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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.
|
Nov. 23, 1998.

Attorneys and Law Firms

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P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Gustavo Adolfo Vasquez, individually and on behalf of others similarly situated, plaintiff.

P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Francisco Ponce, individually and on behalf of others similarly situated, plaintiff.

P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Antonio Martinez, individually and on behalf of others, similarly situated, plaintiff.

P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Manuel Sigala, individually and on behalf of others similarly situated, plaintiff.

P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Graciela Garcia, individually and on behalf of others similarly situated, plaintiff.

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MEMORANDUM AND ORDER

OCONNOR, J.

*1 This matter is before the court on the defendant IBP, Inc.'s motion to modify the summary judgment orders relating to plaintiffs Antonio Martinez, Francisco Ponce, and Manuel Sigala (Doc. # 660). Plaintiffs have responded, and "do not oppose defendant's motion to the extent that defendant's suggestions appear to be in accordance with the Court's intended rulings on ... summary judgment." Plaintiffs' Response at 1. Plaintiffs request "that the Court make such changes the Court deems necessary to clarify its Orders." *Id.* The defendant has filed no reply, and the time for filing a reply has passed. The motion is thus ready for ruling.

Pursuant to Federal Rule of Civil Procedure 60(a),¹ defendant IBP, Inc., requests the following three modifications to the court's summary judgment orders:

1. With respect to the summary judgment order relating to plaintiff Antonio Martinez, the defendant respectfully requests that the court modify the last sentence of the first paragraph of Doc. # 652 to read:

“For the reasons set forth below, IBP’s motion is *granted as to Martinez’s Title VII claims and denied as to his § 1981 claims.*”

The court finds such proposed language is consistent with the court’s summary judgment ruling, and concludes such modification is necessary to clarify the court’s order. Accordingly, the defendant’s proposed modification to Document # 652 is granted.

2. [T]o clarify the Court’s Order regarding plaintiff Francisco Ponce, defendant IBP respectfully requests that the Court modify pages 14–16 of Doc. # 651 as shown on Exhibit A hereto.

After reviewing the proposed modifications denoted on Exhibit A attached to defendant’s motion, the court concludes that such changes accurately reflect the court’s ruling and serve to clarify the court’s order. To further clarify the order, the court has added several additional modifications to defendant’s Exhibit A, which the court has attached to this order. Accordingly, the defendant’s proposed modification to Document # 651 as shown on Exhibit A is granted, with the court’s additional modifications.

3. [D]efendant respectfully requests that the Court modify Doc. # 647 by deleting the first full paragraph on page 16.

Plaintiff Sigala does not object to defendant’s proposed modification to delete from the summary judgment order the court’s discussion of a claim of retaliatory discharge. Such a claim was addressed in the plaintiff’s response to defendant’s summary judgment motion, and in

defendant’s reply. Plaintiff, however, has pointed to no portion of the Pretrial Order that includes such a claim, and the court can find none. Accordingly, defendant’s proposed modification to Document # 647 is granted.

IT IS THEREFORE ORDERED that the defendant IBP, Inc.’s motion to modify the summary judgment orders relating to plaintiffs Antonio Martinez, Francisco Ponce, and Manuel Sigala (Doc. # 660) is granted. The clerk of the court is directed to modify the summary judgment orders (Docs. # 647, 651, and 652) as described herein.

IV. Plaintiff Ponce’s Hostile Work Environment Claim.

*2 IBP moves for summary judgment on plaintiff’s claims under Title VII and § 1981 for hostile work environment harassment. We previously granted summary judgment on plaintiff’s Title VII claim so it is not addressed here. IBP contends that it is entitled to summary judgment on this claim, because Ponce has failed to produce sufficient evidence that he experienced severe or pervasive racially hostile conduct.

A. Hostile Work Environment Claim under § 1981.

To survive summary judgment, Ponce 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 Ponce, 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. Ponce has produced sufficient evidence from which a jury could reasonably infer that the racial epithets “Mexican wetback” and “fucking wetback” were more than just occasional utterances. Though Ponce has not cited a great number of instances of racial epithets directed towards him

personally, he has cited other instances of racial epithets and other abusive conduct that he has witnessed directed toward other Hispanic co-workers. See *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 781–82 (10th Cir.1995) (evidence of a general work atmosphere, including evidence of harassment of others, may be considered in evaluating a claim) (citing *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415–16 (10th Cir.1987)). Ponce testified in his deposition that white workers were treated much better with regard to restroom privileges than Hispanic workers. Ponce’s evidence that numerous times he was denied permission to go to the bathroom, and that he had witnessed a fellow Mexican employee forced to urinate in his pants because he was denied permission to go to the bathroom, supports an inference of severe or pervasive racial harassment on account of national origin, ethnicity, ancestry, and race which precludes entry of summary judgment. Additionally, plaintiff has presented evidence that he was denied prompt and appropriate medical treatment for work-related injuries. Considering the totality of the circumstances, we find that plaintiff has produced enough evidence to survive summary judgment on his claim of hostile working environment harassment, brought pursuant to § 1981.

***3** 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 Ponce’s claim of hostile work environment harassment under § 1981, 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. Transfer and Promotion Claims.

Finally, IBP moves for summary judgment as to any transfer and promotion claims. In his response brief, Ponce clarifies that the only plaintiff making a discrimination claim regarding transfer and promotions is Gustavo Vasquez. Ponce’s Brief at 101, n. 21. Thus, IBP’s motion for summary judgment on this issue is denied as moot.

All Citations

Not Reported in F.Supp.2d, 1998 WL 865758

Footnotes

¹ Federal Rule of Civil Procedure 60(a) permits correction by the court on the motion of any party of “[c]lerical mistakes in ... orders ... arising from oversight or omission....”.