UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DOBSON COLLINS,

Plaintiff,

v.

FLAGSHIP AIRLINES, INC.,
a Delaware Corporation,

Defendant.
_____/

Case No.: 96-1104-CIV-(GOLD)

MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER

1. Preliminary Statement

Plaintiff herein submits this memorandum of law in opposition to defendant's motion to reconsider. A review of the record reflects that the Court did not overlook any significant part of the record. In addition, if the Court reconsiders the summary judgment decision, it should also reconsider plaintiff's motion to supplement the record which was denied as moot.[1] It should be noted that defendant's motion to reconsider is made thirty-three day after the Court's decision denying defendant's summary judgment.

2. The Record Developed For Summary Judgment

Plaintiff commenced his employment with defendants in December 1989, at their aircraft maintenance facility. Plaintiff was hired as a mechanic to perform maintenance work at the defendants' facility. However, he did not receive promotions

[1]Any references to the Exhibits are attached to plaintiff's original response to its memorandum in opposition to defendant's motion for summary judgment and plaintiff's motion to supplement the record which was submitted to the Court and should be deemed incorporated herein.

93

commensurate with his experience and performance. Plaintiff believes the defendants' failure to promote him was racially motivated because of the complete lack of African Americans in supervisory positions. Plaintiff filed charges of discrimination with the U.S. Equal Employment Opportunity Commission's Miami Office alleging racial discrimination in the defendant's failure to promote plaintiff.

In July 1992, plaintiff entered into a negotiated settlement that resulted in his promotion and an award of back pay. In exchange for plaintiff's agreement not to sue American-Eagle, the company agreed to:

> Affirm and confirm that the charging party Mr. Collins has been upgraded to Tech Level (I) as of June 1991, and his rate of pay adjusted to its equivalent in accordance with established policies. (Exhibit "A")
>
> American Eagle also agreed:
>
> a. not to retaliate against Mr. Collins "in future consideration of transfers, promotions, and other terms and conditions of employment because of these proceedings," id. at paragraph 3.B;
>
> b. not to discriminate or retaliate against any person by virtue of the person's opposition to any unlawful, discriminatory practice under Title VII of the Civil Rights Act of 1964, as amended," filing of a charge, giving testimony or assistance, or otherwise participating in an investigation, proceeding, or hearing pursuant to Tittle VII, id. at paragraph 3.C; and
>
> c. "to re-emphasize its EEO policy to all of its Maintenance employees, particularly, to those who perform in a supervisory or lead capacity, limited to respondent's Miami facility," id. at paragraph 3.D (emphasis added).

Subsequently, in April 1993, plaintiff was accused by his supervisor of insubordination regarding a work assignment he had been given in the Bahamas. The allegations against plaintiff were not true. Roughly three weeks later, in May 1993,

plaintiff's supervisor gave him a choice: Plaintiff could either accept termination of his employment, or sign a "Letter of Commitment" in which he acknowledged his "performance problem" and agreed to correct immediately the problem, with the understanding that plaintiff could be discharged without further warning. Fearing the loss of his job, plaintiff signed the letter under protest, noting on the letter that he disputed that plaintiff had a "performance problem" and denying the letter's purported waiver of any grievance or claim he may have against the company.

Based on that series of events, plaintiff then filed another charge of discrimination, alleging that he was being discriminated against because he is black, and that American Eagle had taken retaliatory action against plaintiff based on the prior charges. This charge was again resolved in March 1994, and plaintiff withdrew the charge.

The following month, in April 1994, plaintiff's supervisor, Noel Franz, docked him for an hour of overtime pay one day when he stated that plaintiff had violated the defendants' overtime "policy" by arriving an hour early for a shift and claiming overtime pay for that hour. Another non-black employee who had done the same thing as plaintiff that day was paid overtime, as other employees consistently had been in the past until plaintiff had filed his EEOC charge.

In May 5-6, 1994, were very busy. More aircrafts than usual arrived at the facility with mechanical problems that needed to be corrected. On typical days at the end of their shifts, the technicians enter into a computer various information related to necessary repairs and parts on the aircraft that they serviced. However, on May 5-6, 1994, few if any of the technicians had time to do so and were not authorized to work overtime

to do so. They instead entered the information into the computers on the following morning.

Because the technicians failed to enter the required information in the computer before the end of their shifts, Mr. Franz placed "Quality Assurance, Notifications of Non-Compliance" in the technicians personnel files. However, when white employees, Dick Osos, Craig Underhill and Jamie Neno, complained to Mr. Franz, he removed the notifications from their files, but when plaintiff complained, he left the quality assurance notification in plaintiff's file. It should be noted that defendant has failed to produce the notifications from the caucasian personnel files because they do no longer exist.

Subsequently, plaintiff was authorized to work overtime on May 12, 1994. When plaintiff arrived for his shift, Mr. Franz instructed him to research with respect to each airplane listed in the facility's computer every possible defect that he could find with the airplanes' systems and provide replacement part numbers for all of those airplanes, a huge and tedious task. However, none of the aircraft in the computer was physically available to plaintiff at the facility to determine whether possible defects appearing in the computer were accurate. To plaintiff's knowledge no one had ever previously been assigned the same task.

When plaintiff asked Mr. Franz why he had been given him that task, Mr. Franz responded that it was because plaintiff had received the "non-compliance" write-ups on May 5-6, 1994. Plaintiff then indicated that he thought he was unfairly being singled out. Mr. Franz then clocked plaintiff out and told him to go home because he complained too much about the company to the EEOC. This statement when construed in a light most favorable to Collins is a direct admission of retaliatory intent. On the same day (May 12,

1994) plaintiff filed another charge of discrimination with the Miami Office of the EEOC that forms in part the basis of plaintiff's claim in this lawsuit.

On or about the morning of October 15, 1994, plaintiff reported to work to begin his shift. Hanging from the mechanic's trailer was a noose with the words "To Hang Dobson" written on it. A co-worker, Henry Cruz, who saw the noose told plaintiff that Mr. Franz had told him that the noose was to hang plaintiff.[2] Plaintiff understood the rope to symbolize a lynching and was very upset by it because of its obvious symbolic reference. In fact, the rope incident affected plaintiff personally to the point that he was extremely upset.

Sometime after that, another black co-worker of plaintiff Oswald Russell, found in the facility an overexposed Polaroid picture with a black background on which was written, "In the ramp at 10:00 P.M., Dobson and Ozzy." On the black background were smiling faces that had been painted on the Polaroid picture with white typewriter correction fluid. This also was extremely upsetting to plaintiff and compounded his personal feeling concerning the implication of a lynching.

On November 30, 1994, plaintiff went to Mr. Franz's office to review his personnel file. While plaintiff was reviewing his file, plaintiff was taking notes on a personal document on the back of a bank statement that plaintiff had in his possession. When Mr. Franz observed plaintiff he asked him to see the document. Plaintiff explained that it was a personal document, not a file document, and that plaintiff would prefer for him not to read the document. Plaintiff displayed the document so that Mr. Franz could clearly see that it

---

[2] This incidents were brought to the attention of defendant during a December 7, 1994 meeting. (Exhibit "4")

was not a company document but a bank statement. The bank statement was clearly visible to Mr. Franz.

Unsatisfied, Mr. Franz became upset and demanded to read the document and screamed at plaintiff that he was going to fire him. Plaintiff refused and began to walk away from Mr. Franz, fearing physical harm. Plaintiff reached the stairs leading down from the office, and Mr. Franz pushed plaintiff from behind. Plaintiff injured his left hip in the fall down stairs and sought medical treatment for his injury and then filed a workers' compensation claim.

On or about December 12, 1994, plaintiff was informed by letter from Mr. Franz that he had been terminated for insubordination. The termination letter stated that plaintiff have failed to turn over a document from his personnel file that Mr. Franz had accused him of removing on November 30, 1994. The termination letter also stated that plaintiff breached his previous "Letter of Commitment" that plaintiff had signed in May 1993. Subsequent to plaintiff's termination, Mr. Franz approach co-workers Lazaro Lopez, Carlos Gonzalez, and Juan Coadra, and others asked them to make statements against plaintiff and his work performance. Some refused, stating that he had treated plaintiff discriminatory, but others complied. Prior to plaintiff's termination, Mr. Franz had also approached co-workers and asked them for incriminating written statements or information concerning him.

As a result of filing of charges, the defendants, through base manager Noel Franz and others, took retaliatory actions against plaintiff that the defendants did not take against white employees, including docking plaintiff overtime pay; "papering" plaintiff's personnel file with notices of policy "infractions" not enforced against whites and with

written statements against him solicited by Mr. Franz from other employees under explicit or implicit threat of termination; hanging a noose from the mechanic's trailer with plaintiff's name on it; shoving plaintiff down a stairway; and ultimately terminating plaintiff.

The defendants unlawfully retaliated against plaintiff because he opposed the defendants' unlawful, discriminatory employment practices by inter alia, filing EEOC charges, because they did not promote African-Americans.

Put simply, the defendants unlawfully created a hostile work environment and discharged plaintiff based upon his race and his opposition to their unlawful employment practices.

In addition, there have been numerous other incidents which have given rise to other black employees claiming that Mr. Franz has discriminated against them based upon race. For example, Oswald Russell, Anthony Lee, Oran Camejo and Charles Mclech have all filed EEOC charges claiming Noel Franz has discriminated against them on the basis of race. (Exhibit "2")

Also attached as Exhibit "3" are two statements prepared by Jesus Sanchez. One can gleam the second longer statement contains a lot more detail such as Mr. Franz following plaintiff to the bathroom which did not occur according to anyone which is why a second a shorter and more credible statement was written by Mr. Sanchez to support the termination.

In addition, in plaintiff's motion to supplement the record, the deposition testimony was attached of the following witnesses which reflect an openly hostile bias against African-Americans by the base manager, Noel Franz.

For example, Edgar Cerezo was the former base manager and immediate supervisor of Noel Franz. His testimony reflects an openly hostile and racially charged atmosphere in which upper management was aware of but in which it took no action. For example, cartoons on the walls stated **"kill all niggers"**. (emphasis added) There were pictures of African Warriors were in the crew chief office and Franz told him racial jokes. (73-79,82-85) He also stated that Franz was on a racial vendetta and would follow Russell, Camejo and Collins. Franz made racist comments and would use the word nigger frequently (120-124).

Franz's racial bias against black employees is a critical issue and the former base manager's testimony is devastating to defendant's defense.

Moreover, Ralph Perez's testimony that Franz treated black employees differently and made comments about blacks such as the picture of a gorilla looks like Ozzie Russell and that he found a job for Tony picking watermelons up. He also confirmed that it was common shop talk to make racial comments and confirmed seeing the noose. (22-26, 107-113, 117-119 and 122-127)

Further, Jesus Rivera confirmed the existence of a noose, and a racially derogatory picture of a black employee, Oswald Russell. (108-112, 213-216)

Finally, Mr. Gonzalez stated that racial comments and racial cartoons on the wall were common and that there was no training regarding racial sensitivity. (9-15) He acknowledged a poster in plain view on the crew chief wall that could have been construed as racially offensive. (94-96)

ARGUMENT

POINT I

THE COURT'S DECISION WAS BASED UPON THE RECORD AND DID NOT OVERLOOK ANY FACT OR ARGUMENT AND THUS THE MOTION SHOULD BE DENIED

At the outset, plaintiff's motion to reconsider is untimely since it was made thirty-three days after the court's decision.

In connection with a motion for summary judgment, the Court's function was to determine whether a material factual issue exists, not to resolve any existing factual issues. United States v. Diebold Inc., 369 U.S. 654 (1962). A court may grant summary judgment under Fed.R.Civ.P. 56(c) only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Where, as here, the nonmovant bears the ultimate burden to prove at trial that the defendant discriminated against plaintiff, he may defeat the summary judgment motion by procuring sufficient specific facts to establish that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Also, the party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact. Weinberger v. Hynson, 412 U.S. 609 (1973). In addition, in ruling on a motion for summary judgment, a court must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion. Welch v. Celotex Corp, 951 F2d 1235, 1237 (11 Cir. 1992) Hoffman v. Allied Corp, 912 F2d 1379 (11th Cir. 1990), Eastway Construction Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985), cert. denied. In assessing whether the movant has met this

burden, the district court must review the evidence and all factual inferences drawn therefrom, in the light most favorable to the non-moving party. Welch v. Celotex Corp. 951 F2d 1235, 1237 (11 Cir. 1992); Rollins v. TechSouth, Inc., 951 F2d 1525, 1528 (11th Cir. 1987). If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exists genuine issues of material facts. Matushita Electric Industrial Co. v. Zenith Radio Corp. 475 U.S. 574, 586-87, 106 S.Ct. 1328, 1355-56, 89 L.Ed. 2d 538 (1086); Clark v. Coats & Clark, Inc. 929 F2d 604, 608 (11th Cir. 1991).

Applicable substantive law will identify those facts that are material. Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant. For factual issues to be considered genuine, they must have a real basis in the record. Matsushita, 475 U.S. at 586-87, 106 S. Ct., at 1355-56. It is not part of the court's function, when deciding a motion for summary judgement to decide issues of material fact, but determine whether such issues exist to be tried. Anderson, 477 U.S. at 249, 106 S.Ct. at 2135. The court must avoid weighing conflicting evidence or making credibility determinations. Id, at 255, 106 S.Ct. at 2513- Instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". Where a reasonable fact finder may "draw more than one inference from the facts, and the inference creates a general issue of material fact, then the court should refuse to grant summary judgment." Barfield v. Briertonm, 883 F2d 923, 933-34 (11th Cir.1989) (citation omitted).

Court have recognized that in discrimination cases, an employer's true motivations are particularly difficult to ascertain, see United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (acknowledging that discrimination cases present difficult issues for the trier of fact, as "there will seldom be `eye witness' testimony as to the employer's mental processes"), thereby making such factual determinations generally unsuitable for disposition at the summary judgment stage. Lowe v. City of Monrovia 775 F.2d 998, 1009 (9th Cir.1985).

In Howard v. BP Oil Co., 32 F3d 520 (11th Cir. 1994) held that plaintiff's burden on summary judgement is merely creating a factual issue as to the truthfulness of the defendant's proffered explanation. See also Cooper-Houston v. Southern Railway Co., 37 F3d 603 (11th Cir. 1994).

When construing every fact in a light most favorable to plaintiff, these are factual issues as to the truthfulness of the defendant's proffered explanation which precluded summary judgment and made the court's denial of the summary judgment sound.

At the outset, approximately four other black individuals have filed EEOC charges against the same supervisor. (Exhibit "2") Clearly, these sworn statements against the same supervisor reflect that plaintiff's perspective of an open bias and racially hostile environment was not unique and the belief was held by numerous other black employees. Moreover, the testimony of nonblack employees such as Cerezo (hispanic), Perez (hispanic) , Rivera (hispanic) and Gonzlez (hispanic) reflects an openly hostility toward the black employees and insidious racial atmosphere which permeated the work site.

Second, there is a clear factual dispute regarding the circumstances of plaintiff's termination and whether it was used as a pretext to terminate plaintiff because of his long standing opposition to the discriminatory practices of defendant and because of Franz's hatred of black employees.

Third, there are circumstances regarding the rope and picture and the symbolic implication it has to a black individual and the statement that was made to a co-worker by Mr. Franz, that it was going to be used to hang plaintiff. The cartoons on the wall, the race hate hour by coworkers, the common use of the work **nigger** at the work site, the posters in plain view on the walls of the job site create a clear factual dispute in the record.

Fourth, the statements of Juan Quadra, a co-worker regarding the issue of noncompliance reports and the fact that plaintiff was singled out also creates a factual issue.

The unreasonable assignment by Mr. Franz and the direct admission by him that it was done in retaliation for his EEOC activity[3] also presents a factual issue and further supports plaintiff's claim that his termination was done trumped up in retaliation for his prior EEO activity.

---

[3]Noel Franz who was the base manager and had been employed for some time at Miami states that he was unaware of plaintiff's prior EEO activity which presents a direct conflict in the record but also further raises an issue as to his veracity since it would be virtually impossible to believe that he was unaware of the prior EEOC charges and settlements since he was the highest official at Miami International Airport and had to discuss disciplinary action and the consequences of it with personnel.

Plaintiff respectfully submits that when viewing the evidence in a light most favorable to plaintiff, that the Court properly found a material factual dispute in the record which precluded summary judgment.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that Defendant's Motion be denied.

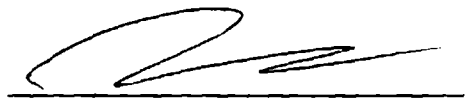
Dated: Fort Lauderdale, Florida
March 9,1999

Respectfully submitted,

STEWART LEE KARLIN, ESQ.
Florida Bar No. 0961159
400 Southeast Eighth Street
Fort Lauderdale, Florida 33316
(954) 462-1201

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the deposition notices were furnished by Fax and U.S. Mail to: Alex Sun, Esq. and Terence G. Connor, Morgan Lewis & Bockius LLP, 5300 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2339, on this 9th day of March, 1999.



STEWART LEE KARLIN, ESQ.
Florida Bar No. 0961159
400 Southeast Eighth Street
Fort Lauderdale, Florida 33316
(954) 462-1201