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United States District Court, W.D. North Carolina.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
and
John A. WARREN and Eddie Johnson, Plaintiff–Interveners,
v.
CROWDER CONSTRUCTION COMPANY, Defendant.

No. 3:00CV186. | Oct. 26, 2001.

Opinion

MEMORANDUM AND RECOMMENDATION

HORN, Magistrate J.

***1** THIS MATTER is before the Court on the Defendant's "Motion for Summary Judgment" (document # 30) and "Memorandum of Law Supporting ..." (document # 31), both filed August 31, 2001; Plaintiff–Interveners' "Memorandum of Law in Opposition ..." (document # 34) filed September 17, 2001; and "Plaintiff EEOC's Response ..." (document # 38) filed October 1, 2001. Defendants' "Reply ..." (document # 40) was filed October 11, 2001.

The instant motion has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), and is now ripe for disposition.

Having carefully considered the parties' arguments, the record, and the applicable authority, the undersigned will respectfully recommend that Defendant's Motion for Summary Judgment be *denied,* as discussed below.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

This is an action, brought by the Equal Employment Opportunity Commission ("EEOC"), seeking damages and equitable relief for a racially hostile work environment and constructive discharge arising under Title VII of the 1964 Civil Rights Act ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.*.

The Plaintiff–Interveners, John Augusta Warren and Eddie Johnson, along with John Carlos Warren (collectively "Plaintiffs"),[1] who has not intervened in the action, but whose interest is represented by the EEOC, were formerly employed by Defendant Crowder Construction Company ("Crowder"), a North Carolina corporation headquartered in Charlotte, North Carolina. At the times relevant to the Complaint, Mr. Johnson was 36 years-old, John Warren was 32 years-old, and Carlos Warren was almost 19 years-old. All three men are black.

[1] John Augusta Warren, who will be referred to as "John Warren" or "J. Warren," is uncle to John Carlos Warren, who will be referred to as "Carlos Warren" or "C. Warren." The pair will collectively be referred to as "the Warrens," when appropriate.

Crowder handles industrial construction projects in North Carolina, South Carolina, Virginia, Georgia, and Tennessee. The events giving rise to the instant Complaint occurred at Crowder's Irwin Creek Wastewater Treatment Project ("ICP") in Mecklenburg County, North Carolina.

In April, 1998, Crowder hired Mr. Johnson as a laborer for the ICP. On September 7, 1998, Crowder hired the Warrens as laborers for ICP. Michael Louvet was Crowder's ICP Project Superintendent—the senior Crowder official at the site—while Ray Powell was the Plaintiffs' immediate supervisor. Crowder's upper management, located at Crowder's main office, included Otis Crowder, President; Bob Haltom, Vice President of Risk Management and EEO Officer; and Steve Reynolds, Senior Safety Compliance Officer.

Taken in the light most favorable to the Plaintiffs, their depositions establish that almost immediately upon beginning their employment with Crowder, they were subjected to racially derogatory comments from Mr. Powell, who subjected them to a daily barrage of racial slurs, including the words "nigger" and "boy," combined with yelling, vulgar language, and attempted physical violence. *See* "Deposition of Eddie Johnson" at 10, 12, 14, 17, 18, 21, 25–28, 56, 93, 151; "Deposition of John A. Warren" at 20, 71, 73, 74, 75, 80, 81, 86, 87, 95, 123, 126–127, 133, 135, 137, 140; and "Deposition of John Carlos Warren" at 48–49, 51–52, 86–87, 94, 96–98, 102–103, 106, 107; attached as Exhibits 1–3 to "Plaintiff EEOC's Response ..." (document # 38).[2]

[2] Subsequent cites to depositions will reference the deponent's name and deposition page number.

***2** Mt. Johnson testified that on one occasion, Mr. Powell instructed him to measure the length and width of a piece

of pipe and, when Mr. Johnson explained that he did not know how to use a ruler, Mr. Powell called him a "dumb ass nigger." Johnson Dep. at 10. Mr. Johnson further testified that he responded by asking Mr. Powell to repeat what he had just said, to which Mr. Powell replied, "Aw, I didn't say nothing. Just shut up and get your ass back to work, boy." *Id.*

On another occasion, when Mr. Johnson testified that he was carrying a board and some tools up a hill, when Mr. Powell spoke to a passerby and remarked, "[l]ook at that damn nigger back there. He is taking his time coming up that hill." Johnson Dep. at 25–26. When Mr. Johnson objected to the statement, Mr. Powell told him, "I will fire you ... [s]hut the hell up and get on the road and take your ass home." *Id.*

John Warren testified that on September 7, 1998, when he and his nephew Carlos Warren applied for laborer positions, Mr. Louvet and Mr. Powell subjected them to racial harassment almost immediately. *See* J. Warren Dep. 15–16. During the joint interview between all four men, Mr. Louvet told Mr. Powell, "I'm fixing to hire two more of them," to which Powell responded, "Well, how am I going to tell them apart?" J. Warren Dep. at 15. Later that same day, the Warrens testified that they heard Mr. Powell use the word "nigger" for the first time when he spoke of his family's attempt to secure food stamps when he was a teenager and stated that, "[my] family couldn't get food stamps, but they give food stamps to the niggers and let them sit on their ass and not do anything." J. Warren Dep. at 72; C. Warren Dep. at 51. Mr. Powell then added, "but you two boys, at least you two boys are out here working." J. Warren Dep. at 72.

On one occasion, John Warren testified that during a particularly loud outburst, Mr. Powell accused Carlos Warren of stealing his tools and exclaimed, "I ain't been missing no goddamn tools until we hired these goddamn boys." J. Warren Dep. at 80–81. Mr. Powell continued to accuse the Warrens and Mr. Johnson of stealing in a loud voice, that is, loud enough for others to stop and listen to him. *See* J. Warren Dep. at 126–127. During the disturbance, which lasted for approximately twenty minutes, Powell allegedly repeatedly yelled at the Warrens and Johnson stating, "goddam[n] boys," "fucking boys," and "[goddamn] boys up the road." J. Warren Dep. at 81, 126–127. Mr. Powell allegedly later found the tools, which he had misplaced. *See* C. Warren Dep. at 95, 97.

Mr. Powell admitted that he called Carlos Warren "boy" at least "two or three times," although he claimed he did so because Carlos Warren was "under the age of 21" at the time. "Deposition of James Rayford Powell, Sr." at 32–33, attached as Exhibit 9 to "Plaintiff EEOC's Response ..." (document # 38). Carlos Warren testified that he heard Mr. Poweil refer to his uncle and Mr. Johnson, both of whom were 32 or older at the time, as, "fucking sorry-ass boys." C. Warren Dep. at 48–49, 96.

***3** In addition to calling the Plaintiffs "niggers" and "boys," Mr. Powell used other demeaning words including—"stupid," "dumb," and "lazy"—in a racially provocative manner. Although during his deposition Mr. Powell denied calling Mr. Johnson stupid, he admitted that he told Mr. Johnson to "use his head for something besides a place to wear a hat." Powell Dep. at 29–30. John Warren testified that Mr. Powell referred to the Warrens as "a bunch of lazy niggers," "stupid niggers," and "stupid boys." J. Warren Dep. at 20, 71, 73, 75, 80. Carlos Warren also testified that he heard Powell refer to his uncle, Johnson and himself as "fucking lazy niggers." C. Warren Dep. at 48–49, 96.

Aside from his verbal racial harassment, on one occasion Mr. Powell acted in a way which Mr. Johnson considered an attempt to physically injure him. *See* Johnson Dep. at 37–38, 121–123; *and* J. Warren Dep. at 66–67. While Mr. Powell was operating a backhoe at the ICP worksite, he instructed Mr. Johnson to pick up a piece of paper. When Mr. Johnson bent over, Mr. Powell swung the backhoe's loaded bucket over Mr. Johnson's head and dumped a load of dirt on his feet, nearly covering him. John Warren testified that he witnessed the event. *See* J. Warren Dep. at 66. Mr. Johnson exclaimed, "[m]an, what are you trying to do, kill me?" Johnson Dep. at 38; J. Warren Dep. at 66. Powell responded saying, "Aw, there ain't nobody trying to hurt you or nothing like that. If I wanted to hurt you, I could have dumped it on you anyway." Johnson Dep. at 38.

Although Crowder now disputes that it had any knowledge of the alleged harassment at any time prior to receiving copies of the Plaintiffs' EEOC charges, taking the evidence in the light most favorable to the Plaintiffs, they repeatedly complained to Mr. Louvet, who refused to take action or report Mr. Powell to higher management.

Mr. Johnson testified that on either eight or nine occasions, he complained to Mr. Louvet about Mr. Powell's racial harassment. He also asked Mr. Louvet to transfer him to another crew, but Mr. Louvet required Mr. Johnson to remain under Mr. Powell's supervision. *See* Johnson Dep. at 56–57.

John Warren testified that he complained to Mr. Louvet several times from September through November, 1998 to no avail and, indeed, Mr. Louvet's indifferent attitude was "a big part of the problem." J. Warren Dep. at 75.

Carlos Warren testified that he complained to Mr. Louvet about Mr. Powell's continual harassment and, like Mr. Johnson, asked to be moved to another crew. *See* C. Warren Dep. at 41–42.

The Plaintiffs further testified that rather than take action, Mr. Louvet, as well as Michael K. Bordwine, another Crowder foreman at the ICP site, simply made excuses for Powell's behavior. During one conversation Mr. Louvet told Mr. Johnson, "Ray [Powell] has been here a long time, and he is not racist." Johnson Dep. at 19. Mr. Louvet responded to John Warren's complaints by stating, "that's just the way people are down here in the south" and that "[Powell was] not racist." J. Warren Dep. at 76–77, 137–138. Carlos Warren testified that Mr. Louvet told him to keep doing his job because, "that is just the way Ray is, it's the way they are down here [in the south] ... what do you want me to do about it?" C. Warren Dep. at 41–42, 47. Similarly, Mr. Bordwine told Mr. Johnson, "Ray [Powell] is just set in his ways all of his life ... [h]e has always been like that." Johnson Dep. at 13, 19.

***4** Taking the evidence in the light most favorable to the Plaintiffs, Mr. Powell even engaged in racial harassment and used racial slurs in Mr. Louvet's presence. For example, when Mr. Powell's crew was pouring concrete at the ICP site—with several other foremen and Mr. Louvet present to observe the operation—Mr. Johnson testified that Mr. Powell looked at him and said, "[d]amn nigger, they think they know everything." Johnson Dep. at 27. Mr. Johnson immediately told Mr. Powell not to use the epithet when referring to him. Mr. Powell responded by, once again, threatening to fire Johnson, stating, "[t]ake your ass and put your ass to work. I don't want to hear none of that. I will fire your ass." Johnson Dep. at 28.

Mr. Johnson also testified that Mr. Powell racially harassed him in Mr. Louvet's presence while he, Mr. Powell, Mr. Louvet, John Warren, and Carlos Warren were together in the ICP boiler room. Mr. Powell sent Mr. Johnson to get some nails from a nearby truck. When Mr. Johnson returned, Mr. Powell became angry because he claimed the nails were the wrong size and called Mr. Johnson a "stupid, dumb-ass, old black boy" in the presence of Mr. Louvet and the others. Johnson Dep. at 14. After Mr. Powell's tirade ended, Mr. Johnson said to Mr. Louvet, "[d]o you see what I mean?" In response, Louvet merely "dropped his head like he didn't see [anything]." Upon observing Mr. Louvet's apathy, Mr. Johnson said, "Mike, do you see? I know you can put a stop to Ray." Johnson Dep. at 15. Mr. Louvet responded merely by saying, "[w]hat do you want me to do?" Johnson Dep. at 57.

John Warren further testified that instead of stopping the harassment, Mr. Louvet participated in it. *See* J. Warren Dep. at 86–88. On one occasion, John Warren and a white laborer were emptying bags of a brown substance at the construction site. When Mr. Louvet passed by the men, he told the white laborer to be careful not to get the substance on his hands because it would make them turn the color of John Warren's skin and make him "look like do-do." J. Warren Dep. at 86. On another occasion, when John Warren worked with a co-worker named Richard, Mr. Louvet told Richard to watch his tools because John Warren would steal them. J. Warren Dep. at 87. And, when John Warren voluntarily retrieved a piece of paper that had flown out of Louvet's hands, Louvet allegedly said "fetch, boy, fetch." *Id.*

Regarding Mr. Powell's daily racial insults and other events that occurred prior to December 1, 2000, Mr. Johnson testified that when he realized his complaints about Mr. Powell's behavior were to no avail, Mr. Johnson began to "hide" from Mr. Powell and avoid him. Mr. Johnson testified that Mr. Powell's repeated use of the words "nigger" and "boy" reminded Mr. Johnson of the plight of blacks during slavery, caused him to "ache" emotionally, and to want to "jump on" Mr. Powell. Johnson Dep. at 22, 71, 83. Mr. Johnson testified that he endured the racially hostile work environment at Crowder because his family needed the money "bad[ly]," but that the experience severely damaged his self-esteem and made him "feel like a piece of shit ... like dirt ... good for nothing." Johnson Dep. at 33, 73.

***5** John Warren testified that the constant racial harassment took an emotional toll on him as well. *See* J. Warren Dep. at 98–99, 134–35. Mr. Powell's comments about "niggers" on food stamps threw John Warren "for a loop." J. Warren Dep. at 135. During his employment with Crowder, John Warren would often keep his wife up late at night because he would "ramble" and talk often about the harassment he experienced during the day. Mr. Powell's comments and harassment made John Warren uncomfortable and paranoid at work and he began to "pay attention" closely to and "watch" Mr. Powell in apprehension of something unpleasant. J. Warren Dep. at 136–37. Mr. Powell's words, particularly his use of the term "boy," were offensive and degrading to John Warren, who was no boy at approximately age 32 at the time of his employment with Crowder. *See* J. Warren Dep. at 147. John Warren, however, was most disturbed by the fact that Mr. Powell got "away with it." *Id.* Even now, John Warren avoids discussing his tenure of employment with Crowder Construction because it generates bad memories and feelings of low self-esteem. *See* J. Warren Dep. at 98–99.

Carlos Warren testified that he felt Mr. Powell harassed him because he was black; that Mr. Powell's words and actions "offended" him a great deal; and that he was afraid Mr. Powell's behavior might make Carlos Warren "get mad" and say or do something he shouldn't. C. Warren Dep. at 41–42, 101, 107.

The "last straw"—which Plaintiffs contend caused them to quit their jobs at Crowder and file EEOC charges—occurred on December 1, 1998, when Crowder

management conducted a "work safe/work smart" meeting inside a trailer office at the ICP site. Mr. Louvet and Mr. Powell led the meeting, but several other foremen, including Carlos Scott Cassell and Mr. Bordwine, were in attendance. *See* "Deposition of Carlos Scott Cassell" at 34, 39, 43; *and* "Deposition of Michael K. Bordwine at 27, 29–30; attached as Exhibits 8 and 11 to "Plaintiff EEOC's Response ..." (document # 38). The Warrens, Mr. Johnson, and Morris Miller, a laborer, were the only blacks at the safety meeting.

In short, the meeting began with a discussion of unsafe work habits but ended with the display of a noose and references to lynching by Mr. Louvet and Mr. Powell. At the start of the meeting, Mr. Johnson told Mr. Louvet that Mr. Powell had attempted to dump dirt on him with a back hoe. Mr. Louvet did not respond to his report. *See* Johnson Dep. at 37–38; 119–123; *and* J. Warren Dep. at 66–67. Mr. Johnson then asked the assembled managers why a steel plate fell at the jobsite the day before, almost striking an employee. Mr. Louvet began to explain why the plate slipped, but then picked up a piece of rope and began tying it into a noose. *See* J. Warren Dep. at 38; *and* C. Warren Dep. at 63–64. Mr. Johnson responded, "noose ... wait a minute, man. I don't play like that ... you don't have to go getting into tying a noose." Johnson Dep. at 39; J. Warren Dep. at 38. Mr. Louvet then stated, "you know noose, how we used to hang you people back in the day." J. Warren Dep. at 38.

***6** When Mr. Louvet had difficulty tying the noose, Mr. Powell approached him and took the rope, saying, "[o]h hell, he don't even know how to tie a damn noose." J. Warren Dep. at 39; C. Warren Dep. at 64. Mr. Louvet then replied, "yeah Ray ... show them how we used to do it ... show them how we used to hang them back in the day ... throw it across the oak tree limb, pull on it and kill people." Johnson Dep. at 38–39, 44; J. Warren Dep. at 38–39, 44; C. Warren Dep. at 83.

At this point, Mr. Powell, who was standing behind Johnson, began to wind the rope into coils, which the men in the room, including Mr. Louvet and Mr. Cassell, recognized as a noose. *See* Johnson Dep. at 39–40; J. Warren Dep. at 39; C. Warren Dep. at 64; Louvet Dep. at 67–68; Cassell Dep. at 43–46; *and* "Deposition of Morris L. Miller" at 34–35; attached as Exhibit 6 to "Plaintiff EEOC's Response ..." (document # 38). Mr. Powell then leaned forward while approaching Mr. Johnson and said, "this is a noose, we know what it's for." Louvet Dep. at 68.

In the light most favorable to the Plaintiffs, when Mr. Johnson attempted to rise from his seat to get away from Mr. Powell, Mr. Louvet pushed him and yelled, "sit down." Johnson Dep. at 39–40; J. Warren Dep. at 39–40; C. Warren Dep. at 64. When Mr. Johnson rose from his chair again, Mr. Louvet pushed him in the chest a second time, forced him down into his seat, and yelled, "[n]o, you asked a question, sit down. I'm going to answer it for you ... I said sit down." Johnson Dep. at 39–40; J. Warren Dep. at 40; C. Warren Dep. at 64.

When Mr. Powell finished tying the noose, he moved closer to Mr. Johnson in a manner suggesting to the men, including Mr. Miller and Mr. Cassell, that he was about to place the noose over Mr. Johnson's head and around his neck. *See* Johnson Dep. at 39–40; J. Warren Dep. at 40; C. Warren Dep. at 65; Miller Dep. at 34–35; *and* Cassell Dep. at 44–45.

Mr. Miller observed that the Warrens and Mr. Johnson were visibly shaken by what was happening. *See* Miller Dep. at 35, 37, 40. Mr. Cassell testified that he knew that the demonstration "wasn't appropriate" so he moved closer to Mr. Johnson, Mr. Louvet, and Mr. Powell, and placed his arm through the noose, preventing Mr. Powell from placing the noose around Mr. Johnson's neck. *See* Johnson Dep. at 43; J. Warren Dep. 40–41; Cassell Dep. at 43–45; C. Warren Dep. at 65; *and* Miller Dep. at 35. Mr. Powell then stated, "Oh, hell, I ain't going to hurt you. If I was wanting to hurt you, I'd have been [sic] killed you." J. Warren Dep. at 41; C. Warren Dep. at 65. The meeting abruptly ended and the men left the trailer.

Mr. Powell's testimony corroborates the Plaintiffs' account of the safety meeting. *See* Powell Dep. at 56–61. During his deposition on March 12, 2001, Mr. Powell drew a diagram of a noose and revealed his knowledge of noose-tying when he testified as follows:

> ***7** It's called a noose if it was made right. A noose has 13 rings on it ... that's the reason they call 13 unlucky. [When you make it] you bring the tail back through that end of the rope right there, and you pull it tight, and this right here (indicating) would come on down. And that would be your loop. It'd take a pretty good-pretty good long rope to make a noose.

Id. at 58–59. In an apparent reference to lynching, Powell also testified that he "had not seen [a noose] used" because he "ain't that old." Powell Dep. at 59.

Following the "noose incident," the Plaintiffs were extremely upset. John Warren testified that as he walked out of the trailer, he thought "God, these guys are crazy ... no apologies, no sorry to offend you ... just [an attitude of] hey guys, that's the way we are down here in the South." J. Warren Dep. at 43–44.

Mr. Johnson testified, "all [Powell] needed to do was put

it around my neck. Mike [Louvet] was supposed to be there to bound me ... they were trying to hurt me—do you know what I'm saying—trying to hurt me." Johnson Dep. at 41, 44.

After the meeting, the Warrens and Mr. Johnson were under the impression that Mr. Powell would continue to be their foreman and Mr. Powell, in fact, continued to work at IPC for three more weeks, that is, until his vacation commenced on December 22, 1998. Indeed, taking the evidence in the light most favorable to the Plaintiffs, Mr. Powell continued to call his three black crew members "boy" and "nigger" with impunity until he went on vacation. *See* C. Warren Dep. at 49–51, 84–86.

On December 11, 1998, the Warrens filed charges with the EEOC alleging a racially hostile work environment.

On December 17, 1998, upon receipt of the employer's copies of the Plaintiffs' EEOC charges, Mr. Reynolds, Crowder's Senior Safety Officer, and Mr. Haltom, Crowder's Vice President of Risk Management and EEO Officer, went to the IPC site and began an investigation. Crowder maintains that except for one page, the notes of their investigation have been "misplaced." Mr. Reynolds testified that he interviewed various Crowder supervisors on December 17, 1998, and returned on December 22, 1998, when he interviewed the Plaintiffs. *See* "Deposition of Steve Reynolds" at 8–11, 49–51, 58–62, 143; *and* "Deposition of Bobby Alan Haltom" at 64–65, attached as Exhibits 5 and 10 to "Plaintiff EEOC's Response ..." (document # 38).

The surviving page of the notes reflects that Carlos Warren and Mr. Johnson reported being called a "boy"; that Carlos Warren reported being called a "nigger"; and that both men reported having gone to Mr. Louvet much earlier about their concerns. Although the one page note makes no mention of an interview of John Warren, Mr. Reynolds testified that John Warren reported being called a "nigger" and a "boy" and that he, too, had complained earlier to Mr. Louvet to no avail. Mr. Reynolds testified that Mr. Louvet would have been subject to discipline if he had admitted to receiving such complaints and not correcting the conduct or reporting it upwards. *See* Reynolds Sep. at 129. Mr. Reynolds also admitted that his investigation confirmed that the "noose incident" did occur. *See* Reynolds Dep. at 63, 74–79, 87–89, 97–101, 127.

***8** According to the Warrens and Mr. Johnson, Mr. Reynolds asked them virtually no questions and already was aware of at least some of the name calling and the noose incident before he talked with any of them. *See* C. Warren Dep. at 36–41; Johnson Dep. at 78–81; *and* J. Warren Dep. at 51–59. Mr. Reynolds asked John Warren to describe the noose incident, but was already aware of it. Mr. Reynolds offered the Plaintiffs no assurance that they would no longer be assigned to Mr. Powell's crew. *See* C. Warren Dep. at 56–59, 100–01; J. Warren Dep. at 51–53, 55–57, 128–32, 140–41, *and* Reynolds Dep. at 142–43.

It is undisputed that Mr. Powell was only disciplined for "abusive language" through a one week suspension and a written reprimand that did not mention the racial overtones of his remarks or actions during the "noose incident." Mr. Powell testified that he first learned of the complaints when he returned to work after the Christmas and New Year holidays and was transferred after the "suspension." He testified he was not told that he was accused of racial harassment and was never questioned about the allegations before Christmas vacation. *See* Defendant's "Memorandum of Law Supporting ..." at 5 (document # 31); Reynolds Dep. at 117–18, 127–28, 171–72; Haltom Dep. at 61–63, 66–68, 82–83; *and* Powell Dep. at 36–40. Mr. Louvet was not disciplined in any way.

By the end of December, 2000, the Warrens quit their jobs at Crowder. John Warren stated he quit his job because "there were a lot of things happening, but that noose incident, I would have to say confirmed it. I needed to find ... somewhere else to [work]." J. Warren Dep. at 90. Mr. Johnson stayed on into early 1999, but when he was placed under Mr. Louvet's supervision again at his next project, he too resigned. *See* Johnson, pp. 54–55.

During Mr. Johnson and the Warren's employment, Crowder had a written policy prohibiting racial harassment and providing to whom reports of harassment could be made. *See* Exhibit A to Defendant's "Memorandum of Law Supporting ..." (document # 31). Crowder alleges that this policy or one like it was posted on a bulletin board at the ICP site and published in its Employee Handbook, and that company practice was to review the harassment policy with every supervisor and employee every six months.[3] Additionally, Crowder's Employee Handbook contained a separate policy which in different versions of the Handbook was entitled "Complaint Procedure" and "Employee Concerns." *See* Exhibits B and C to Defendant's "Memorandum of Law Supporting ..." (document # 31).

[3] Crowder alleges that it documents these bi-annual reviews in its safety reports, but has produced only one such report, dated January 26, 1999, after the Plaintiffs had left their employment at Crowder. *See* Louvet Dep. at 17, Reynolds Dep. at 193, *and* Haltom Dep. at 29, 90.

Crowder's posted Harassment Policy provided as follows [bracketed language is from the version published in the Employee Handbook]:

It is the policy of Crowder Construction Company to

> provide, have and maintain a harmonious working environment. Furthermore, employees have a right to work in an environment free of harassment, whether racial, sexual, [verbal, physical] or otherwise. Harassment may be verbal, or physical. *All supervisory personnel are, and will be reminded of their responsibilities in this area. Supervisors are instructed to take swift, [and] appropriate, remedial action in response to any report or indication of abuse, threats, intimidation or harassment* (sexual [,physical] or otherwise) directed toward any employee. If any employee feels he/she is being harassed or mistreated in any way, they [he or she] *should:*
>
> ***9** 1. Tell his/ [or] her Supervisor [Foreman.]
>
> 2. Tell his/her project manager [project superintendent, project manager or division manager].
>
> 3. Call or write:
>
> Bob Haltom, Personnel Director and EEO Officer [EEO Officer or Personnel Director]
>
> Crowder Construction Company
>
> Post Office Box 30007
>
> Charlotte, North Carolina 28230
>
> All reports will be handled in a prompt, appropriate and confidential manner. Discrimination and harassment will result in appropriate disciplinary action which could include dismissal.

Exhibit A to Defendant's "Memorandum of Law Supporting ..." (document # 31) (emphasis added).

The Employee Handbook policy entitled "Complaint Procedure" or "Employee Concerns" stated:

> If something is bothering you, or you feel you have not been treated right, we want to know about it. In most cases, you will get satisfaction by talking with your foreman. Listed below are the steps for you to take to get your problem resolved:
>
> *STEP 1* The first step is to contact your foreman ... Your foreman has the authority to settle conflicts and he/she will treat every complaint with interest and respect.
>
> *STEP 2* If for some reason you do not get satisfaction from your foreman, then go to your superintendent or general superintendent who will try to settle your complaint.
>
> *STEP 3* If you still have not received satisfaction, write or talk to Bob Halstom, Personnel Director and EEO Officer, [listed mailing address and telephone number of Crowder's main office.]
>
> *STEP 4* If you continue to be dissatisfied, you may write to Otis A. Crowder, President, [listed mailing address and telephone number of Crowder's main office.]
>
> Crowder Construction Company wants every employee to be happy with his/her work. Remember, we cannot settle a complaint unless you let us know there is one.

Exhibits B and C to Defendant's "Memorandum of Law Supporting ..." (document # 31).

In the light most favorable to the Plaintiffs, none of them was ever given a copy of the posted Harassment Policy, Mr. Johnson did not receive a copy of the Employee Handbook, and no member of Crowder's management team ever discussed the policy or Employee Handbook with them. *See* J. Warren Dep at 17–18, 59; C. Warren Dep. at 26, 34, Johnson Dep. at 99, 100–02, Reynolds Dep. at 36–37; *and* Haltom Dep. at 29, 90, 115–116.

Mr. Louvet testified that Mr. Johnson and the Warrens followed company procedure when they made reports of racial harassment directly to him, the Project Superintendent who had a duty to resolve employee complaints. Specifically, Mr. Louvet testified that he was the "initial step" to resolve the complaint," and that it was his responsibility to resolve the complaint in "one way or another" or "get somebody that would." Louvet Dep. at 24.

Mr. Cassell summarized Crowder's policy as follows:

> If [the employee] has a complaint, they usually come and speak to the foreman and tell them that they've got a problem. You talk about it. If they don't feel like they got satisfaction, they can call the superintendent. There's a job-site superintendent. They can call the superintendent.

***10** Cassell Dep. at 16.

Mr. Reynolds testified that the Warrens and Mr. Johnson adhered to Crowder's policy for reporting harassment. According to Mr. Reynolds, supervisors "go out, investigate [the complaint] and resolve it. And if they can't then they contact us [at the corporate office]." Reynolds Dep. at 37. In fact, Reynolds explained that the power to investigate and respond to employee complaints rests in the hands of Crowder's "field" management employees because "they are the first line supervisors ... they have to be on the lookout for it, period ... [t]hey see

things going on out on the job ... [t]hey're to handle [the complaints], period ... and its just as the policy says." *Id.*

Mr. Haltom testified that a complaint was not necessary to initiate an internal investigation into an allegation of harassment under Crowder's complaint procedure. If a manager overheard abusive language being used in reference to employees, it was that manager's responsibility to "follow the policy and take action." Haltom Dep. at 61. Haltom also testified that making a verbal complaint with the Project Superintendent would be in compliance with the company's policy and, further, would be sufficient to trigger an investigation. *See* Haltom Dep. at 127, 129.

On April 24, 2000, and following its own investigation which substantiated charges of racial harassment, the EEOC filed the instant action on behalf of the Warrens and Mr. Johnson, alleging a racially hostile work environment in violation of Tittle VII and seeking compensatory and punitive damages, injunctive relief, and attorney's fees.

On July 3, 2000, and January 29, 2001, the undersigned allowed John Warren and Mr. Johnson's respective Motions to Intervene, and each filed a Complaint joining in the EEOC's Complaint, as well as stating a claim for relief for constructive discharge.

On August 30, 2001, the Defendant filed its Motion for Summary Judgment, which has been fully briefed as set forth above. The motion is now ripe for determination.

II. *DISCUSSION OF CLAIMS*

A. *Summary Judgment Standard*

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted when the pleadings, responses to discovery, and the record reveal that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." *Accord Charbonnages de France v. Smith,* 597 F.2d 406, 414 (4th Cir.1979). Once the movant has met its burden, the non-moving party must come forward with specific facts demonstrating a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

A genuine issue for trial exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). However, the party opposing summary judgment may not rest upon mere allegations or denials and, in any event, a "mere scintilla of evidence" is insufficient to overcome summary judgment. *Id.* at 249–50.

***11** When considering summary judgment motions, courts must view the facts and the inferences therefrom in the light most favorable to the party opposing the motion. *Id.* at 255; *Miltier v. Beorn,* 896 F.2d 848 (4th Cir.1990); *Cole v. Cole,* 633 F.2d 1083 (4th Cir.1980). Indeed, summary judgment is only proper "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (internal quotations omitted).

B. *Plaintiffs' Title VII Claim for Racially Hostile Work Environment*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* makes it an unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

In order to establish that the aggrieved individuals were subjected to racial harassment because of a hostile work environment, the EEOC must establish that: (1) the subject conduct was unwelcome; (2) it was based on the race; (3) it was sufficiently severe or pervasive to alter the conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual basis to Crowder. *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 185 (4th Cir.2000), *citing Causey v. Balog,* 162 F .3d 795, 801 (4 th Cir.1998); *see also Burlington Indus. v. Ellerth,* 524 U.S. 742, 754 (1998). The harassment is actionable only if it is so severe or pervasive to "alter the conditions of [the victim's] employment and create an abusive working environment." *Ellerth,* 524 U.S. at 754.

This analysis is greatly simplified by the Defendant, who, while contesting much of the Plaintiffs' deposition testimony, concedes that the evidence taken in the light most favorable to the Plaintiffs "rises to the level of actionable racial harassment." Defendants' "Reply ..." at 2 (document # 40).

In any event, it is clear that the Plaintiffs' deposition testimony, along with the testimony of Crowder foremen Louvet and Cassell, is more than sufficient to establish that Mr. Powell subjected Mr. Johnson and the Warrens to

unwelcome conduct, which was based on their race and which created an abusive working environment. *Accord Spriggs,* 242 F.3d at 185 ("Far more than a mere offensive utterance, the word 'nigger' is pure anathema to African–Americans. Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.")

The "noose incident" alone, which Crowder's internal investigation confirmed and which Mr. Cassell felt was sufficiently inappropriate to put to a stop, provides an issue of material fact sufficient to survive summary judgment as to the first three elements of a racially hostile working environment. *Accord Williams, et al. v. New York City Housing Authority,* 154 F.Supp.2d 820, 825 (S.D.N.Y.2001) ("as for the display of a noose, there can be little doubt that such a symbol is significantly more egregious that the utterance of a racist joke ... no less than the swastika or the Klansman's hood, the noose in this context is to arouse fear").

***12** The Defendant's sole remaining contention is that summary judgment is proper, notwithstanding evidence sufficient to establish a material issue of fact as to the existence of actionable harassment, because Plaintiffs have not established a factual basis sufficient to impute the harassment to Crowder; that is, Crowder contends it is entitled to the affirmative defense established by the Supreme Court in *Ellerth,* 524 U.S. at 762–63.

Generally, an employer is liable for the racially discriminatory conduct of its employee if it "knew or should have known of the harassment, and took no effectual action to correct the situation." *Katz v. Dole,* 709 F.2d 251, 256 (4th Cir.1983). "Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with Title VII, would be aware of the conduct." *Spicer v. Commonwealth of Virginia, Department of Corrections,* 66 F.3d 705, 710 (4th Cir.1995).

The evidence, taken in the light most favorable to the Plaintiffs, establishes that on an almost daily basis, Mr. Powell racially harassed the Warrens and Mr. Johnson, and that during a safety meeting where other management officials were present, Mr. Powell and Mr. Louvet subjected the Plaintiffs to the above described humiliation/threats with a noose.

The Plaintiffs have testified that all the incidents of harassment occurred in the open areas of the construction site, in a boiler room in the Project Superintendent's presence, or in "public" during an office safety meeting. Due to the open layout of the jobsite and the presence of Mr. Louvet, Mr. Bordwine, and Mr. Cassell during the safety meeting, Crowder knew or should have known about the harassment. The evidence is undisputed that even following the "noose incident," Crowder took no investigatory action for more than two weeks—that is, after EEOC charges were filed—and took no disciplinary action of even the mildest form until three weeks after the incident.

Accordingly, absent an affirmative defense, both Mr. Powell's ongoing verbal harassment as well as the harassment and threats made during the "noose incident" is properly imputed to Crowder.

Under *Ellerth,* 524 U.S. at 762–63, an employer has an affirmative defense to liability for a racially hostile work environment if it can demonstrate (1) that the employee did not suffer an adverse "tangible employment action" at the hands of his supervisor or a member of the employer's higher management;[4] (2) that it exercised reasonable care to prevent and correct promptly any harassment; and, (3) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

4 If an employee suffers an adverse "tangible employment action" at the hands of supervisor or member of the employer's higher management as a result of the prohibited discrimination, the employer is held strictly liable. *Accord Spriggs,* at 186, *citing Ellerth,* at 762–63.

The EEOC and the Defendant sharply disagree whether constructive discharge, as alleged in the Plaintiff–Interveners' complaints, constitutes a "tangible employment action" for the purposes of an *Ellerth* defense.[5] For discussion of Plaintiff–Intervener's constructive discharge claims, *see* II C below. However, the parties have cited no controlling authority on this point, and the undersigned is aware of none. Moreover, even assuming *arguendo* that the Plaintiffs did not suffer a "tangible employment action," Crowder has failed to satisfy the second and third prongs of the *Ellerth* defense.

5 For the purposes of this motion, John Warren and Mr. Johnson stipulate that constructive discharge is not a tangible employment action. *See* Plaintiff–Interveners' "Memorandum of Law in Opposition ..." at 11 (document # 34).

***13** While a published anti-harassment policy may satisfy the second prong of the *Ellerth* defense, the Fourth Circuit has held that "any anti-harassment policy an employer adopts must be both reasonably designed and reasonably effectual." *Brown v. Perry,* 184 F.3d 388, 396 (4th

Cir.1999). Moreover, the employer will not prevail on this element of the affirmative defense if is has adopted a policy in "bad faith" or has a policy which is "otherwise defective or dysfunctional." *Smith v. First Union National Bank,* 202 F.3d 234, 244–245 (4th Cir.2000), *citing Brown,* 184 F.3d at 396, n8.

In the light most favorable to the Plaintiffs, Crowder has not established that it exercised reasonable care to prevent and correct promptly any harassment. To the contrary, the record establishes that despite Crowder's claim that it had an anti-harassment policy which was reviewed with supervisors and employees every six months, there is no evidence that any such training or review occurred at the ICP site anytime before or during the Plaintiffs' employment. Indeed, Crowder maintains that it documents these training/safety meetings with written reports, and the only such document it has produced is dated after the Plaintiffs quit their jobs.

Moreover, Crowder's "Harassment Policy"—the only document which was posted at the ICP site and also published in the Employee Handbook—states the Plaintiffs had three distinct options for reporting Mr. Powell's harassment—report to their foreman, Mr. Powell, which obviously would have been pointless; report to Mr. Louvet, the Project Superintendent, which they did repeatedly; or contact Mr. Haltom in the Crowder main office.

In other words, the Plaintiffs followed one of Crowder's published policies—the only one entitled "Harassment Policy." Mr. Reynolds, Mr. Cassell, Mr. Louvet, and Mr. Haltom testified that the Plaintiffs' complaints to Mr. Louvet, as well as to Mr. Bordwine, along with Mr. Cassell and Mr. Bordwine's presence at the "noose incident," should have been sufficient to start an investigation. Nevertheless, Crowder still failed to address the Plaintiff's legitimate concerns in a timely or minimally adequate manner.

Although Crowder's *other* policy—"Complaint Procedure" or "Employee Concerns," as published in different editions of Crowder's Employee Handbook—instructed employees to continue to carry their complaint "up the chain" to Mr. Haltom or Mr. Crowder, there is no evidence that Plaintiffs were ever made aware of this separate policy. This policy was neither posted at the job-site nor published in the portion of the Employee Handbook relating to harassment. Indeed, an employee looking in the Handbook's table of contents or index under "harassment" would not have found this policy.

Finally, regarding Crowder's belated investigation and remedial efforts, the evidence in the light most favorable to the Plaintiffs establishes that Crowder's upper management knew about the "noose incident" by at least December 17, 1998, but waited until December 22, 1998 to take any action against Mr. Powell; that Crowder's only disciplinary action against Mr. Powell was a one-week suspension without pay and a transfer; that Crowder never told Mr. Powell that his racial comments were inappropriate; and that Crowder never took action any against Mr. Louvet or the other foremen who failed to report Mr. Powell to higher management. These efforts, which lack the vigor expected of sincere efforts to correct such brazen racial harassment, support an inference that Crowder did *not* make reasonable efforts to prevent and correct the obvious problem. *See Spriggs,* 242 F.3d at 190 (*Ellerth* defense unavailable to defendant who made insincere attempts to correct harassment).

***14** In short, in the light most favorable to the Plaintiffs, Crowder's anti-harassment policies were ineffective and do not satisfy the second prong of the *Ellerth* defense. *Accord Smith,* 202 F.3d at 244–245; *and Brown,* at 184 F.3d at 396.

Similarly, Crowder has failed to satisfy the final requirement of the *Ellerth* defense, that is, it has failed to show that the Plaintiffs unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. To the contrary, it appears that the Plaintiffs fully complied with Crowder's published and posted "Harassment Policy" and were unaware of the separate "Complaint Procedure" or "Employee Concerns" directing them, following Mr. Louvet's failure to address the problem, to contact Mr. Haltom and permitting them to write Mr. Crowder.[6] Moreover, according to the testimony of Crowder's foremen and managers, the Plaintiffs' belief that their complaints to Mr. Louvet would result in an investigation was entirely reasonable.

6 As quoted in its entirety above, Step Four of this policy states, "you may write to Otis Crowder."

Accordingly, where the evidence in the light most favorable to the Plaintiffs clearly establishes actionable racial harassment, properly imputed to the employer, the undersigned must respectfully recommend that the Defendant's Motion for Summary Judgment be *denied* as to the Plaintiffs' hostile work environment claim.

C. *Constructive Discharge Claim*

In order to prove a claim for constructive discharge, the Plaintiffs must show that on account of their race, Crowder "deliberately made their working conditions intolerable in an effort to induce [them] to quit." *Martin v. Cavalier Hotel Corp.,* 48 F.3d 1343, 1353–54 (4th Cir.1995), *citing Bristow v. The Daily Press, Inc.,* 770

F.2d 1251, 1255 (4th Cir.1985).

As discussed above, Mr. Powell's behavior was clearly racially related and was directed at all three Plaintiffs. In the light most favorable to the Plaintiffs, the evidence also establishes that the Plaintiffs reasonably feared for their safety at the IPC site. Mr. Powell dumped a load of dirt from a backhoe on Mr. Johnson, an assault which John Warren witnessed. When Mr. Powell attempted to put his noose around Mr. Johnson's neck, Mr. Louvet prevented Mr. Johnson from moving away. A co-worker testified that the Warrens, as well as Mr. Johnson, appeared "shaken" by the incident.

In short, by the time they quit their jobs, it was reasonable for the Plaintiffs to believe that Mr. Louvet would *not* act to protect a black employee from Mr. Powell. After the investigative interview with Mr. Reynolds, the Plaintiffs were also justified in believing that they would continue to work under Mr. Powell's supervision, once he returned from Christmas vacation and his one week suspension. Under these circumstances, it is difficult to conclude that any reasonable black employee would have continued working for Crowder, but would have instead concluded that Crowder intended for the employees to quit. Accordingly, the undersigned will also respectfully recommend that Defendant's Motion for Summary Judgment be *denied* as to the Plaintiffs' constructive discharge claim.

D. ***Claims for Punitive Damages and Attorney's Fees***

***15** A punitive damages award is appropriate where the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the [Plaintiffs'] federally protected rights." 42 U.S.C. § 1981a(b)(1). In the light most favorable to the Plaintiffs, the Defendant ignored the Plaintiffs' repeated complaints and did nothing to protect their rights.

Furthermore, if the Plaintiffs ultimately prevail in this matter, they *will* be entitled to attorney's fees pursuant to 42 U.S.C. § 2000e–5(k). Accordingly, the undersigned will recommend that the Defendant's Motion for Summary Judgment be *denied* as to Plaintiffs' claims for punitive damages and attorney fees.

III. *RECOMMENDATION*

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that Defendants' "Motion for Summary Judgment" (document # 30) be DENIED.

IV. *NOTICE OF APPEAL RIGHTS*

The parties are hereby advised that, pursuant to 28 U.S.C. § 636(b)(1)(c), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within ten (10) days after service of same. *United States v. Ridenour,* 889 F.2d 1363, 1365 (4th Cir.1989); *United States v. Rice,* 741 F.Supp. 101, 102 (W.D.N.C.1990). Failure to file objections to this Memorandum with the district court constitutes a waiver of the right to *de novo* review by the district court, *Ridenour,* 889 F.2d at 1365, and may preclude the parties from raising such objections on appeal. *Thomas v. Arn,* 474 U.S. 140 (1985); *Wright v. Collins,* 766 F.2d 841, 845–46 (4th Cir.1985); *United States v. Schronce,* 727 F.2d 91 (4th Cir.), *cert. denied,* 467 U.S. 1208 (1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to counsel for the parties; *and to the Honorable Richard L. Voorhees.*