

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

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| KAREN J. WALSH | : | |
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| | : | CIVIL ACTION |
| Plaintiff, | : | |
| v. | : | |
| | : | |
| IRVIN STERN'S COSTUMES, et al | : | NO. 05-2515 |
| | : | |
| | : | |
| Defendants | : | |

MEMORANDUM

Baylson, J.

January 19, 2006

I. Introduction

Presently before this Court are: (1) a Motion to Dismiss, pursuant to F.R. Civ. P. 12(b)(6) and 12(b)(7), and/or for Partial Summary Judgment, and (2) a Motion to Strike Plaintiff’s Surreply Brief and Exhibits pursuant to F.R. Civ. P. 12(f), both filed by Defendants Irvin Stern’s Costumes (“Stern’s”), Pierre’s Costumes (“Pierre’s”) and Williamson Costume Company (“Williamson Costume”) (collectively “Entity Defendants”), as well as Joyce Williamson, and Richard Williamson (collectively “Individual Defendants”). Also, Plaintiff Karen Walsh (“Plaintiff” or “Walsh”) filed a Motion to File a Surreply. For the reasons set forth below, Defendants’ Motion to Dismiss will be granted in part and denied in part, Defendants’ Motion to Strike the Surreply will be denied and Plaintiff’s motion will be granted.

II. Background

A. Procedural Background

Plaintiff filed her original employment discrimination complaint on May 27, 2005, alleging her

former employer fired her three weeks after she advised management that she was pregnant.¹ Plaintiff filed an Amended Complaint on August 25, 2005. On September 26, Defendants filed their Motion to Dismiss/Motion for Partial Summary Judgment (Doc. No. 8). Plaintiff filed a Response (Doc. No. 10) on October 13, 2005, and Defendants filed a Reply brief (Doc. No. 12) on October 21, 2005. On November 7, 2005, Plaintiff filed a Motion for Leave to File a Surreply (Doc. No. 13). On November 15, 2005, Defendants then filed a Motion to Strike Plaintiff's Surreply Brief and Exhibits (Doc. No. 15), in opposition to which, in turn, Plaintiff submitted a brief on December 1, 2005 (Doc. No. 16). Defendants submitted one final Reply in Support of their Motion to Strike the Surreply (Doc. No. 17) on December 5, 2005.

B. Allegations in the Complaint

According to the Amended Complaint, Plaintiff worked as store manager for Defendant Irvin Stern's Costumes from December 1989 until her termination on November 21, 2003. On Monday, November 3, 2003, Plaintiff advised Defendants Joyce Williamson and Richard Williamson that she was expecting her first child. On November 21, 2003, Defendant Richard Williamson terminated her. He informed Plaintiff the decision was for business — and not personal — reasons, citing a fifteen percent decrease in Halloween sales from the previous year and a twenty-five percent year-to-date drop in sales.

Plaintiff avers that, in fact, through September 2003, Stern's sales were effectively even with 2002, information she knew as the former manager of the store. Additionally, she alleges that Defendants hired and/or gave increased salaries and responsibilities to non-pregnant employees shortly

¹This action arises out of Plaintiff's original claim filed with the Pennsylvania Human Relations Commission ("PHRC") on or about February 26, 2004, which was also filed with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff requested and received a right to sue letter from the EEOC before filing this lawsuit on May 27, 2005.

before and after terminating Plaintiff. Plaintiff also cites specific comments allegedly frequently made by Joyce Williamson, evincing hostility toward female employees getting pregnant, beginning several years before Walsh's pregnancy and continuing through and after her termination. Moreover, she avers that Joyce Williamson told employees and customers that Plaintiff left Stern's because she was pregnant. Finally, Plaintiff asserts that after she filed her initial civil complaint in federal court on May 27, 2005, Defendants threatened to accuse her of theft and seek criminal charges against her unless she withdrew the lawsuit. (Amended Compl. at ¶¶ 15-54).

The Amended Complaint sets forth four causes of action. The First Cause of Action asserts pregnancy discrimination and retaliation under the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) ("PDA"), which is a subset of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") against the Entity Defendants only. *Id.* at ¶¶55-59. The Second and Third Causes of Action allege the same against all Defendants under the Pennsylvania Human Relations Act, 43 P.S. § 951 *et. seq.* ("PHRA") and the Equal Rights Amendment to the Pennsylvania Constitution Article I, § 28 ("PERA"), respectively. *Id.* at ¶¶60-65. Finally, the Fourth Cause of Action asserts a common law abuse of process claim against all Defendants. *Id.* at ¶¶66-68. Plaintiff seeks relief in the form of injunctive relief, compensatory damages, punitive damages, attorneys' fees and costs and other relief as is reasonable and just. *Id.* at 12-13.

III. Jurisdiction and Legal Standard

A. Jurisdiction

This Court has federal question jurisdiction under 28 U.S.C. § 1331, as this action is brought pursuant to the PDA, 42 U.S.C. § 2000e(k), a subset of Title VII, 42 U.S.C. § 2000e *et seq.* This Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, to consider Plaintiff's state law claims. In the alternative, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332

because the matter in controversy exceeds \$75,000 and is between citizens of different states.

Venue is appropriate in this district, pursuant to 28 U.S.C. § 1391 because the claim arose in this judicial district.

B. Legal Standard

When deciding a motion to dismiss pursuant to F.R. Civ. P. 12(b)(6), the court may grant the motion only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief. Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183 (3d Cir. 2000). Accordingly, a federal court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001).

IV. Contentions

A. Contentions Regarding the Motion to Dismiss or for Summary Judgment

Defendants first argue that all claims made under the PDA/Title VII, the PHRA, and the PERA should be dismissed pursuant to F.R. Civ. P. 12(b)(6). They assert the pregnancy discrimination claims cannot survive because Plaintiff has failed to set forth sufficient facts supporting her claim of purposeful discrimination. (Def's Mem. at 6-10; Def's Reply at 1-2). Defendants also assert that the retaliation claims fail because Walsh cannot establish Defendants' conduct caused an "adverse employment action." (Def's Mem. at 10-13; Def's Reply at 2-5). Next, Defendants contend that Plaintiff's cause of action pursuant to the PERA must separately be dismissed under F.R. Civ. P. 12(b)(6) because the PERA does *not* provide a private cause of action for damages (Def's Mem. at 13-19; Def's Reply at 5-6). Additionally, Defendants argue Plaintiff is not entitled to relief for her abuse of process claim because a mere threat is insufficient to establish improper "use" of a legal process, and, in any event, the conduct was legitimately related to the value of Walsh's claims. (Def's Mem. at

19-20; Def's Reply at 7-8).

Second, Defendants urge that the entire Amended Complaint must be dismissed pursuant to F.R. Civ. P. 12(b)(7) because Plaintiff failed to join an indispensable party, BCA Employee Management Group, Inc. ("BCA"), who allegedly was Plaintiff's employer of record for the final three years she worked for Stern's. (Def's Mem. at 21-28; Def's Reply at 9-11).

Last, Defendants argue that in the alternative, summary judgment must be granted as to Plaintiff's PDA/Title VII claims because Defendant Stern's does not employ the requisite fifteen persons required by statute to support a claim under Title VII. (Def's Mem. at 28-39).

In response, Plaintiff argues that she has proffered numerous specific facts supporting her pregnancy discrimination claims, and that Defendants' actions amounted to an extortionate threat to Plaintiff's civil rights, a sufficient basis to maintain the retaliation claims. (Pl's Response at 2-7; Pl's Surreply at 2-4). Further, Plaintiff alleges that her PERA claim may proceed because the Third Circuit squarely pronounced that a private right of action is available for cases of gender discrimination under the Pennsylvania ERA. Walsh also argues that caselaw suggests that a threat to bring unauthorized action, even if not carried out, is sufficient to establish a prima facie case of abuse of process. *Id.* at 10-12. Next, Plaintiff's responds to Defendants' motion to dismiss under F.R. Civ. P. 12(b)(7) by arguing that BCA was merely a payroll/administrative contractor to Defendants with absolutely no involvement with her termination. (Pl's Response at 12-17; Pl's Surreply at 4-5). Finally, addressing Defendants' partial motion for summary judgment, Plaintiff argues it is premature, because she has had no opportunity to conduct discovery. (Pl's Response at 17-19).

B. Contentions Regarding the Motion to Strike Surreply Brief

Additionally, Defendants filed a Motion to Strike Plaintiff's Surreply Brief and Exhibits (Doc. No. 15) on November 14, 2005, and request this Court impose sanctions in connection therewith,

arguing: (1) it was untimely, (2) it is redundant of previously stated arguments, and (3) it states “unfounded allegations” of criminal and unethical conduct by Defendants. (Def’s Mem. to Strike Surreply at 4-7). Plaintiff counters that the brief was not excessively late, was short and limited to arguments raised by Defendants in their Reply, and the exhibits were legitimately related to the retaliation and abuse of process claims. (Pl.’s Br. in Opp. to Def’s M. to Strike Surreply at 1-2).

V. Discussion

At the outset, it is important to note that F.R. Civ. P. 8(a)(2) articulates the liberal notice pleading requirements in the federal courts. Rule 8 simply requires that a pleading include “a short and plain statement of the claim showing that the pleader is entitled to relief” F.R. Civ. P. 8(a). “Generally, in federal civil cases, a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim.” Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Weston v. Pennsylvania, 251 F.3d 420, 428 (3d Cir. 2001).

A. Employment Discrimination Claims

Plaintiff’s Amended Complaint presents three counts for pregnancy discrimination, arising under the PDA/Title VII, the PHRA and the PERA. Defendants move to dismiss these claims pursuant to F.R. Civ. P. 12(b)(6), asserting that Plaintiff has failed to set forth sufficient facts to support her claim of purposeful discrimination. (Def’s Mem. at 6-10; Def’s Reply at 1-2).

A prima facie case for gender discrimination requires a plaintiff to show that (1) she is a member of a protected class; (2) she was qualified for the job in question; (3) she suffered an adverse employment decision; and (4) circumstances surrounding the adverse decision support an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Weldon v. Kraft, Inc., 896 F.2d 793, 796 (3d Cir. 1990). Although each of these elements must be demonstrated to withstand

a motion for summary judgment, this requirement need not be satisfied at the point of a motion to dismiss. Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 511 (2002) (noting the McDonnell Douglas test “is an evidentiary standard, not a pleading requirement.”). Instead, the plaintiff must only present the “short and plain statement of the claim showing that the pleader is entitled to relief” established by F.R. Civ. P. 8(a)(2). Swierkiewicz, 534 U.S. at 512. Essentially, plaintiff must merely set forth facts sufficient to support an inference that the employer took an adverse employment action as the result of discriminatory animus. Weldon, 896 F.2d at 796.

Under this standard, Plaintiff’s pregnancy discrimination claims survive. Plaintiff argues, and the court agrees, that she has proffered numerous facts supporting her discrimination claims. (Pl’s Response at 2-3). Specifically, she details specific statements made by Joyce Williamson over the course of several years which, when viewed in the light most favorable to Walsh, evince hostility toward female employees getting pregnant. For example, Williamson allegedly remarked that she “hope[d] [Walsh] doesn’t plan on getting pregnant,” and if she did, Ms. Williamson “didn’t know what we’ll do with her because she won’t be able to work.” Amended Compl. at ¶¶36-37. Also, Plaintiff avers that Defendants hired and/or gave increased salaries and responsibilities to non-pregnant employees shortly before and after terminating Plaintiff. Furthermore, the temporal proximity between her pregnancy announcement and termination alone — a mere three weeks — certainly supports an inference that purposeful action was taken *because of* Plaintiff’s pregnancy. Plaintiff’s pregnancy discrimination claims survive this motion to dismiss.

B. Retaliation Claims

Walsh contends that, after she filed her initial federal complaint on May 27, 2005, Defendants threatened — via telephone and U.S. mail — to accuse her of theft and seek criminal charges against her unless she withdrew the lawsuit. Title VII and PHRA prohibit discrimination against an employee

in retaliation for filing an employment discrimination charge and/or participating in related proceedings. 42 U.S.C. § 2000e-3 (“Section 704(a)”); 42 P.S. § 955(d).

In order to make out a *prima facie* case for retaliation, a plaintiff must demonstrate that (1) the employee engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and (3) a causal link exists between the employee's protected activity and the employer's adverse action. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000). Walsh easily satisfies the first and third prongs of the *prima facie* case, in that (1) filing and pursuing an employment discrimination claim is clearly a protected activity, Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 201 (3d Cir. 1994) (Title VII claim); and (2) the Amended Complaint avers the threats were in direct response to filing the lawsuit. The second prong presents more of a challenge.

Defendants argue that in order to establish an “adverse employment action,” a former employee must demonstrate that the employer's action harmed *existing or future* employment opportunities. They contend that because Plaintiff was no longer employed by Stern's when the alleged retaliatory action occurred, and because the threat was never carried out, she cannot establish an adverse employment action took place. (Def's Mem. at 10-13). Plaintiff points to Third Circuit law that action against a former employee for exercising rights under Title VII may in fact be considered “adverse employment action.” (Pl's Response at 4-7).

Plaintiff is correct that both the U.S. Supreme Court and the Third Circuit have clearly held that the anti-retaliation provisions of Title VII confer *former employees* with a legal recourse against post-employment retaliation. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997) (holding the word “employee,” as used in anti-retaliation provision of Title VII, includes former employees); Charlton, 25 F.3d at 200 (former teacher could state a claim for retaliation arising out of post-employment attempts

to revoke her teaching license).

However, in order to establish an adverse employment action, the retaliation must bear some nexus to the plaintiff's employment; that is, it must affect the plaintiff's current or future employment opportunities. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997). In City of Pittsburgh, the Third Circuit held that in order to satisfy the "adverse employment action" element of a Title VII retaliation claim in cases not involving actual discharge or refusal to hire, the "[r]etaliatory conduct [must] alter[] the employee's compensation, terms, conditions, or privileges of employment, deprive[] him or her of employment opportunities, or adversely affect[] his [or her] status as an employee." Id. at 1300 (internal quotations omitted). Thus, "unsubstantiated oral reprimands" and "unnecessary derogatory comments" do not rise to the level of an adverse employment action for a retaliation claim. Id. at 1301 (holding that where, in alleged reprisal for filing an EEOC complaint, employer reassigned plaintiff police officer, restricted job duties, failed to grant her request to transfer, and orally reprimanded her, such conduct did not rise to the level of the "adverse employment action" required for a retaliation claim). See also Nelson v. Upsala College, 51 F.3d 383, 389 (3d Cir. 1995) (holding retaliatory conduct must affect the plaintiff's employment situation).

Had Defendants carried out their threat to file charges, it appears Plaintiff would have a colorable retaliation charge. This is because a theft conviction, arrest, or even an investigation could certainly adversely affect Plaintiff's future employment opportunities as a store manager in the retail job market. However, the mere threat to accuse her of theft and seek criminal charges against her, while questionable, simply did not result in any tangible adverse employment consequences to Walsh. See Crumpton v. Potter, 305 F. Supp. 2d 465, 475 (E.D. Pa. 2004) (summary judgment granted in favor of defendant on retaliation claim because mere *threat* to suspend plaintiff postal worker for filing an

EEOC grievance, which was not subsequently carried out, did not result in any tangible adverse employment action as required under City of Pittsburgh). Likewise, the very nature of an unfulfilled threat means Walsh can not prove that the Defendants' conduct impacted her current or future employment opportunities as City of Pittsburgh requires. Since she has failed to make out a prima facie case, Walsh's retaliation claims must fail.²

C. Pennsylvania Equal Rights Amendment Claims

In addition to asserting employment discrimination under Title VII and the PHRA, Plaintiff also states claims under the Pennsylvania Equal Rights Amendment ("PERA").³ Defendants contend this claim must fail because Pennsylvania does not recognize a private right of action for damages for PERA violations. Specifically, they argue that cases concluding that there is a private cause of action under the PERA — including dicta in a Third Circuit case — were wrongly decided. (Def's Mem. at 13-19; Def's Reply at 5-6). Plaintiff notes that the Third Circuit has squarely pronounced a right to pursue a private right of action under the PERA (Pl's Response at 7-10).

Specifically, Plaintiff relies on Pfeiffer v. Marion Center Area School District, 917 F.2d 779, 789 (3d Cir.1990), a case brought by a former student against a school district and others under Title IX to recover damages for dismissal from the National Honor Society because of her pregnancy. It is important to note that the Pfeiffer appeal followed a trial in which the district court found that the plaintiff was dismissed from the National Honor Society because of premarital sexual activity, and not

²Because the retaliation claims have been dismissed, we need not address Defendants' other arguments that first, the conduct was not retaliatory, because it directly related to the amount of damages at issue pursuant to the after-acquired evidence doctrine, and second, that Plaintiff waived her retaliation claims by failing to pursue them before the PHRC or EEOC.

³The PERA states that "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. 1, § 28.

because of gender discrimination, and this factual finding was affirmed. Id. at 784-85. However, the Third Circuit found that the district court had erroneously excluded evidence of premarital sex by a male member who was not dismissed from the Society. Id. at 786. The Circuit Court remanded the case for the purpose of the district court considering the proffered testimony, following which it would determine whether, once considering this testimony, the result would be changed. Id. The district court could find, after admitting the proffered testimony, that the dismissal was not motivated by discriminatory intent that violated Title IX and could then enter judgment again for the defendants.

In the final portion of the opinion, Judge Aldersert discussed but declined to decide whether the district court had erred in refusing to consider the plaintiff's constitutional claims, and also noted, as to plaintiff's assertion of a violation of the Pennsylvania Equal Rights Amendment ("PERA"), that if the district court should conclude, on remand, that there was no violation of Title IX, the plaintiff's ERA claim could be dismissed. Otherwise, the district court "may have to meet the question whether, if damages are available under Title IX, duplicative damages may also be available under the state ERA. We are of the view that a private right of action is available for cases of gender discrimination under the Pennsylvania ERA." Id. at 789 (citing Bartholomew v. Foster, 541 A.2d 393 (Pa. Commw. 1988), aff'd, 563 A.2d 1390 (Pa. 1989); Welsch v. Aetna Ins. Co., 494 A.2d 409 (Pa. Super. 1985)).

The cases which Judge Aldersert cites in support of the last sentence do not hold that PERA establishes a private right of action. Barthomview, which was affirmed without opinion, involved an administrative appeal as to insurance rates allegedly improperly based on gender, and has nothing to do with a private cause of action. The second case, Welsh, affirmed dismissal of a damages claim based upon allegedly improper rates because of gender, and does not contain any definitive holding that a private right of action exists under the Equal Rights Amendment of the Pennsylvania Constitution.

Moreover, the fact that the defendants in Pfeiffer included state actors may have motivated Judge Altersert's dictum about a private right of action being available for cases of gender discrimination under PERA. In the present case, the Defendants are not state actors. This Court notes each of these distinctions, in addition to the obvious fact that the sentence is dictum.

This Court, of course, needs to pay full respect to the holdings of the Third Circuit. However, when statements in Third Circuit cases are merely dictum, as with Pfeiffer's discussion of constitutional claims and PERA, they are not necessarily binding. Menell v. First Nat'l Bank (In re Menell), 37 F.3d 113, 114-15 n. 1 (3d Cir.1994) (finding unpersuasive cases cited in dicta by the Supreme Court); In re Conston, Inc., 181 B.R. 769, 774-74 (D. Del. 1995) (noting that while dicta may be instructive as to the position of a particular appellate panel, it is not binding on the lower Court). Our conclusion is supported by Powell v. Ridge, 189 F.3d 387, 402 (3d Cir. 1999), where the court noted that where claims are brought specifically under Title IX, district courts may not have to reach constitutional claims of gender discrimination brought under Section 1983. Another Third Circuit decision, Chester Residents Concerned for Quality Living v. SCIF, 132 F.3d 925, 932-33 (3d Cir. 1997) recognized the above-quoted sections of Pfeiffer as containing dictum and thus not binding on other panels of the Third Circuit.

It may be that the Third Circuit will squarely decide that a private right of action is available for cases of gender discrimination under the Pennsylvania ERA, or that Pennsylvania courts may so hold; however, such a holding has not yet occurred.

Although it is true that some district court judges within the Third Circuit have held a private right of action under PERA exists, see, e.g., Barrett v. Greater Hatboro Chamber of Commerce, Inc., 2005 WL 2104319, *4-5 (E.D. Pa. Aug. 19, 2005), this Court believes that its prior decision to the

contrary in Ryan v. General Machine Products, 277 F.2d 585, 595 (E.D. Pa. 2003), although overlooking the dictum in Pfeiffer, is still nonetheless a correct interpretation. Just as Ryan followed many other district court holdings, this Court's finding in Ryan has been followed by other judges, including by Judge Davis in EEOC v. Dan Lepore & Sons Co., 2004 WL 569526, at *2 (E.D. Pa. Mar. 15, 2004), specifically distinguishing the dictum in Pfeiffer.

In this case, the Plaintiff is being allowed to proceed under Title VII, and therefore, overlapping claims under PERA should be dismissed, particularly when there is substantial doubt as to whether a private right of action exists under PERA. Of course, if there is a definitive appellate ruling by a Pennsylvania court or by the Third Circuit during the pendency of this litigation, this Court will be open to reinstating Plaintiff's PERA claims.

D. Abuse of Process

Plaintiff alleges that the threats which were the basis of the retaliation claims, discussed *supra*, also subjected her to abuse of process. In order to state a claim for abuse of process, the plaintiff must allege that the defendant: (1) used a legal process against the plaintiff; (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. Douris v. County of Bucks, 2001 WL 767579, at *10 (E.D. Pa. July 3, 2001) (citing Gen. Refractories Co. v. Liberty Mut. Ins. Co., No. Civ. A 97-7494, 1999 WL 1134530, at *4 (E.D. Pa. Dec. 9, 1999)). The Supreme Court of Pennsylvania has stated that: “[t]he gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it . . . An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it” McGee v. Feege, 535 A.2d 1020, 1023 (Pa. 1987).

Defendants advance two arguments: first, that mere communication regarding criminal

prosecution, without tangible action, is insufficient to establish the improper “use” of a legal process prong and, second, the warnings were not for some unlawful object because they legitimately related to Plaintiff’s right to recover damages. (Def’s Mem. at 19-20; Def’s Reply at 7-8). Plaintiff counters that a threat to bring unauthorized action — in this case a threat to seek charges against her unless she withdrew her lawsuit — is sufficient under the law to satisfy the elements of an abuse of process claim. (Pl’s Response at 10-12). The Court agrees with Plaintiff.

An extortionate threat alone may support an abuse of process claim. Douris, 2001 WL 767579, at *10 (emphasis added) (stating the tort requires “some proof of a ‘definite act or *threat* not authorized by the process, or aimed at an objective not legitimate in the use of the process.”); Hart v. O’Malley, 647 A.2d 542, 551-52 (Pa. Super. 1994) (same). Further, in Gen. Refractories Co. v. Fireman’s Fund Ins. Co., 337 F.3d 297 (3d Cir. 2003), while holding an extortion-like purpose was not *required* to sustain an abuse of process claim, the Third Circuit noted conduct with the purpose of forcing plaintiff to abandon its claim would likely suffice to establish a claim. Id. at 306 n. 4. Other courts cite examples of actions for which recovery may be had under the abuse of process tort to include “extortion by means of attachment, execution or garnishment, and *blackmail by means of arrest or criminal prosecution.*” Douris, 2001 WL 767579, at *10 (emphasis added) (citing Russoli v. Salisbury Township, 126 F. Supp. 2d 821, 858 (E.D.Pa. 2000) and Bristow v. Clevenger, 80 F. Supp. 2d 421, 431 (M.D. Pa. 2000)). Thus, while Defendants may merely have “communicated the possibility of criminal prosecution,” if, as Plaintiff’s Amended Complaint clearly asserts, this conduct was undertaken to force her to abandon her claim, then Plaintiff has alleged sufficient “use” of process for the purposes of her prima facie claim.

Further, the Court finds that, at this stage, Defendants’ pronouncements that the warnings had a

proper purpose is of no matter.⁴ Certainly, the objectives of prosecuting a criminal theft are varied, and include punishment, deterrence, incapacitation, and rehabilitation. Here, taking all inferences in favor of the Plaintiff, she has clearly alleged the required element that Defendants threat to prosecute “perverted” these objectives because to get Plaintiff to forgo her right to sue is “not the purpose which it is intended by the law to effect.” McGee, 535 A.2d at 1023. Whether there was some other, legitimate motive is a disputed issue of material fact. to be resolved at later stages of this litigation. Given that we can only dismiss a claim if no set of facts consistent with the allegations would give rise to relief, Doe, 257 F.3d at 313, it is not appropriate to dismiss the abuse of process claim at the 12(b)(6) stage.

E. Failure to Include an Indispensable Party

Defendants move to dismiss Plaintiff’s entire Amended Complaint pursuant to F.R. Civ. P. 12(b)(7) because she failed to join a purportedly indispensable party, BCA Employee Management Group, Inc. ("BCA"). According to Defendants, BCA was Plaintiff’s employer of record for the last three years she worked for Stern’s. (Def’s Mem. at 21-28; Def’s Reply at 9-11). F.R. Civ. P. 19 determines when joinder of a particular person or party is compulsory. A Rule 19 inquiry is bifurcated. First, a district court must consider whether a party is “necessary” to an action under Rule 19(a). If the party is deemed necessary, then joinder must take place if feasible. If joinder is “not feasible,” then the court must apply Rule 19(b) to determine whether, “in equity and good conscience,” the party is

⁴In sum, Defendants argue that contrary to Plaintiff’s assertion that the threat had an improper purpose unrelated to the underlying lawsuit, in fact they had a legitimate right to make the threat because pursuant to settled caselaw, after-acquired evidence of theft could limit her right to damages and reinstatement. Thus, Defendants were merely communicating that continuing with the lawsuit would be unwise because her right to damages and reinstatement would be limited. Def’s Rep. at 3, 7-9 (citing, among other cases, McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352 (1995))

“indispensable” or whether the action should proceed without that party. If indispensable, the action must be dismissed for lack of subject matter jurisdiction. HB General Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1190 (3d Cir. 1996).

Under Rule 19(a), a party is “necessary” if: (1) in the party's absence complete relief cannot be accorded among those already parties, or (2) the party claims an interest relating to the subject of the action and is so situated that the disposition of the action in the party's absence may (i) as a practical matter impair or impede the party's ability to protect that interest or (ii) leave any of the entities already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.” F.R. Civ. P. 19(a); Manchester Partners, 95 F.3d at 1190. However, subdivision (a)(2)(ii) was “enacted to protect parties from a ‘substantial’ risk of multiple or inconsistent obligations, not merely a possible risk.” Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, 895 F.2d 116, 122 (3d Cir. 1990).

Defendants focus on subsection two of the second alternative, asserting that the absence of BCA as a party leaves them “subject to a substantial risk of incurring . . . inconsistent obligations by reason of BCA’s alleged participation in discriminatory actions.” Specifically, Defendants contend that Walsh’s allegation that payroll records did not include employees paid “under the table” directly implicates BCA. Finally, Defendants argue that although necessary, Plaintiff can not now add BCA as a party because her failure to include BCA at the PHRC and EEOC stage precludes her from doing so. (Def’s Mem. at 21-26; Def’s Reply at 9-11). Plaintiff responds that BCA, a “professional employer organization” (“PEO”),⁵ was merely a payroll contractor to Defendants, with absolutely no

⁵ Neither party to this case precisely defines a PEO, yet this seems critical to disposition of the issue of indispensability. The National Association of Professional Employer Organizations (“NAPEO”) states PEOs “enable clients to cost-effectively outsource the management of human resources, employee benefits, payroll and workers' compensation.”

involvement with any wrongdoing in general and with her termination in particular. (Pl's Response at 12-17; Pl's Surreply at 4-5).

It is well-settled that the Plaintiff is master of her complaint.⁶ Mints v. Educ. Testing Serv., 99 F.3d 1253, 1256-57 (3d Cir. 1996). Here, Walsh asserts that the Defendants alone controlled access to her employment by hiring and terminating employees, and Defendants alone caused her injury by firing her. Plaintiff makes no allegation that BCA in any way helped to create or maintain the employer's alleged discriminatory practices. Lewis v. B.P. Oil, Inc., 1990 WL 6116 (E.D. Pa. Jan. 26, 1990) (unions were not necessary and indispensable parties in Title VII case against employer, because plaintiff's claims rested on the *employer's* alleged discriminatory practices and made no allegation that the union in any way helped to create or maintain these practices). See also Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 531 (W.D. Pa. 1983), aff'd in part and vacated in part, 541 F.2d 394 (3d Cir. 1976). Finally, Defendants here have failed to indicate in any way *how* it would be subject to multiple, or inconsistent obligations if BCA is not a party to this case, and the court is unable to independently find one given the lack of any alleged wrongdoing by BCA. See, e.g., Legacy Wireless Servs., 314 F. Supp. 2d 1045, 1050-51 (D. Or. 2004) (Oregon PEO was not an indispensable party

NAPEO, What is a PEO?, available at www.napeo.org/peoindustry/definition.cfm. Moreover, NAPEO asserts that "once included in the PEO's workforce, . . . workers are protected by [federal, state, and local discrimination laws, [including] Title VII of the 1964 Civil Rights Act, Age Discrimination in Employment Act, ADA, FMLA, HIPAA, Equal Pay Act, and COBRA]." NAPEO, Who is responsible for employment laws and regulations?, available at www.napeo.org/peoindustry/faq.cfm#16. Providing more detail, another member of this court stated: "The PEO assumes substantial employer rights, responsibilities and risk and establishes and maintains a co-employer relationship with the client companies' workers. . . . Mash Enterprises, Inc. v. Prolease Atlantic Corp., 199 F. Supp. 2d 254, 255-56 (E.D. Pa. 2002).

⁶Given the "co-employer" relationship BCA likely acquired pursuant to the PEO contract, it seems Plaintiff *could* have joined BCA if she believed it engaged in prohibited conduct. However, the co-employer/PEO relationship does not force Plaintiff to do so.

where dispute was between plaintiff client and a second PEO). In sum, the unsupported allegations made by Defendants simply are insufficient to support a finding by this court that BCA is a necessary party under Rule 19(a).⁷ Defendants' motion to dismiss Plaintiff's Amended Complaint pursuant to F.R. Civ. P. 12(b)(7) is accordingly denied.

G. Summary Judgement on Title VII Claim

In the alternative to the grounds for dismissal asserted under F.R. Civ. P. 12(b), Defendants also move for summary judgment as to Plaintiff's Title VII claim on the grounds that Defendant Stern's does not employ a sufficient number of people to support Walsh's claim.

An "employer," as salutarily defined, must employ fifteen or more employees for twenty or more calendar weeks in the current or preceding calendar year to be subject to suit under Title VII. 42 U.S.C.A. § 2000e(b); Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 76 (3d Cir. 2003). The Third Circuit has held that the issue of whether an organization meets this fifteen-employee requirement is a substantive element of a Title VII claim, requiring its adjudication by a motion for summary judgment. Id. at 83. Nesbit also outlined a multi-prong test for establishing whether entities were sufficiently "integrated," and/or "consolidated" such that the number of employees should be aggregated for the purposes of determining the Title VII fifteen-employee minimum. Id. at 85, 87.

As a threshold matter, therefore, Walsh's case cannot survive summary judgment if her employer employed less than fifteen employees during the statutorily prescribed period, as Defendants argue. Plaintiff avers in her Amended Complaint that Stern's, Pierre's and Williamson Costume are all one integrated enterprise, which she in good faith believes together employs at least fifteen persons.

⁷Because we have determined that BCA is not a necessary party, our inquiry ends there. We need not assess whether the parties could feasibly be joined and/or whether BCA is an indispensable party under Rule 19(b).

Moreover, she contends summary judgment is premature, as she has had no opportunity to conduct any discovery. (Pl's Response at 17-19). Defendants present sworn affidavits "without question" establishing that the entities were not integrated, but even if they were, Defendants urge they together do not employ fifteen persons. (Def's Mem. at 28-39; Def's Reply at 12).

This motion indeed is premature. Defendant moved for summary judgment on the Title VII claim before the Court even scheduled a pretrial conference pursuant to Rule 16, Federal Rules of Civil Procedure. Thus, Plaintiff has had no opportunity whatsoever to previously obtain discovery on the issue of integration, the number of persons employed by Defendants, and the possible legal effect of being included in the PEO's workforce. See Supra n. 6. The Court finds that the Plaintiff has acted diligently, having attached the required F.R. Civ. P. 56(f) affidavit in accordance with Dowling v. City of Phila, 855 F.2d 136 (3d Cir. 1988), and stating what information is sought, how it would preclude summary judgment and why it has not previously been obtained.⁸ See Pl's Response, Ex. B. This Court concludes that Plaintiff must have an opportunity to take discovery, and that the Court cannot rule on the Defendant's Motion for Summary Judgment until a reasonable time for this discovery has been allowed. However, Defendant may renew this argument later in this litigation.

G. *Motion to Strike the Surreply Brief and Exhibits*

Finally, Defendants contend that Plaintiff's Motion for Surreply and its accompanying exhibits should be stricken under F.R. Civ. P. 12(f) because it: (1) was untimely (2) merely reiterates arguments asserted in early briefings and (3) states "unfounded allegations" of criminal and unethical conduct by

⁸In Dowling, the Third Circuit counseled that a party opposing summary judgment, on the grounds that discovery is essential, must file an affidavit pursuant to F.R. Civ. P. 56(f). Id. at 140. Plaintiff has done this, specifically seeking to investigate: (1) the number of "off-the-books" employees maintained by the companies, (2) whether Richard and Joyce Williamson should be considered "employees," and (3) the degree of operational and financial entanglement between the entities.

Defendants and their counsel. Moreover, Defendants request that the Court impose sanctions against Plaintiff's counsel for publicly filing exhibits in support of the Surreply brief.⁹ (Def's Mem. to Strike Surreply at 4-7).

This motion is meritless. It is fully within this Court's discretion to grant leave to file a Surreply where, as here, it includes information that enables this Court to more fully and fairly decide a particular issue. Plaintiff's Surreply brief was only four pages long and responded to new arguments posited in Defendants' Reply brief. Moreover, the allegedly "scandalous" letters were attached with a specific and legitimate purpose: they provide legal authority supporting Plaintiff's retaliation and abuse of process claims, both of which Defendants challenge. Accordingly, Defendants' Motion to Strike the Surreply and Exhibits (and corresponding request for sanctions) is denied. We also grant Plaintiff's Motion to File the underlying Surreply.

VI. Conclusion

Defendants' Motion to Dismiss/Motion for Partial Summary Judgment (Doc. No. 8) will be granted in part and denied in part, Plaintiff's Motion to File a Surreply (Doc. No. 13) will be granted, and Defendants' Motion to Strike the Surreply and Exhibits (Doc. No. 15) will be denied. An appropriate Order follows.

⁹The exhibits at issue are two letters previously sent by Plaintiff's counsel to the undersigned judge stating that the threats made by defense counsel that underlie the retaliation and abuse of process claims were criminal and unethical.

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

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|-------------------------------|---|--------------|
| KAREN J. WALSH | : | |
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| | : | CIVIL ACTION |
| Plaintiff, | : | |
| v. | : | |
| | : | |
| IRVIN STERN'S COSTUMES, et al | : | NO. 05-2515 |
| | : | |
| | : | |
| Defendants | : | |

ORDER

AND NOW, this **19th** day of January 2006, based on the foregoing memorandum and upon consideration of the pleadings and briefs, it is hereby ORDERED that Defendants' Motion to Dismiss/Motion for Partial Summary Judgment (Doc. No. 8) will be GRANTED IN PART and DENIED IN PART:

1. The retaliation claims in the First, Second, and Third Causes of Action are hereby DISMISSED WITH PREJUDICE;
2. The Third Cause of Action, alleging violations of the Pennsylvania Equal Rights Amendment, is hereby DISMISSED WITH PREJUDICE; and
3. As to all the other claims, the Motion to Dismiss/Motion for Partial Summary Judgment is DENIED.
4. Additionally, Plaintiff's Motion to File a Surreply (Doc. No. 13) will be GRANTED; and
5. Defendants' Motion to Strike the Surreply and Exhibits (Doc. No. 15) will be DENIED.

BY THE COURT:

/s/ **Michael M. Baylson**

MICHAEL M. BAYLSON, U.S.D.J.