UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-1104-CIV-GOLD
U.S. Magistrate Judge Brown

DOBSON COLLINS,

Plaintiff,

vs.

FLAGSHIP AIRLINES, INC.,
a Delaware corporation,

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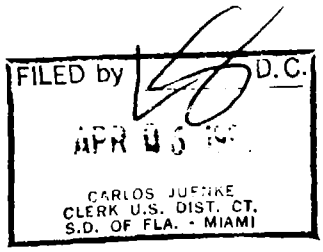

ORDER DENYING MOTION TO RECONSIDER ORDER DENYING SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO WITHDRAW ORDER DENYING SUMMARY JUDGMENT

THIS CAUSE is before the Court upon the Defendant's Motion to Reconsider Order Denying Summary Judgment, or in the Alternative, to Withdraw Order Denying Summary Judgment [D.E. #90]. Defendant challenges the Court's interpretation of the evidence in the record, arguing that the "factual findings [] were neither appropriate at *this stage* in the litigation nor supported by the record." Defendant's Memorandum in Support of Motion to Reconsider, at 1 (emphasis added). Defendant also avers that the Court misconstrued "Eleventh Circuit law as it applies both to evidentiary rules on Summary Judgment and to the shifting burdens of proof in a discrimination action." Id. As will be abundantly clear, all factual assertions included within the Order denying summary judgment were derived from evidence in the record, and the application of the relevant law to those facts was correct. Therefore, the Court concludes that the Order Denying the Defendant's Motion for Summary Judgment shall stand without alteration.

I. Discussion and Analysis

Rather than repeat the detailed factual and procedural background contained in the Order being reconsidered, the Court shall rely on that portion of its Order for the general factual allegations. Nevertheless, the issues of fact which Defendant now disputes as being in existence shall be addressed in the order in which Defendant has presented them in its motion to reconsider.

A. Standard for Summary Judgment

As a threshold matter, summary judgment is warranted only where the pleadings and supporting materials in the record demonstrate that there is an absence of genuine issues of material fact. See Fed. R. Civ. P. 56(c). An issue of fact is "material" if it is a legal element of a claim under the applicable substantive law and one which might *affect* the outcome of the suit under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A material fact is "genuine" if "the record *taken as a whole* could lead a rational trier of fact to find for the non-moving party." Id. (emphasis added). "[I]n every case, before the evidence is left to the jury, there is a preliminary question for the judge . . . whether there is *any* [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." Id. at 251, 106 S. Ct. at 2511 (emphasis added).

In reviewing a motion for summary judgment the court focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997) (quoting Anderson, supra). This review entails analysis under the two-prong framework of

shifting burdens set forth in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986). In assessing whether summary judgment is warranted, the Supreme Court places the initial burden on the moving party to establish the absence of a genuine issue as to any material fact. See Allen, 121 F.3d at 646 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970)).

When ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. See id. The Court's task is simply to determine whether a genuine issue is presented to justify trial. See Augusta Iron & Steel Works v. Employers Ins. of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). The initial burden is on the movant to identify the absence of a genuine issue of fact. See Allen, 121 F.3d at 646. Unless the moving party meets this burden, the party opposing summary judgment has no obligation to present contrary evidence. See id.; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (in ruling on a motion for summary judgment, the trial judge "must view the evidence through the prism of the substantive evidentiary burden"). The Court's function is not to resolve factual issues, but to determine whether, upon a review of the record, there exists a genuine issue of material fact. See Fed. R. Civ. P. 56(c).

Although Defendant argues that summary judgment should have been granted because Plaintiff did not submit affirmative evidence that genuine issues of fact exist, the Court found that Defendant had not met its burden. As the moving party, Defendant was required to show that there is an absence of evidence to support Plaintiff's case. See Celotex, 477 U.S. at 325, 106 S. Ct. at 2554. The Court may review the entire record to make this determination and need not merely rely

on the submissions of the parties in support of or in opposition to a motion for summary judgment. See, e.g., Brown v. Termplan, Inc., 693 F.2d 1047, 1049 (11th Cir. 1982). Rather, the Court is obligated to fully review the record before it to see whether there is a factual dispute over a material issue. This analysis is necessary before the Court may foreclose a party's right to a trial on the merits. Prior to denying Defendant's Motion for Summary Judgment, the Court made a thorough review of the record, which revealed that there were several genuine issues of material fact as to the racially discriminatory and hostile environment in which Plaintiff worked. The fact that credibility will play a crucial role in resolving Plaintiff's claims further supports denial of summary judgment. The Court never intimated that Plaintiff does not face difficult trial burdens.

B. Plaintiff's Prima Facie Case of Race Discrimination

To justify that Plaintiff did not show that he was assigned tasks unique from those assigned to Plaintiff's white co-workers, Defendant points to one incident in August 1991, in which a purportedly white mechanic was assigned a similar task of identifying part numbers on all open MEL items. See Franz Affidavit, at Exhibit 1. However, this evidence indicates that, when the employee failed to complete the assignment, Franz reassigned the employee to another task, and completed the MEL task himself. Unlike Plaintiff, the other employee was not told to punch out and go home. Therefore, the Court finds that this does not support Defendant's position that Plaintiff enjoyed treatment similar to that of employees who were not members of the protected class.

Regarding Defendant's failure to remove Plaintiff's non-compliance notification for Plaintiff's failure to timely input data into the computer ledger while Franz removed them from the

personnel files of white employees, Plaintiff presented the statement of Juan Cuadra.[1] This handwritten statement was executed before a notary public, constituting probative evidence which raises a dispute over this material issue. Ironically, the only other non-compliance notice that refers to the same day and incident concerns Mr. Cuadra.[2] However, the Court has no information as to the source of this record, and, based on Mr. Cuadra's statement, there appears to be a significant issue whether Defendant's position is undisputed.[3]

Defendant next challenges "the Court's reference to plaintiff's allegation that 'he did not receive promotions he believed were commensurate with [his] performance and seniority.'" Defendant argues that these allegations are beyond the scope of Plaintiff's underlying EEOC Charge, because, although they were the subject of Plaintiff's prior EEOC Charges, they were withdrawn upon the parties' reaching a settlement. However, the Eleventh Circuit has held that actions occurring before the 300-day period may be used as background *information* to explain Defendant's

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[1] Mr. Cuadra stated that "[Franz] told us that the non compliance report that he [h]as given to us we should forget about. Later that day he gave to Mr. Dobson Collins CRI's which was totally in reverse of what he told." Plaintiff's Opposition Memorandum, at Exhibit H. Interestingly, Mr. Cuadra's notice of non-compliance is the only other notice supplied by Defendant to support its contention that other employees were treated similarly. However, Mr. Cuadra indicates in his statement that he was specifically told to ignore the notification. While Defendant argues the lack of a genuine issue, its argument for reconsideration actually raises more issues than were observed when the Court denied summary judgment.

[2] Defendant attached a non-compliance notification for the same type of "offense" committed by Craig Underhill. However, the notification was dated February 15, 1991. Since the incident to which Plaintiff's notification refers occurred in May 1994, Mr. Underhill's notice is irrelevant to this issue.

[3] Defendant also purports to introduce evidence that other employees, in addition to Plaintiff, were docked for time clocked in before 7:00 a.m. However, the evidence in support of Defendant's position is confusing. Nevertheless, this minor issue, even if resolved favorably for Defendant, does not revive Defendant's entitlement to summary judgment.

later motives and actions. See EEOC v. Reichhold Chemicals, Inc., 988 F.2d 564, 1571 n.6 (11th Cir. 1993) (citation omitted). Therefore, this information is not irrelevant to the determination.[4]

Defendant next argues that the "undisputed" evidence in the record illustrates that Plaintiff was promoted before the June 1992 settlement was reached, not as a result thereof. However, the record substantiates otherwise. In fact, the settlement was to resolve the issues surrounding Plaintiff's two prior EEOC Charge filings: in April 1991 and February 1992. Even though the settlement agreement made the promotion and salary increase "effective as of June 1991," Plaintiff had filed at least one EEOC Charge by that time. Moreover, just because the promotion was made to have a retroactive effect, it clearly did not precede the July 1992 settlement agreement.

As for Defendant's proffer of a "legitimate" reason for its decisions regarding Plaintiff, the Court focused on more than just the actual termination decision.[5] However, based on the substantial questions raised about the credibility of Defendant's witnesses, the Court found, and continues to

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[4] Moreover, in revisiting the record upon Defendant's motion to reconsider, there are several pieces of evidence which could lead a jury to find that Defendant had a propensity for passing over minorities, including African-Americans, for promotional opportunities. See, e.g., Deposition of Francisco Gonzalez, at 46; Deposition of Edgar Cerezo, at 117-18. The Court, finding there was ample evidence in the record to deny summary judgment, did not consider these depositions, which were the subject of a motion to supplement the record. However, since Defendant's reply memorandum in support of its motion to reconsider is replete with references to these and other depositions, and attached excerpts thereto, the Court is compelled to consider them as now being part of the record.

[5] Although Defendant argues that Plaintiff violated company policy by the unauthorized removal of a record from his personnel file, other than Franz' supposition as recited in his affidavit, Defendant has not put forth a shred of evidence to prove that is what occurred. Again, it was Defendant's initial burden to show the absence of a genuine issue of material fact. That it failed to meet its burden is not the fault of the Court's consideration of the entire record.

find, that this requires resolution by a jury.[6]

C. Plaintiff's Hostile Work Environment Claim

As with Defendant's argument regarding the insufficiency of evidence in the record to support a claim of racial discrimination, Defendant's position concerning the quantum of evidence to support a claim of hostile work environment is without merit. Defendant states that Plaintiff did not show that his workplace was permeated with severe discrimination, and thus, did not support his claim of hostile environment. The Court disagrees.

Again, in addition to the evidence previously identified above, there is ample evidence of an atmosphere adverse to minorities, especially African-Americans. Several employees have testified that racially offensive jokes were told, racial epithets were written on walls, and racially offensive effigies were posted on bulletin boards, around the hangars, and in supervisors' offices. See, e.g., Cerezo Deposition, at 77, 89, 127; Gonzalez Deposition, at 9, 68.

Additionally, the presence of the noose and the photograph are indicative of racial bigotry creating a strong inference that a hostile environment existed within Defendant's workplace. Although Defendant challenges even the existence of this evidence, it has not diffused their significance. Defendant asks the Court to consider the deposition testimony of a witness taken ***after*** summary judgment was denied, to support Defendant's contention that the noose is an innocuous piece of evidence which was last seen in 1990 or 1991. However, there is evidence showing that the noose was not only around after that time, but that it was used in a threatening and discriminatory

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[6] For instance, there is abundant evidence in the record that Franz "was on a racial vendetta." See Statements of Lozano Lopez and Juan Cuadra; see also Cerezo's Deposition, at 94.

manner. See Deposition of Jesus Rivera, at 213.[7]

Moreover, Defendant disingenuously attempts to discount Franz' statement by claiming that, since Franz, who did not become acting base manager until after Plaintiff filed his earlier EEOC Charges, was unaware of the Charges, and therefore his statement could not be interpreted as retaliatory. In fact, Franz has been employed by Defendant since September 1989. See Franz Affidavit, at ¶ 1. In February 1991, Franz became a supervisor, and was promoted to acting base manager in September 1994. See id. Plaintiff filed his first EEOC Charge in April 1991, and his second in February 1992--while Franz was a supervisor. As a supervisor Franz either knew, or should have known, of the Charges and the acts of discrimination that were alleged to be occurring among his subordinates.

In sum, there is ample evidence in the record to infer that there was pervasive racial hostility, *and* that Franz and other supervisors not only were aware of this abusive environment, but also participated in creating it. See Statements of Lopez and Cuadra; Cerezo Deposition, at 116.[8] Moreover, Plaintiff's repeated Charges filed with the EEOC put Defendant on notice that the discrimination and hostility which commenced, at least in 1991, continued to permeate the

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[7] Mr. Rivera said that he saw a stuffed toy gorilla hanging from a noose with the name of one of Plaintiff's African-American co-workers affixed.

[8] In addition, several employees testified that the walls were painted on numerous occasions to cover the racially offensive comments written thereon. This would support a finding that Defendant was well aware of the hostile environment, overcoming the Faragher affirmative defense for purposes of summary judgment. Contrary to Defendant's assertion, the Court did not "prematurely determine" Defendant's vicarious liability for Franz' conduct. The Court merely concluded that there was sufficient evidence to permit this claim to be determined by a fact-finder.

workplace. Accordingly, the Court finds no error in its prior reasoning that Plaintiff be permitted to have a jury decide this claim.

D. Plaintiff's Retaliation Claim

Defendant's argument that Plaintiff did not establish a prima facie case of retaliation lacks even a modicum of merit. Defendant's strongest support for its position is simply that Franz denies telling Plaintiff to leave because he complained too much to the EEOC about the company. Only Plaintiff and Franz were present at the time Franz allegedly made the statement. Therefore, it will be Plaintiff's word against Franz'. This is a quintessential example of a credibility issue which requires jury resolution.[9]

Defendant further argues that the six-months which elapsed between the filing of Plaintiff's final EEOC Charge in May 1994 and his termination in December 1994 "defeats any attempted showing of a prima facie case [of retaliation]." This is simply not the case where retaliation through harassment continues throughout the time period between the filing of the Charge and the ultimate adverse employment action of termination.[10] See Donnellon v. Fruehauf Corp., 794 F.2d 598, 601

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[9] Furthermore, the comment was considered by the Court to be *direct* evidence of retaliation. By presenting direct evidence of retaliation, the McDonnell Douglas burden-shifting scheme is of no consequence. See Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997). According to the Eleventh Circuit, "[w]here the non-movant presents *direct* evidence that, if believed by a jury, would be sufficient to win at trial, summary judgment is not appropriate *even where the movant presents conflicting evidence*." Mize v. Jefferson City Bd. of Educ., 93 F.3d 739, 742 (11th Cir. 1996) (emphasis added). Contrary to Defendant's accusation, the Court has not "misconstrued Eleventh Circuit law as it applies both to evidentiary rules on Summary Judgment and to the shifting burdens of proof in a discrimination claim." Defendant will be required to apply these rules and burdens in addressing these issues at trial.

[10] To reiterate, Plaintiff's termination is not the sole adverse employment action on which the causal relation element of Plaintiff's retaliation claim is based. The racial hostility that permeated throughout the workplace, the statement uttered by Franz prior to discharging Plaintiff for the day, the constant harassment

(11th Cir. 1986) (a significant factor in establishing causal relation is the close proximity between the time the EEOC Charge is filed and when the employee experiences the effects of an adverse employment action).

Although the record contains other examples raising an inference that Plaintiff was retaliated against by Defendant,[11] the Court need not belabor the point. Defendant has not shown an absence of a genuine issue concerning Plaintiff's retaliation claim, nor has Defendant successfully rebutted the inference of pretext. Accordingly, Defendant is not entitled to summary dismissal.

II. Conclusion

At the urging of Defendant, the Court has repeated its exhaustive review of the record. After so doing, the Court finds no merit to the arguments raised in Defendant's motion for reconsideration. To the contrary, the Court finds that Defendant has misrepresented several facts crucial to resolving Plaintiff's claims and has urged an improper interpretation of the record to foreclose Plaintiff's right to a jury trial on the merits. Whether such a practice requires sanctions prescribed under Rule 11 of the Federal Rules of Civil Procedure may be determined in the future.

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and scrutiny as observed by Mr. Cerezo and Mr. Cuadra, among others, are all relevant in establishing a prima facie case of retaliation. Moreover, except for Franz' affidavit, Defendant has not presented any evidence that Plaintiff's actions on November 30, 1994, or on any other day, warranted termination. The Court recognized Defendant's contention that some of the adverse conduct claimed by Plaintiff may have been justified, but, based on the totality of the evidence, there remains an inference of pretext. Accordingly, the Court found Defendant's asserted reasons insufficient to establish that Plaintiff's alleged insubordination, rather than race and/or retaliation, was the basis relied upon in terminating Plaintiff.

[11] Defendant challenges Plaintiff's allegations that he was more closely scrutinized and that Franz solicited employees to provide statements adverse to Plaintiff to justify Franz' treatment. Defendant contends that the only support in the record is Plaintiff's own self-serving averments. Defendant is advised to conduct a comprehensive review of the record, which, as the Court has found, reveals evidence to support Plaintiff's allegations. See, e.g., Statements of Lopez and Cuadra; Cerezo Deposition, at 124-25.

In denying summary judgment, the Court stated that:

> The Court's decision that Defendant cannot prevail as a matter of law at this stage of the proceedings does not mean that Plaintiff has proven his case. Plaintiff has made out a prima facie case as to all of his claims and is, therefore, entitled to attempt to prove by a preponderance of the evidence that the justifications proffered by Defendant are pretextual. The proof submitted by Defendant with respect to these justifications is not so clear and undisputed as to warrant summary judgment.

Moreover, the state of mind and intent of Defendant remains very much in dispute. Evidence submitted by both parties presented two differing accounts of the relevant events. Thus, the outcome will depend on whose version of the facts will be believed--a determination of credibility. On summary judgment, the Court may not weigh the credibility of the parties. See Rollins v. TechSouth, Inc., 833 F.2d 1525, 1531 (11th Cir. 1987). "Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are jury functions." Anderson, 477 U.S. at 255, 106 S. Ct. at 2513. If the determination of the case rests on which competing version of the facts or events is true, the Court is required to deny summary judgment. See Rollins, 833 F.2d at 1531.

Defendant's reiteration of its arguments in its motion for reconsideration did not clarify the evidence, nor did it eliminate the controversies present in the record. Defendant will have the opportunity to expose what it believes to be significant flaws in Plaintiff's case at trial. However, the Court will not abrogate Plaintiff's right to a trial on the merits based on Defendant's unconvincing argument that no genuine issue of fact exists.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion to Reconsider Order Denying

Summary Judgment, or in the Alternative, to Withdraw Order Denying Summary Judgment [D.E. #90] is DENIED. It is further

ORDERED AND ADJUDGED that the Court reserves the right to consider the imposition of sanctions against Defendant and its counsel upon any motion filed by Plaintiff in accordance with Fed. R. Civ. P. 11.

DONE and ORDERED in Chambers at Miami, Florida, this 6 day of April, 1999.

ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

copies furnished:

U.S. Magistrate Judge Stephen T. Brown

Stewart Lee Karlin, Esq.
Stewart Lee Karlin, P.A..
400 S.E. 8th Street
Fort Lauderdale, Florida 33316

Terence G. Connor, Esq.
Morgan, Lewis & Bockius, LLP
200 South Biscayne Boulevard
5300 First Financial Center
Miami, Florida 33131