2001 WL 34384461
United States District Court,
M.D. Tennessee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
Deena BLAKE, Plaintiff–Intervenor
v.
STEPHEN T. COX, INC., d/b/a Cox Cabinet Company, Defendant.

No. 3:99–1184. | June 28, 2001.

Attorneys and Law Firms

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Opinion

MEMORANDUM

NIXON, Senior J.

***1** Pending before the Court is Defendant's Motion for Summary Judgment, (Doc. No. 14), to which Plaintiff has filed a Response, (Doc. No. 19). Defendant in turn has filed a Reply to Plaintiff's Response. (Doc. No. 22.) Deena Blake, on whose behalf the Equal Employment Opportunity Commission ("EEOC") brought this lawsuit, has been permitted to intervene, (Doc. Nos.12, 23), and has filed a Plaintiff–Intervenor's Amended Complaint, (Doc. No. 25), to which Defendant has filed an Answer, (Doc. No. 27). Additionally, before the Court is the EEOC's Motion for Leave to Amend Complaint, (Doc. No. 33), which has been addressed in a separate, contemporaneously filed Memorandum Order.

The Equal Employment Opportunity Commission brings this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §§ 20002 *et seq.,* and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. In its complaint the EEOC alleges that between 1996 and 1997, Deena Blake, Michelle Phillips, and other unnamed female employees of Cox Cabinet Co., Inc ., ("CCCI"), were subjected to unwelcome and offensive verbal and physical sexual harassment, a hostile work environment, and retaliatory and constructive discharge for rejecting unwanted sexual advances made by CCCI's President, supervisors, and male employees. (Doc. No. 7.) Defendant, Stephen T. Cox, Inc. ("STCI"), purchased the assets of CCCI in February of 1998. Immediately after the purchase, STCI began operating a kitchen cabinet manufacturing business that was substantially similar to the business that CCCI had previously conducted. CCCI changed its name to C.C.C. Custom Kitchens, Inc., and filed for bankruptcy protection in July of 1998.

STCI maintains that it is not the proper defendant in this lawsuit, because it should not be liable as a successor in interest to CCCI since CCCI was insolvent at the time of the asset transfer. (Doc. No. 14 at 2.) In the alternative, Defendant argues that if STCI is found to be liable as a successor employer, the company should only be liable for those claims asserted at the time that it purchased CCCI's assets, and not for any subsequently asserted claims. (*Id.* at 2–3.) Defendant also seeks that Plaintiff be denied punitive damages in this case, given that the alleged actions occurred prior to the formation of STCI and that neither Defendant nor any of its employees or owners engaged in any of the alleged actions. (*Id.*)

I. Background

In the early 1980's, Stephen Cox and his brother founded CCCI, as a Kentucky corporation based in Campbellsville, Kentucky, to produce kitchen cabinetry. (Doc. No. 14 at 3.) In or about 1984 Stephen became the sole owner of the company and approximately two years later he and Henry "Hank" Schmidt, became co-owners of CCCI with each partner holding fifty percent of the company's stock. (*Id.* at 4.) CCCI eventually conducted its business in Kentucky, Southern Ohio and Middle Tennessee. (*Id.*)

***2** In 1995 Citizens Bank & Trust Company ("Citizens Bank") notified the co-owners that CCCI had a negative net worth and was out of compliance with its 1994 and 1995 loan agreements with Citizens Bank. (Doc. No. 16 at ¶ 3, *Affidavit of Mark U. Johnson* (hereinafter "Johnson Affidavit").) In November, 1995, Mr. Cox sold his remaining fifty percent stock interest in CCCI to Mr. Schmidt for $600,000. (Doc. No. 14 at 4.) Mr. Schmidt paid $150,000 in cash and the remaining $450,000 was paid in the form of a promissory note payable over eight years. (*Id.*) As security for the promissory note, Mr. Cox was given a lien against all real estate, fixtures, receivables, and equipment of CCCI and its subsidiary company Cox Wood Designs, Inc. (Def. Ex. Al, "Agreement" at ¶ 12.) Until the note was paid in full, Mr.

Schmidt could not transfer, mortgage or assign his stock without the prior consent of Mr. Cox. (*Id.*) Under the sale agreement, Mr. Cox was also granted the right of first refusal to purchase all the CCCI stock, should Mr. Schmidt decide to sell. (*Id.* at ¶ 7.) If Mr. Schmidt should default on the promissory note or violate the buy-sell agreement, Mr. Cox could exercise any available legal or equitable remedies. (Def. Ex. A2 "Promissory Note.") Mr. Cox also retained the right to examine the quarterly and annual financial statements of Cox Cabinet Company. (Def. Ex. A1 "Agreement" at ¶ 6.) Under the sale agreement Mr. Cox was required to remain a co-guarantor on all notes, mortgages and lines of credit for CCCI. (*Id.* at ¶ 1.) At the time of the conveyance, Mr. Cox was personally liable for two notes to Citizens Bank. (Doc. No.14 at 4.) The obligations had an aggregate principal balance of approximately $740,000 and were secured by liens on real and personal property owned by CCCI. (*Id.; see also* Johnson Affidavit at ¶ 5 .)

After purchasing the stock, Mr. Schmidt became CCCI's President and the sole member of its board of directors. (Doc. No. 14 at 4.) It was during Mr. Schmidt's tenure as President and owner of CCCI that the sexual harassment complained of in this lawsuit allegedly occurred.[1] The EEOC's first Amended Complaint alleges that in or about March 1996, Deena Blake was employed by CCCI as a sales representative in its Brentwood, Tennessee office. (Doc. No. 7 at 3; Doc. No. 25 at 5.) Beginning in June 1996, Ms. Blake was subjected to inappropriate comments, touching, and sexual propositions by her supervisor, CCCI's President, Hank Schmidt. (*Id.*) In July 1996, immediately after Ms. Blake rejected Mr. Schmidt's advances and complained about his conduct, CCCI, through its agent Mr. Schmidt, retaliated against her by changing her status with the company and altering the terms by which she received compensation. (*Id.*) The terms of Ms. Blake's compensation were again detrimentally affected after she informed CCCI that she was pregnant. (Doc. No. 7 at 3–4; Doc. No. 25 at 6.) Ms. Blake filed a charge of discrimination against her employer on January 29, 1997, and CCCI was served notice of her charge within ten days. (*Id.*) CCCI terminated Ms. Blake's employment on March 3, 1997. (*Id.*)

1 The substance of the plaintiffs' sexual harassment claim is not the subject of STCI's Motion for Summary Judgment. As a result Defendant's summary of facts does not include any account of the alleged sexual harassment that led to the commencement of this lawsuit. The Court, therefore, relies entirely upon the facts as alleged by the plaintiff and plaintiff-intervenor in this context.

***3** In her Amended Complaint, Ms. Blake states that in or about February 2000, she was employed by STCI d/b/a Cox Cabinet Company in the Nashville area. (Doc. No. 25 at 9.) She asserts that Defendant STCI directly retaliated against her for pursuing her sexual harassment claims with the EEOC. (*Id.*) STCI's retaliation allegedly commenced in late August 2000, after a conference call between counsel for the parties and the Court, and the subsequent submission of the EEOC's proposed consent decree on August 18, 2000. (*Id.*) STCI's alleged retaliatory behavior included: the offer of a lucrative contract, that had been promised to Ms. Blake, to another sales representative; heightened scrutiny of Ms. Blake's performance and allegedly unsupported negative performance evaluations; repeated refusal to provide Ms. Blake with information essential to the performance of her job; refusal to communicate with Ms. Blake; and refusal to compensate her which culminated in a constructive discharge after she had not been paid for three weeks. (*Id.* at 11.) It is not apparent from the record that Ms. Blake has filed a charge of discrimination with the EEOC with respect to her second period of employment with Cox Cabinet Company.

Michelle Phillips was hired by CCCI in its Campbellsville, Kentucky facility in approximately May 1996. (Doc. No. 7 at 4.) From then until Ms. Phillips' termination in November 1997, Mr. Schmidt allegedly subjected her to offensive sexual comments and propositions and to physical touching on intimate parts of her body. (*Id.*) The EEOC's first Amended Complaint further alleges that CCCI subjected a class of female employees to unwelcome and offensive sexual jokes, comments, propositions, and offensive touching. (*Id.* at 4–5.) Plaintiff alleges that this conduct was committed by the President of the company, supervisory employees, and male co-workers. Plaintiff asserts that CCCI took no action to stop the harassment of its female employees, took no steps to prevent sexual harassment from occurring in the work place, and had no sexual harassment policy or procedure to remedy complaints of unlawful conduct. (*Id.*) Ms. Phillips filed a charge with the EEOC against CCCI on December 18, 1997, alleging sexual harassment by Mr. Schmidt. Notice was sent to CCCI in Campbellsville on December 22, 1997. (Doc. No. 19 at 4.)

During Mr. Schmidt's ownership of CCCI, the company fell behind in its debt payments to Citizens Bank on two notes for which Mr. Cox was personally liable. (Doc. No. 14 at 4.) Additionally, Mr. Schmidt was several months behind in his payments on the note to Mr. Cox. (*Id.*) On February 10, 1998, counsel for Citizens Bank sent letters to CCCI, and to the individual co-guarantors of the delinquent notes—Hank Schmidt, his wife Mary Schmidt, and Stephen Cox—demanding payment of a fully matured $250,000 note with accrued interest, and full payment on another note that was two months past due. (Def. Ex. C1 Letters from Bertram & Cox to guarantors.)

***4** Prior to receiving his demand letter, Mr. Cox had assessed CCCI's financial situation and determined that Citizens Bank was likely to foreclose upon the outstanding debts for which he bore personal liability. (Doc. No. 14 at 5.) Additionally, it was apparent that CCCI was insolvent and preparing to seek protection in bankruptcy. (*Id.* at 4–5.) Mr. Cox decided that under the circumstances the best way to protect his economic interests was to establish a new company, use this company to purchase the assets of CCCI, and start a new business for the production of kitchen cabinetry. (*Id.* at 5.) To that end, Mr. Cox established Defendant STCI in January of 1998, and entered into an asset purchase agreement with CCCI on February 13, 1998. (*Id.;* Def. Ex. A3.) As consideration for his transfer of CCCI's assets to STCI, Mr. Schmidt was removed as a personal guarantor on the note to Citizens Bank and on the note to Steven Cox. (Johnson Affidavit at ¶ 14.)

Pursuant to the Purchase Agreement, STCI acquired all of the assets of CCCI including the building used for business operations and all rights to the name Cox Cabinet Company. (Def. Ex. A3 "Asset Purchase Agreement" at 1–2.) The liabilities assumed by STCI under the Purchase Agreement were specifically limited to: the Citizens Bank notes for which Mr. Cox was personally liable; the balance due on a 1996 vehicle; and the maximum liability of $7,386.28 offered in settlement of a pending case unrelated to the instant civil rights case. (*Id.* Def. Ex. A3 at 2; *see also* "Exhibit B to Asset Purchase Agreement.") Exhibit F to the Purchase Agreement listed CCCI's pending claims and litigation. (Def Ex. A3 "Exhibit F to Asset Purchase Agreement.") Included in this list were the charges of sex discrimination that had been filed with the EEOC against CCCI by Deena Blake and Michelle Phillip. (*Id.*) Both claims were listed as under review by the EEOC at the time of the sale. (*Id.*) Defendant specifically stated that it would not assume or agree to pay or discharge any "losses, costs, damages or expenses based upon or arising from any claims, litigation, legal proceedings or other actions against Seller, its officers, directors, agents or employees, or Seller's products or contracts and based upon or related to any set of facts occurring prior to the Closing Date." (Def. Ex. A3 at 2, § 1.3.) The Purchase Agreement also contained indemnification clauses. (*Id.* at § 6.)

On the date of sale, Mr. Schmidt changed the name of Cox Cabinet Company, Inc. to C.C.C. Custom Kitchens, Inc. (Def. Ex. D "Bankruptcy Petition" 100–101.) After acquiring CCCI's assets under the Purchase Agreement, STCI commenced operations, using the name Cox Cabinets. (Doc. No. 14 at 6.) STCI/Cox Cabinets retained most of CCCI's employees and supervisors although a new plant manager was hired to replace Mr. Schmidt. (*Id.*) As part of the consideration offered for the purchase of CCCI's assets, STCI agreed to employ Mr. Schmidt as an outside salesperson for one year following the purchase. (*Id.*) At the end of that year STCI fired Mr. Schmidt and at no time since the purchase did Mr. Schmidt or any of his relatives have an ownership or management position with STCI. (*Id.*) Subsequent to STCI's acquisition of CCCI's assets, manuals containing the company's sexual harassment policy were distributed to employees. (*Id.* at 6–7.)

***5** On or about June 29, 1998, C.C.C. Custom Kitchens, Inc., filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court for the Western District of Kentucky. (Doc. No. 14, Def. Ex. D "Bankruptcy Petition.") The bankruptcy petition indicated that no assets were expected to be available for distribution to unsecured creditors and stated that the company's assets were in the range of zero to $50,000 and its debts were between $10,000,000 and $50,000,000. (*Id.*)

II. Legal Standard

A. *Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c) (West 2001). The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Granger v. Marek,* 583 F.2d 781, 786 (6th Cir.1978). Mere allegations of a factual dispute between the parties are not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one which, if proven at trial, would result in a reasonable jury finding in favor of the non-moving party. *Id.* at 247–48. The substantive law involved in the case will underscore which facts are material and only disputes over outcome-determinative facts will bar a grant of summary judgment. *Id.* at 248.

As the moving party, the defendant bears the burden of showing the absence of a genuine issue of material fact as to at least one essential element of the plaintiff's claim. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the defendant meets its initial burden of proof for his motion, the plaintiff, as the party who opposes the motion, has the burden to come forth with sufficient proof to support its claim,

particularly when the plaintiff has had an opportunity to conduct discovery. *See id.* at 323. An opponent to a summary judgment motion may not rely solely on conclusory allegations, but rather must come forward with affirmative evidence which establishes its claims and raises an issue of genuine material fact. *See id.* at 324. In ruling on a motion for summary judgment, the court must review the facts and reasonable inferences to be drawn from those facts in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.,* 303 F.2d 425, 427 (6th Cir.1962) (citations omitted).

***6** To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *See Anderson,* 477 U.S. at 250. The Court must determine whether a reasonable jury would be able to return a verdict for the non-moving party and if so, the court must deny summary judgment. *See id.* at 249. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial." ' *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1478 (6th Cir.1989) (citations omitted).

B. *Successor Liability*

In *EEOC v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086 (6th Cir.1974), the Sixth Circuit articulated the applicable legal standard for determining successor liability in the context of a Title VII action. Analogizing to successorship law applied to National Labor Relations Act ("NLRA") cases, the *MacMillan* court determined that a successor company may be held liable for the unlawful employment practices of its predecessor. *See* 503 F.2d at 1089–90. The *MacMillan* court emphasized, however, that while successor liability may be applicable in Title VII cases, it is not automatic, and must be determined on a case by case basis. 503 F.2d at 1089. To determine whether successor liability is appropriate on a particular set of facts, a court is required to balance the purposes of "Title VII with the legitimate and often conflicting interests of the employer and the discriminatee." *Id.* Weighing these concerns, the *MacMillan* court found that both the NLRA and Title VII place particular emphasis upon protecting and providing relief for victims of prohibited employment practices. *Id.* This statutory goal of providing discriminatees with full relief justified the imposition of liability on a corporate successor for Title VII violations of a predecessor company. *Id.* The court cautioned in dicta that

> [f]ailure to hold a successor employer liable for the discriminatory practices of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminatee without a remedy or with an incomplete remedy. In the case where the predecessor company no longer had any assets, monetary relief would be precluded. Such a result could encourage evasion in the guise of corporate transfers of ownership.

503 F.2d at 1091–92. Additionally, where the relief sought involved seniority, reinstatement, or hiring, only a successor could provide it. *See id.*

The *MacMillan* court identified nine factors relevant to determining a successorship question in the labor context.[2] Recognizing that *MacMillan* factors four through nine simply aid the court in determining whether there is substantial continuity of business operations, courts applying *MacMillan* have reduced these factors to three: (1) whether there is substantial continuity of business operations, (2) whether the successor employer had notice of the predecessor's legal obligation, and (3) the ability of the predecessor to provide adequate relief. *See Rojas v. TK Communications, Inc.,* 87 F.3d 745 (5th Cir.1996); *Musikiwamba v. Essi,* 760 F.2d 740, 751 (7th Cir.1985); *Bates v. Pacific Maritime Ass'n,* 744 F.2d 705, 710 (9th Cir.1984); *Howard v. Penn Cent. Transp.,* 87 F.R.D. 342 (N.D.Ohio 1980).

2 The *MacMillan* factors for determining the appropriateness of successor liability are:

> 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.
> 503 F.2d at 1094.

***7** In *Wiggins v. Spector Freight Sys., Inc.,* 583 F.2d 882, 886 (6th Cir.1978), the appellate court affirmed the *MacMillan* balancing test but held that it did not apply unless the district court first finds that: (1) the charges of discrimination had been filed with the EEOC at or before the time of acquisition, and (2) the successor had notice of

contingent charges of discrimination at or before the time of acquisition.

The ability of the predecessor to provide adequate relief has been interpreted to mean at least three things. First, to the extent that a predecessor is still an on-going entity capable of providing relief to the plaintiff, successor liability is not appropriate. *See Howard Johnson Co. v. Hotel employees,* 417 U.S. 249, 257, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Musikiwamba,* 760 F.2d at 750; *Bates,* 744 F.2d at 710; *Howard,* 87 F.R.D. at 348; *Brown v. Evening News Ass'n,* 473 F.Supp. 1242 (E.D.Mich.1979). Second, where the predecessor no longer exists or no longer has any assets, but did have sufficient assets to provide a remedy at the time the employee filed her claim, the employee should be able to enforce against the successor a claim that she could have successfully enforced against a predecessor. *See Peters v. NLRB,* 153 F.3d 289, 301 (6th Cir.1998); *Musikiwamba,* 760 F.2d at 750; *MacMillan,* 503 F.2d at 1091–92. Third, where the predecessor is insolvent at the time that an employee brings her claim and is therefore incapable of providing the employee with the remedy sought, courts have come to divergent conclusions. In the context of labor relations cases, the Sixth Circuit has held that where the predecessor company was financially incapable of compensating the employees when they brought their lawsuit, courts should be reluctant to impose successor liability, because without the successor's efforts the employees might have been out of a job. *See Peters,* 153 F.3d at 301 (*citing Musikiwamba,* 760 F.2d at 751). In the context of workplace discrimination the Sixth Circuit has emphasized that providing the injured employee with full relief is the primary concern. *MacMillan,* 503 F.2d at 1092. The Sixth Circuit has yet to extend the *Peters* financial capacity requirement to Title VII cases. The Seventh Circuit, which authored *Musikiwamba,* recognized in *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.,* 59 F.3d 48, 51 (7th Cir.1995), that the availability of relief from the predecessor is not a dispositive factor, but one that must be considered along with other facts in a particular case. In *Tasemkin* the Court considered the fact that the "apparent nature of the acquisition of Old Tasemkin by New Tasemkin—which clearly had the effect, intended or no, of frustrating unsecured creditors while resurrecting virtually the identical enterprise," and determined that this justified the imposition of successor liability. *See id.*

C. *Limited Liability*

***8** Timely filing of an EEOC complaint is a prerequisite to a Title VII suit. *See* 42 U.S.C. § 2000e–5(e); *E.E.O.C. v. Wilson Metal Casket Co.,* 24 F.3d 836 (6th Cir.1994). The purpose of the Title VII filing requirement is to give notice of potential Title VII liability to an alleged wrongdoer and to allow the EEOC to attempt to conciliate with the wrongdoer rather than go to court. *See Wilson Metal Casket,* 24 F.3d at 839; *Foster v. Gueory,* 655 F.2d 1319, 1323 (D.C.Cir.1981). In certain circumstances, however, the EEOC charge of one plaintiff can satisfy the filing requirement of other plaintiffs, under what is known as the "single filing rule." *Howlett v. Holiday Inns, Inc.,* 49 F.3d 189, 194 (6th Cir.1995); *Wilson Metal Casket,* 24 F.3d at 840. The single filing rule allows a plaintiff to join a Title VII action if another plaintiff filed a timely EEOC charge. The joining plaintiff can "piggyback" on the timely charge. *Id.* In order for the single filing rule to apply, the joining claim must be substantially related to a timely filed claim which arose out of similar discriminatory treatment in the same time frame. *See Wilson Metal Casket,* 24 F.3d at 840. The rationale behind the single filing rule is the belief that it would be wasteful for numerous employees with the same grievances to file identical complaints with the EEOC. *See id.* (*citing Wheeler v. Am. Home Prod. Co.,* 582 F.2d 891, 897 (5th Cir.1977)).

Furthermore, an injured party's complaint must be limited to "the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co., Inc.,* 563 F.2d 439, 446 (6th Cir.1977). This may include retaliation claims that are actions in response to the filing of the EEOC charge itself. *See Duggins v. Steak 'N Shake, Inc.,* 195 F.3d 828, 831 (6th Cir.1999). Although the facts of *Duggins* were limited to that case, the court of appeals noted that " 'where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." ' *Id.* at 832 (*quoting Davis v. Sodexho, Cumberland Coll. Cafeteria,* 157 F.3d 460, 463 (6th Cir.1998)).

D. *Punitive Damages*

Plaintiffs who allege employment discrimination on the basis of sex traditionally have been entitled to such remedies as injunctions, reinstatement, back pay, lost benefits, and attorney's fees under § 706(g) of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e–5(g)(1) (West 2001). In the Civil Rights Act of 1991, Congress expanded the remedies available to these plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages. *See Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 121 S.Ct. 1946, 150 L.Ed.2d 62, 2001 WL 589077 (2001). As codified in 42 U.S.C. § 1981a(a)(1), the 1991 Act only provides compensatory and punitive damages awards to plaintiffs who prevail upon unlawful intentional discrimination claims. Successful claims charging unlawful disparate impact will not be awarded expanded remedies. *See* 42 U.S.C. § 1981a(a)(1) (West 2001).[3]

3 42 U.S.C. § 1981a(a)(1) reads:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C.2000e–5) [42 U.S.C. §§ 2000e–5 or 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C.2000e–2 or 2000e–3) [42 U.S.C .A. §§ 2000e–2, 2000e–3, or 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e–5(g)], from the respondent.

***9** A successor employer may be held liable for the intentional discrimination of its predecessor where the value of promoting important statutory policies outweighs the harm to the successor. *See Musikiwamba,* 760 F.2d at 747. The Plaintiff need not prove that the successor intended to discriminate. *See id.* A basic assumption of successor liability is that the successor is an innocent party who may nevertheless be required to compensate the injured employee. *See id.*

III. Discussion

A. *Successor Liability*

As a preliminary matter, the Court finds that the charges of sex discrimination were filed with the EEOC at or before the time that STCI acquired CCCI's assets. As discussed below, the Court also finds that STCI had notice of the charges of discrimination at or before the time of acquisition. The prerequisites to application of the *MacMillan* analysis are therefore satisfied and the Court will proceed to determine whether successor liability should be imposed upon STCI in this matter. *See Wiggins;* 583 F.2d at 886.

STCI's Motion for Summary Judgment is entirely based upon the argument that it is not the successor in interest to any liability that CCCI might incur during the course of this lawsuit. (Doc. No. 14 at 13–14.) Plaintiff argues that an application of the relevant legal standard for determining successor liability compels the Court to find that successor liability is warranted in this case. (Doc. No. 19 at 15.)

1. *Ability to Provide Relief*

The imposition of successor liability in this case hinges upon whether the second *MacMillan* factor has been satisfied. As discussed below, the remaining eight factors have been satisfied without significant dispute by the parties. The second factor requires the Court to consider the predecessor's ability to provide relief. The parties do not share a common understanding of what this factor requires. Defendant, citing *Musikiwamba v. Essi, above,* argues that when a predecessor employer would have been unable to provide its injured employees with relief at the time it transferred its assets to a successor, the successor should not have to bear any liability. (Doc. No. 14 at 15.) Defendant argues that for the Court to hold otherwise in this case would make the injured employees better off than they would have been had CCCI not sold its assets to STCI. (*Id.*) Plaintiff conversely asserts that because there is indisputable evidence that CCCI was unable to compensate the victims of discrimination, successor liability should be imposed. (Doc. No. 19 at 11.)

Although *Musikiwamba* is not controlling, the Court finds its reasoning persuasive with respect to the relative importance of the *MacMillan* factors in an employment discrimination case. The Seventh Circuit in *Musikiwamba* determined that successor liability may apply to claims for employment discrimination brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). 760 F.2d at 744. In reaching this conclusion the court determined that the justifications for successor liability under the NLRA apply equally to such liability in employment discrimination cases. *Id.* at 746. At the time *Musikiwamba* was decided punitive and compensatory damages were not available under Title VII, *see above* (discussion of punitive damages), but were available under § 1981. The *Musikiwamba* court relied upon this difference in available remedies and what it determined to be a difference in underlying statutory goals, to justify an analytical approach which diverged from that articulated in *MacMillan. See* 760 F.2d at 746. The *Musikiwamba* court determined that since § 1981 permitted successful plaintiffs to receive punitive and compensatory damages, the first two *MacMillan* factors were critical to the imposition of successor liability, whereas the importance of continuity of business operations varied depending on the facts of the case. *Id.* at 750.

***10** The Seventh Circuit reasoned that the continuity of business relations is particularly relevant in the context of actions to compel a successor company to recognize and bargain with an incumbent union, or to recognized and abide by prior workplace agreements. *See id.* at 751. In the context of employment discrimination, however, the importance of business continuity varies in relation to the number of employees adversely affected by the predecessor's action and the remedy sought by the injured parties. *See id.* Where an employee seeks only monetary

relief less continuity would be required than where she seeks reinstatement, retroactive seniority, or placement on a preferential hiring list. *See id.* Plaintiff correctly points out that the *Musikiwamba* court clearly distinguished its analysis of a § 1981 claim from that applicable to Title VII claims. (Doc. No. 19 at 13.) This Court nevertheless, holds that the analysis in *Musikiwamba* is applicable to Title VII claims in light of the expanded remedial options made available by the Civil Rights Act of 1991.

The parties do not dispute that CCCI is no longer able to provide a remedy for its allegedly injured employees. Nor do they dispute that CCCI, at the time of the asset transfer to SCTI, would have been unable to provide adequate relief to its injured employees if their sexual harassment claims were successful. Under *Peters v. NLRB,* 153 F.3d 289, 301 (6th Cir.1998) it would appear that the injured employees of an insolvent employer have no remedy. However, this Court finds that *Peters* can be distinguished from this case. In *Peters* the successor employer, New Specialty, appealed a National Labor Relations Board ("NLRB") order requiring it to bargain with an incumbent union and compensate the injured employees. The NLRB cross petitioned for enforcement of its order. The court determined that successor liability, or "Golden State Liability" as the court termed it, should not apply to New Specialty because it had purchased the assets of its predecessor through receivership, "a transaction which, unlike a purely private transaction, did not allow it to negotiate an indemnity clause or bargain for a price that would capture the risk associated with any fair labor practices." *Id.* at 301. The *Peters* court also determined two other factors that militated against the imposition of successor liability. The first was a "policy interest against saddling an existing collective bargaining agreement on a 'potential employer [who] may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision." ' 153 F.3d at 301 (*citing NLRB v. Burns Int'l Sec. Servs., Inc.,* 406 U.S. 272, 287–88, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972)). And second, it reasoned that the argument in favor of successor liability is less compelling where there is little chance that the predecessor would have been able to provide a remedy. 153 F.3d at 301 (*citing Musikiwamba,* 760 F.2d at 750).

***11** Applying the factors considered relevant in *Peters* to the instant case, the Court is not persuaded that the balance of equities is the same here as it was in *Peters.* First, STCI did not purchase CCCI through receivership and therefore it could and did negotiate an indemnity clause. Defendant asserts that since CCCI was in such dire financial straits at the time that the transfer of assets took place, STCI was not in a position to negotiate a lower price to cover the risk of successor liability. (Doc. No. 14 at 16.) The Court, however, agrees with Plaintiff that STCI was not forced to accept a poor deal in its acquisition of CCCI's assets because Stephen Cox could have had Mr. Schmidt declared in default of the 1995 Agreement and accompanying Promissory Note, permitting CCCI to revert to Mr. Cox's control.

Second, in a Title VII case, there is no question of a successor being saddled with a pre-existing collective bargaining agreement or similar commitment that would bind the successor's hands with respect to changing the corporate structure or practices of the company. Additionally, any injunctive relief resulting from a successful Title VII action is likely to enjoin the successor employer from permitting, tolerating or promoting unlawful discrimination in the work place, and require compliance with the federal anti-discrimination statute. Where the employer is operating substantially the same business with the same workforce, the imposition of such requirements, while not an insignificant burden, is equitable, as it is likely that the same employees will continue the same pattern of illegal discriminatory behavior if their employer is not required to remedy it.

Finally, while the courts have acknowledged a substantial interest in the free transfer of capital and the reorganization of unprofitable businesses, the courts have also acknowledged that the federal policy of eradicating sex discrimination in the workplace is substantially promoted by ensuring that the entire burden of the wrong does not fall on an injured party who is less able to bear that burden than the innocent third party. *Musikiwamba,* 760 F.2d at 747 (*citing Horn v. Duke Homes,* 755 F.2d 599 (7th Cir.1985)). This Court agrees with the reasoning in *Tasemkin,* finding that the availability of relief from the predecessor is not a dispositive factor, but one that must be considered along with other facts in a particular case. *Tasemkin,* 59 F.3d at 51. In light of the fact that STCI's acquisition of CCCI had a similar effect to that in *Tasemkin,* and in view of the strong purpose of Title VII to protect and provide relief for victims of prohibited practices, this Court finds that STCI may be held liable for the discriminatory practices of CCCI, despite its predecessor's insolvency, if the other *MacMillan* factors indicate that such liability is warranted. The Court is convinced that this balancing of equities is consistent with the language in *MacMillan* urging that a court's primary concern in a Title VII case is to provide the discriminatee with full relief.

2. *Continuity of Business Operations*

***12** Defendant concedes that the last six of the nine *MacMillan* factors are satisfied in this case.[4] (Doc. No. 14 at 13.) Despite these concessions, STCI argues that its business was materially different from that of its predecessor because it hired a new plant manager, entered into new contracts for materials, supplies, and services, and solicited new business. (*Id.* at 18.) STCI also submits

that its issuance of an employee manual with a sexual harassment grievance policy distinguishes it significantly from CCCI. (*Id.*) STCI further maintains that the Court should take into account the fact that no complaints of sexual harassment were made against it. (*Id.*)

4 Specifically STCI concedes that: 1) it uses the same plant as was used by CCCI; 2) it uses substantially the same work force; 3) it uses the same or substantially the same supervisory personnel, except that Mr. Schmidt has not been involved in ownership or management of STCI; 4) the same jobs exist under substantially the same working conditions; 5) it uses the same machinery, equipment and methods of production; and 6) it produces the same product. (Doc. No. 14 at 13.)

Although STCI has installed a sexual harassment grievance policy that is substantially different from CCCI's complete lack of such policy, the Court finds that there is sufficient evidence to show that STCI and CCCI share a substantial continuity of business operations. The factors to which STCI has conceded serve as a "foundation for analyzing the larger question of whether there is a continuity of business operations and the work force of the successor and predecessor employers." *Musikiwamba,* 760 F.2d at 751. The evidence shows that the supervisors and employees for the two companies are virtually identical. In a case such as this where all of the male employees are implicated in the creation of a hostile work environment, the substantial retention of the predecessor's employees strongly militates in favor of a finding of successor liability. This is especially true with respect to any non-monetary relief sought which would require the promotion and maintenance of a discrimination free work environment. In addition to the above conceded factors, the Court is persuaded that Mr. Stephen Cox's admitted long-standing personal and financial ties to Cox Cabinets in its several incarnations, viewed in conjunction with his rights under the Agreement of November 1995, and the Purchase Agreement of February 1998, provide sufficient additional evidence to show substantial continuity of business operations.

3. ***Notice of the Charges***

The first *MacMillan* factor is also satisfied because Defendant has admitted that at the time it acquired CCCI's assets it had notice that charges of sexual harassment had been filed against its predecessor with the EEOC by Deena Blake and Michelle Phillips. (Doc. No. 14 at 17.) The 1998 Purchase Agreement specifically listed these sex discrimination charges as under review by the EEOC and attached a letter dated January 26, 1998, from the attorney for Ms. Blake and Ms. Phillips offering to settle the case for $80,000 each and warning that absent a rapid settlement a lawsuit would be brought. (Def. Ex. A3, "Exhibit F" and attachment to Exhibit F.)

The Court has determined that all three of the modified *MacMillan* factors militate for the imposition of successor liability upon STCI in the event that the plaintiff and plaintiff-intervenor prevail. Defendant has not satisfied his initial burden showing the absence of a genuine issue of material fact as to at least one essential element of the plaintiff's claim, accordingly his Motion for Summary Judgment is denied. *See Celotex,* 477 U.S. at 323.

B. ***Limited Liability***

***13** Defendant argues that if successor liability is imposed against STCI, it should be limited to only the claims of Deena Blake and Michelle Phillips, because STCI did not have notice of any other claims by other female employees at the time it purchased CCCI's assets. (Doc. No. 14 at 17.) Plaintiff argues in response that since STCI had notice that the two claims had been filed and were under review, STCI had sufficient information to be able to predict that other claims might be brought. (Doc. No. 19 at 15.) Plaintiff suggests that STCI was able to seek legal advice about the significance of the unresolved claims and thus had the opportunity to protect itself. (*Id.*) Further, Plaintiff points out that STCI secured an indemnity clause in the 1998 Purchase Agreement, and explicitly stated that it was not acquiring all of CCCI's liabilities, including the award or settlement amount of pending or future lawsuits. (*Id.*) Plaintiff argues that it was precisely this evasion of liability in the guise of corporate transfers of ownership that *MacMillan* warned would happen if successor liability was not imposed. 503 F.2d at 1092.

At this stage of the proceedings the EEOC's Amended Complaint provides so little information about the class of female employees and their complaints, that neither the Court nor the defendant can determine whether their claims may take advantage of the single filing rule accepted in *Wilson Metal Casket,* 24 F.3d at 840. In order for the single filing rule to apply, the claims of the class members must be substantially related to the timely filed claims of Ms. Blake and Ms. Phillips, and must arise out of similar discriminatory treatment in the same time frame. *See id.* At this time the Court denies Defendant's request to limit liability, however, after the completion of discovery, and presumably the filing of a Third Amended Complaint by the EEOC, the defendant may renew its motion to limit liability or seek to dismiss the claims of the class of female employees.

C. ***Punitive Damages***

The EEOC and Ms. Blake seek equitable relief, back pay,

front pay, compensatory and punitive damages, costs, expert witness fees, and attorney fees. (Doc. No. 23 at 2; Doc. No. 7 at 6–7.) The EEOC seeks injunctive relief enjoining the defendant employer, its officers, successor, assigns and all persons in active concert or participation with it from engaging in any employment practices that: 1) discriminate against employees because of sex; and 2) retaliate against persons who oppose employment practices made illegal by Title VII or who participate in proceedings under Title VII. (Doc. No. 7 at 6.) Plaintiff EEOC also seeks an Order requiring the defendant employer to institute and carry out policies, practices and programs which eradicate the effects of its past and present unlawful employment practices, including but not limited to implementing and disseminating policies and procedures to prevent sexual harassment and to instruct employees on recognizing and preventing sexual harassment.

***14** Defendant argues that should the Court impose successor liability upon STCI, the damages available to Plaintiff should be limited to preclude the possibility of punitive damages. (Doc. No. 14 at 11–13.) The Court agrees with Plaintiff that this request is premature. However, after the completion of discover, Defendant may renew this motion and the Court will determine at that time whether punitive damages would be appropriate in this case. In light of the balancing of equities performed above, the Court is mindful of its obligation to impose only such burden upon Defendant as would be fair under the circumstances of this case.

IV. *CONCLUSION*

For the reasons stated herein, Defendant's Motion for Summary Judgment is DENIED. The portions of Defendant's Motion which sought to limit liability to the claims of Deena Blake and Michelle Phillips and which sought to preclude punitive damages are DENIED as premature, but may be renewed after the completion of discovery.

An Order consistent with this Memorandum is filed contemporaneously.

Parallel Citations

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