

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

TERRY FOX,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
KEYSTONE TURF CLUB, INC.,	:	
BENSALEM RACING ASSOCIATION,	:	
INC., GARY PRESTAIGE, and ERIC	:	
BUFO,	:	
	:	
Defendants.	:	NO. 97-1424

MEMORANDUM AND ORDER

AND NOW, this 4th day of December, upon consideration of the motion of defendants Keystone Turf Club, Bensalem Racing Association, Inc. (collectively referred to as “Keystone” or “corporate defendants”), Gary Prestaige (“Prestaige”), and Eric Bufo (“Bufo”) (collectively referred to as “individual defendants”) to dismiss Count V of the amended complaint of plaintiff Terry Fox (“Fox”) for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) (Document No. 9) and the response of the plaintiff thereto, and having found and concluded that:

1. Fox filed a complaint in this Court on February 26, 1997 (Document No. 1), alleging that the defendants discriminated against her based on her sex and retaliated against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) and the Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 955(a) and (d). Fox also made claims in her complaint for wrongful termination and civil conspiracy. On April 7, 1997, after receiving information from Keystone that she had misidentified her employer in the complaint, Fox filed an amended complaint in order to substitute “Keystone Turf Club, Inc.” and “Bensalem Racing Association, Inc.” for “Turf Club, Inc.” as corporate defendants (Document No. 6);

2. Fox worked as a teller at Keystone from September 1991 to November 1991, when she was laid off because of slow business. In February of 1992, Fox was rehired as an admissions clerk, a job which required her to take an admission fee from incoming patrons. All money collected by the admission clerks was placed in the same cash drawer. Fox alleged in her amended complaint that there were problems with this system, which she brought to the attention of her employers, but the system did not change;

3. The core of Fox's complaint is her description of a series of sexual comments made to her by Prestaige and sexual advances made toward her by Bufo during her employment at Keystone, all of which she rejected. Bufo was Fox's immediate supervisor, and Prestaige was Bufo's immediate supervisor. When Bufo began dating another employee of Keystone in September of 1994, Fox alleged that she was asked to change her hours so that Bufo's new girlfriend could have her work schedule. Fox refused. Subsequently, Keystone fired Fox on the ground that the money in her cash drawer was short. Fox alleged this reason was merely a pretext for firing her because she ignored sexual comments and rejected sexual advances by Prestaige and Bufo and "reported improper and illegal activities at the Turf Club." (Pl.'s Amended Complaint ¶ 31);

4. The defendants have filed this motion to dismiss three counts of Fox's amended complaint. The defendants argue that Count V of the amended complaint, alleging a civil conspiracy, should be dismissed because Prestaige and Bufo, as employees, are agents of the corporate defendants, and thus cannot conspire with the corporate defendants because an entity cannot conspire with itself;¹

5. This Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1367;

6. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that "the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). A complaint should be

¹ Prestaige and Bufo also moved to dismiss Counts II and III of the amended complaint, which were claims against the corporate defendants, and Prestaige and Bufo, as employees of Keystone and in their individual capacities, for sex discrimination, sexual harassment, and retaliation in violation of Title VII. Prestaige and Bufo argued that individuals cannot be liable under Title VII. In Fox's response to the defendants' motion, she conceded that individuals cannot be liable under Title VII and agreed to voluntarily dismiss Counts II and III of her amended complaint against Prestaige and Bufo. A stipulation stating such was signed by the parties and ordered by Magistrate Judge Angell on May 29, 1997 (Document No. 12).

dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984);

7. To state a claim for civil conspiracy under Pennsylvania common law, a plaintiff must allege the combination or agreement of two or more persons to commit an unlawful act or perform a lawful act by unlawful means. See Thompson Coal Co. v Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979); Burnside v. Abbott Laboratories, 505 A.2d 973, 980 (Pa. Super. Ct. 1985); Slaybaugh v. Newman, 479 A.2d 466, 472 (Pa. Super. Ct. 1979). In addition, the plaintiff must allege that the defendant had an unjustified intent to injure or acted with malice. See Thompson Coal, 412 A.2d at 472; Rutherford v. Presbyterian-University Hospital, 612 A.2d 500, 508 (Pa. Super. Ct. 1992) (citing Thompson Coal);

8. Under Pennsylvania law, a corporation cannot conspire with itself or with its agents when they are acting on behalf of the corporation. “A single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves.” Id. at 508. However, a plaintiff may state a claim for conspiracy if the “agents or employees act outside of their roles as officers and employees of the corporation even in the absence of a co-conspirator from outside the corporation.” Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1328 (E.D. Pa. 1994) (applying Pennsylvania law); see also Denenberg v. American Family Corp. of Columbus, Ga., 566 F. Supp. 1242, 1253 (E.D. Pa. 1983) (denying a motion to dismiss a claim for civil conspiracy under Pennsylvania law because the plaintiff alleged that the acts of the employee defendant were done both as an agent of the company and on his own behalf). Cf. O’Neill v. ARA Services, Inc., 457 F. Supp. 182, 188 (E.D. Pa. 1978) (dismissing a claim of civil conspiracy against the corporation and its employees because inferences from the complaint indicated that the individual defendants were acting as agents of the corporation and “[n]othing in the present complaint suggest[ed] that defendants were at any time acting outside their roles as officers and agents of the corporation or that they were acting for personal motives.”);²

9. In Count IV of the amended complaint, which is incorporated in Count V, Fox alleged that Keystone fired her “with the specific intent to harm her in that said termination was made with no legitimate cause and with malice.” (Pl.’s Amended Complaint ¶ 42). In addition, Fox alleged in paragraphs 5 and 6 of her amended complaint that she was making claims against Prestaige and Bufo both

² Fox argues in the response to the defendants’ motion that an action for civil conspiracy “against a corporation and one of its shareholders may be maintained if the officer is acting in a personal capacity as opposed to an official capacity,” citing Robinson v. Canterbury Village, Inc., 848 F.2d 424, 431 (3d Cir. 1988). (Pl.’s Mem. at 5). The Court does not rely on the reasoning of Robinson because the decision was made in reference to a claim for conspiracy under 28 U.S.C. § 1985(3), not under the common law of Pennsylvania.

as employees of Keystone and in their individual capacities. While it is possible that Fox would be able to produce evidence to show that a connection existed between the alleged sexually harassing actions of Prestaige and Bufo and her termination by Keystone, through one of its agents acting in his official capacity, she has not pled facts indicating the existence of such a connection sufficient to state a claim for civil conspiracy in her complaint. Liberally construing the rather vague allegations of the complaint in favor of the plaintiff, I find that Fox has not specified any official agent of Keystone was involved in the conspiracy nor alleged a specific act that such an agent made in furtherance of the conspiracy, making the identity or the existence of the co-conspirators involved unclear at best. Thus, I find that Fox's allegations are insufficient to state a claim for civil conspiracy involving the corporate and individual defendants under Pennsylvania law; accordingly

it is hereby **ORDERED** that the motion to dismiss Count V of the amended complaint is

GRANTED. Count V of the amended complaint is **DISMISSED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that if the facts and Fed. R. Civ. P. 11 will allow, plaintiff may no later than December 29, 1997 file a second amended complaint reasserting and re-numbering the averments and counts of the amended complaint (except that claims against individuals for liability under Title VII should be removed from Counts II and III) and including a separate count asserting a claim of civil conspiracy consistent with the ruling in this Order to the extent that the facts and the law will allow. In that event, defendants shall file their answer to the second amended complaint no later than January 20, 1998. **IT IS FURTHER ORDERED** that if plaintiff elects not to file a second amended complaint, the case shall proceed upon the amended complaint giving full affect to the stipulation regarding Counts II and III and excluding Count V.

LOWELL A. REED, JR., J.