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United States District Court, D. Kansas.

Saul ZAPATA, et al., Plaintiffs,
v.
IBP, INC., Defendant.

No. Civ.A. 93-2366-EEO.
|
Sept. 29, 1998.

MEMORANDUM AND ORDER

OCONNOR, J.

*1 This matter is before the court on defendant IBP, Inc.'s motion for summary judgment against plaintiff Gustavo Vasquez (Doc. # 515). Vasquez has responded and opposes the motion. IBP, Inc. ("IBP") has filed a reply. The court granted the parties leave to submit supplemental briefing, and on September 1, 1998, IBP filed its supplemental memorandum and appendix in support of summary judgment. On September 15, 1998, plaintiff submitted his supplemental memorandum and appendix in opposition to summary judgment. The matter is now ready for ruling. For the reasons set forth below, the motion is denied as to his Title VII and § 1981 claims of hostile work environment discrimination and discriminatory termination, and granted as to his claim of discriminatory denial of transfers and promotions.

Vasquez contends that he was subjected to harassment based on his national origin, ancestry, ethnicity and race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981. In addition, Vasquez contends that he was wrongfully discharged because of his national origin, ancestry, ethnicity, and race, also in violation of Title VII and § 1981. In defense, IBP maintains that Vasquez's Title VII claims are barred for failure to exhaust administrative remedies, and for failure to timely file a charge of discrimination with the appropriate state or federal administrative agency. Additionally, IBP contends that Vasquez was terminated not as a result of his national

origin, ancestry, ethnicity, or race, but rather was discharged in accordance with IBP's neutrally-applied leave of absence policy.

I. Plaintiffs' Claims Pursuant To 42 U.S.C. § 1981.

a. *All Plaintiffs Have Sufficiently Stated A Claim Pursuant to Section 1981.*

Defendant IBP moves for summary judgment on plaintiffs' section 1981 claims on the ground that plaintiffs have alleged only national origin discrimination, which is not cognizable under section 1981. Defendant maintains that plaintiffs must include a claim of "race" discrimination to maintain a section 1981 claim. Defendant relies entirely on plaintiffs' allegations in their Second Amended Complaint, while ignoring the pretrial order. The pretrial order specifically includes plaintiffs' allegations of discrimination based on "national origin, ancestry, ethnicity and race." *See* 5/16/97 Pretrial Order at 2, 3, 6-8, 10-24. Although defendant objected to the allegations in the pretrial order based on "ancestry, ethnicity and race," the court effectively overruled defendant's objection by including these allegations in the final pretrial order. Defendant did not seek reconsideration of the pretrial order. It is well established that the pretrial order supersedes all pleadings and controls the subsequent course of the case. *See Hullman v. Board of Trustees of Pratt Community College*, 950 F.2d 665, 667 (10th Cir.1991); Rule 16(e) of the Federal Rules of Civil Procedure; Rule 16.2(c) of the Rules of Practice for the District of Kansas. Accordingly, plaintiffs clearly have stated a claim under section 1981 based on their allegations in the pretrial order.

*2 Even if we reviewed the sufficiency of plaintiffs' section 1981 claim under the Second Amended Complaint, rather than the pretrial order, we would find that plaintiffs' allegations are sufficient to state a claim. Rule 8(a) of the Federal Rules of Civil Procedure merely requires that a pleading which sets forth a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although defendant's argument is raised in the context of a motion for summary judgment, defendant essentially contends that plaintiffs have failed to state a claim under section 1981. In these circumstances, the court must view all reasonable inferences in favor of the plaintiffs and the pleadings must be liberally construed. *See Swanson v. Bixler* 750 F.2d

810, 813 (10th Cir.1984). The issue in reviewing the sufficiency of a complaint is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In a tax case, the Tenth Circuit noted that “while it may have been proper [previously] ... to rely upon ‘magic words’ in a complaint, notice pleading under the rules of civil procedure and the tax code now emphasize function instead of form, and economic reality rather than labels.” *Gail v. United States*, 58 F.3d 580, 583 (10th Cir.1995) (citing *Alexander v. City of Chicago*, 994 F.2d 333, 340 (7th Cir.1993)). Similarly, courts generally recognize that it is “improper to dismiss a claim which raises a cognizable cause of action where that claim is merely mislabeled, in view of the command of F.R.Civ.P. 8(f) that ‘(a)ll pleadings shall be so construed as to do substantial justice.’” *Voytko v. Ramada Inn*, 445 F.Supp. 315, 325 (D.N.J.1978) (citations omitted).

Section 1981(a) provides: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981 (emphasis added). The Tenth Circuit has recognized that section 1981 prohibits race discrimination, not discrimination based upon national origin per se. *See Daemi v. Church’s Fried Chicken, Inc.*, 932 F.2d 1379, 1387 n. 7 (10th Cir.1991); *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 971–72 (10th Cir.1979). Although section 1981 does not apply to discrimination based solely on the nation of one’s origin, courts have noted that the concept of race discrimination under section 1981 is quite broad. The Supreme Court has held:

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. The Court of Appeals was thus quite right in holding that § 1981, “at a minimum,” reaches discrimination against an individual “because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.” It is clear from our holding, however, that a distinctive physiognomy is not essential to qualify for § 1981 protection. If respondent

on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.

*3 *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1986) (footnote omitted); *see Daemi*, 931 F.2d at 1387 n. 7 (“The concept of race under § 1981 is broad. It extends to matters of ancestry which are normally associated with nationality, not race in a biological sense.”).

The Tenth Circuit has noted that “often the line between national origin discrimination claims under Title VII and racial discrimination claims under § 1981 is ‘not a bright one’” and that the concepts of “race” and “national origin” overlap to a significant degree. *Daemi*, 931 F.2d at 1387 n. 7 (quoting *Saint Francis College*, 481 U.S. at 614 (Brennan, J., concurring)). In *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir.1979), the Tenth Circuit evaluated the sufficiency of a section 1981 claim brought by a Mexican American:

Of course, section 1981 makes no mention of race, national origin, or alienage. The only reference is that “all persons” shall have described rights and benefits of “white citizens.” Thus the standard against whom the measure was to be made were the rights and benefits of white citizens. The measure is group to group, and plaintiff has alleged that the “group” to which he belongs—those he describes as of Mexican American descent—is to be measured against the Anglos as the standard. This is perfectly clear and well understood in the context, and in the geographical area concerned. The allegation is direct that discrimination was directed to members of his group, and to him individually because of his affiliation. We hold that this was sufficient to have withstood the motions to dismiss. In this holding we consider that Mexican American, Spanish American, Spanish-surname individuals, and Hispanos are equivalents, and it makes no difference whether these are terms of national origin, alienage, or whatever. It is apparent that a group so described is of such an identifiable nature that the treatment afforded its members may be measured against that afforded the Anglos.

Thus plaintiff has alleged that there has been or is discrimination against him by defendants by reason of the fact he is of Mexican American origin, and this is a sufficient identification of a group within the protection of section 1981. The group to group comparison or contrast is made, and with the other allegations a cause of action is alleged.

Id. at 970.

Here, we find that plaintiffs have sufficiently stated a claim under section 1981 in their Second Amended Complaint. Plaintiffs allege that they “have the same national origin; they are either Mexican–American or native-born Mexicans.” Second Am. Compl. ¶ 2; *see id.* ¶ 24 (“The class of plaintiffs is defined as all employees of defendant IBP whose national origin is Mexican or Mexican–American.”). Plaintiffs clearly have alleged discrimination based on something more than their birthplace because not all of the plaintiffs apparently were born in Mexico. This conclusion is further supported by the fact that four of the plaintiffs do not even allege in the Second Amended Complaint where they were born. *See id.* ¶¶ 12, 15, 17, 19. In addition, we note that plaintiffs allege in the Second Amended Complaint differential treatment between Mexicans and non-Mexicans. *See id.* ¶¶ 9, 13, 15, 17, 18, 21. For example, plaintiff Pedro Lira alleges he is of Mexican national origin but does not state his birthplace in contrast to 10 of the other 14 plaintiffs. Plaintiff Lira then alleges that he was “denied the rights and privileges given to other employees of defendant IBP who are not Mexican.” *See id.* ¶ 17. The alleged name calling referenced in the Second Amended Complaint also suggests that plaintiffs’ claims involve more than simply “national origin” discrimination in a limited sense. *See id.* ¶ 30(f). In sum, we find that plaintiffs have sufficiently stated a claim under section 1981 because their allegations are not limited to discrimination based on the nation of their origin, but rather their allegations also encompass discrimination based on ethnicity and ancestry. *See Saint Francis College*, 481 U.S. at 613.

*4 Our reading of the Second Amended Complaint is consistent with our prior rulings in this case. Magistrate Judge Rushfelt held that “[b]oth the pleadings and prior discovery motions suggest the probability that the discrimination claims of plaintiffs more probably arise from their common ethnicity and ancestry, as persons of Mexican or Mexican American heritage, rather than as people sharing a common national origin in terms of political or geographical boundaries or birthplace.” 9/1/95 Mem. & Order at 5. Likewise, the court recognized, in ruling on plaintiffs’ motion for class certification, that “[s]imply because a number of Mexican–American workers may harbor animosity towards Mexican workers is not clear evidence that their interests or claims in the case are antagonistic: indeed, *both groups are claiming that they were discriminated against because of their Mexican ethnicity or ancestry.*” 5/15/96 Mem. & Order at 18 (emphasis added); *see id.* at 13 (noting plaintiffs’ allegations regarding “the use of racial epithets”); *id.* at 32 (denying plaintiffs’ motion to certify class consisting of workers of “Mexican ethnicity or ancestry”).¹

The purposes of the notice pleading requirements of rule 8(a) are “to give the defendant fair notice of the claims against him” to enable him to adequately respond to the allegations. *See Evans v. McDonald’s Corp.*, 936 F.2d 1087, 1091 (10th Cir.1991); *Kohn v. American Housing Found. I, Inc.*, 170 F.R.D. 474, 476 (D.Colo.1996); *see also Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1443 (10th Cir.1992) (purposes of notice pleading requirements are served if plaintiff is put on notice well in advance of trial of the nature of the defense asserted) (citation omitted). Whether plaintiffs here labeled the discrimination “racial” or “national origin” in their complaint, defendant was on notice that plaintiffs’ claims involved allegations of discrimination against Mexicans and Mexican–Americans in various forms, including the use of racial epithets. The purposes of the notice pleading requirements were satisfied in this case and defendant was able to adequately prepare a responsive pleading. We also note that IBP was put on notice of the nature of plaintiffs’ claims early in the discovery process by plaintiffs’ interrogatory answers. At least twelve of the plaintiffs made specific references to “racial discrimination” in their answers to defendant’s first set of interrogatories. *See, e.g.,* O. Cabral’s Answers at 7 (Dec. 15, 1993); A. Martinez’s Answers at 7 (Jan. 14, 1994); F. Ponce’s Answers at 7 (Dec. 15, 1993); M. Sigala’s Answers at 6 (Jan. 14, 1994); G. Vasquez’s Answers at 8 (Dec. 15, 1993).

While the court certainly believes that plaintiffs should have included allegations of discrimination based on race, ancestry, and ethnicity in their complaint, the absence of those specific labels or titles should not detract from the heart of plaintiffs’ allegations—discrimination against Mexicans and Mexican–Americans. Magistrate Judge Rushfelt stated in an earlier order in this case:

*5 The foregoing cases suggest that the claims of the named plaintiffs are probably pleaded adequately as violations of 42 U.S.C. § 1981 to the extent they allege intentional discrimination because they are Mexican or Mexican American. The presence or absence of the labels “race” or “national origin,” therefore, should not detract from the more substantive allegations which otherwise qualify their claims under the statute. Whether their wrongs be labeled with “race” or “national origin,” the named plaintiffs who allege discrimination because they are Mexican or Mexican American should have satisfied the requirements of § 1981 to protect the rights of “All persons ... to the full and equal benefit of all laws ... as is enjoyed by white citizens....” Such interpretation accords with the concept of justice set forth in Fed.R.Civ.P. 1.

9/1/95 Mem. & Order at 10. IBP contends that Magistrate

Judge Rushfelt's statements conflict with this court's ruling, in reviewing Magistrate Judge Rushfelt's order, that plaintiffs could not belatedly add a new theory of recovery by amending their complaint to assert race discrimination claims. *See* 10/6/95 Mem. & Order at 4. We find nothing conflicting in the two orders which reached the very same result. The court's October 6, 1995 order did not specifically address the tangential issues discussed by Magistrate Judge Rushfelt regarding whether the denial of plaintiffs' motion for leave to amend would have any practical effect on the viability of plaintiffs' section 1981 claims. While we are not bound by Magistrate Judge Rushfelt's analysis of this issue in the context of the motion to amend, we find Magistrate Judge Rushfelt's statements on the issue generally accurate and persuasive in addressing the instant motion for summary judgment.

For the above reasons, the court concludes that all plaintiffs have sufficiently stated a claim pursuant to section 1981. Defendant's motion for summary judgment on this issue is denied.

b. Plaintiff Vasquez's Alleged Waiver Of His Section 1981 Claim.

IBP argues that plaintiff Vasquez has waived his section 1981 claim by signing a release in settlement of his workers' compensation claim. Plaintiff argues that IBP has waived this defense for failing to specifically assert the defense in its answer or in the pretrial order. As we explained earlier, the Tenth Circuit has held that the purposes behind the notice pleading requirements are served if plaintiff is put "on notice well in advance of trial that defendant intends to present a defense in the nature of an avoidance." *Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1443 (10th Cir.1992) (quoting *Marino v. Otis Eng'g Corp.*, 839 F.2d 1404, 1408 (10th Cir.1988)). Here, plaintiff was specifically put on notice of IBP's defense on April 21, 1997, nearly one month prior to the pretrial order and well over a year in advance of trial. Accordingly, the court finds that IBP can raise its waiver defense. *See Xidex*, 967 F.2d at 1443-44 (party did not waive affirmative defense where party first raised defense in a motion for summary judgment filed three months prior to trial); *Marino*, 839 F.2d at 1408 (purposes of rule 8(c) served where plaintiff had notice at least three months prior to trial of affirmative defense); *Bledsoe v. Bruce*, No. 90-3342-DES, 1995 WL 40627, at *1 (D.Kan.1995) (finding no waiver where affirmative defenses first identified in pretrial order); *see also Denty v. Smithkline Beecham Corp.*, 907 F.Supp. 879, 882

(E.D.Pa.1995) ("although the defense of failure to sue the proper party is indeed considered to be an affirmative defense which must be pled in the defendant's answer [], the defense is not waived unless prejudice to the plaintiff can be shown"), *aff'd*, 109 F.3d 147 (3d Cir.1997), *cert. denied*, 522 U.S. 820, 118 S.Ct. 74, 139 L.Ed.2d 34 (1997).

*6 Although IBP will be allowed to pursue its waiver defense to plaintiff Vasquez's section 1981 claim, the court will deny IBP's motion for summary judgment on the issue. Vasquez signed a release in conjunction with the settlement of his workers' compensation claim with IBP. The release excluded plaintiff's "national origin discrimination claims, if any, which claimant may have as a putative class member in *Zapata, et al. v. IBP, inc.*, CV-93-2366-EEO." Although section 1981 employment discrimination claims may be waived by the execution of a release, "[w]aivers of federal remedial rights [] are not lightly to be inferred." *Torrez v. Public Service Co.*, 908 F.2d 687, 689-90 (10th Cir.1990). Here, the release specifically excludes national origin claims which Mr. Vasquez may have in this case. At the time the release was executed, plaintiffs had only asserted claims labeled "national origin" in their complaint. As we explained above, however, the precise labels attached to plaintiffs' section 1981 claims are not as important as the substantive allegations in the complaint that IBP discriminated against Mexicans and Mexican-Americans on the basis of ethnicity and ancestry. Except for the actual release, neither party has offered any evidence of the parties' intent regarding the scope of the release. Based on the record evidence, a reasonable juror could find that the parties intended to exclude plaintiff's section 1981 claim from the scope of the release. Accordingly, IBP's motion for summary judgment on this issue is denied.

II. Administrative Exhaustion Requirements and Plaintiff Vasquez's Title VII Claims.

Defendant argues that it is entitled to summary judgment on Vasquez's Title VII claims because he failed to file timely charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and, therefore, failed to exhaust his administrative remedies. Vasquez responds that defendant is not entitled to summary judgment on his Title VII claims because the filing of the class action² tolled the time for him to file charges of discrimination with the EEOC. Vasquez does not rely on the single-filing rule as articulated in *Lange v. Cigna Individual Financial Services Company*, 759

F.Supp. 764 (D.Kan.1991). *See* Plaintiffs' Response Brief at 55 n.11.

On September 3, 1993, Manuel Sigala and thirteen other individuals (including Vasquez) filed a class action complaint against IBP, alleging discrimination in violation of Title VII. Plaintiffs thereafter moved for certification of the complaint as a class action. The motion for class action certification was denied on May 15, 1996. The class action complaint served the purpose of notifying IBP of the allegations being brought against it, and IBP was put on notice of the claims of each of the individually named plaintiffs.

When an individual files a charge of discrimination with the EEOC and receives a right-to-sue letter (as Sigala did before filing suit), it is not necessary for each of the other named plaintiffs or members of the proposed class to obtain their own separate right-to-sue letters. *Barela v. United Nuclear Corp.*, 462 F.2d 149, 153 (10th Cir.1972); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720–21 (7th Cir.1969). We find that plaintiff had a right to rely on the general rule that he did not have to file an administrative claim until after the class action certification motion was denied. *See Andrews v. Orr*, 851 F.2d 146, 150 (6th Cir.1988) (“so long as a class action is pending the employer[] is put on notice of the claims of all putative class members. Once the class action ends, however, the employee is required to bring her individual claim to the attention of the employer by filing an administrative complaint with her EEO counselor.”). *See also Griffin v. Singletary*, 17 F.3d 356, 361 (11th Cir.1994) (the charge-filing period for the individual claims was tolled during the pendency of the class action, from the time the lawsuit was filed until the court published its opinion vacating the order certifying the class). Under the particular circumstances of this case, the court believes that Vasquez is entitled to benefit from the equitable tolling doctrine. Accordingly, we conclude that the 300-day statute of limitations for Vasquez to file an EEOC charge of discrimination was tolled from September 3, 1993, until May 15, 1996.

*7 Vasquez filed a charge with the EEOC on or about September 6, 1996,³ alleging hostile work environment discrimination. According to IBP, Vasquez's last day of work at IBP was approximately April 12, 1993.⁴ He then took a one-year leave of absence from IBP. Subsequently, on April 18, 1994, IBP terminated his employment.

Calculating Vasquez's time for filing his EEOC charge from April 12, 1993, and tolling the time that elapsed between September 3, 1993, and May 15, 1996, we find that Vasquez timely filed his EEOC charge on or about September 6, 1996. His charge was filed well within the

300-day charge-filing period. In addition, the court finds that Vasquez's claims of hostile work environment discrimination and discriminatory termination are “like or reasonably related to” the allegations contained in Sigala's EEOC charge. *See Seymore v. Shawver & Sons, Inc.*, 11 F.3d 794, 799 (10th Cir.1997). Accordingly, IBP's motion for summary judgment as to Vasquez's Title VII claims of hostile work environment discrimination and discriminatory termination for failure to comply with administrative requirements is denied.

III. Standards for Summary Judgment.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538–39 (10th Cir.1993). A factual dispute is “material” only if it “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248.

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hicks v. Watonga*, 942 F.2d 737, 743 (10th Cir.1991). Essentially, the inquiry as to whether an issue is genuine is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251–52. An issue of fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. This inquiry necessarily implicates the substantive evidentiary standard of proof that would apply at trial. *Id.* at 252.

Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial “as to those dispositive matters for which it carries the burden of proof.” *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991). The nonmoving party may not rest on his pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

*8 “[W]e must view the record in the light most favorable to the parties opposing the motion for summary judgment.” *Deepwater Invs. , Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir.1991). “In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial.” *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir.1988). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 256. Where the nonmoving party fails to properly respond to the motion for summary judgment, the facts as set forth by the moving party are deemed admitted for purposes of the summary judgment motion. D. Kan. Rule 56.1.

IV. Plaintiff Vasquez’s Discriminatory Termination Claim.

IBP moves for summary judgment on Vasquez’s discriminatory termination claims brought pursuant to Title VII and section 1981. IBP contends that it is entitled to summary judgment on these claims, because Vasquez did not personally plead in the Second Amended Complaint that he was discharged on the basis of his national origin. Defendant relies entirely on Vasquez’s allegations in the Second Amended Complaint while ignoring the pretrial order. The pretrial order specifically includes Vasquez’s allegations of discriminatory termination, stating, in part: “Mr. Vasquez was terminated by IBP based on his national origin, ethnicity, ancestry and race.... Mr. Vasquez was eventually terminated by IBP as a result of IBP’s pattern and practice of discrimination under the pretext of ‘extended medical leave of absence.’” See 5/16/97 Pretrial Order at 19. To the extent defendant objected to including in the pretrial order Vasquez’s allegations of discriminatory termination, the court effectively overruled any such objection by including these allegations in the final pretrial order. Defendant did not seek reconsideration of the pretrial order. It is well established that the pretrial order supersedes all pleadings and controls the subsequent course of the case. See *Hullman v. Board of Trustees of Pratt Community College*, 950 F.2d 665, 667 (10th Cir.1991); Rule 16(e) of the Federal Rules of Civil Procedure; Rule 16.2(c) of the Rules of Practice for the District of Kansas. Accordingly, Vasquez clearly has stated a claim for discriminatory termination based on his allegations in the pretrial order.

A. Discriminatory Termination Claim under Title VII.

IBP contends that it is entitled to summary judgment, because Vasquez has failed to present sufficient facts to establish a prima facie case for discriminatory termination. Specifically, in its initial brief, IBP argues that Vasquez has not shown (1) that he was qualified or applied to return to work, or (2) that similarly-situated persons of non-Mexican national origin were treated more favorably.

*9 With respect to the first point, the court finds, after reviewing the excerpts presented from plaintiff’s second deposition, that plaintiff has presented sufficient evidence that he was qualified and applied to return to work. With respect to the second point, as we held with respect to Sigala’s claim, under the particular facts and circumstances of this case, we are unpersuaded that Vasquez has not stated a prima facie case because he has not shown he was replaced by someone of a different national origin. We recognize that “[t]he facts necessarily vary in Title VII cases, and the specification ... of the prima facie proof required ... is not necessarily applicable in every respect to differing factual situations.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 13, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Next, IBP contends that even if Vasquez has stated a prima facie case, IBP has proffered a legitimate, non-discriminatory reason for discharging him, and Vasquez has not demonstrated that his separation from employment was a pretext for unlawful national origin discrimination. A plaintiff must present enough evidence to support an inference that the employer’s reason was merely pretext, by showing either “that a discriminatory reason more likely motivated the employer or ... that the employer’s proffered explanation is unworthy of credence.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1121–22 (10th Cir.1991). “Pretext can be shown by ‘such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.’” *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997).

Here, IBP has presented the affidavit of Roger Brownrigg, personnel director for IBP’s Emporia facility. Brownrigg states that “Vasquez was terminated by IBP when he did

not return to work in a year. He was formally separated from employment on April 18, 1994, when his leave of absence exceeded one year, pursuant to IBP's Emporia Facility Policy No. 19." IBP's Appendix I, Exhibit I at 6. We have reviewed the entire record submitted regarding Vasquez's claims. Viewing the record evidence in the light most favorable to Vasquez, we find that genuine issues of material fact exist regarding pretext, precluding summary judgment on his Title VII discriminatory termination claim.

Trial courts should act with caution in granting summary judgment, and may deny summary judgment where there is reason to believe that the better course would be to proceed to trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. *See also Jones v. Nelson*, 484 F.2d 1165, 1168 (10th Cir.1973) (summary judgment is a drastic remedy, which should be approached cautiously). Out of an abundance of caution, therefore, we deny summary judgment on Vasquez's discriminatory termination claim, under the belief that we will be in a much better position to make a definitive ruling after hearing the evidence at trial. Accordingly, IBP's motion for summary judgment on this claim is denied.

B. Discriminatory Termination Claim under § 1981.

*10 Plaintiff also asserts a claim of discriminatory termination pursuant to 42 U.S.C. § 1981. Plaintiff's section 1981 claim is premised on the same conduct at issue in the Title VII claim discussed above. "[I]n racial discrimination suits, the elements of a plaintiff's case are the same, based on the disparate treatment elements outlined in *McDonnell Douglas*, whether that case is brought under §§ 1981 or 1983 or Title VII." *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir.1991). Thus, summary judgment on plaintiff's section 1981 claim must be denied for the same reasons as those discussed with respect to plaintiff's Title VII claim.

V. Plaintiff Vasquez's Hostile Work Environment Claims under Title VII and § 1981.

To survive summary judgment, Vasquez must show that "under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment ..., and (2) the harassment was racial or stemmed from racial animus." *Vigil v. City of Las Cruces*, 113 F.3d 1247, 1997 WL

265095,*2 (10th Cir.1997) (citing *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir.1994), *cert. denied*, 516 U.S. 826, 116 S.Ct. 92, 133 L.Ed.2d 48 (1995)). Moreover, plaintiff must be able to point to "more than a few isolated incidents of racial enmity." *Id.* (citing *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1412 (10th Cir.1987)).

Viewing the factual record and all reasonable inferences in the light most favorable to Vasquez, we find that material issues of fact exist as to whether plaintiff's environment at IBP was sufficiently severe or pervasive so as to alter the conditions of his employment and create a racially hostile working environment. Vasquez has produced sufficient evidence from which a jury could reasonably infer that racial epithets such as "wetback" were more than just occasional utterances. Additionally, plaintiff has presented evidence that because he is Mexican, he was denied prompt and appropriate medical treatment for work-related injuries, and was required to work in positions contrary to his medical restrictions. Such evidence supports an inference of severe or pervasive racial harassment which precludes entry of summary judgment. Considering the totality of the circumstances, we find that plaintiff has produced enough evidence to survive summary judgment on his claims of hostile working environment harassment.

Once again, trial courts should act with caution in granting summary judgment, and may deny summary judgment where there is reason to believe that the better course would be to proceed to trial. *Anderson*, 477 U.S. at 255. Out of an abundance of caution, therefore, we deny summary judgment on Vasquez's Title VII and section 1981 claims of hostile work environment discrimination, under the belief that we will be in a much better position to make a definitive ruling after hearing the evidence at trial.

Finally, IBP moves for summary judgment as to Vasquez's transfer and promotion claims. Vasquez is the only plaintiff making a discrimination claim regarding transfer and promotions. Vasquez's Brief at 101, n. 21. We have previously ruled that plaintiffs' counsel abandoned all claims regarding transfer and promotion opportunities. *See* 5/15/96 Mem. & Order at 2. Moreover, Vasquez himself observes that his transfer claim is being brought as a discriminatory termination claim, when he states, "[i]n denying plaintiffs positions, IBP placed plaintiffs Cabral, Garcia, Zapata, Lira, and Vasquez on medical leave with the intent to terminate them in one year. As for these individuals, their claims [regarding] transfer are brought as discriminatory termination claims and are set forth in Section III.D.1." *See* Vasquez's Brief at 101, n. 21 (emphasis added). Consequently, IBP's motion for summary judgment on this issue is granted.

***11** IT IS THEREFORE ORDERED that defendant IBP's motion for summary judgment as to plaintiff Gustavo Vasquez (Doc. # 515) is denied as to his Title VII and section 1981 claims of hostile work environment discrimination and discriminatory termination, and is granted as to his claim of discriminatory denial of transfers and promotions.

All Citations

Not Reported in F.Supp.2d, 1998 WL 717621

Footnotes

- ¹ IBP argues that the court's February 20, 1997 order precludes plaintiffs' race discrimination allegations and that plaintiffs accordingly cannot state a claim under section 1981. In our February 20 order, we denied plaintiffs' request to add allegations that each plaintiff "has filed a claim of racial and national origin discrimination with the Equal Employment opportunity Commission (EEOC) in a timely manner." The court's ruling was limited to plaintiffs' attempt to assert their procedural compliance in bringing a Title VII race claim where plaintiff Sigala's EEOC charge did not assert race discrimination. The court did not rule on the issue presented in the instant motion, *i.e.*, whether plaintiffs have stated a claim under section 1981.
- ² As an alternative argument, plaintiff claims that the 300-day charge-filing period was tolled *from the date Sigala first filed his EEOC charge*, on November 18, 1992, until the court denied the class action certification motion on May 15, 1996. Plaintiff offers no convincing rationale for this proposition; consequently we summarily reject it.
- ³ Vasquez refers the court to Exhibit 15 as documentation for the date he filed his charge. Exhibit 15 (the actual EEOC Charge of Discrimination), however, does not show that it was filed on September 6, 1996, but merely reflects that it was "subscribed and sworn" on September 3, 1996.
- ⁴ In his response brief, Vasquez states that his last day of work at IBP was April 23, 1993. Vasquez cites no supporting authority for this statement. We assume, for purposes of deciding this motion, that his last day worked was April 12, 1993.