2002 WL 31505551
United States District Court,
E.D. Missouri.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION Plaintiff,
v.
AMERICAN CYANAMID COMPANY et al., Defendant.

No. 2:01CV110MLM. | Oct. 8, 2002.

Opinion

MEMORANDUM AND ORDER

MEDLER, Magistrate J.

***1** This matter is before the court pursuant to the Motion to Dismiss or, in the alternative, Motion for Summary Judgment filed by Defendant BASF Corporation ("BASF"). [38] Plaintiff Equal Opportunity Employment Commission ("EEOC") has filed a Response and BASF has filed a Reply. The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). [35]

UNDISPUTED FACTS[1]

Prior to July 1, 2000, Defendant American Cyanamid Company ("American Cyanamid") owned and operated a plant near Palmyra, Missouri ("Palmyra plant"). American Cyanamid is a division of American Home Products. ("AHP"). *See* Pl.Ex. A-3. As of May 1999, American Cyanamid employed approximately 450 individuals at its Palmyra plant. *See id.*

Michael Ray Cox ("Cox") and David Brian Fohey ("Fohey") have Type I or insulin-dependent diabetes. On about February 3, 1998, Cox interviewed with American Cyanamid for the position of CPP Material Handler, and on February 1, 1999, Josh Sprowl, Human Resources, sent Cox correspondence offering him a material handler position, "contingent upon the successful completion of [American Cyanamid's] employment process, including but not limited to: ... [a] medical examination and inquiry." Pl.Ex. A-3, Attach. A.

On February 10, 1999, Nancy Roberts, RN, APN, of American Cyanamid's Human Resources Department, contacted Cox and told him that he did not pass the physical due to high blood sugar and indications that his condition was not under control.[2] *See* Pl.Ex. A-3. American Cyanamid asserts that Cox reported that he was not under a doctor's care for diabetes; that it told Cox that he could reapply if he could demonstrate that his diabetes was under control; that Cox notified the company, on approximately February 24, 1999, that his blood sugar was under control; and that, at the time Cox reported his diabetes was under control, although two material handlers had left the company, the positions had not been filled due to a hiring freeze. *See* Pl.Ex. A-3.

According to the Complaint filed by the EEOC in this matter, American Cyanamid also withdrew a conditional offer of employment it had made to Fohey to work as material handler in late 1998. The EEOC alleges that the job offers to Cox and Fohey were withdrawn because the men have diabetes. The EEOC further alleges that because American Cyanamid regarded Cox and Fohey as disabled based on their diabetes, American Cyanamid's conduct violated Title I of the American with Disabilities Act of 1990 ("the ADA"), and Title I of the Civil Rights Act of 1991. In its prayer for relief, the EEOC seeks a permanent injunction, enjoining American Cyanamid from engaging in employment practices which discriminate on the basis of disability. The EEOC also asks this court to order American Cyanamid to: (1) provide equal employment opportunities to qualified individuals with disabilities; (2) make Cox and Fohey whole by providing back pay; (3) provide compensation to Cox and Fohey for nonpecuniary losses resulting from American Cyanamid's allegedly unlawful conduct; (4) place Cox and Fohey in the next available material handler positions at the Palmyra facility; (5) pay Cox and Fohey punitive damages; and (6) grant other relief as the court finds necessary.

***2** On about March 20, 2000, BASF Aktiengesellschaft, American Cyanamid, and AHP executed a purchase agreement ("Purchase Agreement"), pursuant to which BASF Aktiengesellschaft purchased certain assets from American Cyanamid and AHP. BASF, a subsidiary of BASF Aktiengesellschaft, assumed operational control over the Palmyra plant on July 1, 2000. BASF did not own, operate or employ any individuals at the Palmyra plant at any time prior to July 1, 2000 BASF contends that prior to signing the Purchase Agreement, it requested information regarding potential employment claims against American Cyanamid and AHP arising from any facilities subject to the Purchase Agreement and that American Cyanamid and AHP produced information regarding certain employment-related claims, but that, as of July 1, 2000, it did not have notice of any claims or threatened claims by Cox or Fohey.

The Purchase Agreement includes an indemnification provision. Article XI(a)(vi) provides that American Cyanamid and AHP are required to indemnify BASF in regard to causes of action or litigation on behalf of employees or former employees. *See* Pl. Ex C. Additionally, Article II of the Purchase Agreement provides that BASF purchased the assets of American Cyanamid and AHP. *See* Pl.Ex. C. Article IX(3)(a) provides that BASF was obligated to continue to employ all of American Cyanamid's employees or offer employment to the employees. In particular, BASF was obligated to offer employment to all of American Cyanamid's employees who were represented by a union and to assume all the terms and conditions of employment of collective bargaining agreements. *See* Pl.Ex. C.

On February 12, 2000, the EEOC filed a First Amended Complaint joining BASF as a defendant in the matter under consideration. In its prayer for relief, the EEOC seeks a permanent injunction enjoining BASF from discriminating against employees at the Palmyra plant on the basis of disability. It also requests that the court order BASF to institute practices and programs which eradicate the effects of past unlawful employment practices at the Palmyra plant, and to order BASF to hire Cox and Fohey.[3]

On March 15, 2002, BASF laid off approximately twenty hourly employees from the Palmyra plant. BASF contends that this lay off was due to economic conditions. The EEOC asserts that because no depositions have been taken and because there has been no written discovery, it is unable to determine the veracity of this alleged reason for the lay offs. *See* Pl. Resp. to Defendant. Facts, ¶ 8.

BASF asserts that pursuant to the collective bargaining agreement governing the Palmyra plant, the above described lay off of employees was based on seniority dates and, pursuant to the seniority system, all hourly employees who were hired on or after February 9, 1999, were laid off in March 2002. BASF further asserts that it does not anticipate that its future business needs will result in the recall of laid off employees. In support of these contentions, BASF submitted to the court the affidavit of Steve Farley, the Human Resources Manager at BASF's Palmyra plant. *See* Defendant Ex. B. The EEOC contends that because there has been no written discovery, it is unable to determine the veracity of these alleged reasons for order of the lay offs and the veracity of BASF's contention that it will not recall the employees on lay off. *See* Pl. Resp. to Defendant. Facts, ¶¶ 8-11.

STANDARD FOR A MOTION TO DISMISS

***3** A court may dismiss a cause of action for failure to state a claim if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Alexander v. Peffer,* 993 F.2d 1348, 1349 (8th Cir.1993) (holding that a motion to dismiss should be granted as a practical matter only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief). "The issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support [its] claim." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *See also Bennett v. Berg,* 685 F.2d 1053, 1058 (8th Cir.1982), *cert. denied* 464 U.S. 1008, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983) (holding that a complaint should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations). The court must review the complaint most favorably to the plaintiff and take all well-pleaded allegations as true to determine whether the plaintiff is entitled to relief. *See Conley,* 355 U S. at 45-46. A dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff has presented allegations that show on the face of the complaint that there is some insuperable bar to relief. *See Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir.1994).

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment if all of the information before the Court shows that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (*Celotex*); *F.D.I.C. v. Bell,* 106 F.3d 258, 263 (8th Cir.1997). The initial burden is placed on the moving party to clearly establish the non-existence of any genuine issue of fact that is material to a judgment in his favor. *See Handeen v. Lemaire,* 112 F.3d 1339, 1346 (8th Cir.1997); *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op.,* 838 F.2d 268, 273 (8th Cir.1988).

Once this burden is discharged, if the record does in fact bear out that no genuine dispute exists, the burden then shifts to the non-moving party who must set forth affirmative evidence and "specific facts showing there is a genuine issue for trial." *Handeen,* 12 F.3d at 1346 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Once the burden shifts, a party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to the jury without any significant probative evidence tending to support the complaint. *See Anderson,* 477 U.S. at 256. Moreover, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Indeed, the non-moving party must establish to the court that there is sufficient evidence favoring the non-moving party which would enable a jury to return a verdict for him. *See Anderson,* 477 U.S. at 249; *Celotex,* 477 U.S. at 324.

***4** Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex,* 477 U.S. at 233-23.
In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U.S. at 322-23; *see also Fennell v. First Step Designs, Ltd.,* 83 F.3d 526, 535 (8th Cir.1996) (*Fennell*) (holding that Fed.R.Civ.P. 56(c) "mandates the entry of summary judgment, .. upon motion, against a party who fails to make showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *See Roberts v. Browning,* 610 F.2d 528, 531 (8th Cir.1979). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is an "integral part of the Federal Rules as a whole." *Celotex,* 477 U.S. at 326; *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.,* 838 F.2d 268, 273 (8th Cir.1988).

DISCUSSION

In support of its Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, BASF states that equitable considerations render it fundamentally unfair to hold BASF liable for the alleged conduct of American Cyanamid because: (1) BASF had no involvement in the alleged discriminatory conduct alleged in EEOC's First Amended Complaint; (2) BASF had no association with the Palmyra plant for over one year after the alleged discrimination occurred; (3) BASF had no knowledge of EEOC's claims prior to assuming responsibility for the Palmyra plant; and (4) Cox and Fohey can receive full and satisfactory relief from American Cyanamid without BASF's being a party to this action. *See* BASF Mem. at 1-2.

The EEOC opposes BASF's motion on the grounds that "genuine issues of material fact exist as to whether BASF was an innocent purchaser of the Palmyra plant with neither notice of nor an opportunity to protect itself from potential claims by Cox, Fohey, and/or the EEOC, and whether BASF is able to provide some or all of the injunctive relief sought by the EEOC." EEOC Mem. at 6.

***5** Clearly, at the time Cox and Fohey's alleged offers of employment were withdrawn, BASF did not own nor operate the Palmyra plant. Because American Cyanamid no longer owns nor operates the Palmyra plant, and because the plant is currently owned and operated by BASF, the EEOC seeks injunctive relief from BASF, which relief the EEOC alleges is necessary to provide a remedy for American Cyanamid's allegedly unlawful conduct. The EEOC also requests that BASF be ordered to hire Cox and Fohey. In order to impose such liability on BASF, the court must consider whether the doctrine of successor liability is applicable.

The United States Supreme Court has applied the doctrine of successor liability in cases involving unfair labor practices under the National Labor Relations Act ("NLRA") *See Howard Johnson Co., Inc., v. Detroit Local Joint Executive Bd.,* 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974) (*Howard Johnson*); *Golden State Bottling Co., v. NLRB,* 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973) (*Golden State Bottling*). "Although the Supreme Court has never ruled on whether its reasoning also applies to [other] discriminatory practices by employers, almost all Circuits have assumed that it does." *Korlin v. Chartwell Health Care, Inc.,* 128 F.Supp.2d 609, 613 (E.D.Mo.2001) (*Korlin*) (citing *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union, Local No. 64,* 674 F.2d 732 (8th Cir.1982) (*Dominguez*) (other citations omitted)). As further stated by the court in *Korlin:*

> The doctrine of successor liability is derived from equitable principles, and fairness is the prime consideration in application of the doctrine. (citations omitted). It would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the successor did not have the opportunity to protect itself. (citations omitted) A balance must be struck between conflicting legitimate intersts of the bona fide successor and the free transfer of capital, and the affected employee and the underlying labor law policy. (citations omitted). Courts have chosen a case-by-case approach in determining whether or not successor liability should apply in any given case. (citations omitted).

Id.

The factors to which courts look when determining whether a successor can be held liable include: "(1) whether there has been a continuity in the operations and work force between the successor and predecessor employers; (2) whether the successor had notice of the charge or pending lawsuit prior to acquiring the business; and (3) whether the predecessor has the ability to provide adequate relief directly." *Id.* at 613-14 (citations omitted).

The Supreme Court has acknowledged, in the context of the NLRA, that a critical factor in determining successor liability is whether there is a continuity in the employing industry. *See id.* at 614 (citing *Golden State Bottling,* 414 U.S. at 182 n. 5). "Some cases simply state that the doctrine applies when 'the assets of the defendant employer are transferred to another entity,' then follow with an analysis of the [above quoted three] factors." *Id.* at 614 n,3 (citation omitted). In regard to a continuity inquiry, courts also consider: "(a) whether the new employer uses the same plant; (b) whether it uses the same or substantially the same work force; (c) whether it uses the same or substantially the same supervisory personnel; (d) whether the same jobs exist under substantially the same working conditions; (e) whether the successor uses the same machinery, equipment, and methods of production; and (f) whether he produces the same product." *Desporte-Bryan v. Bank of America,* 147 F.Supp.2d 1356, 1362 (S.D.Fla.2001) (citing *Musikiwamba v. ESSI, Inc.,* 760 F.2d 740, 750 (7th Cir.1985) (*Musikiwamba*)).

***6** It is quite clear that in this matter the assets of American Cyanamid were transferred to BASF; that BASF operates the same Palmyra plant that American Cyanamid operated; that there is a continuity in the operations and work force between the BASF and American Cyanamid; and that, as American Cyanamid and BASF are parties to the detailed Purchase Agreement, there is privity between American Cyanamid and BASF[4] Not only did BASF purchase the assets of the Palmyra plant, but it agreed to continue to employ American Cyanamid's employees, recognize their collective bargaining representatives, and abide by the terms of existing collective bargaining agreements. *See Howard Johnson,* 417 U.S. at 263-64 (holding that whether the successor employer hires a majority of the predecessor's employees can determine the legal obligations of the successor). The court finds, therefore, that the undisputed facts establish the presence of the factors discussed above, which factors can be considered when determining whether there is a continuity between American Cyanamid's and BASF's operation of the Palmyra plant for purposes of applying successor liability.

Additionally, the Supreme Court further directs that a successor's potential liability may be reflected in an indemnity clause in purchase agreement, which clause would indemnify the alleged successor for liability arising from the seller's conduct. *Id.*

(citing *Golden State Bottling,* 414 U.S. at 185). In the matter under consideration the indemnity provisions in the Purchase Agreement suggest that the parties to the agreement intended that American Cyanamide would indemnify BASF for the type of conduct alleged in the First Amended Complaint. As discussed by the Seventh Circuit in *Musikiwamba,* 760 F.2d at 750, "it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when ... the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement." It follows, that such unfairness does not exist where liability is imposed on a successor who is protected by an indemnification agreement.

Whether the successor had knowledge of the pending lawsuit or potential liability must also be considered when determining whether successor liability is applicable. BASF contends that it did not have any knowledge of the conduct of American Cyanamid which precipitated this lawsuit The EEOC responds that sufficient discovery has not taken place which would enable it to determine the veracity of this statement. In any case, BASF did protect itself with an indemnification provision. The court finds that, under such circumstances, it would not be unfair to impose liability upon BASF even if it did not have knowledge of American Cyanamid's alleged withdrawal of an offer of employment to Cox and Fohey prior to its purchase of the Palmyra plant. Because of the inclusion of an indemnity provision in the Purchase Agreement, in the event BASF is ordered to provide a remedy for the conduct of American Cyanamid, providing a remedy will not provide undue hardship on BASF.

***7** Another consideration is whether the predecessor could have provided any or all relief to remedy the alleged unlawful conduct prior to the transfer of assets. *See Musikiwamba,* 760 F.2d at 750. This consideration is based on the notion that "an employee's statutory rights should not be vitiated by the mere fact of a sudden change in the employer's business. That an employee should be able to enforce against a successor a claim or judgment that he could have successfully enforced against a predecessor." *Id.* Because "the public has a substantial interest in the free transfer of capital and the reorganization of unprofitable businesses," successor liability should not be imposed where a predecessor could not have provided relief. *Id.* at 750-51. In the matter under consideration, the undisputed facts fail to establish that there is any reason why the predecessor, American Cyanamid, could not have provided the relief sought by the EEOC in the event American Cyanamid had not transferred the assets of the Palmyra plant to BASF.

In *Musikiwamba* the Seventh Circuit noted that the "[t]he purpose of requiring a successor to remedy a predecessor's discrimination is not to leave the employees free to exercise discretionary rights but to protect the statutory purpose of nondiscrimination, which inheres to all employees as a matter of right." *id.* at 751 (citation omitted). The *Musikiwamba* court continued to state that greater continuity from the operation of the predecessor to that of the successor is required where the relief sought is more than monetary. Thus, in the matter under consideration, where reinstatement, monetary relief, as well as injunctive relief are sought, there should be a substantial degree of continuity for successor liability to be imposed upon BASF. As evidenced by the Purchase Agreement, the degree of continuity in this matter can be characterized as substantial. Additionally, this court notes that the Supreme Court stated, in *Golden State Bottling,* 414 U.S. at 180, that injunctive relief may be obtained from even a nonparty successor. Under such circumstances, the court finds that the relief which the EEOC seeks from BASF is not inconsistent with the public policy considerations which are applicable when applying successor liability.

BASF argues that it cannot reinstate Cox and Fohey, as requested by the EEOC, because employees hired before the date that American Cyanamid allegedly discriminated against Cox and Fohey are on lay off with no reasonable expectation of being rehired. BASF further argues that it can only recall employees according to the seniority rules in its collective bargaining agreement. Even assuming, arguendo, that, as of this date, BASF has no expectation of recalling employees on lay off, in the event judgment is entered in favor of EEOC, the possibility of recalling laid off employees must be determined as of the date of such judgment. In agreement with the EEOC, the court finds speculative BASF's argument that in the event Cox and Fohey are placed on the seniority list, they will not be recalled. Moreover, without BASF as a defendant in this matter, if the EEOC prevails on its substantive claims, the EEOC cannot obtain the injunctive and hiring relief which it seeks without BASF's being found to be a successor to American Cyanamid. Without BASF's inclusion in this matter as a defendant, the EEOC arguably would be limited to obtaining, as a remedy, back and front pay for Cox and Fohey. BASF argues that this relief should suffice. The court notes, however, that appropriate relief cannot be determined prior to a consideration of the totality of American Cyanamid's conduct by the trier of fact

CONCLUSION

***8** The court finds that the uncontested facts fail to establish that BASF is not a successor employer to American Cyanamid. The court also finds that BASF has failed to establish that the EEOC can prove no set of facts in support of its claim that it is entitled to relief from BASF. Additionally, the EEOC has established that there are sufficient facts showing there is a genuine issue for trial in regard to the liability of BASF. Therefore, BASF's Motion to Dismiss, or Alternatively, Motion for Summary Judgment, should be dismissed. Under such circumstances it is not necessary for the court to determine, pursuant to the request of the EEOC, that a decision regarding BASF's motion should be postponed pending further discovery.

Accordingly,

IT IS HEREBY ORDERED that the Motion to Dismiss, or Alternatively, Motion for Summary Judgment filed by Defendant BASF Corporation is DENIED. [38]

Parallel Citations

13 A.D. Cases 1193

Footnotes

1 The facts are undisputed unless otherwise stated.

2 A laboratory report, dated February 2, 1999, from the Hannibal Clinic, Inc., states that Michael Cox's glucose level was 270 mg/dl and that this level was "high." *See* Pl.Ex. 3, Attach B.

3 Plaintiff the Equal Employment Opportunity Commission ["EEOC"] also joined the International Chemical Workers Union/United Food and Commercial Workers Local 887-C ("the Union") as a defendant in the First Amended Complaint. The EEOC and the Union entered into a Settlement Agreement regarding the allegations against the Union in the First Amended Complaint. They also filed a Joint Stipulation to Dismiss the Union, with prejudice, pursuant to the Settlement Agreement, which Joint Stipulation the court approved on May 3, 2002.[45] Pursuant to the terms of the Settlement Agreement, the Union will not oppose or grieve the hiring of Michael Ray Cox ("Cox") and David Brian Fohey ("Fohey"), with all seniority rights, at the Palmyra plant, in the event a consent decree or settlement agreement is entered or in the event the court orders such hiring. The Union further agreed that it would not oppose nor grieve other relief which has an impact on the bargaining unit at the Palmyra plant. [45]

4 The Eighth Circuit considered, in *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union, Local No. 64,* 674 F.2d 732 (8th Cir.1982), whether successor liability is applicable in the context of alleged discriminatory employment practices. Because there was no privity between the predecessor and the successor, the Eighth Circuit declined to impose successor liability; the successor purchased the business, a Holiday Inn, at a foreclosure sale.