

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

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| JAMES THORPE, Plaintiff, | : | CIVIL ACTION |
| | : | NO. 06-00828 |
| | : | |
| v. | : | |
| | : | |
| THE READING HOSPITAL, Defendant. | : | |

MEMORANDUM AND ORDER

Stengel, J.

November 1, 2006

Before the Court is a failure to hire employment discrimination case. James Thorpe ("Plaintiff") alleges that The Reading Hospital ("Defendant") failed to hire him as a parking valet because he is African-American. Defendant filed a motion for summary judgment on August 31, 2006 arguing that an independent contractor is solely responsible for operating the hospital's valet service and therefore Defendant is not liable. For the reasons that follow, I will grant Defendant's motion.

I. BACKGROUND

Plaintiff, an African-American male, applied for a job as a valet parking attendant on May 20, 2005 at Reading Hospital. Compl ¶¶ 1, 5. David Feltman, a man Plaintiff believed to be an operations manager for the hospital¹ told Plaintiff on May 19, 2006 to come to the hospital to fill out an application and use him for a reference. Id. ¶ 6. On

¹Defendant states that David Feltman has never been employed by Defendant The Reading Hospital or The Reading Hospital Medical Center. Def's Statement Undisputed Material Facts ¶ 21.

May 20, 2005, Plaintiff filled out an application² and had an interview with an individual named Drew, who was a supervisor for Healthcare Parking Systems. Id. ¶ 8. At the interview, the parking supervisor told Plaintiff he was a good candidate and said he would call Plaintiff on Monday, presumably to set up a work schedule. Id. ¶ 9. Plaintiff assumed he had the job after his meeting with the parking supervisor. Id. ¶ 11. However, neither the parking supervisor or Mr. Feltman ever called Plaintiff and offered him the position. Id.

Plaintiff asserts he was qualified for the valet parking position because he was already working as a parking attendant. Id. ¶ 12. Plaintiff also believes that Mr. Feltman's recommendation should have carried great weight, since Mr. Feltman knew Plaintiff from a former job. Id. Plaintiff states that "Reading Hospital is a very racist business entity" and alleges the hospital didn't hire him because of his race. Id. ¶ 13. According to Plaintiff, there are no black parking attendants working at the Healthcare Parking Systems. Id.

Defendant, The Reading Hospital, is a Pennsylvania parent corporation of a wholly owned subsidiary named The Reading Hospital and Medical Center ("TRHMC"). Def's Statement Undisputed Material Facts ¶ 2. Defendant has no employees. Id. ¶ 3.

On May 11, 2005, TRHMC entered into a "Valet Parking Services Agreement" ("Parking Agreement") with Healthcare Parking Systems of Maryland, Inc. ("HPSM)."

²The top of the application form is entitled "HPS Management, Inc. Application for Employment" and throughout the document "HPS Management, Inc" is referred to as the employer. See Dep. Thorpe Ex. 1.

Id. ¶ 5. At the time it executed the Parking Agreement, TRHMC did not employ any valet parking attendants. Id. ¶ 10. The Parking Agreement states that HPSM, operating as an independent contractor, will provide valet parking and front door services for TRHMC. Id. Ex. 1 Art. I. Article II. provides that “[a]ll decisions regarding hiring, transferring, management, promotion, discipline, and termination of the Valets shall be the sole responsibility of the Contractor.” Id. at Art. II. 2.1. Article VI of the Parking Agreement provides that “[i]t shall be Contractor’s responsibility and obligation to arrange for and pay for all of valets and/or persons hired and/or paid by Contractor their compensation and all incidents thereof, such as employment taxes, workmen’s compensation, income tax withholding, insurance, fringe benefits, and so forth, and [TRHMC] shall have no liability to Contractor or Contractor’s employees, agents, or servants with respect to these obligations.” Id. at Art. VI.

HPSM made all employment decisions for the valet staff, including screening, interviewing, and ultimately deciding who to hire. Def’s Statement Undisputed Material Facts ¶ 11. HPSM provided a full-time Manager who is responsible for all employment issues. Id. ¶ 8. TRHMC does not supervise HPSM valets and does not have authority to assign tasks to HPSM employees. Id. ¶¶ 13, 14. TRHMC has no ownership interest in HPS Management, Inc, the owner and operator of HPSM. Id. ¶ 8.

Plaintiff admitted in his deposition that he did not apply for a position with the Defendant or TRHMC. Dep. Thorpe pp. 68-69. Additionally, the top of the application

form is titled “HPS Management, Inc. Application for Employment” and HPSM is referred to as the employer throughout the application. Dep. Thorpe Ex. A. Plaintiff also conceded that he had no evidence that Defendant had any input in the decision to hire him. *Id.* p. 93-94. Instead, Plaintiff asserts aiding and abetting liability, arguing that Defendant is “part responsible because the contracted company is there performing the service at the hospital.” *Id.* p. 94.

On February 2, 2006, Plaintiff, acting *pro se*, filed a complaint in the Court of Common Pleas of Berks County alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”); § 1981 of the Civil Rights Act (“Section 1981”), and the Pennsylvania Human Relations Act 43 PA. CONS. STAT. § 951 et seq (“PHRA”). Plaintiff exhausted his administrative remedies by filing a timely charge of employment discrimination with the EEOC and received a right to sue letter less than ninety days prior to filing his complaint.³ Compl ¶ 17. On February 24, 2006, Defendant timely removed the case to federal court. On March 2, 2006, Plaintiff filed a motion to remand that the Court denied on April 25, 2006. On August 31, 2006, the Defendant filed this motion for summary judgment. Plaintiff has not responded in opposition to the motion.

II. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any

³It is not clear whether Plaintiff requested the complaint be cross-filed with the PHRC.

material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party initially bears the burden of showing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by demonstrating "to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. A fact is "material" only when it could affect the result of the lawsuit under the applicable law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non[-]moving party." Id. The moving party must establish that there is no triable issue of fact as to all of the elements of any issue on which the moving party bears the burden of proof at trial. See In re Bessman, 327 F.3d 229, 237-38 (3d Cir. 2003) (citations omitted).

After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); see also Williams v. West Chester, 891 F.2d 458, 464 (3d Cir. 1989). However, a court is permitted to grant summary judgment when appropriate even if the adverse party does not respond. FED. R. CIV. P. 56(e); Anchorage Assocs. v. Virgin Islands Bd. of Tax Rev., 922 F.2d 168, 175 (3d Cir. 1990) (noting that a movant must satisfy Rule 56 even if the nonmovant does not

respond).

A district court analyzing a motion for summary judgment "must view the facts in the light most favorable to the non-moving party" and make every reasonable inference in favor of that party. Hugh v. Butler County Family YMCA, 418 F.3d 265, 267 (3d Cir. 2005) (citations omitted). Summary judgment is therefore appropriate when the court determines that there is no genuine issue of material fact after viewing all reasonable inferences in favor of the non-moving party. See Celotex, 477 U.S. at 322.

III. DISCUSSION

A. Employer liability under Title VII.

Defendant's basic argument is that this is a case of "mistaken identity" because it has no employees and the actual employer is wholly owned subsidiary TRHMC, who contracted with HPSM to provide valet parking for the hospital. Since Title VII only holds employers liable for employment discrimination, this Court must determine as a threshold matter the relationship between Defendant and TRHMC and Defendant and HPSM.

(1) Defendant meets the numerosity requirement of Title VII because Defendant and TRHMC are operationally entwined.

Defendant argues that it is not liable because it has no employees and Title VII

only applies to employers who employ more than fifteen people.⁴ 42 U.S.C. 2000(e)(b); see also Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1245 (2006) (holding that the threshold number of employees for application of Title VII is an element of a plaintiff's *prima facie* case). While Defendant, The Reading Hospital, has no employees, its wholly owned subsidiary, The Reading Hospital and Medical Center, undoubtedly has more than fifteen employees.⁵

The Third Circuit permits two “nominally distinct entities” to be consolidated and considered as one in order to satisfy Title VII’s numerosity requirement in three situations. Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 85-59 (3d Cir. 2003) *cert denied* 541 U.S. 959 (2004); Fishman v. La Z-Boy Furniture Galleries of Paramus, Inc., No. 05-749, 2005 U.S. Dist. LEXIS 18088 (D. N.J. Aug. 17, 2005) (applying the Nesbit factors to determine whether a parent and subsidiary should be consolidated for Title VII purposes). The first two situations are clearly inapplicable.⁶ The third situation, operational entanglement, is found where the “operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another.” Id. at 87. To determine whether two entities are operationally entwined and

⁴The Pennsylvania employment discrimination statute also has a numerosity requirement and only applies to businesses with four or more employees. 43 PA. CONS. STAT. § 954 (b). The following analysis applies to this statute as well.

⁵Defendant does not identify the number of employees at TRHMC.

⁶The first situation occurs when a company splits itself into separate entities with less than fifteen employees to intentionally evade Title VII. Nesbit, 347 F.3d at 85-86. The second situation is when a parent company directs the subsidiary to do the alleged discriminatory acts. Id. These situations do not present themselves in this case.

should be consolidated into one entity, courts must consider the following operational factors: (1) the degree of unity between the entities with respect to ownership, management (both directors and officers), and business functions (e.g., hiring and personnel matters), (2) whether they present themselves as a single company such that third parties dealt with them as one unit, (3) whether a parent company covers the salaries, expenses, or losses of its subsidiary, and (4) whether one entity does business exclusively with the other.” Id. at 87-88.

The Supreme Court has recently clarified that the numerosity requirement is an element of a Title VII plaintiff’s *prima facie* case. See Arbaugh, 126 S.Ct. at 1245. Therefore, plaintiff bears the burden of proof on this issue. However, at the summary judgment stage, the moving party must demonstrate “an absence of evidence to support the non-moving party’s case” even if the non-moving party bears the burden of proof on that particular issue at trial. Celotex Corp., 477 U.S. at 325. In other words, even though Plaintiff has the burden of pleading a *prima facie* case including the numerosity requirement at trial, summary judgment for Defendant is not proper unless Defendant shows an absence of evidence on this issue.

Simply put, Defendant does not meet this burden.⁷ After proving a bare bones outline of the Nesbit test, Defendant argues that none of the Nesbit situations apply

⁷Defendant’s dearth of argument or analysis on this issue suggests the weakness of this argument. Defendant refers to The Reading Hospital and The Reading Hospital and Medical Center interchangeably, all but conceding the unity between these two entities.

because “there is [no] evidence of any direction from the Hospital to TRMC.” Def’s Mot. Summ. J. p. 9. This conclusion does not address the operational entanglement test or apply the four factors. Even though Plaintiff has not opposed Defendant’s motion, common sense and the facts of this case indicate there is a genuine issue of material fact as to all the factors and specifically the second: whether the entities “present themselves as a single company such that third parties dealt with them as one unit.” 347 F.3d at 87-88. With very similar names (The Reading Hospital and The Reading Hospital and Medical Center) and the common mission of operating The Reading Hospital, these two entities seem to present themselves to the public as a single entity. Defendant has not met its burden of showing an absence of evidence the Defendant and TRHMC are not operationally entwined. Therefore, the Court can consolidate Defendant and TRHMC under Nesbit and Defendant can be held liable under Title VII.

(2) Defendant is not a joint employer and is not liable under Title VII for HPSM’s alleged discrimination because HPSM employed and supervised all parking attendants.

However, even if Defendant is subject to Title VII liability, the Court must determine the relationship between Defendant and HPSM to determine if liability attaches for HPSM’s actions. In limited circumstances, a party can be held liable for employment discrimination as a co-employer even if they are not the plaintiff’s direct employer. Graves v. Lowery, 117 F.3d 723, 728 (3d Cir. 1997). This broader definition of employer reinforces the remedial purpose of Title VII and recognizes that a defendant does not

have to be the plaintiff's employer to interfere with the plaintiff's employment opportunities. Ware v. Plastic Container Corp., 432 F. Supp.2d 434, 439 (D. Del. 2006). Therefore, Defendant could be potentially liable for HPSM's alleged discrimination even though it had no actual or prospective employment relationship with the Plaintiff. To determine whether this exception applies, the Court must examine the nature of the employment relationship and determine whether the party asserts control over the plaintiff's access to employment. 117 F.3d at 728 *citing* Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973). If the co-employer exercises substantial control, it will be deemed a *de facto* co-employer and therefore be liable under Title VII. Id. at 728.

Satisfying the control test articulated by the Third Circuit in Graves is demanding. In that case, the court permitted former law clerks to sue the county under Title VII even though the clerks were technically employees of the judicial branch of the Commonwealth of Pennsylvania. Id. at 723. The plaintiffs alleged that the county was their co-employer because "they were covered by the County's personnel policies,...they were told that they were County employees,...the County investigated their allegation of sexual harassment,...they were subject to termination and/or reinstatement by the County and...two of them were hired by the County." Id. at 729. Therefore, the court viewed the county as a co-employer because it exercise control over the plaintiffs' daily employment activities. Id.

Some federal courts use the common law agency principles espoused by the Supreme Court in Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992) to conduct the control test analysis. Cimino v. Borough of Dunmore, No. 3:02cv1137, 2005 U.S. Dist. LEXIS 40049 at *17-18 (M.D. Pa. Dec. 21, 2005). The analysis is simplified when the plaintiff receives no compensation from the defendant. Id. at 17. This allows courts to identify situations, like the one here, where the defendant merely contracted with plaintiff's employer but did not exercise control over the terms and conditions of plaintiff's work. See Ware v. Plastic Container Corp., 432 F. Supp.2d 434, 439 (D. Del. 2006)(holding that defendant was not a co-employer when a third-party contractor employed plaintiff as a driver to deliver bottles to defendant's plant and defendant did not have control over plaintiff's work or compensate plaintiff directly); Cimino v. Borough of Dunmore, No. 3:02cv1137, 2005 U.S. Dist. LEXIS 40049 at *20-24 (M.D. Pa. Dec. 21, 2005)(concluding that a janitor employed by a third-party contractor could not sue defendant under Title VII because defendant did not compensate plaintiff or control the methods or means of her employment.)

Here, Defendant specifically hired HPSM as an independent contractor to provide parking valet service and did not retain its own parking attendants. Article II of the Parking Agreement governing the relationship between Defendant and HPSM specifies that “[a]ll decisions regarding hiring, transferring, management, promotion, discipline, and termination of the Valets shall be the sole responsibility of the Contractor.” Def’s

Statement Undisputed Material Facts Ex. 1. Art. II. 2.1. Defendant did not pay the valets hired by HPSM and did not exercise control over their daily work. Plaintiff further admits in his deposition that he has no evidence showing that the Defendant had a role in deciding whether to hire him “[o]ther than me, at the time, thinking David Feltman worked for [the] hospital.” Dep. Thorpe pp. 93-94. These factors indicate that Defendant did not control the work of the parking attendants and cannot be viewed as a co-employer. Therefore, the Defendant cannot be held liable for the alleged discrimination conducted by HPSM in its decision not to hire the Plaintiff under Title VII.

B. Plaintiff has not pleaded a *prima facie* case of employment discrimination and therefore Defendant is not liable under Section 1981.

Unlike Title VII, a party can be liable for race discrimination under Section 1981 without being an employer.⁸ Courts in the Third Circuit apply the burden-shifting framework first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) to employment discrimination claims under Title VII.⁹ Jones v. Sch. Dist. of Philadelphia, 198 F.3d 403, 409 (3d Cir. 1999). In the McDonnell

⁸ Section 1981 states, in relevant part, “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”

⁹ This framework also applies to Section 1981 and PHRA claims. Schurr v. Resorts International Hotel Inc., 196 F.3d 486, 499 (3d Cir. 1999) (holding that the elements of employment discrimination under Title VII are identical to the elements of discrimination under § 1981); Weston v. Pennsylvania, 251 F.3d 420, 426 n.3 (3d Cir. 2001) (“The proper analysis under Title VII and the Pennsylvania Human Relations Act is identical, as Pennsylvania courts have construed the protections of the two acts interchangeably.”).

Douglas analysis, the plaintiff bears the initial burden of establishing a *prima facie* case of employment discrimination by a preponderance of the evidence. Storey v. Burns Int'l Sec. Servs., 390 F.3d 760 (3d Cir. 2004)(citing Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)). A *prima facie* case requires a showing that plaintiff: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.” McDonnell Douglas, 411 U.S. at 802. A plaintiff's properly pleaded *prima facie* case "eliminates the most common nondiscriminatory reasons" for an employer's actions and creates a presumption that discrimination is more likely than not. Burdine, 450 U.S. at 253-54.

Plaintiff has not pleaded a *prima facie* case of employment discrimination and therefore his Section 1981 claim must fail. Specifically, the plaintiff fails to plead the second element of the *prima facie* case because he did not apply for a job with Defendant but with HPSM.¹⁰ Additionally, Plaintiff cannot show the fourth element of the *prima facie* case—that the position remained open after Plaintiff's rejection and Defendant continued to seek applications from people with Plaintiff's qualifications—because Defendant has established that it did not recruit or employ parking valets. Therefore,

¹⁰Plaintiff admits in his deposition that he did not apply for a position with the Defendant or TRHMC. Dep. Thorpe pp. 68-69. Additionally, the top of the application form is titled “HPS Management, Inc. Application for Employment” and HPSM is referred to as the employer throughout the application. Id. at Ex. A.

Plaintiff's Section 1981 claim does not survive summary judgment.

C. Plaintiff's PHRA claim for aiding and abetting also fails.

Even though Plaintiff's Title VII claim fails for the reasons noted above, liability under the PHRA is broader than Title VII. Rodriguez v. Polo Ralph Lauren, 77 F. Supp.2d 643, 646 n.8 (E.D. Pa. 1999). Section 955(e) of the PHRA provides:

(e) For any person, employer, employment agency, labor organization or employe, (sic) to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice. 43 PA. CONS. STAT. § 955(e).

This section of the PHRA clearly expresses the legislature's intent that "any person, whether or not an employer" can be held responsible for aiding or abetting unlawful discriminatory employment practices. Commonwealth v. Transit Casualty Ins. Co., 387 A.2d 58, 62 (Pa. 1978). Courts have allowed an individual supervisory employee to be held liable under this theory "for his own direct acts of discrimination or for his failure to take action to prevent further discrimination by an employee under supervision." Davis v. Levy, Angstreich, Finney, Baldante, Rubenstein & Coren, P.C., 20 F. Supp.2d 885, 887 (E.D. Pa. 1998). However, there can be no liability for refusing to remedy discrimination unless the plaintiff alleges that the party knew or should have known about the discrimination and refused to take remedial action. Dici v. Commonwealth, 91 F.3d 542, 553 (3d Cir. 1996).

Plaintiff presents no evidence to support liability under a state law aiding and abetting theory. Plaintiff argues that Defendant is “part responsible because the contracted company is there performing the service at the hospital.” Dep. Thorpe p. 94. More is required for aiding and abetting liability. Plaintiff does not allege that Defendant directly supervised HPSM’s employment practices. Moreover, the Parking Agreement provides stark evidence that Defendant had no responsibility for any employment decisions HPSM made regarding the valets. Further, Plaintiff does not allege that Defendant knew about the alleged discrimination and refused to remedy it. Pointing to a contractual relationship between the parties does not sufficiently support aiding and abetting liability under the PHRA.

IV. CONCLUSION

For the reasons stated above, I will grant Defendant’s motion.

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

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| JAMES THORPE, | : | CIVIL ACTION |
| Plaintiff, | : | NO. 06-00828 |
| | : | |
| v. | : | |
| | : | |
| THE READING HOSPITAL, | : | |
| Defendant. | : | |

ORDER

AND NOW, this 1st day of November, 2006, upon consideration of Defendant's Motion for Summary Judgment (Document No. 11), it is hereby **ORDERED** that the motion is **GRANTED**. The Clerk of the Court is directed to mark this case as closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.