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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
DAN LEPORE & SONS COMPANY and L.F. DRISCOLL COMPANY,	:	
Defendants.	:	NO. 03-CV-5462

MEMORANDUM ORDER

Presently before the Court is the Amended Motion to Intervene as Party Plaintiff Filed by Beth Anne Burroughs Pursuant to F.R.C.P. 24(a) (Dkt. No. 19). For the reasons that follow, Plaintiff's motion is GRANTED in part, and DENIED in part.

I. Factual Background and Procedural History

In 2003, Beth Anne Burroughs ("Burroughs") filed charges of discrimination with the Equal Employment Opportunity Commission (the "EEOC" or the "Commission"). (Compl. ¶ 6). On September 30, 2003, more than thirty days after Burroughs filed her charges of discrimination, the EEOC filed the instant action pursuant to Title VII of the Civil Rights Act of 1964, as amended, and Title I of the Civil Rights Act of 1991 alleging unlawful gender biased employment practices and retaliation. (See generally Compl.). The Commission alleges that the charging party, Beth Anne Burroughs ("Burroughs") was sexually harrassed by Defendant Dan Lepore & Sons Company's ("Lepore") foreman and male co-workers on two separate construction sites. The Commission also alleges that Burroughs was also subjected to disparate

treatment as a consequence of her gender when she was evicted by the general contractor, Defendant L.F. Driscoll Company ("Driscoll," Lepore and Driscoll collectively identified as "Defendants"), from the job site because she was not wearing safety glasses. Male employees who also failed to wear safety glasses and hard hats were not similarly evicted. (Id.) The Commission further alleges that, in retaliation for reporting the sexual harassment to Driscoll, Burroughs was not hired for future projects.

On October 10, 2003, pursuant to Federal Rule of Civil Procedure 24(a), Burroughs's filed a Motion to Intervene As Party Plaintiff. (Dkt. No. 2). On November 6, 2003, Burroughs filed an Amended Motion to Intervene As Party Plaintiff, adding an antitrust claim under the Clayton Act. (Dkt. No. 6). In her amended motion, Burroughs seeks to assert the following claims: (1) federal antitrust violations under the Sherman Act and the Clayton Act; (2) a state law claim for gender discrimination in violation of the Pennsylvania Human Relations Act ("PHRA"); and (3) violations of Article I § 28 of the Pennsylvania Constitution, which is commonly identified as the Pennsylvania Equal Rights Amendment ("PERA").

Burroughs asserts that her claims arise from the same operative facts as the claims asserted by the EEOC, and that to grant the motion to intervene would further the important interest of judicial economy. While the EEOC is amenable to intervention, Defendants oppose intervention on numerous grounds.

II. Legal Standards

Rule 24(a)(1) of the Federal Rules of Civil Procedure provides "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene." See Fed.R.Civ.Pro. 24(a)(1). Title VII provides

that "the person or persons aggrieved shall have the right to intervene in a civil action brought by the [EEOC]." See 42 U.S.C. § 2000e-5(f)(1); see also EEOC V. DPCE, Inc., 1990 WL 54995, at * 1 (E.D. Pa. April 25, 1990). The statue, however, does not grant an unconditional right to assert additional claims. See 42 U.S.C. § 2000e-5(f)(1); see also EEOC v. The West Co., 1986 WL 1239, at *3 (E.D. Pa. Jan. 27, 1986) ("The fact that [plaintiff] has an unconditional right to intervene in the EEOC's Title VII action, however, does not provide her with an unconditional right to bring state law claims in the same action."). Additionally, the right to intervene "presupposes the presentation of a cognizable claim that the intervenor would have standing to pursue." EEOC v. Victoria's Secret Stores, Inc., 2003 WL 21282193, at * 1 (Jan. 13, 2003) (citations omitted). Thus, a motion to intervene should be denied when standing is lacking or the complaint fails to present cognizable claims. Id.

42 U.S.C. § 2000e-5(f)(1) clearly grants to Burroughs the right to intervene this action. The right to intervene, however, is not coextensive with the assertion of additional claims. Thus, the narrow issues before the court concern the appropriate scope of Burroughs's intervention and whether the complaint asserts cognizable claims for which she has standing.

A. Antitrust Claims

In Count I of her proposed complaint-in-intervention, Burroughs asserts antitrust claims against Lepore and Driscoll pursuant to the Sherman and Clayton Acts, 15 U.S.C. § 1 et. seq. and 15 U.S.C. § 15 et. seq., respectively. Lepore and Driscoll argue that Burroughs's claims under the Sherman Act and the Clayton Act cannot be added because: (1) they impermissibly expand the scope of the Title VII litigation; (2) she lacks standing to assert claims under either Act; and (3) she fails to state a claim under either Act. (Defendant L.F. Driscoll's Motion in Opposition to

Plaintiff's Amended Motion Intervene at 3-6; Defendant Dan Lepore & Sons Company Motion in Opposition to the Amended Motion to Intervene of Beth Anne Burroughs at 1-3). Burroughs urges the Court to grant the Motion to Intervene and decide the issue of pendent jurisdiction only should Defendants file a Rule 12(b) motion. (Burroughs' Reply to Defendant Lepore's Motion Opposing the Intervention of Beth A. Burroughs at 1).

Neither the Sherman Act nor the Clayton Act "provide a remedy for what are in actuality Title VII claims." Daley v. St. Agnes Hospital, Inc., 490 F. Supp. 1309, 1317 (E.D.Pa. 1980) (citing Marchwinski v. Oliver Tyrone Corp., 83 F.R.D. 606 (W.D. Pa. 1979)); see also Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 429 (1986). Stated differently, "the type of injury redressed by Title VII is not related to the type of injury cognizable under antitrust laws, for [they provide] remedy for sex discrimination." Daley, 490 F. Supp. at 1318. Policy considerations also disfavor allowing plaintiffs to recast Title VII claims as antitrust claims: "[B]y simply phrasing their claim in terms of the malleable term 'competition' and bringing in a civil action sounding in antitrust, plaintiffs could easily circumvent the vital administrative procedure of Title VII and virtually eliminate the EEOC's role as conciliator, thereby frustrating a major policy behind the statute." Id., (quoting Monk v. Island Creek Coal Co., 1979 WL 266, at * 8 (W.D. Va. July 24, 1979)). In determining whether a plaintiff has standing to pursue antitrust claims "courts must analyze the question of antitrust injury from the viewpoint of the consumer of the product or services at issue" as antitrust laws were promulgated to protect competition, not competitors. See Hughes v. Halbach & Braun Indus., Ltd., 10 F. Supp. 2d 491, 494 (W.D. Pa. 1998) (citing Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S.Ct 897, 74

L.Ed.2d 723 (1983)).

Burroughs specifically alleges that Lepore and Driscoll acted in concert to "remove Burroughs from both the RPAC site and the Wharton School site on the false pretext of a minor safety infraction, after she tried to stop ongoing sexual harassment," (Burroughs's proposed complaint-in-intervention ¶ 38), and that this action is "ongoing and continuous and directed specifically at Burroughs in illegal retaliation for attempts to stop constant sexual harassment altering the terms and conditions of her employment." (Id. ¶ 45). Burroughs also alleges that as a direct and proximate result of Defendants' illegal action, she has suffered antitrust injury, loss of income and earning capacity, and continues to be excluded from relevant job markets. She seeks treble damages, among other relief, for Defendants' "illegal concerted action in restraint of trade and boycotting her, based on her gender." (Id. ¶ 43).

On its face, Burroughs's proposed complaint-in-intervention fails to allege the type of injury antitrust laws were designed to remedy. See Daley, supra; Hughes, supra. Although Burroughs alleges that she suffered "antitrust injury," it is clear from a reading of the proposed complaint-in-intervention that in actuality she seeks a remedy for injury to competitors, not to competition. Indeed, Count I of Burroughs's proposed complaint-in-intervention attempts to recast Title VII claims into purported violations of the Sherman and Clayton Acts. Simply stated, Burroughs alleges specific acts of sexual discrimination which result in the type of injury redressed by Title VII, not the type of injury cognizable under antitrust laws. Accordingly, Burroughs's proposed complaint-in-intervention fails on its face to allege antitrust injury.

Even if Burroughs's proposed complaint-in-intervention alleged antitrust injury, inclusion of antitrust claims in the instant action would unduly complicate the proceedings and shift the

focus the litigation from the EEOC's Title VII claims. See Equal Opportunity Employment Commission v. Rekrem, Inc., 199 F.R.D. 526, 529 (S.D.N.Y. 2001) (citing EEOC v. National Cleaning Contractors, Inc., 1991 WL 161364, at *2 (S.D.N.Y. 1991)). Accordingly, Burroughs's motion to intervene to litigate the antitrust claims presented in Count I is denied.

B. Pennsylvania Human Relations Act Claim

In Count II of her proposed complaint-in-intervention, Burroughs asserts claims against Driscoll for violations of the PHRA. Burroughs alleges that Driscoll violated the PHRA by aiding and abetting Lepore in its illegal retaliatory and discriminatory treatment. (Burroughs Motion at ¶ 49). Driscoll argues that Burroughs's claim under the PHRA cannot be properly added because it fails to meet the requirements for exercising pendent jurisdiction. Specifically, Driscoll argues that Plaintiff's "aiding and abetting" theory contradicts the EEOC's theory that Driscoll violated Title VII by treating Burroughs differently because of her sex. (Defendant L.F. Driscoll's Motion in Opposition to Plaintiff's Amended Motion to Intervene at 6). Burroughs contends that the Court should grant her motion to intervene and reserve judgment on the issue of pendent jurisdiction until receipt of a Rule 12(b) motion. (Burroughs' Reply to Defendant Lepore's Motion Opposing the Intervention of Beth A. Burroughs at 1).

Burroughs has an unconditional right to intervene in the EEOC's Title VII action; she does not, however, have an unconditional right to bring state law claims in the same action. See EEOC v. The West Co., 1986 WL 1239, at *3. The "[e]xercise of pendent jurisdiction requires an examination of both constitutional and discretionary considerations." Id., (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 725-26 (1966)). In assessing whether to exercise pendent jurisdiction, the Court must consider the following three factors: (1) whether the pendent

state claims and the federal claim on which jurisdiction is based derive from a common nucleus of operative facts; (2) whether the exercise of federal jurisdiction over the state law claims or the pendent party would violate a specific federal policy which seeks to limit the scope of federal jurisdiction; and (3) fairness to the litigants, judicial economy, and the interests of federalism. See Ambromovage v. United Mine Workers of America, 726 F.2d 972, 989-90 (3d Cir. 1984).

A review of the Complaint filed by the EEOC and the proposed complaint-in-intervention reveals that Burroughs's claims under the PHRA and the EEOC's Title VII claims derive from a common nucleus of operative facts. Indeed, Driscoll does not dispute this. (Burroughs' Reply to Defendant Lepore's Motion Opposing the Intervention of Beth A. Burroughs at 1). Instead, Driscoll argues that Burroughs's claim is inconsistent with the EEOC's theory of liability, and that it would contravene federal policy to permit an intervenor to determine the scope and the focus of litigation. (Defendant L.F. Driscoll's Motion in Opposition to Plaintiff's Amended Motion to Intervene at 6). This Court does not view Burroughs's aiding and abetting claim as inconsistent with the EEOC's theory of liability. In relevant part, the EEOC alleges that Driscoll's disparate treatment of Burroughs in evicting her from the Kimmel Center construction site "assisted" Lepore in its retaliatory failure to hire her for future employment. (Compl. ¶ 8). Under the circumstances of this case, the exercise of federal jurisdiction over the PHRA count would not conflict with a specific federal policy which seeks to limit the scope of federal jurisdiction. Further, given the overlapping factual and legal issues presented by the EEOC's Complaint and Count II of Burroughs's proposed complaint-in-intervention, principles of fairness and judicial economy weigh in favor granting Burroughs's motion to intervene to assert PHRA violations.

C. Pennsylvania Equal Rights Amendment Claim

______Count III of Burroughs's proposed complaint-in-intervention seeks to raise violations of the PERA. (Id. ¶ 52). Defendants contend that the PERA does not authorize claims brought by private actors. (Driscoll's Supplemental Memorandum of Law in Support of its Motion in Opposition to Plaintiff's Amended Motion to Intervene at 1). Burroughs implores the Court to grant the motion to intervene and decide the issue of standing only upon presentation of a Rule 12(b) motion. (Burroughs' Reply to Defendant Lepore's Motion Opposing the Intervention of Beth A. Burroughs at 1).

As discussed previously, the right to intervene "presupposes the presentation of a cognizable claim that the intervenor would have standing to pursue." Victoria's Secret Stores, 2003 WL 21282193, at * 1. While Supreme Court of Pennsylvania has not ruled on the issue of whether a private cause of action for damages exists under the PERA, courts in this circuit have concluded that the Pennsylvania Constitution does not create such a right. See Ryan v. General Machine Products, 277 F. Supp. 2d 585. 595 (E.D. Pa. 2003) (holding that plaintiff's claims fail as a matter of law because the PERA does not create a private right of action); see also Douris v. Schweiker, 229 F. Supp. 2d 391, 405 (E.D. Pa. 2002) (citing Kelleher v. City of Reading, No. 01-3386, 2001 WL 1132401, at *2-3 (E.D. Pa. Sept. 24, 2001)). As Burroughs lacks standing to assert claims under the PERA, her Motion to Intervene to assert the PERA violations alleged in Count III is denied.

III. Conclusion

For the foregoing reasons, Burroughs's motion to intervene is GRANTED in part, and DENIED in part.

ORDER

AND NOW this ___ day of January 2004, upon consideration of the Amended Motion to Intervene as Party Plaintiff Filed by Beth Anne Burroughs Pursuant to F.R.C.P. 24(a) (Dkt. No. 6), and the responses thereto, it is hereby ORDERED that Burroughs' motion is GRANTED in part and DENIED in part. More specifically:

1. Burroughs's Amended Motion to Intervene to raise the antitrust claims alleged in Count I is DENIED.

2. Burroughs's Amended Motion to Intervene to raise the PHRA claims asserted in Count II is GRANTED.

3. Burroughs's Amended Motion to Intervene to raise the PERA violations alleged in Count III is DENIED.

4. Burroughs's Motion to Intervene as Party Plaintiff Filed by Beth Anne Burroughs Pursuant to F.R.C.P. 24(a) (Dkt. No. 2) is DENIED as moot.

5. Burroughs is directed to file an amended complaint in conformity with this order on or before February 16, 2004.

By the Court:

Legrome D. Davis