2002 WL 32357095
United States District Court,
M.D. Tennessee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Plaintiff,
Deena BLAKE, Plaintiff–Intervenor
v.
STEVEN T. COX, INC. and Arete MDF, Inc d/b/a Cox Cabinet Company Defendant.

No. 3:99–1184. | July 19, 2002.

Attorneys and Law Firms

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Opinion

MEMORANDUM ORDER

NIXON, Senior J.

***1** Pending before the Court is Defendant Stephen T. Cox Incorporated’s (“STCI”) Renewed Motion for Summary Judgment (Doc. No. 66), to which Plaintiff Equal Employment Opportunity Commission (“EEOC”) has responded (Doc. No. 74). Plaintiff–Intervenor Deena Blake has also filed a response to Defendant’s Motion (Doc. No. 82).

I. Background[1]

[1] Since this Court’s earlier memorandum (Doc. No. 42) fully addressed the factual background of this case, the Court deems it unnecessary to do so in detail again.

The Equal Employment Opportunity Commission brings this action under Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. §§ 2000e *et seq.,* and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. In its complaint the EEOC alleges that between 1996 and 1997, Deena Blake, Michelle Phillips, and other unnamed female employees of Cox Cabinet Co., Inc ., (“CCCI”), were subjected to unwelcome and offensive verbal and physical sexual harassment, a hostile work environment, and retaliatory and constructive discharge for rejecting unwanted sexual advances made by CCCI’s President, supervisors, and male employees. (Doc. No. 7.)[2] This Court previously denied Defendant’s Motion for Summary Judgment on the issue of successor liability, and held in abeyance a holding on the issues of limited liability and punitive damages. (Doc. No. 42). Defendant now moves for summary judgment on the two reserved issues, as well as two new grounds. First, Defendant argues that it is not liable under Title VII because Deena Blake was an independent contractor, not an employee. Second, Defendant argues that it is not an employer as that term is defined by the Tennessee Human Rights Act, and hence Plaintiff Blake’s State law claims should be dismissed.

[2] Defendant, STCI, purchased the assets of CCCI in February of 1998.

II. Legal Standards

A. *Summary Judgment*

Summary judgment is appropriate when there is “no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Fed. R.Civ.P. 56(c) (West 2001). The Advisory Committee for the Federal Rules has noted that “[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” All the facts and the reasonable inferences to be drawn from those facts must be viewed in the light most favorable to the non-movant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In order to succeed, “the moving party must show that there is an absence of evidence to support the non-moving party’s case,” and that “the evidence is so one-sided that one party must prevail as a matter of law.” *Lexington–South Elkhorn Water Dist. v. City of Wilmore,* 93 F.3d 230, 233 (6th Cir.1996). The non-movant, however, may not rely solely on conclusory allegations in the complaint to defeat a motion for summary judgment, but must come forward with affirmative evidence that establishes its claims and raises an issue of genuine material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Mere allegations of a factual dispute between the parties are not sufficient

to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one which, if proven at trial, would lead a reasonable fact finder to find in favor of the non-moving party. *Id.* at 247–48. The substantive law involved in the case will underscore which facts are material and only disputes over outcome-determinative facts will bar a grant of summary judgment. *Id.* at 248.

***2** A movant for summary judgment makes a sufficient showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues to support the non-movant's case. *See Celotex,* 477 U.S. at 323. Once the movant makes this showing, the non-movant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *See id.* at 323.

The Court must determine whether a reasonable fact finder would be able to return a verdict for the non-moving party and if so, the Court must deny summary judgment. *See Anderson,* 477 U.S. at 249. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1478 (6th Cir.1989) (citations omitted). In sum, "[t]he test is whether the party bearing the burden of proof has presented a jury question as to each element of the case." *Davis v. McCourt,* 226 F.3d 506, 511 (6th Cir.2000).

B. ***Limited LiabilityThe Single Filing Rule***

Timely filing of an EEOC complaint is a prerequisite to a Title VII suit. *See* 42 U.S.C. § 2000e–5(e); *E.E.O.C. v. Wilson Metal Casket Co.,* 24 F.3d 836 (6th Cir.1994). The purpose of the Title VII filing requirement is to give notice of potential Title VII liability to an alleged wrongdoer and to allow the EEOC to attempt to conciliate with the wrongdoer rather than go to court. *See Wilson Metal Casket,* 24 F.3d at 839; *Foster v. Gueory,* 655 F.2d 1319, 1323 (D.C.Cir.1981). In certain circumstances, however, the EEOC charge of one plaintiff can satisfy the filing requirement of other plaintiffs, under what is known as the "single filing rule." *Howlett v. Holiday Inns, Inc.,* 49 F.3d 189, 194 (6th Cir.1995); *Wilson Metal Casket,* 24 F.3d at 840. The single filing rule allows a plaintiff to join a Title VII action if another plaintiff filed a timely EEOC charge. The joining plaintiff can "piggyback" on the timely charge. *Id.* In order for the single filing rule to apply, the joining claim must be substantially related to a timely filed claim which arose out of similar discriminatory treatment in the same time frame. *See Wilson Metal Casket,* 24 F.3d at 840. The rationale behind the single filing rule is the belief that it would be wasteful for numerous employees with the same grievances to file identical complaints with the EEOC. *See id.* (*citing Wheeler v. Am. Home Prod. Co.,* 582 F.2d 891, 897 (5th Cir.1977)).

Furthermore, an injured party's complaint must be limited to "the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co., Inc.,* 563 F.2d 439, 446 (6th Cir.1977). This may include retaliation claims that are actions in response to the filing of the EEOC charge itself. *See Duggins v. Steak 'N Shake, Inc.,* 195 F.3d 828, 831 (6th Cir.1999). Although the facts of *Duggins* were limited to that case, the court of appeals noted that " 'where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." ' *Id.* at 832 (*quoting Davis v. Sodexho, Cumberland Coll. Cafeteria,* 157 F.3d 460, 463 (6th Cir.1998)).

C. ***Punitive Damages***

***3** Plaintiffs who allege employment discrimination on the basis of sex traditionally have been entitled to such remedies as injunctions, reinstatement, back pay, lost benefits, and attorney's fees under § 706(g) of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e–5(g)(1) (West 2001). In enacting the Civil Rights Act of 1991, Congress expanded the remedies available to these plaintiffs by permitting, for the first time, the recovery of compensatory and punitive damages. *See Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843, 121 S.Ct. 1946, 150 L.Ed.2d 62 (2001). As codified in 42 U.S.C. § 1981a(a)(1), the 1991 Act only provides compensatory and punitive damages awards to plaintiffs who prevail upon unlawful intentional discrimination claims. *See* 42 U.S.C. § 1981a(a)(1) (West 2001).[3] Plaintiff may only recover if she can show that the Defendant engaged in discrimination that was "with malice or reckless indifference to the federally protected right of an aggrieved individual." *Id.*

[3] 42 U.S.C. § 1981a(a)(1) reads:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C.2000e–5) [42 U.S.C. §§ 2000e–5 or 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C.2000e–2 or 2000e–3) [42 U.S.C .A. §§ 2000e–2, 2000e–3, or 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party

> may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e–5(g)], from the respondent.

Successor liability for punitive damages is assessed on a case-by-case basis. *See EEOC v. MacMillan Bloedel Containers, Inc.,* 503 F.2d 1086, 1092 (6th Cir.1974)("We emphasize that the liability of a successor is not automatic, but must be determined on a case by case basis."). Where a successor is substantially similar to a predecessor, and has notice of its liabilities, courts have held that the successor may be found liable. *EEOC v. SWP, Inc.,* 153 F.Supp.2d 911 (N.D.Ind.2001)(*citing Wheeler v. Snyder Buick, Inc.,* 794 F.2d 1228, 1237 (7th Cir.1986)). Successor liability includes liability for punitive damages, so long as punitive damages would be appropriate. *EEOC v. G–K–G, Inc.,* 39 F.3d 740, 748 (7th Cir.1994).

D. ***Independent Contractors Under Title VII***

Title VII generally offers protection solely to employees. Courts have generally ruled that independent contractors are not employees, and are therefore not covered by Title VII. *See e.g., Falls v. Sporting News Pub. Co.,* 834 F.2d 611, 613 (6th Cir.1987) (while the term "employee" is to be construed broadly in Title VII, it is not meant to reach independent contractors); *Alfred v. Tenn. Farmers Mut. Ins. Co.,* 8 F.Supp.2d 1024, 1026 (E.D.Tenn.1997).

Title VII defines "employee" very broadly: "The term 'employee' means an individual employed by an employer ..." 42 U.S.C. § 2000e(f). As Judge Jones of the Sixth Circuit recognized

> The legislative history supports the view that Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception. *See, e.g.,* 42 U.S.C. § 2000e(f) (persons not covered as employees); 42 U.S.C. § 2000e(b) (entities not considered to be employers); 42 U.S.C. § 2000e–2(e)–(j) (special exceptions to illegal practices).

Armbruster v. Quinn, 711 F.2d 1332, 1339 (6th Cir.1983). In other words, given the broad remedial purpose of Title VII of the Civil Rights Act of 1964, the term "employee" should be defined broadly. As the Sixth Circuit observed, the term " 'employee' cannot be defined hypertechnically, without reference to "the broadly humanitarian goals of the Act." *Id.* Therefore, a district court should consider whether the individuals at issue are "susceptible to the kind of unlawful practices that Title VII was intended to remedy." *Id.,* 711 F.2d at 1342. If so, the court should consider those individuals to be employees for title VII purposes. *Id.*

***4** "In determining whether a business relationship is one of employee-employer, courts look to the 'economic realities' of the relationship and the degree of control the employer exercises over the alleged employee." *See Unger v. Consolidated Foods Corp.,* 657 F.2d 909, 915–16, n. 8 (7th Cir.1981) (*citing Spirides v. Reinhardt,* 613 F.2d 826, 831–32 (D.C.Cir.1979)). The economic realities test requires the court to focus on factors such as the hiring and termination process, history of the positions, evidence of company payments and benefits, advancement opportunities, among others. *Armbruster,* 711 F.2d at 1342. As the *Armbruster* court recognized, the most important factor under the economic realities test is "the employer's ability to control the job performance and employment opportunities of the plaintiff ..." 711 F.2d at 1341–42. *See also Lilly v. BTM Corp.,* 958 F.2d 746, 750 (6th Cir.1992).

Additionally, some courts have recognized that Restatement (Second) of Agency § 220 (1958) provides some useful guidance as well.[4] *Sublett v. Edgewood Universal Cabling Systems, Inc.,* 194 F.Supp.2d 692, 700–01 (S.D.Ohio., 2002).

[4] In determining whether one acting for another is a servant or an independent contractor, the following matters of fact among others, are considered:
(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
(b) whether or not the one employed is engaged in a distinct occupation or business;
(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

E. ***Tennessee Human Rights Act***

The Tennessee Human Rights Act ("THRA") is a comprehensive anti-discrimination statute that is codified at Tenn.Code Ann. § 4–21–101 *et. seq.* Although the language of Title VII and the THRA differ slightly, it is clear that the Tennessee legislature intended the THRA to be coextensive with federal law. *Bennett v. Steiner–Liffe Iron and Metal Co.,* 826 S.W.2d 119, 121 (Tenn.1992).

Tennessee Code Annotated ("T.C.A.") § 4–21–1–2(4) defines "employer" to include "the state, or any political subdivision thereof, and persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly." T.C.A. § 4–21–102(14) defines "person" to include, in relevant part, "one or more individuals ... corporations, legal representatives, partnerships, associations ... or other organized groups of persons." Furthermore, T.C.A. § 4–21–301(a)(1) provides that:

> It is discriminatory for a person or for two or more persons to: (1) Retaliate or discriminate in any manner against a person because such person had opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding, or hearing under this chapter.

The Tennessee Court of Appeals has held that in order for a "plaintiff to maintain a claim for retaliation the defendant must be a person within the meaning of T.C.A. § 4–21–102(14)." *Roberson v. Univ. of Tenn.,* 912 S.W.2d 746, 747 (Tenn.Ct.App.1995).

III. DISCUSSION

A. ***Successor Liability, Notice of Claim and the Single Filing Rule***

Defendant seeks summary judgment as to all class members other than Deena Blake and Michelle Phillips, on the grounds that Defendant had no notice of any other employment discrimination claims pending against its successor at the time of its acquisition of CCCI's assets. Plaintiff counters that the "single-filing" rule is applicable to this case, and mandates dismissal of Defendant's motion.

***5** The Court finds that the single filing rule is applicable in this case. Defendant does not dispute that it received notice of the employment discrimination claims prior to the filing of this lawsuit. Instead, Defendant assets that it had no notice of class-based claims at the time it purchased CCCI's assets. However, the Court notes that Defendant had notice of the EEOC investigation into this matter. A reasonably prudent buyer would have been put on notice that the EEOC's investigation, coupled with the Blake and Phillips charges, might give rise to further charges of employment discrimination. Although the Defendant suggests otherwise, there is certainly precedent for the proposition that a single filing puts a successor on notice of the possibility of future filings, especially where the EEOC has commenced an investigation. *See e.g., E .E.O.C. v. The Bailey Company, Inc.,* 563 F.2d 439, 447 (6th Cir.1977). Although the Defendant argues that this finding would result in "serious roadblocks to future transactions where there is a notice of any Title VII claims," (Doc. No. 67, p. 20), this Court believes that the buyer and seller are in the best position to determine the possible costs of a pending Title VII lawsuit, given the existence of the "singlefiling" rule. Certainly, the buyer and seller are better placed to shoulder this burden than an innocent plaintiff.

Even if the Court did not believe that the buyer and seller were always in the best position to determine the costs of a possible Title VII suit, the buyer and seller in this instance would certainly be well placed to make such a determination. The buyer (STCI) and seller (CCCI) here were intimately familiar with each other in this situation. In fact, the buyer and seller were, for all practical purposes, almost the same entity.

Defendant attempts to cloak STCI as an innocent, unknowing successor to the wrongdoing, evil CCCI. The Court is not convinced by Defendant's argument, and this type of attempted legal amnesia will not be tolerated. In the corporate law arena, a court may properly "pierce the corporate veil" when the court finds an identity of interests between two entities, and, *inter alia,* the corporate form is used to perpetrate fraud or justify a wrong. *See e.g., Bodenhamer Bldg. Corp. v. Architectural Research Corp.,* 873 F.2d 109, 112 (6th Cir.1989). Similarly, a corporation may not use the expediency of state corporate law to escape an obligation under federal law. Hence, the Court finds that a reasonable jury could conclude that the Defendant is a reincarnated form of CCCI, and is deemed to have notice, via the single-filing rule, of pending and future law suits. Accordingly, this Court hereby denies Defendant's motion for summary judgment in this respect.

B. *Employee or Independent Contractor under Title VII?*

This Court must determine whether Deena Blake was an employee, or the functional equivalent of an employee, in order to determine whether she is entitled to Title VII protection. While the Defendant contends that Deena Blake was an independent contractor, Plaintiff–Intervenor Blake argues that she was, for all intents and purposes, an employee in this situation.

***6** As discussed above, the Sixth Circuit has adopted an "economic realities" test to determine whether an individual is an employee or an independent contractor. *Wilson Metal Casket,* 24 F.3d 836. *See also Armbruster,* 711 F.2d at 1340. The most important factor in this test is the employer's ability to control the employee's job-related destiny. *Lilly v. BTM Corp.,* 958 F.2d at 750.

Defendant argues that although Blake was an employee for the first three months of her employment with CCCI, this relationship changed when, in August of 1997, Defendant designated Deena Blake as an "independent contractor". Plaintiff contends that Defendant's re-classification of Deena Blake did not alter her true status as an employee of the company. The Court agrees that the economic realities of Deena Blake's employment point toward an employer-employee relationship, both with CCCI and with SCTI.

Most importantly, regardless of a change in classification, CCCI continued to retain control over Deena Blake throughout her employment. Judge Haynes recently noted that a Court should be mindful of the economic realities of the employment relationship, regardless of the actual job title that an employer chooses to give to an individual. *Equal Opportunity Employment Commission v. The Guardian,* No. 3:99–1145 (M.D.Tenn. Feb.16, 2001). In this situation the Plaintiff correctly notes that "CCCI did not suddenly lose control over Blake's work[,]" when Defendant chose to change Ms. Blake's job title. Ms. Blake's status changed in name only. The economic realities of her job relationship remained the same.

Specifically, Deena Blake received the bare necessities of her employment from CCCI, such as business cards, a fax machine, a pager (Doc. No. 71, Response to First Set of Interrogatories, No. 2), samples of cabinetry, and various business forms. (Doc. No. 67, p. 20–21). Deena Blake also received all of her training from CCCI, mostly by Hank Schmidt. (Blake Depo, pp. 24–25, 36). While Deena Blake had some experience with cabinetry, she received all of her relevant training from CCCI. Additionally, although Ms. Blake drove her own car for client visits, she was still bound by CCCI's price-list (Blake Depo, p. 23), used CCCI's furniture samples, utilized CCCI forms, and essentially carried out CCCI business, albeit in a fairly independent manner. However, employees often work in a fairly independent manner. Given the ever-changing, telecommuting business world, a court must define the term "employee" broadly.

In this situation CCCI exerted control over Ms. Blake. For example, Ms. Blake was told that she had to work a trade show on Valentine's Day in 1997 (Depo., p. 50–51). Independent contractors are not forced to work trade shows; employees are. This is precisely the type of control that informs this Court's conclusion that, viewing the economic realities implicit in this arrangement, Ms. Blake was an employee of CCCI for Title VII purposes.

***7** The Court also finds that Ms. Blake was functionally an employee of STCI, and remained within the control of her employer. Ms. Blake had STCI business cards and forms, and, although she worked on a commission basis, she was sometimes told what clients to see and when. (Blake Depo., pp. 101, 103). Ms. Blake also was provided with an office/showroom. (Doc. No. 71, Response to First Set of Interrogatories, No. 3). Although this presents a closer case, the Court concludes that Ms. Blake was functionally an employee of STCI, rather than an independent contractor, and is therefore covered under Title VII's provisions.

Deena Blake was an employee, not a general contractor, at all points of her employment with both STCI and CCCI. An employer may not switch an employee's job classification in order to avoid Title VII liability. An individual's status for Title VII purposes is not dependant upon the employer's classification of that individual, but, rather, on the economic realities of the relationship. As the Sixth Circuit recognized in *Armbruster,* a Court should not hyper-technically define the term "employee" when doing so would defeat the broad remedial purpose of Title VII. 711 F.2d at 1342. Regardless of what Defendant termed Ms. Blake, she was an employee for Title VII purposes, who was subject to the control and whims of her employer.

Thus, although there are still factual disputes over the precise contours of CCCI and STCI's control over Ms. Blake, the Court believes that there is evidence from which a reasonable jury could conclude that Ms. Blake was functionally an employee of both CCCI and STCI. Accordingly, the Court will deny Defendant's motion for summary judgment in this respect.

C. *Punitive Damages*

Defendant seeks a determination that punitive damages are not available where a court has found a successor to be liable. Defendant stresses that because STCI was not in existence at the time of the alleged violations of discrimination laws, it could not have acted with the

malice or reckless indifference required by 42 U .S.C. § 1981 for the imposition of punitive damages. Defendant essentially argues that, as an innocent successor, it should not be held liable for the wrongs of its predecessor.

Plaintiff EEOC responds that there is no set rule for determining whether punitive damages are warranted against a successor. Rather, Plaintiff EEOC stresses that courts determine the nature and extent of a successor's liability on a case-by-case basis. Here, the EEOC argues the Defendant was not an innocent successor, and can therefore be held liable for punitive damages.

The Court finds that, although it may indeed be inappropriate to impose punitive damages on an innocent successor, STCI is not an innocent successor. Furthermore, the Court is unable to conclude, based on the facts before at this time, that STCI should escape liability for punitive damages.

In this case, the factual circumstances convince the Court that a reasonable jury could conclude that STCI is a successor to CCCI, and should be potentially bound by its liabilities. For STCI to now claim that it would be unfair for this Court to find it liable for the liabilities of CCCI is disingenuous. Ordinarily, a purchaser of assets (such as STCI) is not bound by the seller's liabilities. *G–K–G, Inc.,* 39 F.3d at 743. However, the Seventh Circuit recognized that if a sale of assets is strategically utilized to shift liabilities to an empty shell, the buyer can by held liable. Furthermore, where a claim involves a violation of federal rights, the successor is liable if it had notice of the claim before the acquisition, so long as there is substantial continuity in the operation of the business. *Id.,* 39 F.3d at 748. This case presents precisely the "sneaky ... transaction" that Judge Posner did not find in *G–K–G.* As Plaintiff argues, Stephen T. Cox, the owner of STCI, was once an owner of CCCI, except for a two-year period in which he retained a security interest and a right of first refusal over his former co-owner, Henry Schmidt. In early February 1998, with its business in decline and pending charges filed with the E.E.O.C,[5] CCCI became a shell corporation, and STCI salvaged certain assets from CCCI's scrap-heap, leaving behind the most undesirable liabilitiesspecifically, the looming discrimination charges. This Court will simply not allow Defendant to use clever lawyering and a carefully-crated purchase agreement to skirt its obligations to an innocent third-party. STCI retained most of CCCI's assets, most of CCCI's employees, and, apparently, continued operating as before. Therefore, this Court finds that STCI is far from an innocent successor, but, rather, may be bound by the alleged wrongs of its predecessor. As between the Plaintiff–Intervenor and the Defendant, only the Plaintiff–Intervenor can be termed an "innocent party." As the Seventh Circuit observed, even if a court determines, as a matter of policy, that punitive damages should not be imposed on a successor, "[a]n injured party should not be denied any remedy ... that can be imposed on a successor ... [in order to] make the victim whole for his losses." *Musikiwamba v. ESSI, Inc.,* 760 F.2d 740, 749 (7th Cir.1985).

5 As of February of 1998, Deena Blake (charge of discrimination filed on December 10, 1997), and Michelle Phillips (filed February 10, 1997) had already filed charges against CCCI. (Doc. No. 74, Exh. 5).

***8** Considering all of the facts and circumstances of this case, *see MacMillan,* the Court hereby denies Defendant's summary judgment motion in this respect. Insofar as there are any damages associated with these alleged wrongs, it is for the jury to determine whether Defendant's actions rose to the level necessary for the imposition of punitive damages.

D. *Tennessee Human Rights Act*

Defendant contends that Plaintiff's State law retaliation claims should be dismissed because the Defendant is not an "employer" with eight or more persons, as required by Tenn.Code. Ann. § 4–21–301. However, as the Plaintiff notes, the statutory language that Plaintiff relies upon seemingly implicates not only "employers" with eight or more persons, but also persons themselves. As discussed above, in Tennessee a "person" includes a corporation, pursuant to Tenn.Code Ann. § 4–21–102(14). The Tennessee Court of Appeals has specifically held that "[i]n order for the plaintiff to maintain a claim for retaliation the defendant must be a person within the meaning of T.C.A. § 4–21–102(14)." *Roberson,* 912 S.W.2d at 747. The Sixth Circuit has also implicitly assumed that § 4–21–301 applies to persons, not simply employers. *See Crutchfield v. Aerospace Center Support,* 202 F.3d 267, 1999 WL 1252899 (6th Cir.1999).

However, there is a dearth of Tennessee caselaw on this subject, and the Tennessee Supreme Court has not specifically addressed this issue.[6] This Court hesitates to determine this issue for the first time, and rather than protract this litigation by certifying this question the Tennessee Supreme Court, this Court declines to entertain supplemental jurisdiction over the Tennessee Human Rights Act retaliation Claim, pursuant to 28 U.S.C. § 1367(c)(1) and (c)(4). Thus, the Tennessee Human Rights Act retaliation claim is dismissed, and Plaintiff–Intervenor(or the Plaintiff) may bring this portion of the case in State court.

6 The Court does not find the discussion in *Carr v. United Parcel Services, et. al.,* 955 S.W.2d 832, 835 (Tenn.1997), to be determinative of this issue.

IV. CONCLUSION

For the reasons discussed above, Defendant's motion for summary judgment is hereby DENIED. The Court finds that there are genuine questions of material facts, and these claims are not appropriate for summary resolution. Additionally, the Court hereby declines to retain jurisdiction over the Tennessee Human Rights Act retaliation claim, and that claim is hereby dismissed. This case will proceed expeditiously to trial.

It is so ORDERED.

Parallel Citations

84 Empl. Prac. Dec. P 41,539