

~~FILED~~
CLERK, U.S. DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION
7 FEB 02 AM 9:46

DISTRICT OF UTAH

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

vs.

SBARRO'S ITALIAN EATERY and TRI-
SPUR INVESTMENTS, INC.,

Defendants.

CRYSTLE COLLINS,

Plaintiff in Intervention

vs.

TRI-SPUR INVESTMENT COMPANY,
INC., *et. al.*

Defendants

BY: _____
DEPUTY CLERK

ORDER

Case No. 2:00-CV-774B

Before the Court is plaintiff Equal Employment Opportunity Commission's ("EEOC") motion to strike certain of defendants' facts in support of defendants' motion for summary judgment. Pursuant to Fed. R. Civ. P. 56(e) and Utah Local Rule 56-1, EEOC moves the Court to strike certain facts because they are inadmissible, argumentative, lack foundation, unsupported

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by evidence, irrelevant, or offered to prejudice the Court. Plaintiff in intervention, Crystal Collins, joins EEOC in the present motion.

Defendants respond that the Rules of Civil Procedure do not allow plaintiff to challenge defendants' motion for summary judgment by filing a motion to strike. Specifically, defendants contend that motions to strike are governed by Fed. R. Civ. P. 12(f) and apply only to pleadings. Defendants further argue that a motion for summary judgment is not a pleading for purposes of a motion to strike. Defendants state that plaintiff's quarrel with the facts should have been dealt with in the beginning portions of its opposition memorandum.¹

Defendants are correct that Fed. R. Civ. P. 12(f) only applies to pleadings. Defendants are also correct that summary judgment motions are not pleadings for the purpose of the rule. Nevertheless, plaintiff did not file the present motion pursuant to rule 12(f) but rather filed the motion to strike pursuant to Fed. R. Civ. P. 56(e) and Utah Local Rule 56-1. Rule 56(e) requires that evidence supporting and opposing summary judgment must set forth facts as would be admissible in evidence. Also, it is well settled that "[a]n affidavit that does not measure up to the standards of rule 56(e) is subject to a motion to strike." *Noblett v. General Elec. Credit Corp.*, 400 F.2d 442, 445 (10th Cir. 1968). Therefore, plaintiff's motion to strike under rule 56(e) is procedurally appropriate.

The Court now turns to the merits of the present motion. Plaintiff first argues that a number of defendants' facts should be stricken because they contain improper argument. Specifically, plaintiff contends that the facts are improper because they (1) inappropriately

¹Defendants do not address the merits of plaintiff's motion to strike but apparently rest on their procedural argument.

characterize the testimony of plaintiff's witnesses, (2) contain legal conclusions, (3) challenge the credibility of non-movant witnesses or (4) are just plain argument. The Court finds plaintiff's first argument that defendants mischaracterize witness testimony to be largely without merit. The Court has reviewed the cited record and finds that the record speaks for itself. Accordingly, the motion is denied in this regard.

The Court does find, however, that several of defendants' facts contain inappropriate legal conclusions. Therefore, the following portions of defendants' facts will be stricken and will not be considered by the Court: Paragraph 16 "That policy goes beyond what the law requires, as it forbids even 'sexual discussion' which does not arise to the level of harassment"; Paragraph 19 "Not all of those allegations, even if true, would rise to the level of sexual harassment"; Paragraph 32 "There may be enough evidence that no reasonable jury could believe Ms. Collins' version of events, and the Court could resolve the question of whether there was any 'attack,' or any other harassment, at the workplace on summary judgment. But it is not necessary for the Court to do so, because of the undisputed facts regarding Ms. Collins' reporting of the events, and Tri-Spur's actions thereafter"; Paragraphs 104, 171, and 174 "That [or this] dispute is immaterial."

Regarding facts that allegedly "challenge the credibility of non-movant witnesses" or "are just plain argument," the Court finds plaintiff's contentions without merit and therefore denies the same. Plaintiff had the opportunity to challenge these facts in its memorandum in opposition to summary judgment.

Plaintiff's next argument is that several of defendants' facts should be stricken because they are unsupported by admissible evidence. Specifically, plaintiff contends that the facts are


(1) unsupported by the cited record, (2) lack any citation to the record, (3) reflect a lack of personal knowledge, (4) lack foundation, or (5) are hearsay. The Court finds plaintiff's arguments without merit. The facts cited by defendants do have some basis in the cited record and those facts without citation are simply placed in the fact section by way of explanation. The Court further finds that the cited facts do not reflect a lack of personal knowledge of the witness, do not lack foundation, and are not inadmissible hearsay. As previously discussed, plaintiff has had ample opportunity to address these facts in its opposition to defendants' motion for summary judgment and has taken advantage of that opportunity.

Plaintiff's final argument is that defendants have improperly placed facts before the Court that are irrelevant. Fed. R. Evid. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Court finds that the background information contained in paragraphs 1-13 of defendants' motion is relevant to the case. Furthermore, the Court finds relevant the facts contained in paragraphs 19, 24, 29, 87, 143, and 152. The Court finds irrelevant, however, the facts contained in paragraph 158 and in footnotes 12 and 14. Accordingly, these facts will be stricken and will not be considered by the Court in analyzing the motion for summary judgment.

CONCLUSION

For the reasons stated above, plaintiff's motion to strike certain of defendants' facts in support of defendants' motion for summary judgment is GRANTED IN PART AND DENIED IN PART – granted with respect to those facts previously discussed that are irrelevant or contain inappropriate legal conclusion and denied as to the remaining facts. IT IS SO ORDERED.

DATED this 6th day of February, 2002.



Dee Benson
United States District Judge

United States District Court
for the
District of Utah
February 8, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:00-cv-00774

True and correct copies of the attached were either mailed or faxed by the clerk to the following:

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