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United States District Court,
W.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
EVERDRY MARKETING AND MANAGEMENT, INC., and Everdry Management Services, Inc., a/k/a Everdry Waterproofing and Everdry of Rochester, Defendants.

No. 01-CV-6329CJS. | Jan. 31, 2005.

Attorneys and Law Firms

Robert D. Rose, EEOC New York District Office, New York, New York, for the Plaintiff.

Kenneth B. Baker, Javitch, Block and Rathbone, Cleveland, Ohio, Sanford Shapiro, Peter C. Nelson, Shapiro, Rosenbaum, Liebschutz & Nelson, LLP, Rochester, New York, for the Defendants.

Opinion

DECISION AND ORDER

SIRAGUSA, J.

INTRODUCTION

***1** This is an action pursuant to Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991, alleging sexual discrimination. Now before the Court is a motion [# 84] for summary judgment by defendant Everdry Marketing and Management, Inc. For the reasons discussed below, the application is denied.

BACKGROUND

Defendants in this action are Everdry Marketing and Management, Inc. ("EMM") and Everdry Management Services, Inc. ("EMS"), a/k/a Everydry Waterproofing and Everdry of Rochester. EMM apparently patented a method for waterproofing basements which it sells to franchisees around the United States. EMS began operating an Everdry waterproofing business in Rochester, New York, after the original franchisee left the business. EMS employed a number of telemarketers at the Rochester office whose job it was to market Everdry's services to homeowners. On or about July 21, 1999, one of those telemarketers, Stephanie Distasio ("Distasio"), filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that she was sexually harassed while working for EMS. On June 27, 2001, the EEOC commenced the subject action on behalf of Distasio and twelve other similarly situated females who had been employed at EMS's Rochester office. The Amended Complaint [# 4] alleges that several of EMS's male managers created a hostile work environment and constructively discharged the women, by touching them and by making sexual comments.

EMM is now moving for summary judgment, on the grounds that it was not the women's "employer" within the meaning of Title VII. In this regard, EMM contends that: 1) both the perpetrators and the victims of the alleged harassment were employed by EMS, not EMM; 2) EMS employees were paid from EMS's own bank account; and 3) EMM "had no control whatsoever of those individuals employed by EMS" (EMM Memo p. 11). EMM further maintains that there was no parent/subsidiary relationship between EMM and EMS. For example, EMM contends that it had no involvement in EMS's day-to-day business operations, such as selecting contractors, maintaining inventory, or hiring and firing employees.

Plaintiff, however, contends that EMM and EMS are actually a single employer. In that regard, plaintiff contends that EMM was actively involved in the day to day operations of EMS's Rochester Everdry office. According to plaintiff, the record

> shows that EMM and EMS have common ownership and management. It also shows that EMM has made numerous employment decisions, including hirings, firings, promotions, and transfers, affecting EMS employees. Additionally, the evidence reveals that EMM has been integrally involved in the daily operations of EMS, including the training and direct supervision of EMS employees. EMS also has been involved in the enforcement of EMS's sexual harassment policy, including receiving and investigating the sexual harassment complaint made by Stephanie

Distasio.

***2** Pl. Memo, pp. 2-3.

The facts produced in discovery and contained in the record before the Court, viewed in the light most favorable to the plaintiffs, are as follows. At all relevant times, both EMM and EMS were Ohio Corporations with offices at 365 Highland Road East, Macedonia, Ohio. Nicholas DiCello ("DiCello") was the owner and President of both EMM and EMS. A single individual, Judy Garvin ("Garvin"), also served as Secretary and Treasurer of both EMM and EMS. Jack Jones ("Jones"), an employee of EMM who specialized in sales, also served as President of EMS for a time. DiCello Dep. 61. EMM and EMS shared offices in Ohio, although DiCello claims that he was the only EMS employee there. DiCello Dep. p. 24.

EMM employees trained EMS employees regarding sales, advertising, marketing, and installation. DiCello Dep. pp. 30-31. EMM employees also had supervisory control over EMS employees. Gene Ake, a former employee of EMS, testified that Paul Trecarichi ("Trecarichi"), an EMM employee, "was the [EMS] general manager's boss." Ake Dep. 59. David Molinaro ("Molinaro"), who worked as a telemarketing manager for EMS, testified that Trecarichi "oversaw" EMS's Confirmation Department: "[H]e kind of ran that department-well, he oversaw the progress of our department on a corporate level-or on the Cleveland level." Molinaro Dep. 14-15; *see also, Id.* at 18 ("[U]ltimately, people answered to him in that department.").[1] Trecharichi also placed his written approval on decisions by the EMS general manager granting pay raises to EMS employees. Rose Aff. Exs. 34-35. Molinaro also stated that an EMM employee named Theresa Nightzel ("Nightzel") was his "direct supervisor outside of the general manager. She oversaw all of telemarketing." Molinaro Dep. 24. According to Molinaro, Nightzel had control over EMS's telemarketers and "reviewed the numbers on a daily basis." Molinaro Dep. 25. Employees of EMS's confirmation department also had to send daily reports to EMM. Stevenson Aff. ¶ 29.

[1] At his deposition, Trecarichi initially attempted to minimize his involvement with EMS, however he later admitted that he advised EMS concerning marketing. Trecarichi Dep. 7.

EMM employees were involved in the hiring and firing of EMS employees. For example, Molinaro testified that Nightzel had the ability to hire and fire EMS employees, and in fact Nightzel hired Molinaro as a Telemarketing Manager for EMS. Molinaro Dep. 11-12. Nightzel also hired EMS employee Michelle Trick. Trick Dep. 10, 15. Molinaro also stated that "corporate" "had the ultimate decision" on hiring managers. *Id.* at 100-01. Jay Lang ("Lang"), a male employee who was fired as a result of Distasio's complaints of sexual harassment by him, testified that after he was fired, he contacted Trecharichi in Ohio to see if he could have his job back. Lang Dep. 28. Lang also said it was possible that he spoke to Jones for the same reason. *Id.* at 28. There is also evidence that EMM employees decided whether EMS telemarketers would be retained or terminated. Stevenson Aff. ¶ ¶ 23-24; Buckner Aff. ¶ 16.

***3** EMM and EMS shared employees. For example, David Bowers ("Bowers"), who was EMS's general manager from 1998 through May 2000, is listed on EMM's list of employees for 1999. *See,* Rose Aff. Exs. 18, 27, 45. Similarly, an EMM employee named Tim Rose ("Rose") was made the acting general manager of EMS at various times in 2000 and 2001.[2][3] *See,* Rose Aff. Exs. 27, 17, 19a-20b; Molinaro Dep. 19. Anna Stevenson ("Stevenson"), a former EMS employee, stated that another EMM employee, Jack Myers, came to work in the Rochester office "for approximately four to six months after the former production manager, Brian Johnson, went to Pittsburgh." Stevenson Aff. ¶ 9.

[2] Rose denies that he was ever the General Manager at EMS in Rochester, that he ever performed any of the "general manager duties in Rochester," and that he ever worked full time in the Rochester office. Rose admits that he sometimes received paychecks from EMS, but claims that he did not know why. Rose Dep. 14, 18.

[3] During oral argument of the subject motion, EMM's counsel acknowledged that if the documentary evidence indicated that Rose was employed by both EMM and EMS at that same time, this fact alone would raise a triable issue of fact sufficient to defeat summary judgment. Some time after oral argument, EMM's counsel requested permission to supplement his submissions to address this issue, however the Court denied the request.

EMM employees performed various services for EMS. For example, Garvin, who as noted earlier was an officer of both EMS and EMM and an employee of EMM, processed the payroll for EMS. Garvin Dep. 10. EMS employees faxed information to Garvin in Ohio, who prepared the payroll using computer software. Garvin then prepared and signed the paychecks and sent them back to Rochester. *Id.* Joan Garvin, a relative of Judy Garvin and an employee of Ohio State Home Services, another company owned by DiCello, acted as EMS's "insurance coordinator." Garvin Dep. 23. Molinaro stated that EMS's human resources, "the benefits and all that stuff," were "handled all out of the corporate office in

Cleveland." Molinaro Dep. 153.

EMM was also involved in the administration of EMS's sexual harassment policy. The sexual harassment policy used by EMS advised employees that they could report harassment to "Judy Garvin, at Corporate Human Resources in Macedonia, OH." Rose Aff. [# 101], Ex. 42. However, when Distasio contacted "corporate" headquarters in Ohio to complain about Lang, she was directed to Jones, who directed her to send her written complaint to him. At that time, Jones was an employee of EMM, not EMS.[4] Subsequently Trecarichi conducted at least part of the investigation into Distasio's complaint of sexual harassment by Lang. Rose Aff. [# 101], Ex. 41.

[4] Distasio complained in July 1999. On January 10, 1998, Jack Jones, who was employed by EMM, was also made President of EMS. See, Rose Aff. Ex. 44. However, DiCello testified that Jones only served in that capacity for "about 30 days." DiCello Dep. 61. It therefore appears that at the time Jones directed Distasio to submit her written complaint to him, he was vice-president of sales for EMM. Jones Dep. 15.

Finally, the same law firm has represented both EMM and EMS in this action:

> THE COURT: Who are you representing; both?
>
> MR. NELSON: At the present point in time I'm representing both.
>
> THE COURT: And you see no conflict there?
>
> MR. NELSON: They're related entities, your Honor. We're not denying that. The only-so that's not a concern here.

Transcript of February 12, 2002, Court appearance in this action, p. 41;[5] *see also, Id.* at 43 ("THE COURT: ... So, Mr. Nelson, I wanted to be clear. You're representing Everdry Management Services, Inc. and Everdry Marketing and Management. MR. NELSON: That's correct, your Honor."); Answer to Amended Complaint [# 6]; Nelson Aff. [# 9], ¶ 1: Letter of Peter C. Nelson to the Hon. William G. Bauer dated June 13, 2002 ("My *co-counsel for the defendants,* Kenneth Baker, has his offices in Cleveland, Ohio.") (emphasis added). Although, in their papers submitted to the Court on the pending motions, Mr. Baker and Mr. Nelson/Mr. Shapiro purport to represent only EMM or EMS, respectively, prior to that they consistently represented to the Court that they were "co-counsel" for the defendants. *See, e.g.,* Motion by Kenneth Baker to be excused from Status Conference on January 28, 2004[# 79] (referring to his "co-counsel, Peter C. Nelson."); Motion for excusal from oral argument on June 30, 2003[# 59]; Baker Aff. [# 57], ¶ 1 ("I am one of the attorneys representing the Defendants in the within matter.").

[5] Notably, EMM's counsel, Mr. Baker, was present for these statements, and made no objection.

ANALYSIS

***4** The standard for granting summary judgment is well established. Summary judgment may not be granted unless "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). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 MOORE'S FEDERAL PRACTICE, § 56.11[1][a] (Matthew Bender 3d ed.). Once that burden has been established, the burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson,* 477 U.S. at 249. The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy,* 988 F.2d 303, 308 (2d Cir.1993). The parties may only carry their respective burdens by producing evidentiary proof in admissible form. FED. R. CIV. P. 56(e).

Title VII

Title VII "makes it unlawful for an employer to discriminate against any individual with respect to the 'compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." ' *Richardson v. New York State Department of Correctional Services,* 180 F.3d 426, 436 (2d Cir.1999) (citations omitted). The issue in the instant motion is whether or not EMM was the "employer" of the women whom the plaintiff represents. "The term 'employer' has been construed liberally under

Title VII, and does not require a direct employer/employee relationship." *Laurin v. Pokoik,* No. 02 Civ.1938(LMM), 2004 WL 513999 at *4 (S.D.N.Y. Mar. 15, 2004). For example, the "single employer/integrated enterprise" doctrine "is used to determine whether two entities will be regarded as a single employer subject to joint liability for employmentrelated acts," and "results in the treatment of two ostensibly separate entities as a single, integrated enterprise." *Id.* at *4 (citation and internal quotation marks omitted).[6] Here, plaintiff contends that EMM should be considered an employer under Title VII, because EMM and EMS are related companies that comprise a single employer or an integrated enterprise.

[6] A similar doctrine, the joint employer doctrine, "assumes separate legal entities that have chosen to handle certain aspects of their employer-employee relationships jointly." *Arculeo v. On-Site Sales & Marketing, LLC,* 321 F.Supp.2d 604, 608 (S.D.N.Y.2004) (citation and internal quotations marks omitted). "[A] joint employer relationship may be found where there is sufficient evidence that a defendant had immediate control over another company's employees. Relevant factors include the commonality of hiring, firing, discipline, pay, insurance records, and supervision." *Id.* "Primarily, the analysis is used to construe the term 'employer' functionally, to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an employee's compensation or terms, conditions, or privileges of employment." *Laurin v. Pokoik,* 2004 WL 513999 at 8. Plaintiff expressly states that the single employer/integrated enterprise test, and not the joint employer test, should apply in this case. Pl. Memo of Law, p. 5, n. 5.

***5** The test for determining whether two defendants may be considered a single employer/integrated enterprise is as follows:

> There are four factors used in determining whether two entities can be considered a single employer: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. The most important of the four factors is the second-centralized control of labor relations. Additional relevant factors include use of common office facilities and equipment and family connections between or among the various enterprises. No one factor is controlling, and not every factor is required. Whether entities can be joined as a single employer is a question of fact.

Laurin v. Pokoik, 2004 WL 513999 at *4 (citations and internal quotation marks omitted).

Applying these principles of law to the facts of this case, viewed in the light most favorable to the plaintiff, the Court finds that there are triable issues of fact which preclude a grant of summary judgment. Beginning with the last of the four factors set forth above, there is clearly common ownership between EMS and EMM, as Nicholas DiCello owns both companies. Similarly, with regard to the third factor, there is some common management between EMS and EMM: DiCello was the President of both companies, and Garvin was the Secretary and Treasurer of both companies. Jones, an employee of EMM, was also president of EMS for a time.

When considering the first of the four factors, the interrelation of operations, courts have used the following criteria:

> (1) whether the parent was involved directly in the subsidiary's daily decisions relating to production, distribution, marketing, and advertising; (2) whether the two entities shared employees, services, records, and equipment; (3) whether the entities commingled bank accounts, accounts receivable, inventories, and credit lines; (4) whether the parent maintained the subsidiary's books; (5) whether the parent issued the subsidiary's paychecks; and (6) whether the parent prepared and filed the subsidiary's tax returns.

Herman v. Blockbuster Entertainment Group, 18 F.Supp.2d 304, 309 (S.D.N.Y.1998), *aff'd* 182 F.3d 899 (2d Cir.1999), *cert den.* 528 U.S. 1020 (1999). As discussed above, here there is evidence that EMM was involved in EMS's daily decisions regarding marketing and production. There is also evidence that the two companies shared some employees.

Finally, with regard to the second of the four factors, control of labor relations, the analysis

> can include such factors as whether the companies have separate human resources departments and whether the entity establishes its own policies and makes its own

> decisions as to the hiring, discipline, and termination of its employees. Other relevant factors include whether employment applications are sent to the other entity, whether the other entity must clear all major employment decisions, and whether the entities shift employees back and forth. The critical question to be answered is: What entity made the final decisions regarding employment matters related to the person claiming discrimination?

***6** *Laurin v. Pokoik,* 2004 WL 513999 at *6 (citing and quoting *Cook v. Arrowsmith Shelburne, Inc.,* 69 F.3d 1235, 1240 (2d Cir.1995); other citations and internal quotation marks omitted). Here, there is evidence that EMM handled human resources matters for EMS. There is also evidence that employees at EMM hired and fired employees at EMS.

Weighing all of the relevant factors, the Court finds that there are triable issues of fact as to whether EMM and EMS should be treated as a single employer/integrated enterprise. That both companies are or were represented in this action by the same attorneys is further evidence of the close relationship between the two.

EMM raises several contrary arguments, none of which is persuasive. First, EMM contends that the "single employer/integrated enterprise" doctrine is not appropriate in this case, since EMS is not a true "subsidiary" of EMM. This argument seems, at first glance, to have merit, since *Cook,* cited in the *Laurin* decision, as indicated above, involved a parent/subsidiary situation, and most of the subsequent cases dealing with the single employer/integrated enterprise doctrine refer to it as pertaining to the parent/subsidiary context. However, courts in this circuit have expressly held that a technical parent/subsidiary relationship is not required. *See, e.g., U.S. v. New York State Dept. of Motor Vehicles,* 82 F.Supp.2d 42, 53 (E.D.N .Y.2000) ("The principle that animates the [single employer] doctrine is not limited to the technical relation of parent to subsidiary corporation (the 'integrated enterprise')) (citation omitted); *Femot v. Crafts Inn, Inc.,* 895 F.Supp. 668, 686 (D.Vt., 1995) (Noting that "[t]he single employer doctrine is not limited to parent-subsidiary relationships."). Moreover, in *Parker v. Columbia Pictures Industries,* 204 F.3d 326, 331, 341-42 (2d Cir.2000), the Second Circuit applied the integrated enterprise doctrine to a defendant, Columbia Pictures Industries, Inc. ("CPI), which was not in a parent/subsidiary relationship with the plaintiff's direct employer, Sony Pictures Entertainment, Inc. ("SPE"). The Second Circuit was certainly aware that no parent/subsidiary relationship existed in that case, since it noted that CPI and SPE were both subsidiaries of the same parent corporation, Sony Corporation of America. *Id.* at 331. Other courts have similarly applied the single employer doctrine to companies that were not parent/subsidiary corporations. *See, e.g., Laurin v. Pokoik,* 2004 WL 513999 (Involving two defendant companies owned by members of two families having some common business dealings). This Court therefore rejects EMM's argument in this regard.

EMM contends next that it was not the employer of the female claimants because it did not directly provide them with remuneration such as pay or benefits:

> *What the Second Circuit has clearly required in making a determination on whether an entity is a Plaintiff's employer is 'direct or indirect renumeration from the alleged employer.' York v. Ass'n of the Bar,* 286 F.3d 122, 125-126 (2d Cir.2002). In the instant matter, there is not a shred of evidence that any of those complainants received any remuneration from EMM. As such, as a matter of law, EMM is not an "Employer."

***7** Def. Reply Brief, pp. 9-10 (emphasis in original). However, the United States District Court for the Southern District of New York recently rejected this very same argument. Specifically, in *Nelson v. Beechwood Org.,* No. 03 Civ. 4441(GEL), 2004 WL 2978278 at *3-4 (S.D.N.Y. Dec. 21, 2004), the court wrote:

> Where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because compensation by the putative employer to the putative employee in exchange for his services is an essential condition to the existence of an employer-employee relationship. Beechwood [the defendant] is therefore correct that Nelson [the plaintiff] has failed to establish a *direct* employment relationship with Beechwood. But this analysis fails to engage with Nelson's actual argument. The issue here is not whether Nelson was a volunteer or a paid employee. It appears undisputed that DMP [a subcontractor of Beechwood] employed and paid Nelson. The question is whether he can be considered an employee of Beechwood as well as of DMP.

(*citing York v. Ass'n of the Bar,* 286 F.3d at 126; other citations and internal quotation marks omitted; emphasis added).[7] The court went on to find that the plaintiff in *Nelson* had adequately pleaded that Beechwood was a joint employer. *Id.* at *4-5. This Court agrees with the reasoning in *Nelson.* In short, EMM's argument concerning remuneration would be appropriate only if there was some question about whether the claimants were employees, as opposed to volunteers, which there is not. Therefore, the Court is not persuaded by EMM's argument.

[7] The *York* decision, which EMM has cited extensively, is inapposite here, since it did not involve the "single employer/integrated enterprise" doctrine. Rather, the issue in *York* was whether the plaintiff was a volunteer or an employee of the defendant. *York v. Ass'n of the Bar of the City of New York,* 286 F.3d at 125. Here, the female claimants were clearly employees of EMS. The question is whether or not EMM may also be considered an employer under Title VII even if it did not directly employ the claimants.

Finally, EMM contends that it cannot be held liable as an "employer" under Title VII since it did not exercise control specifically over the female claimants in this case. This issue is somewhat confusing because the number of claimants that the plaintiff EEOC claims to represent has changed. When EMM moved for summary judgment in February 2004, it understood that plaintiff represented thirteen claimants: 1) Lorraine Backus; 2) Milikah Bruner; 3) Catherine Clauss; 4) Lill Cocilova; 5) Stephanie DiStasio; 6) Danielle Doty; 7) Ashley Houghton; 8) Nancy Hoffmeier; 9) Joelle Lolacono; 10) Kyley O'Brien; 11) Anna Pompakidis; 12) Meghan Powell; and 13) Jennifer Zazzaro. However, after EMM filed its summary judgment motion, plaintiff was granted leave to conduct additional discovery before responding to the application. Apparently after conducting such discovery, plaintiff identified additional claimants, since, on June 29, 2004, EMM filed a supplemental affidavit which recognized that four "additional persons alleged to have been sexually harassed" had been identified, namely 1) Anna Stevenson; 2) Tina Bradley; 3) Jessica Buckner; and 4) Melanie Buckner. *See,* Supplemental Aff. [# 96]. In its response to the summary judgment motion, plaintiff included declarations from Anna Stevenson and Jessica Buckner, indicating that they had been terminated from EMS at the direction of supervisors at EMM. Rose Aff. Exs. 15 & 16. In its reply brief, EMM argues that

> ***8** the EEOC has gone to great lengths to conceal the fact that as to the initial complainants in their depositions they all confirmed the obvious [sic]. That they were hired by and reported to employees of EMS [sic].... Now it is only after the EEOC has reviewed the Motion by EMM, that its latest invitees, Stevenson and Buckner, bring EMM into the picture. However, as to the initial thirteen (13) complainants they have not and cannot dispute EMM's position that it had nothing to do with the terms and conditions of their employment.

Def. Reply Brief., p. 2. In this regard, defendants contend that the statements by Stevenson and Buckner are irrelevant, since the original thirteen claimants were no longer employed at EMS at the time Stevenson and Bucker were employed. According to defendants, "[i]t cannot be assumed nor can the inference be reasonably drawn from [Stevenson's and Buckner's] declarations ... that any EMM employee controlled the terms and conditions of employment for any of the original thirteen complainants, who were all hired and terminated prior to July, 2000." Def. Reply Brief, p. 5.

The Court finds, however, that plaintiff did nothing improper by submitting the affirmations from Stevenson and Buckner. Defendants were obviously aware that Stevenson and Bucker had been added as claimants months prior to plaintiff filing its response to the summary judgment motion. *See,* Supp. Aff. [# 96]. Therefore, to the extent that defendants are trying to claim that they were "sandbagged" by plaintiff's response, the Court disagrees. Moreover, it is not clear that EMM is correct in asserting that all of the original thirteen claimants had been terminated by the time Stevenson and Buckner were hired. While it is true that most of the original thirteen were terminated by mid-1999, both Danielle Doty and Nancy Hoffmeir testified that they continued to work into 2000. Hoffmeier stated that she worked into January 2000, and Doty stated that she worked for a month or two in 2000, without specifying which months. Stevenson began working at EMS in March 2000, and Buckner began in April 2000. Therefore it is possible that Doty was employed at the same time as either Stevenson or Buckner. In any event, there is no evidence in the record that defendants changed their employment practices during the months separating the employment of the original thirteen from that of Stevenson and Buckner. Therefore, it would be reasonable to infer that the control that EMM allegedly exerted over Stevenson and Buckner was the same or similar to what it exerted over the original thirteen complainants. The Court also disagrees with defendants' suggestion that Stevenson's and Buckner's affirmations are the only proof that EMM exerted influence over the thirteen original claimants. As already discussed, plaintiff has produced other evidence of EMM's overall control

over EMS's employees during the period of 1998 through early 2000. Stevenson's and Buckner's affirmations merely provide additional proof of this.

CONCLUSION

***9** EMM's motion for summary judgment [# 84] is therefore DENIED.

So ordered.