

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

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THOMAS BAINBRIDGE,

Plaintiff,

vs.

LOFFREDO GARDENS, INC.,

Defendant.

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**No. 4:02-cv-40192**

**ORDER ON  
SUMMARY JUDGMENT**

This matter is before the Court on Defendant's Motion for Summary Judgment (Clerk's No. 10). Defendant moved for summary judgment on Plaintiff's claims on December 31, 2002. Hearing was held on the motion on June 13, 2003. Attorney Michael Reck appeared for Defendant, and attorney Thomas Newkirk appeared for Plaintiff. The matter is now fully submitted for review. For the reasons discussed below, Defendant's Motion for Summary Judgment is **granted**.

**I. SUMMARY OF MATERIAL FACTS**

Thomas Bainbridge is a 53-year-old Caucasian male who is married to Yumiko Bainbridge, a female of Japanese ancestry. In April of 1998, Bainbridge applied for employment with Loffredo Gardens, Inc., a fresh produce company. After an initial interview, Bainbridge interviewed with Mark Zimmerman, the Comptroller, and Gene

Loffredo Jr., CEO of the company. Bainbridge was ultimately hired to manage the warehouse.

Bainbridge claims that from June 25, 1998, through June 15, 2000, he heard at least 20-25 derogatory comments about Asians, such as “Jap”, “nip”, and “gook”. Though Bainbridge claims to have taken contemporaneous notes of the alleged derogatory slurs, he can only identify a few specific instances in which he contends such racial slurs were made in his presence. Bainbridge alleges that on June 25, 1998, Jim Loffredo, Vice-President in charge of operations, referred to a white employee as a “Jap”. Bainbridge asserts he only heard Jim Loffredo use this term on this one occasion. Bainbridge next claims that on November 20, 1998, he overheard Mike Loffredo, Vice-President in charge of purchasing, refer to an Asian customer as a “Jap”, and that on June 12, 1999, Mike Loffredo referred to an Asian customer as a “nip”. Finally, Bainbridge claims that on October 29 1999, while showing his Nissan SUV to Mike Loffredo and Larry Loffredo, Vice-President of operations, Larry Loffredo said, “Yea, those Japs can do something right.” Bainbridge claims that in addition to these specific instances and dates, Mike Loffredo used the term “Jap” or “nip” in front of Bainbridge at least once a month even after Bainbridge had reminded him that his wife was Japanese. Bainbridge states that he believed all the harassment and discriminatory remarks were made just to aggravate him.

Bainbridge also alleges that racial slurs were made in reference to other minorities, including the slurs “spic”, “wetback”, “monkey”, and “nigger”. Bainbridge specifically asserts that Gene Loffredo, Sr., Gene Loffredo, Jr., and Larry Loffredo used the term “spic” almost daily. Bainbridge states that he complained to Gene Loffredo, Jr., in 1998 about the derogatory remarks being made about Asians.

Bainbridge asserts that on June 15, 2000, while having a conversation with Mike Loffredo, Mike Loffredo stated that they were going to have another “Jap” produce company try to run Loffredo Gardens out of business. This comment drove Bainbridge to complain to Dave Dennis, his immediate supervisor. Bainbridge alleges that he told Dennis about the racial slurs pertaining to Asian employees and about the use of the word “nigger” in the workplace. Bainbridge claims that Dennis said, “Okay. I know what to do. I’ll take care of it.” Bainbridge then took his scheduled vacation. Loffredo Gardens denies that Bainbridge ever made such a complaint to Dennis.

The day after Bainbridge left for his vacation, three supervisors, Mike Jacobs, Lee Bunch, and Mark DeJoode, approached Gene Loffredo, Jr., and Zimmerman complaining about Bainbridge’s abusive behavior. According to Loffredo Gardens, these three supervisors made it clear to Gene Loffredo, Jr., and Zimmerman that either Bainbridge had to be terminated from his employment with the company or the three of them would terminate their own employment.

Loffredo Gardens alleges that once it learned that it risked losing three supervisors because of one supervisor's misconduct, Gene Loffredo, Jr., and Zimmerman reached the decision that Bainbridge had to go. Loffredo Gardens decided to communicate the termination through a letter because Loffredo Gardens employees were frightened by Bainbridge's volatile and violent behavior. Gene Loffredo, Jr., and Zimmerman informed Dennis that they made the decision to terminate Bainbridge's employment. They then asked Dennis to sign the termination letter to indicate they were all in agreement. Dennis complied with the request. The termination decision was communicated to other managers, and a letter was promptly sent to Bainbridge terminating his employment. Although the termination letter was mailed to Bainbridge, he apparently did not receive it and returned to work after his vacation ended. Upon his arrival at the workplace, Zimmerman and Dennis personally informed Bainbridge his employment had been terminated.

On April 24, 2002, Bainbridge filed a complaint alleging that his discharge from employment was motivated in substantial part by race or association with race, and in retaliation for complaints of discrimination and harassment, in violation of 42 U.S.C. § 2000e, 42 U.S.C. § 1981, and Iowa Code Chapter 216. Bainbridge also asserts that because of his association with a Japanese American, he was subjected to a hostile work environment due to the racial comments made by upper management about Asians, blacks,

and other minorities. Bainbridge seeks lost wages and benefits, front pay, and emotional distress damages. Loffredo Gardens admits that certain individuals employed by Loffredo Gardens knew of Bainbridge's marriage to a Japanese American, however, it denies that Bainbridge's marriage to a Japanese female had anything to do with any decisions regarding his employment.

On December 31, 2002, Loffredo Gardens filed a Motion for Summary Judgment, asserting summary judgment is required because there is no showing of causation between Bainbridge's allegedly protected conduct and the decision to terminate his employment. Loffredo Gardens further claims that compelling reasons for Bainbridge's termination occurred between his allegedly protected conduct and the decision to terminate his employment, and that Bainbridge's behavior either rendered him unqualified for his job or established a legitimate non-discriminatory reason for his discharge. Loffredo Gardens also states that although Bainbridge alleges retaliatory discharge, he did not do so before the Iowa Civil Rights Commission (ICRC) or the EEOC, and, therefore, his retaliation claim is barred due to his failure to exhaust his administrative remedies. Loffredo Gardens claims that Bainbridge's hostile work environment claim is also barred because Bainbridge cannot show any conduct directed at him because of his race, and because the facts he alleges are insufficient to establish a hostile work environment.

## II. APPLICABLE LAW AND DISCUSSION

### A. Standard of Review.

“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.” Swierkiewicz v. Soreman, 122 S. Ct. 992, 998-999 (2002). Summary judgment is a drastic remedy, and the Eighth Circuit has recognized that it “must be exercised with extreme care to prevent taking genuine issues of fact away from juries.” Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000). Summary judgment should seldom be granted in employment cases. Barrett v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000).

The party moving for summary judgment bears the initial burden of “informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue.” Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323); see also Shelter Ins. Co. v. Hildreth, 255 F.3d 921, 924 (8th Cir. 2001); McGee v. Broz, 251 F.3d 750, 752 (8th Cir. 2001). Once the moving

party has carried its burden, the opponent must show that a genuine issue of material facts exists. Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999). The court gives the non-moving party the benefit of all reasonable inferences and views the facts in the light most favorable to that party. de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

“Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.” Shelton v. ContiGroup Companies, Inc., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999)). Summary judgment should not be granted if the court can conclude that a reasonable trier of fact could return a verdict for the non-moving party. Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). In light of these standards, the Court considers the present motion.

**B. Title VII, ICRA, and 42 U.S.C. § 1981 Retaliation.**

Bainbridge’s complaint alleges that his discharge from employment was motivated in substantial part by race or association with race, and in retaliation for complaints of

discrimination and harassment, in violation of 42 U.S.C. § 2000e, 42 U.S.C. § 1981, and Iowa Code § 216. Loffredo Gardens asserts that Bainbridge's retaliation claims are barred because he never presented them to the ICRC or the EEOC, and, therefore, he has not exhausted his administrative remedies.

Bainbridge has brought a claim for retaliation under 42 U.S.C. § 1981, which does not require the exhaustion of administrative remedies. See Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998) (§ 1981 does not have an exhaustion of administrative remedies requirement); Aramburu v. Boeing Co., 112 F.3d 1398, 1410 (10th Cir. 1997) (employee not required to exhaust any administrative remedies before bringing claim under § 1981); Caldwell v. National Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971) (“[A]ppellant has an independent remedy under § 1981 without respect to exhaustion under Title VII.”). Bainbridge's claim for retaliation under § 1981 is, therefore, not barred.

In addition to his § 1981 retaliation claim, Bainbridge has also brought a claim for retaliation under Title VII and Iowa Code Chapter § 216. Title VII and § 216 require a plaintiff to exhaust administrative remedies before bringing suit in federal court. “Before the federal courts may hear a discrimination claim, an employee must fully exhaust [his] administrative remedies.” Burkett v. Glickman, 327 F.3d 658, 660 (8th Cir. 2003); see also Iowa Code § 216.17 (2003). “Administrative remedies are exhausted by the timely filing of a charge and the receipt of a right-to-sue letter.” Faibisch v. Univ. of

Minn., 304 F.3d 797, 803 (8th Cir. 2002); see also Baker v. John Morrell & Co., 220 F. Supp. 2d 1000, 1009 (N.D. Iowa 2002) (“In order to initiate a claim under the ICRC, a party must first timely file an administrative complaint with the ICRC and obtain a right-to-sue letter.”) (citing Iowa Code § 216). “[T]he completion of that two-step process constitutes exhaustion only as to those allegations set forth in the EEOC charge and those claims that are reasonably related to such allegations.” Id. “Because persons filing charges with the EEOC typically lack legal training, those charges must be interpreted with the utmost liberality in order not to frustrate the remedial purposes of Title VII.” Cobb v. Stringer, 850 F.2d 356, 359 (8th Cir. 1988). “Accordingly, the sweep of any subsequent judicial complaint may be as broad as the scope of the EEOC investigation which could reasonably be expected to grow out of the charge of discrimination.” Id. (quoting Griffin v. Carlin, 755 F.2d 1516, 1522 (11th Cir. 1985)) (internal quotation marks omitted).

In the complaint form Bainbridge submitted to the ICRC, he stated as follows:

My wife is Japanese and owners of Loffredo Produce are aware of this. It hasn't stopped the use of words Jap, & Nip in my presence on many occasions. I have voiced my dislike about these words and how it offends me. . . June 15th 2000 the word Jap was used again and I informed the operation manager (Dave Dennis) of my dislike and was tired of hearing. He said he would take care of it. I went on vacation on June 16th and when I returned . . . the 28th I had no job. Other reasons were given. This type of discriminating remarks were given. . . have heard, made for a intimidating,

hostile, and offensive working environment for me. Plus upsetting my wife and children.<sup>1</sup>

Bainbridge asserts that retaliation was actually raised in the ICRC complaint, that it was investigated by the ICRC, and that Loffredo Gardens was on notice that it was an issue, thereby satisfying any exhaustion requirements. Bainbridge points to Exhibits 13, 23, 24, and 25 in support of this conclusion. Bainbridge's Exhibit 13 is a spreadsheet detailing employees who were terminated from employment, their race, what department they were in, the decision maker, the date of the decision, and the reason for the termination. It is not clear whether this is a document Bainbridge created or whether this is an internal document kept by Loffredo Gardens. In any event, its relevance to the determination of whether Bainbridge has exhausted his administrative remedies is unknown. Bainbridge's Exhibit 23 is the ICRC jurisdictional intake sheet. It lists "retaliation" under the heading "Incident". It is unclear from the record who completed this form, what function it serves in the process of investigating an ICRC complaint, or whether Loffredo Gardens was initially given a copy of this form by the ICRC. This may be an internal document used for processing complaints, but the record does not reflect that Loffredo Gardens ever received a copy of this form. Bainbridge's Exhibit 24 is the ICRC

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<sup>1</sup> Includes original grammatical errors. The ellipses indicate those portions of the document that are illegible.

questionnaire mailed to Bainbridge; it contains questions pertaining to retaliation. Bainbridge's Exhibit 25 is the ICRC questionnaire mailed to Loffredo Gardens; it also contains questions pertaining to retaliation.

The actual ICRC complaint form provides twelve boxes in which a complainant can check the bases upon which they believe they have suffered discrimination. Bainbridge checked the box labeled "Race", including the handwritten note "by Assoc." Bainbridge did not check the box marked "Retaliation\*".<sup>2</sup>

In Faibisch, the court found that the plaintiff had not exhausted her administrative remedies with respect to her Title VII sex discrimination claim. Faibisch, 304 F.3d at 803. "The statement of sex discrimination in the charge follows a long, particularized account of the alleged disability-based discrimination, stating, "Eventually, management refused to renew my employment contract for the upcoming year, resulting in my termination from employment." Id. The court found that, even assuming the plaintiff's contention that her termination was "due in part to gender based discrimination," she had failed to set forth any facts in her EEOC charge to establish "any connection between the alleged gender discrimination and her termination." Id. Similarly, in the present case, Bainbridge has failed to set forth any facts in his ICRC complaint form that demonstrate any connection

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<sup>2</sup> The asterisk stated, "Because I filed a prior complaint or opposed a discriminatory practice."

between his claim that he complained to Dennis and his statement that when he returned from his vacation his job was gone and “[O]ther reasons were given.” Such a connection between his complaint and his termination would be necessary to demonstrate a charge of retaliation.

In Williams v. Little Rock Municipal Water Works, the court addressed whether a plaintiff who had failed to check the appropriate box on the administrative complaint form had exhausted her administrative remedies. Williams v. Little Rock Mun. Water Works, 21 F.3d 218 (8th Cir. 1994). The plaintiff in that case had filed a complaint in federal court alleging retaliation and race discrimination against her employer. Id. at 221. In holding that the district court did not err in granting the defendant’s motion for summary judgment as to plaintiff’s race discrimination claims, the court stated that plaintiff’s claims of race discrimination were separate and distinct from her claims of retaliation, noting that not only had plaintiff marked the box entitled “retaliation”, she had *not* marked the box entitled “race”. Id. at 223. The court further noted that the plaintiff’s EEOC complaint did not even hint of a claim of race discrimination and that the only claim properly addressed by the EEOC was the retaliation claim. Id.

In Kells v. Sinclair-Buick-GMC Truck, Inc., the court found that the EEOC charge “failed to put the Defendant on notice that Kells was claiming he was subject to harassment.” Kells v. Sinclair-Buick-GMC Truck, Inc., 210 F.3d 827, 836 (8th Cir.

2000). In his EEOC charge, Kells asserted he had been removed from his employment position due to his disability and that the defendant's actions "were taken in an effort to force [him] to resign." Id. The district court dismissed Kells' harassment claims, finding Kells had failed to exhaust his administrative remedies as to those allegations. Id. The Eighth Circuit agreed with the district court, finding "Kells' claim that he was unlawfully subject to verbal harassment by [one employee] is not reasonably related to his claims of discriminatory demotion and termination at the hands [of another]." Id. The court found that the EEOC charge "failed to put the Defendant on notice that Kells was claiming he was subject to harassment." Id. "[W]e are prohibited from inventing *ex nihilo*, a claim which simply was not made." Id. (quoting Shannon v. Ford Motor Co., 72 F.3d 678, 685 (8th Cir. 1996)) (internal quotation marks omitted).

In a September 7, 2000, letter addressed to the ICRC, then acting counsel for Loffredo Gardens stated:

[I]t is clear that the decision to terminate Mr. Bainbridge had nothing to do with his alleged complaint, as the decision makers were not even aware of it. Instead, Mr. Bainbridge's separation from employment with Loffredo Gardens, Inc. in June of 2000 was entirely a result of his own abusive behavior and ineffective job performance, and had nothing whatsoever to do with any considerations given the fact that he is married to a Japanese woman or that he allegedly complained about the use of the word "jap."

This letter on behalf of counsel for Loffredo Gardens indicates that Loffredo Gardens, at the very minimum, was aware that retaliation may be an issue with respect to Bainbridge's

civil rights complaint. However, “[e]ven if through discovery [defendant] became aware of the [evidence pertaining to uncharged claims] that [plaintiff] intended to introduce, an awareness of the evidence does not amount to notice of an unrelated, uncharged theory of discrimination.” Tart v. Hill Behan Lumber Co., 31 F.3d 668, 673 (8th Cir. 1994) (finding plaintiff’s allegation of racial harassment in the workplace was not sufficiently like or reasonably related to claim of discriminatory discharge). The Court cannot find that proactive investigation and potentially preemptive legal arguments by defense counsel would relieve the Plaintiff of the exhaustion requirement.

Loffredo Gardens points out that Roger Halleck, the ICRC investigator, wrote in his notes that he “didn’t address [retaliation] because [Bainbridge] did not directly allege retaliation.” In reviewing Bainbridge’s description of why he felt discriminated against, it is not readily apparent that he is alleging retaliation at all – he simply states that other reasons were given for his termination. “Allegations outside the scope of the EEOC charge . . . circumscribe the EEOC’s investigatory and conciliatory role, and for that reason are not allowed.” Mohr v. Dustrol, Inc., 306 F.3d 636, 644 (8th Cir. 2002) (citing Williams, 21 F.3d at 223), abrogated on other grounds by Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

Based on the instructive analyses in similar cases, it appears that Bainbridge did not exhaust his administrative remedies with respect to his retaliation claim. Bainbridge

failed to produce any facts in his ICRC complaint form which connected his termination from employment with his alleged complaint about the racial slurs. Although Loffredo Gardens received a generic questionnaire relating to the complaint which contained some questions relating to retaliation, and counsel for Loffredo Gardens indicated in a September, 2000, letter that they had a defense in the event retaliation was alleged, there is no evidence in the record that Loffredo Gardens had notice that Bainbridge was actually charging retaliation. The ICRC investigator himself indicated that he did not look into retaliation because it had not been alleged in the complaint. It is also noteworthy that Bainbridge ardently adheres to his claim that he was fired due to his complaint, yet he failed to check retaliation on the complaint form, especially where the complaint form included the notation indicating what was meant by the term “retaliation”.

The Court finds that Bainbridge has not exhausted his administrative remedies with respect to his Title VII and Iowa Code § 216 retaliation claims. Bainbridge’s claim for retaliation under 42 U.S.C. § 1981 does not require the exhaustion of administrative remedies and, therefore, is not barred.

“A plaintiff establishes a prima facie case of retaliation under § 1981 by proving: (1) statutorily protected participation; (2) adverse employment action; and (3) a causal relationship between the two.” Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 259 (8th Cir. 1996). “Protected activity is an informal or formal complaint about, or other opposition

to, an employer's practice or act . . . if the employee reasonably believes such an act to be in violation of the statute in question." Jeseritz v. Potter, 282 F.3d 542, 548 (8th Cir. 2002) (internal quotation marks omitted) (citing Sherman v. Runyon, 235 F.3d 406, 409 (8th Cir. 2000)). Bainbridge asserts that he complained to Dennis regarding the racial slurs that were being made. Loffredo Gardens disputes such a complaint was made. Viewing the evidence in the light most favorable to the non-moving party, the Court will assume for summary judgment purposes that such a complaint was made.

The next step of the analysis requires Bainbridge to demonstrate that he suffered an adverse employment action. Neither party disputes that Bainbridge's employment was terminated by Loffredo Gardens. There is no doubt that being terminated from one's employment is sufficient to show that an adverse employment action was taken.

Finally, Bainbridge must demonstrate a causal connection between his termination from employment and his complaints about the racial slurs. Bainbridge argues that the timing of his termination demonstrates a connection between his June 15, 2000, complaint to Dennis and the decision to terminate his employment, which occurred the next day. "Generally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine factual issue on retaliation." Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999).

Loffredo Gardens states Zimmerman and Gene Loffredo, Jr., made the decision to terminate Bainbridge with no knowledge of Bainbridge's alleged complaint to Dennis. Although Bainbridge claims that he complained to Gene Loffredo, Jr., in 1998, the length of time that passed between the alleged 1998 complaint and the 2000 decision to terminate Bainbridge's employment demonstrates that the decision was not made in retaliation for the 1998 complaint. See Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1051 (8th Cir. 2002) (finding no causal connection between protected activity and adverse employment action where gap between protected activity and adverse action was measured in years).

In support of his assertion that Dennis took his June 15, 2000, complaint to management, Bainbridge also relies on the fact that Loffredo Gardens has a written policy that requires investigation of complaints. The fact that Loffredo Gardens has a policy regarding how complaints are to be handled does not establish that Dennis in fact informed management of the complaint. In any event, even if Bainbridge could demonstrate that his June 15 complaint was taken to management, such a fact, without more, does nothing to evidence a connection between Bainbridge's complaint and his termination from employment.

“Mere arguments or allegations are insufficient to defeat a properly supported motion for summary judgment; a non-movant must present more than a scintilla of

evidence and must advance specific facts to create a genuine issue of material fact for trial.” F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997) (internal quotation marks omitted) (citing Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)). “[A] non-movant cannot simply rely on assertions in the pleadings to survive a motion for summary judgment.” Krein v. DBA Corp., 327 F.3d 723, 726 (8th Cir. 2003). While counsel for the Plaintiff labored mightily to demonstrate fact issues through argument, his efforts are futile in the absence of factual support.

There is no evidence in the record to support the inference that the decision to terminate Bainbridge’s employment was made because of his complaint to Dennis. To the contrary, the available record demonstrates that Bainbridge was unable to get along with his co-workers and that his co-workers viewed him as difficult to work with. “[T]he anti-discrimination statutes do not insulate an employee from discipline for violating the employer’s rules or disrupting the workplace.” Kiel, 169 F.3d at 1136. In addition, the record shows that another employee, Chris Johnson, an African-American, also made a complaint regarding racial slurs, and that this employee was not fired. Bainbridge has failed to demonstrate a causal connection between his complaint and the termination of his employment.

Assuming *arguendo* that Bainbridge could establish his prima facie case, which the Court finds he cannot, Loffredo Gardens is able to articulate a legitimate,

non-discriminatory reason for its decision to terminate Bainbridge's employment. Loffredo Gardens states that after being approached by three supervisors threatening "him or us", the decision was made to terminate Bainbridge's employment due to his inability to get along with his co-workers. Bainbridge himself agrees that he has no reason to dispute that the supervisors approached Gene Loffredo, Jr., and Zimmerman and said Bainbridge had to go. An inability to get along with co-workers is a legitimate, non-discriminatory reason to terminate one's employment. See Meiri v. Dacon, 759 F.2d 989, 997 (2nd Cir. 1985) (stating plaintiff's profound inability to get along with her co-workers was a legitimate, nondiscriminatory reason for her termination) (citing Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 73 (1st Cir.), cert. denied, 469 U.S. 1018, 105 S. Ct. 433, 83 L. Ed. 2d 359 (1984) (inability to get along with co-workers is a legitimate non-discriminatory reason for firing an employee)); Frausto v. Legal Aid Society, 563 F.2d 1324, 1328-29 (9th Cir. 1977); Turner v. ABT Electronics, Inc., --- F. Supp. 2d ---, 2003 WL 1562557 (N.D. Ill. 2003) (three reported incidents of hostile behavior towards co-workers is a legitimate non-discriminatory reason for firing an employee) (citing Kahn v. United States Sec'y of Labor, 64 F.3d 271, 279 (7th Cir. 1995) (finding that belligerent behavior towards co-workers is a legitimate reason for termination of employment)); Ramos v. Marriott Int'l, Inc., 134 F. Supp. 2d 328, 343 (S.D.N.Y. 2001) ("The failure of an employee to get along with

coworkers rebuts the employee's prima facie case even if the employee's performance ratings were high in other respects."').

Bainbridge claims that the timing of his termination, coupled with his assertion that Loffredo Gardens has artificially tried to remove Dennis from the decision to terminate his employment, is enough to allow a jury to infer retaliatory motive and demonstrate Loffredo Gardens' proffered reasons are merely pretextual. In determining whether Loffredo Gardens' explanation of the termination was merely pretextual, temporal proximity alone is insufficient to create an issue of fact. See Buettner v. Arch Coal Sales Co. Inc., 216 F.3d 707, 716 (8th Cir. 2000); Kiel, 169 F.3d at 1136. Therefore, Bainbridge must point to other evidence in the record, in addition to the timing of his alleged complaint, in order to create an issue of fact regarding whether the proffered reason for his termination is merely a pretext.

Bainbridge asserts that Dennis admitted in his deposition that he was the primary decision maker who fired Bainbridge. A review of the Dennis deposition reveals that this is an overly generous characterization of the deposition testimony and that at no time does Dennis state that he was the primary decision maker. The fact that Dennis was Bainbridge's immediate supervisor and, therefore, had the power to fire him does not establish that he, in fact, was the one to make the termination decision any more than the fact that Gene Loffredo, Jr., was the CEO and had the power to terminate anyone

establishes that *he* was the decision maker. Similarly, the fact that Dennis signed the termination letter does not establish that he was involved in making the termination decision, as Larry Loffredo also signed the letter, and there is no assertion that he was involved in the decision to fire Bainbridge. The fact that Dennis may have told Iowa Workforce Development that Bainbridge was fired by Gene Loffredo, Jr., Zimmerman, and Dennis does nothing to establish that Dennis was involved in the actual decision making process of whether Bainbridge's employment should be terminated.

Plaintiff next asserts that outright lies about Bainbridge being demoted were designed to paper his file and to lend credence to the claims of his work performance problems and abusive management style. Even assuming, in the light most favorable to Bainbridge, that he was not demoted, the overwhelming evidence in the record indicates that Bainbridge was considered unprofessional and difficult to work with by most of those employees who worked with him.

Plaintiff claims that the significance of the three supervisors approaching management in June of 2000 has been exaggerated in order to create an intervening reason for why Loffredo Gardens would terminate his employment and that this exaggeration supports a finding of pretext. Plaintiff does not, however, dispute that the three supervisors did, in fact, approach Gene Loffredo, Jr., and Zimmerman and complain about Bainbridge's management style. Numerous current and former employees have indicated

that Bainbridge was an abusive and unprofessional supervisor, relaying various instances of both verbal and physical altercations. Given the nature of the complaints and the fact that nearly every former and present Loffredo Gardens employee who came forward in this action testified that the complaints began almost immediately after Bainbridge's employment began, there is no evidence in the record to demonstrate that Loffredo Gardens' proffered reason for Bainbridge's termination was a pretext for discrimination.<sup>3</sup>

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<sup>3</sup> Bainbridge himself gave a reason other than discrimination or retaliation in explaining why he believed he was fired. During a phone interview with the ICRC investigator, the following exchange occurred:

Bainbridge: They brought me in there to straighten that warehouse out. I did it. I kept their overtime down. I set the ground rules. They didn't need me anymore, they could get some other guy to do it for cheaper money.

Investigator: Well, Tom then here is a real direct question to what you just stated and to follow up. Well it wouldn't have made any difference of whether you were married or not to a woman from England, a woman from Latin America, or a Canadian or it wouldn't have made any difference. They hired you to do a job, you did it. They thought you did it. They got rid of you.

Bainbridge: Well I don't know. I can't say that for sure. I mean I'm just saying that is probably what happened. The basis of my frustration and the harassment that goes on there and the way they treated me and the disregard and the disrespect that they showed to my wife had a substantial influence on how I did things and how I. I mean I could have done better but you know if you go in there, if you go in there with a positive attitude. If you go in there saying what am I going to be called today or how are they going to discriminate against my wife today. What are they going to say about my family today or what are they going to say in reference to my family today. That doesn't give you a very positive attitude to go to work.

Bainbridge is unable to establish a prima facie case on his retaliation claim. Even assuming Bainbridge could establish his prima facie case, the evidence fails to show that Loffredo Gardens' proffered reason for the termination is merely a pretext for unlawful retaliation. Loffredo Gardens' motion for summary judgment as it pertains to Bainbridge's § 1981 retaliation claim must, therefore, be granted.

**C. Title VII and ICRA Hostile Work Environment.**

To sustain a claim against an employer for a racially hostile work environment, a plaintiff is required to show: (1) he or she is a member of a protected group, (2) he or she was subjected to unwelcome harassment, (3) the harassment was based upon race, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew or should have known of the racially discriminatory harassment and failed to take prompt and effective remedial measures to end the harassment.

Willis v. Henderson, 262 F.3d 801, 808 (8th Cir. 2001).

Bainbridge alleges he was discriminated against by Loffredo Gardens because of his marriage to a non-white, specifically, a female of Japanese ancestry. A person may state a cause of action under § 1981 based on alleged discrimination due to the association with a minority. See Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1447 (10th Cir. 1988) (white employee, who claimed he was fired for assisting a black co-employee with co-employee's EEOC claim, could maintain § 1981 action against former employer); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 890 (11th Cir. 1986) ("section 1981 prohibits discrimination based upon an interracial marriage or association"); Alizadeh v.

Safeway, 802 F.2d 111, 114 (5th Cir. 1986) (“§ 1981 provides a cause of action to a white spouse who alleges that he was discriminated against in employment because of his marriage to a nonwhite.”); Fiedler v. Marumsco Christian Sch., 631 F.2d 1144, 1150 (4th Cir. 1980) (taking adverse action against a white student because of her association with a black student is actionable under § 1981); Winston v. Lear-Siegler, Inc., 558 F.2d 1266, 1270 (6th Cir. 1977) (white plaintiff has standing to sue his former employer under § 1981 for discharging him in alleged retaliation for plaintiff’s protesting the alleged discriminatory firing of a black co-worker); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2nd Cir. 1975) (white employee has standing to sue under § 1981 where former employer allegedly forced him into premature retirement for selling his house to a black employee).

“Generally, a plaintiff alleging racial or national origin harassment would present facts showing that he was subjected to racial epithets in the workplace.” Kang v. U. Lim America, Inc., 296 F.3d 810, 817 (9th Cir. 2002). Although a plaintiff may maintain a cause of action based on association with a non-white, it is important to note that in each of the above cited cases, the alleged discrimination was specifically directed at the person’s association with a non-white. As Bainbridge is alleging he was harassed due to his marriage to a non-white, he would need to present facts showing that he was subjected to racial epithets or harassment directed at his interracial marriage.

Ray Edwards, a former Loffredo Gardens employee, stated in his declaration that he heard another employee refer to Bainbridge's wife his "chinky girlfriend" or "gook girlfriend"; however, these remarks were never heard by Bainbridge himself, and Bainbridge does not indicate that he was aware these alleged remarks were being made about his wife prior to Ray Edwards making his declaration for this case. Bainbridge concedes that none of the racial slurs he overheard were directed at the fact that he was married to a non-white. Instead, Bainbridge complains about racial slurs he overheard which were directed at others. There is no evidence in the record which shows that any of the statements Bainbridge alleges were made, by any person, were ever specifically directed at him. Viewing the evidence in the light most favorable to Bainbridge, the Court finds that a question of fact exists as to whether any of the derogatory Asian slurs, although directed at others, were intended to harass Bainbridge based on his relationship with his wife. However, that does not end the summary judgment analysis.

Bainbridge must establish he was subjected to unwelcome harassment that affected a term, condition, or privilege or employment. "[T]he question whether particular conduct was indeed unwelcome . . . turns largely on credibility determinations committed to the trier of fact". Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68, 106 S. Ct. 2399, 2406 (1986). The correct inquiry is whether Bainbridge, by his conduct, indicated that the alleged harassment was unwelcome. Id. Assuming Bainbridge's assertions are true, upon

hearing derogatory comments about Asians, he verbally asserted that his own wife was Japanese. A reasonable person would understand that a person married to an Asian would not welcome derogatory comments about Asians. However, Bainbridge has not indicated that he objected to hearing derogatory remarks about blacks or Hispanics, or that he in any way indicated that racial slurs about blacks and Hispanics were unwelcome.

[W]hether an environment is “hostile” or “abusive” can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993); see also Gipson v. KAS Snacktime Co., 171 F.3d 574, 578 (8th Cir. 1999).

Bainbridge has stated that at all times he was performing his job at an exceptional level. Therefore, the Court finds the alleged conduct did not interfere with his work performance. Bainbridge does not allege that the derogatory comments were in any way physically threatening or humiliating.

Bainbridge has detailed four specific instances of racial slurs being used and who they were used by. He further asserts that he overheard Mike Loffredo use terms such as “Jap” and “nip” approximately 20-25 during Bainbridge’s entire employment with Loffredo Gardens. “[M]ere utterance of an . . . epithet which engenders offensive feelings in an employee’ does not sufficiently affect the conditions of employment to

implicate Title VII.” Harris, 510 U.S. at 21 (quoting Meritor, 477 U.S. at 67). It is only where such conduct becomes so “severe or pervasive” that a Title VII violation may exist. Id. The Eighth Circuit Court of Appeals has held that a few isolated racial slurs are not sufficient to violate Title VII. See Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981). Finding “no steady barrage of opprobrious racial comment”, the Eighth Circuit in Bunny Bread discussed that “[t]he use, if any, of racial terms was infrequent” and limited to “casual conversation among employees.” Id. “Such slurs . . . were largely the result of individual attitudes and relationships which, while certainly not to be condoned, simply do not amount to violations of Title VII.” Id.

“[M]ore than a few isolated incidents of harassment must have occurred. Racial comments that are merely part of casual conversation, [or] are accidental, or are sporadic[,] do not trigger Title VII’s sanctions.” Bunny Bread Co., 646 F.2d at 1257 (quoting EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384 (D. Minn. 1980) (citations omitted). At most, Plaintiff asserts that he heard racial slurs pertaining to Asians once a month during his two-year employment with Loffredo Gardens. Over the course of a two-year period, a total of twenty to twenty-five racial slurs is not so frequent as to rise to the level making such comments severe and pervasive in violation of Title VII.

Under the facts of this case, Bainbridge cannot demonstrate that the work environment at the warehouse was “so excessive and opprobrious as to constitute an

unlawful employment practice under Title VII.” Cardidi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977). “A work environment must be dominated by racial hostility and harassment to rise to the level of a Title VII violation.” See Ways, Sr. v. City of Lincoln, 871 F.2d 750, 754 (8th Cir. 1989) (citing Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983)). While it is certainly understandable the comments at issue, if made, would have been perceived as offensive to Bainbridge, the law does not provide a remedy for all circumstances of bad manners and thoughtless behavior in the workplace. The record fails to demonstrate that Bainbridge was subjected to a work environment dominated by racial hostility and harassment sufficient to rise to the level of a Title VII violation. Therefore, Loffredo Gardens’ motion for summary judgment, as it pertains to Bainbridge’s claim of a hostile work environment, is granted.

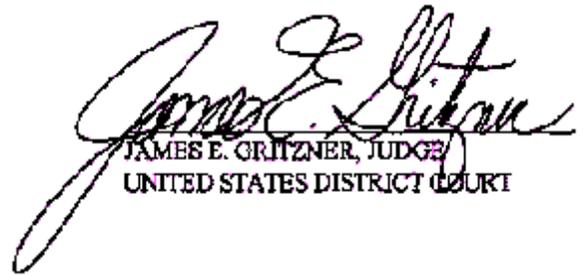
Where a plaintiff does not present separate arguments under the ICRA, state civil rights claims are addressed together with Title VII claims. Hannoon v. Fawn Eng’g Corp., 324 F.3d 1041, 1046 (8th Cir. 2003) (citing Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm’n, 322 N.W.2d 293, 296 (Iowa 1982)) (federal cases persuasive in selecting the analytical framework for deciding discrimination cases under the ICRA); see also Mercer v. City of Cedar Rapids, 308 F.3d 840, 846 n.2 (8th Cir. 2002). Because Bainbridge’s hostile work environment claim under Iowa Code § 216 is premised on the same factual bases as his Title VII claim, it must also fail.

### III. CONCLUSION

The Court finds there is no genuine issue of material fact on the essential claims, and judgment may be entered as a matter of law. Defendant's Motion for Summary Judgment (Clerk's No. 10) is **granted**.

**IT IS SO ORDERED.**

Dated this 31st day of July, 2003.



JAMES E. GRITZNER, JUDGE  
UNITED STATES DISTRICT COURT