

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI, DIVISION

CASE NO.: 96-1104-CIV-KING  
Magistrate Stephen T. Brown

DOBSON COLLINS,

Plaintiff,

v.

FLAGSHIP AIRLINES, INC.  
A Delaware corporation,

Defendant.

FILED BY JE D.C.  
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CARLOS JUENKE  
CLERK U.S. DIST. CT.  
S.D. OF FLA. - MIAMI

**PLAINTIFF DOBSON COLLINS' MOTION TO STRIKE DEFENDANT'S  
AFFIRMATIVE DEFENSES, AND SUPPORTING MEMORANDUM OF LAW**

Plaintiff, DOBSON COLLINS, by and through his undersigned counsel, hereby moves to strike defendant FLAGSHIP AIRLINES, INC.'s ("FLAGSHIP") Affirmative Defenses for the grounds set forth below:

1. Defendant's Affirmative Defenses are legally insufficient, or are a sham, and therefore should be stricken pursuant to Federal Rule of Civil Procedure 12(f).
2. In the alternative, Plaintiff denies and/or avoids each and every Affirmative Defense set forth by the defendant.

Wherefore, Plaintiff respectfully requests this Honorable Court grant its Motion to Strike Defendant's Affirmative Defenses.

**MEMORANDUM OF LAW**

**Introduction**

Plaintiff, DOBSON COLLINS, has sued defendant FLAGSHIP for damages and other relief against the defendant's racially discriminatory and retaliatory conduct, as well as for the

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unlawful termination of the Plaintiff on or about December 12, 1994. In April 1994, defendant commenced discriminatory conduct against Plaintiff relating to this matter. This conduct continued through Plaintiff's termination in December, 1994. An initial EEOC charge of discrimination was filed on May 12, 1994 and was later amended on December 14, 1994 (see attached copy). Plaintiff filed suit in this Court on April 25, 1996.

In response to DOBSON COLLINS' complaint, FLAGSHIP filed an Answer and Affirmative Defenses. This Motion follows.

### **Overview of Rule 12(f)**

Federal Rule of Civil Procedure 12(f) authorizes this Court to “. . . order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.”

Rule 12(f) also encompasses sham pleadings. See *Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986); *Totalplan Corp. of America v. Lure Camera, Ltd.*, 613 F.Supp. 451 (D.C.N.Y. 1985).

Rule 12(f) also authorizes striking insufficient legal defenses. *U.S. v. Union Gas Corp.*, 743 F.Supp 1144 (E.D. Pa. 1990); *First Financial Savings Bank v. American Bankers Insurance of Florida*, 783 F.Supp 963 (E.D.N.C. 1991).

In the instant case, defendant FLAGSHIP has raised Affirmative Defenses that directly conflict with the facts stated in the initial pleading or simply have no basis in fact. FLAGSHIP's Affirmative Defenses are therefore a sham and/or legally insufficient and should be stricken.

#### **I. Plaintiffs Affirmative Defense #One Should be Stricken as it is Legally Insufficient**

Defendant's Affirmative Defense #One set forth at paragraph 1 of its Answer, Defenses and Affirmative Defenses states:

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

This Affirmative Defense is legally insufficient as this Court has already ruled that Counts I and II of the Complaint are legally sufficient and will stand. See Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, ¶ II.A. and ¶ II.B. Where defense is insufficient as a matter of law, it should be stricken to eliminate the unnecessary delay and expense of litigating it. *Resolution Trust Corp. v. Youngblood*, 807 F.Supp 765 (N.D. Ga. 1992).

**II. Plaintiffs Affirmative Defense # Two Should be Stricken as it is Legally Insufficient and a Sham**

Defendant's Affirmative Defense #Two set forth at paragraph 2 of its Answer, Defenses and Affirmative Defenses states:

Plaintiff's claims are barred, in whole or in part, by the applicable limitations period.

This Affirmative Defense is legally insufficient, is inconsistent with the plain facts of the Complaint (See Complaint ¶ 28) and is devoid of factual basis. Affirmative Defenses which are inconsistent with the pleadings should be struck. *Williams v. Jader Fuel Co.* 944 F.2d 1388 (7th Cir. 1991) cert. denied, 112 S.Ct. 2306 (1992).<sup>1</sup> A pleading which contain allegations that are

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<sup>1</sup> In the Eleventh Circuit, the statute of limitation for filing an EEOC charge is 300 days from the time the discriminatory act was sufficiently permanent in nature to "trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate." *Watson v. Bally Mfg. Corp.*, 844 F.Supp 1533, 1535 (S.D. Fla. 1993), quoting *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983). However, even if the initial discriminatory conduct begins prior to the 300-day window, if the actions continue into the 300-day period, the claim would not properly be dismissed as barred by the statute of limitations. *Watson v. Bally Mfg. Corp.*, 844 F.Supp 1533, 1535-1536 (S.D. Fla. 1993). In this instance, the discriminatory conduct at issue commenced in April 1994 and continued until Plaintiff was terminated in December 1994. The original EEOC charge of discrimination was filed on May 12, 1994 and an amended charge was filed on December 14, 1994.

In addition, the Petitioner has 90 days from the date of the EEOC Dismissal and Notice of Right to file a lawsuit in district court. On January 26, 1996, the EEOC Dismissal and Notice of

false and devoid of factual basis should be stricken as a sham pleading. *Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986).

**III. Plaintiffs Affirmative Defense # Three Should be Stricken as it is Legally Insufficient and/or a sham**

Defendant's Affirmative Defense #Three set forth at paragraph 3 of its Answer, Defenses and Affirmative Defenses states:

Some or all of Plaintiff's claims are barred by doctrines of waiver, estoppel and/or laches.

This Affirmative Defense is legally insufficient, inconsistent with the plain facts of the Complaint (See Complaint ¶ 28), devoid of factual basis and the defendant offers no factual support for the conclusory allegation.

A pleading which contains allegations that are false and devoid of factual basis should be stricken as a sham pleading. *Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986). Here defendant defendant merely states conclusions of law and fails to allege any alternative factual allegations as a basis for this Affirmative Defense. Affirmative Defenses which are nothing but bare bones of conclusory allegations may be stricken. *Heller Financial, Inc. V. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1295 (7th Cir. 1989).

In addition, laches is properly relevant only where the claims presented may be characterized as equitable, rather than legal. *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990).

**IV. Plaintiffs Affirmative Defense # Four Should be Stricken as it is a sham**

Defendant's Affirmative Defense #Four set forth at paragraph 4 of its Answer, Defenses and Affirmative Defenses states:

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Right was issued and sent to DOBSON COLLINS. This suit was filed on April 25, 1996 within the requisite time period.

Plaintiff has not met all statutory prerequisites to filing suit.

This Affirmative Defense is devoid of factual basis. Affirmative Defenses which contain allegations that are false and devoid of factual basis should be stricken as a sham pleading.

*Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986).

**V. Plaintiffs Affirmative Defense # Five Should be Stricken as it is Legally Insufficient and a sham**

Defendant's Affirmative Defense #Five set forth at paragraph 5 of its Answer, Defenses and Affirmative Defenses states:

Plaintiff has failed to exhaust his administrative remedies under Title VII.

This Affirmative Defense is also legally insufficient as it is inconsistent with the plain facts of the Complaint. See Complaint ¶ 20 and ¶ 28. Affirmative Defenses which are inconsistent with the pleadings should be struck. *Williams v. Jader Fuel Co.*, 944 F.2d 1388 (7th Cir. 1991) cert. denied, 112 S.Ct. 2306 (1992). Moreover, the claim of failure to exhaust remedies which is legally insufficient should be stricken in order to eliminate the delay and unnecessary expense of litigating an invalid claim. *F.D.I.C. v. Eckert Seamans Cherin & Mellott*, 754 F.Supp. 22 (E.D.N.Y. 1990). Finally, a pleading which contain allegations that are false and devoid of factual basis should be stricken as a sham pleading. *Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986).

**VI. Plaintiffs Affirmative Defense # Six Should be Stricken as it is a Sham**

Defendant's Affirmative Defense #Six set forth at paragraph 6 of its Answer, Defenses and Affirmative Defenses states:

Plaintiff's claims are outside the scope of his administrative charge.

This Affirmative Defense is devoid of factual basis. Affirmative Defenses which contain allegations that are false and devoid of factual basis should be stricken as a sham pleading.

*Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986).

**VII. Plaintiffs Affirmative Defense # Seven Should be Stricken as it is a sham**

Defendant's Affirmative Defense #Seven set forth at paragraph 7 of its Answer, Defenses and Affirmative Defenses states:

All actions taken by defendant with regard to Plaintiff were based on legitimate and reasonable business factors not related to any statutory prohibition invoked by Plaintiff.

This Affirmative Defense is devoid of factual basis. Affirmative Defenses which contain allegations that are false and devoid of factual basis should be stricken as a sham pleading.

*Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986).

**VIII. Plaintiffs Affirmative Defense # Eight Should be Stricken as it is a sham**

Defendant's Affirmative Defense #Eight set forth at paragraph 8 of its Answer, Defenses and Affirmative Defenses states:

Plaintiff's entitlement to any damages is barred by his failure to mitigate his damages.

This Affirmative Defense is devoid of factual basis. Affirmative Defenses which contain allegations that are false and devoid of factual basis should be stricken as a sham pleading.

*Kramer, Levin, Nessen, Kamin & Frakel v. Aronoff*, 638 F.Supp 714 (S.D.N.Y. 1986).

Respectfully submitted,

KURZBAN, KURZBAN, WEINGER  
& TETZELI, P.A.

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IRA J. KURZBAN, ESQ.

FLORIDA BAR NO. 225517

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY a true and correct copy of the foregoing was served via U.S. Mail this 16th day of September, 1996, upon: Terence G. Connor, Esq., MORGAN, LEWIS & BOCKIUS L.L.P., 5300 First Union Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33131-2339.

\_\_\_\_\_  
IRA J. KURZBAN, ESQ.

**ADDITIONAL  
ATTACHMENTS**

**NOT**

**SCANNED**

**PLEASE REFER TO COURT FILE**