

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

2006 NOV -8 PM 2:49

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: 
DEPUTY CLERK

ALICIA MANSEL,
Plaintiff - Intervenor

V.

BUILDER'S GYPSUM SUPPLY, LLP
Defendant

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§

CASE NO. SA05CA0965RF

**PLAINTIFF-INTERVENOR, ALICIA MANSEL'S, SECOND-AMENDED COMPLAINT
AND JURY DEMAND**

1. Pursuant to the Court's order dated July 11, 2006 and the motion for leave to add additional parties filed with this pleading, Plaintiff-Intervenor, Alicia Mansel ("Ms. Mansel"), files this Second Amended Complaint. The purpose of the amendment is to clarify the causes of action previously pleaded. Additionally, to promote judicial economy, additional causes of action are added that have occurred subsequent to the filing of the intervention. Finally, the amendment adds new parties who are general partners and thus subject to joint and several liability for the claims presented herein.

2. This is an action under Title VII of the Civil Rights Act of 1964, as amended, and Title I of the Civil Rights Act of 1991, to correct unlawful employment practices on the basis of sex, female and retaliation and for assault or battery committed by agents and supervisors of Builders Gypsum Supply, L.L.P., f/d/b/a Builders Gypsum Supply Co., Inc. ("Builders Gypsum"). This action is being brought to provide appropriate relief to Ms. Mansel who was adversely affected by such

practices and actions of Builders Gypsum by and through its agents and supervisors who committed assaults and/or batteries against Ms. Mansel. Ms. Mansel alleges that Builders Gypsum Supply, L.L.P., f/d/b/a Builders Gypsum Supply Co., Inc. subjected her to sexual harassment on the basis of her sex, in violation of Section 703(a) of Title VII, and retaliated against Ms. Mansel by, among other things, discharging her for complaining of this sexual harassment in violation of Section 704(a) of Title VII, and by and through agents and supervisors, engaging in assault and/or battery of Plaintiff-Intervenor, Ms. Mansel.

Jurisdiction and Venue

3. Jurisdiction is proper pursuant to 28 U.S.C. § 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) (“Title VII”) and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

Parties

4. Plaintiff-Intervenor, Alicia Mansel, is a citizen of the United States and the State of Texas, and resides in Houston, Harris County, Texas.

5. At all relevant times, Defendant, Builders Gypsum Supply, L.L.P., f/d/b/a/ Builders Gypsum Supply Co., Inc. (Builders Gypsum) has continuously been a Texas partnership doing business in the State of Texas and has, in the aggregate of its various business entities, continuously had at least fifteen (500) employees. It has already been served and answered in this cause.

6. At all relevant times, Builders Gypsum has continuously been an employer engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) and (h) of Title VII, 42 U.S.C. § 2000e (b), (g) and (h).

7. Defendant, Rigoberto Flores, a/k/a Rigo Flores, is an individual and a partner of Defendant Builder's Gypsum. He can be served at his business address, 2015 Pasket, Houston, TX 77092 or his home address, 8614 Cedarspur, Houston, TX 77055 any other place he can be found.

8. Defendant, Israel Flores, is an individual and a partner of Defendant Builder's Gypsum. He can be served at his business address, 2015 Pasket, Houston, TX 77092 or his home address, 9214 Outpost, Houston, TX 77041 or any other place he can be found.

9. Defendant, Narciso Flores, is an individual and a partner of Defendant Builder's Gypsum. He can be served at his business address, c/o Olympia Drwall Company, 2525 McAllister Road, Houston, TX 777092 or his home address, 12564 Memorial, Houston, TX 77024 or any other place he can be found.

10. All defendants are referred to collectively as Defendant or Builder's Gypsum.

Statement of Claims

11. More than thirty day (30) prior to the institution of this lawsuit, Ms. Mansel filed a charge with the Commission alleging violation of Title VII by Builders Gypsum. All conditions precedent to the institution of this lawsuit have been fulfilled.

12. Since at least August 2002, Builders Gypsum engaged in unlawful employment practices and promoted a hostile work environment at its San Antonio, Texas facility, in violation of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) and Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a) including the following:

- a. Subjecting Ms. Mansel to a hostile work environment based on her sex, through inappropriate sexual touching; sexual photographs and images displayed on various company computers, loud, sexually crude and physically intimidating tirades directed at her gender, including sexual gestures, sounds and innuendos; and then failing to take any prompt and effective remedial action after becoming aware of this conduct;
- b. Failing to investigate claims of inappropriate conduct and failing to supervise individuals engaging in such conduct; and
- c. Retaliating against Ms. Mansel by, among other things, discharging her for complaining about the sexual harassment.

13. The effect of the practices complained of above has been to deprive Ms. Mansel of equal employment opportunities and to otherwise adversely affect her status as an employee because of her sex, female, and in retaliation for opposing such unlawful practices.

14. The unlawful employment practices complained of above were intentional and were done with malice or with reckless indifference to the federally protected rights of Ms. Mansel.

15. Agents and supervisors' of Defendant assaulted and/or committed battery against Ms. Mansel by engaging in repeated unwelcome touching of her body, including her breasts, repeated hugging and groping of Ms. Mansel, pulling Ms. Mansel upon the supervisor's lap and holding her against her will, forcibly pinning Ms. Mansel against a wall, trapping Ms. Mansel in the women's restroom (a small open room about the size of a walk-in closet without individual stalls) at

Defendant's warehouse facility and locking the door and turning off the lights and elbowing her into a doorframe at Defendant's warehouse facility. All such conduct alleged herein was done in the course and scope of business of Defendant and its employees and were within the knowledge of Ms. Mansel's supervisors and owners and were ratified by the same. Such acts continued until Ms. Mansel's termination without any corrective action by Defendant's owners or supervisors.

16. The assault or battery alleged herein are part and parcel of the facts and circumstances that give rise to the claims of sexual harassment made by Ms. Mansel.

17. The unlawful assaults and/or batteries complained of above were intentional and were done with malice or reckless indifference to the rights of Ms. Mansel.

18. Thus, Ms. Mansel bring claims against Builders Gypsum for assault and battery, intentional infliction of emotional distress, hostile work environment, negligent hiring of supervisory personnel and negligent supervision of such personnel.

Breach of Contract

19. All previous paragraphs are incorporated herein by reference.

20. In the first part of 2006, Builder's Gypsum and the Equal Employment Opportunity Commission ("EEOC") entered into a settlement agreement (the "Settlement"). The Settlement was limited to only claims pursued by the EEOC; it excluded claims brought by Ms. Mansel as Intervenor and called for, among other things payment of \$200,000.00 to Ms. Mansel (less withholding)(the "Settlement Funds"). The Settlement was unconditional; it did not require any release language or require a release from Ms. Mansel as a condition to receiving the funds. Despite the fact that it had not negotiated for or obtained an agreement regarding a release, on May 18, 2006, Builder's Gypsum

Defendant tendered a check to Ms. Mansel *that it was required to tender by this Court's order*, but also included release language.

21. Subsequently, Builder's Gypsum moved the Court to dismiss Ms. Mansel's claims based upon the affirmative defenses of accord and satisfaction, release, res judicata, waiver and payment. These claims were based solely upon the notation Builder's Gypsum added to the check.

22. Builder's Gypsum is a party to a distinct contract with the EEOC that required unconditional payment to Ms. Mansel. The actions of Builder's Gypsum in failing to pay according to the terms of the contract constitute a breach. Ms. Mansel has and continues to incur damages as a result of defending against affirmative defenses brought in contravention to the Settlement. Further, Defendant wrongfully withheld amounts from the Settlement Funds causing Ms. Mansel to incur damages as result of having to recover funds from federal and/or state agencies.

23. Therefore, based on Builder's Gypsum breach of contract, Ms. Mansel requests that this Court enter judgment against Defendant.

Request for Declaratory Relief

24. All previous paragraphs are incorporated by reference.

25. In October of 2006, Builder's Gypsum engaged in a sale related to its business. An investigation of the corporate filings of Builder's Gypsum with the Texas Secretary of State reveals that Builder's Gypsum was registered at one time as a limited liability partnership. It appears that Builder's Gypsum allowed such registration to lapse effectively causing Builder's Gypsum to be a general partnership and subjecting its owners to personal liability for all conduct complained of herein.

26. Therefore, pursuant to Rule 57 of the Federal Rules of Civil Procedure and the Declaratory Judgment Act (28 U.S.C. section 2201-2202), Ms. Mansel asks the Court to declare without limitation as follows:

- A. That at all relevant times, Builder's Gypsum was a general partnership and its owners are personally liable for the actions complained of herein;
- B. Defendant wrongfully withheld amounts from the Settlement Funds;
- C. That Olympia Drywall and perhaps other companies are a common enterprise and constitute one company for purposes of the claims presented herein; and
- D. The affirmative defenses of accord and satisfaction, release, res judicata, waiver and payment are not supported by law or fact and cannot be asserted by Defendant.

Fraud/ Constructive Trust

27. All previous paragraphs are incorporated by reference.

28. As part of her compensation while working for Defendant, Ms. Mansel was entitled to commissions based upon sales. Defendant manipulated sales attributable to Ms. Mansel to avoid paying her commissions. Specifically, Defendant did not credit some sales to Ms. Mansel, but rather took clients away that Ms. Mansel developed and paid the commissions to male members of Defendant. Further, as part of a larger scheme to divert business assets for individual gain, Defendant fabricated invoices and return slips and back-charged Ms. Mansel's commissions.

29. As a result, Ms. Mansel is owed commissions based upon the customers she developed and the sales she actually made. All actions were within the knowledge of Ms. Mansel's supervisors and Defendant's owners and /or were ratified by the same.

30. Ms. Mansel asserts fraud and constructive trust to recover those funds and requests that this Court enter judgment against Defendant.

Attorney's Fees

31. The conduct complained of herein and the resulting losses to Ms. Mansel has required Ms. Mansel to retain the undersigned attorney. Pursuant to the Texas Civil Practice and Remedies Code, Ms. Mansel is entitled to recover from Builder's Gypsum an additional sum to compensate her for the reasonable and necessary fees and expenses incurred in the preparation and prosecution of this lawsuit.

Jury Demand

32. Ms. Mansel hereby reasserts her previous request that this cause be tried to a jury.

Conditions Precedent

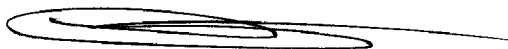
33. All conditions precedent to recovery have been performed or have occurred.

Prayer

THEREFORE, premises considered, Ms. Mansel requests that Builder's Gypsum be cited to appear and answer herein, and that upon final trial, Ms. Mansel have and recover a judgment against Builder's Gypsum and its general partners which grants:

- A. all damages caused by Builder's Gypsum's conduct, including but not limited to, compensatory damages, incidental and consequential damages, and special and/or punitive damages.
- B. reasonable attorneys' fees;
- C. cost of suit;
- D. pre-judgment interest as allowed by law;
- E. post-judgment interest as allowed by law; and
- F. for all other relief at law or in equity as it is justly entitled.

Respectfully submitted,



By: _____
Warren J. Fields, TBA #06981300

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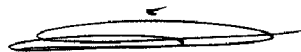
Certificate of Service

I certify that a true and correct copy of the foregoing has been forwarded to the counsel of record by first class mail, postage prepaid on November 3, 2006:

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