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United States District Court, N.D. Illinois.

Rosalind WARNELL and Suzette Wright, each individually and on behalf of other similarly situated persons, Plaintiffs,
v.
FORD MOTOR COMPANY and Ford Stamping Plant, Defendants.

No. 98 C 1503. | Oct. 21, 1998.

Attorneys and Law Firms

Keith L. Hunt, Hunt & Associates, Chicago, IL, Edward R. Vrdolyak, Attorney at Law, Tinley Park, IL, for Plaintiffs.

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Opinion

MEMORANDUM OPINION AND ORDER

BUCKLO, J.

***1** The plaintiffs, Rosalind Warnell and Suzette Wright, sued Ford Motor Company and Ford Stamping Plant on behalf of a purported class including all present and former employees in the Ford organization who work or have worked at the Ford Assembly Plant and the Chicago Stamping Plant from 1993 through the present time. The plaintiffs alleged federal claims for sexual harassment, sex discrimination, race discrimination, and retaliation in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.,* and for race discrimination in violation of 42 U.S.C. § 1981. In addition, the plaintiffs alleged state claims for assault, battery, intentional infliction of emotional distress, and negligent hiring and retention. Ford moved to dismiss the claims of intentional infliction of emotional distress (Counts VIII and XVII) and negligent hiring and retention (Counts IX and XVIII[1]). For the following reasons, Ford's motion is granted in part, and denied in part.

Ford's Motion to Dismiss Counts VIII, IX, XVII, and XVIII for Lack of Subject Matter Jurisdiction

The Exclusive Remedy Provision of the Illinois Human Rights Act
Pursuant to the Illinois Human Rights Act ("IHRA"), "[e]xcept as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." 775 ILCS § 5/8–111(C) (West Supp.1998). Under the IHRA, sexual harassment, unlawful discrimination, and retaliation against a person for opposing sexual harassment or unlawful discrimination are civil rights violations. 775 ILCS § 5/2–102(D) (West 1993), 775 ILCS § 5/2–102(A) (West 1993), 775 ILCS 5/6–101(A) (West 1993). Unlawful discrimination includes discrimination on the basis of sex and race. 775 ILCS § 5/1–103(Q) (West Supp.1998).

Where plaintiffs bring common law tort claims that are factually related to alleged civil rights violations, the issue presented is whether the exclusive remedy provision in the IHRA preempts the common law claims. The Illinois Supreme Court has twice addressed this issue. In *Geise v. Phoenix Co. of Chicago, Inc.,* 159 Ill.2d 507, 639 N.E.2d 1273, 203 Ill.Dec. 454 (1994), the plaintiff alleged that her supervisor sexually harassed her and that her employer was liable for negligent hiring and retention of the supervisor. *Id.* at 1274–75, 203 Ill.Dec. at 455–56, 639 N.E.2d 1273. The Illinois Supreme Court held that the IHRA preempted the plaintiff's negligent hiring and retention claims because,

> [a]bsent the allegations of sexual harassment, [the plaintiff] would have no independent basis for imposing liability on her former employer under the facts present here. [The negligent hiring and retention claims] depend on the prohibitions against sexual harassment for their viability. *Id.* at 1277, 203 Ill.Dec. at 458, 639 N.E.2d 1273.

The Illinois Supreme Court clarified the scope of the *Geise* holding three years later, in *Maksimovic v. Tsogalis,* 177 Ill.2d 511, 227 Ill.Dec. 98, 687 N.E.2d 21 (1997). In *Maksimovic,* the plaintiff filed a complaint with the Illinois Human Rights Commission alleging that she was sexually harassed by her manager. *Id.* at 22, 227 Ill.Dec. at 99, 687 N.E.2d 21. She then filed a lawsuit in the circuit court alleging assault, battery, and false imprisonment. *Id.* Her common law claims were based on the same factual allegations as her sexual harassment claim. *Id.* The Illinois Appellate Court held that, "[b]ecause the fundamental nature of plaintiff's claims are offensive touchings of a sexual nature and she can not support a cause of action independent of these allegations, her claims for assault, battery, and false imprisonment are barred by the [IHRA] and *Geise." Maksimovic v. Tsogalis,* 282 Ill.App.3d 576, 668 N.E.2d 166,173, 218 Ill.Dec. 3,10. (1st Dist.1996).

***2** The Illinois Supreme Court reversed. It framed the issue as follows: "[m]ust a claim of intentional tort related to allegations of sexual harassment be litigated before the Illinois Human Rights Commission ... or, stated differently, does the exclusive remedy provision of the [IHRA] divest the circuit court of jurisdiction to adjudicate such common law tort claims?" *Id.* at 21–22, 177 Ill.2d 511, 227 Ill.Dec. 98–99, 687 N.E.2d 21. In holding that the common law torts were not preempted, the court stated:

> The rule from *Geise* is not that the [IHRA] precludes the circuit court from exercising jurisdiction over *all* tort claims related to sexual harassment. Rather, whether the circuit court may exercise jurisdiction over a tort claim depends upon whether the tort claim is inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the Act itself. *Id.* at 23, 227 Ill.Dec. 23.

The court explained that the exclusive remedy provision in the IHRA "makes no mention of common law actions. A legislative intent to abolish all common law torts factually related to sexual harassment is not apparent from a plain reading of the statute." *Id.* at 24, 227 Ill.Dec. at 101. In conclusion, the court held that "a common law tort claim is not inextricably linked with a civil rights violation where a plaintiff can establish the necessary elements of the tort independent of any legal duties created by the [IHRA]." *Id.*

Counts VIII and XVII–Intentional Infliction of Emotional Distress

Ford argues that, pursuant to the exclusive remedy provision of the IHRA, I lack subject matter jurisdiction over the intentional infliction of emotional distress claims. In light of the Illinois Supreme Court's holding in *Maksimovic,* Ford's argument fails.

Maksimovic makes clear that a common law tort claim, although factually related to a civil rights violation, is not preempted by the IHRA unless it is "inextricably linked" to the civil rights claim "such that there is no independent basis for the action apart from the Act itself." *Id.* at 23, 227 Ill.Dec. at 100, 687 N.E.2d 21. Like the intentional torts of assault, battery, and false imprisonment that the Illinois Supreme Court considered in *Maksimovic,* intentional infliction of emotional distress is a "long-recognized tort action[ ] which exist[s] wholly separate and apart from a cause of action" under the IHRA. *Id.* Therefore I have subject matter jurisdiction over Counts VIII and XVII.[2]

Counts IX and XVIII–Negligent Hiring and Retention

Ford also argues that, pursuant to the IHRA, I lack subject matter jurisdiction over the plaintiffs' negligent hiring and retention claims. Essentially Ford's argument is that these claims are indistinguishable from the negligent hiring and retention claims that the Illinois Supreme Court held were preempted in *Geise.* The plaintiffs respond that their claims are distinguishable. They point to the fact that the plaintiff in *Geise* relied only on allegations of sexual harassment to support her negligent hiring and retention claims. In the instant case, the plaintiffs incorporate into their negligent hiring and retention claims allegations of sexual harassment, sex discrimination, race discrimination, retaliation, assault, battery, and intentional infliction of emotional distress.

***3** The Illinois Supreme Court has made clear that the plaintiffs may not rely on a legal duty created by the IHRA to support

a common law claim. Therefore, to the extent that the plaintiffs' negligent hiring and retention claims are based on allegations of sexual harassment, sex discrimination, race discrimination, retaliation, or any other civil rights violation described in the IHRA, I lack subject matter jurisdiction to hear them.

The more difficult question is whether the negligent hiring and supervision claims are preempted to the extent they rely on allegations that Ford was negligent in hiring and retaining employees who committed acts of assault, battery, and intentional infliction of emotional distress. In *Ofoma v. Armour,* 1998 WL 409381 (N.D.Ill. June 25, 1998), the court faced a similar question. The plaintiffs brought negligent supervision claims that were based on the failure to prevent sexual harassment, sex discrimination, national origin discrimination, assault and battery. *Id.* at *3. The court held that the negligent supervision claims were preempted to the extent they were based on allegations of sexual harassment, sex discrimination, and national origin discrimination, but not preempted to the extent they were based on allegations of assault and battery. *Id.* at *3– *4. Negligence claims based on a failure to prevent common law torts, the court reasoned, "are in no way dependent upon the IHRA for legal viability. Rather, they involve only the Illinois common law which, as *Maksimovic* makes clear, is not affected by the exclusive remedy provision of the IHRA." *Id.* at *4.

To state viable claims for negligent hiring and retention, the plaintiffs must allege the elements of those claims without relying on legal duties created by the IHRA. Counts IX and XVIII incorporate by reference both statutory and common law claims. To the extent that the plaintiffs state their claims for negligent hiring and retention independently of causes of action created by the IHRA, those claims are not preempted and I have subject matter jurisdiction to hear them.

Therefore I deny Ford's motion to dismiss Counts IX and XVIII for lack of subject matter jurisdiction but I strike all references to causes of action created by the IHRA from the claims of negligent hiring and retention.

Ford's Motion to Dismiss Counts IX and XVIII for Failure to State a Claim

Negligent Hiring

Ford argues that the plaintiffs have not alleged facts sufficient to state a claim for negligent hiring. Under the Federal Rules of Civil Procedure system of notice pleading, plaintiffs " 'need not plead facts; [they] can plead conclusions. [However,] the conclusions must provide the defendant with at least minimal notice of the claim." ' *Kyle v. Morton High School,* 144 F.3d 448, 455 (7th Cir.1998) (quoting *Jackson v. Marion County,* 66 F.3d 151, 153–54 (7th Cir.1995)).

In Illinois, a plaintiff has a cause of action against an employer for negligent hiring if it is alleged and established that (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) the particular unfitness was known or should have been known at the time of hiring; and (3) the particular unfitness proximately caused the claimed injury. *Mueller v. Community Consolidated School District 54,* 287 Ill.App.3d 337, 678 N.E.2d 660, 663, 222 Ill.Dec. 788, 791 (1st Dist.1997). In Counts IX and XVIII, the plaintiffs base their negligent hiring claims on the allegation that "Ford had a duty to thoroughly and properly investigate the background" of its employees. (Compl. at ¶¶ 70, 120.) They further allege that, in "violation" of that duty, Ford negligently "[f]ailed to investigate the background and work records of employees...." (Compl. at ¶¶ 73(a), 123(a).)

***4** Case law does not support the plaintiffs' theory that a negligent hiring claim can be based on a general, common law duty to investigate employees, if such a duty even exists. In *Fallon v. Indian Trail School,* 148 Ill.App.3d 931, 500 N.E.2d 101, 102 Ill.Dec. 479 (2d Dist.1986), the plaintiff, a student, alleged that her school district was liable for negligently hiring her teachers. *Id.* at 102, 102 Ill.Dec. at 480, 500 N.E.2d 101. She claimed that, as a result of the negligent hiring, she was harmed in a trampoline accident. *Id.* In support of her claim, the plaintiff alleged that the school district negligently "failed to investigate the teachers' credentials...." *Id.* at 103, 102 Ill.Dec. at 481, 500 N.E.2d 101. In holding that the allegations were "legally insufficient to support a cause of action for negligent hiring" the court explained:

> There are many kinds of unfitness for employment that do not give rise to tort liability for negligent hiring.... Liability for negligent hiring arises only when a particular unfitness of an applicant creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed this applicant in employment where he could injure others. *Id.* at 103–04, 102 Ill.Dec. at 481–82.

It is true, as the plaintiffs argue, that notice pleading requires only a short and plain statement of the claim that gives the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests. *Kyle,* 144 F.3d at 454. However, a complaint must be dismissed if it appears that the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Doherty v. City of Chicago,* 75 F.3d 318, 322 (7th Cir.1996). In Counts IX and XVIII, the ground upon which the plaintiffs' claims rest is an alleged common law duty that has not been recognized as supporting a negligent hiring claim in Illinois courts.[3] The plaintiffs have not alleged that any prospective employee had any particular unfitness at the time he or she was hired of which Ford even *could* have been aware. Therefore I grant Ford's motion to dismiss the negligent hiring claims.

Negligent Retention

Ford also argues that the plaintiffs failed to allege sufficient facts to state a claim for negligent retention. A plaintiff has a cause of action for negligent retention in Illinois if it is alleged and established that: (1) the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) the employer retained the employee in his or her employment even after the employer knew or should have known about the unfitness; and (3) the particular unfitness proximately caused the claimed injury. *Van Horne v. Muller,* 294 Ill.App.3d 649, 691 N.E.2d 74, 79, 229 Ill.Dec. 138,143 (1st Dist.1998).

In Counts IX and XVIII, the plaintiffs alleged that, while employed at Ford, other Ford employees subjected them to assault, battery, and intentional infliction of emotional distress. The plaintiffs further alleged that Ford negligently "[f]ailed to take appropriate action" to protect them, and that their injuries were proximately caused by the negligence. (Compl. at ¶¶ 73(d), 123(d).) Factual allegations pleaded in the complaint must be taken as true and construed in the light most favorable to the plaintiffs. *Doherty,* 75 F.3d at 322. "A complaint under Rule 8 limns the claim; details of both fact and law come later, in other documents." *Bartholet v. Reishauer A.G.,* 953 F.2d 1073, 1078. (7th Cir.1992).

***5** The plaintiffs have included sufficient allegations in their complaint to put Ford on notice of their negligent retention claims and to allow the district court "to understand the gravamen of [their] complaint." *Doherty,* 75 F.3d at 326. Therefore Ford's motion to dismiss the negligent retention claims is denied.

Conclusion

For the foregoing reasons, Ford's motion to dismiss Counts VIII, IX, XVII, and XVIII for lack of subject matter jurisdiction is denied, but I will strike from Counts IX and XVIII any reference to causes of action created by the IHRA. Ford's motion to dismiss Counts IX and XVIII for failure to state a claim is granted with respect to negligent hiring but denied with respect to negligent retention.

Footnotes

1 The plaintiffs labeled both of the last two Counts in the complaint as Count XVII. I will refer to the last Count in the complaint, alleging negligent hiring and retention at the Assembly Plant, as Count XVIII.

2 Ford's motion to dismiss this count rested solely on Rule 12(b)(1), Fed.R.Civ.P. In its reply memorandum it appears to argue that the claim is also barred by Rule 12(b)(6) for failure to state a claim. Plaintiff's allegations must, of course, be evaluated in the light most favorable to them on this motion. Their complaint includes allegations that a Ford supervisor repeatedly subjected plaintiffs to both verbal and physical confrontation, and continued to do so with the knowledge of Ford management. The conduct alleged, if proved, could be found to be extreme and outrageous. Since plaintiffs allege knowledge by Ford and severe emotional distress as a result, their claim is sufficient to withstand a motion to dismiss under Rule 12(b)(6). *Doe v. Calumet City,* 161 Ill.2d 374, 641 N.E.2d 498, 204 Ill.Dec. 274 (1994).

3 In its response to Ford's motion to dismiss, the plaintiffs restate the duty to investigate but do not cite to any authority for such a proposition-other than to their own complaint.