UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BABU THANU CHELLEN, et al.,

Plaintiffs,

v.

JOHN PICKLE CO., INC.,

Defendant.

Case No. 02-CV-0085-EA (M)

ORDER

Now before the Court is the motion to dismiss (Dkt. # 56-2) filed as a part of Defendant John Pickle Company, Inc.'s Answer to the Plaintiff's Fifth Amended Complaint, and the motion to dismiss (Dkt. # 62-2) filed as part of the Answer and Motion to Dismiss of Individual Defendant John Pickle, Jr.

I.

Plaintiffs are citizens of India who came to work at John Pickle Company, Inc. ("JPC") in 2001. They allege that defendants made false representations when they were recruited to work for JPC, required them to work in excess of forty hours per week, paid them below minimum wage, compelled them to eat and sleep at the JPC factory, restricted their ability to leave or travel freely to other locations, placed armed guards at the gates of the factory to discourage their travel or compel them to stay at the factory when they were not on duty or working, and held them unlawfully against their will within the confines of the JPC factory. Their causes of action against JPC and John Pickle, Jr. ("Pickle") include (1) violation of the Fair Labor Standards Act ("FLSA"); (2) race discrimination; (3) deceit; (4) false imprisonment; (5) intentional infliction of emotional distress; (6) violation of Title

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VII of the Civil Rights Act of 1964; and (7) violation of the Immigration Reform and Control Act of 1986 ("IRCA").

In defense, JPC claims that the plaintiffs were employed by an Indian company, Al Samit International, to be trained in the United States by JPC. JPC contends that the plaintiffs entered the United States through visas and passports authorizing entry into the United States for the sole purpose of receiving training at JPC. JPC maintains that it provided dormitories where plaintiffs could sleep, and a cafeteria, staffed by Indian cooks, where plaintiffs could eat. JPC moves to dismiss plaintiffs' FLSA, race discrimination, civil rights, and IRCA claims. Pickle moves to dismiss all seven claims against him.

II.
Standard of Review

A motion to dismiss is properly granted when it appears beyond doubt that plaintiffs could prove no set of facts entitling them to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Ramirez v. Department of Corrections, 222 F.3d 1238, 1240 (10th Cir. 2000). For purposes of making this determination, a court must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff. Ramirez, 222 F.3d at 1240. Defendants have submitted matters outside the pleading to the court with their motions to dismiss. Fed. R. Civ. P. 12(b) gives the Court two options if a Rule 12(b)(6) motion presents matters outside the pleading. First, the Court may exclude any matters outside the pleadings submitted by the defendant, and may treat the motion as one to dismiss. Second, the Court may consider the additional material, and convert the motion into one for summary judgment. If the Court chooses the second option, the parties must be given a reasonable opportunity to present all pertinent material.

"Failure to convert to a summary judgment motion and to comply with Rule 56 when the court considers matters outside the plaintiff's complaint is reversible error." Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991). However, a district court's review of "mere argument contained in a memorandum in opposition to dismiss" does not require conversion to a summary judgment motion. Id. Further, a district court's failure to comply with Rule 56 is harmless if the dismissal can be justified under Rule 12(b)(6) without reference to matters outside of the plaintiffs' complaint. Id. at 1566.

III.
JPC's Motion to Dismiss

In support of its motion to dismiss, JPC submitted (1) the affidavit of Christina Pickle, in which she states that the plaintiffs entered the United States afer October 1, 2001, on Indian passports and with B-1 or B-2 visas; (2) a copy of one plaintiff's passport and visa; (3) a copy of that plaintiff's responses to a request for admission and an answer to interrogatory in which that plaintiff did not admit or deny that he entered this country under an Indian passport and was accorded visa status of B-1 or B-2; and (4) a list of plaintiffs who did not sign the Joint Status Report. All of these materials relate to JPC's argument that plaintiffs' FLSA claim should be dismissed.

The Court elects to exclude these matters outside the pleadings submitted by JPC, and to treat the motion as one to dismiss because the materials are not disputed by the plaintiffs and they are irrelevant to the Court's determination for reasons discussed below.

1. Fair Labor Standards Act

JPC argues that plaintiffs were not authorized to be employed in the United States and hence, they cannot recover claimed back wages. JPC points out that plaintiffs were in the United States on

Indian passports and B-1 or B-2 visas, and plaintiffs do not deny these facts. However, the case law indicates that the kind of passport plaintiffs possess and their visa status are irrelevant for purposes of whether plaintiffs were entitled to minimum wage under the Fair Labor Standards Act.

JPC relies on Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, ___ U.S. ___, 122 S.Ct. 1275 (2002), a case which involved the wrongful termination of an illegal alien who sought reinstatement and back pay for work not performed. In Hoffman, the United States Supreme Court held that federal immigration policy, as expressed by Congress in IRCA, foreclosed an award of backpay to an undocumented alien who had never been legally authorized to work in the United States. Id. at 1278, 1284. The Hoffman Court emphasized the fact that the alien in that case was not lawfully present in the United States and had obtained his employment by tendering fraudulent documents to the employer. Id. at 1282-83. This case is distinguishable because plaintiffs were not in the United States illegally, there is no evidence that they obtained employment here by unlawful means, and they are not seeking back pay for work not performed. They are seeking pay for work they allegedly performed at less than minimum wage.

As plaintiffs point out, there is persuasive authority indicating that IRCA does not prevent an undocumented alien from bringing an action for unpaid minimum wages and overtime. See Patel v.Quality Inn South, 846 F.2d 700, 706 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989). If the rule were otherwise, employers would have incentive to hire illegal aliens and pay them less than minimum wage, thus disadvantaging American workers seeking employment. Regardless of whether the plaintiffs were recruited for training or for employment in the United States, it is undisputed that they performed work for JPC and were paid for that work. At least three courts have held that Hoffman does not preclude an undocumented employee from recovering unpaid wages for work

actually performed. See Singh v. Jutla & C.D. & R's Oil, Inc., No. C 02-1130 CRB, 2202 WL 1808589 (N.D.Cal. Aug. 5, 2002); Liu v. Donna Karan Intern., Inc., No. 00 CIV. 4221 WK, 2002 WL 1300260 (S.D.N.Y. June 12, 2002); Flores v. Albertson's Inc., No. CV0100515AHM(SHX), 2002 WL 1163623 (C.D. Cal. April 9, 2002). This Court agrees.[1]

2. 28 U.S.C. § 1981 Race Discrimination

JPC contends that plaintiffs' claim for race discrimination under 42 U.S.C. § 1981 should be dismissed because plaintiffs' claim is based on national origin and not race and because plaintiffs' claim involves conduct after the formation of the employment relationship, not "in the making or enforcement of employment contracts." Plaintiffs' Fifth Amended Complaint sets forth an allegation that "non-Indian" employees were paid more than plaintiffs for the same or identical work. (See Dkt. # 47 at ¶¶ 21, 22, 23, 36, 37.) At most, JPC argues, plaintiffs have stated a claim for discrimination based on national origin, which is prohibited by 42 U.S.C. § 2000e–2.

The relevant authorities acknowledge that the line between discrimination based on race and discrimination based on national origin is not a "bright" one. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 614 (1987) (Brennan, J., concurring); Von Zuckerstein v. Argonne Nat. Laboratory, 984 F.2d 1467, 1472 (7th Cir. 1993); Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1387 n. 7 (10th Cir. 1991). The Tenth Circuit has observed:

> 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. See Alizadeh v. Safeway Stores, Inc., 802 F.2d 111, 114-15 (5th Cir. 1986)(noting that persons of

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[1] JPC also argues that, pursuant to 29 U.S.C. § 216(b), dismissal is appropriate as to those plaintiffs for whom a written consent to become a party has not been filed. In response, counsel for plaintiffs represents that each plaintiff has signed a verification in support of interrogatory answers submitted in this case, thus satisfying the consent requirement. Since JPC does not challenge this representation, the Court finds that dismissal on this ground is not appropriate.

> Iranian descent are a protected race under § 1981, although anthropologists classify them as Caucasian); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979)(noting that § 1981 is "no[t] necessarily limited to the technical or restrictive meaning of 'race'"). . . . As the Supreme Court has noted, Congress intended § 1981 to "protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." Saint Francis College, 481 U.S. at 613, 107 S.Ct. at 2028.

Daemi, 931 F.2d at 1387 n.7. The Daemi court ruled that, "[a]s a person of Iranian descent, Daemi was protected by § 1981's bar against discrimination on the ground of race." Id. Plaintiffs point out that several courts have allowed individuals of Indian/East Indian descent to proceed with § 1981 racial discrimination claims. Chankoke v. Anheuser-Busch, Inc., 843 F.Supp. 16, 18 n.2 (D.N.J. 1994) ("Although Indians are technically classified as 'Caucasian,' they may still state a claim under Section 1981"); Jatoi v. Hurst-Euless- Bedford Hospital Auth., 807 F.2d 1214, 1218 (5th Cir.) (allegation that plaintiff was East Indian sufficient to invoke protection of § 1981), modified on other grounds, 819 F.2d 545 (5th Cir.1987); see also Banker v. Time Chemical, Inc., 579 F. Supp. 1183, 1187 (N.D. Ill. 1983); Baruah v. Young, 536 F. Supp. 356, 363 (D. Md 1982).

JPC emphasizes the Daemi court's ruling that, in light of Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the lower court properly rejected Daemi's §1981 claim because the claim was premised solely on conduct of Daemi's employer after the formation of his employment contract. JPC argues that plaintiffs' allegations in this matter are likewise premised on conduct after the formation of the employee relationship, *i.e.*, the conditions of their employment. JPC fails to point out that Patterson has been superseded by statute. As numerous courts have noted, Congress amended § 1981 through the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. E.g. Turner v. Arkansas Ins. Dept., 297 F.3d 751, 755 (8th Cir. 2002); Simons v. Southwest-Petro-chem, Inc., 28 F.3d 1029, 1031 (10th Cir. 1994). Section 1981 guarantees to all persons in the United

states "the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (1994). In response to Patterson, Congress broadened the scope of the phrase "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b)(1994).

While plaintiffs must still establish racial discrimination, they have sufficiently stated a claim for racial discrimination to withstand a motion to dismiss.

3. Title VII of the Civil Rights Act of 1964

To the contrary, plaintiffs' claim of discrimination based on national origin under Title VII of the Civil Rights Act of 1964 cannot survive JPC's motion to dismiss. Plaintiffs have not complied with the requirements of 42 U.S.C. § 2000e *et seq.*, which require plaintiffs to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and exhaust their administrative remedies before filing a private lawsuit. See Love v. Pullman Co., 404 U.S. 522, 523 (1972) ("A person claiming to be aggrieved by a violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, may not maintain a suit for redress in federal district court until he has first unsuccessfully pursued certain avenues of potential administrative relief."); Jones v. Runyon, 91 F.3d 1398, 1399 (10th Cir. 1996) ("Exhaustion of administrative remedies is a 'jurisdictional prerequisite' to suit under Title VII."). Plaintiffs assert that they filed a claim with the EEOC, but they admit that they have not yet received right-to-sue letters. They ask that the Court stay the proceedings and/or hold its decision in abeyance pending the issuance of right-to-sue letters by the EEOC.

Plaintiffs' request is ironic, given that plaintiffs did not file their claims with the EEOC until July 9, 2002 - almost five months after they filed this action. Further, they have repeatedly

emphasized to this Court the need for expeditious resolution of this matter because, they assert, they are no longer earning any wages from their work at JPC and are relying on charity for survival pending the outcome. It is not clear that the EEOC will issue a right-to-sue letter or, if so, when. The Court declines to stay the proceedings or hold its decision in abeyance. Plaintiffs' Title VII claim is dismissed without prejudice to refiling.

4. Immigration Reform and Control Act

Finally, plaintiffs indicate that they have stipulated to a voluntary dismissal of their claim for a violation of IRCA, thus conceding that they have not stated a claim for which relief can be granted on their IRCA claim. It shall be dismissed.

IV.
Pickle's Motion to Dismiss

Pickle moves to dismiss all seven claims against him. He attaches an affidavit denying his personal involvement in the acts alleged by plaintiffs and admitting his role, if any, solely as an agent of JPC. He specifically references statements in the affidavit to support his arguments to dismiss plaintiffs' claims for violation of the FLSA, deceit, false imprisonment, and violation of Title VII of the Civil Rights Act of 1964. He also incorporates by reference the motion to dismiss filed by JPC and the reply brief thereto as to plaintiffs' claims for violation of the FLSA, race discrimination, violation of Title VII, and violation of IRCA.

With regard to plaintiffs' race discrimination claim, Pickle also argues that there are no factual allegations against him other than the allegation that Pickle, as owner and officer of JPC, engaged in race discrimination acting on behalf of JPC and acting on his own behalf. The affidavit, while it is not specifically referenced in Pickle's argument on the motion to dismiss the race discrimination claim,

does address whether Pickle acted as an agent of JPC or in his individual capacity. Similarly, the affidavit sets forth facts in support of Pickle's argument to dismiss plaintiffs' claim for intentional infliction of distress, although Pickle does not reference that portion of the affidavit in his argument for dismissal of that claim.

The facts contained in the affidavit attached to Pickle's motion to dismiss relating to violation of the FLSA, race discrimination, deceit, false imprisonment, and intentional infliction of emotional distress are disputed and relevant. Pickle's motion to dismiss is hereby converted to a Rule 56 motion summary judgment, and the parties are given until October 18, 2002 to simultaneously present all materials pertinent to the motion. Responses may be filed no later than October 25, 2002.

Plaintiffs apparently admit, in their response to Pickle's motion to dismiss, that their complaint does not sufficiently state claims against Pickle for violations of Title VII and IRCA. (See Resp. Br., Dkt. # 70, at 2.) In addition, Pickle's affidavit does not address facts relevant to plaintiffs' claims that Pickle violated IRCA. It does address facts relevant to plaintiffs' claim that he violated Title VII, but those facts are irrelevant to the Court's determination of that issue. Thus, the Court does not consider the affidavit with regard to plaintiffs' claims against Pickle for violations of Title VII and IRCA, and the Court treats Pickle's motion as one to dismiss those claims. Further, the Court dismisses those claims against Pickle for the same reasons it dismisses those claims against JPC.

V.

IT IS THEREFORE ORDERED that the motion to dismiss of John Pickle Company, Inc. (Dkt. # 56-2) is hereby GRANTED in part and DENIED in part. It is granted as to plaintiffs' claims against JPC for violation of Title VII of the Civil Rights Act of 1964 and violation of the Immigration

Reform and Control Act of 1986. It is denied as to plaintiffs' claims for violation of the Fair Labor Standards Act and race discrimination under 42 U.S.C. § 1981.

IT IS FURTHER ORDERED that the motion to dismiss (Dkt. # 62-2) filed by individual defendant John Pickle, Jr. is hereby GRANTED in part as to plaintiff's claims for violation of Title VII of the Civil Rights Act of 1964 and violation of the Immigration Reform and Control Act of 1986; it is CONVERTED in part to a Rule 56 motion summary judgment as to all remaining claims, and the parties are given until October 18, 2002 to simultaneously present all materials pertinent to the motion. Responses may be filed no later than October 25, 2002.

Dated this 3rd day of October, 2002.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE