

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

<b>KATHLEEN B.S. SIKO,</b>	:	
<b>Plaintiff,</b>	:	
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<b>v.</b>	:	<b>CIVIL ACTION</b>
	:	
<b>KASSAB, ARCHBOLD</b>	:	<b>No. 98-402</b>
<b>&amp; O'BRIEN, L.L.P.</b>	:	
<b>Defendants.</b>	:	

**MEMORANDUM-ORDER**

Before the Court is Defendant's Motion to Dismiss Counts I, II, III, IV, and V of Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6), Defendant's Motion for Summary Judgment with respect to Count VI pursuant to Fed.R.Civ.P. 56(c), and in the alternative Defendant's Motion to Strike language in Counts I and V pursuant to Fed.R.Civ.P. 12(f). For the following reasons, Defendant's Motion to Dismiss will be denied, Motion for Summary Judgment will be dismissed without prejudice, and Motion to Strike will be granted.

**FACTUAL AND PROCEDURAL BACKGROUND**

In January, 1994, Plaintiff Kathleen B.S. Siko was employed by Defendant law firm, Kassab, Archbold & O'Brien, L.L.P. In January, 1996, Plaintiff informed Defendant that she was pregnant. Plaintiff allegedly requested and received approval for disability leave as well as an additional ten (10) weeks of leave, which Plaintiff claims is confirmed in a July 24th memorandum. On July 25, Plaintiff received an inaccurate performance review from Defendant. Plaintiff responded to the review on August 15, asserting that she believed Defendant had subjected her to different treatment since she announced her pregnancy. The following day Plaintiff began disability leave.

On August 30, 1996, Plaintiff filed a charge of pregnancy discrimination with the Philadelphia Human Relations Commission (PHRC), which was also referred to the Equal Employment Opportunity Commission (EEOC). Two months later, on October 22, Plaintiff received a hand-delivered letter from Defendant stating that her disability leave expired on October 21 and she was expected to return to work by October 25. In response, Plaintiff sent a letter to Defendant explaining that she did not intend to resign and did not understand the October 25 deadline since it did not comply with her prior notice of disability leave, any employee guideline, or the 13 week limit for disability leave offered by Defendant. Plaintiff asserts that she received no response from Defendant and was subsequently discharged.

Plaintiff commenced this action after receiving a right to sue letter on or about October 29, 1997 from the EEOC. Plaintiff's Complaint set forth six counts: Counts I and II alleged pregnancy discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) et seq., and the Pennsylvania Human Relations Act (PHRA), 42 P.S. § 951 et seq.; Count III alleged a violation of the Employee Retirement and Income Security Act, 29 U.S.C.A. § 1001 et seq.; Counts IV and V alleged retaliation under the PHRA and Title VII; and Count VI alleged a violation of the Family and Medical Leave Act, 29 U.S.C.A. § 2160 et seq. Defendant now moves for dismissal of Counts I, II, III, IV, and V and for summary judgment with respect to Count VI. In the alternative, Defendant moves to strike language in Counts I and V.

## **DISCUSSION**

### **I. MOTION TO DISMISS**

To assert a claim under federal law, a plaintiff is required to plead the facts in a short and plain statement. See Fed.R.Civ.P. 8(a)(2). To survive a motion to dismiss for failure to state a

claim, the plaintiff must allege sufficient specific facts giving rise to the cause of action to put the defendant on notice of the essential elements of the plaintiff's cause of action. Frazier v. Southeastern Pennsylvania Transportation Authority, 785 F.2d 65 (3d Cir.1985). The plaintiff cannot be expected to provide proof, however, nor proffer all of the available evidence concerning the plaintiff's claim at the pleading stage. See District Council 47 v. Bradley, 795 F.2d 310, 313 (3d Cir. 1986). Rather, identifying the specific conduct violating the plaintiff's rights, the time, the place, and those responsible is adequate for notice pleading. Id.

When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all the factual allegations as true and construe the complaint liberally in the light most favorable to the plaintiff. Robb v. City of Philadelphia, 733 F.2d 286, 291 (3d Cir. 1984) (citing Gomez v. Toledo, 446 U.S. 635, 636 n.3 (1980)). A court may grant a motion to dismiss if it appears from the face of the complaint that the plaintiff can establish no set of facts which would entitle the plaintiff to relief. Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

#### **A. Counts I and II**

To state a claim of pregnancy discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), or the Pennsylvania Human Relations Act, 42 P.S. § 951, the complaint must allege that (1) the plaintiff was pregnant at the time in question, (2) she was performing her job well, (3) she was terminated, and (4) there is a nexus between her pregnancy and the adverse employment decision. Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996); Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995).<sup>1</sup> In Title VII cases, the

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<sup>1</sup> Under Pennsylvania law, the Pennsylvania Human Relations Act is generally applied in accordance with Title VII. Dici v. Commonwealth of Pennsylvania, 91 F.3d 542 (3d Cir. 1996); Griffiths v. CIGNA Corp., 988 F.2d 457 (3d Cir.1993).

plaintiff has the initial burden of proving a prima facie case by a preponderance of the evidence which, if successful, raises the inference of unlawful discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981).

In the present case, the Complaint states that Plaintiff (1) was pregnant at the time in question, (2) was performing her job satisfactorily, (3) was terminated, and (4) was replaced by another employee who was not pregnant, thereby creating a prima facie case of pregnancy discrimination. Although Plaintiff does not specifically assert that Defendant took adverse action as a result of a discriminatory animus, a jury could infer from the allegations enough evidence to support a claim of purposeful discrimination.<sup>2</sup> Hence, Plaintiff's allegations comply with the notice pleading requirements of Fed.R.Civ.P. 8(a)(2) affording the Defendant fair notice of Plaintiff's claim, and Defendant's Motion to Dismiss Counts I and II of Plaintiff's Complaint will be denied.

**B. Counts IV and V**

Prior to seeking judicial relief under Title VII and PHRA, the complainant must first satisfy the preconditions and requirements of the administrative agencies, EEOC and PHRC respectively, charged with enforcing employment discrimination. See Price v. Philadelphia Elec. Co., 790 F. Supp. 97, 98 (E.D. Pa. 1992), aff'd 61 F.3d 896 (3d Cir. 1995). Once a complainant has exhausted all administrative remedies he or she may bring suit under Title VII in a court of law. McNasby v. Crown Cork & Seal, Inc., 888 F.2d 270, 282 (3d Cir. 1989). The scope of a

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<sup>2</sup> For example, in Plaintiff's Complaint, she specifically states that Defendant requested she return to work before October 28, in violation of their previous agreement and the 13 week disability approved by Defendant. (Compl. at 4, ¶ 24). Plaintiff further alleges that Defendant failed to respond to her request for an explanation as to her return date. (Compl. at 5, ¶ 26).

judicial complaint, however, is not limited to the expressed allegations made in the administrative complaint. See Hicks v. ABT Associates Inc., 572 F.2d 960, 966 (3d Cir. 1978). Instead, the judicial complaint must reflect what a reasonable administrative investigation would have uncovered, including new acts which occurred during the pendency of the administrative proceedings. See Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984); see also Ostapowicz v. Johnson, 541 F.2d 394, 399 (3d Cir. 1976). The analysis is not contingent on the occurrence of an actual administrative investigation. See Hicks, 572 F.2d at 966.

In the present case, Counts IV and V allege that (1) Defendant attempted to discharge Plaintiff after Plaintiff “oppose[d]” unlawful discriminatory practices in the workplace, and (2) Defendant discharged Plaintiff after Plaintiff filed a complaint with the EEOC and the PHRC. (See Compl. at 9-11). Defendant argues that Counts IV and V should be dismissed because Plaintiff’s allegations of retaliation were not included in her administrative complaint and are not related to the administrative claim of pregnancy discrimination.

Although Plaintiff’s administrative complaint does not expressly allege retaliation, it is reasonable to expect that her allegations of retaliation would have been uncovered by a reasonable investigation of her complaint.<sup>3</sup> Plaintiff’s allegations, in relation to her job performance and discharge, fall within the scope of her original pregnancy discrimination claim because a reasonable investigation would have uncovered those allegations. Therefore, Plaintiff’s allegations of retaliation are not barred from being included in her judicial complaint, and Defendant’s Motion to Dismiss Counts IV and V will be denied.

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<sup>3</sup> In Plaintiff’s administrative claim, Plaintiff alleges that she received an inaccurate performance review after she announced her pregnancy. (See Pl.’s Reply, Ex. “D”). Plaintiff further alleges that she was discriminated against in the terms and conditions of her employment solely because of her sex and her pregnancy. Id.

### C. Count III

To state a claim of gender discrimination under the Employee Retirement Income Security Act, 29 U.S.C.A. § 1001 et seq. (hereafter “ERISA”), an employee must show (1) prohibited employer conduct; (2) taken for the purpose of interfering; (3) with the attainment of any right to which the employee may be entitled. 29 U.S.C.A. § 1140. An employee can also establish a cause of action under ERISA when the employee’s termination has allegedly occurred in retaliation for the employee exercising his or her right to receive ERISA protected benefits. See Kowalski v. L&F Products, 82 F.2d 1283, 1287 (3d Cir. 1996).

In the present case, Count III alleges that Defendant violated section 510 of ERISA when Defendant forced the discharge of Plaintiff because she exercised her right to obtain lawful disability benefits (Compl. at 8, ¶ 41). The Complaint further alleges that Defendant’s willful conduct deprived Plaintiff of obtaining future benefits. (Compl. at 8, ¶ 42). Defendant moves to dismiss Count III on two grounds. First, Defendant asserts the second element of an ERISA claim has not been satisfied because Plaintiff fails to demonstrate that Defendant retaliated against Plaintiff for using disability benefits. Second, Defendant argues that Plaintiff has not stated a cause of action because Plaintiff does not allege she was deprived of any benefits protected by ERISA, and Defendant claims that Plaintiff has received all of her benefits.

While it is true that an employee must demonstrate proof of a specific intent by an employer to interfere with the employee’s pension benefits to succeed under ERISA, an employee may meet his or her burden by introducing direct or indirect evidence of an employer’s intent. See Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir. 1987). In the present case, the allegations presented circumstantially support the contention that Defendant had the

specific retaliatory intent of denying current and/or future disability benefits to Plaintiff when Plaintiff was treated differently from other employees and subsequently terminated. (Compl. at 3, ¶¶ 14, and 15; Compl. at 4, ¶ 24). Although Plaintiff may have received all current benefits, Plaintiff may still be entitled to relief because the Complaint alleges deprivation of prospective benefits. Thus, Count III alleges sufficient facts to state a cause of action under ERISA, and Defendant's Motion to Dismiss will be denied.

## **II. MOTION FOR SUMMARY JUDGMENT**

With respect to Defendant's Motion for Summary Judgment, Defendant argues that it is entitled to judgment on Count VI under the Family and Medical Leave Act, 29 U.S.C. § 2601 ("FMLA"), because Defendant has never employed fifty (50) or more employees and, therefore, does not meet the definition of "employer" under the act. (See Def.'s Motion, Ex. "B").

Defendant concedes that it employs forty-five (45) employees but rejects Plaintiff's argument that partners of Defendant's law firm are employees for purposes of FMLA. Id. Instead, Defendant argues that in a limited liability partnership ("L.L.P."), partners are members of a professional corporation who employ themselves. Similarly, Defendant argues that "of counsel" attorneys are not employees of the law firm but, rather, independent contractors subject to a written contract. (See Def.'s Reply, Ex. "A"). As a result, Defendant asserts that summary judgment is appropriate in this matter because Defendant is not an "employer" under FMLA.

Plaintiff opposes Defendant's motion on the premise that there is a disputed issue of material fact as to the number of individuals employed by Defendant. Plaintiff presents evidence showing that Defendant employs at least fifty-five (55) possible employees, including law firm partners and "of counsel" attorneys. (See Pl.'s Reply, Ex. "A"). Plaintiff argues that law firm

partners of a limited partnership are employees under certain federal statutes including FMLA. In addition, Plaintiff suggests that there are other personnel that are not included on Defendant's payroll list but are noted to be working on the premises. (See Pl.'s, Ex. "A"). Therefore, pursuant to Fed.R.Civ.P. 56(f), Plaintiff requests more discovery to determine whether those personnel are employees of Defendant's law firm under FMLA.

A moving party is entitled to a grant of summary judgment where there is no genuine issue as to any material fact. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986). A plaintiff can move for summary judgment after 20 days from the commencement of the action, and contrary to Plaintiff's argument, a defendant can move for summary judgment at any time. See Fed.R.Civ.P. 56(a)(b). The moving party bears the burden of proving that there is no genuine issue of material fact in dispute. See Fed.R.Civ.P. 56(c); see also Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994). A fact is material if it affects the outcome of the litigation when applied to substantive law. Anderson, 477 U.S. at 248.

The FMLA defines "employee" by reference to subsections (e) and (g) of § 3 of the Fair Labor Standards Act of 1938. See 29 U.S.C.A. § 2611(3) (referring to 29 U.S.C.A. § 203(e) and (g)). The Fair Labor Standards Act provides that an employee is "any individual employed by an employer" and provides that "employ includes to suffer or permit to work." 29 U.S.C.A. § 203(e)(1). In determining whether a worker is an "employee" of another person or organization within the purview of the FLSA, the Supreme Court has emphasized that the circumstances of the whole activity should be examined rather than any one particular factor. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947).

Generally, bona fide partners and independent contractors are not considered employees

for purposes of federal anti-discrimination statutes. See Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996), cert. denied, 117 S.Ct. 1862 (1997). The determination of employment status of an employee or an employer is conducted on a case-by-case basis based on the totality of the circumstances. See Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). Although there is no definitive test to distinguish between an independent contractor and an employee, or a partner and an employee, courts have developed several criteria in determining the existence of an employment relationship under federal anti-discrimination statutes.<sup>4</sup>

In the present case, there is insufficient evidence at this time to support Defendant's contention that Defendant's law firm partners are not employees for purposes of FMLA. This matter is distinguishable from the cases Defendant relies on which hold that partners are not employees under federal anti-discrimination statutes.<sup>5</sup> Those cases are limited to general

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<sup>4</sup> In determining whether an individual is a partner rather than an employee, courts look to see whether the individual has 1) the right and duty to participate in management; 2) the right and duty to act as an agent of other partners; 3) exposure to liability; 4) the fiduciary relationship among partners; 5) use of the term "co-owners" to indicate each partner's "power of ultimate control"; 6) participation in profits and losses; 7) investment in the firm; 8) partial ownership of firm assets; 9) voting rights; 10) the aggrieved individual's ability to control and operate the business; 11) the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; 12) the extent of that individual's employment security; 13) and other similar indicia of ownership. See Serapion v. Martinez, 119 F.3d 982, 989 (1st Cir. 1997) (citing Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996)); see also Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

In determining whether a worker is an independent contractor rather than an employee, there are at least six factors to consider: 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business. See Martin v. Selker Bros., Inc., 949 F.2d 1286, 1293 (3d Cir. 1991) (citing Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1382 (3d Cir. 1985)); see also Real v. Driscoll Strawberry Associates Inc., 603 F.2d 748, 754 (9th Cir. 1979). In addition to examining the circumstances of the whole activity, the court should "consider whether, as a matter of economic reality, the individuals are dependent upon the business to which they render service." DialAmerica, 757 F.2d at 1382.

<sup>5</sup> Defendant cites Hull v. Rose, Schmidt, Hasley & DiSalle, 700 A.2d 996 (Pa.Super. 1997) and Wheeler v. Hardman, 825 F.2d 257 (10th Cir. 1987) for the proposition that partners are not employees under federal anti-discrimination statutes. Hull and Wheeler, however, involve general partners who are subject to unlimited liability of the corporation. As such, those partners, unlike those at Defendant's law firm, are accountable for all the benefits

partnerships where the partner is either a shareholder or subject to unlimited liability. In the current matter, partners of Defendant's law firm are neither shareholders nor subject to unlimited liability but, rather, part of a limited liability partnership. (See Def.'s Reply at 8, 9). Thus, for the purpose of summary judgment, Defendant has failed to assert sufficient facts to support the legal conclusion that Defendant's law firm partners are not employees.

Regarding the issue of "of counsel" attorneys, the Court is similarly unable to determine at this stage of the litigation whether Defendant's "of counsel" attorneys are independent subcontractors rather than employees. There has been insufficient evidence offered by Defendant to determine the employment status of Defendant's "of counsel" attorneys. Applying the foregoing criteria, the Court is unable to determine whether the work performed by the "of counsel" attorneys takes place on the premises of the law firm, whether the law firm exercises any control over the "of counsel" attorneys or has the power to fire, hire or modify the employment condition of the employees of the "of counsel" attorneys, or whether the "of counsel" attorneys could refuse to work for the law firm and instead work for other general contractors.

Therefore, a genuine issue of material fact remains as to whether the partners and "of counsel" attorneys are employees of Defendant law firm under FMLA. Although both parties recognize that Defendant has employed on or about forty-five (45) employees at all times relevant to this matter, there is an issue of material fact as to whether the five (5) partners, the three (3) "of counsel" attorneys, and other part-time workers can be considered employees under FMLA. Based on Plaintiff's affidavit, Exhibit "E", Plaintiff has demonstrated that there is a need

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and pitfalls attributable of the corporation.

to conduct further discovery to determine whether Defendant employs fifty (50) or more employees. Hence, Defendant's Motion for Summary Judgment on Count VI will be dismissed as premature, without prejudice, for reinstatement at the close of discovery.

### **III. MOTION TO STRIKE**

Defendant moves to strike language in Counts I and V, ¶¶ 34(d) and 55(d) respectively, demanding over \$100,000.00 in compensatory and punitive damages, because it exceeds the damage award allowed under Title VII. Defendant argues that Title VII does not allow damages to exceed more than \$50,000.00, if a defendant has had fewer than one-hundred and one (101) employees at all relevant times.

Plaintiff concedes Defendant's argument, but asserts that Defendant lacks authority for a motion to strike. Plaintiff suggests that Defendant should answer the complaint and raise the issue by affirmative defense. Furthermore, Plaintiff argues that the issue is insignificant and Defendant suffers no prejudice by simply answering the complaint.

Contrary to Plaintiff's argument, Fed.R.Civ.P. 12(f) authorizes a party to move for the striking of any insufficient defense, or redundant, immaterial, impertinent or scandalous matter, either before responding to a pleading or within twenty (20) days after service of the pleading upon the party. Motions to strike save time and expense by making it unnecessary to litigate claims which will not affect the outcome of the case. See United States v. Kramer, 757 F. Supp. 397, 410 (D.N.J. 1991). In order for a court to grant the motion, however, the movant must show that the allegations being challenged have no possible relation to the matter at issue and that the allegations may be unduly prejudicial to the moving party. North Penn Transfer, Inc. v. Victaulic Co. of Amer., 859 F. Supp. 154, 158 (E.D. Pa. 1994). While motions to strike are not favored,

they are proper if the prayer for relief asserted is unavailable under the applicable law or in excess of the maximum recovery permitted by law. Spinks v. City of St. Louis Water Div., 176 F.R.D. 572, 574 (E.D. Mo. 1997) (citations omitted).

In the present case, both Plaintiff and Defendant agree that the \$100,000.00 damage award requested by Plaintiff exceeds the maximum damage award of \$50,000.00 allowed in this case under Title VII.<sup>6</sup> Therefore, the challenged paragraphs of Plaintiff's Complaint are impertinent to the case because they have no relationship to the cause of action pled. Furthermore, the Court's failure to grant Defendant's motion would create unnecessary confusion and place an undue burden on Defendant to litigate a moot issue. Accordingly, Defendant's Motion to Strike ¶¶ 34(d) and 55(d) in Counts I and V will be granted.

An appropriate Order follows.

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

**KATHLEEN B.S. SIKO,**  
**Plaintiff,**

**v.**

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**CIVIL ACTION**

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<sup>6</sup> Title VII only allows a maximum potential compensatory and punitive damage award of \$50,000.00 against employers who have retained more than 14 or less than 101 employees at all times relevant to the challenged claim. See 42 U.S.C.A. § 1981(a)--(b)(3)(A). Both parties agree Defendant has not employed more than 101 employees at all times relevant to this claim.

**KASSAB, ARCHBOLD  
& O'BRIEN, L.L.P.**  
**Defendants.**

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**No. 98-402**

AND NOW, this 4th day of August, 1998 upon consideration of Defendant's Motion to Dismiss, Motion for Summary Judgment, and Motion to Strike, and Plaintiff's response thereto, IT IS HEREBY ORDERED that:

- (1) Defendant's Motion to Dismiss Counts I, II, III, IV, and V of Plaintiff's Complaint is DENIED.
- (2) Defendant's Motion for Summary Judgment regarding Count VI of Plaintiff's Complaint is DISMISSED as premature, without prejudice, for reinstatement at the close of discovery.
- (3) Defendant's Motion to Strike paragraphs 34(d) and 55(d) in Counts I and V of Plaintiff's Complaint is GRANTED.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.