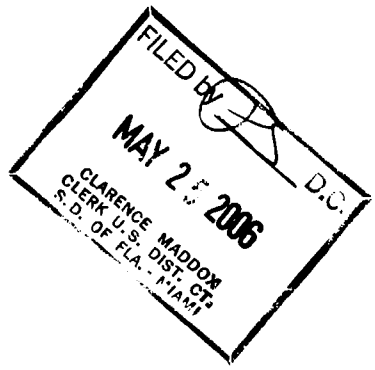

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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 INTERVENER'S AMENDED COMPLAINT AND INTERVENER'S MOTION TO AMEND COMPLAINT

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 Intervener's Amended Complaint **[D.E. 39]**, filed on April 26, 2006. The Court has carefully reviewed the parties' written submissions and the applicable law.

Count I of the Intervener's Amended Complaint [D.E. 31], entitled "Sex and Pregnancy

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Discrimination," alleges that Fitness First violated Titles I and VII of the Civil Rights Act of 1964, by terminating former employee, Dawn Grungo, from her employment "because of her gender and her pregnancy." (Intervener's Complaint [D.E. 31] ¶¶ 12-15). Similarly, Count II, entitled "Sex and Pregnancy Discrimination," alleges that Fitness First violated Title I of the Civil Rights Act of 1991, by terminating Grungo "because of her gender and her pregnancy." (*Id.* at ¶¶ 20-22). 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 the Intervener's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on several grounds. Fitness First argues that Counts I and II must be dismissed because the Intervening Plaintiff has failed to comply with Rule 10(b) of the Federal Rules of Civil Procedure, in that Intervening Plaintiff has failed to present each claim separately, supported by a separate transaction or occurrence. (*See* Defendants' Motion to Dismiss Amended Complaint at 2). Defendants maintain that they are "unable to discern whether Intervening Plaintiff is seeking recovery for alleged discrimination based on her sex, or discrimination based on her pregnancy, which is incidentally associated with her status as a woman." (*Id.*). Defendants further argue that Count I of the Amended Complaint, comprised of conclusory statements, must be dismissed because the Intervening Plaintiff has failed to state a cause of action for sex discrimination under Title VII. (*Id.*). Finally, Fitness First argues that Count II should also

be dismissed, with prejudice, for failure to state a cause of action under Section 1981, since Section 1981 claims are limited to claims of race discrimination. (*Id.*).

In response to Defendants' Motion to Dismiss, Ms. Grungo has filed a Motion to Amend[1] the Amended Complaint and has attached to her Response a proposed Second Amended Complaint. The Second Amended Complaint now consists of one count, entitled "Pregnancy Discrimination," and alleges that Ms. Grungo, during the time in question, was terminated by the Defendants from her employment because of her gender and her pregnancy, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), as amended by the Pregnancy Discrimination Act of 1978, and Title I of the Civil Rights Act of 1991 (42 U.S.C. § 1981a). (*See* Second Amended Complaint ¶¶ 14-16 attached to Plaintiff's Response to Motion to Dismiss).[2]

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)).

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[1]June 1, 2006, is the deadline for filing any motions to amend the pleadings. (*See* Feb. 9, 2006 Order [D.E. 17]).

[2]Intervening Plaintiff's Response to Defendants' Motion to Dismiss does not address any of the arguments made by the Defendants regarding the deficiencies of the Amended Complaint. Rather, Plaintiff's Response to Defendants' Motion to Dismiss consists of Plaintiff's request for leave to amend her Amended Complaint.

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).

As noted, Intervening Plaintiff's proposed Second Amended Complaint consists of a sole count of pregnancy discrimination. In this Second Amended Complaint, it is alleged that on or about December 2003, Ms. Grungo was informed that she would be promoted to a managerial position with the Defendants, and that on or about the Spring of 2004, she was informed that she would start in her new position some time in August of 2004. (*See* Second Amended Complaint ¶¶ 6-7). On or about July 13, 2004, Intervening Plaintiff informed her supervisor that she was pregnant. On or about July 15, 2004, she was terminated from her employment with the Defendants. (*Id.* at ¶¶ 8-9).

In order to state a claim of pregnancy discrimination under Title VII, the complaint must allege that (1) the plaintiff was pregnant at the time in question, (2) she was performing her job well, (3) she was terminated, and (4) there is a nexus between her pregnancy and the adverse employment action. *See B.S. Siko v. Kassab, Archbold & O'Brien, L.L.P.*, 1998 WL 464900 (E.D. Pa. 1998) (citing *Boyd v. Harding Academy of Menphis,Inc.*, 88 F.3d 410, 413 (6th Cir. 1996); *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995)). Although Intervening Plaintiff, through the proposed Second Amended Complaint, attempts to address the inadequacies of the Amended Complaint, as noted by the Defendants in their Motion to Dismiss,[3] Ms. Grungo's most recent allegations fall short

[3]The undersigned agrees with the Defendants' argument that Counts I and II of Intervening Plaintiff's Amended Complaint do not meet the requirements of Rule 10(b) of the Federal Rules of Civil Procedure. Additionally, the undersigned further agrees that in Count I of the Amended Complaint, Intervening Plaintiff has failed to state a cause of action for sex discrimination in violation of Title VII since the allegations made in this count consist of conclusory statements. (*See* the

of what it is required in order to properly plead a claim of pregnancy discrimination. *See B.S. Siko*, 1998 WL at * 2 (denying motion to dismiss where the Plaintiff had not only alleged that she was pregnant at the time in question, was performing her job satisfactorily, and had been terminated, but also alleged that she *was replaced by another employee who was not pregnant*, thereby creating a prima facie case for pregnancy discrimination) (emphasis added); *see also Brennan v. National Telephone Directory*, 850 F.Supp. 331, 336 (E.D. Pa. 1994) (denying motion to dismiss count where plaintiff had alleged facts which, if true, would show that others not in the protected class were treated more favorably than plaintiff). Ms. Grungo's most recent allegation, contained in the proposed Second Amended Complaint, consists of the claim that she was terminated because of "her gender and her pregnancy," and nothing more. (*See* Second Amended Complaint ¶¶ 14-16 attached to Plaintiff's Response to Motion to Dismiss). This statement continues to be 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 Intervener's Amended Complaint **[D.E. 39]** is **GRANTED**. It is

FURTHER ORDERED AND ADJUDGED that Intervening Plaintiff's Motion to Amend

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Court's Order of March 30, 2006 [D.E. 30]). Finally, the undersigned agrees that Count II must be dismissed for failure to state of cause of action under 42 U.S.C. § 1981.

Complaint **[D.E. 43]** is **DENIED**. However, Intervening Plaintiff, Dawn Grungo, has until June 1, 2006 to file a motion for leave to file a second amended complaint that complies with this Order and the Court's prior instructions. Prior to filing her motion, Ms. Grungo must confer with opposing counsel, exchange the proposed amended pleading, and certify whether her motion is unopposed.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of May, 2006.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge William C. Turnoff
counsel of record