IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Equal Employment Opportunity Commission,

Plaintiffs,

vs.

Freeman Mechanical, Inc., FMC of Atlanta, LLC, and FMC of Greenville, Inc.,

Defendants.

Civil Action No. 6:02-1783-25AK

REPORT OF MAGISTRATE JUDGE

This matter is before the court on motion of defendant FMC of Greenville, Inc., d/b/a Freeman Mechanical, Inc., to dismiss or alternatively to strike. On June 24, 2002, plaintiff Equal Opportunity Employment Commission ("EEOC") filed this action alleging employment discrimination and retaliation. In the complaint, the plaintiff alleges racial discrimination and retaliation under Title VII.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS

The EEOC filed this action against all three defendants alleging racial discrimination and retaliation on behalf of a former employee of Freeman Mechanical, Inc.,("FMI"), Don Abrams. The EEOC is seeking injunctive, punitive, and compensatory relief. After the alleged discrimination and retaliation occurred and after Abrams filed a complaint with the EEOC, the assets of FMI were sold to defendant FMC of Greenville

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("FMC"). The EEOC's contends that FMC is liable as a successor employer and has moved for partial summary judgment on the issue of successor liability.[1] FMC has moved to dismiss the claims of the EEOC on the ground that it is not liable as a successor corporation under Title VII for injunctive or punitive relief. Alternatively, FMC contends that since the court has already granted Abrams' motion to intervene,[2] the EEOC fails to state a claim upon which relief can be granted and the EEOC's claims should be dismissed entirely and only compensatory relief should be allowed to be sought by Abrams. The EEOC contends its claims are statutorily independent from Abrams' claims.

APPLICABLE LAW

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief. In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff. *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)(citations omitted).

Rule 56(c) of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

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[1]When a claim involves federal rights such as those enumerated by Title VII, the federal common law doctrine of successor liability governs. *See, e.g., EEOC v. G-K-G, Inc.*, 39 F.3d 740, 747-48 (7th Cir.1994); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1235-36 (7th Cir.1986) (citing cases). Although there is a nine factor test frequently used by the courts (*see* n. 3, *supra*), the test essentially boils downs to the following: a plaintiff may sue a purchaser of the assets of the violator-business if (1) the successor had notice of the plaintiff's claim before acquisition, and (2) there was a substantial continuity in the operation of the business before and after the sale. *See G-K-G, Inc.*, 39 F.3d at 748.

[2]The court notes that although it granted the motion to add Abrams as a plaintiff, an amended complaint adding him has not been filed. Thus, currently the only plaintiff is the EEOC.

> there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that she is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in her pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must

produce existence of every element essential to his action that he bears the burden of adducing at a trial on the merits.

ANALYSIS

FMC seeks partial summary judgment on the plaintiff's claims for compensatory and punitive damages on the ground that such damages may not be awarded against an successor corporation. FMC does not argue that it has no liability for any claim on a theory of successor liability, only that the plaintiff may not recover compensatory or punitive damages against it on this theory.[3] FMC cites to *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir.1985). In *Musikiwamba*, the Seventh Circuit held that successorship liability may be applied in employment discrimination claims brought under §1981. *Id.* at 744, 748-49.[4] However, in dicta, the court noted that successor liability for punitive and compensatory damages in §1981 cases "go far beyond" the purpose of granting remedial relief to an employee.[5] However, the *Musikiwamba* court considered this

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[3]Courts that have considered the successorship question in a labor context have found the following factors to be relevant: 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. *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249, 256-258 (1974). The court notes that the second factor is of importance as it is obviously unjust to punish a successor corporation when the predecessor is fully capable of providing adequate relief. Here, all parties acknowledge FMI is a defunct corporation. *See Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986). This issue, however, differs from the issue of whether the predecessor could have paid a judgment discussed in more depth in this report on page 5.

[4]The court noted that an employee may sue an employer under section 1981 for intentional discrimination in the terms and conditions of employment in much the same manner that he may sue for such discrimination under Title VII, although there are certain procedural differences between the two statutes. *Id.* at 748.

[5]The EEOC cites *City of Richmond, Va. v. Madison Management Group, Inc.*, 918 F.2d 438 (4th Cir. 1990), for the proposition that under successor liability a corporation is liable for all the damages, including punitive damages. The court notes, however, that *Richmond* is not a Title VII case but rather an ordinary torts case.

issue at a time when there were no compensatory or punitive damages under Title VII at all. Until 1991, Title VII "afforded only 'equitable' remedies . . .[and t]he primary form of monetary relief available was backpay." *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994). The Civil Rights Act of 1991 amended Title VII to authorize additional recovery of compensatory and punitive damages in cases of "intentional employment discrimination." *Id.* at 253.[6] Thus, the addition of these potential damages in an employment discrimination case creates a "make-whole" purpose which did not exist when the Seventh Circuit decided *Musikiwamba*. *See Musikiwamba*, 760 F.2d at 748. Accordingly, the court declines to follow this decision. The court concludes that it is entirely appropriate to impose liability on the defendants for all categories of damages being sought by the plaintiffs, including compensatory as well as injunctive and punitive damages. Having concluded that injunctive and punitive damages may be sought, the EEOC should remain as a plaintiff. Accordingly, the defendant FMC's motion to dismiss the punitive and injunctive claims, or alternatively strike the EEOC as a plaintiff, should be denied.

FMC then contends that successor liability is inappropriate where, prior to the succession, the predecessor lost its ability to pay a judgment, so that as alleged in this case, but for the succession, the plaintiffs would not have been able to collect on any judgment. In *Musikiwamba* and *Wheeler v. Snyder Buick, Inc.*, 794 F.2d at 1236, the courts held that successor liability is inappropriate under such circumstances. Whether the plaintiffs would have been unable to collect against FMC's predecessor, FMI, is a question of fact which cannot be determined at this point in the litigation. Thus, the EEOC's motion for partial summary judgment on this issue should be denied.

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[6]The 1991 Civil Rights Act applied to "cases arising" after November 21, 1991.

CONCLUSION AND RECOMMENDATION

Based upon the foregoing, it is recommended that the defendant FMC's motion to dismiss be denied. It is further recommended that the plaintiff EEOC's motion for partial summary judgment be denied.

William M. Catoe
United States Magistrate Judge

December 13, 2002

Greenville, South Carolina