

E-Filed 10/5/2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SHAYAN MESBAHI, MOHAMMAD MESBAHI,
MOSHEN TOOLAMI, MTM AUTOMOTIVE
CORP., dba AUTO TECH COLLISION CENTER,

Plaintiffs,

v.

GEICO INSURANCE; ERIK STENTZ, DOES 1-20;

Defendants.

Case Number CV 07-05772 JF (HRL)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
SUMMARY JUDGMENT**

Re: Docket No. 31

Defendants GEICO Casualty Company, GEICO Indemnity Company and GEICO General Insurance Company (collectively "GEICO") and Erik Stentz ("Stentz") move for summary judgment against Plaintiffs Shayan Mesbahi, Mohammad "Jack" Mesbahi, Moshen "Mike" Toolami, and MTM Automotive Corporation, doing business as Auto Tech Collision Center. For the reasons discussed below, the motion will be granted in part and denied in part.

I. Background

Plaintiffs filed the instant case in the Santa Clara Superior Court on October 2, 2007, alleging interference with prospective business advantage and interference with contractual relations by Stentz, breach of the covenant of good faith and fair dealing and promissory estoppel by GEICO, and race and national origin discrimination under 42 U.S.C. §1981, race and national

1 origin discrimination under the Unruh Civil Rights Act, Civil Code § 51, and intentional
2 infliction of emotional distress by all Defendants. Defendants removed the action to this court on
3 November 14, 2007.

4 The relevant facts are as follows. GEICO, an automobile insurer, invites certain auto
5 body shops to partner with it and become GEICO “Guaranteed Repair Shops” (“GRS”). Beacom
6 Declaration (“Beacom Dec.”) ¶ 2. In 2000, Auto Tech, an auto body shop located in San Jose,
7 California, became a GRS shop. *Id.* at ¶ 3. GEICO guarantees the work done by GRS shops and,
8 if asked by a customer for a recommendation of an auto body shop, will advise the customer of
9 the GRS shops in that geographic area. *Id.* ¶ 4. GEICO’s expectations for GRS shops are in
10 writing. *Id.* at Ex. A ¶ 3.

11 In 2004, GEICO developed its “Auto Repair Xpress” program (“ARX Program”). The
12 ARX Program provides customers with a one-stop option in which an adjuster and repair service
13 are in one location. Beacom Dec. ¶ 4. Each ARX shop is staffed by a GEICO adjuster ready to
14 write an estimate and put the customer into a rental car if needed, as well as to oversee the entire
15 repair process, provide the customer with updates on the progress of the repair, and perform
16 quality assurance inspections of the repair once it is completed. *Id.* GEICO guarantees the work
17 done by ARX shops for as long as the customer owns the vehicle. *Id.*

18 GEICO represents that it continually evaluates ARX shops and in particular monitors
19 their “cycle time.” The cycle time is the number of days it takes a shop to complete repairs for a
20 customer. Beacom Dec. ¶ 7. GEICO asserts that one of the benefits it markets to its customers is
21 that ARX shops will repair their cars quickly, and that in turn GEICO encourages its ARX shops
22 to maintain a cycle time of four days or less so that a customer’s repair is completed in less than
23 one business week. *Id.*

24 Sometime in 2004, GEICO invited Auto Tech to participate in the ARX Program. *Id.* ¶ 8.
25 The process of becoming an ARX shop begins with a recommendation from the field supervisors
26 and adjusters based on their prior experience with a shop’s repair history with GEICO.
27 Deposition of John Hicks (“Hicks Dep.”) 21:11-25:4. The recommendation that Auto Tech be

1 designated as an ARX shop was made to John Hicks, who until January 2007, was the Auto
2 Damage Manager for Region Four. Hicks managed the supervisors and adjusters at Auto Tech
3 and reviewed performance indicators including cycle times. Hicks Dep. 8:17-20, 9:22-10:6,
4 21:11-25:4. Hicks then forwarded this recommendation to Dan Beacom, his supervisor, who
5 subsequently approved the recommendation. Hicks Dep. 24:24-25:12. Plaintiffs allege that
6 GEICO employees, including Hicks and Beacom, visited Auto Tech and informed them that
7 Auto Tech was being invited to join the ARX Program because it was trusted, had performed
8 well, and was large enough to handle the requirements of the new program. Declaration of Jack
9 Mesbahi (“J. Mesbahi Dec.”) ¶ 4. It is undisputed that there is no written document setting forth
10 terms or conditions of Auto Tech’s ARX Program status. Deposition of Shayan Mesbahi at
11 115:4-18; 123:8-24 (“S. Mesbahi Dep.”).

12 Auto Tech was the first, and, at that time, the only ARX shop in the San Jose/Santa Clara
13 area. Beacom Dec. ¶8. A GEICO adjuster was stationed at Auto Tech, and customers in the San
14 Jose area who called GEICO’s claims hotline were informed that Auto Tech now was an ARX
15 shop. *Id.* While participation in the ARX Program would have the effect of GEICO sending an
16 increased number of customers to Auto Tech, Plaintiffs admit that they did not provide any type
17 of payment to Defendants, raise their prices for customer repairs, or provide anything in return to
18 GEICO. S. Mesbahi Dep. at 115:15-116:2. Plaintiffs do assert that GEICO informed them that
19 100 to 150 repairs per month would be referred under the ARX Program and that Auto Tech
20 would need to hire more employees and be sufficiently equipped to keep up with the expected
21 volume. J. Mesbahi Dep. 74:17-75:9, 78:10-20. Defendants deny that they made any such
22 statements. Beacom Dec. ¶6; S. Mesbahi Dep. 120:9-23. Plaintiffs also allege that initially, after
23 a few months as an ARX Program, Auto Tech was assigned a second adjuster because of the
24 volume of business referred by GEICO, and that after the second adjuster was added Auto Tech’s
25 monthly sales attributable to GEICO repairs rose more than tenfold.

26 Mark Kehoe was the first ARX Program adjuster assigned to Auto Tech. Kehoe worked
27 at Auto Tech from early 2005 until the spring or summer of 2007 and maintained an office on
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1 site. Deposition of Mark Kehoe (“Kehoe Dep.”) 46:22-47:3; 88:1-17. One responsibility of an
2 adjuster at an ARX shop is to record cycle times on a laptop computer that is linked to the
3 corporate server so that GEICO can analyze the performance of each ARX Program location.
4 Kehoe Dep. 15:21-16:15. Defendants claim that GEICO evaluated Auto Tech’s cycle time
5 continuously and requested repeatedly that Auto Tech meet the target time of four days. Beacom
6 Dec. ¶ 9; Hicks Dep. 36:25-37:12; Declaration of Robert J. Gibson (“Gibson Dec.”) Ex. C.
7 Defendants also claim that Auto Tech’s cycle time typically was five to six days or more.
8 Beacom Dec. ¶ 9; Gibson Dec., Ex. B-C; Deposition of Mike Toolami (“Toolami Dep.”) 27:9-
9 23.

10 In 2006, GEICO began working with Car West, a new auto body shop in the San
11 Jose/Santa Clara area, and later that year GEICO invited Car West to participate in the ARX
12 Program. Beacom Dec. ¶ 10. GEICO claims that Car West exceeded all of the benchmarks by
13 which GEICO evaluates its ARX shops, particularly with respect to cycle time, and that Car
14 West routinely averaged a cycle time of less than the four day target. *Id.* Plaintiffs allege that
15 Car West maintained a low cycle time in comparison to Auto Tech because it was repairing
16 fewer vehicles and that the majority of other ARX shops that repaired a volume of vehicles
17 comparable to Auto Tech’s had cycle times of more than five days. *Opp. Mot. Ex. 22.*

18 Plaintiffs allege that in January 2007, when Stentz replaced Hicks as the Auto Damage
19 Manager for Region IV, Auto Tech’s positive working relationship with GEICO ended. Jack and
20 Shayan Mesbahi had known Stentz since approximately 2000. Plaintiffs claim that during that
21 lengthy period of time, Shayan was told by a friend, Asam, that Stentz had called Asam a “camel
22 jockey.” S. Mesbahi Dep. 69:15-70:3. Stentz denies making any such statement. Stentz. Dep.
23 22:17-25. Shayan Mesbahi also alleges that he was told by a co-worker, Suzanne, that Stentz did
24 not like him because of his Middle-Eastern heritage. S. Mesbahi Dep. 65:18-67:25.

25 Plaintiffs allege that on March 8, 2007, during a business telephone conversation between
26 Stentz and Shayan Mesbahi, Shayan mentioned Asam, at which point Stentz became agitated and
27 angrily began to shout that Shayan “wanted to talk about people’s past.” S. Mesbahi Dep. 62:3-
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1 63:3. Plaintiffs claim that Stentz also asked Shayan to provide him with a report by 5:00 P.M.
2 that day as to how Auto Tech would improve its cycle times. S. Mesbahi Dep. 63:3-10.
3 Plaintiffs claim that when Shayan called Stentz back later the same day, Shayan suggested that
4 the two be on friendly terms, and that Stentz replied angrily, "I would never have a friend like
5 you. I don't like you. I don't like your people." S. Mesbahi. 65:5-12. Stentz denies that he
6 made any such statement. Stentz Dep. 123:15-19.

7 Plaintiffs allege that following his first conversation with Stentz on March 8 Shayan met
8 with Auto Tech's GEICO adjuster, Kehoe, and informed Kehoe of the conversation. Plaintiffs
9 claim that Kehoe then volunteered to help Shayan draft an email relating to Auto Tech's cycle
10 times. S. Mesbahi 80:1-22. In this email, Shayan referenced a telephone conversation between
11 himself and Beacom. Opp. Mot. Ex. 4. That evening, at 8:33 p.m. Stentz wrote an email to
12 Beacom stating, "I was frankly surprised to see Auto Tech on the ARX Program at GEICO. I
13 have dealt with Shayan and Auto Tech for many years. I can expand on this point with you in
14 person." Opp. Mot. Ex. 5. Beacom responded to Stentz's email that same evening, "Sounds
15 good. I too have some reservations about this shop. We recently began working with Car West
16 around the corner for this very reason. I am looking forward to speaking with you about our
17 alternatives in this area." Opp. Mot. Ex. 6.

18 On April 22, 2007, in response to an email from Tina Munoz, a GEICO dispatcher, Stentz
19 wrote that Auto Tech was to be removed from the ARX Program within the next fourteen days
20 and that work should be transferred to Car West. Opp. Mot. Ex. 9. On April 23, 2007, there was
21 another email exchange between Munoz and Stentz in which Stentz wrote that the cut-off date
22 for Auto Tech's participation in the ARX Program would be April 30, 2007. Opp. Mot. Ex. 10.
23 Plaintiffs claim that on April 24, 2007, Stentz also sent an email terminating Auto Tech's GRS
24 status and that on May 8, 2007, Stentz sent another email reinstating Auto Tech's GRS status.
25 Opp. Mot. Ex. 11.

26 GEICO alleges that in May 2007, Beacom made a business decision to remove Auto
27 Tech from the ARX Program and return it to GRS status based on a combination of Auto Tech's
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1 poor cycle time and Car West's ability to outperform Auto Tech on all matrices upon which
2 ARX Programs were evaluated. Beacom Dec. ¶¶ 10-11. Plaintiffs contend that while Beacom
3 technically may have had final authority to terminate Auto Tech's ARX participation, this
4 decision was actually made by Stentz, was motivated by animus toward Plaintiffs because of
5 their Persian descent, and resulted in Auto Tech laying off more than eighteen employees and
6 losing millions of dollars in revenue. Plaintiffs allege that in a telephone conversation between
7 Stentz and Jack Mesbahi, Stentz said that the decision to remove Auto Tech from the ARX
8 Program was his decision as the manager in Northern California. J. Mesbahi Dep. 48:20-49:12.
9 Plaintiffs claim that after this conversation, Jack Mesbahi attempted to contact a number of
10 GEICO employees, including a San Jose manager, Gary Kelton, who told Jack that he was not
11 involved in the decision to remove Auto Tech from the ARX Program and confirmed that it had
12 been Stentz's decision. J. Mesbahi Dep. 54:1-17.

13 Plaintiffs claim assert that approximately one week later, Jack Mesbahi spoke with Stentz
14 and Stentz told Jack that GEICO would be returning to Auto Tech. Plaintiffs claim that Jack
15 Mesbahi then thanked Stentz and told him that he would recall the employees that had been laid
16 off, and that Stentz assured Jack that all of GEICO's adjusters would be sent back to Auto Tech.
17 J. Mesbahi Dep., 58:21-59:6. Plaintiffs allege that on May 8, 2007, Stentz sent an email to
18 Munoz indicating that something had changed since their last conversation and that Auto Tech
19 would continue as a GRS shop. Opp. Mot. Ex. 16. The next day, Stentz sent another email to
20 Munoz indicating that she again should begin booking appointments at Auto Tech, that she
21 should shift from double-booking to single booking at Car West, and that Kehoe again would be
22 staffed at Auto Tech as an adjuster. Opp. Mot. Ex. 17. Kehoe returned to Auto Tech on May 11,
23 2007. Opp. Mot. Ex. 19. Plaintiffs claim, however, that very few repairs were referred to Auto
24 Tech over the next month and that Kehoe left after approximately two weeks. S. Mesbahi Dec. ¶
25 9. Plaintiffs allege that on June 4, 2007, Stentz sent an email indicating that he planned to speak
26 with Beacom in person regarding Auto Tech. Opp. Mot. Ex. 20. Skelton replied by email to
27 Stentz that he had spoken to Shayan and Jack Mesbahi, that he had informed them that Kehoe
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1 would be removed by June 18, 2007, and that “Bob,” a different GEICO adjuster, would be
2 assigned to Auto Tech for two and a half days a week until additional staffing was possible. *Id.*

3 GEICO claims that Auto Tech remained a GRS shop until July 1, 2009, and that
4 Defendants continued to guarantee Auto Tech’s vehicle repairs for GEICO customers. Beacom
5 Dec. ¶ 3. Plaintiffs allege that since early 2009, GEICO has sent virtually no referrals to Auto
6 Tech. Mesbahi Dec. ¶9.

7 II. Legal Standard

8 A motion for summary judgment should be granted if there is no genuine issue of
9 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
10 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material facts are those
11 that might affect the outcome of the case under the governing law. *Id.* at 248. There is a genuine
12 dispute about a material fact if there is sufficient evidence for a reasonable jury to return a verdict
13 for the nonmoving party. *Id.* The moving party bears the initial burden of informing the Court of
14 the basis for the motion and identifying portions of the pleadings, depositions, admissions, or
15 affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v.*
16 *Catrett*, 477 U.S. 317, 323 (1986). Where the party moving for summary judgment would not
17 bear the ultimate burden of persuasion at trial, it must either produce evidence negating an
18 essential element of the nonmoving party’s claim or defense or show that the nonmoving party
19 does not have enough evidence of an essential element to carry its ultimate burden of persuasion
20 at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the
21 moving party meets its initial burden, the burden shifts to the nonmoving party to present specific
22 facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); *Celotex*
23 *Corp.*, 477 U.S. at 324.

24 The evidence and all reasonable inferences must be viewed in the light most favorable to
25 the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-
26 31 (9th Cir. 1987). Summary judgment thus is not appropriate if the nonmoving party presents
27 evidence from which a reasonable jury could resolve the material issue in its favor. *Anderson*,

1 477 U.S. at 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991). A high standard
2 for granting summary judgment is particularly appropriate in a discrimination case “because the
3 ultimate question is one that can only be resolved through a searching inquiry - one that is most
4 appropriately conducted by a fact-finder, upon a full record.” *Schnidrig v. Columbia Mach., Inc.*
5 80 F.3d 1406, 1410 (9th Cir. 1996), quoting *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1563 (9th
6 Cir. 1994).

7 **III. Discussion**

8 **A. Evidentiary objections**

9 Defendants object to certain evidence contained in the deposition transcript of Shayan
10 Mesbahi on the grounds of hearsay and lack of foundation. Hearsay is a statement, other than
11 one made by the declarant, offered in evidence to prove the truth of the matter asserted. Fed. R.
12 Evid. 801(c). Hearsay is inadmissible except as provided by the Federal Rules of Evidence, or
13 other rules prescribed by the Supreme Court. The testimony of a witness who does not have
14 personal knowledge of the subject of his or her testimony is inadmissible. Evidence to prove
15 personal knowledge may, but need not, consist of the witness's own testimony. Fed. R. Evid.
16 602. Defendants’ objections to evidence are addressed as follows:

17 **Statements 1:**

18 Defendants object to two statements made by Shayan Mesbahi concerning his
19 recollection of a conversation with his friend, Asam. In both instances, Shayan claims that Asam
20 told him that Stentz once called Asam a “camel jockey.” S. Mesbahi Dep. 69:21-70:3; 72:24-
21 73:1. The alleged statement was made by Stentz and would be considered a non-hearsay party
22 admission if testified to by Asam; however, the proffered testimony is of Shayan Mesbahi as to
23 what Asam said to him regarding Stentz’s statement. This is hearsay. Asam’s statement was
24 made outside of court, not by the declarant or a party, and is offered in evidence to prove the
25 truth of the matter asserted - that Stentz called Asam a “camel jockey.” Such evidence cannot be
26 considered on a motion for summary judgment. SUSTAINED.

27 **Statements 2:**

1 Defendants object to two statements made by Shayan Mesbahi recalling a conversation
2 with another friend, Suzanne, who was a colleague of Stentz. S. Mesbahi Dep. 67:6-12, 67:20-
3 25. In both instances, Shayan claims that Suzanne told him that Stentz did not like him partially
4 because Shayan was of Middle Eastern descent. *Id.* Suzanne's statement was made outside of
5 court, not by the declarant, and is offered in evidence to prove the truth of the matter asserted -
6 that Stentz does not like Shayan because he is of Middle Eastern descent. SUSTAINED.

7 **Statements 3:**

8 Defendants object to two statements made by Shayan Mesbahi recalling a conversation
9 between himself and Stentz. In both instances, Shayan alleges that Stentz said to him directly, "I
10 would never have a friend like you. I don't like you. I don't like your people." S. Mesbahi Dep.
11 65:5-12. This statement comes within the party admission exception to the hearsay rule. Fed. R.
12 Evid. 801(d)(2)(a). OVERRULED.

13 **B. Discrimination claims**

14 42 U.S.C. §1981 provides that "[a]ll persons within the jurisdiction of the United States
15 shall have the same right in every state . . . to make and enforce contracts . . . and to the full and
16 equal benefit of all laws . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). California's
17 Unruh Civil Rights Act, Civil Code Section 51, et seq., makes business entities liable for denying
18 "full and equal accommodations" on the basis of sex, race, color, religion, ancestry, national
19 origin, disability or medical condition. Cal. Civ. Code 51. The right to contract and do business
20 with a business entity, free of racial or national origin discrimination is an "advantage" that is
21 protected by the Unruh Civil Rights Act. *Payne v. Anaheim Memorial Medical Center, Inc.* 130
22 Cal. App. 4th 729, 745-46 (2005). Plaintiffs may establish a *prima facie* case either by
23 presenting direct evidence of discriminatory intent or by establishing the existence of factors such
24 as those set forth in *McDonnell Douglas*. *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138,
25 1144-45 (9th Cir. 2006) (determining as a matter of first impression that the *McDonnell Douglas*
26 standard was the appropriate one to apply in a Section 1981 discrimination case involving a non-
27 employment contract); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004);

1 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998).

2 **1. *Prima facie* case**

3 **A. Direct evidence of discrimination**

4 Direct evidence is “evidence which, if believed, proves the fact [of discriminatory
5 animus] without inference or presumption.” *Vasquez v. County of Los Angeles*, 349 F.3d 634,
6 640 (2003), citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir.1998). Plaintiffs
7 allege that Stentz, during a business telephone conversation with Shayan Mesbahi on March 8,
8 2007, stated, “I would never have a friend like you. I don’t like you. I don’t like your people.”
9 S. Mesbahi Dep. 65:5-12. Defendants argue that even if Stentz made such a statement, (1) the
10 statement is so vague that a reasonable person would not conclude that it was intended to
11 describe people of Persian descent; and (2) that Plaintiffs have failed to establish a causal
12 connection between the alleged comment and GEICO’s decision to remove Auto Tech from the
13 ARX Program. *See Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2004)
14 (determining that a stray remark by a non-decision maker is not sufficient to create a material
15 issue of fact); *see also Smith v. Firestone Tire and Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir.
16 1989) (holding that stray “remarks,. . .when unrelated to the decisional process, are insufficient to
17 demonstrate that the employer relied on illegitimate criteria, even when such statements are made
18 by the decision-maker in issue”).

19 Defendants’ first argument is unpersuasive for several reasons. First, the statement must
20 be viewed in context. It is undisputed that the Mesbahis and Stentz had known each other since
21 approximately 2000, and it would be reasonable for a trier of fact to presume that Stentz knew of
22 the Mesbahis’ Middle Eastern heritage. Secondly, Plaintiffs allege that Shayan had two
23 conversations with Stentz on March 8, 2007. During the first conversation, Stentz allegedly
24 became angry and began screaming after Shayan mentioned his friend Asam, another man of
25 Middle Eastern descent. S. Mesbahi Dep. 62:3-63:3; 79:11-21. Then, later that same day, when
26 Shayan suggested that he and Stentz could interact on a friendly or cordial basis, Stentz allegedly
27 said, “I would never have a friend like you. I don’t like you. I don’t like your people.” S.

1 Mesbahi Dep. 65:5-12. Finally, Defendants suggest no other explanation as to the import of the
2 words “your people” other than as a description of Shayan’s national origin. “With direct
3 evidence, a triable issue as to the actual motivation of the employer is created even if the
4 evidence is not substantial.” *Blue v. Widnall*, 162 F.3d 541, 546 (9th Cir.1998), citing *Godwin*,
5 150 F.3d at 1220-21. A plaintiff is required to produce “very little” direct evidence of the
6 employer's discriminatory intent to move past summary judgment. *Godwin*, 150 F.3d at 1221,
7 quoting *Lindahl v. Air France*, 930 F.2d 1434, 1438 (9th Cir.1991). Plaintiffs have produced
8 sufficient evidence for a reasonable jury to find that Stentz’s statement is direct evidence of racial
9 animus.

10 Defendants’ second argument presents a closer question. To survive summary judgment,
11 Plaintiffs must offer evidence tending to show that there is a nexus between Stentz’s alleged
12 discriminatory remarks and the subsequent termination of Plaintiffs’ ARX Program status.
13 *Vasquez*, 349 F.3d at 640 (concluding that a stray remark by a non-decision maker is not
14 sufficient to create a material issue of fact). Defendants and Plaintiffs present contradictory
15 evidence as to who made the decision to terminate. Defendants, relying on Beacom’s and
16 Stentz’s deposition testimony, allege that Beacom, not Stentz, was the decision-maker. Beacom
17 Dec. at ¶¶ 11-13; Stentz Dep. 75:9-14, 80:22-23. Plaintiffs, relying on Jack Mesbahi’s
18 deposition testimony, claim that two separate conversations support their position that Stentz was
19 the actual decision-maker. First, Plaintiffs point to Stentz’s alleged statement to Jack Mesbahi
20 that, “This is my decision. This is my – I’m the manager in Northern California.” J. Mesbahi
21 Dep. 48:20-49:12. Second, Plaintiffs cite Skelton’s alleged statement, “I’m not involved and it’s
22 not my decision.’ And, you know, we work together for years, and this is just between Erik – his
23 decision. I don’t have any involvement with this part.” J. Mesbahi Dep. 54:1-17. Taking these
24 statements together, a reasonable trier of fact could find that the decision to terminate Auto
25 Tech’s ARX status ultimately was made by Stentz, even if technical approval of the decision was
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1 Beacom's responsibility.¹

2 Plaintiffs' evidence is sufficient to raise a genuine issue of material fact as to whether
3 Stentz was the decision-maker. Moreover, on March 8, 2007, the same day that Stentz allegedly
4 made racially-motivated statements to Shayan Mesbahi, he also sent an email to Beacom, stating
5 that he was "surprised to see Auto Tech on the ARX Program at GEICO," that he had "dealt with
6 Shayan and Auto Tech for many years" and that he could "expand on this point with [him] in
7 person." Opp. Mot. Ex. 5. In response, Beacom wrote an email back stating, "Sounds good. I
8 too have some reservations about this shop. We recently began working with Car West around
9 the corner for this very reason. I am looking forward to speaking with you about our alternatives
10 in the area." Opp. Mot. Ex. 6. The timing of this email exchange in the context of the alleged
11 racially-charged statement by Stentz is further evidence of a nexus between the statements
12 themselves and Stentz's influence or role in the decision-making process.

13 **B. *Prima facie* case of discrimination under the *McDonnell Douglas***
14 **framework**

15 Under *McDonnell Douglas*, if the plaintiff satisfies the initial burden of establishing a
16 *prima facie* case of racial discrimination, the burden shifts to the defendant to prove it had a
17 legitimate non-discriminatory reason for the adverse action; if the defendant meets that burden,
18 the plaintiff must prove that such a reason was merely a pretext for intentional discrimination.
19 *Lindsey*, 447 F.3d at 1144, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03
20 (1973); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The proof required to
21 establish a *prima facie* case is "minimal and does not even need to rise to the level of a
22 preponderance of the evidence." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115,
23 1124 (9th Cir. 2000), quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

24 The specific elements of a *prima facie* case may be altered to analyze the specific facts
25 before the court. *Lindsey*, 447 F.3d at 1145; *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 854 (9th

26 ¹ During oral argument, Plaintiffs' counsel admitted that Beacom technically was the
27 final decision-maker, but also reaffirmed Plaintiffs' position that Stentz was the *actual* decision-
28 maker and the "but, for" cause of the termination.

1 Cir. 2002). In order to establish a prima facie case of discrimination under *McDonnell Douglas*
2 in the instant action, Plaintiffs must show that: (1) they belong to a class of persons protected by
3 statute; (2) Auto Tech was performing competently as an ARX Program auto shop; (3) they
4 suffered an adverse action; and 4) some other circumstances suggest a discriminatory motive.

5 Defendants' most substantial challenge to Plaintiffs' *prima facie* case involves the
6 adequacy of Auto Tech's performance. Defendants offer both testimonial and documentary
7 evidence that Auto Tech's cycle time was substandard and needed to be improved. Gibson Dec.
8 Exs. A-C. Plaintiffs nonetheless contend that they were performing competently. Opp. Mot. Ex.
9 22. Although they admit that they did not consistently achieve a cycle time of four days or less,
10 Plaintiffs do proffer evidence that they handled a significantly greater volume of repairs than Car
11 West, and that their cycle time was comparable to that of other ARX shops with a similar volume
12 of repair work. Opp. Mot. Ex. 22. Plaintiffs also offer undisputed evidence that other ARX auto
13 shops were not eliminated from the program despite the fact that they had longer cycle times than
14 Auto Tech. Hicks Dep. 44:18-45:15. Under the circumstances, a reasonable trier of fact could
15 find that Auto Tech was performing competently, even if its cycle time did not meet GEICO's
16 desired standard.

17 **2. Defendants' legitimate non-discriminatory reason for the adverse action**

18 Defendants contend that their decision to terminate Auto Tech was motivated by a
19 legitimate comparison of Auto Tech's performance with that of Car West. Beacom Dec. ¶¶ 10-
20 11, 13. As noted above, Defendants offer evidence of frequent emails between GEICO and
21 Plaintiffs expressing concern over Auto Tech's cycle time. Gibson Dec. Ex. B-C; Toolami Dep.
22 27:9-23.

23 **3. Whether the legitimate non-discriminatory reason for the adverse action 24 was pretextual**

25 Once a defendant presents legitimate non-discriminatory reasons for its actions, the
26 presumption of discrimination "drops out of the picture," and the plaintiff has the new burden of
27 proving that the proffered reasons were a pretext for discrimination. *St. Mary's Honor Ctr. v.*
28 *Hicks*, 509 U.S. 502, 510-11 (1993). "[P]laintiff[s] can prove pretext in two ways: (1) indirectly,

1 by showing that the employer's proffered explanation is 'unworthy of credence' because it is
2 internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful
3 discrimination more likely motivated the employer." *Chuang*, 225 F.3d at 1127, citing *Godwin*,
4 150 F.3d at 1220-22. While the inference created by the *prima facie* case no longer stands, the
5 evidence utilized to substantiate it may be considered for examining pretext. *Reeves v.*
6 *Sanderson Plumbing Products, Inc.* 530 U.S. 133, 143, citing *St. Mary's Honor Center*, 509 U.S.
7 at 507-508. The court must analyze the entire record in order to evaluate the credibility of the
8 reasons proffered, the possibility of other non-discriminatory reasons, and the ultimate possibility
9 that discrimination on the basis of national origin or race was the main motive for the adverse
10 action.

11 As noted above, Plaintiffs offer evidence that Auto Tech was not the only ARX shop that
12 failed to achieve GEICO's ideal cycle time. Opp. Mot. Ex. 22. As Plaintiffs contend in their
13 opposition papers, the vast majority of auto body repair shops participating in GEICO's ARX
14 Program failed to achieve the benchmark. Between January 1, 2007 and March 24, 2007, at or
15 about the time that Stentz became regional manager and GEICO began to discuss terminating
16 Auto Tech's ARX status, seven other ARX shops had cycle times even longer than Auto Tech's,
17 including three shops with cycle times of more than six days. *Id.* While Car West was the only
18 other ARX shop in direct competition with Auto Tech, the comparison of their performance
19 arguably was flawed. While Car West maintained a much better cycle time, it also handled a
20 significantly lower volume of repairs. Although Car West had a 1.6 day driveable cycle time, it
21 repaired only forty-one vehicles, while Auto Tech repaired 232 vehicles. Opp. Mot. Ex. 22. In
22 light of the undisputed fact that GEICO did not terminate any other auto body shop's ARX status
23 irrespective of whether it met the cycle time standard, this evidence is sufficiently substantial to
24 raise a genuine issue of material fact as to whether Defendants' proffered reason for Auto Tech's
25 termination was pretextual.

26 **C. Interference with prospective business advantage**

27 The elements of tortious interference with prospective business advantage are as follows:
28

1 (1) an economic relationship between the plaintiff and some third party, with the probability of
2 future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3)
3 intentional acts on the part of the defendant designed to disrupt the relationship, which acts are
4 wrongful by some legal measure other than the fact of interference itself. An act is independently
5 wrongful if it is "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory,
6 common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*,
7 63 P.3d 937, 950-51 (2003); (4) actual disruption of the relationship, and (5) economic harm to
8 the plaintiff proximately caused by the defendant's acts. *Korea Supply Co.*, 63 P.3d at 950.

9 Stentz argues that he is entitled to summary judgment on Plaintiffs' claim for interference
10 with prospective business advantage for the following reasons: (1) the only evidence of alleged
11 interference consists of two alleged statements, the first being hearsay and thus inadmissible, and
12 the other being the ambiguous, "I don't like you. I don't like your people;" (2) Stentz did not
13 make the decision to remove Auto Tech from ARX status, Beacom Dec.¶ 12; and (3) there is no
14 evidence that Stentz made the alleged racially offensive statements to GEICO. MSJ 13-14.
15 Stentz's first two arguments are addressed above. The question of whether Stentz made the
16 offensive remarks to GEICO is immaterial based upon the Court's earlier conclusion that a
17 reasonable fact-finder could determine that Stentz himself was the decision-maker.

18 **D. Interference with contractual relations**

19 The elements of a claim for intentional interference with contractual relations are: (1) a
20 valid contract between the plaintiff and a third party; (2) the defendant's knowledge of this
21 contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the
22 contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)
23 resulting damage. *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126
24 (1990).

25 It is undisputed that there was no written contract governing Auto Tech's participation in
26
27
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1 the ARX Program.² S. Mesbahi Dep. 123:8-20; J. Mesbahi Dep. 83:2-4. Plaintiffs claim that
 2 there was an oral or implied-in-fact contract; Defendants contend that no contract of any kind
 3 existed with respect to Auto Tech's ARX status. Beacom Dec. ¶ 5.

4 In order for an oral contract or promise to be enforceable, it "must be definite enough that
 5 a court can determine the scope of the duty, and the limits of performance must be sufficiently
 6 defined to provide a rational basis for the assessment of damages." *Ladas v. CSAA*, 19 Cal.App.
 7 4th 761, 770 (1993) (holding that "Under basic contract law '[a]n offer must be sufficiently
 8 definite, or must call for such definite terms in the acceptance that the performance promised is
 9 reasonably certain."); *see also Robinson & Wilson, Inc. v. Stone*, 35 Cal.App.3d 396, 407
 10 (1973). An alleged oral contract is not binding if its terms are vague and uncertain. *Banco Do*
 11 *Brasil, S. A. v. Latian, Inc.*, 234 Cal.App.3d 973, 1015, n. 55 (1991).

12 Here, the evidence fails to establish the existence of a promise in certain terms. Indeed,
 13 Plaintiffs are unable to identify any terms relating to the duration or termination of any alleged
 14 contract. J. Mesbahi Dep. 83:18-84:2; M. Toolami Dep. 26:12-14. In response to a question as
 15 to whether anyone from GEICO told him how long Auto Tech would remain on the program,
 16 Shayan Mesbahi answered, "No. But my understanding was as long as we were in a good
 17 standing with them, it should continue." S. Mesbahi Dep. 115:8-11. When asked whether
 18 GEICO ever actually promised that Auto Tech would remain on the ARX Program as long as it
 19 was in good standing, Shayan Mesbahi replied, "No. That was my understanding" and "I don't

20
 21 ² Plaintiffs contend in their opposition papers that even if there was no contract
 22 governing Auto Tech's status as an ARX shop, contractual claims against Stentz and GEICO also
 23 arise from an alleged contract governing Auto Tech's participation in the GRS Program. Opp.
 24 Mot. Exs. 1-3. However, there is no evidence Auto Tech ever was eliminated from the GRS
 25 Program. Plaintiffs allege that Auto Tech's GRS status recently has been "unofficially"
 26 terminated, as reflected in a decrease in the number of referrals but it is undisputed that GEICO
 27 has continued to employ adjusters at Auto Tech and guarantee Auto Tech's work as a part of the
 28 GRS Program. *See* S. Mesbahi Dec. ¶ 9 (stating that GEICO has continued to send its adjusters
 to Auto Tech); Beacom Dec. ¶ 11; *contra* J. Mesbahi Dep. 47:11-48:6) (claiming that Auto
 Tech's GRS status has been "unofficially" terminated). There is no language in any written
 document in the record that makes any reference to or guarantees the volume of work that Auto
 Tech should expect or is entitled to receive. Opp. Mot. Ex. 1-3; Beacom Dec. ¶ 6.

1 remember talking about that.” S. Mesbahi Dep. 125:7-17; 115:4-11. Plaintiffs concede that no
2 actual representations were made as to the terms or duration of Auto Tech’s participation in the
3 ARX Program.

4 Even if Plaintiffs could show that there was an oral promise by GEICO to maintain Auto
5 Tech’s ARX status as long as it was in “good standing,” such a contract would be unenforceable
6 under the Statute of Frauds because it would be indefinite in its duration and thus could not be
7 performed within a year from its making. *See* Cal. Civ. Code §1624(a)(1).

8 Nor is there any evidence of an implied-in-fact contract. “An implied contract is one, the
9 existence and terms of which are manifested by conduct.” Cal. Civ. Code § 1621. “The essential
10 elements of an implied-in-fact contract are mutual assent and consideration.” *See Bleu Products,*
11 *Inc. v. Bureau Veritas Consumer Product Services, Inc., et al.* No. CV 08-2591CAS, 2009 WL
12 2412413, at *9 (C.D. Cal. Aug. 3, 2009), citing *Chandler v. Roach*, 156 Cal.App.2d 435, 440
13 (1957). The parties do not dispute that their business relationship involved mutual assent, but
14 there is no evidence that Plaintiffs provided any consideration in exchange for their participation
15 in the ARX Program. As argued by Defendants, Plaintiff’s view would allow Auto Tech to
16 obtain all of the benefits of being an ARX Program participant without providing any
17 consideration or undertaking any increased burdens beyond those associated with participation in
18 the GRS Program. While GEICO sent more customers to Auto Tech, Auto Tech did not provide
19 any type of payment to Defendants, raise its prices for customer repairs, or provide anything in
20 return to GEICO. S. Mesbahi Dep. 115:15-116:2. Plaintiffs do not identify any other form of
21 consideration.

22 **E. Breach of implied covenant of good faith and fair dealing**

23 Plaintiffs allege that GEICO breached the implied covenant of good faith and fair dealing
24 under California common law. This claim is wholly dependent upon the existence of a contract.
25 *Racine & Laramie, Ltd. v. Cal. Dep’t of Parks & Recreation*, 14 Cal. Rptr. 2d 335, 338-39 (Ct.
26 App. 1993); see also *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988) (explaining
27 that “[t]he covenant of good faith and fair dealing was developed in the contract arena and is
28

1 aimed at making effective the agreement's promises"). Because no contract existed governing the
2 terms of Auto Tech's participation in the ARX Program, *see supra* III.D., this claim cannot
3 survive summary judgment.

4 **F. Intentional infliction of emotional distress**

5 To establish a claim for intentional infliction of emotional distress, a Plaintiff must show:
6 (1) extreme and outrageous conduct by the defendant; (2) intention to cause emotional distress,
7 or reckless disregard; (3) severe emotional suffering; and (4) actual and proximate causation of
8 the emotional distress. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal.3d 148, 155, n. 7 (1987);
9 *Helgeson v. American Int'l*, 44 F. Supp. 2d 1091, 1094 (S.D. Cal. 1999), citing *KOVR-TV, Inc. v.*
10 *Superior Court*, 31 Cal.App.4th 1023, 1028 (1995). "Severe emotional distress is not mild or
11 brief; it must be so substantial or long lasting that no reasonable person in a civilized society
12 should be expected to bear it." *James v. Career System Development Corp.*, No. C 05-4125,
13 2008 WL 3891968 at *5 (Cal. N.D. August 20, 2008), citing *Fletcher v. W. Nat'l Life Ins. Co.*, 10
14 Cal.App.3d 376, 367 (1970). Plaintiffs argue that since they have demonstrated the existence of
15 a triable issue of material fact as to their discrimination claim under Section 1981 and the Unruh
16 Civil Rights Act, there is sufficient evidence to support their claim for intentional infliction of
17 emotional distress, as racial discrimination *per se* is beyond the bounds of decency. However,
18 Plaintiffs offer no evidence as to the second element of their claim, which is that they in fact have
19 suffered severe or extreme emotional distress. *Id.* Without such evidence, this claim cannot
20 survive summary judgment.

21 **F. Promissory Estoppel**

22 Promissory estoppel is based on the theory that "a promisor is bound when he should
23 reasonably expect a substantial change of position, either by act or forbearance, in reliance on his
24 promise, if injustice can be avoided only by its enforcement." *Smith v. City of San Francisco*,
25 225 Cal.App.3d 38, 48 (1990), citing *Youngman v. Nevada Irrigation Dist.* 70 Cal.2d 240, 249
26 (1969); *Signal Hill Aviation Co. v. Stroppe*, 96 Cal. App.3d 627, 637 (1979). In order for
27 Plaintiffs to maintain their claim for promissory estoppel, they must present evidence that
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1 Defendants: (1) made a promise that was clear and unambiguous in its terms; (2) that Plaintiffs
2 relied on the promise; (3) that Plaintiffs' reliance was both reasonable and foreseeable; and (4)
3 that Plaintiffs were injured by their reliance. *Laks v. Coast Fed. Sav. & Loan Assn.*, 60
4 Cal.App.3d 885, 890 (1976). Plaintiffs allege two separate instances of reliance upon promises
5 allegedly made by GEICO.

6 **1. GEICO's invitation to Auto Tech to join the ARX Program**

7 Plaintiffs claim that when they were invited to participate in the ARX Program in 2004,
8 they added employees and machinery to handle the increased volume of repairs that they
9 necessarily expected would accompany Auto Tech's designation as an ARX shop. J. Mesbahi
10 Dec. at ¶4; J. Mesbahi Dep. 74:22-75:9; 78:10-79:25. Plaintiffs admit, however, that GEICO
11 never required or suggested that Auto Tech needed to hire additional employees, maintain a
12 certain number of employees or have a certain amount of space in its facility to be an ARX shop.
13 Plaintiffs' evidence consists entirely of the Mesbahis' subjective "understanding." S. Mesbahi
14 Dep. at 115:4-18; 120:9-23; 123:8-24. Plaintiffs have not identified evidence that would permit
15 a reasonable trier of fact to determine that they relied on "a promise that [was] clear and
16 unambiguous in its terms." *Laks*, 60 Cal.App.3d at 890.

17 **2. GEICO's alleged assurances that Auto Tech would retain two adjusters 18 regardless of whether other shops in the area joined the ARX Program**

19 Plaintiffs allege in their complaint that in November 2006, Hicks, who was Stentz's
20 predecessor, represented to Shayan Mesbahi that two adjusters would remain at Auto Tech even
21 if additional ARX shops were added in the Bay Area. Plaintiffs claim that they relied on this
22 representation by Hicks and proceeded to purchase the building in which Auto Tech then was
23 located and make certain improvements thereto. Complaint ¶¶ 10, 55; S. Mesbahi 118:8-120:22.
24 Plaintiffs' only evidence on this point is Shayan Mesbahi's testimony, and Shayan is unable to
25 recall whether it was Hicks or Hicks's superior, Beacom, who made the alleged statement. *Id.*
26 Plaintiffs also have admitted in interrogatory responses that they closed escrow on the building
27 on or about October 4, 2006, a month before Hicks' representations allegedly were made.
28 Gibson Dec., Ex. K. In light of this admission, Plaintiffs cannot show that they relied upon the

1 alleged representation in purchasing the building. In fact, Plaintiffs acknowledge that the alleged
2 statement “confirmed...their decision to purchase the building based upon the increased revenue
3 from the Guaranteed Repair program and the Xpress program was a sound decision.” *Id.*

4 **IV. ORDER**

5 Good cause therefor appearing, Defendants’ motion for summary judgment is DENIED
6 as to Plaintiffs’ claims pursuant to 42 U.S.C. § 1981 and Cal. Civ. Code § 51 and for intentional
7 interference with prospective business advantage by Stentz, and GRANTED as to Plaintiffs’
8 remaining claims for relief.

9 **IT IS SO ORDERED.**

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11 DATED: 10/5/09

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13 
14 JEREMY FOCHEL
United States District Judge_

1 This Order was served on the following persons:

2 Daniel Stewart Rodman drodman@swlaw.com

3 Robert David Baker attyatlaw@earthlink.net

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