1997 WL 324066
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
NEWMARK & COMPANY REAL ESTATE, INC., Defendant,
and
Kalabi Realty Company, Defendant.

No. 96 CIV. 9091(LMM). | June 13, 1997.

Opinion

MEMORANDUM AND ORDER

MCKENNA, District Judge.

***1** Plaintiff Equal Employment Opportunity Commission (the "EEOC") commenced this action alleging, among other things, violations of Title VII of the Civil Rights Act of 1964, as amended. Defendant Kalabi Realty Company ("Kalabi"), moves, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss the federal employment discrimination claims against it on the ground that it is not an "employer" under 42 U.S.C. § 2000e(b) because it employs fewer than fifteen employees.

For the reasons set forth below, Kalabi's motion to dismiss is denied.

I. Factual Background

Between 1993 and 1995, the relevant time period according to the EEOC complaint, Kalabi, a partnership that develops real estate in New York City, owned a single commercial property located at 40 Fulton Street. Kalabi contends that, during this period, it employed only a single person continuously, Ivor Jones, the building manager at 40 Fulton Street. Kalabi concedes that, in addition to Jones, it hired various individuals to perform renovations at 40 Fulton Street for periods of time ranging from five weeks to four months. (Caiola Aff. ¶ 5.) However, even including these additional employees, Kalabi contends that it never employed fifteen or more employees in any calendar week. (*Id.* ¶ 4.) Kalabi has provided the Court with certain payroll and tax information indicating that Kalabi had fewer than fifteen employees on its payroll during the relevant period. (*Id.* Exs. A & B.)

In addition to hiring its own employees, Kalabi entered into a Management and Exclusive Agency Agreement (the "Agency Agreement") with defendant Newmark & Company Real Estate, Inc. ("Newmark"). (Boyd Aff. Ex. 7.) The Agency Agreement provided that Newmark would "manage, subject to [Kalabi's] approval, coordinate and supervise the proper conduct of the ordinary and usual business and affairs pertaining to the operation, maintenance and management of ..." 40 Fulton Street. (*Id.* Ex. 7, at 2.) Individuals hired by Newman were hired subject to Kalabi's prior approval, and, although Newmark had the authority to discharge such employees, Kalabi retained the right to "require [Newmark] to terminate" them. (*Id.* Ex 7, at 5.) Under the Agency Agreement, Newmark had the responsibility to "direct and supervise all personnel hired by [Newmark] in the performance of their duties." (*Id.*)

Carlos Rodriguez and Roy Lindsay, who filed the discrimination charges with the EEOC that resulted in the instant lawsuit, were apparently hired by Newmark under the Agency Agreement to work at 40 Fulton Street. According to both Rodriguez and Lindsay, they were hired to be security guards at 40 Fulton Street by Kalabi's building manager, Jones.[1] Although Newmark paid Rodriguez' and Lindsay's salaries, Jones was their supervisor, providing them with their "working instructions" and their "working duties." (Rodriguez Aff. ¶¶ 2–3; Lindsay Aff. ¶¶ 2–3.) Rodriguez contends that Jones identified Sam Mohabir, a Newmark employee, as Jones' supervisor. (Rodriguez Aff. ¶ 4.) Rodriguez and Lindsay each contend that Jones terminated their employment. (Rodriguez Aff. ¶ 10; Lindsay Aff. ¶ 9.) The EEOC charge was based on the allegedly discriminatory conduct of Jones toward Rodriguez and Lindsay.

[1] Although Kalabi concedes that Jones was its employee during the relevant time period, Jones' name curiously does not appear on the payroll records submitted by Kalabi.

***2** Rodriguez and Lindsay have identified twenty-three individuals who worked at 40 Fulton Street under Jones during the relevant time period. (Rodriguez Aff. ¶¶ 3, 7–9; Lindsay Aff. ¶¶ 3, 5–7.) Moreover, Newmark, in response to an inquiry from the EEOC, identified seventeen regular and two temporary employees that were supervised by Jones during the relevant period. (Boyd Aff. Ex. 6.) Apparently, none of these individuals were on Kalabi's payroll. (Caiola Aff. Ex. B.)

II. Discussion

A. Standard Of Review

In deciding a motion to dismiss a complaint for lack of subject matter jurisdiction, the Court views the complaint in the light most favorable to the plaintiff. *Scheur v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The Court is not to draw argumentative inferences favorable to the party asserting jurisdiction. *Norton v. Larney,* 266 U.S. 511, 515, 45 S.Ct. 145, 69 L.Ed. 413 (1925). The Court may consider affidavits and other evidence outside of the pleadings in resolving a 12(b)(1) motion. *Antares Aircraft, L.P. v. Federal Republic of Nigeria,* 948 F.2d 90, 96 (2d Cir.1991), *vacated on other grounds,* 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992).

B. The Term "Employer" Under Title VII.

Under 42 U.S.C. § 2000e(b) 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." 42 U.S.C. § 2000. "[I]t is generally recognized that the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities." *Spirt v. Teachers Ins. and Annuity Ass'n,* 691 F.2d 1054, 1063 (2d Cir.1982) (quoting *Vanguard Justice Society, Inc. v. Hughes,* 471 F.Supp. 670, 696 (D.Md.1979)) (internal quotation omitted), *vacated on other grounds,* 463 U.S. 1223 (1983). "Where it appears that more than one entity is involved in controlling an individual's employment situation, courts have recognized the concept of multiple 'employers'.... Two or more employers may be considered a single entity with respect to an individual employee if they stand in some sort of relationship ..." *Fox v. City Univ. of New York,* 1996 WL 384915, *4 (S.D.N.Y.1996).

Kalabi has not supplied any information to dispute the EEOC's contention that Kalabi's employee, Jones, supervised fifteen or more individuals at 40 Fulton Street during the relevant period, nor has Kalabi disputed the intercompany relationship it apparently had with Newmark. Instead, relying on *Walters v. Metropolitan Educational Enterprises, Inc.,* 519 U.S. 202, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997), which approved of the "payroll method" to determine whether the fifteen-employee threshold has been met, Kalabi argues that, because fifteen or more individuals did not appear on its payroll during the relevant period, it was not an employer under Title VII. Kalabi misconstrues *Walters.*

In Walters, defendant Metropolitan Educational Enterprises, Inc. ("Metropolitan") contended that employees should only be counted toward the fifteen-employee threshold on days in which they actually performed work or were being compensated despite their absence. *Id.* at 662–63. The Supreme Court disagreed with this narrow interpretation of "employer" and concluded that "the ultimate touchstone under § 2000e(b) is whether an employer has employment relationships with fifteen or more individuals for each working day in twenty or more weeks during the year in question." *Id.* at 666. Under the interpretation adopted by the Supreme Court, "all one needs to know about a given employee for a given year is whether the employee started or ended employment during that year and, if so, when. He is counted as an employee for each working day after arrival and before departure." *Id.* at 665–66.

***3** The test approved by the Supreme Court is referred to as the "payroll method" because "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *Id.* at 663. However, contrary to Kalabi's contention, the payroll method does not restrict liability to those employers who have fifteen or more employees on their payroll. Rather, the touchstone is whether Kalabi had an employment relationship with fifteen or more employees during the relevant period. *Id.* at 666.

Here, it is apparently undisputed that Kalabi's employee, Jones, supervised fifteen or more individuals at 40 Fulton Street during the relevant period. Thus, under Walters, Kalabi had an employment relationship with a sufficient number of employees to meet the fifteen-employee threshold, and its motion to dismiss is denied. *See EEOC v. Sage Realty Corp.,* 507 F.Supp. 599, 611 (S.D.N.Y.1981) (holding that two companies would be considered individual's employer under Title VII where one company paid employee's salary and second company oversaw the terms and conditions of employee's employment).

III. Conclusion

For the reasons set forth above, defendant Kalabi's motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction is denied.

SO ORDERED