UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER STRANGE, MAGAN MORRIS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LES SCHWAB TIRE CENTERS OF OREGON, INC., et al.,

Defendants.

CASE NO. C06-045RSM

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

LES SCHWAB TIRE CENTERS OF WASHINGTON, INC., et al.,

Defendants.

This matter is now before the Court for consideration of defendant Les Schwab Warehouse Center's motion for partial summary judgment (Dkt. # 108). The Court has fully considered the motion, plaintiffs' opposition, and the record in this matter, as well as relevant case law, and deems oral argument

unnecessary. For the reasons set forth below, the motion shall be granted in part and denied in part.

BACKGROUND

Plaintiffs Jennifer Strange and Magen Morris are former employees of defendant Les Schwab Tire Centers of Washington, Inc. They filed this employment discrimination complaint based on Washington state and federal law, alleging that their employer discriminated against them on the basis of their gender by failing to promote them to managerial positions, and by retaliating against them for filing an employment discrimination complaint. Their second amended complaint names Les Schwab Warehouse Center, Inc. ("Warehouse Center" or "Warehouse"), an Oregon corporation, as an additional defendant. With respect to this defendant, the individual plaintiffs allege:

> 2.3 The defendants collectively operate under the name "Les Schwab Tire Centers." Les Schwab Warehouse Center, Inc. has, for equal employment reporting purposes, identified itself as the parent corporation for all Les Schwab Tire Center operations. For the purpose of this action, the defendants together constitute a single integrated enterprise. The principal place of business of all Les Schwab Tire Center operations is Prineville, Oregon.

Second Amended Complaint, Dkt. # 113, p. 2.

After the individual plaintiffs filed this action, the EEOC brought a separate action on behalf of Ms. Strange and Ms. Morris, and "similarly situated individuals who were adversely affected by [defendants'] practices." *Equal Employment Opportunity Commission v. Les Schwab Tire Centers of Washington, Inc., et al.*, C06-761RSM. The action named as defendants the Les Schwab Tire Centers of Washington, Inc., and Les Schwab Warehouse Center, Inc. *Id.*, Dkt. # 1. The two cases were consolidated into one action, and the EEOC filed an amended complaint.[1] With respect to defendant Warehouse Center, plaintiff EEOC alleges in the amended complaint:

> This is an action under Title VII of the Civil Rights Act of 1964 ("Title VII") and Title I of the Civil Rights Act of 1991 to correct the unlawful employment practices and to provide appropriate relief to Magen Morris, Jennifer Strange and similar situated individuals who were adversely affected by such practices. The Equal Employment Opportunity Commission ("the EEOC" or "the Commission") alleges that defendants Les Schwab Tire Centers of Washington, Inc.[,] Les Schwab Warehouse Center, Inc., Les Schwab Tire Centers of Boise, Inc., . . . (collectively referred to herein as "Les Schwab" or "defendants") violated Title VII by discriminating against Ms. Morris, Ms. Strange and similarly situated individuals on the

[1] The EEOC First Amended Complaint also names additional Les Schwab Tire Centers in other states than Washington, but those are not put at issue in this motion. Dkt. # 36.

> basis of sex when defendants failed to provide training opportunities to them and when it failed to promote them to management positions on the basis of sex. The EEOC also alleges that Les Schwab violated Title VII when it failed to hire female applicants for positions in the sale/service departments of Les Schwab Tire Center facilities on the basis of sex.

EEOC First Amended complaint, Dkt. # 36, p. 2.

Defendant Warehouse Center has moved for partial summary judgment, asserting that it should not be a defendant in this action because both the individual defendants worked only for Les Schwab Tire Centers of Washington, Inc. Warehouse Center, located in Prineville, Oregon, is a warehouse and distribution center for the network of Les Schwab retail tire sales centers, of which Les Schwab Tire Center of Washington, Inc., is one. Warehouse Center asserts that it was not plaintiffs' employer and thus not amenable to suit by them under either state or federal law. Warehouse asserts that it is a separate corporation from each of the individual state's Tire Centers, with its own by-laws and Articles of Incorporation. According to Warehouse, there is no parent-subsidiary relationship between the Warehouse Center and any of the Tire Centers, nor does the Warehouse Center act as an agent for the Tire Centers. Warehouse does provide financial and accounting services for the Tire Centers on a fee basis, but the various Tire Centers have the sole authority to manage their own business activities. Defendant Warehouse's Motion for Partial Summary Judgment, Dkt. # 98, ¶¶ 5-6. The individual plaintiffs and the EEOC have opposed the motion, contending that the relationship between the Tire Centers and the Warehouse Center is sufficient to allow imposition of liability upon the Warehouse Center under both state and federal law.

ANALYSIS

I. Legal Standard for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if "a reasonable jury could return a verdict for the nonmoving party" and a fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The evidence is viewed in the light most favorable to the non-moving

party. *Id*. "[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F. 3d 1216, 1221 (9th Cir. 1995). It should also be granted where there is a "complete failure of proof concerning an essential element of the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient" to prevent summary judgment. *Triton Energy Corp.*, 68 F. 3d at 1221.

II. Liability for Discrimination under Title VII

Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Title VII only covers employers with fifteen or more employees. 42 U.S.C. § 2000e. The courts have developed and applied a four-part "single employer" or "integrated enterprise" test to determine whether two related companies may be considered one employer for the purposes of counting employees and thus determining statutory coverage under Title VII. Under the four-part test, multiple businesses may be treated as a single employer for the purpose of Title VII coverage if they had "(1) integrated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control." *Morgan v. Safeway Stores, Inc.*, 884 F. 2d 1211, 1213 (9th Cir. 1989).

However, this four-part test for determining whether two entities may constitute a "single employer" or "integrated enterprise" is not used to determine joint liability; instead it "determines whether a defendant can meet the statutory criteria of an 'employer' for Title VII applicability." *Anderson v. Pacific Maritime Association*, 336 F. 3d 924, 928-29 (9th Cir. 2003). Thus, the "coverage" cases must be distinguished from the "liability" cases, in which a court analyzes whether two or more corporations are related in such a way that one may be subjected to the Title VII liability of the other as either a joint or indirect employer. *See*, *EEOC v. Pacific Maritime Association,* 351 F. 3d 1270,

1272-73 (9th Cir. 2003).[2]

"Liability as an indirect employer requires that the employer have 'some peculiar control over the employee's relationship with the direct employer' and that the indirect employer engaged in 'discriminatory interference.'" *Id*. at 1274, quoting *Anderson*, 336 F. 3d at 932. Plaintiffs have alleged neither "peculiar control" not "discriminatory interference" on the part of Warehouse, so it is not an indirect employer. However, where the indirect employer test is not met, an employer may still be subject to liability as a joint employer where both entities exert some control over the terms and conditions of employment and the employee. *Id*. at 1275.

The Ninth Circuit's "joint employer" test for liability was originally set forth in a case under the Fair Labor Standards Act ("FLSA"). *See, Bonnette v. California Health and Welfare Agency*, 704 F. 2d 1465 (9th Cir. 1983), (disapproved of on other grounds in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)). Under this test, the district court should look to the "economic reality" behind the relationship between the two employers, considering whether the alleged joint employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. *Id*. at 1470. The *Bonnette* economic reality test for joint employer liability was applied to Title VII actions in *EEOC v. Pacific Maritime Association*, 351 F. 3d at 1275. The appellate court noted that the "joint employer" doctrine "recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." *Rubino v. Acme Building Maintenance*, 2008 WL 5245219 at *3, quoting *Pacific Maritime Association,* 351 F. 3d at 1276-77. As noted previously by a court of this district, "[t]he Ninth Circuit has stated that the '*sine qua non'* of determining whether the entity is a joint employer is whether

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[2]The Ninth Circuit Court of Appeals agreed to re-hear this case *en banc*, but no *en banc* decision was ever issued. *EEOC v. Pacific Maritime Association*, 367 F. 3d 1167 (9th Cir. 2004). The opinion of the three-judge panel has subsequently been cited by the Ninth Circuit Court of Appeals and the district courts of this circuit for the "joint employer" analysis. *See, e.g., Morsovillo v. Clark County*, 136 Fed. Appx 17 (9th Cir. 2005) (unpublished disposition); *Rubino v. Acme Building Maintenance*, 2008 WL 5245219 at *3 (N.D. Ca. 2008); *Garcia v. Courtest Ford, Inc.*, 2007 WL 1192681 at *5 (W.D.Wash. 2007).

the entity has 'the right to hire, supervise and fire employees.'" *Garcia v. Courtesy Ford, Inc.*, 2008 WL 1192681 at *6.

In moving for summary judgment, Warehouse asserts that it

> does not employ or control the hiring, training, promotion, firing, wages, hours, or working conditions of the employees in the retail tire stores. Rather, the Tire Center companies have power and authority over such issues as to the retail tire stores each owns and operates. Warehouse has its own by-laws and Articles of Incorporation, each Tire Center company has its own by-laws and Articles of Incorporation, and there is no parent-subsidiary relationship between Warehouse and any Tire Center company.

Declaration of Corey Parks, Dkt. # 100, ¶ 3. Warehouse does provide "certain financial and accounting services for the Tire Center companies for a fee as provided in Managerial and Administrative Services Agreements between Warehouse and each Tire Center company." *Id.*, ¶ 4. These Agreements specify that Warehouse "has no control or responsibility for the day-to-day management, operation or staffing of the retail tire centers." *Id.*, citing Agreement, Dkt. # 100, Exhibit 1, ¶ 3.2.

In their opposition to the motion for summary judgment, the individual plaintiffs assert that

> Warehouse is directly involved with the claims of the individual plaintiffs. The Third Man Training Program, a necessary prerequisite for promotion to an Assistant Manager position, is conducted in Warehouse facilities in Prineville, Oregon. The training materials and notification of who is selected also comes from Human Resources, a Warehouse function managed in Prineville. Many of the persons who select Assistant Managers are Warehouse employees. When each plaintiff requested a medical leave of absence due to retaliatory conduct, that request was forwarded to Human Resources (a Warehouse function) and a Warehouse employee responded to plaintiffs' requests.

Plaintiffs' Response, Dkt. # 114, pp. 3-4. While the fact that "many of the persons who select Assistant Managers are Warehouse employees" could be evidence demonstrating that Warehouse does have some authority to supervise Tire Center employees, plaintiffs have submitted no evidence to support this conclusory allegation—their motion is unsupported by affidavits or declarations, and nowhere in this motion have they pointed to actual evidence in the record to support this or their other allegations. The sole exhibit attached to the individual defendants' motion is a Rule 30(b)(6) deposition notice, asking Les Schwab Tire Centers to designate and produce an employee, agent, or manager with knowledge of the eligibility criteria and selection process for tire center assistant managers. Dkt. # 114, Exhibit A. Plaintiffs contend that this deposition notice is significant, because the person designated as the Tire

Centers' Rule 30(b)(6) representative was Jodie Hueske, director of the human resource department of Warehouse. However, this fact does not, without more, demonstrate that Warehouse has the right to hire, supervise, or fire the Tire Center employees. The individual plaintiffs' conclusory allegations on this point are insufficient to withstand summary judgment on the Title VII claim.

The EEOC opposition to the summary judgment motion includes selected pages from the deposition of Jodie Hueske, highlighted to indicate those portions that the EEOC believes are most significant to the question of Warehouse's status with respect to Tire Center employees Among these are the following:

> Q. Who are you currently employed by?
>
> A. Les Schwab Warehouse Center, Inc.
>
> . . . .
>
> Q. What do you do as director of the human resources department?
>
> A. I oversee all human resource-related activities that support the corporate office, some of our ancillary businesses, as well as provide assistance to the tire center corporations.
>
> . . . .
>
> Q. Are there separate human resource functions within the separate tire corporation?
>
> A. Each manager of every tire center provides and conducts a variety of what one would consider human resource-related activities, such as hiring decisions, performance evaluation, discipline and termination, dealing with payroll and things of that nature. But on a sort of more global basis, the warehouse, through an administrative arrangement with the tire centers, provides assistance and support to the tire centers and to the management of the tire centers on various HR-related issues as well as we administer employee benefits and compensation programs.
>
> . . . .
>
> Q. Is there a document—strike that. Was there a document in the 2003, '4, '5 time frame that described the process by which someone applied for an assistant manager position?
>
> A. In order to really talk about how one applies for an assistant manager position, there are several steps that a sales and service employee has to go through in order to be eligible to apply should there be an opening.
>
> Q. I didn't ask about the process yet. I just want to know whether there was a document that described it during that time frame?
>
> . . . .

A. During that time frame, again, there was The Ron White Book that would explain part of this process. There was also a list that was available on the intranet that would list openings for assistant manager positions, as well as any time there was an opening, the point of sale system would print out a notice to the store as to any openings within the assistant manager position so that anybody who was interested at any time would be able to see either on the intranet or through a document that would be printed within each store openings for the assistant manager position.

. . . .

Q. The intranet in 2004 was maintained in Prineville?

A. The intranet was maintained by the IS department in Prineville.

Q. And the store training department was located in Prineville?

A. The store training department, the employees, yes, were located in Prineville.

Q. And the intranet was available to all of the stores—employees in the stores throughout the company?

A. Yes.

. . . .

Q. Tell me about the training. Who conducts it?

A. Once a year all the assistant managers come to Prineville for training. That happens in J une of every year. Once a year all the managers come to Prineville for training. That happens in September of every year. It's typically a two-day training, and it covers a variety of issues from advertising, marketing, new policies, inventory, human resources, legal, work comp. It's a variety of issues that get covered.

. . . .

Q. I interrupted you when you were telling me the various things that you've done to recruit women in the sales and service position.

A. Well, in addition to the training that we have talked about, as well as the advertising, we partner with a company called Unicru, which was purchased by Kronos, which is a company that allows us to electronically receive applications and do it over the Internet, either through our website or through any other portal, so that we can—instead of just t aking applications in our stores, we have the ability to take applications from anybody, anywhere, any time, anyplace.

Deposition of Jodie Hueske, Dkt. # 116, Exhibit B, pp. 4, 6-7, 16-21.

In addition to this deposition, the EEOC has presented various corporate documents, indicating the extent of the relationship between the Warehouse and the various Tire Centers. For example, John Britton and Corey Parks are listed on the various states' Secretary of State corporate registration

websites as President and Secretary, respectively, of the Warehouse and of the Tire Centers incorporated in Washington, Oregon, and Nevada. Declaration of Lisa Cox, Dkt. # 116, Exhibit D. Further, the Warehouse address in Prineville (646 NW Madras Highway, and/or PO Box 667, Prineville) is listed as the business address for the Tire Centers incorporated in California, Idaho and Utah. *Id*. Announcements regarding employee benefits and group health insurance are initiated from the Warehouse and bear the name of the Warehouse and each Tire Center. *Id*., Exhibit G. Finally, EEOC has provided copies of the "Managerial and Administrative Services Agreement" between the Warehouse and the Washington Tire Center, together with the amended fee agreement providing that a percentage of gross sales shall be paid to the Warehouse by the Tire Center for the covered services. *Id*., Exhibit H, I. The Managerial and Administrative Services Agreement provides that Warehouse employees may serve as officers and directors of the Tire Center corporation; that Warehouse may advise the Tire Centers regarding asset acquisition and disposal; that Warehouse shall maintain the Tire Center's financial and accounting records, and provide credit management services; that Warehouse shall develop marketing plans and advertising promotions for the Tire Center; that Warehouse shall develop plans for the management and control of consumer credit, employee benefits, pensions Workman's Compensation, liability insurance, and other management plans and make them available to the Tire Center, as well as administer those plans; that Warehouse shall assist in the purchase of tools, machinery, and equipment, and in negotiations for the lease or purchase of real property; and that Warehouse shall employ field Representatives to provide marketing and management advice to the Tire Center. *Id*., Exhibit I. The Tire Center, on the other hand, "shall be responsible for the day-to-day management, operation, and staffing of its tire stores and other businesses." *Id*.

While these factors may satisfy some of the requirements of the four-part test for Title VII **coverage**, particularly as to demonstrating integrated operations and common management, they do not subject the Warehouse to Title VII **liability**. Of the four requisite factors that would qualify Warehouse as a joint employer for the purposes of liability (the power to hire and fire the employees, supervision and control of employee work schedules or conditions of employment, determination of the rate and method

of payment, and maintenance of employment records), EEOC's evidence only demonstrates the last one. *Bonnette v. California Health and Welfare Agency*, 704 F. 2d at 1470. The "*sine qua non*" of the joint employer test— whether the Warehouse has "the right to hire, supervise and fire employees" —is absent. *Garcia v. Courtesy Ford, Inc.*, 2008 WL 1192681 at *6. Thus, even when EEOC's evidence is viewed in a favorable light, it is insufficient to demonstrate that Warehouse is a joint employer of the individual plaintiffs, and insufficient to withstand summary judgment on the Title VII claim.

Dismissal of plaintiffs' Title VII claims against Warehouse Center is reasonable in light of the allegations of the individual plaintiffs' complaint. The essence of the two plaintiffs' complaint is that it is the practice of the Tire Centers to promote employees to the manager or assistant manager position exclusively from the pool of "Sales and Service" employees. Second Amended Complaint, Dkt. # 113, ¶ 4.4. Women are excluded from working in the "Sales and Service" division; they are only employed in clerical and office positions ("Sales and Administration"). Women are therefore not eligible for promotion to manager or assistant manager positions. *Id*. The result is that in the fifty years that Les Schwab Tire Centers have been in business, there has never been a female manager, and a woman was hired as an assistant manager only after plaintiffs filed their charge of discrimination with the EEOC. *Id*., ¶ 4.3. These allegations are very serious, but also highly specific—by their very terms they apply only to the Tire Centers. Nowhere have plaintiffs alleged or demonstrated that the Warehouse Center follows the same practice, or even that it has the same hierarchy of employees and managers. Nowhere have plaintiffs alleged that women have been excluded from any particular position within the Warehouse Center. Thus, Warehouse can only be subject to liability under Title VII in this action as a joint employer. As plaintiffs have failed to demonstrate that Warehouse is a joint employer with the Tire Centers, the motion for summary judgment shall be granted as to plaintiffs' claims under Title VII.

III. Liability under the Washington Law Against Discrimination

The individual plaintiffs have also asserted claims of discrimination and retaliation under the Washington Law Against Discrimination ("WLAD"), RCW 49.60. The WLAD makes it an "unfair practice for any employer . . . to discriminate against any person in compensation or in other terms of

conditions of employment because of . . . sex . . .” RCW 49.60.180(3). The definitions section of the statute states that the term “employer” “includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons. . . .” RCW 49.60.040(3).

In moving for summary judgment on the WLAD claims, Warehouse has cited two Washington cases which consider the definition of “employer” in the context of co-worker or shareholder liability under the WLAD. In one, the Washington State Court of Appeals applied the “acting in the interest of” language to determine that a co-worker was not subject to liability under the WLAD. *Jenkins v. Palmer*, 116 Wash. App. 671 (2003). In the other, the appellate court reversed a trial court ruling that the owner of a closely-held corporation (a rental car company), rather than the company itself, was the “employer” for the purposes of the WLAD. *Patten v. Ackerman*, 68 Wash. App. 831 (1993). Neither of these cases provides any guidance on the question of liability of Warehouse under the WLAD.

The individual plaintiffs, for their part, have cited to a Washington Supreme Court case in which the court found that managers and supervisors may be held personally liable under the WLAD when they act in their employer’s interest. *Brown v. Scott Paper Worldwide*, 143 Wash. 2d 349 (2001). This case, like the ones above, is not directly applicable to the relationship between Warehouse and the Tire Centers. It does, however, stand for the proposition that the “acting in the interest of an employer” definition of “employer” in the WLAD is to be broadly construed. *Id.* at 357-58.

Plaintiffs contend that Jodi Hueske “acted on behalf of Tire Centers” when she testified as the Tire Centers’ Rule 30(b)(6) representative, and that her testimony creates questions of fact regarding whether the Warehouse acts “in the interest of” the Tire Centers within the meaning of the WLAD. The Court agrees. While the parties did not brief this question fully, the Court notes that Ms. Hueske’s testimony regarding the manager training conducted by Warehouse, the partnering with Unicru which was mentioned in response to the question regarding recruitment of women, together with various provisions of the Managerial and Administrative Services Agreement between the Warehouse and the Tire Centers, all create an issue of fact as to the extent to which the Warehouse acts in the interest of the Tire Center in these matters. While Warehouse argues that it would go too far to hold a “legally distinct

entity" liable on the basis of its services performed under contract, this Court has previously found that a similar situation does create an issue of fact regarding WLAD liability. *See, Ayon v. Lincare*, 2006 WL 2372294 at *4-5 (W.D.Wash. 2006) (denying summary judgment on WLAD liability to a separate company which provided training services under contract to the plaintiff's employer). Thus, while this Court does not at this point hold Warehouse liable under the WLAD as a matter of law, it does find that there are factual issues which preclude summary judgment.

CONCLUSION

As set forth above, the motion for summary judgment by defendant Warehouse is GRANTED as to liability under Title VII, and DENIED as to liability under the Washington Law Against Discrimination.

DATED this 21 day of January 2009,

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE