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United States District Court, N.D. Illinois, Eastern Division.

Francene HOLLEY, Sarah Hughes, Gladys Jeter, Nancy Morgan, Brenda Rigg, Janet Salkeld, Mary Elizabeth Grimm, Cheryl Treleaven, individually and on behalf of all others similarly situated, Plaintiffs,
v.
PANSOPHIC SYSTEMS, INC., Computer Associates International, Inc., David J. Eskra, Roberta Fortelka, G. Gordon M. Large, Anthony Paoni, Douglas R. Percy, Defendants.

No. 90 C 7505. | June 12, 1992.

Opinion

MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

***1** Plaintiffs Francene Holley, Sarah Hughes, Gladys Jeter, Nancy Morgan, Brenda Rigg, Janet Salkeld, Mary Elizabeth Grimm, Cheryl Treleaven, *et.al.* brought this suit against defendants Pansophic Systems, Inc., Computer Associates International Inc., David J. Eskra, Robert Fortelka, G. Gordon M. Large, Anthony Paoni, and Douglas R. Percy, claiming sex discrimination and unlawful retaliation under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, as well as various state common law violations. Defendants filed this motion to dismiss plaintiffs' breach of contract, intentional interference with contract, and negligence claims alleged in Counts IV, V, and VI of the plaintiffs' amended complaint. For the reasons stated below, the court denies the defendants' motion to dismiss Counts IV, V, and VI of the plaintiffs' amended complaint.

Background

According to the allegations in plaintiffs' amended complaint, the plaintiffs were employed by defendant Pansophic for numerous years.[1] During the course of their employment, the plaintiffs claim that the defendants engaged in a pattern and practice of discriminatory conduct which included: (1) failing to hire qualified women for management positions, (2) underutilizing women in management positions, (3) considering marital and parental status when making employment decisions, (4) systematically paying women lower salaries and benefits than men, (5) failing to credit women for their academic and work backgrounds on the same basis as men, (6) failing to timely consider women for promotions or title changes on the same basis as men, (7) requiring women to perform the duties of higher paid positions but denying them the salary, title, and authority of the positions they performed, (8) selectively enforcing quota requirements against women through punitive performance plans, (9) penalizing women for taking maternity leaves of absence, (10) taking adverse actions such as layoffs against women due to their sex, (11) failing to consider women employees for job actions less drastic than layoffs, (12) humiliating, intimidating, and demeaning women including frequently and inappropriately remarking about their sex, marital status, parental status, bodies, and clothing, (13) retaliating against women who complained of sexual discrimination or harassment, and (14) requiring women managers to participate in retaliatory conduct against other women employees who complained of sexual discrimination or harassment.

On May 15, 1990, a number of Pansophic employees were laid off including all of the plaintiffs except Grimm and Treleaven.[2] Prior to these layoffs, Pansophic transferred or hired less qualified males into vacant positions. While women holding similar titles or positions, such as the plaintiffs, were laid off, these new male employees were not. As part of the layoffs, Pansophic also conducted performance evaluations. Pansophic ignored the results when women outranked men, adversely considered women managers' marital and parental status, and refused to credit women managers for their years of service while crediting men for their years of service. In addition, Pansophic offered male managers more prestigious

positions in lieu of layoffs while offering women managers less prestigious positions which constituted de facto demotions. Other women managers, including plaintiff Grimm, were also subsequently terminated either through layoffs or other methods.

***2** Plaintiffs further contend that prior to the layoffs, Pansophic conducted an internal investigation into the merits of a sexual discrimination charge filed by one of its female employees, Carol Burns. As part of the investigation, Pansophic interviewed plaintiff Morgan because she had previously raised allegations of sexual harassment to the Human Resources Department ("HRD"). Morgan supported Burns' charges and disclosed her belief that Pansophic engaged in systematic sexual harassment and discrimination. Burns also identified several female employees, including plaintiff Salkeld, as witnesses to or victims of sexual discrimination.

About the same time that Pansophic was investigating Burns' claim, plaintiff Holley complained to the HRD that defendant Fortelka, a vice-president of Pansophic, was sexually harassing her by commenting about her body and the way her clothes fit. Fortelka was not disciplined based upon Holley's charge and he was subsequently promoted. Plaintiffs claim that Pansophic took adverse actions against Holley, Morgan, Salkeld, and other prospective witnesses who supported Burns' claims and other women, including the remaining plaintiffs, who complained of discrimination or sexual harassment. As a result, plaintiffs filed this law suit.

The Motion to Dismiss

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(c) may not be granted "unless it appears beyond doubt that the plaintiff cannot prove any facts that would support [a] claim for relief." *Thomason v. Nachtrieb,* 888 F.2d 1202, 1204 (7th Cir.1980); *see Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). Moreover, a motion to dismiss cannot be granted if a material issue of fact cannot be resolved or one party is not clearly entitled to judgment. *Flora v. Home Federal Savings and Loan Ass'n.,* 685 F.2d 209, 211 (7th Cir.1982); *National Fidelity Life Insurance Co. v. Karangus,* 811 F.2d 357, 358 (7th Cir.1987). When considering such a motion, the court must accept the allegations as true, *see Flora,* 685 F.2d at 211, and view the facts in the complaint in the light most favorable to the nonmoving party. *Thomason,* 888 F.2d at 1204. These standards apply equally to claims that a plaintiff has failed to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Conley,* 355 U.S. 41.

In the instant action, plaintiffs raise breach of contract, intentional interference with contract, and negligence claims in Counts IV, V, and VI of their complaint. As defendants suggest, these counts are based upon the same premise: that Pansophic's affirmative action policy ("AAP"), created pursuant to Executive Order 11246 ("EO11246"),[3] is an enforceable employment contract which can give rise to liability under Illinois common law doctrines such as those alleged in Counts IV, V, and VI. The defendants contend that these counts should be dismissed because the plaintiffs' state law claims are preempted by EO11246 and its related regulations.

***3** Preemption of state law arises when Congress explicitly establishes its intention or the structure and purpose of a federal law demonstrate Congress' intention to occupy a whole field. *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153 (1982); *Campbell v. Hussey,* 368 U.S. 297 (1961). As the Supreme Court has stated, absent explicit preemptive language, Congress' intent to supersede state law may be inferred when the scheme of federal regulation is so pervasive, the federal interest is so dominant, or the object sought and the obligations imposed implicitly preclude enforcement of state laws on the same subject. *Fidelity Fed. Savings and Loan Ass'n,* 368 U.S. at 153. In addition, even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–43 (1963); *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

The question of preemption of state law by EO11246 has been addressed on one occasion in this circuit. In *Manuel v. International Harvester Co.,* the court determined that the plaintiffs should not be precluded from bringing state law claims although EO11246 applied to their case. 502 F.Supp. 45 (N.D.Ill.1980). In reaching this conclusion, the court rejected many of the arguments raised by the defendants in this case. For example, the court considered the defendant's argument that application of state law principles would unduly disrupt the administrative scheme established pursuant to EO11246. The court determined that this claim was unavailing because the federal regulations at issue would not be burdened or subjected

to uncertainty by variant state law interpretations regarding whether potential plaintiffs have a private cause of action against their employers which is not provided for under EO11246. *Id.* at 48.

The *Manuel* court was also not persuaded by the defendants' argument that the judiciary's refusal to imply a private right of action under EO11246 suggested that private enforcement of the executive order could never be obtained through a law suit. Contrary to the defendant's assertion, the court saw no indication that judicial enforcement of EO11246 would necessarily contravene the administrative machinery established under the executive order. *Id.* Since the court found that Congress had not exercised its authority to render state law inapplicable to actions involving EO11246, the court denied the defendant's motion to dismiss the plaintiff's state law claims. *Id.*

This court is persuaded by the reasoning in *Manuel.* Here, as in *Manuel,* defendants have not provided sufficient evidence to establish that state law actions would create uncertainty as to the obligations of those who are subject to the policies of EO11246. Moreover, this court recognizes that EO11246 does not provide a remedy for employees who are intended to be the beneficiaries of the federal regulatory scheme established pursuant to EO11246. *Id.; see Jones v. Local 520, International Union of Operating Engineers,* 603 F.2d 664, 665 (7th Cir.1979), *cert. denied,* 444 U.S. 1017 (1980). However, no evidence has been submitted which suggests that the absence of a remedy under EO11246 should preclude employees from obtaining a private remedy under state law. So long as the plaintiffs' establish the elements of their state law claims against the defendants, it is not evident that judicial enforcement of the plaintiffs' claims would contravene the administrative machinery established under EO11246.

***4** The defendants contend that the *Manuel* court incorrectly determined that Congress has not indicated its intention to preempt state law in the area of AAP compliance. 41 C.F.R. § 60–2.31 states:

> To the extent that any state or local law, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive Order.

Contrary to the defendants' contention, however, this provision does not establish that EO11246 and its related regulations automatically preempt all state laws. The clear language of the provision indicates that only those laws directly conflicting with EO11246 and the regulations promulgated pursuant to it would be preempted. The defendants have not provided this court with adequate evidence indicating that the state laws at issue in this case directly conflict with EO11246. For example, there is no evidence that compliance with both federal and state regulations is impossible or the state laws at issue would impede the execution and accomplishment of the objectives of EO11246. *See Fidelity Fed. Savings and Loan Ass'n,* 368 U.S. at 153. Therefore, in keeping with *Manuel,* this court finds that the plaintiffs' state law claims are not preempted by EO11246.

The defendants next contend that even if the plaintiffs' state law claims are not preempted, their claims should still be dismissed because the plaintiffs fail to state a claim for which relief can be granted. The plaintiffs' three state law claims are based upon the plaintiffs' contention that Pansophic's AAP constituted a contractual agreement between Pansophic and its employees. The defendants contend that the plaintiffs' state law claims must be dismissed because the AAP established by Pansophic cannot be considered a valid contract.

Under Illinois law, an employment relationship established for an indefinite period of time, such as the employment relationships established between Pansophic and the plaintiff employees, generally is terminable at will by either party. However, this presumption that the relationship is terminable at will can be overcome by a showing that the parties contracted otherwise. *Duldulao v. Saint Mary of Nazareth Hospital,* 115 Ill.2d 482, 505 N.E.2d 314, 317–18 (1987). In *Duldulao,* the Illinois Supreme Court determined that language in an employee policy statement can give rise to a binding employment contract where the traditional elements for contract formation are present. To establish the existence of a valid contract on this basis, a plaintiff must demonstrate that: (1) the language of the policy statement contains a promise clear enough that an employee would reasonably believe that an offer has been made, (2) the statement was disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer, and (3) the employee accepts the offer by commencing or continuing to work after learning of the policy statement. *Id.* at 318.

***5** Applying these principles to the case at bar, this court finds that the plaintiffs have adequately alleged the existence of a contract based upon Pansophic's AAP. In their complaint, the plaintiffs allege that Pansophic established an AAP which was embodied in a written plan. They further allege that Pansophic disseminated the AAP through managerial training classes and otherwise, and that the plaintiffs were aware of the AAP and reasonably believed it to be an offer. They also allege that the

plaintiffs continued to work for Pansophic after learning about the AAP. *See* Plaintiffs' Amended Complaint at 14. These allegations clearly suffice to establish the plaintiffs' claim that the AAP constituted a contract.

The defendants argue that the plaintiffs have not established the requisite element of a promise by Pansophic. However, as the plaintiffs suggest, courts in this jurisdiction have recognized that an AAP could give rise to an implicit promise of favorable treatment which suffices for the purpose of establishing the existence of a contract. *See Yatvin v. Madison Metropolitan School District,* 840 F.2d 412, 416 (7th Cir.1988); *Goodman v. Board of Trustees of Community College,* 511 F.Supp. 602 (N.D.Ill.1981). Viewing the complaint in the light most favorable to the plaintiffs, it cannot be said that it is beyond doubt that the plaintiffs can prove no set of facts in support of their claim that Pansophic's AAP constituted a valid contract. *See Conley,* 355 U.S. at 45–46; *Carl Sandburg Village Condominium Ass'n v. First Condominium Development Co.,* 758 F.2d 203, 207 (7th Cir.1985). One must bear in mind that the plaintiffs are not required to prove that the AAP was a valid contract at this point in the litigation as the defendants' arguments appear to suggest. The plaintiffs have met their burden of adequately alleging the existence of a contract which is all that is required to withstand a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[4]

Conclusion

For the reasons stated above, the court denies the defendants' motion to dismiss Counts IV, V, and VI of the plaintiffs' amended complaint.

Footnotes

1 Hughes worked for Pansophic for approximately 4 years; Grimm worked there for approximately 5 years; Jeter, Salkeld, and Treleaven worked there for approximately 6 years; Morgan and Riggs worked there for approximately 9 years; and Holley worked for there for approximately 13 years.

2 Grimm was terminated by Pansophic in June 1991 and Treleaven worked there until September 1991.

3 EO11246 requires private actors contracting with the federal government to establish AAPs. Regulations regarding the contents of such AAPs and their enforcement have also been promulgated.

4 The plaintiffs do not, however, state a valid claim as third party beneficiaries to the AAP. In order to have an enforceable right in this case, the plaintiffs must establish that the applicable provisions of Pansophic's government contract were made for the plaintiffs' direct benefit. "If the agreement was not intended to benefit the third party, however, he is viewed as an 'incidental' beneficiary, having no legally cognizable rights under the contract." *D'Amato v. Wisconsin Gas Co.,* 760 F.2d 1474, 1479 (7th Cir.1985); *Holbrook v. Pitt,* 643 F.2d 1261, 1270 (7th Cir.1981). As the defendants properly suggest, the plaintiffs have failed to allege that they are the direct beneficiaries of the government contract in question in this case. Therefore, the plaintiffs cannot establish their state law claims on this basis.