UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10226

TOM CLIFTON,

Plaintiff-Appellant,

VERSUS

WARNACO, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1720-T)

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No. 94-10657

JOHN T. CLIFTON,

Plaintiff-Appellant,

VERSUS

THE OLGA COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-0603-T)

(April 18, 1995)

Before POLITZ, Chief Judge, REAVLEY, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In his action against Warnaco, Inc. (***Clifton I***), the first of these two appeals, John Thomas Clifton challenges a summary judgment holding (1) termination of his employment with Warnaco was not a breach of contract, because he was an employee at will; and (2) comments by officials of The Olga Company, an unincorporated division of Warnaco, were not defamatory. In the second appeal (***Clifton II***), Clifton's subsequent action against Olga, which claimed violations of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 (ADEA), he challenges a Rule 12(b)(6) dismissal, granted on the basis of *res judicata* as a result of ***Clifton I***. We **AFFIRM**.

I.

In 1990, when Warnaco employed Clifton as a salesman in its Olga division, his compensation was on a commission plan. Warnaco changed it to a salary/bonus plan in March 1992; and, with this change, issued a compensation data sheet to Clifton which stated that his 1992 "annual salary" was $125,000.

On July 31 of that year, Warnaco terminated Clifton's employment. Within a month, he filed ***Clifton I*** against, *inter alia*, Warnaco, claiming breach of an employment contract and that,

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

during the month preceding his discharge, Warnaco officials defamed him. Summary judgment was granted against both claims.

While the appeal before us in ***Clifton I*** was pending, Clifton filed ***Clifton II***, this time against Olga. It alleged sex and age discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the ADEA, 29 U.S.C. § 621 *et seq.* Pursuant to FED. R. CIV. P. 12(b)(6), Olga moved to dismiss on the basis that the claims were barred by *res judicata*, because they should have been brought in ***Clifton I***. The district court, taking judicial notice of its own records, granted the motion.

II.

A.

As is more than well-established, we review a summary judgment *de novo*, *e.g.*, ***King v. Provident Life & Accident Ins. Co.***, 23 F.3d 926, 928 (5th Cir. 1994); the judgment is proper if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". FED. R. CIV. P. 56(c). The movant has the initial burden of demonstrating the absence of material fact issues. ***Topalian v. Ehrman***, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992). "To avoid summary judgment, the nonmovant must adduce evidence which creates a material fact issue concerning each of the essential elements of its case for which it will bear the burden of proof at trial." ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 619 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1219 (1994). The nonmovant must "go beyond the pleadings and

by [his] own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial'." ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986) (quoting FED. R. CIV. P. 56(e)). It goes without saying that unsubstantiated assertions are not competent summary judgment evidence. ***Id.***

1.

Concerning Clifton's termination, "[t]he long-standing rule in Texas provides for employment at will, terminable at any time by either party, with or without cause, absent an express agreement to the contrary". ***Federal Express Corp. v. Dutschmann***, 846 S.W.2d 282, 283 (Tex. 1993); *accord*, *e.g.*, ***Winters v. Houston Chronicle Publishing Co.***, 795 S.W.2d 723, 723 (Tex. 1990); ***East Line & R.R.R. Co. v. Scott***, 10 S.W. 99, 102 (Tex. 1888). Thus, "to establish wrongful termination, an employee must first prove that he and his employer had a contract specifically depriving the employer of the right to terminate the employee at will". ***Zimmerman v. H.E. Butt Grocery Co.***, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 502 U.S. 984 (1991). This writing must, "*in a meaningful and special way*, provide that the employer simply does not have the right to terminate the employment at will". ***Benoit v. Polysar Gulf Coast, Inc.***, 728 S.W.2d 403, 406 (Tex. Ct. App. -- Beaumont 1987, writ ref'd n.r.e.) (emphasis in original). Additionally, "if an employee seeks to make out a hiring for a definite period of time he assumes the burden of establishing that such was the intention of the parties at the time the contract was made." ***Dallas Hotel***

Co. v. McCue, 25 S.W.2d 902, 905 (Tex. Ct. App. -- Dallas 1930, no writ).

Warnaco relies in part on Clifton's signed job application and an employee handbook provided to, and signed by, Clifton at the start of his employment. Both state that Clifton's employment was at will.[2] Relying upon ***Winograd v. Willis***, 789 S.W.2d 307 (Tex. Ct. App. -- Houston [14th Dist.] 1990, writ denied), Clifton contends that, when Warnaco issued the compensation data sheet, it limited also its right to terminate his employment; that, because the sheet describes his compensation in terms of an annual salary, Warnaco committed to employ him for a year.

Winograd involved a wrongful termination action brought by Willis against Judwin Properties. Prior to terminating his long-term employment with another company, Willis sought, and obtained, written confirmation of his new job at Judwin. Included in the confirmation letter was the statement that his initial compensation package included an annual salary of $52,000. Less than four months after Willis began working for Judwin, his employment was

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[2] The job application states, just above Clifton's signature: "I understand and agree that if hired, my employment is for no definite period and may be terminated at will". Likewise, the signature page of the handbook provides:

> [T]his Handbook is not and was not intended to serve as a contract ... regarding the nature or the duration of my employment with Warnaco, except that this Handbook is our entire agreement concerning each party's right ... to terminate the employment relationship with or without cause at any time, and that no one at Warnaco is authorized to make an exception to this understanding, except an officer of Warnaco who does so in writing.

terminated. Although the ***Winograd*** court recognized the employment at will rule, it noted that, "[i]n the absence of special circumstances, however, Texas also follows the general rule practiced in England, which dictates that *a hiring* at a stated sum per week, month, or year, is a definite employment for the period named and may not be arbitrarily concluded". ***Id.*** at 310 (citing, *inter alia*, ***Dallas Hotel Co. v. Lackey***, 203 S.W.2d 557 (Tex. Ct. App. -- Dallas 1947, writ ref'd n.r.e.)) (emphasis added).

Employment with a stated, periodic sum does not, *ipso facto*, vitiate the at will relationship. The cases recognizing the practice in England demonstrate an appreciation for the circumstances surrounding *the establishment* of the employment relationship. In ***Lackey***, one of the cases cited in ***Winograd***, the court noted that the stated salary period did not establish conclusively the applicable term of employment. ***Lackey***, 203 S.W.2d at 561-62. Although on the face of the writing it may appear to be, *e.g.*, a year period, "the intention of the parties as ascertained from the terms of the contract, read in the light of surrounding circumstances, will control." ***Id.*** at 562 (quoting Annotation, *Contract of Hiring*, 100 A.L.R. 834, 841 (1936)).[3] As the court noted:

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[3] Although ***Lackey*** involved an employment card stating that the relationship was at will, the court found controlling a letter providing that compensation would not be due entirely or payable until "the end of a year's service". ***Lackey***, 203 S.W.2d at 562. But, the court did not rely on this fact alone: "surrounding circumstances, such as sale of home and removal of employee and family to the place of the new undertaking, has been usually deemed a factor of controlling weight." ***Id.***

> [i]n construing a contract the court must seek the parties' intention from the words used, the subject-matter, and the purpose of the agreement, placing itself, if the intention is not clearly expressed, in the position of the parties, and then, from a consideration of the instrument as a whole, in the light of all circumstances, endeavoring to reach its real meaning, reconciling clauses apparently in conflict, if possible, to render the agreement fair, customary, and such as reasonable business men would execute.

Id. (quoting ***Stone v. Robinson***, 180 S.W. 135, 136 (Tex. Ct. App. -- Amarillo 1915, writ ref'd n.r.e.)); *see* ***McCue***, 25 S.W.2d at 905-06 ("[i]n determining the duration of the employment under a contract whereby a person is hired or employed without any specific agreement as to the period of service or employment, regard must be had to the circumstances of each particular case").

Clifton fails to identify any evidence tending to demonstrate that Warnaco, "in a meaningful and special way", ***Benoit***, 728 S.W. 2d at 406, intended to contract away its right to terminate his employment at will. The compensation data sheet does list Clifton's salary in terms of an "annual salary"; but, when we consider, not only the data sheet, but also its subject-matter and purpose, we conclude that the at will employment relationship between Warnaco and Clifton was not altered. The fact that Clifton's job application, as well as the handbook, provided explicitly that Clifton was being hired as an employee at will is not dispositive to our decision; however, they corroborate Warnaco's understanding of its relationship with Clifton.[4]

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[4] In the handbook, Warnaco provided the mechanism for altering the employment at will relationship:

2.

In early July 1992, Clifton and his supervisor, Henry Kronbach, discussed the latter's concerns about Clifton's performance; he was terminated at the end of the month. Clifton bases his defamation claim on three occurrences between that discussion and his termination. First, the reason for Clifton's termination, as stated by Kronbach, was that he had lost confidence in Clifton's ability to follow directions and to accomplish sales goals. Prior to the termination, Kronbach prepared a memorandum outlining the basis for his decision; it was circulated among certain Olga officials before Kronbach presented it to Clifton. Second, Clifton claims that Kronbach and Joseph DiPonti, the president of Olga, made disparaging statements about Clifton and his job performance to attendees at a Warnaco sales meeting. And third, Clifton claims that Kronbach and another Warnaco official made derogatory remarks about him to representatives of Dillards' Department Stores, which was one of his accounts.

"Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse." ***Randall's***

> ... this Handbook is our entire agreement concerning each party's right ... to terminate the employment relationship with or without cause at any time, and ... no one at Warnaco is authorized to make an exception to this understanding, except an officer of Warnaco who does so in writing.

We reject Clifton's claim that the data sheet was the written exception to the at will relationship. Even assuming *arguendo* that either of the two Olga officers who signed it with Clifton were the requisite "officer of Warnaco", the document, on its face, still falls short of evincing this fundamental change in the employment relationship.

Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995); *accord* ***Halbert v. City of Sherman, Tex.***, 33 F.3d 526, 530 (5th Cir. 1994). "Utterances are slanderous per se if they are false, made without privilege and ascribe to another conduct, characteristics or a condition incompatible with the proper conduct of his lawful profession or office." ***McDowell v. State of Texas***, 465 F.2d 1342, 1344 (5th Cir. 1971), *cert. denied*, 410 U.S. 943 (1973).[5]

Of course, even if communications are defamatory, qualified privilege may protect them.[6] "Accusations or comments about an employee by [his] employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege." ***Schauer v. Memorial Care Systems***, 856 S.W.2d 437, 449 (Tex. Ct. App. -- Houston [1st Dist.] 1993, no writ); *see* ***Bozé v. Branstetter***, 912 F.2d 801, 806 (5th Cir. 1990); ***Houston v. Grocers Supply Co.***, 625 S.W.2d 798, 800 (Tex. Ct. App. -- Houston [14th Dist.] 1981, no writ) ("qualified privilege comprehends communications made in good faith on subject matter in which the author has an interest or with reference to which he has a duty to perform to another person having a corresponding interest or duty"). "The interest giving rise to the privilege may be that of the publisher of the statement, the recipient, or a third person."

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[5] For the memorandum, the defamation claim may well be for libel, as opposed to slander. Clifton not having contended otherwise, this is a distinction without a difference in this case. Qualified privilege, as discussed *infra*, is applicable equally.

[6] It goes without saying that, because we conclude that the statements in issue are privileged, we need not determine whether any are defamatory.

Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 312 (5th Cir. 1995). Whether a qualified privilege exists is a question of law. ***Bozé***, 912 F.2d at 806; ***Grocers***, 625 S.W.2d at 800.

On the other hand, the privilege may be lost if the declarant's actions are motivated by malice. ***Hurlbut v. Gulf Atlantic Life Ins. Co.***, 749 S.W.2d 762, 768 (Tex. 1987). Because Clifton failed to present such evidence, summary judgment is proper if the claimed defamation is privileged.[7]

a.

As for the Warnaco sales meeting, Clifton stated in his affidavit that Kronbach and DiPonti made false statements regarding his shipping goals and his failure to meet them, as well as characterizing him as incompetent and insubordinate.[8] The uncontroverted summary judgment evidence reflects that the purpose of the meeting was to discuss Olga's sales goals and performance, and how best to achieve those goals. In ***Bergman v. Oshman's***

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[7] Clifton contends that Warnaco, as the summary judgment movant, failed to offer any evidence on a lack of malice. At trial, the plaintiff has the burden of proving malice in order to negate a defendant's privilege. This notwithstanding, for a summary judgment motion, Texas courts shift the burden to the defendant-movant to demonstrate an absence of malice. *E.g.*, ***Martin v. Southwestern Elec. Power Co.***, 860 S.W.2d 197, 199 (Tex. Ct. App. -- Texarkana 1993, writ denied). But, federal procedural rules apply in federal courts. Accordingly, on a summary judgment motion, the burden to demonstrate a material fact issue on malice remains with Clifton. ***Duffy***, 44 F.3d at 313-14.

[8] Clifton stated that Kronbach and DiPonti said that he was "not a company man"; was "insubordinate"; his performance was "far below par"; he "did not follow through"; he failed to communicate to Olga and his customers; he was "a country boy and an order-taker"; he was "not competent" in his position; he got in the way of Olga's relationship with Dillards; and, he "wasn't fit" for his job.

Sporting Goods, Inc., 594 S.W.2d 814 (Tex. Ct. App. -- Tyler 1980, no writ), the court recognized that communications by a store's manager to the plaintiff's co-employee were qualifiedly privileged; the manager and co-employee had an interest in the honest and efficient operation of the business. ***Id.*** at 816. Similarly, Clifton's peers at the meeting, as well as the supervisory personal present, had an interest in not only the progress of sales, but also what conduct was or was not acceptable. Accordingly, the alleged comments were privileged.

b.

In the memorandum, Kronbach stated that he no longer had confidence in Clifton's ability; for example, he questioned Clifton's loyalty, commitment, overall attitude, ability and desire to follow through on Olga programs, and his involvement and ability to supervise Olga personal assigned to Dillards.[9] As with the

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[9] After informing Clifton that he did not have confidence in his ability, Kronbach, in the memorandum, supported this opinion with the following:

> I question your loyalty and commitment to the Olga Company.
>
> I question your ability to take ownership for Olga programs as developed, which results in negative selling ....
>
> I question your overall attitude as a representative of The Olga Company.
>
> I question your ability and desire to take a leadership position with Dillards Corporation as the Olga Coordinator.
>
> ....
>
> I question your ability and desire to follow

sales meeting, the memorandum dealt with Olga's operations, and was communicated only to persons with an interest in them. The three recipients of the memorandum were Olga's President, its Chief Operating Officer/Chief Financial Officer, and its Director of Human Resources.

In ***Schauer***, the court found privilege existed with respect to an employment evaluation. Following Schauer's transfer from

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> through on our programs once developed.
>
> I question your visibility and relationship with Dillards management above the buyer level.
>
> I question your involvement and ability to direct, manage and coach the store rotators assigned to Dillards.
>
> I question your ability to accurately call the business on a monthly and quarterly basis as well as your urgency to develop plans to correct deficiencies to plan.
>
> I question your level of follow-up and communication.
>
> I question your sense of urgency and commitment to add value to our effort as demonstrated by being late to planned meetings ....
>
> ... [I]n summary, I do not have confidence in your desire, sense of urgency and ability to represent Olga as a Sales Manager and Coordinator of Olga's business with our largest corporate client. Where we need vision, leadership and a "can do" attitude toward growing our business and relationship, I see an order taker willing to maintain and accept the status quo without rocking the boat. Your performance, as outlined above, has been unacceptable and I do not believe this performance can improve to a level acceptable to grow our business with Dillards.

For each instance that Kronbach questioned Clifton's abilities, he provided specific examples of incidents to support his conclusion.

Memorial's Southwest facility to its Northwest facility, her former supervisor at Southwest and a individual who evaluated the department in which Schauer worked completed the evaluation. This evaluation was circulated to the supervisor's superior before it was presented to Schauer and her new supervisor at the Southwest facility. The court found the dissemination of the evaluation to be privileged. ***Schauer***, 856 S.W.2d at 449. Similarly, Kronbach's distribution of the memorandum to key, supervisory personnel at Olga was privileged.

c.

Dillards was one of Clifton's accounts. He asserts that, when Kronbach and another Olga official met with Dillards representatives, Kronbach disclosed to them that Clifton "did not communicate properly", was "not a team player", was "dishonest", was "distrustful", and was "just a good old boy order taker". By affidavit, Kronbach denied making these statements.[10] Additionally, Clifton claims that the other Warnaco official called him "an overpaid SOB."

Clifton failed, however, to present any competent summary judgment evidence that these statements were made. The bases for these claims are Clifton's and his wife's affidavits; Clifton stated that Dillards representatives provided this information to him. Obviously, because neither Clifton nor his wife were present

[10] In his affidavit, Kronbach does not deny directly making the statement that Clifton "did not communicate properly". Rather, he stated that, in response to a direct question, he answered that he wanted to improve Olga's communications with Dillards and to develop a closer relationship with the customer.

at the meeting, they lack personal knowledge; moreover, as hereinafter discussed, these allegations are unsubstantiated. *See* ***Courtney v. Canyon Television & Appliance Rental, Inc.***, 899 F.2d 845, 851 (9th Cir. 1990) (summary judgment is proper when only evidence of defamation was non-movant's own assertions that were not based on personal knowledge or within a hearsay exception).

Clifton did present deposition testimony from three Dillards representatives present at the meeting. They did not testify, however, that Kronbach or the other official made any of the claimed statements. Rather, the only statements attributed to Kronbach were that Clifton was no longer with Olga, that he was not a company man, and that communications and follow through were a problem; also, one of the representatives testified that the statement was made that someone did not think Clifton was doing a good job, but could not attribute it to a particular individual.[11]

These comments were made to non-Warnaco employees, but, under the circumstances in which they were made, they were privileged. The Dillards representatives were people whom Clifton often dealt with on behalf of Warnaco. Thus, Dillards and Warnaco had a common

[11] In support of its summary judgment motion, Warnaco submitted an excerpt from Clifton's deposition wherein he related the alleged defamatory remarks made by Kronbach to the Dillards representatives. In reply, Clifton submitted his and his wife's affidavits which related the information the Dillards representatives provided. Because Warnaco relied upon his deposition, Clifton contends he submitted evidence of a similar kind and that, therefore, it is competent summary judgment evidence. We disagree. Suffice it to say that Warnaco offered Clifton's deposition testimony to describe his defamation allegations and rebut them. Clifton has not offered any basis for the information he relies upon to fall within an exception to the hearsay rule or to otherwise be admissible.

interest in ensuring, and improving, the relationship between the two companies. Additionally, Dillards had an interest in the status of their future relationship with Clifton. *See* ***Schauer***, 856 S.W.2d at 449 ("comments about an employee by [his] employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege").[12]

B.

The issue in the second appeal is whether Clifton is barred, based on the doctrine of *res judicata*, from raising his ***Clifton II*** Title VII and ADEA claims. We conclude that he is.

As is well-established, we review *de novo* a Rule 12(b)(6) dismissal, viewing all well-pleaded facts in the light most favorable to the party bringing the claim. *E.g.*, ***Complaint of Liberty Seafood, Inc.***, 38 F.3d 755, 757 (5th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. Feb. 8, 1995) (No. 94-1548). "A Rule 12(b)(6) dismissal will not be affirmed `unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'." ***Blackburn v. City of Marshall***, 42 F.3d 925, 931 (5th Cir. 1995)

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[12] Finally, Clifton challenges the assessment of costs against him. Because Warnaco's amended answer included a demand for costs, and the summary judgment denied all relief not granted therein, Clifton contends that Warnaco's demand was denied. The district court rejected this objection, and stated that it considered costs properly taxable unless the final judgment provides that costs are denied. *See* ***Maldonado v. Parasole***, 66 F.R.D. 388, 390 (E.D.N.Y. 1975). District courts are given broad discretion in assessing costs; we will reverse only upon a showing of abuse of that discretion. *E.g.*, ***Alberti v. Klevenhagen***, 46 F.3d 1347, 1358 (5th Cir. 1995). We find none. This is especially true in light of the fact that the court granted in part Clifton's objections to specific cost items.

(quoting ***Conley v. Gibson***, 355 U.S. 41, 45-46 (1957)). "A motion to dismiss an action for failure to state a claim `admits the facts alleged in the complaint, but challenges [the] plaintiff's rights to relief based upon those facts.'" ***Tel-Phonic Servs., Inc. v. TRS Int'l, Inc.***, 975 F.2d 1134, 1137 (5th Cir. 1992) (quoting ***Ward v. Hudnell***, 366 F.2d 247, 249 (5th Cir. 1966)).[13]

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[13] Noting that ***Clifton I*** is not discussed in his complaint for ***Clifton II***, Clifton contends that a Rule 12(b)(6) dismissal was improper, concomitantly asserting that the district court erred by taking judicial notice of the earlier proceedings before it in ***Clifton I***. In addition, claiming that this transformed the motion into one for summary judgment, Clifton maintains that he was entitled to notice that the court would treat the motion as one for summary judgment, and that he should have had the opportunity to submit additional materials in opposition. *See* FED. R. CIV. P. 12(b); ***Isquith v. Middle South Utils., Inc.***, 847 F.2d 186, 195 (5th Cir.) (party entitled to the procedural safeguards of Rule 56), *cert. denied*, 488 U.S. 926 (1988).

"With respect to a specific affirmative defense such as *res judicata*, the rule seems to be that if the facts are admitted or are not controverted or are conclusively established so that nothing further can be developed by a trial of the issue, the matter may be disposed of upon a motion to dismiss ...." ***Larter & Sons, Inc. v. Dinkler Hotels Co.***, 199 F.2d 854, 855 (5th Cir. 1952). Along that line, the district court did not err in considering records from ***Clifton I*** in ruling on the motion. For example, although FED. R. CIV. P. 8(c) requires generally that an affirmative defense be pled in the defendant's answer, "when all relevant facts are shown by the court's own records, of which the court takes notice, the defense may be upheld on a Rule 12(b)(6) motion without requiring an answer". ***Day v. Moscow***, 955 F.2d 807, 811 (2d Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 71 (1992); *accord* ***United States v. Wood***, 925 F.2d 1580, 1582 (7th Cir. 1991) (court make take judicial notice of matters of public record). As another example, in ***Boone v. Kurtz***, 617 F.2d 435, 436 (5th Cir. 1980), our court permitted a *sua sponte* dismissal on *res judicata* grounds when, in the interest of judicial economy, both actions were brought before the same court, even though the record contained neither the complaint nor the order of dismissal in the earlier action. *See* ***Nagle v. Lee***, 807 F.2d 435, 438 (5th Cir. 1987).

Federal *res judicata* rules apply in resolving the preclusive effect of ***Clifton I***, a diversity action. ***Sidag Aktiengesellschaft v. Smoked Foods Prods.***, 776 F.2d 1270, 1273 (5th Cir. 1985); ***Seven Elves, Inc. v. Eskenazi***, 704 F.2d 241, 244 n.2 (5th Cir. 1983). In determining whether an action is barred by the doctrine of *res judicata*, this court utilizes a four part test: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the prior judgment was final on the merits; and (4) the lawsuits involve the same cause of action. ***Nilsen v. City of Moss Point, Miss.***, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (*quoting* ***Kemp v. Birmingham News Co.***, 608 F.2d 1049, 1052 (5th Cir. 1979)). Clifton contends that the first and fourth elements are lacking.

1.

For *res judicata* purposes, we do not require strict identity of parties. "A non-party defendant can assert res judicata as long as it is in `privity' with the named defendant." ***Russell v. SunAmerica Sec., Inc.***, 962 F.2d 1169, 1173 (5th Cir. 1992). "Privity is merely another way of saying that there is sufficient identity between parties to prior and subsequent suits for res judicata to apply.... [I]t is nothing more than a `legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." ***Meza v. General Battery Corp.***, 908 F.2d 1262, 1266 (5th Cir. 1990) (quoting ***Southwest Airlines Co. v. Texas Int'l Airlines, Inc.***, 546 F.2d 84,

95 (5th Cir.) (quoting Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964)), *cert. denied*, 434 U.S. 832 (1977)).

"For res judicata purposes, this court has held that privity exists in just three, narrowly-defined circumstances: (1) where the non-party is the successor in interest to a party's interest in property; (2) where the non-party controlled the prior litigation; and (3) where the non-party's interests were adequately represented by a party to the original suit." ***Meza***, 908 F.2d at 1266. There is no indication that either of the first two scenarios exist; thus, we look to the third -- whether Warnaco adequately represented Olga's interest in ***Clifton I***.

A non-party to a suit may be bound if the party to the first suit is so closely aligned to the non-party's interests as to be his virtual representative. *E.g.*, ***Eubanks v. Federal Deposit Ins. Corp.***, 977 F.2d 166, 170 (5th Cir. 1992). Privity is a broad concept, however, and requires a court to look at the surrounding circumstances to determine whether the application of *res judicata* is justified. ***Russell***, 962 F.2d at 1173.

When we review the circumstances surrounding ***Clifton I*** and ***Clifton II***, we conclude that, on the privity issue, *res judicata* is appropriate. First, and foremost, Clifton does not dispute that Olga is an unincorporated division of Warnaco. No more really need be said. In any event, Clifton has treated Olga and Warnaco as closely related entities. In ***Clifton I***, he alleged that his

employer was Warnaco; in ***Clifton II***, Olga.[14] Based on the circumstances of this case, and because Warnaco adequately represented the interests of Olga in ***Clifton I***, privity, for *res judicata* purposes, exists between Warnaco and Olga.

2.

Next, we consider Clifton's contention that ***Clifton I*** and ***Clifton II*** do not raise the same cause of action. To determine whether the same cause of action is involved, this court utilizes a transactional test. ***Matter of Howe***, 913 F.2d 1138, 1144 (5th Cir. 1990); ***Robinson v. National Cash Register Co.***, 808 F.2d 1119, 1124-25 (5th Cir. 1987). Under this test, "the critical issue is not the relief requested or the theory asserted but whether [the] plaintiff bases the two actions on the same nucleus of operative facts". ***Howe***, 913 F.2d at 1144. Thus, *res judicata* bars "all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication, ... not merely those that were adjudicated." ***Id.*** (quoting ***Nilsen***, 701 F.2d at 560 (emphasis in original)).

For all practical purposes, both actions have at their core the termination of Clifton's employment. He describes the nucleus

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[14] In contending that *res judicata* was improper, Clifton relies upon the district court's conclusion in ***Clifton I*** that certain officers of Olga were not officers of Warnaco. This contention misses the mark. As noted, identity between the parties is not required. Thus, this aspect of the district court's ruling in ***Clifton I*** is not dispositive of the privity issue. Similarly, Clifton's attempt to justify the action against Olga because the district court declared in ***Clifton I*** that "Clifton was employed by one of Warnaco's operating divisions, The Olga Company," fails to appreciate the distinction between identical parties and privity.

of operative facts of ***Clifton I*** as including a breach of contract brought about by the termination of his employment. As for ***Clifton II***, he claims termination as the result of age and sex discrimination; he attempts to distinguish by claiming that, in ***Clifton II***, the termination was only an after effect of discrimination. This is another distinction without a difference. ***Clifton II*** is based on the same nucleus of operative facts as ***Clifton I*** -- Clifton's employment and termination. *See* ***Langston v. Insurance Co. of N. Am.***, 827 F.2d 1044 (5th Cir. 1987) (action based on ADEA was barred by *res judicata* based on earlier wrongful discharge action); *see also* ***Clark v. Haas Group, Inc.***, 953 F.2d 1235 (10th Cir.) (subsequent ADEA action barred by *res judicata* because of earlier Fair Labor Standards Act action; both actions based on single transaction -- plaintiff's employment), *cert. denied*, ___ U.S. ___, 113 S. Ct. 98 (1992). Accordingly, ***Clifton II*** is barred by *res judicata*.[15]

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[15] Clifton maintains that, even if the requirements for *res judicata* are met, it should not be applied in this case because of the necessity to obtain a right to sue letter from the Equal Employment Opportunity Commission before he could bring the Title VII or ADEA claims. But, he received the right to sue letter over a month before summary judgment in ***Clifton I***. His contention that the mature status of ***Clifton I*** (*e.g.*, discovery deadline had passed, cross-motions for summary judgment had been filed, responded to, and replied to) counseled against adding the Title VII and ADEA claim falls far short. Clifton failed to notify the court of his receipt of a right to sue letter, and simply waited for a ruling on the pending summary judgment motions. (Clifton had moved for partial summary judgment on his wrongful discharge claim.) When he suffered an adverse summary judgment, he sought to play another card. Needless to say, this is one of the tactics that *res judicata* is designed to discourage.

III.

For the foregoing reasons, the judgments are

AFFIRMED.