup>31</sup> Defendants object based on relevance, foundation,  
 26 speculation, lack of personal knowledge, and impermissible lay  
 27 opinion. The statement is relevant to whether company policy was  
 followed inconsistently. As a former district manager, Baker has  
 laid the foundation for and has sufficient knowledge to render an  
 28 opinion about his own performance in comparison to his colleagues.  
 The objections are overruled.

1 he failed to do so." (Defs.' Mot. at 54; SUF ¶¶ 92-93.) Baker  
 2 rejoins, declaring that the problems National Auto Repair experienced  
 3 were "nothing unusual for most of [Aramark's] clients, and [Baker]  
 4 followed up appropriately."<sup>32</sup> (Baker Decl. ¶ 66; Pls.' Resp. to  
 5 Defs.' SUF ¶ 93.) Third, Aramark contends Baker committed "gross  
 6 violations of Aramark policy with respect to the [Quality Control  
 7 Memorandum ("QCM")] Customer Visitation forms . . . ." (Defs.' Mot.  
 8 at 55.) But, Ed Hancock, a former Aramark employee, declares that  
 9 although QCMs were supposed "to be personally taken out by each  
 10 district manager to each client . . . and signed by the person who  
 11 signed the original contract, . . . it was all but impossible to do  
 12 this and the rule was routinely broken by all district managers."<sup>33</sup>  
 13 (Hancock Decl. ¶ 13; SDF ¶ 73.) Such an inconsistent application of a  
 14 policy can be evidence of pretext. Coszalter, 320 F.3d at 978. The  
 15 foregoing reveals that a genuine issue of material fact exists as to  
 16 whether Aramark's asserted reasons for terminating Baker were  
 17 pretextual. Therefore, Aramark's motion for summary judgment on  
 18 Baker's retaliation claim is denied.

#### 19 IV. Andrews's Age Discrimination Claims

20 Aramark moves for summary judgment on Andrews's ADEA claims.  
 21 Aramark argues that "summary judgment is compelled where the same  
 22

---

23 <sup>32</sup> Defendants object based on relevance. The statement is  
 24 relevant to whether company policy was followed. The objection is  
 25 overruled.

26 <sup>33</sup> Defendants object based on speculation, impermissible lay  
 27 opinion, lack of foundation, and lack of personal knowledge as to  
 28 Baker. However, this statement of fact is based on Hancock's  
 observations as a former branch manager. The objections are  
 overruled.

1 individual both hired and fired the plaintiff." (Defs.' Mot. at 59.)  
2 "[C]laims that employer animus exists in termination but not in hiring  
3 seem irrational. From the standpoint of the putative discriminator,  
4 it hardly makes sense to hire workers from a group one dislikes . . .  
5 only to fire them once they are on the job." Bradley v. Harcourt,  
6 Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996) (quoting Proud v.  
7 Stone, 945 F.2d 796, 797 (4th Cir. 1991)). Although Bickerton did not  
8 hire Andrews, Aramark contends "Bickerton's hiring of a co-worker  
9 [Haagensen] who was 3 years older than Andrews should bar Andrews' [s]  
10 claim . . . ." (Defs.' Mot. at 60.) Since Bickerton hired an  
11 employee from Andrews's protected class only four months before  
12 terminating Andrews, Aramark's motion for summary judgment on  
13 Andrews's age discrimination claims is granted.

#### 14 V. Section 1981 Claims

15 Defendants also seek summary judgment on Plaintiffs' claims  
16 under 42 U.S.C. § 1981. "A plaintiff must meet the same standards in  
17 proving a § 1981 claim that he must meet in establishing a disparate  
18 treatment claim under Title VII; that is, he must show discriminatory  
19 intent." E.E.O.C. v. Inland Marine Indus., 729 F.2d 1229, 1233 n.7  
20 (9th Cir. 1984). "Individual supervisors may be found liable for  
21 damages under [§ 1981] if personally involved in the discriminatory  
22 activity. . . . The element of personal involvement may be satisfied  
23 by proof that a supervisor had knowledge of the alleged acts of  
24 discrimination and failed to remedy or prevent them." Amin v.  
25 Quad/Graphics, Inc., 929 F. Supp. 73, 78 (N.D.N.Y. 1996).

26 "[N]egligence does not constitute the 'personal involvement' or  
27 'affirmative link' necessary to support a claim of individual

1 liability." Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d  
2 62, 75 (2d Cir. 2000). "[A] plaintiff must demonstrate 'some  
3 affirmative link to causally connect the actor with the discriminatory  
4 action.'" Id. (quoting Allen v. Denver Pub. Sch. Bd., 928 F.2d 978,  
5 983 (10th Cir. 1991)).

6 A. Eley

7 Defendants Aramark and Polifka move for summary judgment on  
8 Eley's § 1981 claim. Polifka argues, "Eley cannot establish Polifka  
9 engaged in any affirmative acts of misconduct towards him, as required  
10 under Section 1981." (Defs.' Mot. at 63.) Eley counters,  
11 "[Polifka's] order to Baker to 'fire the nigger' amply demonstrates  
12 his discriminatory intent as well as control over Eley's work  
13 environment." (Opp'n at 35; see SDF ¶ 24; Mustafa v. Clark County  
14 Sch. Dist., 157 F.3d 1169, 1180 (9th Cir. 1998) ("Discriminatory  
15 remarks are relevant evidence that, along with other evidence, can  
16 create a strong inference of intentional discrimination.") Since a  
17 genuine issue of material fact exists on whether Baker was subjected  
18 to intentional discrimination, Defendants' motion for summary judgment  
19 on Eley's § 1981 claim is denied.

20 B. Baker

21 Defendants Aramark, Clowes, and Polifka move for summary  
22 judgment on Baker's § 1981 claim. Clowes argues, "When Clowes  
23 terminated Baker he had no knowledge of any purported complaints by  
24 Baker of discrimination in the Reno Depot." (Defs.' Mot. at 64.)  
25 Clowes contends, "Baker's allegations that Clowes failed to remedy the  
26 alleged discriminatory conduct of other individuals in the depot is  
27 not an affirmative act by Clowes and cannot make Clowes liable under

1 Section 1981." (Id. (citing Whidbee, 223 F.3d at 75).) Baker  
2 rejoins, "Clowes sanctioned the discrimination of which Baker  
3 complained . . . ." (Opp'n at 80.) Baker declares that he "informed  
4 . . . Clowes . . . about Polifka's [racist] statements and attitude  
5 [and e]ven though Clowes made clear he did not care that Polifka was  
6 making racist statements, [Baker] repeatedly approached him regarding  
7 this matter."<sup>34</sup> (Baker Decl. ¶ 6; SDF ¶ 10.) Baker further declares  
8 that after he "had a conversation with Jeff Black, an executive with  
9 the company, and brought up Polifka's [racist] attitude," "Clowes  
10 notified [Baker] he was not to talk further to Black about  
11 discrimination issues." (Baker Decl. ¶ 15; SDF ¶¶ 19-20.) Baker's  
12 showing is sufficient to create a genuine issue of material fact on  
13 whether Clowes subjected Baker to intentional discrimination.

14 Polifka also seeks summary judgment on Baker's § 1981 claim,  
15 arguing, "First, even if Polifka failed to respond to racially  
16 derogatory comments made by other employees, Polifka's failure to act  
17 only constitutes inaction, not an affirmative act as is necessary  
18 under Section 1981." (Defs.' Mot. at 64.) Baker counters that  
19 "Polifka, unconcerned, ignored [his] pleas that something be done  
20 about Bickerton's treatment of Andrews, [saying], 'It's nothing to be  
21 concerned about.'"<sup>35</sup> (Baker Decl. ¶ 9; SDF ¶ 13.) This deliberate

---

22  
23 <sup>34</sup> Defendants' hearsay objection is overruled. See supra  
note 24.

24  
25 <sup>35</sup> Defendants object based on hearsay, speculation, lack of  
personal knowledge, lack of foundation, and improper lay opinion.  
26 Defendants' hearsay objection is overruled. See supra note 3.  
Baker has personal knowledge of the conversation. As someone who  
27 worked with Polifka for a considerable time, Baker has laid the  
foundation and basis for a proper lay opinion about Polifka's  
28 emotional state. The objections are overruled.



1 inaction rises above mere "negligence." Whidbee, 223 F.3d at 75.  
2 Second, Polifka argues he disciplined Baker "based upon legitimate  
3 non-discriminatory/non-retaliatory reasons." (Defs.' Mot. at 64.) As  
4 discussed above, a genuine issue of material fact exists as to whether  
5 these reasons were legitimate. Third, Polifka contends that "it is  
6 undisputed that Clowes alone made the decision to terminate Baker's  
7 employment." (Defs.' Mot. at 65.) Baker counters that "Polifka  
8 admitted he had the ability to recommend that Baker be terminated  
9 [and] Clowes terminated Baker based on input from Polifka."<sup>36</sup> (SDF  
10 ¶¶ 84-85.) Since a genuine issue of material fact exists on whether  
11 Polifka and Clowes committed affirmative actions with discriminatory  
12 intent, Defendants' motion for summary judgment on Baker's § 1981  
13 claim is denied.

14 C. Andrews

15 Defendants Aramark, Bickerton, and Polifka also seek summary  
16 judgment on Andrews's § 1981 claim, arguing that "Polifka's alleged  
17 statement about not wanting to hear about Bickerton's 'hostile  
18 conduct' . . . shows at most, inaction on Polifka's part, not  
19 affirmative or intentional behavior evincing any racial animus. . . ."  
20 (Defs.' Mot. at 65.) Polifka also argues that his "advice not to get  
21 'caught up' in the problems of Baker and Eley is entirely proper and  
22 fails to implicate any wrongful conduct." (Id.) Andrews rejoins that  
23 "Polifka is liable to Andrews for his role in terminating him given  
24

---

25 <sup>36</sup> Defendants object based on vagueness of the word  
26 "ability" and relevance. The statements are relevant to whether  
27 Baker's interactions with Polifka led to his termination. The word  
28 "ability" is not vague and Defendants' argument goes to the weight  
of the evidence and not its admissibility. The objections are  
overruled.

1 his knowledge of Bickerton's mistreatment of Andrews and use of racial  
2 epithets when speaking of him." (Opp'n at 24.) Andrews declares he  
3 "spoke several times to Mr. Polifka about Mr. Bickerton's mistreating  
4 [him, and that] Polifka did not do anything."<sup>37</sup> (Andrews Decl. ¶ 6;  
5 SDF ¶ 100.) Baker also declares that on other occasions, when Baker  
6 had gone to speak to Bickerton on Andrews's behalf, Bickerton said  
7 'fuck the nigger' in reference to Andrews and called him 'nigger.'"  
8 (Baker Decl. ¶ 37.)

9 Bickerton argues, "Andrews also fails to demonstrate any  
10 affirmative link between his discipline or his termination and  
11 Andrews' [s] race." (Defs.' Mot. at 66.) But, Baker declares that  
12 "Bickerton found out almost immediately after Andrews had called the  
13 company hotline and told [Baker] he would 'fire the nigger.'"<sup>38</sup>  
14 (Baker Decl. ¶ 46; SDF ¶ 51.) "Discriminatory remarks are relevant  
15 evidence that, along with other evidence, can create a strong  
16 inference of intentional discrimination." Mustafa, 157 F.3d at 1180.  
17 Therefore, a genuine issue of material fact exists on whether  
18 Defendants had discriminatory intent, and Defendants' motion for  
19 summary judgment on Andrews's § 1981 claim is denied.

20 D. Vargas

21 Defendants Aramark, Velasco, Koch, and Polifka move for  
22 summary judgment on Vargas's § 1981 claim. Velasco argues he  
23

---

24 <sup>37</sup> Defendants object based on lack of foundation and  
25 impermissible opinion. Plaintiffs have laid the foundation for the  
26 complaints, and the statement that Polifka did nothing is not an  
opinion. The objections are overruled.

27 <sup>38</sup> Defendants' hearsay objection is overruled. See supra  
28 note 7.

1 "terminated Vargas' [s] employment because of his dishonesty [and  
2 t]here is absolutely no evidence of any discriminatory animus on the  
3 part of Velasco, who is himself Hispanic." (Defs.' Mot. at 67.)  
4 Vargas counters that Velasco "intentionally misrepresented to [Vargas]  
5 the reason for his presence at the game." (Opp'n at 58.) However,  
6 Vargas has presented no evidence that Velasco was "personally involved  
7 in the [alleged] discriminatory activity" or "had knowledge of the  
8 alleged acts of discrimination and failed to remedy or prevent them."  
9 Amin, 929 F. Supp. at 78. Since Vargas has not presented a genuine  
10 issue of material fact as to Velasco's alleged discriminatory intent,  
11 Velasco's motion for summary judgment on Vargas's § 1981 claim is  
12 granted.

13 Defendant Koch also seeks summary judgment on Vargas's  
14 § 1981 claim, arguing that "Vargas' [s] adverse employment action was a  
15 result of Vargas' [s] poor results and poor attitude, rather than any  
16 alleged discriminatory animus on the part of Koch." (Defs.' Mot. at  
17 69-70.) Vargas rejoins, "Koch also directly participated in  
18 Vargas' [s] unlawful and unjustified demotion" and "threat[ened] to  
19 'manage out' Vargas." (Opp'n at 59.) Vargas declares that Koch told  
20 Vargas that he "was 'too outspoken' and, if [he] did not stop being  
21 too 'outspoken,' [he] would be 'managed out' of the corporation."<sup>39</sup>  
22 (Vargas Decl. ¶ 26; SDF ¶ 180.) Vargas declares that three months  
23 later, "Koch summoned [Vargas] into his office and presented [him]  
24 with a notice that [he] would be demoted [and] told [Vargas] he was on  
25

---

26  
27 <sup>39</sup> Defendants' hearsay objection is overruled. See supra  
28 note 14.

1 [his] way to being 'managed' out of . . . Aramark."<sup>40</sup> (Vargas Decl.  
 2 ¶ 32; SDF ¶ 186.) Since a genuine issue of material fact exists on  
 3 whether Koch acted with discriminatory intent, Aramark and Koch's  
 4 motion for summary judgment on Vargas's § 1981 claim is denied.

5 Additionally, Polifka seeks summary judgment on Vargas's  
 6 § 1981 claim, arguing that his "alleged inaction is not an affirmative  
 7 act to support individual liability under Section 1981." (Defs.' Mot.  
 8 at 67.) Polifka also argues that he "was not involved in Vargas'[s]  
 9 alleged demotion in November 2003 or in Vargas'[s] employment  
 10 termination in May 2004." Polifka declares that he "supervised Vargas  
 11 from December 2003 until March 2004." (SUF ¶ 145.) Vargas responds  
 12 that "Polifka is individually liable for the hostile work environment  
 13 . . . . Not only did Polifka fail to stop the conduct, he joined in."  
 14 (Opp'n at 59.) Vargas declares that he was "called names by [Polifka]  
 15 including . . . 'Beaner' and 'Vato.'"<sup>41</sup> (Vargas Decl. ¶ 4; SDF ¶ 158;  
 16 see also SDF ¶ 159.) Since this dispute concerns genuine issues of  
 17 material fact as to whether Polifka acted or failed to act with  
 18 discriminatory intent based on Vargas's race, Polifka's motion for  
 19 summary judgment on Vargas's § 1981 claim is denied.

## 20 VI. Punitive Damages

21 Lastly, Defendants seek summary judgment on Plaintiffs'  
 22 punitive damages claim. "A complaining party may recover punitive  
 23 damages under [§ 1981] against a respondent . . . if the complaining  
 24 party demonstrates that the respondent engaged in a discriminatory

---

25 <sup>40</sup> Defendants' hearsay objection is overruled. See supra  
 26 note 3.

27 <sup>41</sup> Defendants' hearsay objection is overruled. See supra  
 28 note 7.

1 practice or discriminatory practices with malice or with reckless  
2 indifference to the federally protected rights of an aggrieved  
3 individual." 42 U.S.C. § 1981a(b)(1). "An award of punitive damages  
4 under Title VII is proper where the acts of discrimination giving rise  
5 to liability are willful and egregious, or display reckless  
6 indifference to the plaintiff's federal rights." Ngo v. Reno Hilton  
7 Resort Corp., 140 F.3d 1299, 1304 (9th Cir. 1998). "The requisite  
8 level of recklessness or outrageousness can be inferred from  
9 management's participation in the discriminatory conduct." Kimzey v.  
10 Wal-Mart Stores, Inc., 107 F.3d 568, 575 (8th Cir. 1997).

11 Defendants argue Plaintiffs "have no evidence . . . to show  
12 that Defendants acted with malice, fraud or oppression." (Defs.' Mot.  
13 at 70.) Plaintiffs counter that this case "is about a deliberate  
14 agenda on the parts of all [D]efendants of ridding Aramark of  
15 rabble-rousers Baker, Eley, Vargas, and Andrews—who dared to be  
16 'outspoken' on matters of discrimination . . . . At every step,  
17 [D]efendants knew their conduct was unlawful." (Opp'n at 80-81.)  
18 Since a genuine issue of material fact exists on whether defendants  
19 acted or failed to act with reckless indifference, Defendants' motion  
20 for summary judgment on punitive damages is denied.

#### 21 CONCLUSION

22 Aramark's motion for summary judgment on Baker's hostile  
23 racial work environment claim is granted. Aramark's motion for  
24 summary judgment on Andrews's age discrimination claims is granted.  
25 Defendant Velasco's motion for summary judgment on Vargas's § 1981  
26 claim is granted. Since no claims remain against Lewis, Defendant  
27

1 Lewis is dismissed from the case. Defendants' motion is otherwise  
2 denied.

3 IT IS SO ORDERED.

4 DATED: August 31, 2005

5 /s/ Garland E. Burrell, Jr.  
6 GARLAND E. BURRELL, JR.  
7 United States District Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28