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

ANTHONY RAJOPPE	:	CIVIL ACTION
	:	
v.	:	
	:	
GMAC CORPORATION HOLDING CORP.	:	NO. 05-2097

MEMORANDUM AND ORDER

McLaughlin, J. March 19, 2007

This is an employment discrimination suit filed pro se by Anthony Rajoppe ("Rajoppe") against GMAC Commercial Holding Corp. ("GMACCH"). Rajoppe is a Caucasian male and United States citizen who was employed by GMAC Commercial Mortgage Japan, K.K. ("GMACCM Japan"), a foreign subsidiary of GMACCH. The plaintiff alleges that he was terminated based upon his race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq.

GMACCH has moved to dismiss the plaintiff's complaint for lack of subject-matter jurisdiction on the ground that the plaintiff was employed by GMACCM Japan, a foreign corporation to which Title VII does not apply. The plaintiff opposes the motion by arguing that Title VII does apply to the conduct of GMACCM Japan because GMACCM Japan is controlled by GMACCH, and therefore, any conduct by GMACCM Japan that violates Title VII

will be attributed to GMACCH. In his opposition, the plaintiff also requests that the Court reconsider its previous dismissal of his age discrimination claim for failure to exhaust administrative remedies. The Court will deny both the defendant's motion to dismiss and the plaintiff's request for reconsideration.

I. FACTS

In July of 2002, the plaintiff was invited to GMACCM Japan's Tokyo office, where he was interviewed by various officers and employees. The plaintiff was also interviewed over the telephone by Niraj Patel ("Patel"), GMACCH's Executive Vice President and Chief Information Officer. On July 26, 2002, the plaintiff was offered the position of Vice President, Head of Technology, at GMACCM Japan. The plaintiff accepted the offer.

Before he began working at GMACCM Japan, the plaintiff traveled to GMACCH's headquarters in Horsham, Pennsylvania, to meet with Patel and to go over strategy with managers from GMACCH and its global subsidiaries. On September 1, 2002, the plaintiff began working at GMACCM Japan. Throughout his employment at GMACCM Japan, the plaintiff alleges that he reported to both Patel and Yoshitomo Tajima ("Tajima"), the Chief Operating Officer of GMACCM Japan.

The plaintiff claims that, while serving as GMACCM Japan's Head of Technology, he received many complaints from his non-Japanese staff about racist attitudes at the corporation. The plaintiff also alleges that when he attempted to use disciplinary action against a Japanese staff member, Tajima responded by promoting the staff member to a manager position in the plaintiff's department.

On January 15, 2004, the plaintiff was summoned to an unscheduled morning meeting. At the meeting, Tajima allegedly informed the plaintiff that he could either accept a settlement or be fired. The plaintiff eventually accepted the settlement and resigned.

Shortly after the plaintiff was removed, Tajima allegedly removed all other non-Japanese managers at GMACCM Japan in an effort to promote company harmony. The plaintiff claims that most non-Japanese staff were also pressured into leaving.

Upon leaving GMACCM Japan, the plaintiff filed a complaint with the EEOC. The EEOC ruled that the plaintiff had accepted a settlement and declined to proceed further. The plaintiff responded by filing the present complaint, alleging various Title VII and state law claims against GMACCH, Tajima, Patel, and David Creamer, the chairman of GMACCH's board of directors.

On July 14, 2005, the Court dismissed all the plaintiff's claims except for his Title VII claim for race discrimination against GMACCH. The Court also granted a ninety-day period of limited discovery concerning the relationship between GMACCH and GMACCM Japan. The defendant has filed a renewed motion to dismiss, arguing that GMACCH does not "control" GMACCM Japan for purposes of Title VII, and therefore GMACCM Japan's conduct cannot be attributed to GMACCH.

II. STANDARD OF REVIEW

This motion presents the threshold question of whether the applicability of Title VII to foreign corporations that are controlled by American employers constitutes an issue of subject-matter jurisdiction or an issue of the merits of the claim. The defendant has styled its motion as one to dismiss for lack of subject-matter jurisdiction. The Court, however, concludes that the control issue relates to the merits of the Title VII claim.

In 1991, Congress amended Title VII to extend its protections to American citizens working overseas for foreign corporations that are "controlled" by American employers. See Asplundh Tree Expert Co. V. N.L.R.B., 365 F.3d 168, 174 n.5 (3d Cir. 2004). This amendment was prompted by the Supreme Court's decision in EEOC v. Arabian American Oil Co., 499 U.S. 244

(1991), where the Court concluded that Title VII did not apply to extraterritorial conduct. The amended statute provides that when an American employer "controls" a foreign corporation, any conduct by the foreign corporation that violates Title VII will be presumed to be engaged in by the American employer.[1] See Civil Rights Act of 1991, Pub. L. No.102-166, 105 Stat. 1071, 1077 (1991) (codified as amended at 42 U.S.C. § 2000e-1(c)).

The Supreme Court recently set forth a test to determine whether a threshold limitation on a statute's scope, such as this one, constitutes a jurisdictional prerequisite or a substantive element of a claim. Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1245 (2006). The issue before the Supreme Court in Arbaugh was whether Title VII's fifteen-employee minimum is a jurisdictional requirement or a substantive element of a Title VII claim. Id. at 1238. The Court began its analysis by noting

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[1] The relevant provision of Title VII reads, in pertinent part:

> (2) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.
>
> . . .
>
> (3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-
>
> (A) the interrelation of operations;
> (B) the common management;
> (C) the centralized control of labor relations;
> (D) the common ownership or financial control,
> of the employer and the corporation. 42 U.S.C. § 2000e-1(c) (2006).

that Title VII contains its own jurisdiction-conferring provision, which makes no mention of the fifteen-employee minimum. Id. at 1245. That provision provides: "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." 42 U.S.C. § 2000e-5(f)(3) (2006). The Court explained that Congress could have made the employee-numerosity requirement expressly "jurisdictional," as it has expressly made the amount-in-controversy requirement an ingredient of federal subject-matter jurisdiction under § 1332, but Congress did not. See id. Congress placed the fifteen-employee minimum in the "definitions" section of Title VII -- a provision of Title VII that does not speak in jurisdictional terms or refer in any way to federal-court jurisdiction. Id. The Court, therefore, concluded that the numerosity requirement is not jurisdictional.

In the course of rendering this decision, the Supreme Court set out a bright line rule:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory

> limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. (internal citations omitted).

Applying this "readily administrable bright line," id., to the present case, the Court concludes that Title VII's "control" requirement is not jurisdictional. Like the employee-numerosity requirement, the "control" requirement appears in a section of Title VII that does not refer in any way to federal-court jurisdiction. See 42 U.S.C. § 2000e-1(c) (2006). Nor does the control requirement speak in jurisdictional terms. It simply states that if an American employer "controls" a foreign corporation, conduct by the foreign corporation that violates Title VII will be attributed to the American employer.[2] Indeed, when Congress extended Title VII's protections in 1991, it not only added the "control" requirement, but it also amended the "definitions" section -- the very same section that the Arbaugh court found to be substantive -- so that the term "employee" includes American citizens employed in foreign countries. See Civil Rights Act of 1991, 105 Stat. at 1077 (1991) (codified as amended at 42 U.S.C. § 2000e(f)).

[2] Title VII's control requirement is fundamentally different from the provisions cited in Arbaugh as examples of Congressional restrictions of the subject matter jurisdiction of federal courts. See id. at 1245 n.11.

The defendant submits various arguments as to why Title VII's control requirement is jurisdictional. These arguments fail, however, because they ignore the bright-line rule announced in Arbaugh. The defendant's arguments also fail because they rely on cases decided prior to Arbaugh and cases that did not consider the precise issue of jurisdiction versus merits. This latter course of action was expressly foreclosed by Arbaugh, where the Supreme Court dismissed such cases as "drive-by jurisdictional rulings" that should be accorded no precedential effect on the question of whether the federal court has authority to adjudicate the claim. Arbaugh, 126 S. Ct. at 1242-43. The Court explained that cases such as Arabian American Oil Co. obscured the jurisdiction versus merits issue by stating that the Court was dismissing for "lack of jurisdiction" when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim. Id. at 1242.

The Court's decision that the control limitation is not jurisdictional has consequences for the Court's standard of review. When subject matter jurisdiction turns on contested facts, the Court may review the evidence and resolve the factual dispute. If, on the other hand, satisfaction of an essential

element of a claim for relief is at issue, the jury is the proper trier of contested facts. Arbaugh, 126 S. Ct. at 1244. Consequently, if there are material issues of fact on the control issue in dispute, the Court must deny the motion and submit the issue to the jury. In effect, the Court must analyze this motion as if it were a motion for summary judgment.[3]

III. ANALYSIS

A. The Defendant's Motion

Title VII sets forth four factors to be considered in assessing whether a foreign corporation is "controlled" by an American employer: (i) interrelation of operations, (ii) common management, (iii) centralized control of labor relations, and (iv) common ownership or financial control. 42 U.S.C. § 2000e-1(c)(3) (2006).

Although few courts have applied this provision of Title VII, there is a substantial body of case law applying the same four-factor test in other contexts. Most relevant to this

[3] Under Fed. R. Civ. Pro. 56, summary judgment may be granted if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (2006). An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court will review the record in the light most favorable to the plaintiff, non-moving party, who is entitled to all reasonable inferences that can be drawn therefrom. Merkle v. Upper Dublin School Dist., 211 F.3d 782, 788 (3d Cir. 2000).

case is the use of the four-factor test to determine whether related entities constitute an "integrated enterprise" for purposes of assessing liability under various other employment statutes. Watson v. CSA, Ltd., 376 F. Supp. 2d 588, 594 (D. Md. 2005). The section of the EEOC Compliance Manual that discusses Title VII's "control" requirement uses "integrated enterprise" cases to illustrate how the requirement should be applied. See Enforcement Guidance on Application of Title VII and ADA to American Firms Overseas and to Foreign Firms in the United States, Notice 915.002, EEOC Compl. Man., at § I.B.2 (Oct. 20, 1993) [hereinafter EEOC Enforcement Guidance]. The Compliance Manual also indicates that the EEOC's policy statement on the concept of "integrated enterprise" can be consulted for guidance on applying the "control" requirement. Id. The Court will therefore look to authorities that apply the four-factor test in both the foreign employment and "integrated enterprise" contexts.

According to this body of law, the presence or absence of any single factor is not dispositive; rather, the approach is holistic, looking at all the circumstances of the case. E.g., Ferrell v. Harvard Ind., Inc., No. CIV.A. 00-2707, 2001 WL 1301461, at *22 (E.D. Pa. Oct. 23, 2001). Courts typically focus, however, on the third factor of this test –- centralized control of labor relations. E.g., Nesbit v. Gears Unlimited,

Inc., 347 F.3d 72, 84 (3d Cir. 2003); see also EEOC Enforcement Guidance at § I.A.2.

1. Interrelation of Operations

Under the "interrelation of operations" factor, courts typically examine whether the two corporations shared administrative or purchasing services, employees, equipment, and/or finances. E.g., Ferrell, 2001 WL 1301461, at *22. For example, in Ferrell, the court found the requisite interrelation of operations where the subsidiary's budget required the parent's approval, and the subsidiary's sales and marketing were handled by the parent. Id. at *23. Likewise, in Watson, the court found this factor satisfied where the domestic parent and foreign subsidiary utilized the same offices, equipment, policies, procedures, business forms, and disciplinary proceedings. Id. at 595. The court also noted that many of the subsidiary's employees were "dual employees" of both the parent and the subsidiary. Id.

By contrast, courts have found that operations were insufficiently interrelated where the parent and subsidiary shared little or no infrastructure and few or no employees. See, e.g., Fantazzi v. Temple Univ. Hosp., Inc., No. CIV.A. 00-CV-4175, 2002 WL 32348277, at *3-*4 (E.D. Pa. Aug. 22, 2002). For

example, in Fantazzi, the court held that the existence of an integrated telephone directory and the shared use of employees to investigate formal complaints of sexual harassment were not sufficient. Id. at *3-*4. Similarly, in Duncan v. American International Group, Inc., No. 01 Civ. 9269, 2002 WL 31873465 (S.D.N.Y. Dec. 31, 2002), the court found that operations were insufficiently interrelated where the foreign subsidiary provided administrative services to two other subsidiaries but not to the domestic parent. Id. at *4.

In the present case, the defendant relies heavily on the declaration of Linda Pickles ("Pickles"), its Executive Vice President, for its contention that the two companies are not sufficiently interrelated. Pickles states that GMACCM Japan operated independently from GMACCH and was run on a day-to-day basis by a Tokyo-based executive management committee. Pickles Supp. Decl. ¶ 3.[4]

The plaintiff responds by submitting evidence suggesting that GMACCH did, in fact, play a substantial role in the day-to-day operations of GMACCM Japan. According to the plaintiff's evidence, GMACCM Japan's budget required GMACCH's

[4] A copy of Linda Pickles' supplemental declaration is attached to the defendant's motion to dismiss as Exhibit A and cited herein as "Pickles Supp. Decl. ¶ __."

approval. Def. Ans. to Inter. No. 20.[5] GMACCM Japan was required to follow corporate information technology ("IT") guidelines. Pl. Dep. at 41-42.[6] And, all GMACCM Japan IT projects had to be entered into an American project database. Catalano Decl. ¶ 5.[7]

The plaintiff has also submitted evidence indicating that all GMACCH subsidiaries, including GMACCM Japan, were required to use GMACCH's Professional Services Agreement ("PSA") when doing business with IT contractors and consultants. 10/8/02 Email from Kim to Rajoppe.[8] And finally, the plaintiff's evidence shows that an employee of GMACCH managed GMACCM Japan's IT department for several months before Rajoppe assumed the position. Catalano Decl. at ¶¶ 3, 4.

2. Common Management

[5] A copy of the defendant's answers and objections to the plaintiff's first request for interrogatories is attached to the plaintiff's opposition as Exhibit N and cited herein as "Def. Ans. to Inter. No. __."

[6] A copy of the plaintiff's deposition is attached to the plaintiff's opposition as Exhibit F and cited herein as "Pl. Dep. at __."

[7] A copy of John Catalano's declaration is attached to the plaintiff's opposition as Exhibit L and cited herein as "Catalano Decl. ¶ __."

[8] A copy of Elizabeth Kim's October 8, 2002, email to Rajoppe and Charmaine Cheuk is attached to the plaintiff's opposition as Exhibit I and cited herein as "10/8/02 Email from Kim to Rajoppe."

Under the "common management" factor, courts typically examine whether the two nominally separate corporations (i) have the same people occupying officer or director positions, (ii) repeatedly transfer management-level personnel between each other, or (iii) have officers and directors of one company occupying some sort of formal management position with respect to the other. See, e.g., Ferrell, 2001 WL 1301461, at *24. For example, in Ferrell, the court found this factor satisfied where the two corporations' officers were identical, and where the human resources officer in charge of most personnel decisions relevant to the case was transferred from the parent to the subsidiary. Id. Likewise, where the parent appointed all management members of the subsidiary's board, the court held that a genuine issue of material fact existed as to common management. Lavrov v. NCR Corp., 600 F. Supp. 923, 928 (S.D. Ohio 1984).

By contrast, at least one court has found that two corporations do not share "common management" where the sole commonality consisted of one director from the parent exercising management responsibilities at the subsidiary. See Duncan, 2002 WL 318734465, at *4. Similarly, in Martin v. Safeguard Scientifics, Inc., 17 F. Supp. 2d 357 (E.D. Pa. 1998), the court found this factor lacking where the sole commonality consisted of a vice president of the parent acting as a consultant to the subsidiary. Id. at 368.

In the present case, the plaintiff has submitted undisputed evidence that two of GMACCM Japan's five directors

were also directors of GMACCH and that GMACCM Japan's CEO was a member of GMACCH's executive committee. Def. Ans. to Inter. Nos. 3, 4, 16.

3. Centralized Control of Labor Relations

Under the "centralized control of labor relations" factor -- the most important factor of the "control" test -- courts typically look for situations where the parent either (i) controlled the day-to-day employment decisions of the subsidiary, or (ii) directed the subsidiary to take the employment action that gave rise to the discrimination claim. See, e.g., Martin, 17 F. Supp. 2d at 367; Ferrell, 2001 WL 1301461, at *25. In Ferrell, for example, the court found this factor satisfied where the parent promulgated the subsidiary's anti-discrimination and anti-harassment policies, and where the parent trained the subsidiary's employees regarding the relevant anti-discrimination policies. Id. at *26. The court also noted that the parent controlled the subsidiary's employee benefits. Id. Likewise, in Watson, the court found this factor satisfied where the domestic parent retained full discretion to make exceptions to any of the foreign subsidiary's disciplinary procedures, established and approved the foreign subsidiary's compensation/benefits plans,

and prescribed policies regarding outside training opportunities. Watson, 376 F. Supp. 2d at 598.

By contrast, courts have found this factor lacking where the parent only retains control over certain important employment decisions, but not over the day-to-day employment decisions of the subsidiary. See, e.g., Fantazzi, 2002 WL 32348277, at *4. For example, in Fantazzi, the court found that the control of labor relations was insufficiently centralized where the "controlling" entity lacked the ability to discipline or terminate employees of the "controlled" entity. See id. Similarly, in Martin, the court found this factor lacking where the subsidiary controlled all hiring and firing of employees, but where the CEO of the subsidiary consulted with the parent's attorneys before terminating the plaintiff. See Martin, 17 F. Supp. 2d at 365.

In this case, the defendant relies on Pickles' declaration for the argument that control over the two corporations' labor relations was not sufficiently centralized. In her declaration, Pickles states that GMACCM Japan controlled its own labor relations by maintaining its own human resources department and promulgating its own employment policies and benefit plans. Pickles Supp. Decl. ¶ 4. Pickles also states that GMACCM Japan made its own personnel decisions relating to

hiring and firing, as it did with respect to the plaintiff. Id. at ¶¶ 4-6.

The plaintiff responds by submitting evidence suggesting that GMACCH played a role both in the day-to-day employment decisions of GMACCM Japan, as well as in the corporation's hiring and firing of the plaintiff himself. The plaintiff stated in his deposition that before being hired by GMACCM Japan, he was interviewed by Patel, GMACCH's Executive Vice President and Chief Information Officer. Pl. Dep. at 14, 23. Patel was similarly consulted when the issue of the plaintiff's termination was being discussed. See Pickles Supp. Decl. ¶ 6. The plaintiff has also submitted evidence indicating that the human resources departments of the two corporations worked closely together. Catalano Decl. ¶ 6 (stating that yearly reviews were required to be sent to GMACCH and that Pickles and other executives routinely traveled to the Japan office). And finally, the defendant has submitted evidence of various day-to-day labor relations issues that were controlled by GMACCH, including the payment of yearly bonuses to Rajoppe's staff, Def. Ans. to Inter. No. 21, and the ability to hire a new full-time

employee in GMACCM Japan's IT department. See 3/26/03 Email from Wisniewski to Rajoppe.[9]

4. Common Ownership

GMACCH concedes that it is the sole owner of GMACCM Japan. Def. Ans. to Inter. Nos. 1, 2.

5. Weighing the Four Factors

The Court concludes that the plaintiff has raised a genuine issue of material fact regarding whether GMACCH "controlled" GMACCM Japan for purposes of Title VII. The Court will accordingly deny the defendant's motion.[10]

B. Rajoppe's Request for Reconsideration of Age Discrimination Claim

The plaintiff requests that the Court reconsider its July 14, 2005, dismissal of his age discrimination claim on the ground that he exhausted his administrative remedies by checking

[9] A copy of Wendy Wisniewski's March 26, 2003, email to Rajoppe and Stephen Lin is attached to the plaintiff's opposition as Exhibit Z-11 and cited herein as "3/26/03 Email from Wisniewski to Rajoppe."

[10] The plaintiff argues that the Court should deny the motion because Pickles' employee relations directory was destroyed, thereby preventing the plaintiff from obtaining information that might have aided him in his attempt to show that GMACCH "controlled" GMACCM Japan. Because the Court will deny the motion on the merits, it will decline to consider this argument.

the box for "age discrimination" on his EEOC intake questionnaire. The Court will deny the request.

To determine whether a plaintiff has exhausted his administrative remedies, courts examine whether the acts alleged in the subsequent Title VII suit are fairly within the scope of the EEOC's formal charge of discrimination or the investigation arising therefrom. See Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996). Courts in this circuit have uniformly held that a plaintiff fails to exhaust where he checks off a claim on an intake questionnaire but then omits the claim from the formal EEOC formal charge. See, e.g., Johnson v. Chase Home Fin., 309 F. Supp. 2d 667, 672 (E.D. Pa. 2004); Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777, 786 (W.D. Pa. 2000). The Court agrees with these cases. Intake questionnaires do not serve the same function as the formal charge and are not part of the formal charge. A questionnaire, therefore, does not satisfy the exhaustion requirement where a claim marked off in the questionnaire is omitted from the charge and where the EEOC does not investigate the omitted claim.

The plaintiff did not include any allegations of age discrimination in his formal charge. See Formal Charge.[11]

[11] A copy of the plaintiff's formal charge of discrimination is attached to the plaintiff's opposition as

Indeed, the plaintiff does not argue, or even mention, that he was discriminated against because of his age in any of the supporting documents he submitted to the EEOC. See Docs. Sub. to EEOC.[12]

An appropriate Order follows.

Exhibit C and cited herein as "Formal Charge."

[12] A copy of the documents submitted by the plaintiff to the EEOC is attached to the plaintiff's opposition to the defendant's June 23, 2005, motion to dismiss and cited herein as "Docs. Sub. to EEOC."

IN THE UNITED STATES DISTRICT COURT
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ANTHONY RAJOPPE	:	CIVIL ACTION
	:	
v.	:	
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GMAC CORPORATION HOLDING CORP., et al.	:	NO. 05-2097

ORDER

AND NOW, this 19th day of March, 2007, upon consideration of the defendant's motion to dismiss (Doc. No. 23), the plaintiff's opposition thereto (Doc. No. 27), the defendant's reply thereto (Doc. No. 28), and the defendant's supplemental brief pursuant to the court's December 4, 2006, order (Doc. No. 31), IT IS HEREBY ORDERED that the defendant's motion to dismiss is DENIED for the reasons stated in the accompanying memorandum. IT IS FURTHER ORDERED that the plaintiff's request for reconsideration is DENIED.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.