

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-14139-CIV-PAINE/LYNCH

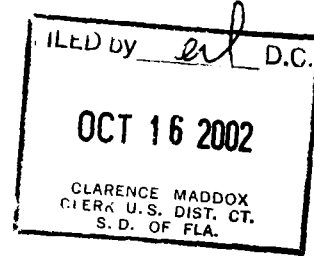
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

EMERGENCY MEDICINE ASSOCIATES, INC.
and
INDIAN RIVER MEMORIAL HOSPITAL, INC.,

Defendants.



**REPORT AND RECOMMENDATION ON DEFENDANT INDIAN RIVER MEMORIAL
HOSPITAL, INC.'S MOTION TO DISMISS [D.E. #6] AND EMA'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT [D.E. #8]**

THIS CAUSE having come on to be heard upon the aforementioned motions and this Court having reviewed the motions, the responses, the replies and having reviewed other pertinent portions of the record, this Court recommends to the District Court as follows:

1. Both Defendants seek dismissal of this case based upon the argument that there is no subject matter jurisdiction for the Plaintiff to proceed against either Defendant. The Plaintiff's theory appears to be that the Defendants constitute a single employer under Title VII.

2. The Defendants attack this and cite to various differences between the management, conduct and general makeup of their businesses as being separate from each other. The Defendants argue that they are not single employers. Based upon that

separation, and the argument by Indian River Memorial Hospital that it did not employ Dr. Farina, Defendants suggest that there is no subject matter jurisdiction sufficient to allow this case to proceed.

3. The Eleventh Circuit Court of Appeals clearly set forth the standard of review in cases such as this in Scarfo v. Ginsberg, 175 F.3d 957 (11th Cir. 1999). There can be two attacks under Federal Rules of Civil Procedure Rule 12 for dismissal. One is a facial attack and the second is a factual attack. The facial attacks are the types of motions the Court normally sees suggesting that under Rule 12 there is no subject matter jurisdiction or that the plaintiff has failed to state a cause of action. The Court looks within the four corners of the complaint to determine if a proper cause of action is alleged and if a particular defendant has sufficiently been put on notice as to what to defend against.

4. The second type of attack is a factual attack on subject matter jurisdiction. This challenges the existence of subject matter irrespective of the pleadings. The reviewing court may go outside the pleadings and consider items such as depositions, affidavits, testimony or other submissions of the parties to determine whether or not subject matter jurisdiction exists under the facts of a particular case. The Eleventh Circuit made it clear in Scarfo that this is a threshold jurisdictional issue under Title VII cases such as this and it is for the court to decide and not for the jury. See also Judge Moore's opinion in Baydar v. Renaissance Cruises, Inc., 36 F.Supp.2d 916 (S.D. Fla. 1999).

5. The Defendants ask this Court to look outside the four corners of the complaint to make a factual finding concerning lack of subject matter jurisdiction. This is akin to what this Court would do in reviewing a motion for summary judgment. This Court points out

that EMA's motion is worded in the alternative for dismissal or summary judgment. Normally, such motions on summary judgment are reviewed after conclusion of discovery and the parties have been given every opportunity to present affidavits, depositions or other matters in support or in opposition to such a motion.

6. The Plaintiff challenges the factual and evidentiary claims made by the Defendants in respect to the single employer issue. Alternatively, the Plaintiff correctly points out that the motions should be denied without prejudice to permit discovery to be concluded before the Court makes a ruling on a factual based motion. This Court believes that the Plaintiff's position is not only well founded, but supported by case law involving similar cases before this Court and the Middle District of Florida.

7. In Lombardi v. Lady of America Franchise Corporation, 2002 WL 459717 (S.D. Fla. 2002), Judge Ferguson reviewed a renewed motion to dismiss in a similar Title VII case. The motion sought dismissal for improper aggregation of six named defendant corporations. While the Lombardi decision goes on to analyze and rule upon the motion to dismiss, it is clear from Judge Ferguson's opinion that that was done after discovery had been completed. In fact, Judge Ferguson refers to the fact that defendants had previously filed a motion to dismiss for lack of subject matter jurisdiction within four months of the complaint being filed. The Lombardi case was brought in August of 2000 and the motion to dismiss was filed in December of 2000. Judge Ferguson denied the defendants' initial motion to dismiss without prejudice to be renewed after the conclusion of discovery. The Lombardi decision cited by this Court refers to that fact and Judge Ferguson then reviews the renewed motion alleging lack of subject matter jurisdiction after the conclusion of

discovery.

8. In Scelta v. Delicatessen Support Services, Inc., 1999 WL 1053121 (M.D. Fla. 1999), Chief Judge Kovachevich reviewed a similar motion to dismiss challenging subject matter jurisdiction under the Scarfo standard of review. Chief Judge Kovachevich correctly determined that it was a factual challenge based upon a threshold jurisdictional argument. Chief Judge Kovachevich stated that the Eleventh Circuit has made it clear that where subject matter jurisdiction is being challenged, the plaintiff must be given the opportunity to discover facts that would tend to support the existence of jurisdiction. See Majda-Pour v. Georgiana Community Hospital, Inc., 724 F.2d 901 (11th Cir. 1984). To dismiss such a claim early on without allowing the plaintiff an opportunity to benefit from reasonable discovery was found by the Eleventh Circuit to be an abuse of discretion.

9. Chief Judge Kovachevich went on to note that in her case discovery had not been completed. The plaintiff had not been given a sufficient opportunity to discover all facts and present them to the court in order for the court to make a factual determination upon the entire record. She denied the renewed motion to dismiss.

10. In the case before this Court, the Complaint was filed on May 1, 2002. The Motion to Dismiss by Indian River Memorial Hospital was filed a little over two months later, on July 3, 2002. EMA's Motion to Dismiss was filed on July 9, 2002. While the Defendants may argue that the facts are the facts and nothing is going to change that, these motions were filed within approximately two months after the complaint was filed.

11. This Court has not seen any order by the District Court which gives a discovery cutoff date. Certainly, discovery is ongoing at this time and all of the facts may or may not

be before the Court.

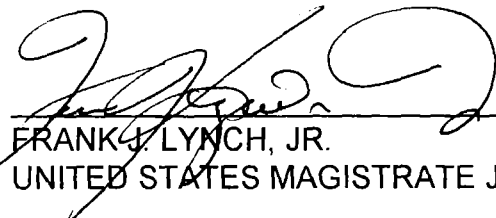
12. This Court believes that it is premature to rule upon a motion to dismiss or a motion for summary judgment which asks the District Court to make factual determinations while discovery is still ongoing.

13. This Court believes that under the standards set by the Eleventh Circuit to dismiss such an action while discovery is ongoing pursuant to these motions filed by the Defendants would be a gross abuse of discretion and would constitute reversible error.

ACCORDINGLY, this Court recommends to the District Court that Defendant Indian River Memorial Hospital, Inc.'s Motion to Dismiss [D.E. #6] and Defendant EMA's Motion to Dismiss or for Summary Judgment [D.E. #8] be **DENIED** without prejudice to be raised again after discovery has been concluded should the facts so warrant the filing of a renewed motion.

The parties shall have ten (10) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable James C. Paine, United States District Judge assigned to this matter.

DONE AND SUBMITTED this 16th day of October, 2002, at Fort Pierce, Northern Division of the Southern District of Florida.


FRANK J. LYNCH, JR.
UNITED STATES MAGISTRATE JUDGE

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