

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

ANNE ELIZABETH ZIEGLER : CIVIL ACTION
and DEBRA ANN DeANGELO :
 :
v. :
 :
ANESTHESIA ASSOCIATES OF :
LANCASTER, LTD. : NO. 00-4803

MEMORANDUM ORDER

Plaintiffs have asserted claims for sex discrimination in employment in violation of Title VII and the Pennsylvania Human Relations Act. Both plaintiffs allege that defendant refused to make them partners because of their sex. Ms. Ziegler further alleges that she was terminated because of her sex and Ms. DeAngelo alleges that she was forced to resign because of her sex. Presently before the court is defendant's motion to dismiss for lack of subject matter jurisdiction.

Defendant is a professional corporation comprised of licensed anesthesiologists who practice in Lancaster County, Pennsylvania. According to the sworn declaration of Dr. Robert B. Falk, Jr., defendant's president, defendant operates in all respects as a partnership. Defendant's shareholders consider and refer to themselves as partners. They share equal ownership and equal voting rights in virtually all matters including hiring, termination, offers of partnership and contracting with outside parties. Partner status is limited to licensed anesthesiologists. The corporation requires a capital

contribution on the part of all prospective partners. All partners enjoy an equal share in the corporation's profits, and each partner is individually liable for his or her own acts of negligence.

According to Dr. Falk, defendant has occasionally hired "non-partner track" anesthesiologists, including plaintiffs, after a vote by the majority of a quorum of shareholders. These non-partner anesthesiologists enjoy neither the rights nor responsibilities of partners. Defendant also employs a small staff of support personnel. During the time of plaintiffs' employment, defendant was comprised of nineteen shareholders. Although the numbers have varied, it appears that defendant never staffed in any time period more than ten non-shareholder employees including support staff and non-partner anesthesiologists.

Title VII prohibits "employers" from engaging in various types of discriminatory practices. See 42 U.S.C. § 2000e-2. The Act defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees." 42 U.S.C. § 2000e(b). An "employee" is "an individual employed by an employer." 42 U.S.C. § 2000e(f). The requirement that an entity employ at least fifteen employees to be considered an "employer" is a jurisdictional prerequisite. See Simpson v. Ernst & Young, 100 F.3d 436, 439 (6th Cir. 1996) (ADEA case);

Podsobinski v. Roizman, 1998 WL 67548, *1 (E.D. Pa. Feb. 13, 1998); Daliessio v. Depuy, Inc., 1998 WL 24430, *1 (E.D. Pa. Jan. 23, 1998); Shepardson v. Local Union No. 401, 823 F. Supp. 1245, 1249 (E.D. Pa. 1993). It is undisputed that, excluding its shareholders, defendant employed less than fifteen employees during the pertinent period. The court's jurisdiction to adjudicate plaintiffs' sole federal claim thus depends upon whether defendant's shareholders can be considered employees for Title VII purposes.

When the factual basis of its jurisdiction is challenged, a court may look beyond the assertions in a plaintiff's complaint to extrinsic evidence without converting the proceeding to one for summary judgment. See Carpet Group Intern. V. Oriental Rug Importers, 227 F.3d 62, 69 (3d Cir. 2000); Berardi v. Swanson Mem'l Lodge No. 48, 920 F.2d 198, 200 (3d Cir. 1990). See also Dynamic Image Techs., Inc. v. United States, 221 F.3d 34, 37 (1st Cir. 2001); Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000). In such instances, however, a plaintiff should ordinarily be afforded an opportunity to support her jurisdictional assertions with affidavits or other proof. Berardi, 920 F.2d at 200.

In determining whether the shareholders of a professional corporation should be considered employees under

Title VII, courts in the best reasoned cases have looked beyond the formal organization of the corporation to the "economic reality" of its existence and operation. See Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996) ("[t]he better reasoned cases hold that the substance of the employment relationship determines whether an individual is an employee under Title VII"); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1990) (finding shareholder in professional corporation was in reality partner rather than "employee" for purposes of ADEA); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984) ("economic reality" of professional corporation indicates it functions like partnership and thus its shareholders are akin to employers rather than employees). See also Serapion v. Martinez, 119 F.3d 982, 987-88 (1st Cir. 1997).

From the sworn declaration of Dr. Falk, it appears that defendant's shareholders much more closely resemble partners who share ownership in an enterprise than employees. It is well settled that equal partners generally are considered employers rather than employees for Title VII purposes. See Hishon v. King & Spalding, 467 U.S. 69, 79-80 (1984) (Powell, J., concurring); Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997); Simpson, 100 F.3d at 443; Wheeler v. Hurdman, 825 F.2d 257, 263 (10th Cir. 1987). Because plaintiffs have not had an opportunity to pursue

jurisdictional discovery, however, the court will deny the motion without prejudice to renew should defendant determine that such is still appropriate at the conclusion of such discovery.

ACCORDINGLY, this day of June, 2001, upon consideration of defendant's Motion to Dismiss Plaintiff's Complaint (Doc. #5), **IT IS HEREBY ORDERED** that said Motion is **DENIED** without prejudice to renew following jurisdictional discovery on the question of defendant's status as an employer for Title VII purposes, which discovery may begin forthwith and shall conclude by July 16, 2001.

BY THE COURT:

JAY C. WALDMAN, J.