IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

SBARRO'S ITALIAN EATERY and TRI-SPUR INVESTMENTS, INC.,

Defendants.

CRYSTLE COLLINS,

Plaintiff in Intervention

vs.

TRI-SPUR INVESTMENT COMPANY, INC., *et. al.*

Defendants

MEMORANDUM OPINION & ORDER

Case No. 2:00-CV-774B

I. INTRODUCTION

Before the Court are defendants Tri-Spur Investment II, LLC's (the "LLC") and Berkley Corporation's ("Berkley") motion to dismiss plaintiff Crystle Collins' ("Collins") verified amended complaint in intervention and motion to dismiss plaintiff EEOC's claims against them.

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This case stems from alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* Former Tri-Spur Investment Company ("Tri-Spur") employees, Collins, Cindy Harris and Christine Byrne (the "charging parties") filed charges of discrimination with the EEOC alleging that Tri-Spur violated Title VII by subjecting them to sexual harassment or gender based discrimination and by retaliating against them when they complained about sexual harassment.

The EEOC filed a complaint on behalf of the charging parties and a class of women and Collins filed a complaint in intervention. Both original complaints named only Tri-Spur as the defendant. Subsequently, however, both the EEOC and Collins amended their complaints and added the LLC and Berkley as additional defendants – alleging that all of the defendants are a single employer pursuant to Title VII. In the present motions, the LLC and Berkley assert that they are not employers for purposes of Title VII and urge the Court to dismiss them from the case for lack of jurisdiction. Having considered the parties' briefs, oral arguments, and the relevant law, the Court issues the following memorandum opinion and order.

II. BACKGROUND

Tri-Spur owns various restaurant franchises, including the Sbarro's restaurant at the Fashion Place Mall ("Fashion Place Sbarro's"). Tri-Spur also operates under a management contract with Berkley whereby Tri-Spur manages the day-to-day operations of a Sbarro's restaurant located in the ZCMI mall and owned by Berkley ("ZCMI Sbarro's") . Tri-Spur is currently in the process of transferring the Fashion Place Sbarro's into the LLC.

Collins was employed by Tri-Spur and worked at the Fashion Place Sbarro's. She alleges that during the summer of 1997, while she worked at the Fashion Place Sbarro's, she was

sexually harassed by fellow Tri-Spur employee, Felipe Sanchez. There is some evidence that Sanchez also worked for Berkley at the ZCMI Sbarro's. Nevertheless, Collins was never employed or supervised by any entity other than Tri-Spur. Likewise, the charging parties in the EEOC's case never had an employment relationship with either Berkley or the LLC. They were all Tri-Spur employees and worked in restaurants owned by Tri-Spur.

III. DISCUSSION

In support of their motion, the LLC and Berkley argue that because neither entity had any kind of employment relationship with Collins or the charging parties, they are not employers for purposes of Title VII.[1] Collins and the EEOC respond that, under the so-called "single-employer" test, Tri-Spur, Berkley and the LLC should be considered a single employer because the operation, management, and ownership of all three entities are so intertwined. The EEOC further argues that Berkley is a proper defendant because one of the class members, Cynthia Fletcher Frampton, was employed by both Berkley and Tri-Spur and was harassed at the ZCMI Sbarro's by a person who was also employed by both Berkley and Tri-Spur.

The Court finds that no facts exist in this case that would support the application of the "single-employer test." The Tenth Circuit has enunciated a test to determine whether related companies constitute a single employer – focusing on factors such as interrelation of operations, centralized control over labor relation, common management, and common ownership or financial control. *See Worrell v. Henry*, 219 F.3d 1197, 1212 n. 3 (10th Cir. 2000). Nevertheless,

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[1] Under Title VII, an "employer"is a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. *See* 42 U.S.C. § 2000e(b).

there is no evidence that those factors apply to Berkley or the LLC to support retaining them as defendants in this action. An additional factual predicate, such as a showing that Berkley or the LLC exercised some amount of control over the labor relations of Tri-Spur, would be needed to support Collins' and the EEOC's arguments. That showing has not been made.[2]

Additionally, the Court finds no merit in the EEOC's contention that the alleged harassment of Ms. Frampton justifies retaining Berkley as a defendant. Berkley was never on notice that such a claim would be made. In fact, Ms. Frampton has never filed a sexual harassment charge against Berkley nor was any attempt of conciliation made on the part of the EEOC or Ms. Frampton. In short, an insinuation, ferreted out in a deposition, that a class member suffered sexual harassment, is not a sufficient reason to warrant the denial of the present motions – especially when that class member filed no formal charges.

Collins and the EEOC lastly argue that the LLC is a proper defendant under some kind of successor liability theory. The Court finds that the facts of this case are insufficient to warrant the application of any successor liability test. There is no indication that the predecessor corporation, Tri-Spur, will not be able to provide relief in this case. Furthermore, the current status of Tri-Spur's asset transfer is unclear. Therefore, the Court refuses to exercise its discretion at this time and declines to impose successor liability theory.

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[2]It is interesting to note that Tri-Spur employs more than 15 individuals, making it an "employer" for purposes of Title VII. Thus, the only apparent reason for retaining Berkley and the LLC – other than having two additional defendants in the lawsuit – would be to increase the damage amounts available to the plaintiffs. *See* 42 U.S.C. § 1981a(b)(3) (capping damages based on the number of employees). In anticipation of this very issue, Tri-Spur offered to stipulate that it employed more than 100 individuals, thereby allowing plaintiffs a higher damage cap than might have otherwise been available.

IV. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in defendants' briefs, defendants' motion is GRANTED – dismissing Berkley and the LLC from this action.

DATED this 7th day of March, 2002.

Dee Benson
United States District Judge

alp

United States District Court
for the
District of Utah
March 12, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:00-cv-00774

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