IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Defendants.

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ORDER

Before the Court is Defendants General Electric Co. ("Def") and Def Group, Inc. ("Def")'s motion for summary judgment (Doc. 73), reply in support (Doc. 93), and suggestion of subsequently decided authority (Doc. 94); along with Plaintiffs' opposition to the motion for summary judgment (Doc. 83, 84, 85, 86, 87, 88, 89, & 92) and response to the defendants' suggestion of subsequently decided authority (Doc. 95). For the reasons set forth below, the motion for summary judgment is **DENIED**.

I. Summary Judgment Standard

Summary judgment should be granted only if "there is no genuine issue as to any material fact and [ ] the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2).[1] The

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[1] Rule 56(c)(2) of the Federal Rules of Civil Procedure, provides that summary judgment shall be granted:

> if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56 (c).

party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The party seeking summary judgment also always bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the nonmoving party fails to make "a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the moving party is entitled to summary judgment. Celotex, 477 U.S. at 323. "In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998-999 (11th Cir. 1992), cert. den., 507 U.S. 911 (1993) (internal citations and quotations omitted). The mere existence of a factual dispute will not automatically necessitate denial; rather, only factual disputes that are material preclude entry of summary judgment. Lofton v. Secretary of Dep't of Children & Family Serv., 358 F.3d 804, 809 (11th Cir. 2004), cert. den., 534 U.S. 1081 (2005).

II. Background Facts[2]

A. General

Defendant Def Group, Inc., the successor to Baghouse Associates, was acquired by Def in 2004. (Doc. 33, pp. 42 (First Amend. Compl. ¶ 16) & 57-58 (Answer ¶ 16)). Def operates Def as a separate entity within its Def Energy division. (Id.). Def/Def[3] contracts with industrial producers of effluent to change bags that collect effluent in baghouses, and performs related services.

In or around 1992, Co-Employer worked as a consultant and later a Technical Advisor ("TA") to Def. In his capacity as TA, Co-employer was in charge of crews of men working in baghouses to replace full bags with new ones and to perform maintenance.

In or around 1996, Co-Employer ceased working for Def and started a business called Co-Employer. From 1996 through 2004, Co-Employer leased laborers to Def to perform the same type of baghouse work that Co-employer had previously supervised as a Def/Def TA. After Def acquired Def, Co-Employer began contracting to lease workers directly to Def.

The plaintiffs, all of them black[4] men, were workers Co-Employer leased to Def/Def.[5] Plaintiffs allege that Def/Def engaged in illegal, intentional discrimination on the

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[2] In resolving this motion for summary judgment, the Court construes the evidence and the factual allegations in a light most favorable to the plaintiffs. Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (11th Cir. 1999) (When ruling on a motion for summary judgment, the court "should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion.").

[3] The defendants' arguments focus solely on Def, as Defendants reason that Def "could be liable to Plaintiffs if, and only if, Def is liable." (Doc. 73-1, n. 3). Without accepting or rejecting that conclusion, this analysis refers to Def and Def interchangeably and as a single defendant.

[4] Def/Def states in its brief that one of the plaintiffs is "Caucasian," but presents no evidence to support that claim. (See id.).

basis of race in violation of both Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and Section 1981 of Title 42 of the United States Code, by creating a racially hostile work environment and allowing it to persist on jobs to which the plaintiffs were assigned and by discharging the plaintiffs on the basis of race. (Id., pp. 40 ¶ 1; 48-50 ¶¶ 62, 65-68, 73-81)). Plaintiffs also allege that Def/Def violated Section 1981 by terminating their employment in partial retaliation for the plaintiffs' and Co-Employer's opposition to racial abuse allegedly perpetrated by Def/Def employee harasser harasser ("harasser"). (Id., p. 49 ¶¶ 69-72).

Plaintiffs filed their complaint on August 19, 2008. (Doc. 33, pp. 16 & 23). An amended complaint was filed on December 12, 2008. (Id., pp. 17 & 40). Jurisdiction is alleged pursuant to Title 28 United States Code, Section 1343. (Id. (First Amend. Compl. ¶ 2)).

B. History of Complaints Regarding Racism

Co-Employer worked on a job for Def/Def with harasser that Co-Employer refers to as "Alcoa." (Doc. 84-6, p. 3 (Co-Employer Dep. 14:18-20)). On the Alcoa job harasser complained to Def/Def's Director of Project Management and Services Div Mgr ("Div Mgr")[6] that Co-employer Enterprises' black crew members were not working. (Id. (Co-Employer Dep. 14:21-15:18)). Div Mgr then called Co-Employer and said she wanted two or three of the Co-Employer crew members

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[5] Def/Def characterizes the plaintiffs as "seasonal subcontractors" rather than "leased workers." (See Doc. 73-1, p. 8).

[6] In her capacity as Director of Project Management and Services, Div Mgr was responsible for services for some of the product lines, which "included technical advisors." (See Doc. 84-8, pp. 7-8 (Div Mgr Dep. 13:8-14:15). She also supervised project managers in the execution of baghouse system projects. (Id.).

Beginning in June of 2007, Div Mgr's title changed to Project Management Program Leader, and Keith managers assumed her old duties. (Id., pp. 9-10 (Div Mgr Dep. 15:6-16:13)). After he assumed the role of Director of Project Management and Services, managers was initially supervised by Mark Hachenski. (Id.).

sent home. (Id.) When Co-Employer asked why sending the workers home was necessary, Div Mgr replied that harasser had reported that the crew members would not work or were lazy. (Id.) Co-Employer responded by arranging a conference call with Div Mgr, managers managers ("managers"), who reported to Div Mgr, and Project Managers managers managers ("managers") and managers managers ("managers"). (Id.). During the call, he explained that the Co-Employer crew working on the Alcoa job was "the best crew [Co-Employer] had and that they were, in [Co-Employer's] opinion, doing what they were supposed to do." (Id.). The subject of harasser's allegedly racist comments arose during the conference call, and managers responded by asking, "[A]re you saying that harasser harasser is a racist? If it's true, then . . . we have problems." (Id.). Co-Employer replied, "Mr. harasser is harassing my men, and it must stop." (Id.).

On or about August 29, 2006, Co-Employer emailed managers regarding what happened at Alcoa and informed managers that "harasser [harasser] has had his racist comments and attitude from day one . . . [and] of course, the men resent it very much since he doesn't hide his views on working blacks." (Id., pp. 3-4 (Co-Employer Dep. 16:2-18:7); Doc. 89-24). In the August 29 email, Co-Employer also told managers: "you have been defending harasser from the start, but now is the time to open your eyes." (Id.). Co-Employer had previously "been telling Def, [redacted] managers, anybody who would listen, [that harasser's] attitude towards blacks was not acceptable . . . ." (Id.). Before sending the email on August 29, 2006, Co-Employer had both spoken with managers and sent managers emails regarding the issue. (Id.). Co-Employer observed that harasser resented having an all black crew working for him "[b]ecause of his attitude toward them on every job they went on. He considered them lazy, told them so." (Id.).

In February of 2007 during a job for a client named Buzzi, Co-Employer told managers over the phone "[t]hat harasser harasser was acting in a racist and harassing manner towards African-Americans

on these crews." (Id., p. 18 (Co-Employer Dep. 129:4-130:5)); (Doc. 89-20, p. 1). managers repeatedly responded by saying "I don't want to hear it." (Doc. 84-6, p. 18 (Co-Employer Dep. 129:4-130:5)).

Co-Employer also told managers during the Buzzi job that he thought harasser was working the Co-Employer crews hard because of harasser's attitude towards blacks. (Doc. 84-3, p. 17 (managers Dep. 36:5-10)). Co-Employer also communicated to managers after the job that harasser was "a racist," that harasser "hate[d] blacks and won't work with them." (Id., p. 18 (managers Dep. 37:10-24)). At that point, managers passed along all of this information to Div Mgr (id.), and Co-Employer and managers both also informed managers that Co-Employer was accusing harasser of racism. (Id., pp. 21-22 (managers Dep 40:12-41:2)).

Plaintiffs allege that throughout his working relationship with Co-Employer' crews, harasser harassed the plaintiffs on account of their race. For example, Plaintiff Jonas Plaintiff ("Plaintiff") stated that "harasser cursed at us if he found a problem . . . [and] would call us things like 'sorry ass niggers' . . . ." (Doc. 87-8, p. 1 (Plaintiff Decl. ¶ 4)). Plaintiff further stated that "[d]uring a job in Tacoma, Washington, harasser called our crew 'sorry ass niggers' and told us 'you don't work for us no more' because the bags that he gave us to install were too short. harasser told the crew: 'You need to make the bags fit.'" (Id. ¶ 5). Plaintiff Carl Plaintiff ("Plaintiff") stated that on a job in St. Louis, when his hands were hurting from exposure to the cold and his co-worker Antonio Plaintiff ("Plaintiff")'s hands were "dr[y] and blistered because he had been working too long out in the cold," Plaintiff, Plaintiff, and a couple of other men went down to harasser's trailer where they sat in front of a heater for ten minutes until harasser walked in and inquired, "What the [expletive] are you all doin' in my office?". (Doc. 86-13, p. 3 (Plaintiff Decl. ¶¶ 13-14)). When Plaintiff and the others "tried to explain to harasser that we needed to warm up . . . and that Plaintiff needed to go to a doctor because his skin was so bad, harasser called us 'chicken

shit mother [expletive]' and told us we are getting paid to work. He said, 'get your black asses the [expletive] out of my office.'" (Id., ¶ 15). As the group was leaving the trailer, harasser told them they were all fired. (Id.).

Finally, Plaintiff Robert Plaintiff ("Plaintiff") stated in his deposition that harasser called him a "nigger" during a St. Louis job. (Doc. 84-12, pp. 21-23 (Plaintiff Dep. 45:7-47:14)).[7] harasser said to three Co-Employer employees, including Plaintiff: "y'all sorry niggers need to get back to work." (Doc. 84-12, p. 23 (Plaintiff Dep. 47:2-5)). Plaintiff responded by

> jump[ing] up out [of his] seat . . . and t[elling harasser] I don't want him to use that kind of words towards me no more. I don't care what he say to me, but don't call me nigger because I wasn't [using . . .] racial slurs like that, so I know he shouldn't do it to me. . . . Don't do it. I told him.
>
> And when I told him that, I don't know if he felt threatened by it or whatever, but I didn't threaten, put my hands on him or nothing. I told him don't do it no more . . . and he told me to get off the premises, me and the other guys. . . . [b]y them being there with me, he told all three of us to get off the premises.
>
> [harasser told me to] get off the job. He didn't want to work with me no more. That was the last job I worked for Co-employer.

(Id., pp. 21-22 (Plaintiff Dep. 45:13-46:22)).

C. "The Demise of Co-employer"

Following the Buzzi job, Div Mgr and/or managers instructed managers not to use Co-Employer crews anymore and told managers that they would be notifying Co-Employer that the relationship between the companies had ended. (Id., p. 21 (managers Dep. 2-6)). However, Def/Def continued to use Plaintiffs on five jobs following Buzzi. (See Doc. 87-1, pp. 1-2

[7] Plaintiffs maintain, and Def/Def does not appear to dispute, that this incident occurred on the Buzzi job. (Doc. 83, p. 19).

(Co-employer Decl. ¶¶ 405)). The last of those jobs, the so-called "Cargill" job, ended on April 17, 2007. (Id.).

On Monday, April 23, 2007, Co-Employer sent an email to Def/Def employees Kenneth manager, managers, and Div Mgr. The email stated: "This game is about over with the libelous remarks made about me and m[y] all black crew. They are livid about your and Def's attitude." (Doc. 89-3, p. 1).

The next day, Div Mgr forwarded Co-Employer's April 23 email to Sourcing Leader Sam manager ("manager")[8] and to managers. (Id.). She prefaced the forwarded email with a message that states: "there have never been any racial comments from our people. Keith [(managers)], I have had it with Co-employer and their lack of professionalism. It's time to part company." (Id.). Div Mgr explained in her deposition that she meant in her email "that in mind of . . . [Def/Def's] past history with Co-employer . . .[,] maybe we shouldn't do business with them any longer." (Doc. 84-8, pp. 62-63 (Div Mgr Dep. 62:21-63:2)).

In response to being asked how she "kn[e]w" that "Mr. Co-employer was alleging that someone at Def had made racial comments," Div Mgr stated in her deposition: "[f]rom his comment about libelous remarks about me and the all black crew." (Doc. 84-8, p. 28 (Div Mgr Dep. 47:1-5)).

On Thursday, April 26, 2007, Co-Employer emailed Div Mgr and wrote:

> It is the opinion of my black crew members that you, . . ., and harasser, by refusing to work with Co-Employer, by your own documented statements have, and are, causing great hardship on them and their families. . .

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[8] In his capacity as Sourcing Leader, manager "make[s] sure that [Def/Def] has adequate resources to support . . . the environmental services operation and make[s] sure [Def/Def has] got the right suppliers, make sure they meet our Def supplier standards," which "covers the baghouse operations." (See Doc. 84-2, pp. 3-4 (manager Dep. 8:6-16; 21:6-17)).

> These men know the feelings harasser harasser has about working blacks. Very strong feelings conveyed to them over the years and again documented on the Buzzi job. Yet, they TOOK his abuse to keep their livelihoods. . . .
>
> Co-Employer cannot continue to see them discriminated against.
>
> ALL WE WANT TO DO IS WORK! START GIVING US JOBS.

(Doc. 89-4, p. 1).

The next day, Div Mgr forwarded the Co-Employer's April 26 email to Def/Def employees including Pam manager ("manager") and stated "I am working with [(Def general counsel)] Scott manager on response and potential investigation. Will keep you updated." (Id.; Doc. 73-1, p. 42 (identifying Scott manager as Def general counsel)). manager replied, copying Scott manager: "Tommie, have you had complaints about harasser in the past regarding any type of racial discrimination. What was documented on the Buzzi job?". (Doc. 89-4, p. 1). Div Mgr replied: "I have not had any complaints about harasser in the past and I have reason to doubt that the indication is accurate. At this point, we are getting a response together for Norm Co-employer and asking for specifics so we can investigate. It is innuendo at this juncture and may not develop further." (Id.).

manager alerted manager to the situation in an effort to "understand [Co-Employer'] ability to do the work relative to other suppliers." (Doc. 89-6, p. 1). manager replied to manager: "We have other suppliers to work with for labor." (Id.). However, he also noted that "In general, we would like to have more labor supplier capacity." (Id.).

On May 3, 2007, Div Mgr emailed Co-Employer. (Doc. 89-20). She stated:

> I received your email on April 26, 2007, and wanted to get back to you on the concerns you raised and to request additional information on specifics on some of the issues.
>
> We continue to search for fabric filter bag installation work that would include Co-Employer as a potential subcontractor. The Sales and Product Management group for this product . . . had a . .

> . session recently to try to help drum up some additional business. The business has been a bit slow right now and we hope that this trend will turn soon.
>
> There have been numerous projects through the year that have been manned by Co-Employer satisfactorily. However, after a tough project at Buzzi in February 2007, and discussions with you and Tony and Keith and myself, we agreed that we need to focus on work for a 6-9 crew size plus supervision. This is the size of project that best suits Co-employer's capabilities.
>
> In your email, you stated harasser harasser has conveyed very strong negative feelings towards your men. You also noted that such feelings were documented on the Buzzi job. You also concluded that Co-Employer cannot continue to see them discriminated against. We are not aware of any discriminatory comments, feelings, or behavior towards your work crews, and we have received no previous complaints or concerns. Your letter raises significant questions and concerns that we need to investigate. Norm [(a.k.a. Ray)], I would really appreciate if you would provide details about what was said, when, and who was involved from our representatives, including any documentation from the Buzzi project. We would involve our Def team to conduct an investigation and identify any corrective actions.
>
> I would appreciate your responses regarding the specifics as soon as possible. We will continue to keep you appr[]ised of business we obtain where we can request Co-employer Enterprise to help provide the service.

(Id.).

On May 9, 2007, Def/Def employee Grant manager ("manager") emailed fellow employee Sarah manager ("manager"), and copied manager. (Doc. 89-7, p. 2). manager wrote: "I need to have Co-Employer . . . put on suspension until further notice." (Id.). manager replied and asked manager, "Is the[re] something I can put on the account why we are suspending them?". (Id., p. 1). manager replied a moment later: "Not at this time. Touchy matter." (Id. (Email from manager to manager)). manager wrote back: "Okay have Tom or Sam say it's okay and I'll get him suspended." (Id.). manager forwarded the entire email train to manager, who replied: "Yes,

please suspend this vendor so that no one can please new PO to them until further notice." (Id. (Email from manager to manager and others)).

On May 21, 2007, Grant manager, who Plaintiffs identify as a Def/Def estimator, sent an email entitled "The Demise of Co-employer" to a number of other Def/Def employees, including Div Mgr, managers, manager, and Robert manager ("manager"). (Doc. 89-8, pp. 2-3)). The email stated:

> Project Management has informed Joe and I that we will no longer be able to use Co-employer.
>
> We understand this was most likely for quality reasons, however, we want to be sure that the ramifications are understood prior to making this decision:
>
> - No replacement contractor was secured prior to this decision essentially eliminating us from the Southern and Mid-Atlantic regions. The closest contractors now are located in Illinois and Oklahoma.
> - Per the analysis conducted last year, Co-employer represents approximately $800,000 in top-line sales per year. This does not take into account Co-employer's involvement outside of their region easily putting this number over $1,000,000. To meet goal, we needed $1.2M out of them this year.
> - We currently have a $225,000 backlog of which jobs were bid for Co-employer. These will need to be rebid using other contractor, however, will likely be lost due to bullet one. In addition, we will be bidding Chicago rates for South Carolina work.
>
> ****
>
> In this time we are looking to grow this business by 53%, we have lost 2 prime contractors representing 45,000 of our required 90,000 labor hours . . . .
>
> ****
>
> Prior to [ ] informing . . . sales of this recent decision, I'd like buy-in from the remainder of management that this is how we wish to proceed.

> In addition, it would be beneficial if sourcing could provide a timeline and plan on when we can expect to have coverage in these areas, and any ideas Project Management in regards to how we can provide coverage in the meantime.
>
> Joe and I will do what we can in the meantime to aid sales in continuing to focus on selling quality, and help manage rebids that could double the original price presented to valued customers.

(Id.)

manager replied to the group asking, "Is there a plan to replace[?] Don't want to state the obvious, but if there isn't, then do we adjust goal since we'll be unable to meet consumer demand?". (Doc. 89-9, p. 1)). manager then replied to the group and explained that "[t]he reason for the temporary suspension is sensitive. [General Counsel] Scott manager is working to resolve the situation right now. Should the situation be resolved successfully, we can work with them again. . . . In the mean time, there is another supplier in the region we can use." (Doc. 89-10, p. 1). manager explained in his deposition that the sensitive reason he was referring to was "the threat of litigation." (Doc. 73-20, p. 7).

On June 4, 2007, manager wrote a group of Def/Def employees, including Div Mgr, and related advice he had received from general counsel Scott manager that "the current case . . . should not stop us from working with Co-employer." (Doc. 73-20, p. 25). manager cautioned though that before the temporary suspension could be lifted, "we need all people to understand the sensitive situation and assign appropriate personnel to work with [Co-Employer]." (Id.). He asked Div Mgr, "Could you set up a meeting with your PMs [(presumably, Project Managers)] to brief the situation and the condition that we need to be sensitive to in working with Co-employer?" and advised her, "I will wait for your signal to un-suspend Co-employer in the system." (Id.). On June 6, 2007, Div Mgr replied to manager and the group he had emailed:

> The direction Project Management has is as follows regarding Co-employer potential subcontracted labor.

> If a job has the labor requirement that fit potential availability of supervision and a small crew from Co-employer to do the work without Technical Advisor at the site, Keith will discuss the possibility with me. If Keith and I decide to move forward, we will request Procurement contact Co-employer to see if they have the availability to properly represent us at site . . . .
>
> Please advise if you have any questions.

(Id.). Div Mgr affirmed in her deposition that by "if Keith and I move forward," she meant "if [we] decide to give Co-employer additional work." (Doc. 73-19, pp. 13-14 (Div Mgr Dep. 83:8-84:24)).

In 2006, Def/Def's baghouse revenue was approximately $3.6-3.7 million. (Doc. 73-13 (managers Dep. 49:11-50:10)). In 2007, it was approximately $3.5 million. (Id.).

Since June 2007, Def has completed many 6- to 9-person jobs of the sort Co-Employer could have performed. (Doc. 84-8, p. 35 (Div Mgr Dep. 95:6-15)).

III. Analysis

A. Title VII Standing

Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." 42 U.S.C. § 2000e(b). The same statute defines "employee" as "an individual employed by an employer . . . ." Id. at (f).

In their summary judgment briefing, Def/Def argues that Plaintiffs lack standing to sue under Title VII because Plaintiffs were not the employees of Def/Def: "Title VII applies to employees but not contractors. . . . Plaintiffs were not Def employees. Whether Plaintiffs are [Co-employer] Enterprises' employees, or contractors—Enterprises pays and treats the Plaintiffs as independent contractors—is Enterprises' issue, but Plaintiffs are without doubt *not* Def employees" (Doc. 73-1, p. 9); "only 'employees' may sue 'employers' under Title VII. []

Because Plaintiffs were by no stretch of the imagination employees of Def, they have no Title VII claim." (id., p. 13). In support of the conclusion that the plaintiffs were not employees of Def/Def, Def/Def cites precedent applying a "hybrid economic realities" test that the Eleventh Circuit has employed when determining whether plaintiffs are the employees (or independent contractors) of Title VII defendants. (See Doc. 73-1, p. 14 (citing Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41 (11th Cir. 1982) (affirming district court's conclusion that former janitor/custodian was independent contractor and therefore not subject to Title VII's protections) and Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1234 (11th Cir. 2004) (affirming district court's finding that graduate student was an "employee" of the university for purposes of Title VII))).

By contrast, the plaintiffs contend that "[t]he [Title VII] issue for summary judgment is not whether Plaintiffs were *either* employees of G.E. or alternately, independent contractors of Co-Employer. It is whether Defendants were joint employers of plaintiffs with Co-employer . . . ." (Doc. 83, p. 32) (emphasis in original). The Court agrees with Plaintiffs.

Courts applying Title VII have employed the "joint employer" analysis in two different contexts. First, the analysis has been used to determine whether the employee-numerosity requirement found in Title VII's definition of "employer" may be satisfied by aggregating the employees of two otherwise distinct entities. However, this application is irrelevant in this case as the parties do not appear to dispute that during all times relevant to this litigation Def/Def employed more than fifteen employees under the circumstances enumerated in Title VII's definition of "employer." Second, courts have applied the joint employer analysis to determine whether a defendant may be held liable to a Title VII plaintiff who is employed by another entity. See Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1244 (11th Cir. 1998)

(characterizing the joint employer doctrine as a "theory of liability"); Walden v. Verizon Bus. Network Servs., et al., No. 1:06-cv-2394-WSD-WEJ, 2008 WL 269619, at *13-14 (N.D. Ga. Jan. 29, 2008) (adopting report and recommendation that concluded joint employer inquiry was appropriate for determining whether a defendant that had procured the plaintiff's services through a recruiting/staffing agency could be considered the plaintiff's "employer, and thus potentially liable under Title VII"); Watson v. ADECCO Emp't Servs., Inc., et al., 252 F. Supp. 2d 1347, 1354-56 (M.D. Fla. 2003) (applying the "joint employer theory of liability" to conclude that a temporary employment agency did not meet Title VII's "employer" definition); see also Zillyette v. Capital One Fin. Corp., 1 F. Supp. 2d 1435, 1444 (M.D. Fla. 1998) (suggesting in dicta that a "joint employer" test would apply to the question of whether a parent corporation could be considered an "employer" when its subsidiary directly employed the defendant). It is this application of the joint employer analysis that the plaintiffs argue renders Def/Def liable for the claims alleged under Title VII.

There is no material dispute, and the Court finds as a matter of law, that the plaintiffs are "employees" (as opposed to independent contractors) "employed by" Co-Employer within the meaning of Title VII.[9] The hybrid economic realities test adopted by the Eleventh Circuit provides that "the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee . . . are determinative" of employee status. Cobb, 673 F.2d at 341. The Cobb court suggested that the following common law agency factors are "relevant to the consideration of this issue":

[9] Def/Def presents no evidence or argument on summary judgment that prevents this conclusion, preferring to treat the issue as if it were irrelevant. (See Doc. 73-1, n. 7 ("[T]he issue of whether Plaintiffs were employees or independent contractors of Enterprises is beyond the scope of this case."); Doc. 93, p. 25 ("Plaintiffs were independent contractors (or employees) of Enterprises")).

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Id. at 340 (quoting Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979) and citing Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 n. 5 (9th Cir. 1980)). However the Cobb court emphasized that while

> [c]onsideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative . . . , the extent of the employer's right to control the means and manner of the worker's performance is the most important factor to review here, as it is at common law . . . If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist.

Cobb, 673 F.2d at 340 (internal quotation marks omitted).

The Eleventh Circuit clarified in Cuddeback that when evaluating the common law principles of agency, "[s]pecifically the court should consider factors such as whether the defendant directed the plaintiff's work and provided or paid for the materials used in the plaintiff's work." Def/Def presents evidence that Co-Employer "hired Plaintiffs . . .; paid Plaintiffs for their services . . .; decided each person's hourly rate . . . ; supplied their tools . . .; provided their transportation . . . ; paid for their food and lodging . . . ; supplied their hard hats, safety glasses, respirators, gloves and protective clothing . . . ; gave them annual safety training required by federal law . . . ; paid for their workers' compensation insurance . . . ; drug-tested

them annually . . . ; employed a crew supervisor and a crew foreman to supervise and direct Plaintiffs' work . . . ; fired them . . . ; [and] issued them warnings." (See Doc. 73-1, pp. 9-10 and record evidence cited therein). The plaintiffs present evidence that baghouse work is unskilled labor. (See Doc. 84-10, p. 4 (Leslie Packer Dep. 13:2-8 (Packer had "never in [his] life" performed baghouse services before arriving on the job with Co-Employer, but "when [he] got there [he] just watched them, s[aw] what they were doing, [and] then [ ] start[ed] filling in what they were doing and it just went from there")); Doc. 84-11, pp. 4-5 (Kelvin Riley Dep. 15:3-16:2 (Riley first came to work for Co-Employer after he was "walking through the projects one day, and they w[ere] hollering about they know a man who . . . needed some men. Me, I ain't got nothing to do . . . so I just got in the truck with them . . . then I got . . . on-the-job-training, then I . . . became part of Mr. Co-employer's crew"))). There is no doubt, in light of this evidence, that Co-Employer had the "right to control the means and manner of the worker[]s['] performance," and that it "provided or paid for the materials used in the plaintiff[]s['] work." Moreover, there is no dispute that the work performed by the plaintiffs was not only an integral part of the business of the employer; it appears to be the only business of the employer.[10]

[10] Def/Def describes Plaintiffs as "[s]easonal, [F]orm-1099 subcontractors" (Doc. 73-1, p. 8), and submit sample copies of certain plaintiffs' 1099 tax forms, which reflect that Co-Employer withheld no income taxes from the plaintiffs' pay and identify the compensation Co-Employer paid the plaintiffs as "Nonemployee compensation." (See, e.g., Doc. 73-11, p. 32 (Robert Plaintiff Dep. Exh. 2); Doc. 73-12, p. 23 (Kelvin Riley Dep. Exh. 6)). In light of the evidence suggesting that the plaintiffs were Co-Employer' employees, the fact that Co-Employer did not withhold taxes from Plaintiffs' checks is insufficient to deem them independent contractors. See Cobb v. Sun Papers, Inc., 673 F.3d 337, 341-42 (11th Cir. 1982) ("This Court has held that employee status under Title VII is a question of federal law") (citing Calderon v. Martin Cnty., 639 F.2d 271 (5th Cir. 1981) and affirming lower court's finding that "the evidence on the question was mixed" and "weigh[ing of] all the factors involved in the situation in making its determination" that the plaintiffs were independent contractors).

In an effort to support the notion that the plaintiffs are merely seasonal workers who were not economically dependent on baghouse work, Def/Def submits evidence that approximately one-third of (Continued)

The threshold Title VII inquiry, then, is whether Def/Def can be considered the plaintiffs' joint employer with Co-Employer.

Def/Def is a joint employer with Co-employer if it is determined that

> [Def/Def] while contracting in good faith with an otherwise independent company [(Co-Employer)], has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer [(Co-Employer)]. Thus the joint employer concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions or employment.

Virgo v. Riviera Beach Assoc., 30 F.3d 1350, 1360 (11th Cir. 1994); Swallows v. Barnes & Noble Bookstores, Inc., 128 F.3d 990, n. 4 (6th Cir. 1997) (internal quotation marks omitted) (ADA/ADEA case cited by the Eleventh Circuit in Llampallas, 163 F.3d at 1245 for its

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Co-Employer' workers also work as fishermen, and that these individuals worked for Co-Employer approximately one-half of the year, during the fishing off-season. (Doc. 73-5, p. 60 (Co-Employer Dep. 146:3-21). However, there is no evidence to suggest that these fishermen also comprise a significant number of the plaintiffs in this lawsuit. On the contrary, Def/Def points specifically only to the deposition of Robert Plaintiff, which tends to establish that five of the plaintiffs—Carlos Hicks, Wilbert Richardson, Timothy Sigler, Jasper Smith, and Robert Plaintiff—work as fishermen half of the year. (See Doc. 73-1, pp. 22-23 & Doc. 73-11, pp. 3 & 5 (Robert Plaintiff Dep. 7:6-25; 11:10-16)). In addition, Def/Def presents evidence that during the relevant time period, another plaintiff, Kelvin Riley, cut trees, did cabinet work, and mowed lawns when he was not working for Co-Employer. (See Doc. 73-12, p. 5 (Kelvin Riley Dep. 9:10-25)). This evidence that a handful—no more than approximately ten percent—of the plaintiffs found ways to make money in addition to working for Co-Employer is insufficient to support a finding that the plaintiffs were independent contractors, particularly in light of the evidence suggesting that the plaintiffs were Co-Employer' employees.

Def/Def also submits an unsigned agreement, labeled an "Independent Subcontractors Agreement" that it claims is typical of the contracts that the individual plaintiffs executed with Co-Employer. (See Doc. 73-6, p. 98 (Co-Employer Dep. Exh. 19). Def/Def does not point to any evidence tending to establish that each individual plaintiff executed such an agreement with Co-Employer. (See Doc. 73-1, p. 19; Doc. 73-8, p. 27 (Anthony Co-Employer Dep. 75:13-16)). Even if Def/Def had submitted evidence tending to establish that each individual plaintiff signed such agreements, the mere title of the agreements would not be dispositive. In addition, several terms of the Independent Subcontractors Agreement support the conclusion that Plaintiffs were Co-Employer employees, such as the provision for a daily wage to be prorated on an hourly basis. (See Doc. 73-6, p. 98 (Co-Employer Dep. Exh. 19 ¶ 2).

explanation of "the differences between the joint employer theory and the single employer theory").

The determination of whether two entities may be considered a joint employer under Title VII is a question of fact for the jury. See Virgo v. Rivera Beach Assocs., Ltd., 30 F.3d 1350, 1359-60 (11th Cir. 1994) ("[w]hether the [defendant] retained sufficient control [to support a finding that it was a joint employer] is essentially a factual question"); accord Lyes v. City of Riviera Beach, Fla., 166 F.3d 1332 (11th Cir. 1999) (en banc) (treating the similar question of whether two entities, one of them a municipality, could be treated as a single employer as "a question of fact") (citing McKenzie, 834 F.2d at 933)); Clark v. St. Joseph/Candler Health Sys., et al., No. 06-14903, 225 Fed. Appx. 799, at **1 (11th Cir. Apr. 4, 2007) (per curiam); U.S. E.E.O.C. v. Rooms to Go, Inc., No. 8:04CV2155T24TBM, 2006 WL 580990, at *9 (M.D. Fl. Mar. 8, 2006); Walden v. Verizon Bus. Network Servs., et al., No. 1:06-cv-2394-WSD-WEJ, 2008 WL 269619, at *13-14 (N.D. Ga. Jan. 29, 2008).

The plaintiffs present sufficient evidence that Def/Def retained sufficient control of the terms and conditions of employment of the plaintiffs to avoid summary judgment on the grounds that Def/Def was not a joint employer. For example, the Master Agreement, which established and governed the terms of the services that Co-Employer/Co-Employer provided to Def, states that Co-employer shall "supervise and direct the [w]ork, using his best skill and attention[,] . . . shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work . . . *unless otherwise directed by* Def." (Doc. 93-1, p. 16 (Master Agreement ¶ 8.0) (emphasis added). The Master Agreement also provides that Co-employer's work "shall be performed under the direction of Def[ ] and to the satisfaction of Def." Id., p. 15 ¶ 3.0. It further states that "Def shall provide general supervision of" Co-employer and "may

make alternate arrangements for portions of the work . . . , equipment[,] or supplies;" that "[a]ll [w]ork shall be satisfactory to Def . . ."; and "that "Def shall at all times have access to the work." Id., p. 16 ¶¶ 7.0, 7.1. The Master Agreement thus arguably reserves for Def/Def the authority to direct and supervise Co-Employer' work.

There is also evidence that Def/Def exercised this contractual authority to control the terms and conditions of the plaintiffs' employment. Plaintiffs submit evidence that Def/Def employee harasser harasser[11] ("harasser") frequently interacted with/instructed and disciplined Co-employer crew members directly. (Doc. 73-8, p. 12 (Anthony Co-Employer Dep. 31:19-33:3); Doc. 84-9, p. 9 (Mark Lewis Dep. 43:1-8 (harasser gave instructions directly to the crew approximately "25 percent of the time"))). The record also includes evidence that harasser set the hours and break times for the crews when he was acting as TA on projects with Co-Employer. (See, e.g., Doc. 87-15, p. 1 (Reginald Richardson Decl. ¶ 4 ("harasser told us how much to work. If he wanted the crew to finish a unit, he would make us work longer than the regular 12-hour day")); Doc. 87-20, p. 1 (Quincy Scott Decl. ¶ 8 ("harasser told us at the beginning of the job how long our workshift would be . . . If harasser wanted to get the job done, he made the crew work 16 hours a day")); Doc. 88-4, p. 3 (Willie Sigler Decl. ¶ 19); Doc. 86-3, p. 2 (Karlos Beasley ¶ 10); Doc. 84-6, p. 12 (███ ███ Dep. 77:5-79:18)). On summary judgment, the Court must give credence to the plaintiffs' evidence to the extent it contradicts evidence submitted by Def/Def. See Tipton, 965 F.2d at 998-99. Accordingly, summary judgment cannot be granted on the grounds that Def/Def was

[11] There is evidence that although a TA was not present on the majority of joint Def/Def/███ ███ jobs, harasser was the TA on a significant number of Co-employer Enterprise jobs, approximately 25-30 per year during the time period Co-Employer was providing baghouse services to Def/Def. (See Doc. 84-4, p. 6 (harasser harasser Dep. 36:9-12)).

not the plaintiffs' joint employer with Co-Employer. As a consequence, nor can summary judgment be granted on the basis that the plaintiffs were not Def/Def's employees.

B. Section 1981 Standing

Def/Def moves for summary judgment on the plaintiffs' Section 1981 claims on the ground that "[i]ndividual plaintiffs who are not parties to a contract that is terminated or under which they sustained harm[] lack standing to bring a § 1981 claim." (Doc. 73-1, p. 27). They reason that "[b]ecause Plaintiffs do not allege—and cannot show—that they were parties to a contract with Def, there is no claim under § 1981." (Id., p. 28).

Plaintiffs counter that a contractual relationship giving rise to Section 1981 standing exists and "is based on the agreement that plaintiffs provide a benefit/service to defendants, for which they were to be compensated, even if indirectly. No written contract is needed." (Doc. 83, p. 50).

If the plaintiffs can prove at trial that Def/Def was their joint employer within the meaning of Title VII, then they will be able to pursue their Section 1981 claims on the grounds that they are constructive, at-will employees of Def/Def. As the court explained in Barbosa v. Continuum Health Partners, Inc., No. 09 Civ. 6572, 2010 WL 768888 (S.D.N.Y. Mar. 8, 2010):

> Several doctrines have been developed to allow a plaintiff to assert employer liability in the employment discrimination context against entities that are not her formal, direct employer. These doctrines apply under . . . Section 1981 . . . . Under one such doctrine—the "joint employer" doctrine—an employee formally employed by one entity can be found to be constructively employed by another entity and may therefore state an employment discrimination claim against her constructive employer as well as her direct employer.

Id. (citing Snyder v. Advest, Inc., No. 06 Civ 1426, 2008 WL 4571502, at *6 (S.D.N.Y. Jun. 8, 2008)); see also Perrymond v. Lockheed Martin Corp., No. 1:09-CV-1936-TWT, 2009 WL 2474226 (N.D. Ga. Aug. 12, 2009) (report and recommendation adopted by district court)

(concluding that in light of Title VII's joint employer doctrine "and Plaintiffs' allegations that Lockheed and Global [Contract Professionals] exercised joint control over Plaintiff's employment conditions, . . . Plaintiff's Title VII and § 1981 claims against Global and Lockheed as joint employers are not frivolous." Id. at *3); Robinson v. Int'l Paper Co., No. 07-610-KD-C, 2008 WL 4080208, n. 8 (S.D. Ala. Aug. 29, 2008) (at-will employment contracts deserve protection under Section 1981 (collecting cases)); Lane v. Ogden Entm't, Inc., 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998) (same).

However, if Plaintiffs are unable to establish that Def/Def is their joint employer, then the plaintiffs will be unable to proceed under Section 1981 because plaintiffs have never directly contracted with Def/Def and would therefore lack standing. See Danco v. Wal-Mart Stores, Inc., 178 F.3d 8, 14 (1st Cir. 1999) ("[n]othing in Section 1981 provides a personal claim, so far as its language is concerned, to one who is merely *affiliated*—as an . . . employee—with a contracting party that is discriminated against by the company that made the contract").

As noted above, Plaintiffs have presented sufficient evidence to survive summary judgment on the grounds that Def/Def was not the plaintiffs' joint employer with [redacted] Co-Employer. As a result, summary judgment based on an absence of standing is likewise denied as to the Section 1981 claims.

C. Hostile Work Environment Claims

To establish a hostile work environment claim pursuant to Title VII, a plaintiff has the burden of proving "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). To meet this burden, a plaintiff must show: (1) he belongs to a

protected group; (2) he has been subject to unwelcome harassment; (3) the harassment was based on a protected characteristic, such as race; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) the employer is responsible for such environment under a theory of vicarious or direct liability. Id.

Def/Def does not challenge the plaintiffs' ability to present sufficient evidence as to the first four elements of a hostile work environment claim. Instead, Def/Def argues that Plaintiffs cannot establish the final element—that Def is responsible for harasser's alleged conduct. To establish a hostile work environment claim, Plaintiffs must show that Def/Def "is responsible for such environment under a theory of either vicarious or direct liability." Lewis v. U.S. Dept. of Labor Admin. Review Bd., 368 Fed. Appx. 20, 30-31 (11th Cir. 2010) (per curiam) (citing Miller, 277 F.3d at 1275). In this case, the appropriate theory of hostile work environment liability "depends on whether the [alleged] harasser [(in this case, harasser)] is the victim[ ]s['] supervisor or merely a coworker." Lewis, 368 Fed. Appx. at 31 (quoting Huston v. Procter & Gamble Paper Prods. Corp., 568 F.3d 100, 104 (3d Cir. 2009)). Def/Def would be

> subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee, ... [However, if] the perpetrator of the harassment is merely a co-employee of the victim, the employer w[ould] be held directly liable [only] if it knew or should have known of the harassing conduct but failed to take prompt remedial action.

Lewis, id. at 31 (quoting Miller, 277 F.3d at 1278) (quotation marks and citation omitted).

Thus, the plaintiffs can avoid summary judgment by offering sufficient evidence tending to demonstrate either that harasser supervised the plaintiffs or that Def/Def should have known of

the harassing conduct but failed to take prompt remedial action. Genuine issues of material fact remain with respect to both of these determinations.

The Eleventh Circuit has not defined who is a "supervisor" under either Title VII or Section 1981. Martinez v. Pavex Corp., 422 F. Supp. 2d 1284, 1294 (M.D. Fla. 2006). However, "[i]n the context of Title VII, a supervisor is generally considered an 'agent' of the employer," and "[t]he Eleventh Circuit has held that the term 'agent' should be liberally construed to effect Title VII's remedial purpose." Id. at 1294; Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1254, 1265 (M.D. Ala. 2001) (citing Urquiola v. Linen Supermarket, Inc., No. 94-14-CIV-ORL-19, 1995 WL 266582, at * 2 (M.D. Fla. 1995)). A sister court has held

> that an employee is a supervisor or "agent" for purposes of Title VII if he has the actual authority to take tangible employment actions, see [Burlington Indus., Inc. v.]Ellerth, 524 U.S. [742,] 762 [(1988)], or to recommend tangible employment actions if his recommendations are given substantial weight by the final decisionmaker, see id., or to direct another employee's day-to-day work activities in a manner that may increase the employee's workload or assign additional or undesirable tasks, see Johnson [v. Booker T. Washington Broad. Serv.], 234 F.3d [508,] 513 [(11th Cir. 2000)].

Dinkins, 133 F. Supp. 2d at 1265. As noted in the joint-employer analysis, Plaintiffs present evidence that harasser frequently interacted with/instructed and disciplined Co-employer crew members directly and set the hours and break times for the Co-employer crews when he was acting as TA on projects with Co-Employer. In particular, Plaintiffs submit evidence that harasser had the power to extend the plaintiffs' work day up to 16 hours. (See, e.g., Doc. 87-15, p. 1 (Reginald Richardson Decl. ¶ 4 ("harasser told us how much to work. If he wanted the crew to finish a unit, he would make us work longer than the regular 12-hour day")); Doc. 87-20, p. 1 (Quincy Scott Decl. ¶ 8 ("harasser told us at the beginning of the job how long our workshift would be . . . If harasser

wanted to get the job done, he made the crew work 16 hours a day")); Doc. 87-8, p. 2 (Plaintiff Decl. ¶ 13) ("harasser cursed at the crew when he found us taking breaks during the day or if we took a lunch break that lasted longer than half an hour")); Doc. 86-13, p. 2 (Plaintiff Decl. ¶ 9 ("harasser told the crew when we could take lunch and when we could go back to the motel at the end of our shift. If harasser wanted us to get more work done before we left for the day, he made us work after our shift was supposed to be over")). In addition, Plaintiffs offer evidence that harasser "direct[ed the plaintiffs'] day-to-day work activities in a manner that [occasionally] increase[d] the employee's workload [and/or] assign[ed] additional or undesirable tasks." For example, Plaintiff Finklea stated that "harasser told us to use hand tools to scrape out the dust in the units instead of using a vacuum truck. Using the vacuum truck to clean out the baghouse would have been faster and easier for the crew but harasser insisted we do the job by hand." (Doc. 86-12, pp. 1-2 (Finklea Decl. ¶ 7); see also Doc. 87-8, p. 2 (Plaintiff Decl. ¶ 12) ("harasser also cursed and yelled at our crew because he wanted us to work faster. If the job was supposed to take fifteen days, harasser wanted us to finish in seven or eight days"). This evidence is sufficient to permit reasonable jurors to conclude that harasser was a supervisor or agent for Title VII purposes. Accordingly, summary judgment cannot be granted on the ground that Def/Def is not responsible for harasser's alleged conduct.

Moreover, if harasser was merely a co-worker, the determination of whether Def/Def responded appropriately to the accusations against harasser also presents issues of fact. An employer that "has knowledge of a racially combative atmosphere in the workplace[ ] has a duty to take reasonable steps to eliminate it." Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 72 (2d Cir. 2000) (citing Snell v. Suffolk Cnty., 782 F.2d 1094, 1104 (2d Cir. 1986)). Although "[a]n employer need not prove success in preventing harassing behavior in order to

demonstrate that it exercised reasonable care in preventing and correcting [ ] harassing conduct . . . if harassment continues after complaints are made, reasonable jurors may disagree about whether an employer's response was adequate." Id. (citing, inter alia, Richardson v. New York State Dep't Corr. Serv., 180 F.3d 426, 442 (2d Cir. 1999), abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); and Carter v. Chrysler Corp., 173 F.3d 693, 702 (8th Cir. 1999)); see also Smith v. Auburn Univ., 201 F. Supp. 2d 1216, 1226 (M.D. Ala. 2002) (holding that genuine issues of material fact were raised regarding whether the employer took appropriate remedial action when, "beyond speaking with [the offender and threatening him with termination], nothing in the record suggest[ed] that [the employer] further investigated the scope of the problem" and the harassment persisted).

Plaintiffs present evidence that [Co-Employer] accused [harasser] of racism approximately eight months before [Def]/[Def] instituted any systematic investigation, and that [Def]/[Def] employees [Div Mgr], [managers], [managers], and [managers] were made aware of those accusations before the Buzzi job commenced. Plaintiffs also present evidence that [managers] "defend[ed] [harasser]" in the face of [Co-Employer]'s accusations, and that [managers] responded to them by saying "I don't want to hear it." Although there is evidence that, following [Co-Employer]'s April, 2007 accusations, [Div Mgr] requested "details about what was said, when, and who was involved from our representatives, including any documentation" and spoke of a "need to investigate," reasonable jurors may disagree about whether [Def]/[Def]'s response was adequate, particularly with respect to [Co-Employer]'s earlier accusations.

Finally, [Def]/[Def] argues that [Co-Employer] "had an affirmative responsibility to take corrective measures to protect Plaintiffs from harassment by a [Def] employee." (Doc. 73-1, p. 51). Even assuming [Co-Employer] does have such a duty, this argument is irrelevant. The

authorities cited by Def/Def do not hold that one joint employer's duty to protect its employees relieves another joint employer of its responsibility for a hostile work environment.

D. Section 1981 Retaliation Claim

"To establish a claim of retaliation under Title VII or section 1981,[12] a plaintiff must prove that he engaged in statutorily protected activity, he suffered a materially adverse action, and there was some causal relation between the two events." Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11th Cir. 2008) (citing Burlington N. & Santa Fe Ry. Co., 548 U.S. at 59-71). As to whether the complaint is statutorily protected, "a plaintiff can establish a prima facie case of retaliation under the opposition clause of Title VII if he shows . . . that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful employment practices, [and] also that his belief was *objectively* reasonable in light of the facts and record presented." Little v. United Technologies, Carrier Transicold Division, 103 F.3d 956, 960 (11th Cir. 1997).

If a prima facie case has been made, the defendant has an opportunity to show a legitimate non-retaliatory reason for its actions. Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). If the defendant does so, the plaintiffs must show that the reasons the defendant gave were pretextual. Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002), modified on other grounds by D'Angelo v. School Bd. Of Polk City Fla., 497 F.3d 1203 (11th Cir. 2007).

Def/Def challenges Plaintiffs' prima facie retaliation case by reasoning that: (a) Plaintiffs personally engaged in no conduct protected by Title VII; (b) Plaintiffs cannot maintain

[12] The Court notes that the amended complaint does not allege retaliation under Title VII.

a claim of retaliation based on Co-Employer's conduct; and (c) Co-Employer did nothing that qualifies for Title VII protection. (Doc. 73-1, pp. 31-34).

Title VII states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Other courts have held that when an individual who is not himself the victim of an unlawful employment practice opposes such an employment practice on behalf of a victimized employee, the victimized employee is protected from unlawful retaliation notwithstanding the fact that the victimized employee did not personally oppose the unlawful employment practice. See Allen Sherod *ex rel.* Stallworth v. Henry Cnty School Dist., Civil Action No. 1:05-CV-0600-JOF, 2007 WL 1020843 (N.D. Ga. 2007) (citing EEOC v. Ohio Edison Co., 7 F.3d 541, 545-46 (6th Cir. 1993) ("we believe that the phrase 'he has opposed any practice' should be construed broadly to mean 'he or his representative has opposed any practice,' because it is consistent with the objective of [Title VII] to prohibit retaliation against protected activity"); Baird v. Rose, 192 F.3d 462, 471, n. 10 (4th Cir. 1999).

Plaintiffs present evidence that Co-Employer discussed harasser's racist comments during the Alcoa job in the course of a conference call that Co-employer arranged to defend a handful of [redacted] Co-Employer crew members whom harasser and Div Mgr planned to send home from the job. When Co-Employer emailed managers regarding harasser's "racist comments and attitude" in August of 2006, Co-employer explained that "the men resent it very much." In his email to Div Mgr on April 23, 2007, Co-Employer informed her that his "all black crew" was "livid about your and Def's attitude." And on April 26, 2007, Co-Employer wrote Div Mgr to relate "the opinion of [his] black crew members" and to explain that the plaintiffs "TOOK [harasser's] abuse to keep their livelihoods." From these

statements, there is sufficient evidence to conclude that Co-Employer complained on behalf of the plaintiffs, who lacked a direct line of communication with Def/Def management.

Moreover, Def/Def's argument that Co-Employer's statements were not specific enough to enjoy legal protection fails. "Internal complaints to supervisors concerning conduct that could reasonably be viewed as racially or sexually offensive plainly constitute protected expression under Title VII." Odom v. Mobile Infirmary, Civil No. 06-0511-WS-C, 2008 WL 748398, at *8 & n. 21 (Mar. 17, 2008) (citing inter alia, Pipkins v. City of Temple Terrace, Fla., 267 F.3d 1197, 1201 (11th Cir. 2001) ("[s]tatutorily protected expression includes internal complaints of sexual harassment to superiors")); Bradford v. Rent-A-Center East, Inc., 346 F.Supp.2d 1203, 1202 (M.D. Ala. 2004) ("plaintiff's casual statement in presence of supervisor that he was passed over before promotion because of race was protected expression under Title VII")).

Examining the record in the light most favorable to plaintiff, the Court finds that the plaintiffs have established both an objective and subjective belief that the reported activity was discriminatory. Moreover, the conduct of which Co-Employer complained could reasonably be construed as racially offensive thus protected activity. Plaintiffs present evidence that Co-Employer's comments during the conference call on the Alcoa job prompted managers to ask: "are you saying that harasser harasser is a racist?", to which Co-Employer replied, "Mr. harasser is harassing my men, and it must stop." In addition, Div Mgr stated in her deposition that Co-Employer's April 23, 2007 comment "about libelous remarks about me and the all black crew" prompted her to conclude that Co-Employer was alleging that someone at Def had made racial comments. These responses suggest that Co-Employer's complaints were specific enough to prompt Def/Def supervisors to conclude that they concerned racist conduct. Also, during the Alcoa job, Co-Employer informed managers that harasser had "had his racist comments and attitude from day one" and that harasser's

"attitude towards blacks was not acceptable." In the midst of the Buzzi job, Co-Employer told managers that "harasser harasser was acting in a racist and harassing manner towards African-Americans on these crews" and advised managers that harasser was working the Co-Employer crew hard because harasser was "a racist" who "hate[d] blacks and won't work with them." Finally, on April 26, 2007, Co-Employer stated that "Co-Employer [could]not continue to see [his black crew members] discriminated against."

Def/Def also move for summary judgment on the ground that they have legitimate, non-discriminatory reasons for not assigning work to Co-Employer and thus to Plaintiffs, and that there is no evidence that Def/Def's articulated reasons for not offering work to the plaintiffs are pretextual. (See Doc. 73, pp. 34-43). According to Def/Def, it

> offered no new projects to Enterprises for two reasons. First, Enterprises was hurting Def's relationship with its customers. Buzzi was the worst project ever, Co-Employer blamed the Buzzi problems on Def for giving him too much work, and Mr. Co-employer decided to "cut all ties" with Def. Second, baghouse business dropped off dramatically in 2007 to the point that Def did not think it could entrust what limited work it was getting to an Enterprises crew.

(Id., p. 44).

In considering whether an employer's reasons were pretextual, "The district court must evaluate whether the plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence. Combs v Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519, 1528 (11th Cir. 1997). In seeking to demonstrate pretext, "[t]he employee may rely on evidence that he already produced to establish his prima facie case." Martin v. Brevard Cnty Pub. Schs., 543 F.3d 1261, 1268 (11th Cir. 2008)

(citing Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997); Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 921 (11th Cir. 1993)).

Plaintiffs present evidence of pretext sufficient to allow a reasonable factfinder to find the proffered legitimate reasons unworthy of credence. Def/Def's first stated rationale—that Plaintiffs' poor performance on the Buzzi project prompted Co-Employer to "cut all ties" with Def/Def and required Def/Def to protect their customer relations by ceasing to work with the plaintiffs—is undermined by the fact that Def/Def continued to work with Co-Employer on five jobs following Buzzi. Def/Def's second rationale—that baghouse business "dropped off dramatically" in 2007 such that "Def did not think it could entrust what limited work it was getting to an Enterprises crew"—is contradicted by the statements of Def/Def employees manager, manager, manager, and managers. On April 27, 2007, immediately following Co-employer's April 26 email and a little more than a week and a half before he authorized Co-Employer' suspension, manager, Def/Def's Sourcing Leader, responded to an inquiry about Co-Employer' "ability to do the work relative to other suppliers" by noting that "[i]n general, we would like to have more labor supplier capacity." Less than a month later, manager wrote a group of Def/Def management with concerns over the "[d]emise of Co-employer." Specifically, manager wanted to make sure that the decisionmakers "[understood] the ramifications . . . prior to making th[e] decision" not to use Co-employer. Winters estimated that Co-employer represented "approximately $800,000 in top-line sales per year[, . . .] not tak[ing] into account Co-employer's involvement outside of their region[, which] easily put[ ] this number over $1,000,000. To meet goal, we needed $1.2M out of them this year." manager went on to note that "[i]n this time we are looking to grow this business by 53%, we have lost 2 prime contractors representing 45,000 of our required 90,000 labor hours . . . ." manager pointed out in response to manager's email that ceasing to work with Co-employer would require

the group to "adjust goal since we'll be unable to meet consumer demand." Rather than pointing out that baghouse business was "dropp[ing] off dramatically," manager responded to manager and manager's concerns by explaining that "[t]he reason for the temporary suspension is sensitive." According to manager, by "sensitive" he had in mind "the threat of litigation," and he advised the group that if General Counsel Scott manager was able to "resolve[the situation] successfully," the defendants could "work with [Co-Employer] again." Finally, managers estimated in his deposition that Def/Def's baghouse revenue dropped by approximately $100,000 to $200,000 between 2006 and 2007 (from approximately $3.6-$3.7 million in 2006 to $3.5 million in 2007). That relatively small decline—at most 5 percent of Def/Def's estimated baghouse revenues—along with the fact that, per manager's estimates, Co-Employer accounted for between $800,000 and $1.2 million worth of yearly revenue, suggests that Def/Def's baghouse business may have improved rather than declined during 2007. Plaintiffs' pretext argument is also supported by evidence that, at the time Def/Def decided to suspend Co-Employer, Def/Def was actually "looking to grow th[e] business by 53%." Accordingly, Plaintiffs have presented sufficient evidence of pretext to avoid summary judgment.

E. Discriminatory Discharge Claims

In the absence of direct evidence of discrimination, courts assessing disparate treatment claims on summary judgment apply the familiar burden-shifting analysis of McDonnell Douglas Corp. v. Plaintiff, 411 U.S. 792, 802 (1973). In order "to prove discriminatory treatment through circumstantial evidence: (1) a plaintiff must first make out a *prima facie* case[;] (2) then the burden shifts to the defendant to produce legitimate, nondiscriminatory reasons for the adverse employment action[;] and (3) then the burden shifts back to the plaintiff to establish that these

reasons are pretextual." Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1375 (11th Cir. 1996) (internal citations omitted).

To make out a prima facie case of discriminatory discharge, the plaintiffs must show that "(1) [they are] member[s] of a protected class; (2) [they were] qualified for the position[s they held]; (3) [they each] suffered an adverse employment action; and (4) [they were] replaced by . . . a person[/persons] outside [the] protected class or w[ere] treated less favorably than a similarly-situated individual[/individuals] outside [their] protected class." Maynard v. Bd. of Regents of the Div. of Univ. of the Fla. Dep't of Educ., 342 F.2d 1281, 1289 (11th Cir. 2003) (citing McDonnell Douglas Corp., 411 U.S. at 802).

For the purposes of summary judgment, Def/Def "assum[es] that Plaintiffs . . . can establish a prima facie case" of discriminatory discharge."[13] (See Doc. 73, p. 43). Instead, Def/Def moves for summary judgment on the grounds that it has legitimate, non-discriminatory reasons for not assigning work to Co-Employer and thus to Plaintiffs. Def/Def asserts the same rationale in connection with both the discriminatory discharge and retaliation claims. (See

[13] Def/Def, however, mentions in a footnote that "Plaintiffs' prima facie discriminatory discharge case is weakest with respect to the 'discharge' element . . . . [because] Plaintiffs' baghouse work was seasonal and episodic . . . [,] so the vast majority of Plaintiffs were not doing baghouse work in 2007." (Doc. 73-1, p. 43). Def/Def has failed to sufficiently develop this argument in a fashion that would permit the Court to award them summary judgment.

In the reply brief, Def/Def mentions that that there is no evidence that Roff Iron's crews are all white and that there is no evidence that Def/Def sent more work to Roff Iron. (See Doc. 93, p. 29). This argument appears to be offered in response to Plaintiffs' arguments relating to the discriminatory discharge claims. (See id.). In the opposition brief, Plaintiffs mention Roff Iron in the context of discriminatory discharge in response to what they characterize as Def/Def's "suggest[ion that] Plaintiffs cannot show pretext, in part because Def/Def had a long-standing relationship with the African-American plaintiffs." (See Doc. 83, p. 58). Because the Court concludes the other evidence of pretext Plaintiffs offer is sufficient to cast doubt on the reasons Def/Def offers for its actions, and because the Def/Def explicitly "assum[ed]" for the purposes of summary judgment that Plaintiffs could establish a case of discriminatory discharge, the undersigned considers irrelevant the argument that there is no evidence of Roff Iron's allegedly all-white crews.

Doc. 73-1, p. 44). Def/Def further argues that there is no evidence that Def/Def's articulated reasons for not offering work to the plaintiffs are pretextual. (See Doc. 73, pp. 44-45).

For the reasons set forth in the analysis of the retaliation claims, the Court concludes that Plaintiffs have presented sufficient evidence of pretext to avoid summary judgment on their discriminatory discharge claims.

F. Statute of Limitation Issues

Def/Def summarily claims in a footnote that thirteen plaintiffs are time-barred from asserting Title VII claims, as these plaintiffs have not performed work for Enterprises since 2005 or before. (See Doc. 73-1, n. 6). Def/Def cites no legal authority in support of this claim and has failed to sufficiently develop its argument, particularly as it pertains to the Section 1981 claims. Accordingly, the Court will not address this issue.

III. Conclusion

For the foregoing reasons, Def/Def's motion for summary judgment (Doc. 73) is **DENIED**.

DONE and **ORDERED** this the **2nd** day of **November, 2010.**

s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE