

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

NOREEN BRZOZOWSKI

CIVIL ACTION

v.

CORRECTIONAL PHYSICIAN
SERVICES, INC.

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NO. 00-2590

ORDER AND MEMORANDUM

A JD NOW, this ⁷11 day of July, 2002, upon consideration of the Plaintiff's Motion for Reconsideration and/or Certification (Docket No. 25), the defendant's response thereto, and after oral argument, IT IS ORDERED that the motion is DENIED for the reasons set forth below.

On May 19, 2000, the plaintiff, Noreen Brzozowski, filed a complaint against her former employer, the defendant, Correctional Physician Services, Inc. ("CPS"), alleging that her 1996 discharge by CPS resulted from gender discrimination violating Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq., and the Pennsylvania Human Relations Act, 43 Pa. Const. Stat. Ann. § 951, et seq.

On March 14, 2001, the plaintiff submitted a motion seeking to join Prison Health Services ("PHS") as an additional defendant. The plaintiff argued that PHS should **be** held liable

as a successor to CPS because CPS's current financial condition may render it unable to satisfy any judgment the plaintiff obtains against CPS. The Court denied the motion.

In denying the motion, the Court held that, because CPS's financial troubles existed prior to its sale of assets to PHS, the partial sale of assets did not cause CPS's inability to provide relief to the plaintiff. Accordingly, the equitable principle underlying the successor liability doctrine - protecting employees when the ownership of their employer suddenly changes - was not implicated. CPS could not provide for any recovery before the transaction, and therefore the plaintiff was not adversely impacted by the sale of assets.

A district court will grant a party's motion for reconsideration only in three situations: (1) when new evidence becomes available; (2) when there has been an intervening change in controlling law; or (3) where there is a need to correct a clear error of law or to prevent manifest injustice. See General Instrument Corp. v. Nu-Tek Elec. & Mfg., 3 F. Supp.2d 602, 606 (E.D. Pa. 1998), aff'd, 197 F.3d 83 (3d Cir. 1999). Because the Court finds that none of these situations is present here, it denies the motion for reconsideration.

The plaintiff moves, in the alternative, for leave to pursue an interlocutory appeal, under 12 U.S.C. § 1292(b).

Interlocutory appeals are not generally favored. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., MDL No. 189, 1979 WL 1689, at *4 (E.D.Pa. Aug. 21, 1979). To certify a case under Section 1292(b), a district court must find that: (1) there is a controlling question of law; (2) there are substantial grounds for disagreement on the question; and (3) termination of the case will be materially advanced by an immediate appeal. 28 U.S.C. § 1292(b).

Because the parties do not dispute that the question of successor liability in this case involves a controlling question of law, the Court will move on to the second prong of the analysis.

The Court finds that there are not substantial grounds for disagreement on the question. The plaintiff states that the Court's decision is inconsistent with Supreme Court precedent, Third Circuit precedent, the Seventh Circuit precedent from which the Third Circuit drew guidance, and the policy underlying successor liability. The Court disagrees.

The Court's decision is not inconsistent with Supreme Court precedent. In NLRB v. Burns Int'l Security Serv., 406 U.S. 272, 288 (1972), the Supreme Court held that a court analyzing successor liability should consider the policies against inhibiting the free transfer of capital and against restricting

employers in making necessary changes in their business.

Ignoring a causation element in a successor liability analysis would contravene these policies by creating a powerful disincentive for healthy companies to take over and rehabilitate ailing ones. Healthy companies would have to assume liabilities that the ailing companies would never have been able to discharge.

Additionally, in Howard Johnson Co. v. Detroit Legal Joint Exec. Bd., 417 U.S. 249, 256 (1974), the Supreme Court held that courts must make fact-specific inquiries when determining whether a successor is liable for the acts of a predecessor. In this case, the solvency of the predecessor is one such fact.

Neither of the Supreme Court cases that the plaintiff cites as inconsistent with this Court's opinion, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964), or Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), state that causation is an improper consideration in determining successor liability. Those cases do not address the issue at all because it was not raised in either of them.

Nor does Third Circuit precedent provide substantial grounds for disagreement. The Court of Appeals, in Rego v. Arc Water Treatment Co. of Pa., 181 F.3d 396, 401 (3d Cir. 1999), cited Musikawamba v. Essi, Inc., 760 F.2d 740, 750 (7th Cir.

1985) for the proposition that successor liability "allows an aggrieved employee to enforce against a successor employer a claim or judgment he could have enforced against the predecessor." Id. (emphasis added). The ~~Musikawamba~~ court explained that "[u]nless extraordinary circumstances exist, an injured employee should not be made worse off by a change in the business. But neither should an injured employee be made better off." Id. Moreover, the Rego court noted that the doctrine of successor liability stemmed from equitable principles, with fairness as a prime consideration, and that it aimed to protect an employee when the ownership of his or her employer changed suddenly. See Rego, 181 F.3d at 401 (citing Criswell v. Delta Air Lines, Inc., 868 F.2d 1093 (9th Cir. 1989), and Rojas v. TK Communications, 87 F.3d 745, 750 (5th Cir. 1996)).

The plaintiff argues that two opinions of other judges of this court provide substantial grounds for difference. The opinions both involved predictions as to the position of the Pennsylvania Supreme Court on an exception to successor liability in products liability cases called the "product-line" exception. See Lacy v. Carrier Corp., 939 F. Supp. 375, 384 (E.D. Pa. 1996); Olejar v. Powermatic Div. of DeVlieg-Bullard, 808 F. Supp. 439, 443-444 (E.D. Pa. 1992). The courts predicted that causation would not be a requirement where the product-line exception

applied. But the cases do not evidence grounds for disagreement with the case at hand, because: (1) the product-line exception stems from principles of risk-spreading that are unique to strict liability; and (2) the cases were decided before Rego.

Finally, the Court finds no substantial grounds for disagreement based on any decisions of the Seventh Circuit subsequent to Musikawamba. In EEOC v. Vucitech, 842 F.2d 936 (7th Cir. 1988), the Seventh Circuit stated that causation was not an "ironclad requirement" in all cases of successor liability, finding there that it was outweighed by the facts of that case. Specifically, the successor there had repurchased the company from a third party to which it had sold the company earlier. Additionally, the discrimination at issue in the litigation was a legacy that arose from the successor company's initial ownership of the company. Under those circumstances, the court found that the causation element was outweighed. Even so, the court pointed out that "the entire issue of successor liability is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake." Id. at 944.

The only other Seventh Circuit case on which the plaintiff relies is EEOC v. G-K-G, 39 F.3d 740, 747-48 (7th Cir. 1994). There were no facts implicating causation in that case,

and the court had no reason to address it. The G-K-G court also cited to Musikawamba with approval.¹ See id. at 748 (citing Musikawamba, 760 F.2d at 740)).

Because the Court finds no substantial grounds for disagreement, there is no need to address the final prong **of** the 1292(b) analysis. The motion for 1292(b) certification is denied.

The plaintiff's final argument is that the Court should enter an order under Fed. R. Civ. P. 54(b), which allows for a court to direct the entry of "a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54 (b). "[Rule] 54(b) orders should not be entered routinely or as an accommodation to counsel." Panichella v. Penn. R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958). The plaintiff has the burden of convincing the Court that this is the "infrequent harsh case" that merits such action. Allis-Chalmers Corp. v. Philadelphia

¹ Another district court has recently upheld the causation rationale of Musikawamba, in an opinion post-dating the cases cited by the plaintiff. See Korlin v. Chartwell Health Care, Inc., 128 F. Supp.2d 609, 617 (E.D. Mo. 2001). The court there held that because a plaintiff was left without relief prior to the change in business allegedly giving rise to successor liability, there was no causation and thus successor liability was improper.

Elec. Co., 521 F.2d 360, 365 (3d Cir. 1975).

The Court finds that Rule 54(b) certification is unwarranted. To determine whether there is any just reason for delay, the Court must consider:

- (1) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final;
- (2) the relationship between the adjudicated and unadjudicated claims;
- (3) the possibility that the need for review might or might not be mooted by future developments in the district court;
- (4) the possibility that the reviewing court might be obliged to consider the same issue a second time; and
- (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Waldorf v. Shuta, 142 F.2d 601, 609 (3d Cir. 1998) (citations omitted).

Here, factors two, three, and five mandate denial of the plaintiff's request. If CPS were found not to be liable, then PHS, as a successor, would not be liable either, and there would be no need for appellate review of this Court's decision on adding PHS as a defendant. See, e.g., Panichella, 252 F.2d at 455. Trial could be commenced fairly promptly: counsel represented at oral argument that only around 60 additional days of discovery are needed, and the parties indicated on their case status sheets that trial was expected to last only five to six

days. The presence or absence of PHS is not likely to simplify or shorten the trial in any way, as the discrimination claim still will need to be litigated fully. Moreover, CPS's resources may continue to drain pending an appeal.

For these reasons, the Court will not enter judgment pursuant to Rule 54(b).

BY THE COURT:



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