

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

MAUREEN DALIESSIO, : CIVIL ACTION
 : NO. 96-5295
 Plaintiff, :
 :
 v. :
 :
 DEPUY, INC., et al., :
 :
 Defendants. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

January , 1998

This is an employment discrimination case. Plaintiff was employed by defendant S.L. Henson and Associates ("S.L. Henson") from January of 1994 until her resignation on October 7, 1997. During plaintiff's period of employment, S.L. Henson was a distributor of orthopedic devices sold by defendant DePuy, Inc. ("DePuy"). Plaintiff alleges that S.L. Henson's manager, defendant Steven L. Henson ("Henson"), sexually harassed her throughout her tenure and discriminated against her on the basis of her age.

Plaintiff filed suit against S.L. Henson, Henson, and DePuy under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq., and the Civil Rights Act of 1991.¹

¹ Plaintiff has also brought the following state law claims pursuant to supplemental jurisdiction, 28 U.S.C. § 1367: (1) violation of the Pennsylvania Human Relations Act; (2)

On October 22, 1996, defendant S.L. Henson moved to dismiss plaintiff's complaint under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure based on the complaint's failure to aver that S.L. Henson employed fifteen or more persons for purposes of invoking jurisdiction under Title VII, 42 U.S.C. § 2000e-(b)², or twenty or more persons for purposes of invoking jurisdiction under the ADEA, 29 U.S.C. § 630(b)³. The Court denied the motion without prejudice to afford plaintiff an opportunity to conduct discovery on this jurisdictional issue. Defendant Henson also moved to dismiss the plaintiff's Title VII and ADEA claims against him on the basis that Title VII and the ADEA do not impose liability on individual employees. See Sheridan v. DuPont, 100 F.3d 1061, 1077-78 (3d Cir. 1996) (rejecting the concept of individual employee liability under Title VII), cert. denied, 117 S.Ct. 2532 (1997); Moore v. Acme

intentional infliction of emotion distress; (3) negligent hiring/contracting; and (4) negligent discipline or retention. Because the plaintiff, defendant Henson and defendant S.L. Henson all appear to be Pennsylvania citizens, the Court has no basis upon which to infer diversity jurisdiction, which, in any event, was not invoked by plaintiff.

² Title VII provides in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks of the current or preceding calendar year, and any agent of such person" 42 U.S.C. § 2000e(b).

³ The ADEA provides in pertinent part: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" 29 U.S.C. § 630(b).

Corrugated Box Corp., Inc., 1997 WL 535906, at *2 (E.D. Pa. Aug. 4, 1997) (holding that individual employees cannot be held liable under the ADEA), citing Newman v. GHS Osteopathic, Inc., Parkview Hospital Division, 60 F.3d 153, 157 (3d Cir.1995)(applying the standards of Title VII and the ADEA interchangeably). The Court agreed and defendant Henson was dismissed from plaintiff's Title VII and ADEA counts.

After discovery was completed, S.L. Henson filed a motion for summary judgment alleging that judgment should be rendered in its favor because it never employed the requisite number of employees to trigger coverage under Title VII and the ADEA during the relevant period.⁴ DePuy filed a motion to dismiss the Title VII and ADEA claims against it, claiming DePuy was never plaintiff's employer.

Plaintiff's response to this jurisdictional attack is, in essence, that even if S.L. Henson never employed the requisite number of employees to trigger coverage under Title VII or the

⁴ S.L. Henson asserts a number of other arguments in its motion for summary judgment. S.L. Henson moves for summary judgment on the plaintiff's PHRA claim because: (1) plaintiff failed to exhaust administrative remedies under the PHRA; (2) plaintiff failure to file a complaint with the PHRC within 180 days of the alleged discriminatory conduct; and (3) plaintiff failed to establish the requisite number of employees to sustain jurisdiction under the PHRA. Defendants S.L. Henson and Henson also alleges that summary judgment should be granted on the plaintiff's intentional infliction of emotional distress claim because as a matter of law she has not proffered evidence to establish "outrageous conduct." Finally, as an alternate ground for dismissing plaintiff's ADEA claim, S.L. Henderson claims that plaintiff has failed to establish a prima facie case of age discrimination. Given the resolution of the jurisdictional issue, the Court does not reach the merits of these arguments.

ADEA, S.L. Henson and DePuy should be treated as a "single employer" whose combined number of employees exceeded the statutory threshold for the relevant period. The Court finds that plaintiff has failed to show that DePuy and S.L. Henson are a "single employer." Therefore, the Court is without jurisdiction over plaintiff's Title VII and ADEA claims. Furthermore, this Court declines to exercise supplemental jurisdiction over plaintiff's state law claims.

I. FACTS

DePuy Orthopaedics, Inc. is a manufacturer of orthopedic devices, such as hip and knee prostheses. DePuy distributes its products through sales representatives who are independent contractors.

On January 1, 1993, plaintiff began her employment as an officer manager with a DePuy distributor, DePuy-Gallagher & Associates ("DePuy-Gallagher"). Upon the retirement of Hugh Gallagher, the principal of DePuy-Gallagher, the right to distribute DePuy products in the area formerly serviced by DePuy-Gallagher was awarded by DePuy to Steven L. Henson. Henson, in turn, formed S.L. Henson & Associates. On or about January 1, 1994, plaintiff began to perform for Henson the work of office manager, which she had previously performed for Gallagher. Plaintiff alleges that she was harassed by Henson throughout her tenure at S.L. Henson, until she left S.L. Henson's employment on October 7, 1994.

During plaintiff's employment S.L. Henson never employed more than three employees. However, at all relevant times, S.L. Henson never retained more than six independent contractors as sales representatives.

II. LEGAL STANDARD

Defendant S.L. Henson has approached the jurisdictional issue as one appropriate for summary judgment. Defendant DePuy, on the other hand, has filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). Both motions, however, address the same issue of whether defendants singly or jointly employed the requisite number of employees. The Court, however, will consider both motions as motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).⁵ This distinction is significant in that, while a motion for summary judgment turns on the merits of the case and would bar subsequent claims in another forum, a jurisdictional inquiry does not. Kulick v. Pocono Downs Racing Ass'n, Inc., 816 F.2d 895, 898 n.6 (3d Cir.

⁵ Rule 12 provides in pertinent part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter

Fed. R. Civ. P. 12 (1997).

1987). Further, under a summary judgment standard, defendant S.L. Henson, as the movant, bears the burden of showing that there is no genuine issue of material fact. However on a motion to dismiss for lack of jurisdiction, it is the plaintiff who bears the burden of showing that jurisdiction exists in fact. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991), cert. denied, 501 U.S. 1222 (1991); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977), citing 5 C. Wright and A. Miller, Federal Practice and Procedure § 1350.

Under Rule 12(b)(1), there are two types of challenges to subject matter jurisdiction: one, to the complaint on its face; and two, to the existence of subject matter jurisdiction in fact. A facial attack requires the Court to accept the truth of the allegations of the complaint. By contrast, in considering a factual attack, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Mortensen, 549 F.2d at 891. Moreover, a factual attack permits the Court to weigh the evidence in deciding whether there is, indeed, subject matter jurisdiction. Id. The instant case involves a challenge to the factual basis for plaintiff's claim to federal jurisdiction.

III. DISCUSSION

A. Single Employer Theory⁶

Plaintiff contends that for the purposes of jurisdictional analysis, DePuy and S.L. Henson should be treated as one employer. In other words, plaintiff claims that the Court should aggregate the employees of both DePuy and S.L. Henson for the relevant period. Under Title VII and the ADEA, the relevant period is defined as the current and preceding calendar years of the alleged offensive conduct. 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b). Thus, the Court will focus its analysis on the calendar

⁶ Although not raised by plaintiff, another way the number of employees of two entities may be aggregated is under a "joint employer" theory. While the single employer theory depends on the existence of a single, integrated enterprise, under the joint employer theory, "the basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1122-23 (3d Cir. 1982), quoted by Zarnoski v. Hearst Bus. Communications, Inc., No. 95-CV-3854, 1996 WL 11301, at *4 (E.D. Pa. Jan. 11, 1996). However, even under the joint employer theory, plaintiff's claim that S.L. Henson and DePuy were a "common enterprise" still fails.

The Third Circuit has held that generally two entities constitute joint employers only where "they share or co-determine those matters governing essential terms and conditions of employment." Browning-Ferris, 691 F.2d at 1124. In deciding whether this test has been met the Court may be guided by three factors: "(1) authority to hire and fire employees, promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (2) day-to-day supervision of employees, including employee discipline; and (3) control of employee records, including payroll, insurance, taxes and the like." Zarnoski, at *8. By plaintiff's own admission, DePuy did not have the authority to hire or fire her, nor did DePuy participate in any decisions regarding her compensation or terms and conditions of her employment, nor did DePuy daily supervise or discipline her, nor did DePuy pay her salary, taxes, or provide plaintiff with benefits. Daliessio Dep. at 80, 192-93, 212-14. See Zarnoski, at *8.

years 1993 and 1994, as required by the relevant statutes. E.g., Powell-Ross v. All Star Radio, Inc., No. 95-1078, 1995 WL 491291, at *1 (E.D. Pa. Aug. 16, 1995) (discussing the relevant period in the context of Title VII), citing Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 580 (7th Cir. 1993) ("Under [the ADEA], the term 'calendar year' means the period from January to December, rather than any period of twelve consecutive months."), accord McGraw v. Warren County Oil Co., 707 F.2d 990,991 (8th Cir. 1983); Angelidis v. Piedmont Management Co., Inc., No. 92-5407, 1994 WL 230438, at *2 (D. N.J. May 23, 1994).

Under the "single employer" theory, developed under National Labor Relations Act jurisprudence and incorporated into the text of the ADEA,⁷ two nominally independent entities, which are actually part of one integrated company, are considered a "single employer." NLRB v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1122 (3d Cir. 1982). The Third Circuit has identified the following factors to be considered in determining whether two

⁷ The ADEA provides in pertinent part:

- (3) For the purposes of this subsection the determination of whether an employer controls a corporation shall be based upon the --
- (A) interrelation of operations,
 - (B) common management,
 - (C) centralized control of labor relations, and
 - (D) common ownership or financial control,
- of the employer and the corporation.

29 U.S.C. § 623.

While these factors were originally developed in a different statutory context, they have been applied widely to Title VII cases. See Zarnoski, at *5 n.8 (collecting cases).

ostensibly separate entities are in reality part of a single, integrated operation: (1) functional integration of the operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. Browning-Ferris, 691 F.2d at 1122, citing Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965); Zarnoski, at *4. These factors are not to be applied mechanically, but rather are to be viewed within the "totality of the circumstances" in the specific case. Zarnoski, at *5. The Court will consider each factor in turn.

1. Functional integration of operations

Plaintiff argues that because S.L. Henson was exclusively in the business of selling DePuy products, S.L. Henson and DePuy were therefore functionally integrated. Specifically, plaintiff points to:

the fact that DePuy's sales organization consisted entirely of 42-46 nationwide distributors who were provided with their inventory by DePuy, sold only DePuy products, used stationary and business cards identifying them as DePuy, sold products to customers who had no reason to believe that the distributors were other than DePuy salesmen, the salesmen considered themselves to be salesmen for DePuy, DePuy billed the customer for the sale and received payment directly from the customer payable to DePuy. In addition, DePuy controlled the price at which the distributor sold the product.

Pl.'s Mem. at 13. Despite these claims, plaintiff does not point to any specific evidence in the record to support them.⁸ Even

⁸ Plaintiff's submissions consist of references to depositions, affidavits and other exhibits. However, plaintiff failed to attach any of the depositions and certain of the

assuming, arguendo, plaintiff's claims to be true, they do not alone support a finding that S.L. Henson and DePuy's operations were functionally integrated.

The fact that the sole business reason for S.L. Henson's existence was to provide services to DePuy, does not alone mean that the operations of the two companies were "functionally integrated." See Zarnoski, at *6. To the contrary, according to the undisputed affidavits supplied by DePuy: the two companies did not share office space; DePuy had no control of S.L. Henson's records, including payroll, insurance, and taxes; DePuy and S.L. Henson did not have joint employment or other policies; and DePuy and Henson did not aggregate payroll, tax accounts or other financial information. Purcell Aff. ¶¶ 7, 8, 9. See Zarnoski, at *6 (finding that where supplier and distributor did not share office space, equipment or supplies, did not develop joint employment policies, did not aggregate payrolls, tax accounts and other information, notwithstanding an exclusive relationship, the operations of the two companies were not necessarily interrelated). Therefore, on balance, plaintiff

affidavits referenced in her response. Because plaintiff failed to attach the relevant deposition transcripts and affidavits, the Court is not able to consider them as evidence. See Trustees of the Mich. Laborers' Dist. Council Pension Fund v. Van Sullen Construction, Inc., 825 F. Supp. 165, 170 (E.D. Mich. 1993) (finding evidence to be insufficient where deposition testimony to which plaintiff refers not included in plaintiff's attached exhibits). Even assuming that the depositions and affidavits which were not attached show what plaintiff purports them to show, plaintiff's proof is insufficient to support her claim that jurisdiction exists.

has not shown that the operations of the two companies were "functionally integrated."

2. Centralized control of labor

According to plaintiff, "centralized control of labor relations is supported not so much by authority exercised by DePuy, but by the authority DePuy retained to exercise such authority." Pl.'s Mem. at 13. Plaintiff directs the Court's attention to the contract between DePuy and its distributors that requires the distributors to comply "with the other policies of DePuy." As an illustration of how this policy worked, plaintiff points to incidents in which DePuy personnel directed her to perform inventory control functions and to make certain telephone calls to obtain payments for DePuy. Plaintiff admits, however, that she was paid by S.L. Henson, not DePuy, Daliessio Dep. at 80, that DePuy did not provide her with any employment benefits, Daliessio Dep. at 214, and that Henson, not DePuy directly supervised plaintiff and determined the duties to be performed by S.L. Henson personnel, Daliessio Dep. at 192-93, 212-13. Therefore, on balance, the Court concludes that plaintiff has not shown that S.L. Henson's labor relations functions were controlled by DePuy.

3. Common management

Plaintiff also claims that S.L. Henson and DePuy shared common management because:

DePuy provided the sales brochures, inventory, financing, sales quotas, assignment of territories, the number of salesmen that should be employed by any

distributorship, the right to withhold product unless certain salesmen were employed, the control of the price which the distributor could charge, the billing for sale and the collection of money.

Pl.'s Mem. at 14. Again, plaintiff does not point to any evidence in the record to support these assertions. In any event, "[a] working relationship between entities does not mean that the companies share the same management." Zarnoski, at *7. Because plaintiff's evidence does not show that S.L. Henson and DePuy shared common employees or officers, see Zarnoski, at *6, plaintiff cannot support her claim that S.L. Henson and DePuy shared common management.

4. Common ownership

Finally, plaintiff argues that DePuy and S.L. Henson shared common ownership because DePuy owned and supplied the inventory, set prices, and could unilaterally terminate the distributorship at will. Plaintiff, however, points to no evidence that DePuy owned an interest in S.L. Henson or that Henson or any other S.L. Henson agent ever served as an officer, director, or shareholder of DePuy. Purcell Aff. ¶ 9. See Zarnoski, at * 7.

* * *

In summary, because plaintiff can point to little evidence beyond her own subjective belief that S.L. Henson and DePuy constituted a single employer for the purposes of jurisdictional analysis, plaintiff fails to meet her burden of showing the existence of jurisdiction under Rule 12(b)(1).

B. "Successor Employer" Theory

Plaintiff argues that in the event the Court finds that DePuy and S.L. Henson were not a "common enterprise," it should hold DePuy liable as a successor to S.L. Henson. Whether DePuy is the corporate successor to S.L. Henson is irrelevant because in order for this type of derivative liability to attach against DePuy, plaintiff must first have established liability on the part of S.L. Henson. Plaintiff, however, has failed to make this showing.

C. Judicial Estoppel

Plaintiff argues that under a theory of "judicial estoppel" DePuy is estopped from claiming that it is not plaintiff's employer because DePuy took previously a legal position before the U.S. Equal Employment Opportunity Commission which is inconsistent with its current legal position. Plaintiff contends that because DePuy did not respond to her EEOC complaint by denying that DePuy was plaintiff's employer, "DePuy by this action has lulled the Plaintiff into a false sense of security believing that the averments concerning her employment status at DePuy were uncontested." Pl.'s Mem. at 18. Plaintiff relies on McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996), cert. denied, 117 S.Ct. 958 (1997), as authority for this argument. In McNemar, the Third Circuit found that a party who claimed to be totally disabled for the purposes of social security disability benefits was estopped from later claiming that he was a qualified individual who, with or without

reasonable accommodation, could perform the essential elements of a job under the Americans with Disabilities Act.

First, plaintiff's reliance on McNemar is misplaced given the recent case of Krouse v. American Sterilizer Co., 126 F.3d 494 (3d Cir. 1997), in which the Third Circuit cast doubt on the continuing validity of McNemar.⁹

Second, plaintiff's argument that DePuy's failure to respond to allegations made in plaintiff's complaint filed with the EEOC that DePuy was plaintiff's employer does not alone trigger the application of judicial estoppel. In Ryan Operations G.P. v. Santiam-Midwest Lumber Co. of New Jersey, 81 F.3d 355 (3d Cir. 1996), the Third Circuit articulated the following two-part inquiry to determine whether judicial estoppel applies: (1) is the party's position inconsistent with a position taken in the same or in a previous proceeding? and (2) has the party asserted either or both of the inconsistent positions in bad faith? Ryan Operations, 81 F.3d at 361; Krouse, 126 F.3d at 501. "Only if both prongs are satisfied is judicial estoppel an appropriate remedy." Ryan Operations, 81 F.3d at 361. Even assuming that

⁹ Judge Mansmann, writing for the panel, acknowledged that "McNemar has been the object of considerable criticism," Krouse, 126 F.3d at 503, and described the decision of the Court of Appeals for the District of Columbia, which rejected the McNemar argument, as "thoughtful." Id. at 503 n.3, citing Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 584-87 (D.C. Cir 1997). Moreover, Judge Mansmann noted that "Judge Becker is persuaded by the authorities set forth . . . that McNemar was wrongly decided, and believes that the court should reconsider it at its first opportunity." Krouse, 126 F.3d at 503 n.4.

defendants' positions before the EEOC could be considered to be inconsistent with those they have taken in the instant case, there is no evidence that DePuy or S.L. Henson asserted positions before the EEOC in bad faith or for an improper purpose. Therefore, plaintiff's judicial estoppel argument fails.

D. State Law Claims

Having dismissed plaintiff's Title VII and ADEA claims, the Court will exercise its discretion, pursuant to 28 U.S.C. § 1367(c), and will decline supplemental jurisdiction over plaintiff's state law claims.¹⁰ Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995).

IV. CONCLUSION

For the reasons stated above, the Court concludes that neither S.L. Henson nor DePuy were plaintiff's employer, singly or jointly, for the purposes of Title VII or the ADEA. Because the Court finds that there is no jurisdictional basis for plaintiff's claims, therefore, defendants' motions to dismiss will be granted.

¹⁰ Plaintiff has indicated that she has already initiated a lawsuit in state court.