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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOSE R. LOPEZ, JR., RICHARD COLON and
JAMES E. CROMER,
*on behalf of themselves and all other employees similarly
situated*

CASE NO.: 07-6186CJS(Fe)

Plaintiffs,

**MEMORANDUM
OF LAW**

- against -

FLIGHT SERVICES & SYSTEMS, INC. and TODD
DUNMYER,

Defendants.

PRELIMINARY STATEMENT

Plaintiffs Jose R. Lopez, Richard Colon and James Cromer, on behalf of themselves and all others similarly situated, respectfully submit this memorandum of law in opposition to defendants' motion to dismiss plaintiffs' First Amended Complaint in part.

Plaintiffs Lopez and Colon submit that their claims for racial discrimination should not be dismissed because such claims could reasonably be expected to grow out of the charges made in their verified complaints to NYSDHR. Similarly, plaintiffs' second cause of action for retaliation should not be dismissed because it could reasonably be expected to grow out of the charges made in their verified complaints to NYSDHR. Plaintiffs' contend that their ninth, tenth, eleventh, twelfth and thirteenth claims for relief should not be dismissed because such claims are not duplicative and are not preempted by FLSA. Lastly, plaintiffs' submit that the ninth cause of action should not be dismissed because it has been stated with sufficient particularity.

STATEMENT OF FACTS

The relevant facts are set forth in the First Amended Complaint and are incorporated herein by reference. With respect to plaintiffs' causes of action based on discrimination, plaintiffs submit that subsequent to their respective employment with defendant Flight Services & Systems, Inc. ("FS&S"), plaintiffs each filed complaints of discrimination with the New York State Division of Human Rights ("NYSDHR"), alleging that FS&S engaged in various unlawful discriminatory practices. Plaintiff's complaints allege the following in pertinent part:

LOPEZ

- "On or about August 4, 2006, I was speaking Spanish to a co-worker whose English-speaking skills were poor. Todd Dundar heard this, and immediately told me that I was not allowed to speak Spanish while at work. This struck me as discriminatory and I reported the incident to Sarah Collier in the Human Resources Department. The following day, I was informed by Mr. Dunbar that I was terminated...He then told me to go home and 'sit on your Puerto Rican bum'..." [Exhibit A at ¶ 5].

CROMER

- "I also told Mr. Moran that I planned to file a complaint with the New York State Division of Human Rights based on race and color discrimination and OSHA. Mr. Dummyer came into his office and told me that I should not be talking to Mr. Morgan and asked me why I would file a complaint with the Division and OSHA. I told him that I was tired of the way I have been treated. Mr. Dummyer

proceeded to send me home for the rest of the day. When I came into work the next day, Mr. Dummyer told me that I was suspended for three days because there were witnesses and film that I had driven recklessly...On June 5, 2006, I returned to work after my suspension. Fifteen minutes before my shift ended, Mr. Dummyer called me into his office and told me I was terminated.” [Exhibit B at ¶ 6 & 7].

COLON

- “White employees were allowed to work in groups, I was forced to work by myself. Black and Hispanic workers were routinely forced to do this work by themselves. When I complained to my manager about this disparity in July, 2005, I received no response...I was not allowed to leave my job at the end of my shift, and was forced to wait for the most recent landed plane to leave.”

Plaintiffs’ complaints that were filed with NYSDHR were dual filed with the United States Equal Employment Opportunity Commission (“EEOC”). *See* Exhibit A, B & C to First Amended Complaint. NYSDHR conducted an investigation of Plaintiffs’ complaints and issued Determinations After Investigation on February 22, 2007. *See* Exhibit A, B & C to First Amended Complaint. NYSDHR determined that there was probable cause to believe that FS&S engaged in or was engaging in the unlawful discriminatory practices complained of. *See Id.* On May 7, 2007 the EEOC issued Right-to-Sue Notices with regard to the discrimination allegations alleged by plaintiffs. *See* Exhibit D, E & F to First Amended Complaint.

POINT I
MOTION TO DISMISS STANDARD

In reviewing a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, the Court is required to accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party. *See In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 384 (2nd Cir. 2005), *amended by* 466 F.3d 187, 200 (2d Cir. 2006). In general, a Court's review is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference. *See Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776 (2nd Cir. 2002). The Federal Rules of Civil Procedure require that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Under this simplified standard for pleading, "a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Tamoxifen*, 429 F.3d at 384 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quotation marks, citation, and alteration omitted)). Therefore, a claim should only be dismissed if plaintiffs can prove no set of facts that would entitle them to relief when construing the complaint most liberally and favorably to plaintiffs.

POINT II

PLAINTIFFS' RACE AND RETALIATION CLAIMS SHOULD NOT BE DISMISSED

There is no reasonable dispute that as a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC. *See Fitzgerald v. Henderson*, 251 F.3d 345, 358-59 (2nd Cir. 2001), *cert. denied*, 536 U.S. 922 (2002). The Second Circuit has recognized, however, that claims that were not asserted before the EEOC may be pursued in a subsequent federal action if they are **“reasonably related”** to those that were filed with the agency. *See Legnani v. Alitalia Linee Aeree Italiane, SPA*, 242 F.3d 683, 686 (2nd Cir. 2001). “A claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can be reasonably expected to grow out of the charges that were made.” *See Fitzgerald*, 251 F.3d at 359-60 (internal quotation marks and citation omitted). The exception to the exhaustion requirement “is essentially an allowance of loose pleadings” and is based on the recognition that “EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that plaintiff claims [he] is suffering.” *Butts v. City of New York Dep’t of Hous. Pres. Dev.*, 990 F.2d 1397, 1402 (2nd Cir. 1993)(superseded by statute on other grounds as stated in *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684 (2nd Cir, 1998). In determining whether claims are reasonably related, the focus should be on the **factual allegations made in the charge itself, describing the discrimination conduct about which a plaintiff is grieving.** *See Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 637 (9th Cir. 2002); *see also*

Alonzo v. Chase Manhattan Bank, N.A., 25 Supp.2d 455, 458 (S.D.N.Y. 1998)(“[I]t is the substance of the charge and not its label that controls.”)

Courts have recognized that race and national origin discrimination claims may substantially overlap or even be indistinguishable depending on the specific facts of the case. *See e.g. Suani v. New England Tel. and Tel Co.*, 3 F.3d 471, 475 (1st Cir. 1993)(“[R]ace and national origin discrimination may present identical factual issues when a victim is ‘born in a national whose primary stock is one’s own ethnic ground’...[and thus] in certain circumstances...national origin and race discrimination may overlap.”)(quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987)), *cert. denied*, 513 U.S. 1025 (1994); *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. Unit B 1981)(“In some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable.”(internal quotation marks and citation omitted)); *cf Dennis v. Pan Am. World Airways, Inc.*, 746 F.Supp 288, 291 (E.D.N.Y. 1990)(acknowledging that “[r]ace...may sometimes be correlated with national origin because of certain historical or demographic facts.”).

A. Race Claims for Lopez and Colon Should Not Be Dismissed

In this case, defendants allege that Lopez’ and Colon failed to expressly allege race discrimination in their Verified Complaint to NYSDHR. It is submitted that both plaintiffs Lopez and Colon did use terms suggestive of potential confusion between the concepts of race and national origin. For instance, at Paragraph 5 of his Verified Complaint (Exhibit A) Lopez states “that I was not allowed to Speak Spanish at work. This struck me as discriminatory and I reported the incident to Sarah Collier in the Human Resources Department.” In Paragraph 6 of Lopez’ Verified Complaint (Exhibit

A) he states that a former employee of FS&S stated that the reason Lopez was fired was because he was speaking “Spanish”. Similarly, in paragraph 1 of Colon’s Verified Complaint (Exhibit C), he states that he is Hispanic. In Paragraph 3 of Colon’s Verified Complaint (Exhibit C) he states that White employees were preferentially treated and “Hispanic workers were routinely forced to work by themselves.” In Paragraph 5 of the Verified Complaint (Exhibit C), Colon states “White workers were allowed to leave as soon as their shifts were over, but...Hispanic workers were forced to wait in these situations.”

As discussed above, precise pleading is not required for Title VII exhaustion. Even in the absence of an express linkage between race and national origin, the specific facts alleged by Colon and Lopez in their verified complaints to NYSDHR suggest both forms of discrimination. Accordingly, it is submitted that NYSDHR received adequate notice to investigate discrimination on both bases (race and national origin). Read liberally, allegations by Hispanic employees that “White” employees are receiving preferential treatment implicitly suggests some form of potential racial discrimination. In such circumstances, it is submitted that because racial categories may overlap significantly with nationality and ethnicity the line between discrimination on account of race and discrimination on account of national origin may be indiscernible, or so blurred to an extent that courts may infer that both types of discrimination would fall within the scope of the ensuing agency investigation for exhaustion purposes. *See Adams v. Mitsubishi Bank, Ltd.*, 751 F.Supp 1548, 1559 (E.D.N.Y. 1990)(quoting *Enriquiz v. Honeywell, Inc.*, 431 F.Supp 901, 904 (W.D.Okla 1977); *see also Bullard*, 640 F.2d at 634-35 (where the line between national origin and race discrimination is difficult to

trace, courts have warned that “an attempt to make such a demarcation before both parties have had an opportunity to offer evidence at the trial is inappropriate); *Butts*, 990 F.2d at 1402 (courts should not attempt to draw overly fine distinctions between race and national origin claims as part of a threshold exhaustion inquiry prior to full development of a plaintiff’s claims, given the potential for overlap between two forms of discrimination and that loose pleading is permitted in an EEOC complaint).

Looking at the specific facts of this case, we submit that the absence of an explicit reference to race discrimination in Lopez’ and Colon’s verified complaints to NYSDHR is not dispositive because an allegation of preferential treatment of “White” employees, punishment for speaking “Spanish”, and isolation of Hispanics encompasses a claim of discrimination based on race. Lopez’ and Colon’ allegations were sufficient to alert NYSDHR to look for potential race discrimination. In sum, because a claim of race discrimination could reasonably be expected to grow out of the complaints of Lopez and Colon made in their Verified Complaints, Lopez and Colon adequately exhausted their race discrimination claim.

B. Retaliation Claims for Plaintiff’s Should Not Be Dismissed

Turning now to plaintiffs’ retaliation claims (Second Cause of Action), it is submitted that this claim is also reasonably related to the charges alleged by plaintiffs in their complaints to NYSDHR. Not only is retaliation expressly mentioned by plaintiffs in each of their charges, there are factual allegations from which one would infer that plaintiffs were alleging retaliation. Specifically, the following allegations are made by plaintiffs relative to retaliation:

LOPEZ

- “On or about August 4, 2006, I was speaking Spanish to a co-worker whose English-speaking skills were poor. Todd Dundar heard this, and immediately told me that I was not allowed to speak Spanish while at work. This struck me as discriminatory and I reported the incident to Sarah Collier in the Human Resources Department. The following day, I was informed by Mr. Dunbar that I was terminated...He then told me to go home and ‘sit on your Puerto Rican bum’...” [Exhibit A at ¶ 5 of Verified Complaint].

CROMER

- “I also told Mr. Moran that I planned to file a complaint with the New York State Division of Human Rights based on race and color discrimination and OSHA. Mr. Dummyer came into his office and told me that I should not be talking to Mr. Morgan and asked me why I would file a complaint with the Division and OSHA. I told him that I was tired of the way I have been treated. Mr. Dummyer proceeded to send me home for the rest of the day. When I came into work the next day, Mr. Dummyer told me that I was suspended for three days because there were witnesses and film that I had driven recklessly...On June 5, 2006, I returned t work after my suspension. Fifteen minutes before my shift ended, Mr. Dummyer called me into his office and told me I was terminated.” [Exhibit B at ¶ 6 & 7 of Verified Complaint].

COLON

- “White employees were allowed to work in groups, I was forced to work by myself. Black and Hispanic workers were routinely forced to do this work by

themselves. When I complained to my manager about this disparity in July, 2005, I received no response...I was not allowed to leave my job at the end of my shift, and was forced to wait for the most recent landed plane to leave.” [Exhibit B at ¶ 6 & 7 of Verified Complaint].

Clearly, each of the plaintiffs have alleged that they were retaliated against for complaining of discrimination. Essentially, after complaining to a supervisor about disparate treatment, adverse employment action was taken against the plaintiffs. With respect to Cromer and Lopez, an inference exists that they were terminated after complaining that they were being subject to discriminatory conduct. With respect to Colon, an inference exists that after he complained of being subject to discriminatory conduct, he was not allowed to leave on time like “White” employees. Considering the facts in light most favorable to plaintiffs, plaintiffs’ claims of retaliation could reasonably be expected to grow out of the complaints of Lopez, Cromer and Colon made in their verified complaints to NYSDHR.

Accordingly, with respect to defendants’ requests to dismiss plaintiffs’ first cause of action, plaintiffs’ request that it be denied in part and plaintiffs be allowed to allege claims of discrimination as follows:

- Lopez: claims of discrimination on the basis of race and national origin.
- Cromer: claims of discrimination on the basis of race/color.
- Colon: claims of discrimination on the basis of race and national origin.

Plaintiffs’ request that defendant’s motion to dismiss their second cause of action be denied in its entirety, and plaintiff’s Lopez, Colon and Cromer be permitted to allege a cause of action for retaliation.

POINT III

PLAINTIFFS' NINTH, TENTH, ELEVENTH, TWELFTH AND THIRTEENTH CLAIMS FOR RELIEF SHOULD NOT BE DISMISSED

Defendants contend that plaintiffs' ninth, tenth, eleventh, twelfth and thirteenth claims for relief should be dismissed as a matter of law because they are preempted by FLSA. Plaintiffs' submit that the said state common law causes of action are not preempted because they do not directly overlap with their claim under FLSA. Moreover, plaintiffs' submit that FLSA does not preempt state common law causes of action. Despite defendants' contentions, said state common law claims are **not** "merely recast claims." Plaintiffs' common law claims are **not** based on the exact same factual circumstances as their FLSA claim.

In *Washington v. Fred's Stores of Tennessee, Inc.*, 427 F.Supp. 2d. 725 (S.D. Mississippi 2006), the Court was confronted with the vary issue of whether FLSA preempted state common law causes of action. In deciding whether FLSA preempted state common law claims, the Court initially examined Congresses' intent behind FLSA and pertinent provisions of FLSA. Based on this analysis, the Court determined that plaintiff's state law causes of action were not preempted by FLSA. The Court held that state common law causes of action are **not** subject to preemption (either express preemption, field preemption or conflict preemption). *See also Williamson v. General Dynamics Corporation*, 208 F/3d 1144 (9th Cir. 2000)(state law career fraud claims not preempted by FLSA). Significant to the Court's decision in *Washington v. Fred's Stores of Tennessee, Inc.* was that the state common law causes of action did not directly overlap with the claims under FLSA. *Id.* at 729.

In the instant case, plaintiffs' state common law causes of action allege the following facts separate and distinct from the factual circumstances of their FLSA claim:

- At all relevant times herein, Dunmyer, or person acting under his express direction, concealed from class plaintiffs the fact that he wrongfully and fraudulently altered the time records of class plaintiffs by accessing computerized time-keeping system and then reducing the number of hours that class plaintiffs had reported working. [Amended Complaint at ¶ 135]
- In providing to class plaintiffs pay checks with written payroll statements that expressly stated the number of hours of work for each class plaintiffs, Dunmyer and FS&S knowingly and falsely represented to class plaintiffs that the hours of work listed on their payroll statements were an accurate reflection of their actual hours of work, which was not the case. [Amended Complaint at ¶ 137]
- Dunmyer's improper alteration of class plaintiffs' reported hours was material in that it reduced the number of hours of work for which class plaintiffs were paid wages and overtime. [Amended Complaint at ¶ 138]
- Dunmyer and FS&S misrepresented and understated the hours of work for class plaintiffs on their written payroll statements with the specific intent of misleading class plaintiffs to believe that the hours reported were accurate, which they were not. [Amended Complaint at ¶ 139]
- Class plaintiffs justifiably and reasonable relied to their detriment upon Dunmyer and FS&S' representation that the hours of work reflected on their payroll statements were true and accurate, which they were not. [Amended Complaint at ¶ 140]

- In offering employment to class plaintiffs, defendant FS&S expressly promised to pay class plaintiffs their hourly wage rate for all of their hours of work, and overtime at the rate of one and one-half times their regular wage rate, if they worked more than 40 hours in any work week. [Amended Complaint at ¶ 143]
- Upon class plaintiffs' acceptance of FS&S' offer of employment, a contract was formed for each class plaintiff such that FS&S was required to pay class plaintiffs their hourly rate for all their hours of work, and overtime at the rate of one and one-half times their regular hourly wage rate, if they worked more than 40 hours in any work week. [Amended Complaint at ¶ 144]
- FS&S is liable to class plaintiffs for breach of implied covenants of good faith. [Amended Complaint at ¶ 147]
- Dunmyer is liable to class plaintiffs for tortious interference with the class plaintiffs' contractual terms with FS&S. [Amended Complaint at ¶ 149]
- As a result of FS&S' receipt and benefit of the labor performed by the class plaintiffs without lawfully paying for the same, FS&S has been unjustly enriched. [Amended Complaint at ¶ 142].

Like *Washington v. Fred's Stores of Tennessee, Inc.*, in the instant case, plaintiffs' state law claims do not directly overlap with their claims under FLSA. Drawing all reasonable inferences in the light most favorable to plaintiffs, it is submitted that the Court should find that the state common law causes of action are not based on the same factual circumstances as the FLSA claim. It is also respectfully submitted that the Court should determine that FLSA does not preempt state common law claims.

Although the underlying facts of the cases cited by defendants' are not entirely clear from the published decisions, it appears that each of these cases are distinguishable because the FLSA claim and state common law claims are based on the same facts. Moreover, nearly all of these cases recognize that the law is unsettled regarding whether FLSA has a preemptive effect. In the instant case, plaintiffs' state law claims do not directly overlap with their claims under FLSA. Accordingly, the cases cited by defendants are distinguishable.

Accordingly, defendants' motion to dismiss the plaintiffs' ninth, tenth, eleventh, twelfth and thirteenth causes of action should be denied.

POINT IV

PLAINTIFFS' CAUSE OF ACTION FOR FRAUD SHOULD NOT BE DISMISSED FOR FAILURE TO COMPLY WITH PLEADING REQUIREMENT FED.CIV.P. 9(b)

Defendants' contend that even if the Court finds that plaintiffs' ninth cause of action for fraud is not preempted by FLSA, it should still be dismissed because plaintiffs' have failed to plead with particularity. Defendants allege that dismissal is predicated on the fact that plaintiffs have failed to allege when and where the alleged fraudulent activity took place.

It is axiomatic that the requirements of particularity under Rule 9(b) differ with the facts of each case. Courts have relaxed Rule 9(b)'s heightened pleading requirements in cases involving complex fraudulent schemes or those occurring over a lengthy period of time and involving a large number of documents. *See Tiesigna v. Dianon Sys. Inc.*, 231 FRD 122, 123-124 (D. Connecticut 2005) (specificity requirements for pleading fraud were somewhat relaxed in case alleging fraudulent billing of healthcare claims and

involving thousands of individual claims). Courts do not hesitate to allow the plaintiff extra leeway in pleading when the necessary information is under the exclusive control of the defendant. *See In re Rockefeller Ctr. Props. Sec. Litg.*, 311 F.3d 198, 216 (3rd Cir. 2003)(“Where it can be shown that the requisite factual information is peculiarly within the defendant’s knowledge or control, the rigid requirements of Rule 9(b) may be relaxed”).

In the instant case, ¶ 30 of the Amended Complaint provides that the class members are those employees who were suffered or permitted to work by defendants and not paid their regular statutorily required rate of pay for all hours worked. Plaintiffs’ ninth cause of action alleges that fraud was perpetrated by concealing from the class plaintiffs the fact that defendants wrongfully and fraudulently altered time records of class plaintiffs by accessing computerized time-keeping system and then reducing the number of hours the class plaintiffs had reported working. In doing the following, it is submitted that defendants knowingly and falsely represented to class plaintiffs that the hours of work listed on their payroll statements were an accurate reflection of their actual hours of work which was not the case.

Because of the complex nature of this case, the fact the fraudulent activities occurred over an extended period of time, and the fact that defendants are in possession of the computerized time-keeping system that is able to document each instance that the number of hours worked was reduced, it is submitted that plaintiffs’ have stated the ninth cause of action with sufficient particularity.

Based on the following, plaintiff’s ninth cause of action should not be dismissed.

Dated: December 30, 2007
Rochester, New York

PHILLIPS LYTLE LLP

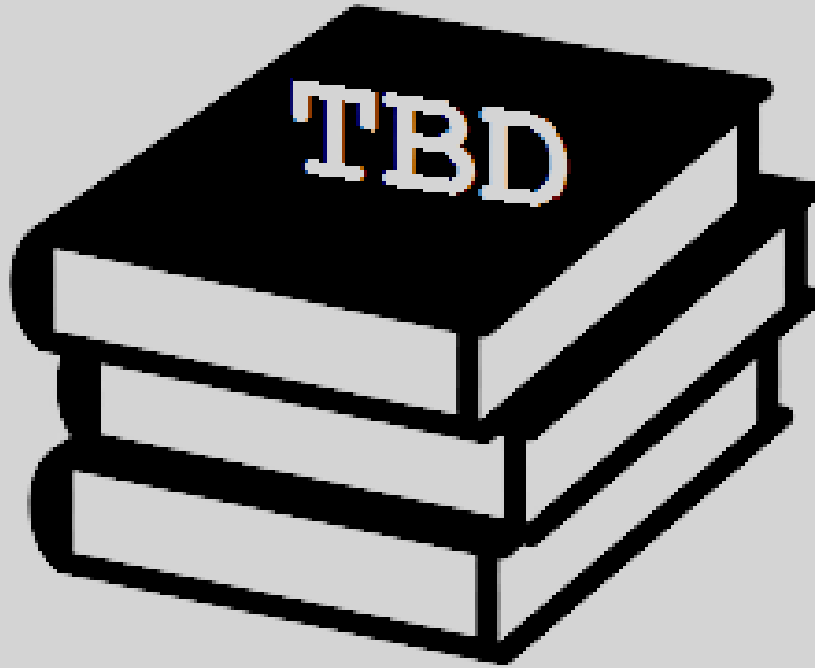


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