

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ARLENE HOLTZMAN,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE WORLD BOOK COMPANY, INC.,	:	
	:	
Defendant.	:	NO. 00-3771

ORDER

AND NOW, on this 13th day of November, 2001, upon consideration of the uncontested motion of plaintiff Arlene Holtzman for leave to file a letter brief (Document No. 31) in support of the motion of plaintiff for reconsideration, **IT IS HEREBY ORDERED** that plaintiff's motion for leave is **GRANTED** and the letter brief is deemed filed as attached to the motion.

LOWELL A. REED, JR., S.J.

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THE WORLD BOOK COMPANY, INC.,	:	
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	:	
Defendant.	:	NO. 00-3771

Reed, S.J.

November 13, 2001

MEMORANDUM

Now before the Court is the motion of plaintiff Arlene Holtzman for reconsideration (Document No. 26) of this Court’s Order of August 14, 2001, granting summary judgment in favor of defendant (Document No. 25), the response of defendant The World Book Company, Inc. (“World Book”) (Document No. 29), and the letter reply of plaintiff thereto (Document No. 31). For the reasons set forth below, the motion of plaintiff for reconsideration will be denied.

I. Background

Arlene Holtzman began working for World Book as a part-time sales representative in 1983. Her job involved selling World Book educational products to parents, schools and libraries in Bucks County, Pennsylvania. Plaintiff continued selling World Book products until 1998, when she was advised by her supervisor, Rosemarie Lee, that she was losing her territory and would no longer be selling World Book products. She filed suit against World Book under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. (“Title VII”), 42 U.S.C. §1981a, and the Pennsylvania Human Relations Act, 43 Pa. C.S.A. §§ 951, et seq. (“PHRA”), contending that the loss of her territory was effectively a discriminatory termination.

By order of August 14, 2001, this Court determined that plaintiff was not an employee within the terms of Title VII, and granted summary judgment in favor of defendant for the claims brought under Title VII and 42 U.S.C. § 1981a. This Court declined to exercise supplemental jurisdiction over the state law claims, and consequently dismissed the PHRA claims without prejudice to pursue in Pennsylvania courts. Plaintiff has filed this motion for reconsideration.

II. Legal Standard

Local Civil Rule 7.1(g) of the United States District Court for the Eastern District of Pennsylvania allows parties to file motions for reconsideration. The purpose of these motions is “to correct manifest errors of law or fact or to present newly discovered evidence.” Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Motions for reconsideration will be granted only upon one of the following grounds: (1) an intervening change in controlling law; (2) the emergence of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent a manifest injustice. See General Instrument Corp. v. Nu-Tek Elecs. & Mfg., 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), aff’d, 197 F.3d 83 (3d Cir. 1999).

III. Analysis

Plaintiff seeks reconsideration of this Court’s Order of August 14, 2001, based on the third ground stated above. Specifically, Ms. Holtzman argues that (1) this Court erroneously found that plaintiff had signed an employment contract with Leer Services, Inc. (“Leer Services”), the corporation formed by her supervisor, Rosemarie Lee; and (2) this Court erroneously dismissed the PHRA claims as the Court maintained diversity jurisdiction over the action.

Employment Contract

In its determination that plaintiff was not an employee of World Book under the terms of Title VII, this Court relied in part on the proffered employment contract entered into by Leer Services and members of its sales force, which expressly provided that the latter were independent contractors rather than employees. This Court observed in the Memorandum issued on August 14, 2001, that plaintiff recalled signing this employment agreement in her deposition testimony.¹ Plaintiff now argues that this interpretation was erroneous, citing to Ms. Holtzman's deposition testimony and her affidavit dated June 19, 2001, attached to plaintiff's Brief in Opposition to the Motion for Summary Judgment.

According to the deposition testimony cited by plaintiff, Ms. Holtzman testified that she could not recall signing the employment contract, despite being told by Rosemarie Lee and others that plaintiff had signed one. (Holtzman Deposition at 39, 41-42, 63-64.) The deposition testimony also reveals that plaintiff did not dispute that Ms. Lee believed that plaintiff had signed the employment contract and had relied on this belief, nor did plaintiff dispute that the copy of

¹ This Court had cited to the following deposition colloquy:

BY MS. DUGGAN:

Q. Now, Ms. Holtzman, does the exhibit Holtzman-1 look familiar to you?

A. It looks familiar in that Rosemarie Lee told me that I signed such an agreement. And I asked her to please fax me what it was that she said that I signed. And I believe this is similar to what she faxed me.

Q. When did you have this conversation with Rosemarie Lee?

A. January, 1999.

Q. Okay. Now, whether or not, do you remember signing this –

A. Uh-huh.

Q. – did you have an understanding at the time this change in the corporate structure was made that you were being asked to be an independent contractor of the person you were associated with, in your case Leer Services?

[Objection interposed]

(Holtzman Deposition at 41-42.)

the contract filed with this Court was the same contract that Ms. Lee believed plaintiff had signed.

Flatly contradicting her deposition testimony that she did not recall signing the contract, plaintiff states in her affidavit supporting the Brief in Opposition to the Motion for Summary Judgment that she never signed this contract. (Holtzman Affidavit, dated June 19, 2001, at ¶ 6.) Where a party contradicts in an affidavit, without satisfactory explanation, his or her prior testimony, a district court considering a motion for summary judgment is free to ignore the conflicting affidavit. See Martin v. Merrell Dow Pharms., Inc., 851 F.2d 703, 705-06 (3d Cir. 1988). Accordingly, this Court did not err in finding that there was no genuine material dispute as to whether Holtzman had signed the employment contract.

Moreover, even accepting as true the position of plaintiff that she had never signed an employment contract with Leer Services, this Court's Order of August 14, 2001, would not constitute an error of law. Despite the discovery of a mistake of fact, "the Court can only disturb its prior ruling if the newly apparent facts would alter the Court's legal conclusions." Hudson United Bank v. Berwyn Holdings Inc., Civ. No. 00-4168, 2000 U.S. Dist. LEXIS 15509, *4 (E.D. Pa. Oct. 25, 2000). While the employment contract at issue was seen as "strong evidence," this Court observed that it was not "dispositive of plaintiff's employment status." Holtzman v. World Book, Inc., Civ. No. 00-3771, 2001 U.S. Dist. LEXIS 12188, *12 (E.D.Pa. Aug. 13, 2001). Ultimately, the determination that plaintiff was not an employee of World Book within the protection of Title VII was based on a variety of factors, including a full analysis of the test set forth under Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-34, 112 S. Ct. 1344 (1992).

Similarly to the employment contract at issue, the contract between World Book and regional directors like plaintiff's supervisor unequivocally provided that regional directors are independent contractors. Moreover, Ms. Lee testified in her deposition that, under the arrangement with World Book, the sales force under regional directors would comprise independent contractors, not employees. The Court further relied upon the following Darden factors as reflective of plaintiff's independent contractor status: (1) the lack of reliance by plaintiff upon any instrumentalities or tools provided by World Book; (2) the fact that plaintiff worked from home; (3) the complete discretion by sales representatives like plaintiff over the time and manner of work and general management of their workload; (4) the payment to plaintiff by commission rather than salary; (5) the lack of health or retirement benefits from World Book or Leer Services to plaintiff after 1996; and (6) the admission by plaintiff of self-employment status on her tax records since 1996. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249, 106 S. Ct. 2505 (1986). This Court concluded that despite any subjective belief of plaintiff that she remained a World Book employee after 1995, a reasonable jury could only find that the objective legal reality of her status was that of an independent contractor. Consequently, if the Court misinterpreted or made an impermissible inference from the record or the deposition testimony of plaintiff that she had signed an agreement with Leer Services, this does not constitute grounds for reconsideration. Accordingly, this Court will deny the motion for reconsideration of the claims under Title VII and 42 U.S.C. § 1981a.

Diversity Jurisdiction

In her complaint, plaintiff alleged that this Court maintained jurisdiction over this action by virtue of federal question jurisdiction over the Title VII and 42 U.S.C. § 1981a claims pursuant to 28 U.S.C. §§ 1331 and 1343(a), and supplemental jurisdiction over the PHRA claims pursuant to 28 U.S.C. § 1367 (a) and Federal Rule of Civil Procedure 18(a). (Complaint at ¶ 3.) Plaintiff did not assert diversity jurisdiction in her complaint. Thus, upon granting summary judgment on the Title VII and § 1981a claims, this Court exercised its discretion and dismissed without prejudice the remaining PHRA claims to be pursued in state court. Plaintiff now argues that, although not expressly pleaded, this Court maintained original subject matter jurisdiction over the PHRA claims through diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). This contention was expressed in a footnote to plaintiff's Brief in Opposition to the Motion for Summary Judgment, which stated that even if this Court granted summary judgment to defendant on the federal law claims, the state law claims could go forward by "virtue of the diversity of the parties, as [World Book] is headquartered in Illinois." (Pl. Brief in Opp. to Summary Judgment Mtn. at 3, n.2.) Aside from the questionable legal propriety of pleading jurisdiction for the first time in a footnote to a brief opposing a motion for summary judgment, plaintiff fails to support adequately her delayed allegation of the existence of diversity jurisdiction.

The burden is on the party asserting it to prove all of the jurisdictional prerequisites. See Carnera v. Lancaster Chem. Corp., 387 F.2d 946, 947 n.1 (3d Cir. 1967). A district court has jurisdiction over a civil action if the parties are citizens of different states and the amount in controversy exceeds \$ 75,000. See 28 U.S.C. § 1332(a). Where a corporation is one of the parties to the action, it "shall be deemed to be a citizen of any state by which it has been

incorporated and of the state where it has its principal place of business.” 28 U.S.C. § 1332(c)(1) (emphasis added). Under the law of the Third Circuit Court of Appeals, the replacement of “its” with “a” to modify the corporation’s principal place of business fails to “properly plead diversity jurisdiction.” Meltzer v. Continental Ins. Co., 163 F. Supp. 2d 523, 526 (E.D. Pa. 2001) (citing J & R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1265 n. 3 (3d Cir. 1994)). The complaint in the instant action alleges that defendant World Book “is a corporation with a principal place of business as set forth above.” (Complaint at ¶ 7) (emphasis added). Not only is this allegation ambiguous,² but it also deviates from the statutory language required to establish diversity jurisdiction. Moreover, the complaint fails to address the state of incorporation for World Book, or to provide any other factual allegations to support the inference that World Book is not a citizen of Pennsylvania. Finally, the complaint is completely devoid of any specific allegations as to the amount in controversy. Therefore, a fair reading of the complaint shows that the pleadings are facially inadequate to invest this court with jurisdiction.

Once jurisdiction is challenged, the “plaintiff bears the burden of proving by affidavits or other competent evidence that jurisdiction is proper.” Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996). The plaintiff realized the necessity of asserting diversity jurisdiction when she filed her brief in opposition to the motion for summary judgment on June 21, 2001 in urging for the possible survival of her state law claims. Since then, she has done nothing to adequately support her assertion of diversity jurisdiction. Plaintiff has failed to take any action to cure the jurisdictional defects. Nothing in her affidavits or submissions establish the citizenship

² The phrase “as set forth above” may refer equally to either the address of the defendant as stated in the caption, or the allegation in paragraph 4, wherein plaintiff pleaded that venue in this district was proper as defendant resides in and conducts business in this judicial district.

of World Book or the requisite amount in controversy.³ Consequently, plaintiff has failed to meet her burden of proof to establish diversity jurisdiction. In addition, because plaintiff is free to pursue her PHRA claims in state court, no “manifest injustice” will result from this Court’s ruling that plaintiff has failed to plead and support her assertion of diversity jurisdiction. Therefore, this Court will deny the motion for reconsideration with regard to the dismissal of the PHRA claims.

IV. Conclusion

Because an erroneous finding that plaintiff had signed the employment contract would not upset the legal conclusions in this Court’s previous ruling, the motion for reconsideration of the grant of summary judgment in favor of defendants on the Title VII and 42 U.S.C. § 1981a claims will be denied. As plaintiff has failed to prove the existence of diversity jurisdiction over the state law claims, the motion of plaintiff for reconsideration of the dismissal of the PHRA claims will also be denied.

An appropriate Order follows.

³ Although the district court may make an independent appraisal of the value of the claim when the complaint does not limit its request for damages to a precise monetary amount, see Angus v. Shiley, Inc., 989 F.2d 142, 145 (3d Cir. 1993), this rule generally applies in the context of the removal of actions from state court rather than when it is the plaintiff’s burden to prove the jurisdictional prerequisites. Moreover, although plaintiff requests monetary damages for back pay, front pay, pay increases, bonuses, and punitive damages, she points to no guidance or testament in the record as to what her salary had been, nor alleges sufficient facts to meet her substantial burden of proof when making a claim under Pennsylvania law for punitive damages. See SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 587 A.2d 702 (1991).

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LOWELL A. REED, JR., S.J.