



P.S. § 951, et seq. (West 1991).<sup>1</sup>

On October 6, 1997, Defendants moved to dismiss Plaintiff's complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the grounds that Roizman Development is not an "employer" subject to Title VII because it does not employ fifteen or more persons, as required to invoke jurisdiction under Title VII, 42 U.S.C. § 2000e(b).<sup>2</sup> The Court granted Plaintiff's request to conduct discovery on this jurisdictional issue. Defendant Israel Roizman also moved to dismiss Plaintiff's Title VII and PHRA claims against him, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the basis that Title VII and the PHRA do not impose liability on individual employees. See Sheridan v. E. I. DuPont de Nemours and Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996) (rejecting the concept of individual employee liability under Title VII). After discovery was completed, the parties filed supplemental briefs on the

---

<sup>1</sup>Although Plaintiff does not specifically invoke this Court's supplemental jurisdiction over her PHRA claim pursuant to 28 U.S.C.A. § 1367 (West 1993), this is the only possible basis for this Court's jurisdiction over Plaintiff's state law claim. Plaintiff and Defendants are all citizens of Pennsylvania. Because diversity of citizenship is lacking in this case, Plaintiff does not, and cannot, rely on 28 U.S.C.A. § 1332 (West 1993; Supp. 1997) as the basis for jurisdiction over her state law claim.

<sup>2</sup>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).

jurisdictional issue.

Plaintiff's response to Defendants' jurisdictional challenge is that Defendants in fact employed 15 or more employees, and therefore the jurisdictional prerequisite set forth in 42 U.S.C. § 2000e(b) has been satisfied. Plaintiff argues that in calculating the number of individuals employed by Defendants, the Court should consider the employees not only of the named Defendants, but also of the following entities: SHNIR Apartment Management, Inc. ("SHNIR"); I.R.P.C., Inc. ("IRPC"); and 11 limited partnerships known as Bethel Villa, Associates, L.P., Blue Hill Housing, L.P., Broadway Townhouses Associates, L.P., Camden Townhouses Associates, L.P., Elm Hill Housing, L.P., E.T.G. Associates, '94, L.P., Fairview Associates '94, L.P., Flipper Temple Associates, L.P., Renaissance Plaza '93 Associates, L.P., Tyler House Associates, L.P., and Yonkers Associates '93, L.P. (collectively referred to as the "Limited Partnerships").

## II. FACTS

Defendant Israel Roizman is the sole shareholder and an employee of Roizman Development, which is in the business of developing and rehabilitating real estate. Defendant Roizman is also the sole shareholder of SHNIR, which is a real estate management company, and of IRPC, a payroll corporation. All

three corporations have their offices at the same location. Plaintiff was employed by SHNIR.

Between 1993 and 1995, Roizman Development had five employees, including Defendant Roizman; SHNIR had seven employees; and IRPC had no employees.

The Limited Partnerships were formed to acquire and renovate apartment complexes in different cities throughout the East Coast of the United States. The federal government provides subsidies for the rental units contained in the apartment complexes. Defendant Roizman is a general partner in the Limited Partnerships, owning no more than a 1% interest in any of the Limited Partnerships, and in most instances, owning significantly less than a 1% interest. The identities of the Limited Partners vary. The Limited Partners have the controlling interest for each of the Limited Partnerships. Defendant Roizman does not have any ownership interest in any of the Limited Partners that own the properties.

SHNIR is the managing agent for the apartment complexes owned by the Limited Partnerships. As such, SHNIR is responsible for managing the properties according to a budget approved by the Limited Partners for the property and by the governmental entities that provide rent subsidies for the rental units. Each Limited Partnership is an economically independent entity, with its own expense and operating bank accounts. The rents received

for each Limited Partnership are used to pay each property's expenses, including the salaries of each Limited Partnerships' employees (e.g., site managers, maintenance staff). The site manager for each Limited Partnership makes the hiring and firing decisions concerning the employees at each separate Limited Partnership.

### III. LEGAL STANDARD

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 v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). Moreover, a factual attack permits the Court to weigh the evidence in deciding whether there is, indeed, subject matter jurisdiction. Id. This case involves a challenge to the factual basis for Plaintiff's claim to federal jurisdiction for her Title VII claim.

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).

#### IV. DISCUSSION

##### A. Defendant Roizman Development

Roizman Development does not employ 15 individuals, and so, standing alone, it is not an "employer" within the meaning of Title VII. For this reason, Plaintiff must rely on either the "single employer" or "joint employer" theories, whereby the number of employees of two or more entities may be aggregated to determine whether an employer has the requisite number of employees to trigger the protections of Title VII. N.L.R.B. v. Browning-Ferris Indus. of Pa., Inc., 691 F.2d 1117, 1122 (3d Cir. 1982).<sup>3</sup> The "single employer" theory depends on the existence of a single, integrated enterprise. As the Court of Appeals for the Third Circuit has explained,

---

<sup>3</sup>The conceptual differences between the single employer and joint employer theories were delineated in Browning-Ferris, a case arising under the National Labor Relations Act. Although the Third Circuit has never expressly endorsed the use of these theories in a Title VII case, courts in this District have frequently applied the single employer/joint employer tests, as described in Browning-Ferris, to employment discrimination cases arising under Title VII. E.g., Daliessio v. Depuy, Inc., Civ.A. No. 96-5295, 1998 WL 24330 (E.D.Pa. Jan. 21, 1998); Zarnoski v. Hearst Bus. Communications, Inc., Civ.A.No. 95-3854, 1996 WL 11301, at \*8 (E.D.Pa. Jan. 11, 1996). The parties argue, and the Court agrees, that the single employer/joint employer tests are applicable to this Title VII action.

[a] single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a "single employer." The question in the "single employer" situation, then, is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise.

Id. (emphasis in original). To determine whether a single employer relationship exists, the Court considers the following four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. Id.

Under the "joint employer" theory, the number of employees of two or more separate entities may be aggregated. Unlike the single employer scenario, "[i]n joint employer situations no finding of a lack of arm's length transaction or unity of control or ownership is required." Id. "The basis of the finding [of joint employer] 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." Id. at 1123.

The Third Circuit has held that two entities constitute joint employers where "they share or co-determine those matters governing essential terms and conditions of employment." Id. at 1124. To determine whether this test has been met, three factors may be considered: "(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, 1996 WL 11301, at \*8.

Although Plaintiff states that she is proceeding under the joint employer theory, she applies the four-factor test for the single-employer theory. (Pl.'s Supp. Mem.) Because of this confusion, the Court will analyze the jurisdictional issue under both the single employer and the joint employer theories.

To defeat Defendants' Motion, Plaintiff must demonstrate that Roizman Development, SHNIR, IRPC, and the Limited Partnerships should either be treated as one employer or as joint employers for the relevant time period. Under Title VII, the relevant period is defined as the current and preceding calendar years of the alleged offensive conduct. 42 U.S.C. § 2000e(b). The offensive conduct in this case allegedly took place beginning in December, 1994 through November 1995. (Compl. at ¶ 14.) Thus, the Court will focus its analysis on the calendar years 1993, 1994, and 1995. Powell-Ross v. All Star Radio, Inc., Civ.A.No. 95-1078, 1995 WL 491291, at \*1 (E.D.Pa. Aug. 16, 1995).

During the relevant time period, Roizman Development, SHNIR, and IRPC had a total of 12 employees. Whether the Court

considers these three corporations as a single employer or as joint employers, the 15 employee requirement under Title VII is not satisfied. The jurisdictional prerequisite can only be satisfied if employees of the Limited Partnerships are included in the 15-employee count. For this reason, in analyzing both theories, the Court will focus its attention on the Limited Partnerships.

1. Single Employer Theory

a. Functional Integration of Operations

As set forth above, the Limited Partnerships are separate and distinct entities -- they are located in different states, have different budgets and bank accounts, have separate assets generated by the rents from their rental units, have different Limited Partners, and have different on-site staffs. The only common link between the Limited Partnerships and Roizman Development and SHNIR is that SHNIR is the managing agent of the apartment complexes owned by the different Limited Partnerships. However, pursuant to the terms of SHNIR's management agreement with each Limited Partnership, each Partnership can terminate SHNIR at will.

b. Centralized Control of Labor Relations

The labor relations of the Limited Partnerships are separate from Roizman Development and SHNIR. Neither Roizman Development nor SHNIR has any control over the labor relations of the Limited Partnerships. Although SHNIR hires the site managers for each Limited Partnership as part of its management responsibilities, once in place, the site managers are responsible for advertising employee openings, hiring and firing employees, and making daily work assignments for the employees for their separate apartment complexes. In addition, the salaries and benefits of each Limited Partnerships' employees are set by the site manager, with the approval of the Limited Partners for the property.

c. Common Management

As discussed above, the Limited Partnerships do not have common management.

d. Common Ownership

Defendant Roizman owns Roizman Development and SHNIR and also has an ownership interest in each of the Limited Partnerships. But Defendant Roizman's ownership interest in the Limited Partnerships is very small and does not come close to a controlling interest in any of the Limited Partnerships.

The Court finds that, when reviewing the totality of circumstances, Roizman Development, SHNIR, and the Limited

Partnerships are not a single interrelated enterprise. Bielawski v. AMI, Inc., 870 F.Supp. 771 (N.D.Ohio 1994)(property manager that owned small interest as general partner of properties it managed was not a single employer of all the properties it managed for Title VII purposes). Therefore, the Court will not aggregate the employees of these different entities under the single employer theory.

## 2. Joint Employer

The focus of the joint employer theory is whether the entities in question share or co-determine those matters governing essential terms and conditions of employment, such as the hiring and firing of employees and the day-to-day supervision of employees. Zarnoski, 1996 WL 11301 at \*8. The focus of the joint employer theory is on one of the factors considered by the Court in its analysis of the single employer theory -- that is, the interrelationship of labor relations among the various entities.

As discussed above, the labor relations of Roizman Development, SHNIR, and the Limited Partnerships are not interrelated. Therefore, the Court will not aggregate the employees of Roizman Development, SHNIR, and the Limited Partnerships under the joint employer theory.

B. Defendant Israel Roizman

Plaintiff argues that Defendant Roizman can be held personally liable as an agent and/or employer under Title VII. The Court disagrees. Plaintiff has not adduced any evidence in discovery that Defendant Roizman was her employer or that the corporate entities through which he operates are shams and should be disregarded.<sup>4</sup> Consequently, Defendant Roizman, as an employee of Roizman Development, cannot be held personally liable under Title VII. Sheridan v. E. I. DuPont de Nemours and Co., 100 F.3d 1061, 1077 (3d Cir. 1996).

V. CONCLUSION

The Court finds that Plaintiff has failed to show that Roizman Development, SHNIR, IRPC, and the Limited Partnerships are a single employer or joint employers. Therefore, the Court is without jurisdiction over Plaintiff's Title VII claim. Because Defendant Roizman cannot be held personally liable under Title VII, the Court also dismisses Defendant Roizman as a defendant with respect to Plaintiff's Title VII claim. Furthermore, this Court declines to exercise supplemental jurisdiction over Plaintiff's state law claim. The Court will

---

<sup>4</sup>In addition, in her Affidavit dated October 16, 1997, filed in support of her Response to Defendants' Motion to Dismiss, Plaintiff states that she was an employee of SHNIR, not Roizman Development or Israel Roizman.

grant Defendants' Motion.

An appropriate Order follows.