

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

EILEEN COYNE CLARK : CIVIL ACTION
: :
v. : :
: :
AMERISOURCEBEGEN CORPORATION; :
R. DAVID YOST; and :
AMERISOURCEBERGEN CORPORATION :
PENSION PLAN ADMINISTRATOR : NO. 04-04332-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

February 2, 2005

Plaintiff's complaint contains the following counts:
Count I, sex discrimination in violation of Title VII; Count II, sex discrimination under Title VII amounting to a hostile work environment; Count III, interference with plaintiff's rights under the FMLA and retaliation for asserting them; Count IV, sex discrimination under the PHRA; Count V, sex discrimination in violation of the Equal Rights Amendment of the Pennsylvania Constitution; Count VI, intentional infliction of emotional distress by the defendant Yost; and Count VII, ERISA violations.

The defendants filed motions to dismiss, whereupon plaintiff has withdrawn certain counts and has consented to dismissal of others. Defendants do not seek dismissal of Count I (sex discrimination in violation of Title VII), Count III (FMLA claim) or Count VII (ERISA claim). Plaintiff has withdrawn Count VI (intentional infliction of emotional distress). Thus, what remains to be decided is whether the following claims survive:

plaintiff's hostile work environment claims under Title VII (Count II) and Count IV (PHRA); and claims based upon the Equal Rights Amendment to the Pennsylvania Constitution (Count V).

A. Hostile Work Environment Claims

Defendants assert that plaintiff may not maintain claims for hostile work environment because she has not exhausted her administrative remedies with respect to such claims. Plaintiff's charges of sex discrimination were filed with the appropriate agencies on or about October 29, 2002, using the form supplied by the EEOC. That form did not contain a block specifically designated "hostile environment." But plaintiff attached a two-page recitation of each instance of gender-related ill treatment she received at the hands of her employer. Two years later, the EEOC issued plaintiff a right-to-sue letter. According to plaintiff, no investigation had actually been undertaken by the EEOC or the Pennsylvania Human Relations Commission, and the defendants were not even required to respond to the charges. The EEOC has issued its right to sue letter, so plaintiff must be deemed to have exhausted her administrative remedies with respect to claims fairly inferable from the facts submitted to the Commission. Whether those facts, if established at trial, would provide adequate support for a finding of hostile work environment is perhaps open to question, but I believe those issues should be resolved in the trial context. I am not

prepared to declare, as a matter of law, that plaintiff was not subjected to a hostile work environment.

B. The Equal Rights Amendment of the Pennsylvania Constitution

The Constitution of Pennsylvania provides, in Article 1, Section 28,

"Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

PA. CONST. art. I, § 28.

The defendants contend that there is no private cause of action against private individuals under this provision, but that "state action" is required. Concededly, there are some decisions that seem to support that view. On the other hand, the Third Circuit Court of Appeals, in Pfeiffer v. Marion Ctr. Area School Dist., 917 F.2d 779, 789 (3d Cir. 1990), has stated flatly "We are of the view that a private right of action is available for cases of gender discrimination under the Pennsylvania ERA." (Citing Bartholemew on Behalf of Bartholemew v. Foster, 115 Pa. Commw. 430, 541 A.2d 393 (1988), aff'd, 522 Pa. 489, 563 A.2d 1390 (1989); Welsch v. Aetna Ins. Co., 343 Pa. Super. 169, 494 A.2d 409 (1985)).

As the Pennsylvania Supreme Court has pointed out,

"The rationale underlying the 'state action' doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its

own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling."

Hartford Acc. & Indem. Co. v. Insurance Comm'r, 482 A.2d 542,549; 505 Pa. 571 (1984).

In my view, the real issue is not whether private individuals may be held liable under the ERA, but whether the Pennsylvania Human Relations Act is the mechanism by which the Pennsylvania constitutional provision is to be implemented in the employment context. In the circumstances of this case, it would seem that a violation of the PHRA would also constitute a violation of the constitutional provision, and vice versa. My colleague, Judge Kauffman, in Imboden v. Crowns Comm., 182 F. Supp. 2d 453 (E.D. Pa. 2002), refused to dismiss an ERA claim because it was not "preempted" by the previously-enacted PHRA. The question remains, however, whether there is any relief available under the constitution which is not also available under the statute, and vice versa. It should be noted that the Third Circuit, in Pfeiffer, supra, in remanding the case to the district court for trial, pointed out that "the district court may have to meet the question whether, if damages are available under Title IX, duplicative damages also may be available under the state ERA." Pfeiffer, 917 F.2d at 789. This is an issue which need not be resolved at this point, since the possibility of overlapping recoveries is not a basis for pre-trial dismissal.

For the reasons discussed above, Count VI will be dismissed; Count IV will be dismissed with respect to the pension plan administrator only; in all other respects, defendants' motion to dismiss will be denied.

An order follows.

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

EILEEN COYNE CLARK : CIVIL ACTION
: :
v. : :
: :
AMERISOURCEBEGEN CORPORATION; :
R. DAVID YOST; and :
AMERISOURCEBERGEN CORPORATION :
PENSION PLAN ADMINISTRATOR : NO. 04-04332-JF

ORDER

AND NOW, this 2nd day of February 2005, upon
consideration of defendants' motion to dismiss and plaintiff's
response, IT IS ORDERED:

1. Count VI of plaintiff's Complaint is DISMISSED.
2. Count IV of plaintiff's Complaint is DISMISSED as
to the defendant Amerisourcebergen Corporation Pension Plan
Administrator only.
3. In all other respects, defendants' motion to
dismiss is DENIED.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.