

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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AUSTIN DIVISION  
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WESTERN DISTRICT OF TEXAS  
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PETRA UGARTE,

Plaintiff,

-vs-

Case No. A-03-CA-596-SS

DOUBLETREE HOTEL CORPORATION;  
DOUBLETREE HOTEL SYSTEMS, INC.; X  
d/b/a Doubletree Hotel; and ANDREW  
SALDANA,

Defendants.

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**ORDER**

BE IT REMEMBERED on the 6<sup>th</sup> day of February 2004 the Court called the above-styled cause for a hearing on all pending matters. Before the Court were Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) [#23], the Doubletree Defendants' Motion for Partial Dismissal of Plaintiff's Third Amended Complaint Under Fed. R. Civ. P. 12(b)(6) [#25], Plaintiff's Motion to Enlarge Time to File Responses to the Doubletree Defendants' Motion for Partial Dismissal of Plaintiff's Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) [#28], Plaintiff's Motion to Dismiss Defendant's Motion for Partial Dismissal of Plaintiff's Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) for Mootness [#33], Plaintiff's Motion to Dismiss Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) for Mootness [#34], Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) [#36], the Doubletree Defendants' Motion for Dismissal of Plaintiff's RICO and 42 U.S.C. § 1985 Claims

Pursuant to Fed. R. Civ. P. 12 (b)(6) [#38], Plaintiff's Motion to Enlarge Time to Designate Experts [#41], Plaintiff's Motion to Amend Scheduling Order [#44], the Doubletree Defendants' Motion to Compel Discovery [#44], and the Doubletree Defendants' Request for Expedited Ruling on Motion to Compel Discovery [#45]. Having considered the motions, responses, the relevant law, the arguments of counsel at the hearing, and the case file as a whole, the Court now confirms its oral announcements with the following opinion and orders.

### **Background**

The plaintiff, Petra Ugarte, is a Mexican citizen and undocumented immigrant who used to work as a housekeeper for at the Doubletree Guest Suites located at 303 West 15<sup>th</sup> Street in Austin, Texas. She has filed this lawsuit against the Doubletree Hotel Corporation, Doubletree Hotel Systems, Hilton, DT Managment, and X d/b/a Doubletree Hotel (collectively, "the Doubletree Defendants"), as well as her supervisor at the Doubletree Guest Suites, Andrew Saldana. In her Fourth Amended Complaint, Plaintiff alleges Doubletree knowingly employed undocumented female workers (including Plaintiff), or employed them with constructive knowledge that they were undocumented, and utilized their undocumented status as a tool in their business plan, to further their profit motives, and as a means for supervisors to exercise control over them without exposure to legal liabilities. She claims the Doubletree Defendants obtained and utilized false social security numbers for the undocumented workers they hired in order to comply with the requirement that they retain I-9 forms. She also claims the Doubletree Defendants failed to advise the undocumented workers of their rights, including their right not to be subjected to discrimination.

Plaintiff contends she worked at the Doubletree Guest Suites in Austin from February 1996 until December 2001. She has alleges that on multiple occasions during August through September

2001, Saldana fondled and groped her, threatening that if she reported him he could have her and her children deported. She further alleges that on two separate occasions, Saldana forcibly raped her while she was cleaning rooms in the hotel, reiterating his threats of harm to her and her children and threatening that he could terminate her employment and get her and her children deported. Plaintiff claims she had reservations but finally complained to a human resources employee about being groped (but not raped), but the human resources employee dismissed her allegations without a proper investigation. Plaintiff maintains after she reported Saldana's alleged harassment, he began retaliating against her, reducing her work schedule. According to Plaintiff, she left the employment of Doubletree on December 23, 2001 as a result of the above-described events and was formally terminated in April 2002.

Plaintiff has asserted the following causes of action against the Doubletree Defendants: (1) violations of Title VII of the Civil Rights Act of 1964 ( including quid pro quo sexual harassment, hostile work environment, sex discrimination, national origin discrimination, and retaliation); (2) conspiracy to violate her civil rights under 42 U.S.C. § 1985(3); (3) violation of the Racketeer Influenced and Corruption Organization Act ("RICO"), 18 U.S.C. § 1961; (4) conspiracy to violate the Fair Labor Standards Act, 29 U.S.C. §§ 206, 207; (5) violation of Sections 21.051(1) & 21.056 of the Texas Labor Code; and (6) negligent hiring and retention. Plaintiff has asserted claims against Saldana under Section 21.051(1) of the Texas Labor Code and for assault and battery and intentional infliction of emotional injury.

### **Analysis**

#### **I. Motions Related to Third Amended Complaint**

On December 23, 2003, both Saldana and the Doubletree Defendants filed motions for partial dismissal of Plaintiff's Third Amended Complaint. However, on December 31, 2003, Plaintiff filed

her Fourth Amended Complaint, rendering the motions for partial dismissal moot. Plaintiff subsequently filed motions to dismiss the motions for partial dismissal as moot. The Defendants did not file any response in opposition. Because Plaintiff's filing of her Fourth Amended Complaint did in fact render the motions for partial dismissal of the Third Amended Complaint moot, the Court will dismiss them as such.

## **II. Motions for Partial Dismissal**

### **A. Rule 12(b)(6) Standard**

Under Rule 12(b)(6), a defendant may move for dismissal for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b). In deciding whether to dismiss for failure to state a claim, "the district court must take the factual allegations of the complaint as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5<sup>th</sup> Cir. 1993). The Court should dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court, in its review of a motion to dismiss a claim under Rule 12(b)(6), may not go outside of the pleadings. *Carpenters Local Union No. 1846 of the United Bhd of Carpenters and Joiners of America v. Pratt-Farnsworth*, 690 F.2d 489, 499-500 (5<sup>th</sup> Cir. 1982).

### **B. Defendant Saldano's Motion to Dismiss Texas Labor Code Claim**

In her Fourth Amended Complaint, Plaintiff asserts a claim against Saldano under Section 21.051(1) of the Texas Labor Code despite the fact that the Court dismissed all claims against Saldano under the Texas Commission on Human Rights Act ("TCHRA") on October 16, 2003. *See* Pl.'s Fourth Am. Compl. ¶¶ 95-97; Oct. 16, 2003 Order. In her response, Plaintiff admits she cannot sue Saldana individually for violating Title VII or the TCHRA. *See* Resp. to Saldana's Mot. for

Partial Dismissal ¶ 1. But Plaintiff nevertheless insists on asserting her § 21.051 claim against Saldano and maintains (in so far as the Court can decipher from the inarticulate arguments of Plaintiff's counsel) that since the definition of employer in § 21.002(8) of the Texas Labor Code applies to Saldana, she is entitled to sue him on a theory of vicarious liability. A claim under a theory of vicarious liability, however, is a claim against an employer for an employee's actions. *See Baptist Memorial Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998) (explaining under the doctrine of respondeat superior, an employer is vicariously liable for the wrongdoing of its agent or employee as opposed to the employer's own wrongdoing). Thus, Plaintiff can sue her employer under the THCRA for the alleged misconduct of her supervisor, not Saldana himself. Accordingly, Plaintiff's § 21.051 claim against Saldana must be dismissed.

**C. The Doubletree Defendants' Motion to Dismiss RICO and § 1985 Claims**

The Doubletree Defendants have moved to dismiss Plaintiff's RICO claim against them and her claims under 42 U.S.C. § 1985. However, the Court at the hearing entered an order instructing Plaintiff to provide specific information regarding her RICO allegations and therefore, the Court will refrain from ruling on the Doubletree Defendants' motion to dismiss the RICO claims until Plaintiff has had the opportunity to respond to the Court's order.

With regard to the § 1985 claims, the Doubletree Defendants first maintain they must be dismissed because § 1985 requires a conspiracy between two or more persons whereas in this case, the Doubletree Defendants are all wholly owned subsidiaries of the Hilton Hotel Corporation, and therefore cannot conspire with one another. Second, the Doubletree Defendants argue Plaintiff is not a member of a class protected by § 1985(3). Plaintiff maintains it would be beyond the scope of a Rule 12(b)(6) motion for the Court to make a ruling regarding the relationship between the various Doubletree entities sued in this lawsuit. However, the Plaintiff wholly failed in its response

to address the Doubletree Defendants' second argument and the Court could therefore assume Plaintiff has conceded she is not a member of a class protected by § 1985(3). Instead, the Court will briefly address the merits of the Doubletree Defendants' second argument.

In order to state a § 1985(3) claim, a plaintiff must allege the defendants engaged in a conspiracy for the purpose of depriving any person or class of equal protection of the laws or of privileges and immunities under the laws and that she suffered injury to her person or property or was deprived of a right or privilege of a United States citizen as a result of the conspiracy. *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983). Additionally, the plaintiff must allege a racial or other invidious class-based animus motivated the conspiracy. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993); *Horaist v. Doctors' Hosp. of Opelousas*, 255 F.3d 261, 270 (5<sup>th</sup> Cir. 2001). Because section 1985(3) only protects rights established by other constitutional provisions, a plaintiff must assert a constitutional right in order to state a claim under that provision. *Scott*, 463 U.S. at 833. Importantly, "[p]laintiffs who assert claims under 42 U.S.C. § 1983 and other civil rights statutes, such as § 1985, must plead the operative facts upon which their claim is based. Mere conclusory allegations are insufficient." *Holdiness v. Stroud*, 808, F.2d 417, 424 (5<sup>th</sup> Cir. 1987). "Equal specificity is required when a charge of conspiracy is made." *Id.*

With regard to her § 1985(3) claim, Plaintiff alleges:

Doubletree Defendants conspired and acted with animus toward [Plaintiff] as an undocumented worker and documented workers with the purpose of hindering and preventing Federal and state officials from performing their affirmative obligations to [Plaintiff], including but not limited to the obligation so these officials to ensure that all employees in the United States are paid Federal and applicable statutory minimum wages and overtime and that they enjoy minimum benefits such as worker's compensation protection and social security coverage.

Fourth Am. Compl. ¶ 70. Thus, Plaintiff appears to allege the Doubletree Defendants conspired and acted with animus toward her because of her status as an undocumented worker.

According to the Supreme Court, however, “it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause.” *Scott*, 463 U.S. at 836. Taking into account this reservation, the Fifth Circuit has emphasized that § 1985(3) protection is limited to two classes of plaintiffs: “(1) those characterized by some inherited or immutable characteristic; and 2) those characterized by political beliefs or associations.” *McClean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5<sup>th</sup> Cir. 1987). Plaintiff has alleged not alleged animus based on a membership in a discrete, insular class of individuals possessing “inherited or immutable characteristics,” such as race, national origin, or sex. *Weingarten Realty Investors v. Albertson’s, Inc.* 66 F. Supp. 2d 825, 851 (S. D. Tex. 1999). Neither has she alleged the Doubletree Defendants’ actions were in anyway motivated by Plaintiff’s political beliefs or associations. *Id.* Accordingly, Plaintiff’s § 1985(3) claim based on her status as an undocumented worker, as opposed to a class-based or political animus on the part of the Doubletree Defendants, fails.<sup>1</sup> *See id.*

#### **IV. Discovery Motions**

The Doubletree Defendants served their discovery requests on Plaintiff on November 26, 2003. They granted Plaintiff two extensions of time to respond. On January 15, 2004, the deadline to respond after the second extension of time, counsel for Plaintiff represented responses were in the mail. Four days later, when counsel for Doubletree again contacted counsel for Plaintiff, he admitted that the responses were not in the mail and that he was having problems complying with the discovery requests because of the language barrier between he and his client. Almost a month after

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<sup>1</sup>Moreover, in so far as Plaintiff is attempting use § 1985(3) to remedy employment discrimination based on her sex or race, she cannot. *Horaist*, 255 F.3d at 270 (holding that a plaintiff may not use § 1985(3) to remedy violations of Title VII).

the original deadline, the Doubletree Defendants filed a motion to compel representing to this Court that Plaintiff had still not served defendants with responses and cannot commit to a date by which she will respond. The Doubletree Defendants ask the Court to compel Plaintiff to respond to their interrogatories and requests for production and award them the attorneys' fees they incurred in pursuing this motion.

Counsel for Plaintiff filed motions to extend the deadline for designating experts and to amend the scheduling order, pushing the trial setting back four months. This lawsuit was filed on August 26, 2003 and therefore has been pending for over five months. Yet counsel for Plaintiff represented at the hearing that he has not taken one deposition, not even Defendant Saldana's. Simply put, lead counsel for the Plaintiff, even if he did not enter an appearance until mid-October, has not demonstrated his diligence in pursuing discovery this case. Accordingly, the Court will deny his motions for extensions of time, grant the Doubletree Defendants' motions to compel and order Plaintiff to pay the Doubletree Defendants \$500 in attorneys' fees.

In accordance with the foregoing:

IT IS ORDERED that Plaintiff's Motion to Dismiss Defendant's Motion for Partial Dismissal of Plaintiff's Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) for Mootness [#33] is GRANTED as unopposed pursuant to Local Rule CV-7(d) and the Doubletree Defendants' Motion for Partial Dismissal of Plaintiff's Third Amended Complaint Under Fed. R. Civ. P. 12(b)(6) [#25] is therefore DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) for Mootness [#34] is



GRANTED as unopposed pursuant to Local Rule CV-7(d) and Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) [#23] is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Plaintiff's Motion to Enlarge Time to File Responses to the Doubletree Defendants' Motion for Partial Dismissal of Plaintiff's Third Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) [#28] is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that Defendant Saldana's Motion for Partial Dismissal Under Fed. R. Civ. P. 12(b)(6) [#36] is GRANTED and Plaintiff's claim against Saldana under Tex. Labor Code § 21.051(1) is DISMISSED for failure to state a claim.

IT IS FURTHER ORDERED that the Doubletree Defendants' Motion for Dismissal of Plaintiff's RICO and 42 U.S.C. § 1985 Claims Pursuant to Fed. R. Civ. P. 12 (b)(6) [#38] is GRANTED IN PART and Plaintiffs claims under 42 U.S.C. § 1985(3) are DISMISSED for failure to state a claim; the Court CARRIES the portion of the motion related to Plaintiff's RICO claims and will rule on it after it receives Plaintiff's response to Court's Order, entered during the hearing, that requires specific pleading related to the RICO allegations.

IT IS FURTHER ORDERED that Plaintiff's Motions to Enlarge Time to Designate Experts [#41] and to Amend Scheduling Order [#44] are DENIED.

IT IS FURTHER ORDERED that Doubletree Defendants' Request for Expedited Ruling on Motion to Compel Discovery [#45] is GRANTED and the Doubletree Defendants' Motion to Compel Discovery [#44] is GRANTED and Plaintiffs are ORDERED to fully respond to the Doubletree Defendants' interrogatories and requests for production on before

February 13, 2004 and to pay \$500 in attorneys' fees to the Doubletree Defendants. Failure to comply with this order may result in dismissal of this lawsuit.

IT IS FINALLY ORDERED this case is set for STATUS CONFERENCE on **February 27, 2004, at 2:00 p.m.** in Courtroom No. 2, United States Courthouse, 200 West Eighth Street, Austin, Texas. Counsel must be prepared to discuss the following: (1) motions pending; (2) any further discovery requests; (3) counsel and witness availability for trial; and (4) settlement negotiations (the Plaintiff must have made an initial offer to settle the entire case prior to the status conference, and the Defendants must have had sufficient time to respond to the offer prior to the status conference).

SIGNED this the 10<sup>th</sup> day of February 2004.

  
SAM SPARKS  
UNITED STATES DISTRICT JUDGE