IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	§	
Plaintiff,	§	
	§	Civil Action No. 3:97-CV-2322-D
VS.	§	
MULTICARE FAMILY CLINIC, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION
AND ORDER

The instant motion for summary judgment presents a question of successor liability under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*. Applying the factors of *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 750 (5th Cir.1996), the court holds that defendants-movants cannot be held liable on that basis. Accordingly, the court grants defendants' motion and dismisses the actions against them.

I

Plaintiff Equal Employment Opportunity Commission ("EEOC") sues defendants Fenyves & Nerenberg, M.D.P.A. ("F&N"), Texas Healthcare Network, Inc. ("THN"),[1] and Columbia/HCA Healthcare Corporation ("Columbia"),[2] contending they are liable pursuant to Title VII for acts of sexual harassment and retaliation committed by Steven Fenyves, M.D. ("Dr. Fenyves") against Regina

[1]The EEOC's amended complaint identifies THN in the case caption as Texas Healthcare Network d/b/a MultiCare Family Clinic.

[2]The EEOC's amended complaint identifies Columbia in the case caption as Columbia/HCA d/b/a MultiCare Family Clinic.

Moore ("Moore"), Mildred Sewell ("Sewell"), Cynthia Aguirre ("Aguirre"), and Mary Ramon ("Ramon").

THN and Columbia argue that they are entitled to summary judgment because neither was at any time the employer of the four aggrieved individuals. Instead, the four were employed by F&N, Dr. Fenyves' professional association. Nerenberg, Fenyves & Associates, M.D.P.A. ("Nerenberg"), a separate entity from F&N, owned the assets of the medical clinic where the four individuals worked. According to THN and Columbia, on December 16, 1996 Nerenberg sold its assets to West 9th Street Healthcare, Inc. ("West"), a nonprofit organization, with which THN, also a nonprofit organization, later merged; F&N, the aggrieved individuals' employer, continues as a viable entity with assets; neither THN nor Columbia purchased the assets nor assumed the liabilities of F&N, including liability for the EEOC's claims; and the four aggrieved individuals had already been terminated from employment several months before the December 16, 1996 transaction. The EEOC responds that there is a genuine issue of material fact whether THN and Columbia can be held liable based on successor liability.

II

A

Title VII liability may be imposed on an entity that is not directly responsible for a violation of the statute when the conditions for successor liability are met. *See Rojas*, 87 F.3d at 750. The policy underlying the successor liability doctrine is to protect an employee when the ownership of her employer suddenly changes. *Id.*

There a nine factors—the first two of which are "critical"—in determining such liability. *Id.* (adopting factors adopted in *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094

(6th Cir. 1974), as paraphrased in *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir.1985)). These factors are:

> (1) whether the successor company had notice of the charge or pending lawsuit prior to acquiring the business or assets of the predecessor; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether he uses the same or substantially the same work force; (6) whether he uses the same or substantially the same supervisory personnel; (7)whether the same jobs exist under substantially the same working conditions; (8) whether he uses the same machinery, equipment, and methods of production; and (9) whether he produces the same product.

Id. Apart from the two critical elements, the remaining seven provide a foundation for analyzing the larger question whether there is a continuity in operations and the work force of the successor and predecessor employers. *Id.* (citing *Musikiwamba*, 760 F.2d at 751).

B

THN and Columbia posit that they cannot be held liable based on successor liability because (1) they lacked notice of the aggrieved individuals' claims; (2) F&N is a viable entity with assets (and is a defendant to this suit); (3) when the harassment and retaliation are alleged to have occurred, THN and Columbia were not involved with F&N; (4) THN and Columbia did not know of the aggrieved individuals' complaints and therefore could not take prompt remedial action to address any such complaints; and (5) THN and Columbia did not make any adverse employment decisions against the aggrieved individuals because they had each been discharged by F&N at least two months before the December 16, 1996 transaction.

The EEOC, which seeks to hold THN and Columbia liable solely based on successor liability, *see* P. Resp. at 7, counters that under the *Rojas* factors, summary judgment is unwarranted. The

EEOC maintains that both THN and Columbia had knowledge prior to the December 16, 1996 sale of the medical practice of the EEOC charges and had notice of discrimination for Moore and Sewell because charges of discrimination and notices of discrimination had been sent to MultiCare Family Clinic at 129 W. 9th Street; on November 15, 1996 F&N's counsel responded to the EEOC's request for information pertinent to Moore's discrimination claim; and on December 6, 1996 F&N's counsel responded to the EEOC's request for information relevant to the Sewell investigation. The EEOC argues that these documents, together with F&N's knowledge of the charges, were sufficient to give THN and Columbia knowledge of the charges before the merger.

The EEOC posits that after the merger, defendants were given the opportunity to conciliate the charges, Ramon filed a charge of discrimination against MultiCare Family Clinic (a copy of which was sent with a notice of charge to MultiCare Family Clinic at 129 W. 9th Street), and the EEOC transmitted a letter of determination covering all four charges of discrimination, and a notice of conciliation failure regarding all four charges, were sent to MultiCare Family Clinic at 129 W. 9th Street. According to the EEOC, the transmittal of all these documents to MultiCare Family Clinic at 129 W. 9th Street is significant because beginning in December 1996, THN and Columbia were operating the MultiCare Family Clinic at that location. The EEOC also relies on evidence that through the merger with West, THN and Columbia assumed the clinic lease, all employees, all patients, and all clinic equipment, and entered into employment contracts with Drs. Fenyves and Nerenberg.

The EEOC challenges defendants' assertion that F&N is a viable entity, contending that there is no evidence to show that it is an active corporation; the physicians are now employed by THN and Columbia; there is no competent evidence that F&N owns any property or equipment or has any

employees or assets; and all property that F&N previously leased, and all F&N employees and patients, were transferred to West and then to THN via the merger. Accordingly, the EEOC urges that there is a fact issue whether the first two critical *Rojas* factors warrant imposition of successor liability. Regarding the remaining seven factors, the EEOC asserts that THN and Columbia have continued the operations and work force of F&N, THN and Columbia have continued the medical practice at MultiCare Family Clinic as before the merger, defendants employ the same workers, the same two physicians, and the same medical staff, the equipment and materials are the same, and all business is conducted in the same manner at the same location.

In a supplemental response, which relies on evidence to which THN and Columbia object,[3] the EEOC argues that THN is a nonprofit foundation of Columbia and that notice to THN of the EEOC charges and the litigation is notice to Columbia.

C

The EEOC has not created a genuine fact issue concerning the basic premise of defendants' motion: neither THN nor Columbia succeeded F&N, the aggrieved individuals' employer. Instead, THN acquired, through a merger with West, the assets of Nerenberg. Nerenberg did *not* employ the four individuals.

THN and Columbia have introduced summary judgment evidence that F&N employed Moore until October 7, 1996, employed Sewell until October 2, 1996, employed Aguirre until October 12, 1996, and employed Ramon through September 14, 1996. Dr. Fenyves Aff. at ¶ 2. F&N made all

---

[3]The court need not resolve this objection because, even considering the evidence, THN and Columbia are entitled to summary judgment. Notice to Columbia via THN is only relevant if adequate notice was given to THN. Under the evidence and reasoning of the court, THN did not obtain sufficient notice and did not, in any event, succeed F&N.

employment decisions regarding these individuals. *Id.* F&N is a separate entity from Nerenberg, which sold its assets to West, which in turn merged with THN. *Id.* at ¶¶ 2-3.

Moreover, as of December 16, 1996, the date Nerenberg sold its assets to West, neither THN nor Columbia had notice of the claims being asserted by the aggrieved individuals. Affidavit of Steven R. Gilfether at 12-13. Neither F&N nor Nerenberg had provided such notice to them. Dr. Fenyves Aff. at ¶ 4. Although F&N had received notice of Moore's and Sewell's EEOC charges by December 16, 1996, they were not disclosed to THN and Columbia because no lawsuit had been filed and F&N viewed the charges as groundless. *Id.* at ¶ 5.

By contrast, the EEOC's evidence, viewed favorably to it, shows only that charges of discrimination and notices of discrimination for Moore and Sewell had been sent to MultiCare Family Clinic at 129 W. 9th Street; that on November 15, 1996 *F&N's* counsel responded to the EEOC's request for information pertinent to Moore's discrimination claim; and on December 6, 1996 *F&N's* counsel responded to the EEOC's request for information relevant to the Sewell investigation. This is not proof that THN and Columbia had knowledge of the charges before the asset sale and merger. It is also inadequate to raise a genuine issue of material fact regarding the notice element of the *Rojas* formulation.

The EEOC also relies on evidence of notice given after the December 16, 1996 transaction. What occurred *after* the asset sale is not probative as to the first *Rojas* factor because that element addresses "whether the successor company had notice of the charge or pending lawsuit *prior to* acquiring the business or assets of the predecessor." *Rojas*, 87 F.3d at 750 (emphasis added).

It is apparent that THN and Columbia did not succeed F&N and did not have notice of the discrimination charges prior to the asset sale. There was no lawsuit pending at the time. The first

factor supports THN and Columbia.

D

Regarding the second factor, THN and Columbia have adduced summary judgment evidence that F&N is a viable entity with assets, Drs. Fenyves and Nerenberg are still practicing medicine, and F&N is a named defendant that is actively participating as a party in this lawsuit. Dr. Fenyves Aff. at ¶¶ 6-7. The EEOC counters that there is no evidence to show that F&N is an active corporation; the proof shows that the physicians of F&N are now employed by THN and Columbia; there is no competent evidence that F&N owns any property or equipment or has any employees or assets; and the evidence reflects that all property that F&N previously leased, and all F&N employees and patients, were transferred to West and then to THN via the merger.

Even if the court concludes that the EEOC has raised a genuine issue of material fact concerning the second factor, in view of the lack of any legal connection with F&N and THN and Columbia, and the overwhelming absence of notice to THN and Columbia of the aggrieved individuals' charges prior to the asset sale, the court holds that a reasonable trier of fact could not find successor liability. *See Rojas*, 87 F.3d at 750 ("[A]pplicability of the doctrine hinges on the need to protect a plaintiff where the offending entity is substituted by another company." (quoting *Brennan v. National Tel. Directory Corp.*, 881 F. Supp. 986, 992 (E.D. Pa. 1995)); *id.* (affirming summary judgment based on second factor despite fact that defendant had notice and thus did not satisfy first element). It would be unjust to impose liability on THN and Columbia merely for the purpose of enhancing the EEOC's ability to recover greater relief. *See id.*

E

In view of the court's disposition of the first critical factor, the court holds that none of the

remaining *Rojas* factors supports the conclusion that THN and Columbia can be held liable as successors to F&N.

* * *

Defendants' motion for summary judgment is granted, and the actions against them are dismissed.

SO ORDERED.

July 6, 1998.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE