IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Equal Employment Opportunity Commission, Plaintiff, v. Graves Environmental & Geotechnical Services, Inc., Defendant.	C.A. No. 1:00-373-22 **ORDER ON OBJECTIONS TO REPORT AND RECOMMENDATION**
Bette Kane, Intervenor, v. Graves Environmental & Geotechnical Services, Inc., Graves Construction Services, Inc., Graves Water Services, Inc., Graves Drilling Services, Inc. and Graves Engineering Services, Inc., Defendants.	

Cmc #1

This matter is presently before the court on objection of Defendant, Graves Environmental & Geotechnical Services, Inc. (hereinafter Graves Environmental), to certain portions of the Report and Recommendation (Report) entered on March 4, 2002, by The Honorable Joseph R. McCrorey, United States Magistrate Judge. In light of the nature of the underlying determination, this court will treat the objection as that of all of Defendants (collectively Graves Corporations).[1]

[1] Plaintiff, the Equal Employment Opportunity Commission (EEOC), suggests in its responsive brief that the filing of this objection on behalf of only Graves Environmental constitutes a waiver of any right to object that might be available to the other Defendants: Graves Construction Services, Inc., Graves Water Services, Inc., Graves Drilling Services, Inc., and Graves Engineering

Defendants object to those portions of the Report which recommend that Defendants' motion for summary judgment be denied and that the motions of Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), and intervenor, Bette Kane ("Kane"), be granted in part. Specifically, Defendants object to the Magistrate Judge's recommendation that this court find, as a matter of law, that Graves Environmental, or the Graves Corporations collectively, should be treated as an "employer" subject to coverage under the provisions of Title VII, 42 U.S.C. § 2000e *et seq.* This is a critical threshold issue as it is a predicate to this court's assertion of subject matter jurisdiction. Defendants also object to the Magistrate Judge's failure to recommend that all, or at least some, of Ms. Kane's claims be time barred for failure to file a timely administrative charge with the EEOC or relevant state agency.[2] Finally, Defendants object to the Magistrate Judge's refusal to recommend dismissal of Kane's claims based on what Defendants characterize as false deposition testimony.

Cmc #2

For the reasons discussed more fully below, this court concludes that neither party is entitled to summary judgment on the issue of whether Defendants meet the statutory definition of employer. This court further concludes that, because this is a jurisdictional matter, it should be resolved by pretrial evidentiary hearing. While this court will not prejudge the question, it may be appropriate

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Services, Inc. This court declines to construe the objection so narrowly, as the issues raised, including whether the various Graves Corporations should be treated as a single employer, are matters as to which a common answer is required.

[2] Portions of Defendants' objection on this point seem to assume that the Magistrate Judge concluded that all of Kane's allegations could survive under a "continuing violation" theory. As this court reads the Report, however, the Magistrate Judge expressly declined to address the question because he concluded that two of Kane's claims could survive to trial. Report at n. 6. This court will, therefore, construe Defendants' objection on this point as going to the Magistrate Judge's failure to address the continuing violation theory.

to certify the issue for interlocutory appeal in the event this court determines that jurisdiction is present.

This court adopts the Magistrate Judge's Report to the extent it recommends that Kane's claims relating to her termination and comments made to her within the six weeks preceding that termination not be treated as time barred. Going beyond that Report, to the matter which the Magistrate Judge declined to address, this court concludes that Kane cannot pursue recovery for earlier events based on a continuing violation theory, which is not to say that evidence of these events may not be subject to limited use at trial.

This court declines to impose dismissal as a sanction for any misbehavior of either Kane or out-of-state counsel for the EEOC. Nonetheless, as set forth below, this court concludes that Defendants are entitled to certain protections from any disadvantage which might result from any incompleteness or inaccuracy in Kane's testimony. The issue of counsel's behavior is also addressed below.

Cmc #3

STANDARD

This case was referred to the Magistrate Judge for pretrial disposition pursuant to the Local Rules of this district. The Magistrate Judge makes only a recommendation to this court. That recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber,* 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. *See* 28 U.S.C. § 636(b)(1).

To the extent the underlying motions are motions for summary judgment, this court applies the summary judgment standard in making its review of the portions of the Report to which objection is made. Fed. R. Civ. P. 56. The summary judgment standard is fully and correctly set forth in the Magistrate Judge's Report.

FACTS

A statement of facts is set forth on pages four through six of the Magistrate Judge's Report. While Defendants take issue with the ultimate conclusion drawn by the Magistrate Judge in reliance on this statement of facts, they do not challenge the accuracy of the statement itself. This court, therefore, finds the statement of facts as contained in the Report to be accurate and adopts that statement with the sole correction being to paragraph seven which incorrectly lists Graves Engineering, rather than Graves Environmental, as one of the four companies for which James Branch is the sole shareholder.

CMC #4

DISCUSSION

1. Existence of subject matter jurisdiction.

This court has subject matter jurisdiction over this action only if Kane's employer is subject to coverage under Title VII, 42 U.S.C. § 2000e *et seq.* To be covered by Title VII, an employer must have at least fifteen employees. 42 U.S.C. § 2000e(b). It is undisputed that the entity by which Kane was employed, Graves Environmental, had less than this number of employees. This court cannot, therefore, exercise subject matter jurisdiction over this matter unless Kane's actual employer, Graves Environmental, can be treated as part of a larger entity with the requisite number of employees.

Based on the degree of common ownership and interrelationship between the various Graves Corporations, the Magistrate Judge recommended that this court treat them as a single employer. Defendants argue that this court should decline to adopt that recommendation for two reasons. First, Defendants argue that the Magistrate Judge applied an incorrect legal standard. Second, Defendants argue that the Magistrate Judge misapplied the standard to the evidentiary record. In an argument that goes to both the standard and application of that standard, Defendants also argue that Graves Environmental cannot be held to be part of a larger entity because no other entity controlled its employment decisions, even if Graves Environmental controlled the actions of the other Graves Corporations.

Clearly, a court is not bound by an employer's own determination of whether it employs an adequate number of employees to be subject to coverage under Title VII. *See generally* Lex K. Larson, 1 Employment Discrimination §5.02 (Matthew Bender March 2001). Rather, the lack of coverage under Title VII is a matter on which the employer bears the burden of proof. Larson § 5.02[2] (citing *EEOC v. Protek of Albequerque, Inc.*, 49 F.E.P. 1110 (D.N.M. 1988)). While there may be some dispute as to precisely which standard should be applied to this determination, it is beyond dispute that there are circumstances in which related corporations may be treated as one and the same for purposes of determining whether an adequate number of persons are employed to invoke Title VII protections. *See, e.g., Hukill v. Auto Care, Inc.*, 192 F.3d 437 (4th Cir. 1999); Larson § 5.02[5].

The "integrated enterprise" test is one of the more common tests which courts have used to determine whether multiple related entities should be treated as a single employer. Under that test, the courts look at four factors: (1) common management; (2) interrelation between operations; (3)

centralized control of labor relations; and (4) degree of common ownership and financial control. *Hukill,* 192 F.3d at 442.

The Fourth Circuit has neither expressly adopted nor rejected the integrated enterprise test. *See Hukill*, 192 F.3d at 443 (declining to decide if the test should be used to determine coverage under the Family Medical Leave Act because the facts were not sufficient to support a finding that the employer was part of an integrated enterprise); *Johnson v. Flowers Indus., Inc.,* 814 F.2d 978, 980-82 (4th Cir. 1987) (recognizing that other courts had routinely applied the 'integrated employer' test, but declining to adopt it outright). Rather, in *Johnson*, the Fourth Circuit stated: "We need not adopt such a mechanical test in every instance; the factors all point to the ultimate inquiry of parent domination. The four factors simply express relevant evidentiary inquiries whose importance will vary with the individual case." *Johnson,* 814 F. 2d at 981 n*. The Fourth Circuit quoted this language in a footnote in *Hukill*, suggesting a continuing lukewarm view of the test. *Hukill* at n.7. In the same note, the Fourth Circuit referred briefly to the Seventh Circuit's recent rejection of the integrated employer test in *Papa v. Katy Indus., Inc.,* 166 F.3d 937, 939-40 (7th Cir. 1999). As the Fourth Circuit noted, that court had rejected the test due to the vagueness of three of the four factors and the "useless[ness]" of the fourth (common ownership). *Hukill* at n.7. The Fourth Circuit did not, however, further discuss the standard which the Seventh Circuit had chosen to apply. Neither did the Fourth Circuit indicate approval or disapproval of the *Papa* analysis, referring to the decision only as "interesting."[3]

CMC #6

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[3] The "test" adopted by the Seventh Circuit in *Papa* might better be described as a listing of three distinct circumstances in which that court would allow employees of one corporation to be treated as those of another: (1) when the traditional conditions for piercing the corporate veil are present; (2) when a corporation has split itself into multiple entities for the express purpose of

Defendants first argue that the Fourth Circuit's failure to expressly adopt the integrated enterprise test indicates that it is not the proper test to apply. Instead, based on that court's brief reference to *Papa*, Defendants suggest that this court should apply the test established by the Seventh Circuit in *Papa*.

While this court agrees that the available guidance is less than clear, it finds the comments from *Johnson* to suggest not that the integrated enterprise test should be rejected altogether, but that it should not be mechanically applied. Rather, the court should focus on whether one corporation dominated the decisions, particularly the employment related decisions, of another corporation. Further, this court finds the Fourth Circuit's reference to *Papa* to be so limited as to be of no guidance as to whether the Fourth Circuit would follow the Seventh Circuit's lead.[4]

Clue #7

This court does not, however, believe that the factual record is so clear and complete at this stage that either party is entitled to judgment as a matter of law on this issue regardless of which test is applied.[5] This court, therefore, concludes that the more appropriate course would be to conduct

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avoiding liability under the anti-discrimination laws; and (3) when the parent company has actually directed the discriminatory act, practice or policy about which a subsidiary's employee complains. *Papa*, 166 F.3d at 940-41.

[4] The only indication of the Fourth Circuit's opinion of *Papa* is the reference to it as "interesting." Such a reference is, at best, an indication of an intent to consider, not a predictor of an intent to follow.

[5] There is, for instance, evidence that all employment related decisions, including decisions to loan employees from one corporation to another, were made by Branch. Branch was not only the president of all of the Graves Corporations, but sole shareholder of all but one of them, and 80% shareholder of the last. Branch was also Kane's direct supervisor at Graves Environmental where all personnel records for all employees of all of the Graves Corporations were maintained. These personnel records were maintained in a common file arranged solely by employee name, not broken down by employer.

There is, on the other hand, evidence that some formalities were observed such that there

an evidentiary hearing relating solely to the jurisdictional issue of whether the Graves Corporations can, under either test, be treated as a single employer. This will allow for development of a complete evidentiary record on which this court can determine if either or both tests would result in a determination of coverage. Depending on the outcome of that hearing, this court may consider certifying the issue for interlocutory appeal.

One further argument which Defendants have advanced should also be addressed: the argument that because no other entity controlled the employment decisions of Graves Environmental, there can be no finding that Graves Environmental is part of a larger enterprise. Defendants appear to argue that this precludes a finding that Graves Environmental is an "employer" as defined by Title VII even if Graves Environmental controlled the actions of the other Graves Corporations such that the other Graves Corporations would be covered by Title VII. This court is not convinced that this is a valid argument.

First, the very concept of an integrated enterprise suggests that multiple, nominally distinct entities are treated as one and the same. This court can discern no reason why that assumption would run downstream only, leaving the "headquarters" corporation free of Title VII as to its own employees, while holding the subordinate corporations to be subject to the Act due to the actions of the exempt headquarters. *See generally Hukill* ,192 F.3d at 442 ("Under the 'integrated employer' test, several companies may be considered so interrelated that they constitute a single employer"). Further, while there is some language in *Papa* which might support Defendants' argument in this

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would likely be insufficient evidence for piercing the corporate veil. For instance, all of the Corporations apparently maintained separate bank accounts, albeit all maintained at Graves Environmental.

regard, there is also language to suggest a contrary result.[6] In any case, *Papa* did not address the question.

Without more authority, therefore, this court declines to accept Defendants' argument that there can be no finding of subject matter jurisdiction absent a finding that one of the other Graves Corporations controlled the employment actions of Kane's nominal employer, Graves Environmental. Should Defendants have additional authority on this point, they should file it pursuant to the briefing schedule set forth at the conclusion of this order.

2. Time Bar as to Claims.

Defendants do not dispute that Kane filed an administrative charge with the appropriate agency on October 6, 1997. This court concludes, as did the Magistrate Judge, that Plaintiff has submitted adequate evidence that sexually suggestive comments were made to her and that she was terminated after rejecting those suggestions both within the 300 days preceding the filing of the administrative charge. Claims based on these allegations are not, therefore, time barred.

Having reached this conclusion, the Magistrate Judge declined to address whether other allegations of earlier events would survive to trial under a continuing violation theory. This court believes that the better course is to address the question as it will be determinative of which claims

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[6] One of the two cases before the Seventh Circuit in *Papa* involved actions allegedly directed by a parent corporation, the other involved allegations relating to an affiliated group of corporations. The court found inadequate evidence in either case to establish any of the three circumstances it felt would justify treating multiple employers as a single employer. As to the third circumstance, the court held that: "There is no suggestion that the parent, or any other affiliate of [the actual employer], or the enterprise as a whole formulated or administered the specific personnel policies, or directed, commanded, or undertook the specific personnel actions, of which the plaintiffs are complaining." *Papa,* 166 F.3d at 942. While hardly determinative, this language might suggest a different interpretation of *Papa* from that advanced by Defendants on this point.

might be addressed at trial. After considering the arguments presented by Defendants and the EEOC's response on this point, this court concludes that no earlier events are independently actionable.

This is not, however, to say that some evidence of prior events may not be admissible in evidence, subject to appropriate limiting instructions, to give context to any conversations or events which occurred during the last six weeks of Kane's employment. Any ruling as to the extent to which such evidence may be used shall, however, be deferred until pretrial briefing of Motions in Limine.

3. Alleged misrepresentations by Kane.

Defendants also argue that the Magistrate Judge erred in not dismissing the action as a sanction for Kane's misrepresentations during her deposition. The alleged misrepresentations are in the nature of nondisclosure of prior similar allegations against another employer and nondisclosure of medical treatment Kane received for emotional injuries which allegedly resulted from the earlier discrimination. Defendants further argue that they were prejudiced by these nondisclosures or misrepresentations because they were unable to inquire as to these matters during discovery or were precluded from conducting additional discovery on these points. Defendants also complain that the nondisclosure has tainted expert testimony.

This court adopts the Magistrate Judge's Report to the extent it recommends against dismissal as an appropriate sanction. This is, in part, because it is not clear from the present record whether the nondisclosures were due to oversight or intentional. Whether the nondisclosures were intentional, as well as the proper remedy for any nondisclosure will, therefore, be subject to further inquiry during the evidentiary hearing scheduled before the court.

Regardless of Kane's intent, the nondisclosure should not be without consequence. Certainly, Kane should not be allowed to place Defendants at a disadvantage through her nondisclosure. The court will, therefore, consider allowing Defendants further discovery or other penalty to the extent they can specifically identify additional discovery which would have been conducted had they had the relevant information at an earlier time.[7] This would include further inquiry related to the nondisclosed information which would have been made during depositions already taken. Defendants shall submit such further request in the form of a new motion for additional discovery under the schedule set forth at the conclusion of this order.

To the extent it is determined necessary due to Kane's nondisclosure, this court will allow Defendants to supplement their expert's report and opinion testimony. Depending on the extent of any added opinions, and the degree of detail provided in any amended report, this court may, but will not necessarily, allow Kane to conduct a further deposition.[8] Defendants are cautioned, however, that they must limit any added or corrected opinion to that made necessary by the late disclosure. As above, the extent of the necessary further discovery shall be subject to discussion at the upcoming hearing.

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[7] On proper showing, this court will consider exclusion of all or a portion of a witness' testimony if further discovery at this stage will not cure the injury, such as if the witness is no longer available. At the conclusion of the action, this court may also consider shifting some or all of the costs and fees required by further discovery necessitated by the nondisclosure. As the first of these is a relatively severe sanction, a strong showing of prejudice will be required.

[8] This court recognizes that denial of further deposition to Kane would place her at a potential disadvantage. That disadvantage, however, is of Kane's own making and may be considered as part of any sanction this court may find appropriate. Whether or not the EEOC might be allowed to conduct further inquiry of Defendants' expert in the event Kane is not allowed to do so depends on whether any new opinion goes to an issue as to which the EEOC has a distinct interest from Kane.

This court will also address the issue of the admissibility of the testimony of any expert designated by Kane at the upcoming hearing. If Defendants demonstrate that Kane's expert's opinion, as previously designated and provided on deposition, is seriously tainted by inadequate or incorrect information which Kane should have disclosed, then that expert's testimony may be limited or excluded. The degree of the limitation or exclusion, and the extent to which Kane may be allowed to correct the deficiencies, if any, in her expert's testimony will be dependent on this court's findings on the issues of intent, prejudice, and the extent to which the nondisclosures may have impaired the accuracy of the expert's opinion.

In short, depending on the degree to which this court determines that intentional nondisclosures tainted the expert opinions previously given, Kane may have to do without an expert or may have her expert's testimony limited, without the right to cure the deficiency. Defendants shall, however, be allowed to supplement their expert's report and conduct such other discovery as this court determines is necessary to cure the nondisclosure regardless of Kane's intent.

4. Sanctions as to EEOC counsel.

Finally, this court finds it appropriate to comment on one matter as to which Defendants did not object, and that is the issue of sanctions for actions by EEOC's out-of-state counsel in signing the name of local counsel, without her permission, to documents filed in this court. The allegations appear to be largely undisputed and would, if true, violate both the local rules of this district and counsel's duty of candor to the court. Serious questions are also raised as to whether the actions constitute misrepresentations under the ethical rules applicable in this court and whether any impropriety was exacerbated by the refusal to correct the problem when requested to do so by local counsel.

While this court concurs with the Magistrate Judge's recommendation that dismissal or disqualification be rejected as a sanction, it does so only because either sanction could result in injury to one who was not a party to the violation of the rules. This court concludes, therefore, that the proper procedures to be followed are those set forth in the Rules of Disciplinary Enforcement for this district which do not require resolution as part of the present action. *See* Local Civil Rule 83.I.08 at RDE V(A). These issues shall not, therefore, be subject to further consideration as part of this action.

5. Hearing and Briefing Schedule

This matter shall be set for hearing on **May 30, 2002** in the Aiken Courthouse at 10:00 a.m. as to the following:

a. evidentiary hearing as to whether Graves Environmental or the Graves Corporations collectively may be treated as an "Employer" as that term is defined by Title VII;

b. evidentiary hearing as to the issue of whether Kane's nondisclosures were intentional;

c. to the extent raised by new motion, hearing as to the necessity for and scope of further discovery necessitated by any nondisclosure, including the need for supplementation of Defendants' expert's report; and

d. hearing as to the admissibility of testimony of Kane's expert.

Defendants shall file any motions or memoranda which are allowed or required by this order no later than May 1, 2002. The normal response and reply times as set forth in Local Civil Rule 7.06 shall apply to any responsive memoranda. In light of the May 30, 2002 hearing date, the normal deadlines will not be subject to extension.

CONCLUSION

Based on the foregoing, IT IS THEREFORE ORDERED that the Plaintiff's and intervenor's Motions for Summary Judgment (Doc. No. 52 & 54) are DENIED. Defendant Graves Environmental's Motion for Summary Judgment (Doc. No. 50) is, likewise, DENIED to the extent it seeks a ruling that Defendant Graves Environmental does not satisfy the definition of "employer" set forth in Title VII. This same motion is, however, GRANTED, in part, to the extent it seeks a dismissal of claims based on allegations of events occurring more than 300 days before October 6, 1997. The motion is DENIED in all other respects. This Defendant's Motion to Dismiss (Doc. No. 57) is also DENIED.

This court adopts the Report and Recommendation to the extent it recommends denial of any sanctions in the form of dismissal. The motion related to nondisclosures or misrepresentations by Kane is, however, granted in part as set forth above. (Doc. No. 71). The motion regarding improper signatures by EEOC counsel is denied to the extent it seeks any relief as part of this action (Doc. No. 66).

IT IS SO ORDERED.

Cameron McGowan Currie

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
April 11, 2002