

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.

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**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSES**

Plaintiff, DOBSON COLLINS, by and through his undersigned counsel, hereby files his Reply to Defendant's Response to Plaintiff's Motion to Strike Defendant's Affirmative Defenses, and states as follows:

Introduction

Defendant conveniently adopts the most narrow application of the rules for striking affirmative defenses and ignores those instances in which their affirmative defenses are legally insufficient as a matter of law.

As discussed in the Plaintiff's Motion to Strike, it is established that Rule 12(f) 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). Moreover, 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). Moreover, the court

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has broad discretion when considering a motion to strike under 12(f). *Williams v. Eckerd Family Youth Alternative*, 903 F.Supp. 1515 (M.D. Fla. 1995), citing *Anchor Hocking Corp. V. Jacksonville Elec. Authority*, 419 F.Supp. 992 (M.D. Fla. 1976)

Legal Argument

I. Defendant's First Affirmative Defense Should Be Stricken.

Defendant's own argument put forth in its Response to the Plaintiff's Motion to Strike Affirmative Defenses supports Plaintiff's Motion with respect to the first affirmative defense. As Plaintiff's Motion to Strike points out, this Court has already ruled, pursuant to Defendant's Motion to Dismiss, that Counts I and II of the Complaint are legally sufficient and will stand. Accordingly, the defense is legally insufficient on the face of the pleading and thus legally insufficient as a matter of law. *Antoniou v. Thiokol Corp., v. Group Disability Plan*, 829 F.Supp. 1323, 1327 (M.D. Fla. 1993); *U.S. v. Walerko Tool & Engineering Corp.*, 784 F.Supp. 1385 (N.D. Ind. 1992). Where a defense is determined to be insufficient as a matter of law, such defense should be stricken in order to avoid unnecessary expenditure of time and money in litigating spurious issues. *Anchor Hocking Corp. V. Jacksonville Elec. Authority*, 419 F.Supp. 992 (M.D. Fla. 1976); *Antoniou v. Thiokol Corp., v. Group Disability Plan*, 829 F.Supp. 1323, 1327 (M.D. Fla. 1993).

II. Plaintiffs Second, Fourth and Fifth Affirmative Defenses Should be Stricken as it is Legally Insufficient and a Sham

Contrary to Defendant's slights against Plaintiff, what is wasteful is Defendant's attempt to rehash legal issues this Court has already ruled on. Where a motion to strike has the effect of making the trial less complicated, or has the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike should be granted. *State of Cal. ex. rel. State Lands Commission v. U.S.*, 512 F.Supp. 36 (D.C. Cal. 1981); *Fantasy Inc. v. Foerty*, 984 F.2d 1524,

1528 (9th Cir. 1993). Here too this Court has ruled as to the scope of the Title VII claim, namely “claims or incidents that were resolved in March 1994 [fall outside] the ambit of the instant suit.”

A fortiori, at issue in Plaintiff’s Title VII claim, are the April and December 1994 charges and the related incidents. Accordingly, the defense is both devoid of any factual basis ¹ and legally insufficient on the face of the pleading and thus legally insufficient as a matter of law. *Antoniou v. Thiokol Corp., v. Group Disability Plan*, 829 F.Supp. 1323, 1327 (M.D. Fla. 1993); *U.S. v. Walerko Tool & Engineering Corp.*, 784 F.Supp. 1385 (N.D. Ind. 1992). Where a defense is determined to be insufficient as a matter of law, such defense should be stricken in order to avoid unnecessary expenditure of time and money in litigating spurious issues. *Anchor Hocking Corp. V. Jacksonville Elec. Authority*, 419 F.Supp. 992 (M.D. Fla. 1976)

With respect to the § 1981 claim, this Court, in response to the Defendant’s Motion to Dismiss, has ruled that Count II will stand in its entirety, rendering the above cited affirmative defenses legally insufficient on the face of the pleading and thus legally insufficient as a matter of law. *Antoniou v. Thiokol Corp., v. Group Disability Plan*, 829 F.Supp. 1323, 1327 (M.D. Fla. 1993); *U.S. v. Walerko Tool & Engineering Corp.*, 784 F.Supp. 1385 (N.D. Ind. 1992).

¹ Defendant clearly missed the point of the Plaintiff’s comments with respect to the commencement of the discriminatory conduct, as they were made in adherence to this Court’s instructions limiting the ambit of the Title VII claim to incidents that were resolved in March 1994 and not as an admission that discriminatory conduct did not actually commence until that time. Clearly a facial reading of the facts pleaded in the Complaint demonstrate that the Defendant’s discriminatory conduct preceded March 1994 and was continuous throughout Plaintiff’s tenure with the company.

Moreover, contrary to Defendant’s accusations, Plaintiff cites *Watson v. Bally Mfg. Corp.*, 844 F.Supp. 1533 (S.D. Fla. 1993) in order to establish the basis of the procedural requirements for filing an EEOC charge in the Eleventh Circuit. Accordingly, reliance on *Watson* is not misplaced. In fact, it is Defendant’s reliance on *Watson* that is misplaced and misrepresented as the text Defendant quotes does not relate to the issue of whether the 300-day filing period has expired. Instead, the quoted language specifically refers to the assertion that Plaintiff *Watson* would have to substantiate her claim that her judicial complaint related to issues within the EEOC investigation which grew out of the administrative charge of discrimination. *Watson v. Bally Mfg. Corp.*, 844 F.Supp. 1533, 1534-1535 (S.D. Fla. 1993).

Moreover, as clearly pleaded in the Complaint, the discriminatory conduct at issue continued continuously throughout the Plaintiff's tenure with Defendant's company and therefore does not violate any procedural requirements.

III. The Defendant's Third Affirmative Defense should be stricken

Estoppel, waiver and laches are inappropriate defenses to a hostile environment claim. Stated otherwise, the relevance of the continuous discriminatory conduct dating back to 1991, goes to establish the hostile environment for Plaintiff at the Defendant's workplace. It is well recognized that pursuant to the "continuing violation" theory, where discriminatory acts constitute a continuing violation, so long as the later violations in the series are within the prescriptive period, an employee may pursue them despite the fact that earlier acts, forming part and parcel of the same pattern, have grown stale. *Mack v. Great Atlantic and Pacific Tea Co., Inc.*, 871 F.2d 179 (1st Cir. 1989). Moreover, a past act of discrimination for which the recipient failed to file a timely claim, may still constitute relevant background evidence in a proceeding in which the status of the [more recent] practice is at issue. *United Air Lines, Inc. v. Evans*, 97 S.Ct. 1885, 1889 (1977). Thus, so long as at least one act of discrimination occurred within the relevant limitations period, the Plaintiff is entitled to introduce acts of discrimination which occurred prior to the 300-day window to demonstrate a pattern of ongoing discrimination. *Young v. Will County Dept. of Public Aid*, 882 F.2d 290, 292 (7th Cir. 1989).

In this instance, references to the events which occurred prior to March 1994 are intended to present relevant background and foundational facts establishing a pattern of ongoing acts of discrimination and a generally hostile environment. Not, as Defendant contends, to litigate the EEOC charges filed prior to April 1994. Accordingly, Defendant's third affirmative defense is misplaced and legally insufficient as a matter of law.

Respectfully submitted,

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

Attorneys for Plaintiff

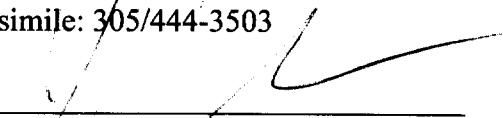
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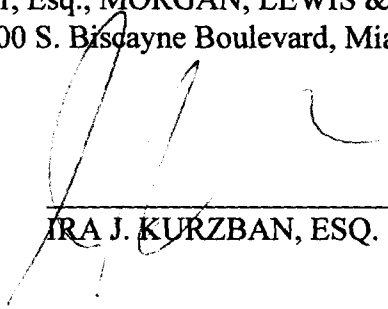
By: 

IRA J. KURZBAN, ESQ.

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CERTIFICATE OF SERVICE

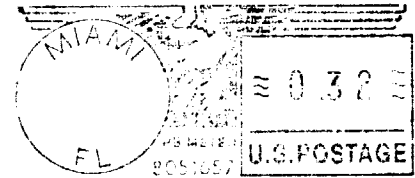
I HEREBY CERTIFY a true and correct copy of the foregoing was served via U.S. Mail this 11th day of October, 1996, upon: Terence G. Connor, Esq., MORGAN, LEWIS & BOCKIUS L.L.P., 5300 First Union Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33131-2339.



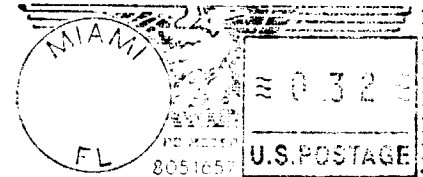
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