U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
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CLERK, U.S. DISTRICT COURT
By ______
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED PARCEL SERVICE, INC., et al.,	)	
	)	Civil Action No.
Defendants.	)	6:01-CV-109-C

ORDER

On this day the Court considered Defendant, United Parcel Service, Inc.'s Motion for Summary Judgment, filed January 22, 2003. Plaintiff, Equal Employment Opportunity Commission, filed a Response to Defendant's Motion on February 11, 2003. Intervenor, Ernest Garcia, filed a Response to Defendant's Motion on February 11, 2003. Defendant filed a Reply to Plaintiff's and Intervenor's Responses on February 26, 2003. The Court also considered Plaintiff and Intervenor's Motion for Partial Summary Judgment filed on January 22, 2003. Defendant filed a Response to the Plaintiff and Intervenor's Motion on February 11, 2003. Plaintiff and Intervenor did not file a Reply to Defendant's Response.

After considering all relevant arguments and evidence, the Court **DENIES in part and GRANTS in part** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff and Intervenor's Motion for Partial Summary Judgment. In addition, in Defendant's Reply, Defendant requests that the Court strike the declarations submitted by Plaintiff and Intervenor in their Responses to Defendant's Motion for Summary Judgment. After reviewing the evidence,

the Court **Denies** as **Moot** Defendant's request. This Court did not consider any of the declarations submitted by Plaintiff and Intervenor, as conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

I. BACKGROUND

On July 6, 2001, Plaintiff, Equal Employment Opportunity Commission, filed this suit against Defendant, United Parcel Services, Inc., in the U.S. District Court, Western District of Texas, San Antonio Division. Plaintiff brought this suit under Title VII of the Civil Rights Act of 1964 alleging unlawful employment practices on the bases of race and national origin. The suit arises out of a charge filed with the Plaintiff by Ernest Garcia alleging numerous violations of Title VII. On August 27, 2001, Intervenor, Ernest Garcia, filed his Complaint against Defendant alleging violations of Title VII. Specifically, both Plaintiff and Intervenor allege that since 1998, Defendant has engaged in unlawful employment practices, namely maintaining a hostile work environment, disparate treatment, and retaliatory conduct. On August 31, 2001, Defendant filed a Motion to Transfer Venue. On October 29, 2001, the suit was transferred to the U.S. District Court, Northern District of Texas, San Angelo Division.

II. STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the

light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. FED. R. CIV. P. 56(e); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id*

III.
DISCUSSION

As an initial matter, this Court must determine whether the Court should analyze the allegations of each individual claimant to determine the viability of each cause of action as to each, or whether this Court should analyze the environment as a whole. This Court has not

found any determinative guidance on the issue of whether this Court should take a conglomerate or independent view of the work environment in an enforcement action brought by the EEOC on behalf of multiple claimants. However, this Court does find instructive the Supreme Court's clear directive that in EEOC enforcement actions, the EEOC may seek classwide relief without being certified as the class representative. *See Gen. Tel. Co. of the N.W. v. EEOC*, 446 U.S. 318, 323-24 (1980). The Supreme Court held in *General Telephone Co.* that an EEOC enforcement action is akin to a class action in that the EEOC can bring suit in its own name to secure relief for a group of aggrieved individuals; however, the EEOC need not comply with the requirements of Federal Rule of Civil Procedure 23, which defines and specifies requirements for a private party plaintiff in bringing class action litigation. *Id.* at 323-36. Because an EEOC enforcement action is akin to a class action filed on behalf of the named claimants and those similarly situated, in which the EEOC may seek classwide relief, this Court concludes that it should review the work environment in this case similarly to its review of any class action, as it affects the aggrieved parties as a whole, not as individuals.

National Origin Discrimination/Harassment/Hostile Work Environment

Title VII creates a private right of action against employers who engage in unlawful employment practices and provides as follows:

> It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

> employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (2000).

A plaintiff may establish a violation of Title VII by using either direct evidence of discrimination, statistical proof, or circumstantial evidence. *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998). Absent direct evidence of discrimination based on national origin, a plaintiff may establish unlawful national origin discrimination under the basic framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, the order of progression for proving up a Title VII claim of discrimination is controlled by the following:

1. The plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination;

2. If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's termination;

3. Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

See Smith v. Wal-Mart Stores (No. 471), 891 F.2d 1177, 1178 (5th Cir. 1990) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)). *See also Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425-26 (5th Cir. 2000).

Plaintiff's Prima Facie Case

To establish a prima facie case of national origin discrimination/harassment/hostile work environment, Plaintiff and Intervenor must show (1) that the claimants belong to a protected group; (2) that the claimants were subject to unwelcome harassment; (3) that the harassment complained of was based upon the claimants' national origin; and (4) that the alleged harassment affected a term, condition, or privilege of employment. *See Watts v. Kroger*, 170 F.3d 505, 509 (5th Cir. 2000).

To survive summary judgment, Plaintiff and Intervenor must create a fact issue on each of the elements of a hostile work environment claim: (1) racially discriminatory intimidation, ridicule, and insults that are (2) sufficiently severe or pervasive that they (3) alter the conditions of employment and (4) create an abusive working environment. *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995).

"A hostile work environment requires the presence of a work environment that a reasonable person would find hostile or abusive." *Id.* Whether an environment is hostile or abusive depends on the totality of circumstances, focusing on factors such as "the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance." *Id.* at 523-24. The Fifth Circuit has established that Title VII was meant to bar severe and pervasive conduct that destroys a protected classmember's opportunity to succeed at work. *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996). Conduct that sporadically wounds or offends someone but that does not hinder that person's performance is not actionable under Title VII. *Id.*

"[O]ffhand comments . . . (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (internal quotations omitted). Title VII is not a "general civility code" and, "properly applied, . . . will filter out complaints . . . such as the sporadic use of . . . gender-related jokes[] and occasional teasing." *Id.* The "conduct must be extreme." *Id.* A "mere utterance of an . . . epithet which engenders offensive feelings" is insufficient, without more, to support Title VII liability. *Weller*, 84 F.3d 194.

As a predicate matter in the instant case, this Court notes that Plaintiff's Complaint alleges that Defendant engaged in a pattern and practice that harassed and discriminated against the claimants on account of their national origin. Plaintiff's and Intervenor's Complaints also allege that Defendant created a hostile work environment for the claimants on account of their national origin and race.

The Court is satisfied that the claimants have met the first prong of their prima facie case–all the claimants belong to a protected class. The Court will now turn to the remaining elements of the claimants' prima facie case. To satisfy the second prong of their prima facie case, the claimants must establish that they were subject to unwelcome harassment.

Plaintiff and Intervenor have presented evidence that the UPS center manager in San Angelo would use the word "meskin" all the time when referring to Hispanic employees. In addition, there is evidence that the UPS center manager, as well as other supervisors, used racial slurs in conversations with other white employees. The evidence also establishes that the UPS center manager in San Angelo admitted that he had stated that there were already too many "meskins" working at the UPS San Angelo center in response to a Hispanic woman's application

for employment. There is also evidence establishing that the UPS center manager in San Angelo used the term "nigger" to describe African Americans and "wetback" and "pepper-bellies" to describe Hispanics. Plaintiff and Intervenor have also submitted evidence that there were numerous other incidents of conduct that affected the claimants; this Court is uncertain whether that behavior constituted sufficiently severe harassment to support Plaintiff and Intervenor's claim. Because this determination rests substantially on credibility assessments, this Court concludes that Plaintiff and Intervenor have raised at least a question of fact on the issue of whether the alleged behavior created a hostile work environment for the claimants.

This Court finds that a fact question exists as to whether the above-mentioned comments and gestures, while not physically threatening to claimants, were frequent and extreme, were severe and pervasive, and were humiliating. Additionally, this Court finds that a fact question exists as to whether the comments and gestures interfered with the claimants' work performance and created an abusive working environment. Accordingly, this Court is of the opinion that summary judgment is not warranted as to Plaintiff's and Intervenor's national origin/hostile work environment claims. Defendant's Motion for Summary Judgment as to this claim is **DENIED.**

Title VII Retaliation Claim

The Court finds that the Defendant is not entitled to summary judgment as to Plaintiff's and Intervenor's Title VII retaliation claims. A three-step process is used to analyze Plaintiff's and Intervenor's claims of discriminatory retaliation. *Mattern v. Eastman Kodak*, 104 F.3d 702, 705 (5th Cir. 1997); *Shirley v. Chrysler First*, 970 F.2d 39, 42 (5th Cir. 1992). In order for Plaintiff and Intervenor to establish a prima facie case of retaliation, it must be shown that (1) the claimants engaged in an activity protected under Title VII; (2) an adverse employment action

occurred; and (3) there was a causal connection between the protected activity and the adverse employment action. *Mattern*, 104 F.3d at 705; *Shirley*, 970 F.2d at 42.

An employee has engaged in a "protected activity" when "he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 28 U.S.C. § 2000e-3(a) (1994). "Activities protected under Title VII fall into two broad categories–opposition and participation." *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998).

Fifth Circuit precedent employs a "balancing test" to determine whether an employee's activities are protected under Title VII. *Id.* at 373. "[T]he employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare." *Id.* (internal quotations omitted). The yardstick used to measure the employee's conduct is "the flexible and protean doctrine of 'reasonableness in [the] light of the circumstances.'" *Id.* at 374.

"Not all activities taken in opposition to an employer's perceived discriminatory practices, however, remain insulated from reprisal under Title VII's shield." *Id.* at 373. "[S]ome conduct, even though engaged in with the most sincere of intentions, may be so inappropriate as to justify the curtailment of statutorily-afforded [sic] safeguards." *Id.* *See also Jones v. Flagship Int'l*, 793 F.2d 714, 727 (5th Cir. 1986) (finding that the employee's conduct in protest of an unlawful employment practice so interfered with the performance of the employee's job that it rendered the employee ineffective in the position for which he was employed; and, in such case, the employee's form of opposition was not covered under Title VII); *Rosser v. Laborers' Int'l*

Union of N. Am., Local No. 438, 616 F.2d 221, 224 (5th Cir. 1980) (agreeing that plaintiff was fired in retaliation but finding that plaintiff's opposition activity, which consisted of seeking her boss's job through the union elections, was unprotected under Title VII); *Jeffries v. Harris County Cmty. Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) (determining that plaintiff's dissemination of confidential employment records calling attention to plaintiff's belief that she was a victim of discrimination was clearly unreasonable and that plaintiff was legitimately discharged).

Here, the summary judgment evidence establishes that the claimants complained on numerous occasions to the union steward as well as other members of management. This Court finds that the claimants engaged in a protected activity under Title VII and satisfied the first prong of the Title VII retaliation claim. *See Green v. Administrators of Tulane Ed. Fund*, 284 F.3d 642, 657 (5th Cir. 2002)(finding that plaintiff's act of making complaints to defendant's personnel department was legally sufficient for a claim of retaliation and was protected by Title VII).

To establish the second prong of the Title VII retaliation claim, it must be shown that an adverse employment action occurred. Some of the claimants were indeed fired; however, some of the claimants resigned from their employment with UPS. Defendant argues that not all of the claimants can prove an adverse employment action occurred. The Plaintiff and Intervenor argue that some of the claimants were constructively discharged.

Constructive discharge occurs when an employer makes working conditions so intolerable that a reasonable employee would feel compelled to resign. *Hunt v. Rapides Healthcare Sys., Inc.*, 277 F.3d 757, 771 (5th Cir. 2001); *Faruki v. Parsons*, 123 F.3d 315, 319

(5th Cir. 1997). For the claimants to prove constructive discharge, the claimants "must demonstrate a greater severity or pervasiveness of harassment" than the minimum required to prove a national origin/hostile work environment claim. *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 (5th Cir. 1996).

Having reviewed the evidence in the light most favorable to Plaintiff and Intervenor and making all justifiable inferences in Plaintiff's and Intervenor's favor, this Court finds that Plaintiff and Intervenor have offered evidence raising a genuine question of material fact regarding intolerable working conditions to support their claims for constructive discharge.

Plaintiff and Intervenor have presented evidence of racial slurs being used by the UPS center manager for San Angelo discussed *supra*. In addition, Plaintiff and Intervenor have presented evidence from the claimants wherein they felt that they were subjected to reprimand and or threats of discharge on a daily basis. Some claimants also claim that they felt they had no choice but to resign. The evidence also suggests that many of the claimants felt they were being set up to fail by being assigned too much work.

Accordingly, because there exists a fact question as to whether or not there existed intolerable conditions or a greater severity or pervasiveness of harassment than that which is required to prove a hostile work environment, this Court finds that summary judgment is not appropriate with respect to said claim. Defendant's Motion for Summary Judgment on this issue is **DENIED.**

Disparate Treatment

Plaintiff and Intervenor contend that Defendant's treatment of white employees is preferential and allege that claimants were discharged when white employees who did the same thing were not discharged. The Plaintiff and Intervenor also argue that the white employees were not disciplined or set up to fail, but that Hispanic and African American employees were.

To establish a prima facie claim of discrimination, Plaintiff and Intervenor must establish that (1) the claimants belong to a protected group; (2) the claimants were qualified for the position held; (3) the claimants suffered an adverse employment action; and (4) others who were similarly situated to the claimants and not within their protected class were treated more favorably. *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). To raise an inference of disparate treatment, the claimants must provide evidence that they were treated less favorably than similarly situated white employees under circumstances that are "essentially identical." *Barnes v. Yellow Freight Sys., Inc.*, 778 F.2d 1096, 1101 (5th Cir. 1985). If the claimants establish a prima facie case, the claim is evaluated under the familiar three-part *McDonnell Douglas* burden-shifting framework discussed *supra*.

The parties do not dispute that the claimants, Hispanic and African American employees, are members of a protected class, and that the claimants were qualified for the positions held. Thus, the first two elements of the prima facie case have been met.

As to the third element, the Plaintiff and Intervenor argue that an adverse employment action occurred: some of the claimants were fired and some of them were constructively discharged. On the other hand, the Defendant argues that none of the claimants was

constructively discharged; and with regard to the claimants who were fired, they were fired for non-pretextual reasons.

As discussed *supra*, a fact question exists as to whether or not any of the claimants were constructively discharged. Because a fact question exists, summary judgment on this issue is inappropriate. Defendant's Motion for Summary Judgment on this issue is **DENIED.**

Record Retention Violation

In Plaintiff's Third Amended Complaint, Plaintiff alleges that Defendant has failed in violation of Section 709(c) of Title VII, "to make and preserve records relevant to the determination of whether unlawful employment practices have been or are being committed and required by the Commission as necessary to the Commission's administration of Title VII." Defendant argues that this was a misunderstanding and that the matter has been resolved.

After reviewing the relevant evidence, the Court is satisfied that Defendant is not in violation of Section 709(c) of Title VII and that the misunderstanding has been resolved. Thus, summary judgment is appropriate on this issue.

Ellerth/Faragher Affirmative Defense

The Plaintiff and Intervenor contend that the Defendant cannot assert the *Ellerth/ Faragher* affirmative defense because it did not exercise reasonable care to prevent the harassment at issue or provide remedies so that its employees might otherwise avoid harm. Specifically, the Plaintiff and Intervenor allege that an ineffective union grievance procedure was used by Defendant.

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate authority over the employee."

Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1975). However, when no tangible employment action has been shown, an employer is entitled to raise an affirmative defense to such a claim. The two elements of this affirmative defense are: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the claimants unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher,* 524 U.S. at 807. Proof that an employer promulgated a sufficient anti-harassment policy with an effective complaint procedure is not necessary in every instance to satisfy the first prong of the affirmative defense. *Id.* However, the adequacy of any stated policy and its corresponding complaint procedure is a relevant consideration for the trier of fact in its evaluation of the employer's reasonable care to be exercised under this prong. *Id.* at 807-808.

The Supreme Court has promulgated a minimum requirement for an anti-harassment policy's complaint procedure to be considered effective. The Supreme Court has stated that employers must "establish a complaint procedure 'designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.'" *Faragher,* 524 U.S. at 806.

This Court concludes that the determination whether the Defendant's existing policy and complaint procedure are adequate is one of fact for the jury to decide. Additionally, to be entitled to summary judgment on this affirmative defense, Plaintiff and Intervenor must establish that Defendant cannot meet its burden of proof under the second prong, as well as under the first prong. Under the second prong of its affirmative defense, Defendant must show the claimants unreasonably failed to take advantage of any preventative or corrective opportunities provided by

it or to avoid harm otherwise. Consequently, the Plaintiff and Intervenor must show that there is no genuine issue of material fact under this prong and, as a matter of law, Defendant cannot satisfy its burden. Plaintiff and Intervenor cannot meet this summary judgment burden of proof because the summary judgment evidence shows that some of the claimants failed to take any steps to complain about or to report the discriminatory conduct. This creates a genuine issue of material fact whether Defendant can satisfy its burden of proof under the second prong of this affirmative defense. Accordingly, Plaintiff and Intervenor's Motion for Partial Summary Judgment on Defendant's affirmative defense is **DENIED.**

CONCLUSION

After considering all the relevant arguments and evidence, this Court **GRANTS** Defendant's Motion for Summary Judgment with respect to Plaintiff's and Intervenor's record retention violation claim and **DENIES** Defendant's Motion for Summary Judgment with respect to (1) Title VII national origin discrimination/harassment/hostile work environment claims; (2) Title VII retaliation claim; and (3) Title VII disparate treatment claim. This Court also **DENIES** Plaintiff and Intervenor's Motion for Partial Summary Judgment.

SO ORDERED this 3rd day of March, 2003.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE