

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C04-866P

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

ORDER DENYING DEFENDANTS
MARTIN HOWELL AND CAROL
CATES' MOTION TO DISMISS
PLAINTIFF IN INTERVENTION'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 Martin Howell (“Howell”) and Carol Cates’ (“Cates”) Motion to Dismiss Intervention Plaintiff Jill Harp’s (“Harp”) claims against them. (Dkt. No. 34). Having considered all relevant materials, the Court DENIES the motion. The Court finds that it has supplemental jurisdiction over Harp’s state law claims against Howell and Cates.

BACKGROUND¹

1
2 The Equal Employment Opportunity Commission (“EEOC”) filed a complaint on behalf of
3 Harp against Union Pacific Railroad Company (“UPRR”) alleging sexual harassment in violation of
4 Title VII of the Civil Rights Act of 1964. Harp intervened as a Plaintiff and filed federal and state
5 claims against UPRR. She also added, among other Defendants, Howell and Cates against whom she
6 alleges malicious harassment and outrage.

7 The facts, when viewed in the light most favorable to Harp, describe the extent of Howell’s
8 treatment of Harp as follows. Howell was employed by UPRR as a tie down loader, he was Harp’s
9 coworker, and he worked during hours when Harp was at work. Howell engaged in a variety of
10 sexually offensive language with Harp, and he engaged in physical sexual demonstrations. When
11 speaking to Harp, Howell used derogatory terms to refer to women. Howell told Harp he had done
12 “horrible unthinkable things” to his ex-wife. Howell told Harp he had a dream about unbuttoning her
13 blouse. Howell told Harp, “I feel you and I have a connection,” and “I knew the day I met you that I
14 was destined to meet you.” Howell told Harp the first two women he ever loved were named Jill
15 (Harp’s first name is also Jill). Lastly, Howell would often appear in an alley when Harp was alone
16 and he would sneak up on her.

17 In this motion, Howell and Cates argue that the Court does not have supplemental jurisdiction
18 over Harp’s malicious harassment and outrage claims against them. In addition, Howell and Cates
19 move in their reply to strike multiple allegations in Harp’s declaration filed with her response.
20

ANALYSIS

21
22
23 ¹ For purposes of determining jurisdiction, the Court is free to review evidence and to resolve
24 factual disputes in determining whether it has jurisdiction over a claim. Steen v. John Hancock Mutual
25 Life Ins. Co., 106 F.3d 904, 910 (9th Cir. 1997). However, where jurisdiction is so intertwined with the
26 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). Howell and Cates argue that the summary judgment standard
is not applicable to this motion, but they fail to provide any supporting legal authority.

1 **A. Howell and Cates' Motion to Strike Allegations in Harp's Declaration**

2 Howell and Cates move to strike over 30 paragraphs of allegations made by Harp in her
3 declaration filed with her response. In looking at the allegations, it is not necessary for the Court, at
4 this time, to make evidentiary rulings on all of these paragraphs. Rather, the Court will only make
5 rulings on the paragraphs or allegations which it intends to use in order to rule on the motion.
6 Those paragraphs are as follows: 7, 23, 24, 32-36, and 40.

7 Howell and Cates argue that Harp's statements in paragraphs 7, 23, 24, 32-36, and 40 are not
8 admissible because they are hearsay. Since all of the statements used from those paragraphs in ruling
9 on this motion are alleged statements made by Howell to Harp, the hearsay rule does not apply. Fed.
10 R. Evid. 801(d)(2)(A) (a statement is not hearsay if it offered against a party and is the party's own
11 statement in either an individual or a representative capacity). In addition, Howell and Cates argue
12 that Harp's statement in paragraph 24 is inadmissible because it is based on lack of personal
13 knowledge of the witness. As Harp correctly points out however, a witness who merely testifies to
14 the fact that the declarant made the statement need only have firsthand knowledge that the statement
15 was made, not of the events described in the statement. Bemis v. Edwards, 45 F.3d 1369, 1373 n.2
16 (9th Cir. 1995). Thus, the statements in paragraphs 7, 23, 24, 32-36, and 40 which are used to rule
17 on this motion are admissible.

18 **B. Subject Matter Jurisdiction Based on Diversity of Citizenship**

19 To bring a diversity case in federal court against multiple defendants, each plaintiff's
20 citizenship must be diverse from each defendant's. Lee v. American Nat. Ins. Co., 260 F.3d 997,
21 1004 (9th Cir. 2001). In this case, Harp is a citizen of Washington. Defendants Howell and Cates are
22 also citizens of Washington. Thus, the Court does not have diversity jurisdiction over Harp's claims
23 against Howell and Cates. Harp argues that the doctrine of necessary and indispensable parties under
24 Fed. R. Civ. P. 19 requires the Court to declare that it has jurisdiction over the claims against Howell
25 and Cates. However, Rule 19 deals with the question of whether the Court must dismiss an action
26 when it cannot add an indispensable party, not whether it should *add* parties or claims when it does

1 not have subject matter jurisdiction. Even Rule 19(a) makes clear that subject matter jurisdiction
2 must always be present.

3 **C. Supplemental Jurisdiction Over State Claims against Howell and Cates**

4 The supplemental jurisdiction statute provides that, where a district court has original
5 jurisdiction, it shall have supplemental jurisdiction over all other claims that are so related to claims in
6 the action within such original jurisdiction that they form part of the same case or controversy. 28
7 U.S.C. § 1367(a). Supplemental jurisdiction includes claims that involve the joinder or intervention
8 of additional parties. Id. However, under § 1367(c), a district court may decline to exercise
9 supplemental jurisdiction when, among other reasons, the plaintiff's claim raises a novel or complex
10 issue of State law, or where, in exceptional circumstances, there are other compelling reasons for
11 declining jurisdiction. The Court can decline to assert supplemental jurisdiction only if one of the
12 categories specifically enumerated in § 1367(c) applies. Executive Software of North America v.
13 U.S. Dist. Ct., 24 F.3d 1545, 1555-1556 (9th Cir. 1994). In the event that none of the categories
14 apply, the court *must* assert supplemental jurisdiction. Id.

15 Howell and Cates' primary argument is that the malicious harassment law has not been used in
16 the sexual harassment context, and thus, a novel issue of state law exists. This argument is very
17 similar to Defendants Rail Terminal Services and Alan Moench's argument regarding the novelty of
18 the negligent hiring, retention, and supervision claim, which this Court rejected. Similarly here, while
19 the factual scenario in the present case may be different from prior Washington cases, Howell and
20 Cates have not shown how this raises a novel legal issue. Harp is still required to prove the elements
21 of malicious harassment, which have been laid out by the statute and by Washington cases. The
22 legislature specifically created a private cause of action to provide redress for victims of malicious
23 harassment regardless of their factual circumstances. See RCW 9A.36.083.

24 In addition, Howell and Cates argue that the Court should dismiss the claims because
25 retaining all claims and parties will probably lead to jury confusion and prejudice, since the jury will
26 have difficulty differentiating among the Defendants and the different claims alleged against each

1 Defendant. This argument was already addressed and rejected in this Court's Order Denying
2 Defendant Moench and RTS' Motion to Dismiss Intervention Plaintiff's Claims.

3 Lastly, Howell and Cates make two other arguments. First they argue that Harp cannot show
4 that Howell's alleged actions were because of his hatred towards Harp's gender. Second, they argue
5 that Harp does not and cannot allege that Howell caused her physical injury, caused her to suffer
6 property damage, or threatened her with specific physical harm. Both of these arguments are more
7 appropriately failure-to-state-a-claim arguments; they are not applicable in Howell and Cates' motion
8 to dismiss for lack of subject matter and supplemental jurisdiction.

9 CONCLUSION

10 The Court DENIES Howell and Cates' motion to dismiss because the Court has supplemental
11 jurisdiction over Harp's malicious harassment and outrage claims against Howell and Cates. The
12 application of the malicious harassment statute in this context does not raise a novel legal issue, and
13 there are no other compelling reasons precluding the Court from exercising supplemental jurisdiction.

14
15 The Clerk is directed to send copies of this Order to all counsel of record.

16 Dated: December 17, 2004.

17 /s/ Marsha J. Pechman
18 Marsha J. Pechman
19 United States District Judge
20
21
22
23
24
25
26