UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

DOBSON COLLINS,
indivudually,

Plaintiff,

-vs-

FLAGSHIP AIRLINES, INC.,
a Delaware corporation,

Defendant.

DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Pursuant to Local Rule 7(C), defendant, FLAGSHIP AIRLINES, INC. ("Flagship"), files this response to plaintiff's motion to strike affirmative defenses ("Motion to Strike").

INTRODUCTION

In a shotgun approach, and relying on an incorrect reading of the Federal Rules of Civil Procedure and the relevant case law, plaintiff asks this Court to strike each and every affirmative defense alleged by Flagship. As shown in this memorandum, motions to strike are disfavored and rarely granted unless the defenses are so unrelated to the plaintiff's claims that they can bear no possible relation to the controversy. Plaintiff has not even attempted to make the required showing, instead asserting that the defenses are "false" or a "sham" because they

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contradict the complaint or will not be supported by facts. Plaintiff also argues that the defenses are legally insufficient but fails to explain why, instead falling back on the argument that they are factually false. Even if more facts should be alleged to support Flagship's affirmative defenses, striking them is not the proper remedy. Plaintiff's ill conceived motion serves only to delay the case and force the parties and the Court to expend time, effort and expense in defense of the motion. Plaintiff can advance no sound basis under existing law in support of his arguments and gains nothing by his motion. Accordingly, it must be denied.

BACKGROUND

Plaintiff's complaint alleges that he was a victim of race discrimination and retaliation in violation of Title VII. Plaintiff's Title VII claims are purportedly based on an administrative charge filed before the Equal Employment Opportunity Commission (EEOC) in May, 1994 and later amended in December, 1994. However, plaintiff's complaint refers to alleged incidents of discrimination that date back to at least 1991 for which separate charges of discrimination were filed, none of which were followed by a judicial complaint. Flagship moved to dismiss the Title VII claim arguing, among other things, that the conduct alleged in the complaint exceeded the scope of the charge. The Court granted in part and denied in part Flagship's motion to dismiss plaintiff's Title VII claim stating that plaintiff's Title VII claims could not include "the claims or incidents that were resolved in March 1994 within the ambit of the instant suit" but may include hostile work environment claims. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, p.6. The prior EEOC charges, filed in 1991 and

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1992, were not specifically addressed in the Order and the Court did not consider the actual scope of the EEOC investigation of the charge at issue in ruling on Flagship's motion.

Plaintiff's complaint also alleges a race discrimination and retaliation claim under 42 U.S.C. § 1981 that Flagship challenged on the theory that retaliation claims are not covered by §1981, as amended. Although the Court denied the motion, the issue is open under Eleventh Circuit case law.

Flagship's answer and affirmative defenses to plaintiff's complaint alleges eight defenses in a "simple, concise, and direct" manner as required by Rule 8(e). The affirmative defenses are: 1) failure to state a claim upon which relief may be granted, 2) plaintiff's claims are barred either in whole or in part by the applicable limitations period, 3) plaintiff's claims are barred by the doctrines of waiver, estoppel and/or laches, 4) plaintiff has not met all statutory prerequisites to filing suit, 5) plaintiff has failed to exhaust his administrative remedies under Title VII, 6) plaintiff's claims are outside the scope of his administrative charge, 7) all actions taken by plaintiff with regard to plaintiff were based on legitimate and reasonable business factors not related to any statutory prohibition invoked by plaintiff, and 8) plaintiff's entitlement to any damages is barred by his failure to mitigate damages.

Plaintiff's Motion to Strike seeks to strike all of Flagship's affirmative defenses pursuant to Rule 12(f). For the reasons set forth in this memorandum, the Motion to Strike should be denied.

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LEGAL STANDARD

Rule 8(e) requires no more than "plain notice" of the issues being raised by the defense. 5 C. Wright & A. Miller, Federal Practice & Procedure § 1261, pp. 384 & 386-87 ("[A]s is true of an affirmative pleading, a defensive pleading should be simple, concise, and direct. Defendant's answer should not contain verbose, argumentative, or redundant material or include evidentiary matters." See also Kulzer v. Pittsburgh-Corning Corp., 942 F.2d 122, 125 (2d Cir. 1991), cert. denied, 503 U.S. 939 (1992) citing Santos v. District Council of New York City, 619 F.2d 963, 967 (2d Cir. 1980) (affirmative defenses "need not be articulated with any rigorous degree of specificity" and are "sufficiently raised for purposes of Rule 8 by [their] bare assertion." (emphasis in original).

Striking a pleading is a drastic remedy and because it is often sought by the movant as a dilatory tactic, Rule 12(f) motions are viewed with disfavor and rarely granted. 5A Wright & Miller, Fed. Prac. & Proc. § 1380 at pp. 647-649. See also, Poston v. American President Lines, Ltd., 452 F.Supp. 568, 570 (S.D. Fla. 1978) (King, J.) (motions to strike affirmative defenses are generally not favored and considered "time wasters"). A motion to strike will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to the moving party. Poston, supra, at 570. See also, Parson v. Nationwide Mutual Ins. Co., 889 F.Supp. 465, 470 (M.D. Fla. 1995) (same). A defense will be stricken only if the defense is legally insufficient as a matter of law on the face of the pleading or patently frivolous. See, Antoniou v. Thiokol Corp., v. Group Disability Plan, 829 F. Supp. 1323, 1327 (M.D. Fla. 1993) (legally insufficient as a matter of law); U.S. v. Walerko Tool & Engineering

Corp.,784 F. Supp. 1385 (N.D. Ind. 1992) (patently frivolous or legally insufficient on face of pleading). A motion to strike should be denied unless it is clear that under no circumstances could the defenses succeed. See, S.E.C. v. Toomey, 866 F. Supp. 719, 722 (S.D.N.Y. 1992) (citations omitted) (Court will deny motion to strike unless there are no questions of law or fact to be resolved that might allow the defense to succeed). In making this determination, the defendant's pleadings will be liberally construed. Id.

Here plaintiff filed his Motion to Strike without apparent consideration of the heavy burden required in order to prevail.

ARGUMENT

First Affirmative Defense

Flagship's first affirmative defense alleges:

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

This defense tracks the language of Rule 12(b)(6) and is appropriate here. It can be raised in either a motion to dismiss or an affirmative defense "at the option of the pleader." Toomey, supra, at 723 citing 5A C. Wright & A. Miller, Federal Practice and Procedure § 1349, at 190. Even though a motion to dismiss was made in this case, because the defense may be revitalized under Rule 12(h), the Court should allow the defense to stand. See, Toomey, supra, at 723 citing Rosenblatt v. United Air Lines, 21 F.R.D. 110, 111 (S.D.N.Y. 1957). See also Fed. R. Civ. P. 12(h) ("A defense of failure to state a claim upon which relief can be granted ... may be

made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.") (emphasis added).

Moreover, plaintiff will not be prejudiced by the defense of failure to state a claim. See, Toomey, supra, at 723 (citing Oppel v. Empire Mutual Inc. Co., 92 F.R.D. 494 (S.D. N.Y. 1981) (even if the defense is equated with a general denial and deemed redundant, there is no prejudice to plaintiff and the defense need not be stricken). See also Sevart v. Paper Machine Co., 8 F.R.D. 482, 483 (W.D. Mo. 1948) (the "failure to state a claim" defense is "invulnerable as against the [12(f)] motion."). Accordingly, plaintiff's motion to strike the first affirmative defense should be denied.

Second, Fourth, Fifth and Sixth Affirmative Defenses

Flagship's second, fourth, fifth and sixth affirmative defenses state:

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

4. Plaintiff has not met all statutory prerequisites to filing suit.

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

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

The second, fourth, fifth and sixth affirmative defenses alleged by Flagship are fairly asserted. As plaintiff acknowledges, in order to file suit under a Title VII, a plaintiff must file an appropriate administrative charge covering the alleged discriminatory conduct within 300 days from the time the discriminatory act triggers an employee's awareness of, and duty to assert, his or her rights. After receiving a notice of right-to-sue a plaintiff has ninety days to file

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a judicial complaint. The judicial complaint filed by a plaintiff may not raise claims that were outside of the scope of his administrative charge. See Evans v. U.S. Pipe & Foundry, 696 F.2d 925 (11th Cir. 1983); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).

Plaintiff's complaint discusses alleged incidents of discrimination that occurred at least as far back as 1991. Although in ruling on Flagship's motion to dismiss the Court stated that plaintiff's Title VII claims could not include claims or incidents resolved in March 1994 within this lawsuit, the administrative charges filed prior to March 1994, (i.e., the 1991 and 1992 charges) were not specifically addressed in the Court's Order. Because the plaintiff was not required to amend his initial pleading, the complaint, as it currently reads, refers to conduct occurring as far back as 1991 and includes references to charges which were never pursued and to conduct occurring outside of the filing period.[1/] Moreover, the Court, in ruling that the Title VII claim would not be dismissed did not consider the actual scope of the EEOC investigation of the charge at issue. Flagship is entitled to allege and attempt to establish the actual scope of the EEOC investigation of the relevant charge and that some of plaintiff's Title VII claims are beyond the scope of the charge.

Plaintiff's proof remains to be seen and discovery may establish that plaintiff's awareness of his rights on his hostile work environment claim was triggered long before he filed the instant charge, particularly given the fact that he was apparently aware of his rights and

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1/ It should be noted that plaintiff himself now states that the discriminatory conduct at issue commenced in April of 1994 and continued until plaintiff was terminated in December 1994. However, the complaint refers to acts occurring prior to April 1994 and appears to attempt to incorporate them into the relevant charge.

consistent in asserting them.[2/] Accordingly, there are factual and legal issues which must be resolved as to the scope of the relevant EEOC investigation and the proper scope of the judicial complaint. When resolved,the Court may find that plaintiff's claims are barred as a result of his failure to comply with the statutory prerequisites for filing suit, or exhaust his administrative remedies, or because they are beyond the scope of the EEOC investigation. Therefore, these affirmative defenses should not be dismissed.

Third Affirmative Defense

Flagship's third affirmative defense states:

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

Flagship maintains that if the discriminatory acts alleged in plaintiff's complaint began to occur as alleged in 1991, plaintiff should have pursued his rights under each of the charges filed by him. He has not done so. As such, plaintiff may be estopped from asserting his claims or they may be barred by waiver or laches.[3/]

2/ Plaintiff's reliance on Watson v. Bally Mftg. Corp., 844 F.Supp. 1533 (S.D. Fla.), in support of his argument that the statute of limitations is not a viable defense is misplaced. In Watson this Court denied a motion to dismiss portions of plaintiff's Title VII claim on the grounds that they were beyond the scope of the charge or filed too late. The Court found that the plaintiff's allegations were sufficient to withstand a motion to dismiss. However, the Court stated that the "burden will be on Plaintiff to sustantiate the representation[s]" contained in the complaint, Id., at 1535,presumably leaving open the possibility that the defenses could be raised in the answer.

3/ Citing White v. Daniel, 909 F.2d 99, (4th Cir. 1990), cert. denied 501 U.S. 1260 (1991) plaintiff argues that laches is relevant only where the claims presented may be characterized as equitable. In fact, Title VII provides primarily for equitable relief,

(continued...)

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Seventh Affirmative Defense

Flagship's seventh affirmative defense 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.

Flagship's seventh defense is clearly appropriate. Flagship is entitled to allege and attempt to establish that plaintiff was disciplined and ultimately discharged for legitimate non-discriminatory reasons and that plaintiff's race had nothing to do with Flagship's actions. Plaintiff may disagree with this but that does not transform the defense into a sham. The evidence in this case will certainly raise questions of fact and law which this Court can evaluate on this defense.

Eighth Affirmative Defense

Flagship's eighth affirmative defense states:

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

The eighth affirmative defense is also fairly asserted. Failure to mitigate is a valid defense to a plaintiff's claim for damages in an employment case. See, Sayre v. Musicland

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3/(...continued)

including back pay, which plaintiff presumably seeks to recover. A claim for back pay under Title VII or Section 1981 is considered equitable in nature. Whiting v. Jackson State University, 616 F.2d 116, 122 n. 3 (5th Cir. 1980) citing U.S. v. U.S. Steel Corp., 520 F.2d 1043, 1060 n. 1 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); See also, Local No. 391 v. Terry, 494 U.S. 558, 573 (1990) (back pay under Title VII equitable in nature).

Group, 850 F.2d 350, 353 (8th Cir. 1988). Flagship intends to explore and evaluate plaintiff's efforts to mitigate. Flagship bears the burden of proof on this defense and must assert it in order to raise the issue.[4/]

CONCLUSION

Plaintiff's motion to strike is without merit and serves only as a "time waster". Flagship's answer provides plaintiff with fair notice of Flagship's defenses. The defenses asserted by Flagship are neither patently frivolous or legally insufficient. It certainly cannot be said that no amount of factual development of issues will save the defenses. Resolution Trust Corp. v. Youngblood, 807 F.Supp. 765 (N.D. Ga. 1992). Flagship is entitled to develop these defenses through discovery and present them to the trier of fact or the Court if appropriate. Accordingly, plaintiff's Motion to Strike Flagship's affirmative defenses should be denied. Alternatively, if the Court finds that any of the defenses are technically or procedurally deficient, Flagship should be permitted to amend the defenses.

Respectfully submitted,
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4/ Plaintiff's attempt to strike the seventh and eighth affirmative defenses exemplifies the unreasonableness of plaintiff's motion to strike. Plaintiff cannot maintain credibly that these defenses are frivolous or legally insufficient as a matter of law.

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CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing was mailed this 3rd day of September, 1996, to Ira J. Kurzban, Esquire, Kurzban, Kurzban, Weinger & Tetzeli, P.A., 2650 S.W. 27th Avenue, Second Floor, Miami, Florida 33133.

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