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U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION 01-D-276-N**
BALLARD REALTY MANAGEMENT COMPANY, INC., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Before the court is Defendants' Motion For Summary Judgment, which was filed on April 10, 2002. (Doc. No. 21.) Plaintiff Equal Employment Opportunity Commission and Plaintiff-Intervenor Pamela Jodie Harris ("EEOC", "Harris", and collectively "Plaintiffs") each filed a Response on April 29. (Doc. Nos. 23-24.) Defendants filed a Reply thereto on May 6. (Doc. No. 25.) After careful consideration of the arguments of counsel, the relevant law, and the record as a whole, the court finds that Defendants' Motion is due to be granted.

I. SUMMARY JUDGMENT STANDARD

The court construes the evidence and makes factual inferences in the light most favorable to the nonmoving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Adickes

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v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Summary judgment is entered only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). At this juncture, the court does not "weigh the evidence and determine the truth of the matter," but solely "determine[s] whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted).

This determination involves applying substantive law to the substantive facts that have been developed. A dispute about a material fact is genuine if a reasonable jury could return a verdict for the nonmoving party, based on the applicable law in relation to the evidence presented. See id. at 248; Barfield v. Brierton, 883 F.2d 923, 933 (11th Cir. 1989). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the non-moving party, which must designate specific facts remaining for trial and "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Judgment will be granted when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. See id. at 587.

II. DISCUSSION

The parties to the present action do not dispute that in the summer of 1998, shortly after Harris announced her pregnancy to her co-workers, her work schedule was cut back from forty hours per week to a mere sixteen. (Harris Aff. ¶ 2.) The caliber of Harris' overall skills as a leasing agent is likewise not contested. (Godwin Aff. ¶ 4.) Indeed, shortly before her schedule was altered, Defendant Ballard Realty Company presented Harris with an award entitled "Leasing Agent of The Quarter." (Pl. Ex. 3.) Nonetheless, Harris' hours were cut, so, unable to subsist on the diminished income, Harris resigned. (Harris Aff. ¶ 2.) Harris' replacement was not a pregnant woman. (Id.)

Plaintiffs bring the present cause of action under the Pregnancy Discrimination Act ("PDA") codified at 42 U.S.C. § 2000e(k). Substantively, the court analyzes the foregoing facts under the familiar McDonnell Douglas burden-shifting analysis. See Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1312-13 (11th Cir. 1994) (holding that analysis under the PDA is the same as that applied under Title VII). Prior to examining the merits, however, the court must address a jurisdictional issue. Namely, the court must determine whether Defendants can be considered Harris' employer under Title VII. See, e.g., Scarfo v. Ginsberg, 175 F.3d 957, 961 (11th Cir. 1999) (observing

that whether a defendant satisfies the statutory definition of "employer" is a threshold jurisdictional question); see also Laurie v. Ala. Ct. of Crim. Appeals, 88 F. Supp.2d 1334, 1336 (M.D. Ala. 2000) (in resolving the issue of subject matter jurisdiction, the court may weigh the evidence and resolve factual disputes which do not implicate an element of the cause of action).[1]

Defendants contend that Harris' actual employer at the time relevant to the present cause of action was, in fact, Azalea Hills Apartment Suites, a property owner who merely hires Defendants to manage and supervise the property. (Mot. at 4.) As the parties do not dispute that Azalea Hills does not employ "fifteen or more employees," it cannot be considered an employer under Title VII even were it named as a defendant. See 42 U.S.C.

[1] The court expresses doubt as to whether a defendant's status as an employer should be treated as a jurisdictional question, particularly in matters such as the present one where the question is highly fact-intensive. Indeed, the Second, Seventh, and D.C. Circuits have offered persuasive arguments against such a conclusion, both out of institutional concerns, and due to plain statutory interpretation. See, e.g., DaSilva v. Kinsho Int'l Corp., 229 F.3d 358, 364-66 (2nd Cir. 2000) (offering reasons favoring the adoption of the approach employed by the Seventh and D.C. Circuits). Nonetheless, the court is bound by the precedent established by the Eleventh Circuit. But see Lyes v. City of Riviera Beach, 166 F.3d 1332, 1340 n.3 (11th Cir. 1999) (acknowledging that other courts "have doubted whether the number of employees is a jurisdiction question," but stating that "we will not take this occasion to re-examine our circuit precedent holding that counting employees is a jurisdictional inquiry").

§ 2000e(b). However, Plaintiffs assert that Defendants are estopped from arguing that they were not Harris' employer inasmuch as their Answer includes an admission that "Harris was employed by Ballard on August 26, 1996, as a leasing agent." (Compl. ¶ 12; Answer ¶ 12.) Of course, as Defendants point out, the court's jurisdiction over the subject matter of a lawsuit does not turn on a party's assent; rather, it depends on whether the allegations of the Complaint constitute a justiciable controversy arising under federal law. See, e.g., Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994). In other words, the fact that a defendant concedes the propriety of jurisdiction has no bearing on the purely legal question at issue. Moreover, Plaintiffs overlook the fact that Defendants explicitly denied the allegation that "[a]t all relevant times [Defendants] had at least fifteen employees." (Compl. ¶ 4; Answer ¶ 4.) To say the least, then, Defendants are not estopped from arguing that they were not Harris' employer for purposes of Title VII.

It is worth noting that the court does not construe Paragraph 12 of the Complaint as alleging jurisdiction; the paragraph merely alleges the date on which Harris became one of Defendants' employees. Defendants admitted that they hired Harris, a fact that is highly relevant to the issue of whether Defendants and the various properties they manage can be viewed

as an "integrated enterprise." Harriel v. Dialtone, Inc. 179 F. Supp.2d 1309, 1311-12 (M.D. Ala. 2001) (discussing factors considered by the court in determining whether two or more distinct entities should be viewed as a single employer under Title VII). To the extent that the fact itself is not a legal conclusion, Defendants are deemed to have admitted having hired Harris, and this fact may be considered in the integrated enterprise analysis. Cf. Almand v. DeKalb County, 103 F.3d 1510, 1513-14 (11th Cir. 1996) (distinguishing between an admission of fact and an admission of a legal conclusion).

Recognizing that the Eleventh Circuit accords "a liberal construction of the term employer," the court previously has found that multiple "ostensibly separate entities [that] are highly integrated with respect to ownership and operations" can be treated as a single employer under the integrated enterprise test. Harriel, 179 F. Supp.2d at 1311-12. There are four factors which courts consider in making this determination: "(1) interrelation of operations, (2) centralized control of labor operations, (3) common management, and (4) common ownership or financial control." Id. Not all factors need be present for the court to find that a single employer exists, nor is one factor alone controlling. Id. However, the second factor "is usually accorded greater weight than the others" given that the

substantive questions raised in Title VII lawsuits concern employment decisions. Id.

Defendants' admission is particularly relevant, then. While Defendants contend that Harris began her employment with Festival Apartments (Mot. at 2), the admission that Defendants hired her indicates some semblance of interrelation between labor operations between Defendants and the property they manage. Indeed, Defendants insist that Harris was "hired" by a property owner in South Carolina in March 1998, but that shortly thereafter she returned to Montgomery whereupon she "was transferred to Azalea Hills." (Id.) What Defendants fail to point out is the fact that the South Carolina property is partially owned by Bowen Ballard, Defendants' president. (Gillenwater Dep. at 50.) Moreover, that Harris was "transferred" implies the existence of an entity with the authority to so transfer Harris from one property to the next. This conclusion provides a context for understanding why Defendants, in answering the interrogatory as to why they cut back Harris' hours, referenced the alleged decline in her work output upon her return from South Carolina. (Id. at 48-49.) Viewed together the facts raise a strong inference of the existence of a centralized decision-maker who determines the

employment status of those employees working at properties managed by Defendants.

As to what entity or entities might constitute this decision-maker, it is noteworthy that in early 1998, when Harris was awarded "Leasing Agent of the Quarter," the origin of the award was printed in bold letters: Ballard Realty Company. (Pl. Ex. 3.) While Defendants insist they were merely responsible for the management of a loose conglomeration of separately owned properties, they seem to ignore the fact that such management was the area in which Harris worked. Indeed, it was common for the employees in this area to perform work for the various properties falling under the management scheme. (Godwin Aff. ¶ 9.) Similarly, members of Defendants' management regularly would go to the various properties to delegate and oversee the work product of the employees. (Harris Aff. ¶ 4; Gillenwater Dep. at 35.) Defendants likewise played a role in the implementation of uniform personnel policy at the various properties they managed. (Gillenwater Dep. at 66.) Furthermore, they were involved in the final hiring and firing decisions at the properties, as well as setting the salaries for the employees. (Godwin Aff. ¶ 7.)

With Defendants paying little heed to the distinctions between the various properties as they went about the day-to-day management of such properties, the court sees no reason it should

not do the same. This is particularly so when one considers the common ownership between the various entities. Indeed, in addition to serving as Defendants' president, Mr. Ballard has an ownership interest in every single property where Harris served as a leasing agent. (Doc. No. 24 Ex. 1.) This fact, when considered in light of the fact that Ballard Management Company signed Harris' paycheck and was responsible for submitting her tax information to the IRS (Pl. Ex. 1), is more than sufficient for the court to find both common ownership and interrelatedness of operations. See, e.g., McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933-34 (11th Cir. 1987) (finding interrelatedness when paychecks and bills are paid by parent, and where insurance policy goes through parent); see also Harriel, 179 F. Supp.2d at 1315 (finding an integrated enterprise when there is common ownership and the paychecks are sent from Defendant). Upon consideration of all the factors, the court is satisfied that Plaintiffs have more than proven that Defendants operate an integrated enterprise.

Accordingly, the court may consider the employees of each distinct entity in determining whether jurisdiction is appropriate. Defendants contest that Plaintiffs have not shown there to be even fifteen employees under Defendants' umbrella. It is curious that in the four years of involvement in the matter

Plaintiffs would not have successfully produced such evidence. However, Defendants have provided as much in documents attached to their Reply brief. Such paperwork shows the number of employees employed by both Festival Apartments and Azalea Hills over a number of years. Adding the number of employees listed on the documents for the years 1997 and 1998, the court concludes that the jurisdictional requisite has been satisfied under the payroll method as adopted by the Supreme Court. See Walters v. Metro. Educ. Enters., 519 U.S. 202, 207 (1997). It goes without saying that this number would be higher still were the evidence of other properties before the court. As this number more than exceeds fifteen, the court concludes that it may exercise jurisdiction over the present matter.

The court may now turn to the substance of Plaintiffs' claims. Plaintiffs can establish a prima facie case of discrimination under the PDA by showing that Harris (1) was pregnant, (2) was qualified for her position, (3) suffered an adverse employment action, and (4) suffered from a differential application of work or disciplinary rules. Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999). Given the award Harris received just months before she became pregnant and had her hours cut back, the court is satisfied that Plaintiffs have satisfied the first three aspects of the prima facie test.

However, it is not clear that the fourth factor has been satisfied.

While Plaintiffs point out that Harris was replaced by a non-pregnant woman, the Eleventh Circuit requires evidence that work rules were applied differently to non-pregnant employees. See Armstrong, 33 F.3d at 1317 ("While the PDA requires the employer to ignore the pregnancy, the employer need not ignore absences, unless the employer likewise ignores the absences of nonpregnant employees.").[2] Defendants have argued that Harris' hours were cut only because of her inability to keep regular work hours. Indeed, included in the record are Harris' employee evaluation form dated June 4, 1998, and a fax sent two weeks later noting that the problems highlighted in the evaluation form had not been improved upon.[3] (Pl. Ex. 2.) Plaintiffs have not

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[2] An exception to this requirement is permitted upon a showing that an employer violated a company rule which adversely impacted a pregnant employee's working conditions. Byrd v. Lakeshore Hosp., 30 F.3d 1380, 1383 (11th Cir. 1994). Nowhere has there been any allegation that Defendants acted inconsistent with the applicable personnel policy.

[3] As Plaintiffs point out, Defendants have not technically "produced" such evidence, and the court cannot grant a motion for summary judgment at this stage absent "the introduction of admissible evidence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 & 255 n.9 (1981) ("An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely . . . by argument of counsel."). Nonetheless the court sees no reason to ignore the evidence simply because it was produced by Plaintiffs rather than Defendants. In addressing a summary judgment motion, the court

pointed out a single individual employed by Defendants who was the subject of similar complaints that might serve as a comparator. Absent such evidence, Plaintiffs cannot meet the initial burden of establishing a prima facie case of discrimination. See Armindo v. Padlocker, Inc., 209 F.3d 1319 (11th Cir. 2000) (upholding district court's grant of summary judgment where plaintiff who was terminated for missing work offered no evidence comparator evidence).

While Plaintiffs do not so argue, the comparator requirement might be susceptible to the criticism that it conflates the issue of an employer's alleged nondiscriminatory reasons with the employee's prima facie case. However, the McDonnell Douglas Court did not intend for the burden-shifting framework to be an inflexibly, formalistic analysis. See Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 439-40 (1996) (insisting that the test not be "mechanized or ritualistic"). The burden is on Plaintiffs at all times to prove intentional discrimination, and the fact remains that, aside from

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must determine whether the evidence that a jury will consider is such that a reasonable juror could find in Plaintiffs' favor. See, e.g., Matsushita, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no issue for trial.") (internal quotations omitted and emphasis added). Undoubtedly a jury will be able to consider the evidence in question, so the court, too, will consider it presently.

the insistence that Harris was, in fact, a good worker, no evidence has been offered from a jury might infer that Defendants' perceptions to the contrary were merely pretextual. See Rojas v. Florida, 285 F.3d 1339, 1342 (11th Cir. 2002) ("[W]e must be careful not to allow Title VII plaintiffs simply to litigate whether they are, in fact, good employees."). As such, even assuming Plaintiffs could establish a prima facie case of discrimination, there is insufficient evidence to show that Defendants' statement that Harris was not dependable is in any sense not an "honest one." Id. Accordingly, summary judgment is appropriate.[4]

III. ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Defendants' Motion For Summary Judgment be and the same is hereby GRANTED. A judgment in accordance with this Memorandum Opinion and Order shall be entered separately.

DONE this 16th of May, 2002.

SENIOR UNITED STATES DISTRICT JUDGE

[4] It is worth pointing out that an employer need not necessarily accommodate a pregnant employee by offering a flexible schedule unless other non-pregnant employees receive similar accommodation. Armindo, 209 F.3d at 1321-22. Therefore, the fact that Harris' dependability issues might have arisen from her pregnancy does not mean that Defendants' response thereto constitutes discrimination.