

U.S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at 4:00 P.M.

OCT 29 2001

By VJ
CLERK, U.S. DISTRICT COURT
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

EQUAL EMPLOYMENT)	
OPPORTUNITY COMMISSION, et al.,)	
)	CASE NO. CV00-0570-E-BLW
Plaintiffs,)	
)	
v.)	
)	ORDER
)	
J.C. PENNEY CO., INC., et al.)	
)	
Defendants.)	
_____)	

INTRODUCTION

Currently pending before the Court for its consideration are the following motions: (1) Defendants' Motion to Compel Examination of Plaintiffs (Dkt #23), filed July 18, 2001; (2) Intervenor-Plaintiffs' Motion for Protective Order (Dkt #33), filed August 7, 2001; and (3) Intervenor-Plaintiffs' Motion to Amend Complaint (Dkt #27), filed July 31, 2001. On October 3, 2001, the Court conducted a hearing on the above motions with counsel for all parties present. During the course of the hearing, Defendants' Motion to Compel was granted in part and denied in part, with certain specified limitations. Consistent with that ruling, Plaintiffs' Motion for Protective Order was granted in part and denied in part. This Order memorializes those rulings. Additionally, for the reasons stated herein, the Court will grant Plaintiffs' Motion to Amend.

74

I.

BACKGROUND.

This lawsuit involves claims by EEOC and several former employees at J.C. Penney Company's ("J.C. Penney") Idaho Falls store (the "store"). The majority of these former employees worked in the beauty salon ("Salon") at the store and were supervised by former Salon Manager Christopher Gee. From a time prior to 1997 until at least August of 1999, Defendant Gee was the Salon Manager and acted as the immediate supervisor for intervening Plaintiffs Turner, Hicks, Hurley and Johnson. Gee continued to work in the Salon until late September of 1999, at which time he resigned.

Defendant Pat Boyce was the Store Manager and Gee's supervisor. Boyce also exercised supervisory authority over intervening Plaintiff Mayer. Defendant Boyce continues to work as the Store Manager.

Intervening Plaintiffs Turner, Hicks, Hurley, Johnson and Mayer maintain that during the course of their employment with J.C. Penney, Defendants Gee and J.C. Penney subjected them and several of their co-workers in the Salon to a continuing course of obscene, offensive, degrading, and intimidating comments and physical acts of a sexual nature. These comments and acts included, *inter alia*, Gee's telling graphic sexual stories, requesting sexual favors, and making other sexually oriented comments toward the intervening Plaintiff's and their co-workers. Defendant Gee's comments included remarks about intervening Plaintiffs Turner, Hicks, Johnson, Hurley, and others giving him oral sex or having sex with him, or about various of the intervening Plaintiffs' children or spouses doing those things.

Specifically, among numerous other incidents, the intervening Plaintiffs maintain that

Gee engaged in the following: (1) repeatedly told Turner that he wanted to see her minor daughter wearing lingerie or a bikini; (2) repeatedly invited Turner, Hicks and Johnson to have sex with him; (3) falsely told other employees that Turner had engaged in sexual relations with him; (4) talked on repeated occasions in the presence of various of the intervening Plaintiffs about his sexual activities with various other employees at the Salon; (5) repeatedly commented in the presence of various of the intervening Plaintiffs about his desire to have oral and anal intercourse; (6) in the presence of various of the intervening Plaintiffs, described in graphic detail his sexual activities with his ex-wife, his subordinates and others; (7) told Hicks that he wanted to have anal intercourse with her son; (8) spoke on repeated occasions about having sexual and anal intercourse with Hicks' daughter; (9) made statements about getting oral sex from Hicks, her daughter and her son; (10) threatened Hurley that he was going to take Hurley's wife out and have sexual intercourse with her; (11) repeatedly expressed to Hurley his desire to have intercourse with Hurley; (12) made repeated comments in Mayer's presence about the breasts or buttocks of female subordinates, customers and others; (13) made repeated comments in Mayer's presence about women, such as "I wish I could get her into bed," as well as statements about his homosexual and heterosexual relationships; (14) falsely told other employees that he had engaged in group sexual activity with Johnson and her husband; and (15) subjected Johnson to repeated unwelcome touching and other behavior of a sexual nature.

The intervening Plaintiffs also maintain that Gee's sexual comments and requests were frequently tied to requests for time off, scheduling accommodations, or other job benefits. To the observation of the intervening Plaintiffs, Gee treated favorably those employees who submitted to his sexual propositions and/or tolerated his offensive language. The intervening Plaintiffs

specifically maintain that Gee gave better working hours, better job assignments, and more referral business to employees who consented to his behavior.

The intervening Plaintiffs contend that they and several other employees complained about Gee's behavior and the work environment in the Salon to J.C. Penney management. Numerous reports were made to intervening Plaintiff Mayer, who was then Loss Prevention Manager at J.C. Penney's Idaho Falls store. Mayer maintains that she passed along these reports to Pat Boyce. Several other reports about Gee and the Salon work environment were made to Boyce, her predecessor, Steve Aller, and other members of J.C. Penney management.

J.C. Penney's own documentation demonstrates that written complaints of sexual harassment in the Salon date back to at least March of 1997. *See* Aff. of Counsel in Support of Mo. to Amend ("Aff. of Counsel"), Ex. K, letter dated March 13, 1997 from J.C. Penney's then Personnel Supervisor Kim Bales to Steve Aller (reporting that some of the salon associates were complaining about Gee's inappropriate touching and sexual comments). Further, Aller admits that Mayer and Bales came to him on separate occasions during the period he served as Store Manager to report the bad language and off-color jokes being told in the Salon by Gee. *See* Aff. of Counsel, Ex. CC, letter from Aller to J.C. Penney's in-house attorney, Ron Winkler.

Among other complaints were oral and written complaints from Rebecca Ord-Page. Although Ord-Page alleges that she complained to management about foul sexual language, demands and threats from Gee, she maintains that she was told, "Oh, that's just Chris." Ord-Page further alleges that shortly after reporting Gee's conduct, she was in the back room of the Salon when Gee sexually assaulted her and threatened that he would kill her if she reported his conduct. Ord-Page reported the matter to Store Manager Aller but nothing was done to remedy

the problem. Ord-Page subsequently left J.C. Penney. Shortly thereafter, Gee was promoted to the Salon Manager position.

Multiple reports were made to J.C. Penney management regarding Gee and the work environment in the Salon even after Aller left and was replaced by Boyce in early 1998. For example, Plaintiff Hicks complained to Boyce about Gee's "inappropriate discussions" in 1998. Also, in a letter dated December 6, 1998 from Troy Hurley, *see* Aff. of Counsel Exs. M and X, Hurley complained about Gee playing favorites and discriminating against him. Further, Becky Turner reported Gee's harassment of her herself and her daughter to Natalee Madsen, the then Merchandise Manager at the store, and requested that her complaint be relayed along to Boyce. When Madsen reported to Boyce, Boyce allegedly responded: "Don't tell anyone. I am not worried. Forget you heard anything."

In February of 1999, Gee exposed his penis to at least one female subordinate in the Salon. This exhibition occurred during work hours in the salon dispensary and was reported by several persons to J.C. Penney management. Among other reports made to J.C. Penney management regarding that incident and Gee's other inappropriate conduct was a written report from Mayer. According to J.C. Penney, Boyce received that report on February 18, 1999. *See* Aff. of Counsel, Ex. L.

Boyce claims that she initially interviewed five selected stylists in the salon regarding Gee's penis exhibition. *See* Aff. of Counsel, Ex. N. She claims that even those selected employees reported favoritism in the Salon and fear of retaliation if they reported any problems to management. Her written report regarding the incident indicates that the selected stylists confirmed that Gee had exposed his penis in the Salon and that Gee admitted exposing himself to

his female subordinates. *See id.*

Concerning the penis exposure incident, Boyce admitted that Gee's conduct was "outrageous" and that Gee's dismissal was appropriate. *See* Aff. of Counsel, Exs. F at 139-40 and O. Nevertheless, Gee was permitted to retain his Salon Manager position and continued to exercise supervisory and managerial authority over various of the intervening Plaintiffs and other similarly situated employees.

During the remainder of the spring and into the summer of 1999, complaints about Gee and the work environment in the Salon continued to be made to J.C. Penney. In addition to those made to Mayer, Boyce's own notes reflect that several of the stylists reported Gee's favoritism and others reported Gee making unwanted remarks. *See* Aff. of Counsel, Ex. X.

Multiple complaints to J.C. Penney management about Gee and the workplace in the Salon continued during August and September of 1999. These included several complaints to Boyce herself. Notwithstanding these complaints, J.C. Penney's own documents reflect the fact that Gee was never terminated. Rather, he resigned and left J.C. Penney in late September of 1999.

In its Complaint, the EEOC alleges that J.C. Penney subjected Turner, Hicks, and a group of similarly situated employees to sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. The EEOC's Complaint seeks monetary and injunctive relief, including pecuniary and nonpecuniary compensatory damages on behalf of Turner, Hicks and similarly situated employees. Further, the EEOC's Complaint prays that J.C. Penney be ordered to pay to Turner, Hicks and similarly situated employees punitive damages for its malicious and reckless conduct.

Intervening Plaintiffs Turner, Hicks, Hurley, Johnson and Mayer sought and obtained leave to intervene and their consolidated Complaint was filed on January 17, 2001. In addition to claims based upon sexual harassment, ongoing hostile work environment, gender discrimination and retaliation of Title VII of the Civil Rights Act of 1964 and the Idaho Human Rights Act, the intervening Plaintiffs' Consolidated Complaint included claims for infliction of emotional distress and negligence under Idaho law. The intervening Plaintiffs' Consolidated Complaint also indicated leave would be sought to amend and add a claim and prayer for punitive damages.

II.

DEFENDANTS' MOTION TO COMPEL EXAMINATION OF PLAINTIFFS (DKT #23) AND PLAINTIFFS' MOTION FOR PROTECTIVE ORDER (DKT #33).

Defendants move the Court for an Order compelling the Plaintiffs to submit to independent medical examinations and that such Order outline the following: (1) that the scope of the examinations include inquiry into the Plaintiffs' non-work related sexual activities; (2) that the Plaintiffs may not have a third party present during the examinations; and (3) that the examinations are to occur at the offices of Dr. Holt in Boise, Idaho with Defendants to bear the costs of Plaintiffs' travel, lodging and meals.

The Court finds that Defendants must be granted the opportunity to examine intervening Plaintiffs in order to formulate the necessary defenses for Plaintiffs' claims of intentional infliction of emotional distress. Accordingly, Defendants' Motion to Compel is granted in part and denied in part. Consistent with this ruling, Plaintiffs' Motion for Protective Order is granted in part and denied in part.

In order to balance the needs of each party, any inquiries pertaining to Plaintiffs' sexual history shall be limited to a three-year period of time. Examination questions relating to family

history shall be limited to where Plaintiffs were born and raised. Additionally, Defendants shall give Plaintiffs a minimum of three weeks notice prior to such examinations. Further, the examinations shall occur at the offices of Dr. Holt in Boise, Idaho. Plaintiffs may have a third party accompany them to the examinations; however, that individual would remain in the waiting area and not be physically present during the examination and interview. Lastly, Defendants shall bear the cost of \$533.97 for Plaintiffs' lost time at work and/or child care expenses, travel, lodging, and meals.

III.

PLAINTIFFS' MOTION TO AMEND.

A. Standard of Review.

Motions to amend a pleading are governed by Federal Rule of Civil Procedure 15(a).

That rule provides that a party may amend a pleading:

[O]nce as a matter of course at any time before a responsive pleading is served or, if the pleading is one of which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party.

Fed. R. Civ. P. 15(a). Pursuant to this rule, leave to amend is to be given freely "when justice so requires." *Id.* The decision to allow a party to amend a pleading lies within the sound discretion of the trial court. *Campbell v. Board of Trustees of the Leland Stanford Junior University*, 817 F.2d 499, 506 (9th Cir. 1987); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981).

However, as the Ninth Circuit stated in *Hurn v. Retirement Fund of Plumbing, Etc.*, 648 F.2d 1252 (9th Cir. 1981):

[t]he Supreme Court has instructed the lower federal courts to heed carefully the command of Rule 15(a), Fed. R. Civ. P., by freely granting leave to amend when

justice so requires. The purpose of pleadings is “to facilitate a proper disposition on the merits.”

Id. at 1253 (citations omitted). *See also, Webb*, 655 at 979 (“In exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits rather than on the pleadings or technicalities.”).

In keeping with the notion that Rule 15(a) is to be interpreted with extreme liberality, the Ninth Circuit has directed courts to consider a variety of factors when ruling on a motion to amend, including: “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether the [defendant] has previously amended his [answer].” *Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). However, these factors are not of equal weight. *See Webb*, 655 F.2d at 980. Rather, it is “[o]nly where prejudice is shown or the movant acts in bad faith [that] courts [are] protecting the judicial system or other litigants when they deny leave to amend a pleading.” *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973), *cited in Webb*, 655 F.2d at 980.

B. Discussion.

Intervening Plaintiffs move the Court for an Order granting their Motion for Leave to Amend their Consolidated Complaint and Demand for Jury Trial to Include a prayer for punitive damages under the Human Rights Act and Idaho common law pursuant to Idaho Code § 6-604, with such amendment to relate back to the filing date of their original Consolidated Complaint. In response, Defendants contend that Plaintiffs cannot recover punitive damages under both Title VII and Idaho common law for the same underlying allegedly wrongful conduct.

Based on the present record before the Court, most notably the facts outlined *supra*, the Court finds that Plaintiffs have established a reasonable likelihood of presenting facts at trial

sufficient to support a claim for punitive damages. The Court is particularly concerned about the fact that Boyce's own documents reflect that she discussed Gee's conduct and the penis exhibition incident with her superiors and those superiors required her to retain Gee. See Aff. of Counsel, Exs. O and F pp. 138. Such superiors included J.C. Penney's Senior Human Resource Attorney Ronald Winkler and its District Manager, Paul Lemmon. Accordingly, Plaintiffs' Motion to Amend will be granted.

With respect to Defendants' concerns about a double recovery for the same injury, Defendants have not demonstrated that they will necessarily incur duplicate penalties for identical wrongful acts if intervening Plaintiffs' motion is granted. If a risk of a double penalty for the same wrongful act is ultimately shown to exist at trial, the Court can provide the jury with an appropriate special verdict form, appropriate jury instructions, or address the issue through a post-verdict action, if necessary. As in all cases in which claims for punitive damages are asserted before this Court:

The parties are advised that this court sees the threshold for amending a complaint to add a claim for punitive damages to be *significantly lower* than the threshold for allowing a punitive damages claim to ultimately reach a jury. At trial, until the court finds that the record is sufficient to allow the jury to consider the issue of punitive damages, the court will exclude evidence about the defendants' wealth and financial condition. Moreover, should the evidence presented at trial fail to establish a sufficient factual basis to support an award of punitive damages, the court will not allow the claim for punitive damages to go to the jury.

Doe v. Cutter Biological, 844 F. Supp. 602, 610 (D. Idaho 1994) (emphasis added). At the time of trial, the same reasoning will be applied in the case at bar and a decision will be made as to whether the Plaintiff has sustained the proof necessary to allow the punitive damages claims to reach the jury. Even still, if Plaintiff is found to have met his burden, the Court would recommend that the punitive damages determination be bifurcated from the liability portion of

the jury's determination process. Under this procedure, the jury would initially determine liability and general and special damages. After that verdict is returned, the parties can then offer additional evidence and present their positions on punitive damages to the same jury. The jury would then deliberate on the punitive damages and return an additional verdict.

ORDER

Based on the foregoing, the Court being otherwise fully advised in the premises, **IT IS**

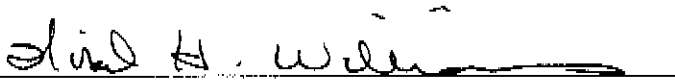
HEREBY ORDERED that

(1) Defendants' Motion to Compel Examination of Plaintiffs (Dkt #23), filed July 18, 2001, is GRANTED IN PART AND DENIED IN PART;

(2) Intervenor-Plaintiffs' Motion for Protective Order (Dkt #33), filed August 7, 2001, is GRANTED IN PART AND DENIED IN PART; and

(3) Intervenor-Plaintiffs' Motion to Amend Complaint (Dkt #27), filed July 31, 2001, is GRANTED.

DATED: October 30, 2001.



MIKEL H. WILLIAMS
UNITED STATES MAGISTRATE JUDGE

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29th day of Oct., 2001, to the following:

A Luis Lucero, Jr
Claire Cordon
Lisa Guarnero
US EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
909 First Ave #400
Seattle, WA 98104-1061

Richard H Greener
Daniel Loras Glynn
COSHO HUMPHREY GREENER & WELSH
815 W Washington
Boise, ID 83702

Bradley J Williams
MOFFATT THOMAS BARRETT ROCK & FIELDS
PO Box 1367
Idaho Falls, ID 83403-1367

Chrys Meador
JC Penney Co., Inc.
PO Box 10001
Dallas, TX 75301-0001

Nicholas A O'Kelly
J.C. PENNEY CO., INC.
6501 Legacy Dr MS-1122
Plano, TX 75024

Steven K. Brown
Reed E. Andrus
Katherine Steele Moriarty
HOPKINS RODEN CROCKETT
HANSEN & HOOPES
PO Box 51219
Idaho Falls, ID 83405-1219

HONORABLE B. LYNN WINMILL
CHIEF UNITED STATES DISTRICT JUDGE
BOISE ID 83724
(hand delivered)

Cameron S. Burke, Clerk
United States District Court


by Deputy Clerk