UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 05-61580-CIV-ALTONAGA/Turnoff

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

PH FITNESS, INC. d/b/a/ FITNESS FIRST and **PBH FITNESS, LLC d/b/a FITNESS FIRST,**

Defendants.
_____/

DAWN GRUNGO,

Intervening Plaintiff,

vs.

PH FITNESS, INC. d/b/a/ FITNESS FIRST and **PBH FITNESS, LLC d/b/a FITNESS FIRST,**

Defendants-in-Intervention.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court on Defendants-in-Intervention, PH Fitness, Inc. and PBH Fitness, LLC's (collectively referred to hereinafter as "Fitness First['s]" or "Defendants[']") Motion to Dismiss Count II of Intervener's Complaint **[D.E. 20]**, filed on February 20, 2006. The Court has carefully reviewed the parties' written submissions and the applicable law.

In Count I of the Intervener's Complaint [D.E. 12], Dawn Grungo ("Grungo"), a former

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employee of Fitness First, alleges that Fitness First violated Titles I and VII of the Civil Rights Act of 1964 by terminating Grungo from her employment "because of her gender and her pregnancy." (Intervener's Complaint [D.E. 12] ¶¶ 13-14). Similarly, Count II, entitled "Pregnancy Discrimination," alleges that Fitness First violated the Florida Civil Rights Act ("FCRA") (Fla. Stat. § 760.10) by terminating Grungo "because of her gender and her pregnancy." (*Id.* ¶¶ 20-21). On the basis of both Counts, Grungo seeks remedies that include: (1) back pay with prejudgment interest; (2) reinstatement and rightful-place hiring; (3) front pay; (4) damages for emotional pain, suffering, inconvenience, loss of enjoyment of life, and humiliation; and (5) reimbursement of medical expenses, out of pocket expenses, job search expenses, moving expenses, punitive damages, attorney's fees, costs, and prejudgment interest. (*Id.* at ¶¶ 18, 24).

Fitness First seeks a dismissal of Count II of the Intervener's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on several grounds. Fitness First points out that it is unclear whether Count II asserts a claim based upon gender discrimination or pregnancy discrimination and that the claim should therefore be dismissed for failure to comply with the Federal Rules of Civil Procedure. Further, insofar as this Count may, as its title would suggest, be asserting a claim for pregnancy discrimination, it should be dismissed because there is no cause of action under Fla. Stat. § 760.10 for pregnancy discrimination, and because such a claim would be preempted by the Title VII claim already alleged in Count I. Grungo maintains that Florida law treats pregnancy discrimination as a form of gender discrimination and that pregnancy discrimination is in fact recognized as a cause of action under Fla. Stat. § 760.10.

For purposes of a motion to dismiss, the Court must accept the allegations of the complaint

as true. *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc). Moreover, the pleading must be viewed in the light most favorable to the plaintiff. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of America*, 795 F.2d 948, 953 (11th Cir. 1986). Thus, to warrant a dismissal under Fed. R. Civ. P. 12(b)(6), it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). However,"[w]hen the allegations contained in a complaint are wholly conclusory . . . and fail to set forth facts which, if proved, would warrant the relief sought, it is proper to dismiss for failure to state a claim." *Davidson v. Georgia*, 622 F.2d 895, 897 (11th Cir. 1980).

Grungo cites to *O'Loughlin v. Pinchback*, 579 So. 2d 788, 791 (Fla. 1st DCA 1991) to support her proposition that under Florida law, pregnancy discrimination is a form of sex discrimination and is not preempted by Title VII. However, a reading of *O'Loughlin* shows that the opposite holds true. In *O'Loughlin*, the court made it clear that Congress amended Title VII in 1978 in order to specify "that discrimination on the basis of pregnancy is sex discrimination, and therefore violative of Title VII," but that, in contrast, "Florida has not similarly amended its Human Rights Act to include a prohibition against pregnancy-based discrimination." *Id.* at 791.

Further, the court in *O'Loughlin* explained that "Florida's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex-based discrimination . . . . Thus we conclude that the Florida Human Rights Act, specifically Section 760.10, Florida Statutes, is pre-empted by Title VII . . . to the extent that Florida's law offers less protection to its citizens than does the

corresponding federal law." *Id.* at 792. *See also Fernandez v. Copperleaf Golf Club Community Ass'n, Inc.*, 2005 WL 2277591 at *1 (M.D. Fla. Sept. 19, 2005) (where a plaintiff filed a complaint alleging two counts of pregnancy discrimination, in violation of Title VII and the FCRA, respectively, the court dismissed count II because "pregnancy discrimination is not prohibited by the Florida Civil Rights Act and therefore the state statute provides no remedy for pregnancy discrimination"); *Swiney v. Lazy Days R.V. Ctr., Inc.*, 200 U.S. Dist. LEXIS 14683, at *1-3 (M.D. Fla., Mar. 19, 1997) (dismissing a claim for pregnancy discrimination under the FCRA because Title VII preempted the claim). Given that the FCRA neither equates pregnancy discrimination with gender discrimination nor recognizes pregnancy discrimination as a cause of action, Count II of Grungo's Complaint, insofar as it pleads discrimination on the basis of pregnancy, fails to state a cause of action.

Although Count II also refers to discrimination on the basis of sex, which is indeed a cause of action under the FCRA, such claim is nevertheless be subject to dismissal for two reasons. First, the Count, as already noted, alleges discrimination on the basis of both pregnancy and gender. Under Federal Rule of Civil Procedure 10(b), "[e]ach claim [must be] founded upon a separate transaction or occurrence." Rule 10(b) requires that the complaint "present each claim for relief in a separate count . . . and with such clarity and precision that the defendant will be able to discern what the plaintiff is claiming. . . ." *Anderson v. District Bd. of Trustees of Cent. Fla. Community College*, 77 F.3d 364, 367 (11th Cir. 1996).

Second, Count II lacks sufficient factual allegations to support a claim for sex discrimination. The statement that Grungo was terminated "because of her gender" is wholly conclusory and the

pleading is devoid of factual averments supporting the claim. *See e.g., Benoit v. Ocwen Financial Corp., Inc.*, 960 F. Supp. 287, 291 (S.D. Fla. 1997);*Cummings v. Palm Beach County*, 642 F. Supp. 248, 249 (S.D. Fla. 1986)("to comply with 'fair notice' pleading, the complaint should at least allege in general terms what violative acts, customs, practices or policies were practiced by the defendant.").

Accordingly, and for the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants-in-Intervention, PH Fitness, Inc. and PBH Fitness, LLC's Motion to Dismiss Count II of Intervener's Complaint **[D.E. 20]** is **GRANTED**. Intervening Plaintiff, Dawn Grungo, has until April 14, 2006 to file her amended complaint.

DONE AND ORDERED in Chambers at Miami, Florida, this 30 day of March, 2006.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge William C. Turnoff
counsel of record