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LEXUS OF SERRAMONTE,
SONIC AUTOMOTIVE, INC. and
FIRST AMERICA AUTOMOTIVE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

LEXUS OF SERRAMONTE, SONIC AUTOMOTIVE, INC., AND FIRST AMERICA AUTOMOTIVE,

Defendants.

Case No. C-05-0962 SBA

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Date (Proposed)[1]: Sept. 19, 2006
Time: 1:00 p.m.
Judge: Armstrong

[1] The EEOC filed its motion with an *ex parte* request to have the motion heard on September 19, 2006 because the hearing date was apparently not available with the court at the time the EEOC filed its motion. In its July 10, 2006 Order, the court advised the parties not to wait until the last minute to file dispositive motions, however the EEOC did so anyway.

1. INTRODUCTION

The EEOC brought this so-called "class action" sexual harassment suit on behalf of Annie Wei and a class of supposedly similarly situated female claimants who worked for defendant Lexus of Serramonte ("Lexus"), an automobile dealership located in Colma, California.

In its complaint, filed on March 8, 2005, the EEOC claims the alleged harassment took place between December 2001 and November 2002. See Declaration of David Hosilyk ("Hosilyk Decl."), filed herewith, Ex. A. Ms. Wei worked in the Sales Department at Lexus for a brief period from December 18, 2001 to early November 2002. On December 27, 2002, Wei filed her Charge of Discrimination with the EEOC and California's fair employment practices agency, the California Department of Fair Employment and Housing ("DFEH"). See Hosilyk Decl., Ex. B.) The EEOC claims the perpetrators of this alleged harassment were Wei's former managers and co-workers, all of whom worked in sales-related functions. Although the EEOC is seeking monetary and injunctive relief on behalf of Wei and a putative class of other similarly situated individuals, in the three plus years the EEOC has been investigating and litigating this case, the agency has identified only one other female who claims she suffered some sort of harassment.

The EEOC is now moving for partial summary judgment with respect to four of defendants' affirmative defenses. For the reasons set forth below, the court should deny the EEOC's motion.

2. LEGAL ARGUMENT

A. EEOC's Motion Should be Denied on Defendants' Tenth, Thirteenth, and Fourteenth Affirmative Defenses. These Defenses Were Appropriately Asserted to Limit the Size of the Potential "Class" of Claimants and Because First America Automotive, Inc. Was Not Named in The Charge of Discrimination And is Therefore Not a Proper Defendant in This Action.

1) Putative Class Claimants Must Be Limited to Those Individuals That Could Have Filed a Charge of Discrimination Within 300 Days of Annie Wei's Charge.

In California, a charging party seeking relief under Title VII who has also filed with the DFEH must file a charge of discrimination within 300 days of the alleged conduct giving rise to the charge. Sosa v. Hiraoka, et al., 920 F.2d 1451, 1455 n.1 (9th Cir. 1990). An EEOC Title VII suit – like a private suit – must be based on a timely EEOC charge. See, e.g., EEOC v. Pierce Packaging Co., 669 F.2d 605, 607 (9th Cir. 1982).

The EEOC claims that more than 30 days prior to the filing of this lawsuit, Annie Wei filed a charge of discrimination. The EEOC also claims that potential claimants need not have actually filed timely charges of discrimination in order for the agency to seek relief on their behalf. Defendants do not dispute these general contentions.

However, the EEOC may not seek relief on behalf of claimants who *could not* have filed charges of discrimination within 300 days of the charge in this case. Only those claimants who could have filed a charge at or after the time the earliest charge was filed by the class representative can be included in the class. Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980). This doctrine is referred to as the "single filing rule," which has also been adopted by other federal courts. See EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 839-840 (6th Cir. 1994); accord Logan v. West Coast Benson Hotel, 981 F. Supp. 1301, 1312-1313 (U.S. Dist. Or. 1997).

Thus, claimants who could not "piggy-back" onto Wei's EEOC charge and therefore

utilize the single filing rule exception to the administrative prerequisites and statutes of limitations under Title VII cannot be members of the class the EEOC purports to represent. Accordingly, Defendants' tenth, thirteenth, and fourteenth affirmative defenses apply to the extent that the EEOC may only seek remedies on behalf of those claimants that could have filed charges of discrimination in the same time frame as Annie Wei.

2) First America Automotive, Inc. Was Not Named in the Charge of Discrimination and May Not Be Sued as a Defendant in This Lawsuit. At the Very Least, There is A Dispute of Fact As to Whether First America Automotive, Inc. Is a Proper Defendant in This Case.

Without any definitive or admissible evidence, and based primarily on the uninformed opinions and speculation of the EEOC's attorney, the agency claims that while First America Automotive, Inc. was never named as a potential defendant in Wei's charge of discrimination, the entity is nevertheless a proper defendant in this court.

Under Title VII the EEOC may sue only a "respondent ... named in the charge." Sosa, supra, 920 F.2d at 1458. Ms. Wei's EEOC charge names only "Lexus of Serramonte and Sonic Auto" as respondents. See Hosilyk Decl., Ex. B. Similarly, EEOC's "Notice of Charge of Discrimination" was directed only to "Lexus of Serramonte and Sonic Auto." See Hosilyk Decl., Ex. C.

To get around this straightforward rule, the EEOC claims that First America Automotive, Inc. ("FAA"), Sonic Automotive, Inc. ("Sonic"), and Lexus of Serramonte ("Lexus") – all separate corporations – are "substantially identical." The agency also claims that FAA should have anticipated being named in the lawsuit, and that FAA had notice of Wei's EEOC charge. These arguments are based on the EEOC's attorney's personal and inadmissible opinions and unsupported conclusions about defendants' business relationships, inadmissible and inapplicable documents, and half-baked speculation about the supposed interrelationship of the three entities. As demonstrated below, the EEOC's argument falls down like a house of cards. At the very least,

there is a dispute of fact as to whether FAA may be named as a defendant in this case.

(a) There Is a Dispute of Fact Whether The Defendants Are "Substantially Identical."

The EEOC claims FAA is substantially identical to defendants Lexus and Sonic because in response to an interrogatory, defendants stated that:

> Lexus of Serramonte is a d/b/a for FAA Serramonte L, Inc., which is wholly owned by First America Automotive, Inc. First America Automotive, Inc. is wholly owned by Sonic Automotive, Inc., which owns a number dealerships in California and throughout the United States. Sonic Automotive, Inc. purchased First America Automotive, Inc. on or about December 1, 1999.

The only pertinent information that can be derived from this response is that a corporate entity, First America Automotive, Inc., wholly owned another corporation, FAA Serramonte L, Inc. (which was a d/b/a for Lexus of Serramonte), and that in 1999, Sonic bought and wholly owned First America Automotive, Inc. That's it. This brief and generic description of the indirect relationship as to ownership of different corporate entities does not even begin to establish that they are "substantially related." There is no basis to make such a conclusion from the simple statement set forth above. Indeed, the fact that the above statement describes an indirect ownership relationship among the three entities in 1999 is simply not relevant given that the EEOC is seeking relief for harassment that allegedly took place at Lexus in 2001 and 2002.

The EEOC's already tenuous argument then degenerates into a discussion about unauthenticated and irrelevant corporate documents filed with the California Secretary of State. These documents, purportedly filed in 2005 and 2006, provide information about FAA Serramonte L, Inc. (Lexus of Serramonte) and FAA for the years 2006; there is also a document providing information about Sonic for the fiscal year ending December 31, 2004. See Esparza-Cervantes Decl., Ex. 2. There is nothing in the proffered documents showing the nature of defendants' business relationship, let alone their alleged relationship between December 2001 and

November 2002, the time frame the alleged harassment took place. Moreover, the documents attached as Exhibit 2 are not admissible evidence. The EEOC failed to authenticate or lay any foundation for the attached documents. See Defendants' Objections to Evidence.

The EEOC then argues that these inadmissible documents show that certain corporate officers were the same for all three entities during the irrelevant time periods of 2004 and 2006. The agency then concludes that because of this one similarity the court should find the entities "substantially related" for Title VII purposes under McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 (11th Cir. 1987). But McKenzie does not support the EEOC's position.

The standard to be employed to determine whether consolidation of separate potential employing entities is proper are the standards promulgated by the National Labor Relations Board: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. Childs v. Local 18, International Brotherhood of Electrical Workers, 719 F.2d 1379, 1382-1383 (9th Cir. 1983). Under both McKenzie and Childs, common management is but one factor to determine whether potential employers are substantially related. Similarly, common ownership is simply one factor in the analysis. See McKenzie, supra, 834 F.2d at 933.

Indeed, in McKenzie, the appellate court ultimately concluded that summary judgment was inappropriate and there were genuine issues of fact even where the trial court had determined that the two potential employers had "quite similar" ownership and a "significant degree of relationship." Id. Similarly, in Childs the Ninth Circuit refused to find the defendant union an employer where the plaintiff failed to prove any indicia of an agency relationship between the union and the local chapter. Childs, supra, 719 F.2d at 1382-1383.

Here, the EEOC has not even come close to establishing that FAA is substantially related to Lexus or Sonic.

On the other hand, there is a strong presumption that a parent corporation is not the employer of its subsidiary's employees. Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993). Defendant Lexus of Serramonte was a wholly-owned subsidiary of defendant FAA, a holding company, which was and still is a completely separate corporation. See Declaration of Vicki Sylvia ("Sylvia Decl."), filed herewith, ¶3. In 1999, Sonic purchased the stock of FAA, and therefore became the indirect owner of Lexus of Serramonte. Id. at ¶6. The dealerships indirectly owned by Sonic are similar to McDonald's franchises in that while Sonic may provide the dealerships with generic employee handbooks, Human Resources services, personnel forms, or negotiated group benefits, the individual dealerships operate as separate corporate entities where the General Managers of each dealership manage the day-to-day operations without any input from either defendants Sonic or FAA. Id. at ¶¶2, 4, and 5. Moreover, each store is required to pay a fee for the aforementioned administrative services provided by defendant Sonic. Id. at ¶5.

In addition, Sonic does not employ the employees that work for the dealerships. Id. at ¶7. Further, among other factors indicating the independence of the dealerships from either Sonic or FAA, the General Managers of each dealership are responsible for hiring and terminating employees (Id. at ¶4); each dealership is individually responsible for its own financial obligations including payroll, benefits, and litigation costs (Id. at 5); and each dealership produces its own financial reports based on each particular automobile manufacturer's requirements without input or control by defendants Sonic or FAA. Id. at 4. Similarly, the dealerships owned by Sonic are franchised new car dealerships that are franchised by a particular automobile manufacturer. Id. at 9. They are not franchised by defendants FAA or Sonic. Id.

Based on nothing more than the EEOC's own opinions of defendants' business relationship, unauthenticated documents, and hearsay statements by the EEOC's attorney based

on deponents' alleged testimony (no transcripts provided), the agency concludes that defendants are interrelated entities such that FAA should be included as a proper defendant employer in this case. As demonstrated above, defendants Lexus of Serramonte, Sonic, and FAA are far from being integrated businesses. At the very least, there is a genuine issue of material fact on this issue. Accordingly, the EEOC's motion for summary judgment as to defendants' fourteenth affirmative defense must be denied.

(b) There Is A Dispute of Fact as to Whether FAA Should Have Anticipated Being Named in This Lawsuit.

For the reasons set forth above, there is undoubtedly a dispute of fact as to whether FAA should have "anticipated" being named in this lawsuit. Again, the EEOC relies on the fact that inadmissible corporate documents from 2004 and 2006 indicate that defendants had similar management at that time. As noted above, the documents are not instructive on the relevant time period (December 18, 2001 to early November 2002) and do not, in and of themselves, establish that FAA should have anticipated this lawsuit. The EEOC provides the court with no evidence that FAA even had notice of Wei's EEOC charge of discrimination, the EEOC's Notice of Charge of Discrimination, or prior notice of this lawsuit.

The agency then submits a W-2 form for Annie Wei for the taxable year 2002 showing First America Automotive as the employer. The EEOC does not authenticate the document establishing that it is Wei's W-2 form. Moreover, for the reasons set forth above, this single document does not establish that defendants Lexus, FAA, and Sonic were so interrelated such that FAA should be a defendant in this action, nor does it establish that FAA was notified of Wei's EEOC complaint or that FAA should somehow have anticipated being sued.

The EEOC also claims that defendants were represented by the same law firm during the EEOC's investigation (EEOC P&A, p.7, lines 15-17), further implying that FAA should have anticipated being sued. However, the undersigned's law firm represented only Sonic and Lexus

of Serramonte during the EEOC's investigation because those were the only corporate entities named in the proceedings. See Hosilyk Decl., Ex.'s B, C, D, and E. (For example, defendants' counsel of record informed the EEOC during the agency's investigation that counsel was representing only Lexus of Serramonte and Sonic Automotive, Inc. as those were the only respondents listed in the charge. Later, toward the end of the agency's investigation, the EEOC sent counsel a letter informing them that the case was being referred to the Regional attorney for litigation review. Again, Lexus of Serramonte and Sonic Automotive, Inc. were the only respondents mentioned.)

(c) There Is No Evidence That FAA Received Notice of Wei's EEOC Charge.

Finally, the EEOC makes the incredible statement that "FAA undoubtedly received notice of Ms. Wei's charge through Lexus of Serramonte and Sonic Automotive, Inc. due to the highly intertwined, interdependent nature of their business relationships." (EEOC P&A, p.8, lines 2-4.) Again, the agency seeks summary judgment on nothing more than speculation. There is no admissible evidence cited for the EEOC's proposition, and the agency's motion for summary judgment as to defendant's fourteenth affirmative defense must be denied.

B. The Unclean Hands Doctrine May Apply Even in A Case Brought By the EEOC.

The EEOC claims that the unclean hands defense (defendants' sixth affirmative defense) does not apply as a matter of law because the agency is allegedly acting in the public interest. Curiously, the agency failed to cite the Ninth Circuit case holding that the unclean hands defense actually may apply to the EEOC under certain circumstances. EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir. 1991).

However, the bigger problem with the EEOC's argument is that defendants are not alleging that the EEOC has unclean hands. The EEOC is pursuing this case and seeking remedies on behalf of Annie Wei and other unidentified "class" members. Accordingly, the remedies the

EEOC is seeking are only available to the extent the individual claimants can prove the elements of a Title VII claim and establish liability. Similarly, the individual claimants are also subject to defenses to Title VII claims, which could include the defense of unclean hands with respect to claims for equitable relief.

As the EEOC notes, the unclean hands defense "closes the doors of a court of equity to a party tainted with inequity or bad faith relative to the matter in which relief is sought, and derives from the principle that one 'who comes into equity must come with clean hands.'" Precision Instrument Mfg. Co.. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945).

In its complaint, the EEOC seeks various equitable relief, including injunctive relief prohibiting defendants from engaging in unlawful harassment and requiring defendants to institute and carry out policies, practices, and programs to eradicate the effects of alleged past and present unlawful employment practices. The agency also asks the court for any further relief it deems proper. See Hosilyk Decl., Ex. A., pp. 3-4.

1) There Is a Dispute of Fact As to Whether The Unclean Hands Doctrine Would Apply to Claimant Annie Wei.

Wei worked for Lexus for a brief period, from December 2001 to November 2002. Wei testified that she did not complain to members of upper management of Lexus of Serramonte about the alleged sexual harassment that took place at the dealership. In her deposition, Wei admitted that she could not even remember if she complained to Jan Tobin, the Controller, Steve Dessy, the Sales Manager, or Huck Hibbard, the General Manager, about sexual harassment in a meeting with Wei immediately before Wei left Lexus of Serramonte. See Hosilyk Decl., Ex. F, Wei's Depo. Tr. p. 251: 8-20.

This is important because defendants' fourth affirmative defense could limit or preclude Wei from receiving damages for the alleged harassment. If Wei cannot prove that she suffered a "tangible employment action" as a result of the alleged harassment, and defendants show they

exercised reasonable care to prevent the harassment and that Wei unreasonably failed to take advantage of any preventive opportunities by defendants or unreasonable failed to avoid harm otherwise, Wei cannot prevail on her Title VII claim. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-765 (1998); Faragher v. City of Boca Raton, 424 U.S. 775, 807-808 (1998). In such a case, it would be inappropriate for the court to order any injunctive relief prayed for by the EEOC, such as ordering defendants to develop a complaint procedure for employees, when Wei never used the procedure that was already in place.

Moreover, after Wei left her employment at Lexus of Serramonte, she claimed that she did not look for work in the automobile industry because it was a male-dominated industry. See Hosilyk Decl., Ex. F, Wei's Depo. Tr. pp. 49: 11-25; 50: 11-18. So, naturally, Wei took a job at the Gold Club, a strip club in San Francisco that features female dancers and bills itself as a "World Class Gentleman's Club." See Hosilyk Decl., Ex. F, Wei's Depo. Tr. pp. 64: 4-25; 67: 6-25; 68: 1-5; Ex. G (Gold Club internet advertisement). Accordingly, any claims Wei may now make that she is entitled to reinstatement or other unspecified equitable relief would be asserted in bad faith given the aforementioned admissions.

In addition, one of Wei's co-workers testified that Wei once blurted out the fact that she (Wei) was not wearing any underwear at work. See Hosilyk Decl., Ex. H., Eva Zee's Depo. Tr. 100: 19-25; 101: 1-11. Another co-worker testified how Wei "cussed like a sailor," told only men to "fuck off," and discussed how one of her friends was on a television dating show, met a guy, tongue kissed him, and was "f_____g [the] guy…." See Hosilyk Decl., Ex. I, Hellaire Depo. Tr., pp. 133: 3-12; 134: 1-2; 135: 1-10; 136: 18-25; 137-138:1-4.

Clearly the aforementioned behavior of Wei could lead a court to conclude that neither Wei nor the EEOC is entitled to equitable remedies because of the behavior. Accordingly, the court should deny the EEOC's motion for summary judgment on defendants' sixth affirmative

defense.

2) There is a Dispute of Fact As to Whether the Unclean Hands Doctrine Would Apply to Unidentified Class Members.

A more troubling issue about the EEOC's motion for summary judgment on defendants' unclean hands defense is that the EEOC is still trying to build its class at this late date in the litigation. Even though years of investigation and litigation have produced only two class claimants, the agency still believes there are other potential claimants out there.

Given that the EEOC is still trying to manufacture a class on the eve of trial, the EEOC may try to produce additional class members prior to trial. Not only would that prejudice defendants in general, but it would seem to be inappropriate to grant the EEOC's motion on the unclean hands defense when the defense might apply to as-yet-unidentified claimants. For this reason alone, the court should deny the EEOC's motion on defendants' unclean hands defense.

3. CONCLUSION

The EEOC has failed to establish that defendants' sixth, tenth, thirteenth, and fourteenth affirmative defenses fail as a matter of law. In many respects, the agency's motion sets forth half-baked arguments, attempts to rely on inadmissible "evidence," and misguides the court on significant issues. In contrast, defendants have demonstrated that there are triable issues of material fact on their affirmative defenses. Accordingly, the EEOC's motion for partial summary judgment should be denied.

Dated: August 29, 2006

Respectfully submitted,
/ s /
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