UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JIMMY DAVID RAMIREZ-CASTELLANOS and FRANCISCO JAVIER GOMEZ ESPINOZA,

Plaintiffs,

v.

NUGGET MARKET, INC. DBA NUGGET MARKETS AND ONE STOP SERVICES DBA ONE STOP SOLUTION, AND DOES 1-10,

Defendants.

No. 2:17-cv-01025-JAM-AC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT NUGGET MARKETS' MOTION FOR SUMMARY JUDGMENT

Jimmy David Ramirez-Castellanos ("Ramirez-Castellanos") and Francisco Javier Gomez Espinoza("Espinoza") (collectively "Plaintiffs") sued their former employers, Defendants Nugget Market, Inc., dba Nugget Markets ("Nugget"), One Stop, and Issa Quara, for allegedly discriminating and retaliating against them based on their Latino national origin. First Amend. Compl. ("FAC"), ECF No. 45. Defendant Nugget now moves for summary judgment, Mot. Summ. J. ("Mot."), ECF No. 92. Plaintiffs oppose this Motion. Opp'n, ECF No. 102. For the reasons set forth

below the Court GRANTS in part and DENIES in part Defendant's motion for summary judgment.[1]

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiffs bring this action against Defendant Nugget for alleged employment discrimination based on their Latino origin under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 1981, California's Fair Housing and Employment Act ("FEHA"), and common law prohibitions on wrongful discharge. FAC at 1-2.

A. Plaintiffs' Employment

Plaintiff Espinoza is an immigrant from Mexico and does not speak English fluently. Opp'n at 1 n.1. He worked for Nugget from 2006 to 2008, and then returned in 2011 as a janitorial associate. Mot. at 2. Nugget promoted him to night stock crew associate in November 2014.

Nugget contracted with Defendant Quarra and his janitorial companies—One Stop and Building Maintenance Group ("BMG")—for floor cleaners. Opp'n at 2. Around the same time Espinoza was promoted, One Stop's supervisor hired Ramirez-Castellanos to work exclusively at Nugget as a night-shift floor cleaner. Id. Ramirez-Castellanos is an immigrant from El Salvador and also does not speak English fluently. Id. at 2 n.3

Because Ramirez-Castellanos was hired by One-Stop, the Parties dispute whether he was employed by Nugget. Defendant maintains it had generally no control over him. Mot. at 4. But

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for April 7, 2020.

Plaintiffs contend the opposite. Opp'n at 2. They state Nugget's maintenance director judged the quality of Ramirez-Castellanos' work, instructed him on how to perform his duties, and assigned him tasks, among other things. Id. at 3.

B. Alleged Discrimination

The Parties also dispute whether Plaintiffs suffered any discrimination on account of their race and national origin. According to Plaintiffs, they took their job seriously and both received positive feedback about their work. Opp'n at 3. However, their enthusiasm waned when Managers Lisset Sanchez and Blake Billings began to make discriminatory remarks about Latinos and other minorities on a nearly daily basis. Id. at 3.

According to Defendant, Plaintiffs were not discriminated against and instead were simply performing poorly at work. Mot. at 3-4. Because Manager Sanchez encouraged Plaintiffs to focus on their work, there was friction between them. Id. Thus, Espinoza complained that Sanchez "made him feel stupid" and Ramirez-Castellanos was angry and rude towards her. Id. Moreover, Defendant contends Ramirez-Castellanos did not make Nugget aware that he was allegedly being discriminated against. Id. at 5.

C. Reporting Incidents

The Parties also dispute whether Plaintiffs reported the alleged discrimination. Plaintiffs contend Ramirez-Castellanos first reported the discrimination to his One Stop manager and to Nugget Grocery Manager Rebecca Reichardt, in April and May 2015 respectively. Id. Reichardt allegedly told him he was a liar and to "shut up and go on working, or else." Id. He continued

to report the discrimination to his One Stop Supervisor for the following ten months. Id. But according to Defendant, Ramirez-Castellanos never reported any discrimination until after his termination. Mot. at 5.

The parties agree that Espinoza had two meetings in May and June of 2015 with Nugget management. But they disagree as to the substance of the meetings. Plaintiffs maintain Espinoza met with management on May 2015 because he complained about the discrimination and requested to be transferred to a different store. Id. Since he complained, the managers attempted to manufacture performance issues for Espinoza and gave him his first and only less than positive review. Id. At the meeting, the managers denied his request to transfer, scrutinized his job performance, and tried to convince him he was not being discriminated against. Id. Management told him he was only targeted because he was not "completing what he needs to do." Id.

The harassment allegedly continued so Espinoza had another meeting with the HR director on June 2, 2015. Id. Once again, he claims the managers over scrutinized his work performance rather than focus on the discrimination complaints. Id. They had the maintenance director interpret for him, but Espinoza decided to switch over to his broken English because he could not rely on the selective interpretation. Id. He told them as best he could about the incidents of discrimination and asked once again to transfer stores. Id. But the managers ignored him, and Manager Sanchez kept harassing Espinoza up until she left for medical leave in May 2016. Id.

Defendant, on the other hand, contends these meetings were not because of Espinoza's complaints about discrimination, but rather a result of his poor performance. Mot. at 2. For example, at the May 20, 2015 meeting he said he was slower at stocking shelves because of a language barrier but did not indicate any discrimination. Id. And Nugget only held the June 2, 2015 meeting because Espinoza told Manager Billings that Manager Sanchez discriminated against him by "making him feel stupid." Id. at 3. The maintenance director translated for Espinoza but he did not indicate he was being discriminated against. Id. The meeting focused on helping Espinoza improve his performance, and after the meeting, Nugget coached Sanchez on how to properly give advice to Espinoza. Id.

D. Termination of Employment

Lastly, the parties also dispute Plaintiffs' termination of employment at Nugget. According to Plaintiffs, Ramirez-Castellano was fired around December 2015 because Nugget threatened to terminate their contract with One Stop if Nugget did not fire him. Opp'n at 7. Espinoza, on the other hand, worked until June 2016 when he reluctantly left Nugget because he could no longer handle the hostile work environment. Id.

Conversely, Defendant contends Ramirez-Castellanos was only fired by One Stop, because of his failure to complete his cleaning duties according to the services contract with Nugget. Mot. at 5. Moreover, Espinoza abandoned his job without ever notifying Nugget that he was leaving. Id. at 3. Defendant contends Espinoza left early one day due to a "family emergency" and never returned. Id.

II. OPINION

A. Judicial Notice

Plaintiffs ask the Court to take judicial notice of the work-sharing agreement between the California Department of Fair Employment and Housing ("DFEH") and the U.S. Equal Employment Opportunity Commission ("EEOC"), along with four facts in the agreement. See Plf's Req. for Judicial Notice, ECF No. 103. Defendant does not oppose this request.

Under Federal Rule of Evidence 201, a district court may take judicial notice of a fact that is "not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). It is well-established that "a court may take judicial notice of matters of public record." Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). The DFEH and EEOC work-sharing agreement is a matter of public record. As such, other Courts have taken judicial notice of this agreement. See, e.g., Saling v. Royal, No. 2:13-CV-1039-TLN-EFB, 2015 WL 5255367, at *9 n. 5 (E.D. Cal. Sept. 9, 2015); Hause v. The Salvation Army, No. CV07-5249CAS CWX, 2007 WL 4219450, at *1 n. 2 (C.D. Cal. Nov. 27, 2007). Since this request is unopposed and since it is proper under Federal Rule of Evidence 201, the Court GRANTS Plaintiffs' request.

B. Evidentiary Objections

The Parties raise numerous evidentiary objections in their Opposition and Reply briefs. See ECF Nos. 104, 109-3. This Court has reviewed the parties' evidentiary objections but

declines to individually rule on each one. Since "courts self-police evidentiary issues on motions for summary judgment," a formal evidentiary ruling is unnecessary to the determination of these motions. Henry v. Central Freight Lines, Inc., No. 2:16-cv-00280, 2019 WL 2465330, at * 2 (E.D. Cal. June 13, 2019).

C. Legal Standard

Summary judgment is appropriate, when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of "informing the court of the basis for its motion and identifying [the documents] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 317, 323 (1986)(internal quotations omitted). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

If the moving party meets its initial burden, the burden shifts to the opposing party to establish that "there is a genuine issue for trial." Id. at 248. An issue of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

D. Analysis

1. Exhaustion of Administrative Remedies

Defendant argues Plaintiffs have not exhausted their administrative remedies with respect to their FEHA claims,

because they did not obtain Right-to-Sue Notices from the Department of Fair Employment and Housing (DFEH) prior to filing this suit. Mot at 6-7. Plaintiffs argue an administrative error at the DFEH prevented them from obtaining the notices, so they should not be penalized for a mistake they did not commit. Opp'n at 10.

To bring a civil action under FEHA, "the aggrieved person must exhaust the administrative remedies provided by law." Rodriguez v. Airborne Express, 265 F.3d 890, 896 (9th Cir. 2001). Accordingly, the employee must file a written charge with DFEH within one year of the alleged unlawful employment discrimination. Cal. Gov't Code § 12960. If after 150 days from filing the complaint DFEH does not issue a civil action against the employer, it shall notify the employee in writing "that it will use, on request, the right-to-sue notice." Id. at § 12965(b). If the employee does not make such a request, the DFEH must issue the notice no later than one year after the filing of the complaint. Id. Regardless of how it is obtained, the notice is a "prerequisite to judicial action." Rojo v. Kliger, 52 Cal. 3d 65, 83 (1990). Moreover, the employee must file a claim for violation of the FEHA within one year of receipt of the right-to-sue notice from the DFEH. Id. at § 12965(d)(1).

Plaintiffs Ramirez-Castellanos and Espinoza timely dual filed an administrative charge with the EEOC and DFEH on October 3, 2016 and March 14, 2017, respectively. Mot. at 6. Plaintiffs requested and obtained Right-to-Sue Notices from the EEOC on April 19, 2017 and May 9, 2017, respectively. Id.

Plaintiffs' then filed this suit on May 16, 2017. Compl., ECF No. 1. However, they had not yet obtained Right-to-Sue notices from the DFEH—a prerequisite to filing their FEHA claims before this Court. In fact, Plaintiffs only requested their notices from the DFEH in April 2018, after Defendant's attorney brought the lack of notice to their attention. Mot at 13. The DFEH issued their notices shortly after, stating they did not provide them sooner because of an administrative error. Opp'n at 16.

Defendant argues obtaining their notices from the DFEH nearly a year after filing their suit, does not remedy Plaintiffs' failure to initially meet that exhaustion requirement. Reply. 3. Indeed, although Plaintiffs' had their EEOC right-to-sue letter prior to commencing this suit, an EEOC notice "does not satisfy the jurisdictional requirement of exhaustion of remedies as to FEHA claims." Mot. at 7 (quoting Alberti v. City & Council of San Francisco Sheriff's Dept., 32 F. Supp. 2d 1164, 1174 (N.D. Cal. 1998)). Instead, an EEOC notice only satisfies the exhaustion requirements for "action[s] based on Title VII." Martin v. Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1726 (1994). Accordingly, Plaintiffs needed to have obtained their DFEH notices prior to commencing this suit to properly exhaust their remedies.

Moreover, the DFEH's administrative error does not excuse Plaintiffs' failure to exhaust administrative remedies. The DFEH was required to issue notices, even if Plaintiffs did not request them, "upon completion of their investigation, and not later than one year after [the charges were filed]." Cal. Gov't Code § 12965(b). Therefore, the DFEH did err by issuing the

notices on April 2018, since it should have issued them by October 2017 and March 2018, a year after the chargers had been filed. But this error is not to blame for Plaintiffs' failure. Plaintiffs should have requested the notices before they filed suit in May 2017, just as they did with the EEOC. Plaintiffs have not even contended that they ever requested their notices prior to commencing this suit. See Opp'n. Accordingly, Plaintiffs' reliance on Grant v. Comp. USA, Inc., is misplaced. 109 Cal. App. 4th 637 (2003) (excusing plaintiff's failure to obtain notice of right to sue, because she filed the suit after the DFEH was required to issue the notice).

The Court finds Plaintiffs' FEHA claims fail as a matter of law, because they did not exhaust their administrative remedies before filing those claims. The Court therefore GRANTS summary judgment on Plaintiffs' third and sixth causes of action.

2. Plaintiff Ramirez-Castellanos' Employment

Defendant argues Plaintiff Ramirez-Castellanos' claims against Nugget also fail as a matter of law because he was not a Nugget employee. Mot. at 7. Plaintiffs, on the other hand, argue Defendants Nugget and One Stop jointly employed Plaintiff Ramirez-Castellanos. Opp'n 11.

a. Applicable Employment Test

The parties do not dispute that courts must apply the common-law test, in both Title VII and Section 1981 claims, to determine whether a defendant is a joint employer. Reply at 4 n. 2; Opp'n at 11. They do dispute, however, which common law test the Court should adopt. Plaintiffs argue the Court should adopt the common-law agency test adopted by the Ninth Circuit in

U.S. Equal Employment Opportunity Commission v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019). Conversely, Defendant argues the Court should not rely solely on that analysis and should instead also consider case law in other circuits. Reply at 10. The Court disagrees.

Supreme Court precedent dictates that "the common-law agency test" governs when statutes like Title VII, "do not meaningfully define terms like 'employer' and 'employee.'" Global Horizon, 915 F.3d at 638. Accordingly, the Ninth Circuit expressly decided "the common-law agency test is the most appropriate one for Title VII purposes." Id. And while the court did look to the Fifth and Seventh Circuits' analysis when considering automatic liability of a joint employer, it only did so to expressly adopt that standard. Id. In other words, just as it had expressly decided that in the Ninth Circuit the common-law agency test governs, it also expressly decided that one joint employer is not automatically liable for the actions of the other. Id. This Court is bound by those two conclusions. Accordingly, the Court need not look elsewhere, as Defendant pleads, when analyzing joint employment. As other courts within this circuit have done, this Court will only employ the Ninth Circuit analysis as set-forth in Global Horizons. See e.g., Horn v. Experis US Inc., No. 17-cv-0814, 2019 WL 2868963, at *6 (E.D. Cal. July 3, 2019), adopted by this court, No. 17-cv-0814, 2019 WL 4955189 (E.D. Cal. Oct 8, 2019); see also Di-az v. Tesla, Inc., No. 3:17-cv-06748, 2019 WL 7311990, at *8 (N.D. Cal. Dec. 30, 2019).

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b. Analysis

Under the common-law agency test, "the principal guidepost" is the element of control." Global Horizons, 915 F.3d at 638. The element of control is "the extent of control that one may exercise over the details of the work of the other." Id. (quoting Clackamas Gastroenterology Assoc., P.C. V. Wells, 538 U.S. 440, 448 (2003)). Courts consider the following non-exhaustive list of factors when analyzing control:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. No one factor is decisive; "all of the incidents of the relationship must be assessed and weighed." Id.

Plaintiffs argue Defendant jointly employed Plaintiff Ramirez-Castellanos with One Stop, because Nugget asserted significant control over him. Opp'n at 11. For example, Plaintiff argues: (1) Nugget supervisors and managers determined the quality of and instructed Ramirez-Castellanos's work; (2) he worked with Nugget employees daily; (3) he rarely communicated with One Stop; (4) Nugget provided most of his cleaning supplies; and (5) Nugget assigned work to him and determined he could no longer work for them. Id.

Defendant disputes all of this, while at the same time arguing that there is no genuine issue of material fact. Reply at 7-9. Defendant contends for instance that: (1) Ramirez-

Castellanos communicated with One Stop at least once a day; (2) providing him with cleaning supplies does not support he was joint employed by Nugget; (3) not granting him access to the store without a Nugget employee implies he is not a Nugget employee; (4) One Stop hiring him to clean Nugget's floors, implies it is outside the scope of Nugget employees to clean floors, and (5) the award Nugget gave Plaintiff is just a nice "sentiment," but not an indication of control. Id. Defendant therefore posits "these facts demonstrate Nugget did not have the level of control necessary for a finding of joint employer status." Reply at 10.

But "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," not functions for this Court. Anderson, 477 U.S. at 257. Defendant cannot have its cake and eat it too. By disputing Plaintiffs' facts in a lengthy three-page analysis, Defendant implicitly admits there are genuine issues of material fact. Whether Defendant jointly employed Plaintiff Ramirez-Castellanos is for a jury to decide. The Court therefore denies summary judgment on Ramirez-Castellanos' claims on this basis and does not need to address Plaintiffs' alternative third-party interference argument. See Opp'n at 12.

3. Hostile Work Environment

Defendant seeks summary judgment on Plaintiffs' first and second causes of action under Title VII and Section 1981 for hostile work environment. Mot. at 11. Plaintiffs, in their opposition, argue they can establish a prima facie case of hostile work environment. Opp'n at 13.

Section 1981 guarantees "all persons" the same right "to make and enforce contracts." 42 U.S.C. § 1981. A hostile work environment violates this guarantee by interfering with "the enjoyment of all benefits . . . and conditions of the contractual [employment] relationship." Manatt v. Bank of America, NA, 339 F.3d 792, 797 (9th Cir. 2003). Similarly, Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C § 2000e-2. Accordingly, Title VII prohibits an employer from "requiring people to work in a discriminatorily hostile or abusive environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

The Ninth Circuit evaluates Section 1981 claims and Title VII claims under the same standard. Manatt, 339 F.3d at 798. To establish a prima facie hostile work environment under either statute, Plaintiffs must show: (1) they were subjected to verbal or physical conduct because of their race or national origin, (2) the conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of Plaintiffs' employment and create an abusive work environment. Vazquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003). Lastly, even if a hostile working environment exists, "an employer is only liable for failing to remedy harassment of which it knows or should know." Id. The Court addresses each factor in turn.

a. Statute of Limitations

When addressing the hostile work environment claim,

Defendant makes a brief one-sentence argument that Plaintiffs did not meet the Title VII statute of limitations requirement. Mot. 14. Specifically, Defendant argues Plaintiff Espinoza is barred because he "filed his administrative charge with the EEOC in March 2017, more than one year after he last claims to have experienced harassment at Nugget." Id.

An employee must file an unlawful employment practice with the EEOC within 300 days of the alleged unlawful practice. 42 U.S.C § 2000e-5(e)(1); see also National R. R. Passenger Corp. v. Morgan, 536 U.S. 101, 109-10(2002). "Each discriminatory act starts a new clock for filing charges." Morgan, 536 at 113. Accordingly, the charge must be filed within the 300-day time period after a discrete discriminator act occurred. Id.

Here, Defendant argues Espinoza's claims are untimely because "the alleged harassing comments" occurred "certainly no later than mid-2016." Mot. at 13. Plaintiffs contend Defendant subjected Espinoza to "racist comments" until "at least mid-2016." Mot. at 14. That the parties dispute the exact timeline is a genuine dispute of fact. Nevertheless, if the last harassing comment occurred in mid-2016, then it falls squarely within the 300-day requirement from March 2017. Accordingly, the Court denies summary judgment on Plaintiff Espinoza's Title VII claims on this basis.

b. Unwelcomed Discriminatory Conduct

Plaintiffs argue they were subjected almost daily to "anti-immigrant insults, jokes, and comments, as well as . . . other harassing conduct." Opp'n at 14. Plaintiff Espinoza argues this harassment endured throughout his employment from 2011

through 2016. Id. Defendant's maintenance director Martinez, as well as managers Billings and Sanchez, all made "numerous disparaging and racial comments about Latinos." Id. For instance, Manager Billings said Mexicans are "cholos," criminals, and that their work is "shit." Id. at 15. Moreover, Manager Sanchez said Latinos are "garbage," do bad work, and steal jobs from Americans. Id.

Plaintiff Ramirez-Castellanos likewise argues he was subjected to similar racial discrimination. Id. He contends that Nugget's night managers insulted him, called him names, and mocked his native language, throughout the 10-month period he worked there. Id. For example, Manager Billings asked him if he was "shopping," "looking for food," or "eating food" after Ramirez-Castellanos discarded garbage, because that is what "Salvadorian guys do." Id. He also told him that "Salvadorian guys are used to looking at dirty floors." Id. And he called him a "cabrón," a derogatory Spanish word akin to "dumbass." Id. Manager Billings also intentionally ran into Ramirez-Castellanos's shoulder as they walked down the aisle, stating "Salvadorians think they are tough." Id. Moreover, both Sanchez and Billings told Plaintiff that Salvadorians are "lazy" and "bad workers." Id. Sanchez even went as far as to accuse him of theft. Id.

Defendant does not necessarily dispute that there was such discriminatory conduct—it only disputes that it was ever made aware of this alleged harassment. See Mot. Accordingly, the Court finds in viewing the facts in the light most favorable to Plaintiffs, a jury could find Plaintiffs have shown they were

subjected to verbal and physical harassing conduct on account of their race and national origin. Neither party addresses the issue of whether this conduct was "unwelcomed." But based on the nature of the conduct the Court presumes for purposes of summary judgment that the conduct was unwelcomed.

c. Severe and Pervasive

To determine whether discriminatory conduct is sufficiently severe or pervasive, the Court must consider the totality of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Vasquez, 349 F.3d at 642. Moreover, the working environment must be subjectively and objectively perceived as abusive. Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).

Plaintiffs argue the hostile conduct was severe and pervasive because it was "frequent, physically threatening, humiliating, and unreasonably interfered with Plaintiffs' work performance. Opp'n at 16. The required level of severity or seriousness of the hostile conduct "varies inversely with the pervasiveness or frequency of the conduct." Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 872 (9th Cir. 2001). Here, Plaintiffs allege they were frequently harassed by managers Sanchez and Billings for months and years respectively. Therefore, Defendants' alleged hostile conduct need not be especially severe or serious. The remaining question, however, is whether the conduct was subjectively and objectively perceived as abusive.

(i) Objectively Hostile

"Whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics." Fuller, 47 F.3d at 1527.

Defendant argues Plaintiffs' cannot show "a reasonable person in [Plaintiffs'] circumstances would have perceived their work environment as hostile." Mot. 13. However, Defendant does not expand on that contention. See Mot. 13. Instead, it argues Ramirez-Castellanos "never complained to management" about the alleged harassment "until after" he was terminated. Id. It also argues Espinoza no longer suffered harassment after he filed the internal complaint. Id.

But the Court finds Plaintiffs have brought forth enough evidence to show a reasonable person in their circumstance would have perceived the managers' actions as offensive. Plaintiffs argue two other employees found the statements to be offensive. Opp'n at 17. For instance, manager Vicente Osegueda admitted he would find the statements offensive. Id. Moreover, Plaintiffs contend a separate employee also complained about a statement Martinez made, when he threatened Latino employees "that he could find more people because people that clean the floor were illegal and they just came to get these types of jobs." Id. Thus, a reasonable man in Plaintiffs' circumstances would have found the hostile conduct "sufficiently severe and pervasive to alter the terms and conditions of his employment." Nichols, 256 F.3d at 873 (finding "the sustained campaign of taunts" directed at Plaintiff "designed to humiliate and anger him," were sufficiently severe and pervasive).

(ii) Subjectively Hostile

"Assuming that a reasonable person would find a workplace hostile, if the victim 'does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.'" Nichols, 256 F.3d at 873.

Plaintiffs argue their "discrimination complaints, fear that Sanchez and Billings would physically harm them, and [Plaintiff] Espinoza's transfer request" are all proof that they subjectively perceived Nugget's work environment to be hostile. Opp'n at 17. Moreover, Plaintiffs believed the conduct to be so severe that it even impacted their mental health. Id. at 16. Ramirez-Castellanos "became withdrawn, turned away from friends, started to drink more," and even stopped working out despite his normal routine of practicing martial arts almost daily. Id. Moreover, Plaintiffs' mental-health experts found the hostile conduct had a significant effect on Espinoza. Opp'n at 16 (redacted to protect Plaintiff Espinoza's privacy). Defendant does not dispute that Plaintiffs subjectively found the conduct to be severe and pervasive. Accordingly, the Court finds Plaintiffs have shown they subjectively found the conduct to be severe and pervasive. Moreover, because Plaintiffs have satisfied their showing for each element, the Court finds in looking at the evidence in the light most favorable to Plaintiffs, that a jury could find they have demonstrated a prima facie case of a hostile work environment claim.

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d. Nugget's Knowledge of Harassment

Even though Plaintiffs have proven a prima facie case of a hostile work environment, the Court "must [still] consider whether [Defendant] is liable for the harassment." McGinest v. GTE Service Corp., 360 F.3d 1103, 1118 (9th Cir. 2004). An employer may be held either vicariously liable for the acts of a supervisor or negligently liable for failing to correct or prevent discriminatory conduct by an employee. Reynaga v. Roseburg Forest Products, 847 F.3d 678, 688-89 (9th Cir. 2017).

Here, two managers and a maintenance director were the alleged perpetrators of the hostile work environment. Accordingly, as they are managers and directors, rather than just employees, Defendant is vicariously liable for their behavior. Defendant argues that its management "was never aware of any complaints Ramirez-Castellanos [made] about race or national origin discrimination," and that Espinoza did not actually complain about discrimination because he qualified his statement by saying Sanchez made him "feel stupid" instead. Mot. at 14. Yet, Plaintiffs have submitted more than enough evidence to the contrary. Plaintiffs firmly maintain that they both made Defendant aware, through its managers, that they were victims of discrimination. Opp'n at 18 n. 13. Instead of addressing those complaints, Plaintiffs maintain Nugget management simply turned a blind eye. Id. Because the Court must view this evidence in the light most favorable to Plaintiffs, the Court finds Plaintiffs have established there is a genuine issue of material fact as to whether Defendant is liable for the hostile work environment. Therefore, the Court

DENIES summary judgment on Plaintiffs' first and second causes of action.

4. Race and National Origin Discrimination

Defendant seeks summary judgment on Plaintiffs' supposed claims for race and national origin discrimination. Mot. at 15. However, Plaintiffs do not assert these claims in their Complaint, nor do they make mention of them in their Opposition brief. The Court therefore need not address Defendant's request for summary judgment on these nonexistent claims.

5. Retaliation Claims

In their fourth and fifth causes of action, Plaintiffs allege Nugget retaliated against them for complaining to their supervisors that they were victims of racial and national origin discrimination, in violation of Title VII and Section 1981. FAC. Defendant seeks summary judgment on these claims.

Title VII prohibits employers from discriminating against an employee because an employee has opposed an unlawful employment practice, "or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing [related to the unlawful practice]." 42 U.S.C. § 2000e-3(a). To prevail on their retaliation claims, Plaintiffs must establish a prima facie case of retaliation. Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000). If Plaintiffs establish a prima facie claim, the burden shifts to Defendant "to articulate a legitimate nondiscriminatory reason for its decision." Id. If Defendant articulates such a reason, the burden shifts back to Plaintiffs to show the reason "was merely a pretext for a discriminatory

motive." Id.

a. Prima Facie Case

To establish a prima facie case of retaliation, Plaintiffs must show that (1) they engaged in a protected activity; (2) Nugget subjected them to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. Ray, 217 F.3d at 1240. Defendant does not dispute that Plaintiffs engaged in a protected activity when they complained about the alleged discrimination. See Id. at 1240 n.3 (finding making an informal complaint with a supervisor is a protected activity). The Court therefore only addresses the last two factors.

(i) Adverse Employment Action

The Ninth Circuit takes "an expansive view of the type of actions that can be considered adverse employment actions." Ray, 217 F.3d at 1241. Moreover, it has adopted the EEOC test, finding an "adverse employment action" is adverse treatment that is "reasonably likely to deter the charging party or others from engaging in protected activity." Id. at 1246.

Plaintiffs argue Nugget subjected Ramirez-Castellanos to an adverse employment action when they fired him for complaining about being discriminated against. Opp'n at 20. Moreover, they contend Nugget also subjected Espinoza to adverse employment by: (1) not granting his transfer request, (2) unfairly scrutinizing his work, (3) giving him his first negative performance review, and (4) dismissing his discrimination complaints. Id. 20-21. Viewing the evidence in the light most favorable to Plaintiffs, the Court agrees that a jury could find Defendant subjected

Plaintiffs to an action of adverse employment.

First, termination constitutes an adverse employment action. See Ray, 217 F.3d at 1241 n. 4 (discussing Nidds v. Schindler Elevator Corp., 113 F.3d 912, 912 (9th Cir. 1996). While the question still remains as to whether Ramirez-Castellanos' termination was casually linked to his alleged reports of discrimination, there is no doubt that the termination itself constitutes an adverse employment action. Moreover, a jury could also find Espinoza was subjected to adverse employment actions. If proven, "undeserved performance ratings . . . would constitute 'adverse employment [actions].'" Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987). Accordingly, a jury could find Defendant subjected Espinoza to an adverse employment action when it gave him his first and only negative performance review after he complained about discrimination.

(ii) Causal Link

When there is a close proximity in time between a protected activity and the alleged adverse employment action, the casual link "can be inferred from timing alone." Thomas v. City of Beaverton, 379 F.3d 802, 812 (9th Cir. 2004).

Here, according to Plaintiffs, Ramirez-Castellanos was fired "one day after he complained about Sanchez's anti-immigrant remarks." Opp'n at 21. Moreover, Nugget gave Espinoza his first and only negative performance review "close on the heels of his complaints." Ray, 217 F.3d at 1244 (finding a causal link exists when the adverse action was "implemented close on the heels of [plaintiff's] complaints."). Accordingly,

the Court finds the casual link between Plaintiffs' complaints of discrimination and the adverse employment actions they were subjected to, can be inferred from timing alone. The Court therefore need not address Plaintiffs' argument in the alternative, that Nugget cannot meet its burden under an affirmative defense to liability. See Opp'n at 21.

b. Nondiscriminatory Reason

Because when looking at the evidence in the light most favorable to Plaintiffs, they can establish a prima facie retaliation case, the burden shifts to Defendant to provide a nondiscriminatory reason for their alleged adverse actions. Ray, 217 F.3d at 1240. Defendant repeatedly argues that any adverse employment action was actually a result of Plaintiffs' poor employment performance. Reply at 11. Therefore, the burden shift backs to Plaintiff to establish that this nondiscriminatory reason is a "pretext[] for retaliation." Ray, 217 at 1244.

c. Pretext for Reason

A plaintiff may establish that the employer's alleged explanation is a pretext for impermissible retaliation by "either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Yartzoff, 809 F.2d at 1377.

Plaintiffs argue they can proffer both direct and indirect pretextual evidence to rebut Defendant's alleged nondiscriminatory reasons. Opp'n at 24-25. For direct evidence, Plaintiffs proffer an email in which a Nugget manager

asks a fellow employer to look for performance related conduct to terminate or discipline Espinoza. Id. at 24. As for Ramirez-Castellanos, Plaintiffs introduce a recorded call between Plaintiff and his One Stop supervisor, in which the supervisor explains that Nugget wants him fired because the manager "doesn't want to hear any more complaints from you or anyone else." Id. at 25. Lastly, as indirect evidence, Plaintiffs re-establish the evidence they presented in making their prima facie claim. Id. The Court finds this evidence to be compelling.

Defendant argues Plaintiffs reliance on the evidence they used in their initial prima facie burden, does not meet the standard to show pretext. Reply at 12. But as stated above, "[e]vidence already introduced to establish the prima facie case may be considered," and there may even be cases "where [that] initial evidence . . . will suffice to discredit the defendant's explanation." Yartzoff, 809 F.2d at 1377. Moreover, Defendant's argue the Court should not consider Plaintiff Ramirez-Castellano's phone recording, because it was illegally obtained. Reply at 12. Defendant's argue it is therefore impermissible hearsay under the Federal Rules of Evidence. Id. However, the nonmoving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Burch, 433 F. Supp. 2d at 1119. Accordingly, the Court will consider the recording to the extent it establishes there is a genuine dispute of material fact as to this claim.

The Court finds in viewing the evidence in the light most favorable to Plaintiffs, that a jury could find Plaintiffs have

shown Defendant's nondiscriminatory reason is pretextual. Moreover, "a grant of summary judgment . . . is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the elusive factual question of intentional discrimination." Yartzoff, 809 F.2d at 1377. The Court therefore DENIES summary judgment on Plaintiffs' fourth and fifth causes of action for retaliation.

6. Wrongful Termination in Violation of Public Policy

Defendant seeks summary judgment on Plaintiff Ramirez-Castellanos' seventh cause of action for wrongful termination in violation of public policy. Mot. at 19. As Defendant points out, Plaintiff Ramirez-Castellanos does not respond to this argument in Plaintiffs' opposition. See generally Opp'n. The Court interprets Ramirez-Castellanos' failure to oppose this argument as acquiescence of its merit. The Court also finds Defendant's argument that Ramirez-Castellanos has neglected to clearly articulate the public policy upon which he bases his claim (which is presumably based on FEHA) to be meritorious. As explained above, Raimrez-Castellanos is jurisdictionally barred from bringing a FEHA claim. Summary judgment on this cause of action is GRANTED.

III. ORDER

For the reasons set forth above, the Court GRANTS Defendant Nugget Markets' Motion for Summary Judgment on Plaintiffs' third cause of action for hostile work environment under FEHA and sixth cause of action for retaliation under FEHA. The Court also GRANTS Defendant Nugget Markets' Motion for Summary Judgment on

Plaintiff Ramirez-Castellanos' seventh cause of action for common law wrongful discharge;

The Court DENIES Defendant Nugget Markets' Motion for Summary Judgment on Plaintiffs' first, second, fourth and fifth causes of action for hostile work environment and retaliation under Title VII and 42 U.S.C. §1981.

IT IS SO ORDERED.

Dated: May 27, 2020

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE