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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY

Defendant.

No. C04-866 MJP

ORDER DENYING DEFENDANTS  
RAIL TERMINAL SERVICES AND  
MOENCHS' MOTION TO DISMISS  
INTERVENTION PLAINTIFF'S  
CLAIMS.

JILL HARP,

Plaintiff in Intervention,

v.

UNION PACIFIC RAILROAD COMPANY, et  
al.

Defendants in Intervention.

This matter comes before the Court on Defendants Rail Terminal Services (“RTS”) and Alan and Jane Doe Moench’s (“Moench”) Motion to Dismiss Intervention Plaintiff Jill Harp’s (“Harp”) claims against them. (Dkt. No. 20). In considering the motion, the Court has reviewed all materials submitted in support of and in response to the motion, as well as the remaining record. Having considered all relevant materials, the Court DENIES Defendants RTS and Moench’s motion. The

1 Court finds that it has supplemental jurisdiction over Harp’s state law claims against Defendants RTS  
2 and Moench.

### 3 **BACKGROUND**

4 Harp was hired by Union Pacific Railroad Company (“UPRR”) in June of 2002 to work as a  
5 tie down loader during the “graveyard” shift (from midnight to eight in the morning). One of her  
6 main duties included unlocking containers that arrived on trains. Once the containers were unlocked,  
7 RTS employees would load and unload the containers and other shipments from the railroad cars.  
8 Thus, due to the nature of their jobs, UPRR and RTS employees interacted with one another quite  
9 often.

10 For the purpose of determining whether the Court has jurisdiction over Harp’s claims against  
11 RTS and Moench, the following facts, when viewed most favorable to Harp, briefly describe the  
12 degree of interaction between RTS and UPRR employees.<sup>1</sup> RTS and UPRR share a main office in  
13 which managerial and administrative staff conduct business, and RTS and UPRR employees are  
14 required to attend daily joint pre-shift meetings conducted by RTS supervisors. Employee policies  
15 and procedures are sometimes applied to both RTS and UPRR employees. RTS supervisors  
16 authorize overtime for UPRR employees. RTS and UPRR employees sometimes share one break  
17 room, share the same work area, and share a locker. RTS supervisors assigned Harp her daily duties,  
18 Harp was required to report to RTS supervisors, and Harp had to report any safety issues or  
19 immediate concerns to RTS supervisors. Despite these interactions, employees are “hired” only by  
20 their respective companies, they do not share standard company policies and procedures, and they  
21 have different collective bargaining agreements.

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24 <sup>1</sup> For purposes of determining jurisdiction, the Court is free to hear evidence and to resolve factual  
25 disputes in determining whether it has jurisdiction over a claim. Steen v. John Hancock Mutual Life Ins.  
26 Co., 106 F.3d 904, 910 (9th Cir. 1997). However, where jurisdiction is so intertwined with the merits  
that its resolution depends on the resolution of the merits, the trial court should employ the standard  
applicable to a motion for summary judgment. Id. Thus, in such cases, the Court will view the disputed  
facts in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio  
Corp., 475 U.S. 574, 587 (1986).

1 During Spring of 2003, Harp filed a complaint with the EEOC alleging that she was being  
2 sexually harassed by both UPRR and RTS employees, and that neither company's management had  
3 addressed her complaints. After conducting an investigation, the EEOC decided to sue UPRR in the  
4 U.S. District Court alleging violations of Title VII of the Civil Rights Act of 1964. The EEOC did  
5 not sue RTS or any RTS employees. Once the complaint by the EEOC was filed, Harp intervened  
6 and filed Title VII claims against UPRR. In addition, Harp filed several state law claims against  
7 UPRR, RTS, Moench (an RTS employee), and Martin Howell and Fletcher Jamison (both UPRR  
8 employees). Defendants RTS and Moench now ask the Court to dismiss Harp's state law claims  
9 against them because they argue the Court has neither diversity jurisdiction nor supplemental  
10 jurisdiction over those state law claims.

## 11 ANALYSIS

12 The parties raise two issues. The first issue is whether the Court has subject matter  
13 jurisdiction through diversity over Harp's state law claims against RTS and Moench. If the Court  
14 does not have subject matter jurisdiction, the second issue is whether the Court has supplemental  
15 jurisdiction over those claims.

### 16 **A. Subject Matter Jurisdiction Based on Diversity of Citizenship**

17 To bring a diversity case in federal court against multiple defendants, each plaintiff's  
18 citizenship must be diverse from each defendant's. Lee v. American Nat. Ins. Co., 260 F.3d 997,  
19 1004 (9th Cir. 2001). A corporation is "deemed to be a citizen of any State by which it is  
20 incorporated and of the State where it has its principal place of business." 28 U.S.C. §1332(c)(1). In  
21 this case, Harp is a citizen of Washington. Defendants Moench are also citizens of Washington.  
22 Defendant RTS was incorporated in Delaware and has its principal place of business in Washington.  
23 As such, it is a citizen of both Delaware and Washington.

24  
25 Because the parties are not diverse, the Court does not have diversity jurisdiction over Harp's  
26 state claims against RTS and Moench. Harp's argument that venue somehow overrides the diversity

1 requirement is without merit. In addition, Harp argues that the doctrine of necessary and  
2 indispensable parties under Fed. R. Civ. P. 19 requires the Court to declare that it has jurisdiction  
3 over the claims against RTS and Moench. However, Rule 19 deals with the question of whether the  
4 Court must dismiss an action when it cannot add an indispensable party, not whether it should *add*  
5 parties or claims when it does not have subject matter jurisdiction. Even Rule 19(a) makes clear that  
6 subject matter jurisdiction must always be present. Thus, the Court does not have subject matter  
7 jurisdiction over Harp's state law claims against Defendants Moench and RTS.

### 8 **B. Supplemental Jurisdiction Over State Claims against RTS and Moench**

9 The supplemental jurisdiction statute provides that, where a district court has original  
10 jurisdiction, it shall have supplemental jurisdiction over all other claims that are so related to claims in  
11 the action within such original jurisdiction that they form part of the same case or controversy. 28  
12 U.S.C. § 1367(a). Supplemental jurisdiction includes claims that involve the joinder or intervention  
13 of additional parties. *Id.* However, under § 1367(c), a district court may decline to exercise  
14 supplemental jurisdiction for any of four enumerated reasons: (1) if the claim raises a novel or  
15 complex issue of State law, (2) the claim substantially predominates, (3) the district court has  
16 dismissed the claims over which it has original jurisdiction, or (4) in exceptional circumstances, there  
17 are compelling reasons to do so.

18 Defendants RTS and Moench argue that the state law claims against them are not part of the  
19 same case or controversy. They further argue that, even if the claims do form part of the same case  
20 or controversy, the first and fourth exceptions under § 1367(c) apply to prevent the Court from  
21 exercising supplemental jurisdiction. The Court will analyze these arguments separately.

#### 22 1. Same Case or Controversy

23  
24 For the related claims to form part of the same case or controversy under § 1367(a), they  
25 must form one constitutional case and derive from a common nucleus of operative facts, Mendoza v.  
26 Zirkle Fruit Co., 301 F.3d 1163, 1173 (9th Cir. 2002), such that they would normally be tried

1 together. Bahrampour v. Lampert, 356 F.3d 969, 978 (9th Cir. 2004). This determination is fact  
2 specific. See generally, Executive Software N. Am., Inc. v. U.S. Dist. Ct., 24 F.3d 1545 (9th Cir.  
3 1994). The supplemental claims need only revolve around a central fact pattern. White v. County of  
4 Newberry, South Carolina et al, 985 F.2d 168, 172 (4th Cir. 1993). However, where the  
5 supplemental claims are wholly separate from the claims upon which the Court has original  
6 jurisdiction, supplemental jurisdiction does not exist. Ray v. Tennessee Valley Authority, 677 F.2d  
7 818, 826 (11th Cir. 1982). In the end, supplemental jurisdiction boils down to whether the facts will  
8 be the same or very similar, and whether the witnesses and evidence will be the same. Mendoza, 301  
9 F.3d at 1173 (citing Palmer v. Hospital Authority of Randolph County, 22 F.3d 1559, 1563-1564  
10 (11th Cir. 1994)).

11 In the case at bar, the relevant question is whether Harp's claims against RTS and Moench  
12 arise out of the same case or controversy as Harp's Title VII claims against UPRR. Harp is alleging  
13 negligent hiring and supervision against RTS, and assault and battery and outrage against Moench.  
14 The Court finds that the evidence, when viewed in favor of Harp, suggests all three of these state law  
15 claims form part of the same case or controversy with Harp's Title VII claims against UPRR.

16 a. Negligent Hiring/Supervision Claim Against RTS

17 RTS argues that, in order to succeed in her claim, Harp must show that RTS knew Moench  
18 was unfit and that retaining him caused her injuries. RTS reasons that the facts supporting this claim  
19 will only involve RTS' knowledge of Moench's acts. However, the Court does not read Harp as  
20 making such a narrow allegation against RTS. To the contrary, the Court reads Harp's complaint as  
21 alleging that, in addition to the Moench incident, RTS was also negligent in supervising other  
22 employees of its own who played a role in creating a sexually hostile work environment (by  
23 distributing the pornographic materials in the shared workplace and by using sex-based profanities in  
24 the workplace). (Intervenor's Compl. at 15-16). This reading is confirmed by Harp's claim that she  
25 "complained and provided notice to RTS' supervisors of the unwanted behavior by Moench *and*  
26 *other RTS employees.*" (Pl. in Intervention's Opp'n to Defs.' RTS and Moenchs' Mot. to Dismiss

1 Intervention Pl.'s Claims at 19, ¶¶ 24-25) (emphasis added). The hostile work environment  
2 allegation, which is based on the totality of circumstances and is not against specific individuals of  
3 either company, is one of the bases upon which Harp is suing UPRR under Title VII. There is no  
4 question that the facts, evidence, and witnesses for the sexually hostile work environment allegation  
5 under Title VII against UPRR will overlap with Harp's negligent hiring and supervision claim against  
6 RTS because the hostile work environment claim will include the alleged conduct of both Moench  
7 and other RTS employees.

8 Even if one reads Harp's negligent supervision claim against RTS to involve only the alleged  
9 conduct of Moench, the claim still forms part of the same case or controversy as the Title VII claim  
10 against UPRR because the facts, evidence, and witnesses regarding Moench's actions will still be  
11 used in the hostile work environment claim. Lastly, Harp is alleging that UPRR also negligently hired  
12 and supervised employees. Again, the facts, evidence, and witnesses will overlap because the  
13 negligent hiring and supervision claim against UPRR is likely to include the hostile work environment  
14 claim under Title VII, which in turn will involve RTS employees' actions. Therefore, the negligent  
15 hiring and supervision claim against RTS does form part of the same case or controversy under §  
16 1367.

17 b. Assault and Battery and Outrage Claims Against Moench

18 The assault and battery and outrage claims against Moench both arise from the same set of  
19 underlying facts. Thus, if these underlying facts form part of the same case or controversy with the  
20 Title VII claims, then the Court can exercise supplemental jurisdiction over both causes of action.  
21 Both causes of action allege that Defendant Moench physically touched Harp. The complaint alleges  
22 that Moench would hug Harp, rub her legs or arms, and grab her. (Intervenor's Compl. ¶ 38). These  
23 allegations, viewed alone, could lead the Court to conclude that they do not form part of the same  
24 case or controversy because the facts, testimony, and witnesses in this specific incident would not  
25 likely be related to the other incidents.

26 However, Harp's allegations do not end there. After being allegedly harmed, Harp claims that

1 she complained to both RTS and UPRR management about Moench, neither of which allegedly  
2 addressed the situation. (Intervenor’s Compl. ¶ 38). Thus, in order to prove these claims against  
3 Moench, the management of RTS and UPRR, the same individuals who will likely testify in the Title  
4 VII claims, will likely testify in the claims against Moench. Further, the facts regarding Harp’s hostile  
5 work environment allegation will likely overlap with the specific actions of Moench. Thus, the claims  
6 form part of the same case or controversy with the Title VII claim. In sum, all three causes of action  
7 against RTS and Moench form part of the same claim or controversy.

## 8 2. Exceptions to Exercising Supplemental Jurisdiction

9 Even if supplemental jurisdiction is present under § 1367(a), a district court may decline to  
10 exercise supplemental jurisdiction if: (1) the claim raises a novel or complex issue of State law, (2) the  
11 claim substantially predominates over the claim or claims over which the district court has original  
12 jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4)  
13 in exceptional circumstances, there are other compelling reasons for declining jurisdiction. § 1367(c).  
14 A court can decline to assert supplemental jurisdiction only if one of the four categories specifically  
15 enumerated in § 1367(c) applies. Executive Software of North America v. U.S. Dist. Ct., 24 F.3d  
16 1545, 1555-1556 (9th Cir. 1994). In the event that none of the four categories apply, the court *must*  
17 assert supplemental jurisdiction. Id.

18 First, RTS argues that Harp’s negligent supervision claim against RTS is a novel issue, and  
19 thus under subsection (1) of § 1367(c) the Court should decline to exercise supplemental jurisdiction.  
20 RTS reasons that while Washington law recognizes negligent supervision liability, it does not  
21 recognize this liability to a third party for negligent failure of a company to discipline a worker for  
22 discriminatory conduct.

23 The negligent hiring, retention, and supervision doctrine imposes on employers a limited duty  
24 to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.  
25 Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). However, an employer is  
26 not liable for negligent supervision of an employee unless the employer knew, or in the exercise of

1 reasonable care should have known, that the employee presented a risk of danger to others. Id.  
2 RTS's argument is not persuasive for three reasons. First, while the parties' factual scenarios may be  
3 different from previous Washington cases, RTS has not shown how this raises a novel legal issue.  
4 Harp is still required to prove the elements of negligent supervision to the fact finder. Second,  
5 Washington courts *do* allow the use of the negligent hiring, retention, and supervision claim in  
6 circumstances where the wrongdoer's job enabled and was closely connected to the wrongdoing; that  
7 is, where the alleged wrongdoing occurred at the workplace, the nature of the employee's job  
8 required him to associate with the victim, and the job duties enabled the wrongdoer to commit the  
9 alleged harm. Betty v. Al-Hellou, 98 Wn. App. 146, 149 988 P.2d 1031 (1999). This is the exact  
10 situation in this case.

11 Third, the negligent hiring, retention, and supervision doctrine has been used in related  
12 circumstances such as in assault cases, Carlsen v. Wackenhut Corp., 73 Wn. App. 247, 868 P.2d 882  
13 (1994), and in inappropriate sexual contact cases, Peck v. Siau, 65 Wn. App. 285, 827 P.2d 1108  
14 (1992), Thompson v. Everett Clinic, 71 Wn. App. 548, 555 860 P.2d 1054 (1993). Thus, there is no  
15 reason to conclude that the state court would not allow a negligent hiring, supervision, and retention  
16 claim based on the facts of this case.

17 Lastly, RTS and Moench argue that, under subsection (4) of § 1367(c), the Court should  
18 decline to exercise jurisdiction because the jury will likely be confused by the different claims that  
19 Harp alleges against UPRR, UPRR employees, RTS and Moench. Under subsection (4) of §  
20 1367(c), the Court must identify the predicate that triggers the applicability of the category (the  
21 exceptional circumstance), and then determine whether, in its judgment, judicial economy,  
22 convenience, fairness, and comity are best served by declining jurisdiction in the particular case.  
23 Executive Software, 24 F.3d at 1558. RTS and Moench's argument is not persuasive. While the  
24 evidence and testimony relating to Harp's claim against UPRR and its employees will overlap with  
25 the claims against RTS and Moench, the jury instructions will likely resolve any possibility of jury  
26 confusion. Since the instructions will instruct the jury exactly what law each party is alleged to have



1 violated and what the elements of each alleged violation are, the jury will not fault one party for  
2 violating a law that the same party is not alleged to have violated.

3 In sum, the Court has supplemental jurisdiction over Harp's three claims against RTS and  
4 Moench under § 1367(a), and none of the exceptions under § 1367(c) apply for the Court to refuse  
5 exercising jurisdiction over such claims.

6 **CONCLUSION**

7 RTS and Moench's motion to dismiss Harp's state law claims against them is DENIED  
8 because, while the Court does not have subject matter jurisdiction over such claims, the Court has  
9 supplemental jurisdiction over such claims, and none of the supplemental jurisdiction exceptions  
10 apply.

11 The Clerk is directed to send copies of this Order to all counsel of record.

12 Dated: November 22, 2004

13 /s/ Marsha J. Pechman  
14 Marsha J. Pechman  
15 United States District Judge  
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