UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

DIANE CANTU,

Plaintiff-Intervenor,

v.

INTOWN SUITES MANAGEMENT, INC.,

Defendant.

CIVIL ACTION

NO. 1:03-CV-1494-RLV

O R D E R

This is an action for retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, and under 42 U.S.C. § 1981. The plaintiff-intervenor, Diane Cantu, is a former employee of InTown Suites Management, Inc. ("InTown Suites"). Following the termination of one of her subordinates, Ms. Cantu sent an e-mail on September 1, 2001, to her boss and to the company's Chief Operating Officer, Ms. Cheryl Vickers, asserting that InTown Suites discriminated on the basis of race in hiring. Believing that Ms. Cantu's allegations were false and an attempt to divert attention from her failure to supervise the subordinate, Ms. Vickers met with Ms. Cantu and then sent her an e-mail documenting for the

first time her alleged performance problems and threatening termination if improvements were not made. Ms. Cantu denied any performance issues but thereafter engaged in conduct that her supervisors believed to be disloyal, including secretly tape-recording a meeting with them and having inappropriate conversations with co-workers. On September 14, 2001, at a meeting called to discuss the plaintiff-intervenor's performance improvement plan, after Ms. Cantu presented Ms. Vickers with a copy of a charge of discrimination she had filed with the Equal Employment Opportunity Commission ("EEOC"), she was discharged for continued disloyal behavior.

The EEOC and Ms. Cantu allege that her termination from InTown Suites was in retaliation for the September 1 e-mail about alleged discrimination in hiring and for her filing of a charge of discrimination with the EEOC. They seek damages and injunctive relief for InTown Suites's alleged violations of Title VII (both plaintiffs) and 42 U.S.C. § 1981 (Ms. Cantu only). InTown Suites contends that Ms. Vickers's criticisms of Ms. Cantu's job performance were legitimate and not in retaliation for her e-mail; the company also contends that Ms. Vickers made the discharge decision before she saw the EEOC charge and that she did not look at it after the plaintiff-intervenor presented it to her. Thus,

she could not have discharged Ms. Cantu in retaliation for filing the charge.

InTown Suites moved for summary judgment, and the magistrate judge has submitted a report and recommendation recommending that the motion be denied. InTown Suites has filed objections to that report and recommendation. InTown Suites does not challenge the magistrate judge's determination that there are genuine issues of material fact with respect to the plaintiffs' Title VII claims; however, InTown Suites argues that the magistrate judge erroneously denied summary judgment with respect to the plaintiff-intervenor's section 1981 claim.

InTown Suites argues that a person may not bring a retaliation claim unless the retaliatory action is based on the plaintiff's own race. It is InTown Suites's position that since the plaintiff-intervenor complained that InTown Suites was discriminating against minorities and since she is white, she cannot bring a section 1981 claim for retaliation. The court agrees that InTown Suites is not entitled to summary judgment on the plaintiff-intervenor's section 1981 claim but not for the reasons set forth in the magistrate judge's report and recommendation.

In his report and recommendation, the magistrate judge stated, "Although the Eleventh Circuit has not spoken on this issue, those circuits that have hold that the race of the plaintiff is not

relevant, if the alleged retaliation was racially based." Non-final Report and Recommendation at 67-68. This is incorrect. The Eleventh Circuit has spoken, just not very clearly. InTown Suites argues, "[T]he Eleventh Circuit has prohibited § 1981 claims where the retaliation alleged is not based on the race of the complainant." Defendant's Objections to the Magistrate Judge's Report and Recommendation on Defendant's Motion for Summary Judgment at 2-3. That statement, however, is also incorrect, since none of the cases cited by InTown Suites so holds. Later in its brief, InTown Suites states, "The Eleventh Circuit has decided the issue at hand, and four decisions from that Court define the parameters of viable § 1981 retaliation claims in this Circuit." Defendant's Objections to the Magistrate Judge's Report and Recommendation on Defendant's Motion for Summary Judgment at 5. However, a careful analysis of those cases show that the Eleventh Circuit has never held that a section 1981 retaliation claim must be based on the race of the complainant.

The first case cited by InTown Suites is Little v. United Technologies, 103 F.3d 956 (11th Cir. 1997), and this court agrees that that case, at first blush, supports InTown Suites's position. The court held that the plaintiff, who was white, failed to state a cause of action under Title VII because he "did not have an objectively reasonable belief that he was opposing an unlawful

employment practice." 103 F.3d at 960. Therefore, the court concluded that the plaintiff had failed to make out a prima facie case under Title VII. The court went on to say, in language that supports Intown Suites's argument, "Here, there is no evidence in the record--and [the plaintiff] does not suggest or allege--that the discrimination or retaliation allegedly leveled against him was due to his race; that is, [the plaintiff] does not contend that [the defendant] discriminated against him because he was white." 103 F.3d at 961. Of course, since the Eleventh Circuit had held that the plaintiff had failed to prove a prima facie case, this language concerning the plaintiff's race was dicta.

If *Little* were the Eleventh Circuit's only decision regarding section 1981 retaliation claims, this court would be inclined to grant InTown Suites's motion for summary judgment. However, the next case cited by InTown Suites shows the lack of precedential authority that should be afforded the *Little* decision.

In Olmsted v. Taco Bell Corp., 141 F.3d 1457 (11th Cir. 1998), the Eleventh Circuit affirmed the district judge's ruling that the plaintiff had abandoned his section 1981 retaliation claim in a pretrial stipulation. The court went on to state, although again in dicta, that the plaintiff might not have prevailed on his section 1981 retaliation claim even if he had not abandoned it, since he was white and had complained about racially motivated

conduct at the defendant's restaurants. After making this observation, the court went on to state that the language in *Little* refusing to recognize such a claim was itself dicta.[1] In a long footnote, the court explained:

> Notably, our prior decisional law leaves unclear whether Olmsted could have prevailed on his § 1981 claim even if we were to find that the claim had not been abandoned in the pretrial statement. Taco Bell points out that our decision in Little v. United Technologies, 103 F.3d 956 (11th Cir.1997), seems to indicate that the concerns underlying a retaliation action brought pursuant to Title VII and § 1981 might, in some circumstances, be different. We acknowledge that *Little* can be read to prohibit suits under § 1981 where the retaliation alleged is not based on the race of the complainant; we further note, however, that prior to our discussion of the plaintiff's § 1981 claim in that case, we discussed at length--in the context of Title VII--our determination that the plaintiff had not shown that he had engaged in statutorily protected conduct that would give rise to a retaliation claim. *See id.* at 9959-60 [*sic*]. *Little*, therefore, does not stand unambiguously for the proposition argued by defendants, particularly in light of the facts presented in that case, *i.e.*, that there had been no showing of retaliation on the basis of the race of either the plaintiff or of the subject matter about which the plaintiff had complained. Indeed, the scope of relief available under § 1981 with respect to retaliation claims appears to remain largely an open question in this circuit. *See, e.g., Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir.1997) (where white employees allegedly were retaliated against for complaining of discrimination against black employees, white plaintiffs had standing to proceed under § 1981); Reynolds v. CSX Transportation, Inc., 115 F.3d 860, 868 n. 10 (11th Cir.1997)("In its entry of judgment, the district court noted that the damages awarded for

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[1] Interestingly, the same judge authored both the *Little* decision and the *Olmstead* decision.

> retaliation could be based on either Title VII or § 1981. This court has not yet addressed the types of retaliation claims cognizable under § 1981 in light of the Civil Rights Act of 1991."). In light of our conclusion with respect to Olmsted's abandonment of his § 1981 claim in this case, we need not resolve the precise contours of § 1981, as amended by the 1991 Act, with respect to retaliation claims.
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> *Olmsted*, 141 F.3d at 1463 n.4.

The dicta in both *Little* and *Olmsted* may be persuasive, but it is not controlling.

The last case cited by InTown Suites, Andrews v. Lakeshore Rehabilitation Hospital, 140 F.3d 1405 (11th Cir. 1998), likewise does not help its argument. InTown Suites acknowledges that the plaintiff in that case was a black female; therefore, the court's statement that "not all retaliation claims are necessarily cognizable" is dicta. That statement is accorded even less weight, since the court cites *Little* as support for that proposition and then acknowledges that *Little* concerned the failure to prove a prima facie case, not the inability of a white person to bring a retaliation claim.

Fatal to InTown Suites's position is Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997). In that case, the defendant moved for a writ of mandamus, asking the court of appeals to vacate a district court order which had authorized the plaintiffs in two consolidated race discrimination cases to

advertise their allegations to the public at large and to communicate with current and former Motel 6 employees through mass mailings. In the *Jackson* case five Motel 6 patrons alleged that they had been discriminated against because of their race. In the *Petaccia*[2] case five white former Motel 6 employees alleged that they had been required to discriminate against blacks and other non-whites and that Motel 6 retaliated against them when they refused to do so.[3] The court held that the *Jackson* plaintiffs "clearly could not be certified as class representatives," 130 F.3d at 1004, and, therefore, directed the district court to decertify that class. With respect to the *Petaccia* plaintiffs, the court held that they had no standing to seek injunctive relief under 42 U.S.C. § 2000a-2 because they were no longer employed by Motel 6. However, the court allowed their claim for damages under section 1981 to proceed. "The *Petaccia* plaintiffs' claim for retaliation

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[2] The district court had consolidated Jackson v. Motel 6 Multipurposes, Inc., Civil Action No. 96-72-CIV-FTM-17D, with Petaccia v. Motel 6, G.P., Inc., Civil Action No. 96-115-CV-FTM-17D.

[3] The race of the *Petaccia* plaintiffs is never specifically mentioned in the *Jackson* opinion, although the clear inference is that they were white. In the *Olmsted* footnote, Judge Birch referred to the *Jackson* opinion and noted that the *Petaccia* plaintiffs were white. Judge Birch also sat on the panel that decided *Jackson*; therefore, this court relies upon Judge Birch's statement with respect to the race of the *Petaccia* plaintiffs.

may, however, proceed under section 1981(b), which provides for money damages." 130 F.3d at 1007.

Because of the holding in *Jackson*, this court concludes that the plaintiff-intervenor's section 1981 claim for retaliation in the instant case may proceed.

In summary, the court adopts the magistrate judge's report and recommendation with respect to the plaintiffs' Title VII claims; the court substitutes its discussion of the plaintiff-intervenor's section 1981 claim in place of the magistrate judge's discussion of that claim. Thus, InTown Suites's motion for summary judgment is DENIED in its entirety.

SO ORDERED, this 24th day of February, 2005.

ROBERT L. VINING, JR.
Senior United States District Judge