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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOHN A. MILANO IA Part 3
Justice

DAWN MOREA, et al.,	:	Index Number 18898 1998
Plaintiffs,	:	
- against -	:	Motion Date: October 2, 2001
LOCAL UNION NO. 74 OF THE SERVICE EMPLOYEES INTERNATIONAL UNION, et al.,	:	Motion Cal. No. 26
Defendants.	:	

The following papers numbered 1 to 20 read on this motion by defendants for an order dismissing the claims of Ellen Gamble and Dorothy Simonson.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits (A-B)	1 - 10
Answering Affidavits-Exhibits (A-D)	11 - 16
Reply Affidavits	17 - 20

Upon the foregoing papers it is ordered that this motion is granted.

Plaintiffs Dawn Morea and Dolly Viarnes commenced the within action in August 27, 1998, alleging that they were subjected to sexual discrimination and a hostile work environment in violation of Section 296 of the Executive Law and Title 8 of the Administrative Code of the City of New York. Defendants Local Union No. 74 of the Service Employees International Union, and Jack Ryan moved to dismiss the complaint on September 23, 1998, and the court, in an order dated October 30, 1998, directed the parties to appear for a traverse hearing on January 30, 1999. The defendants, on that date, and agreed to serve an answer. Defendants served an answer on February 19, 1999 and an amended answer was served on February 26, 1999. On March 11, 1999, the plaintiffs served defendants with their first amended verified complaint which, inter alia, attempted to add three new plaintiffs and have these claims relate back to the commencement of the action. Defendants

rejected this complaint and moved to dismiss the claims of Pam Driggerz on the grounds that it was timed barred and for a more definitive statement as to the claims of Ellen Gamble and Dorothy Simonson. This court, in an order dated April 30, 2001, dismissed Driggerz' claims as time-barred, and directed the plaintiffs to re-serve the amended complaint, setting forth "particulars as to the dates, times and locations of the incidents comprising the claims of plaintiffs Ellen Gamble and Dorothy Simonson". Plaintiffs served their second amended complaint on June 5, 2001.

Defendants Local 74 and Ryan now move to dismiss the second amended complaint on the grounds that Gamble and Simonson were not employees of Local 74 or Ryan, and therefore cannot maintain the within action in the absence of an employer-employee relationship; that these causes of action accrued more than three years prior to either the filing of the original compliant on August 27, 1998 and that these plaintiffs were not named in the complaint, or the date that they were improperly added as plaintiffs in March 1999; and that the plaintiffs have failed to allege any actionable conduct.

Plaintiffs Gable and Simonson in opposition seek leave to serve a third amended complaint, adding Local 74 Benefits Fund as a defendant. It is conceded that Gable and Simonson did not receive their pay from Local Union 74, but assert that a sufficient employee-employer relationship existed between the union and these plaintiffs to warrant relief under the Executive Law and the Administrative Code. It is further asserted that these claims are timely, as the Local 74 Benefits Funds are united in interest with Local Union No. 74 and the individual defendants, and thus the claims relate back to the service of the first amended complaint on March 11, 1999.

The evidence submitted herein clearly establishes that plaintiffs Gamble and Simonson were not employees of the union. Ellen Gamble states in her affidavit that she was hired by Local 74 Benefit Funds in 1986, that her contract was renewed by the funds in 1990, that she was the employed as the Deputy Fund Administrator and that she worked under the supervision of the Fund Administrator. The Fund Administrator was under the supervision of the Trustees of the Funds. Ms. Gamble ceased her employment with the Local 74 Benefits Fund in October 1999. Dorothy Simonson states in her affidavit that she received her compensation from the Local 74 SEIU Pension Fund. Ms. Simonson was also under the ultimate control and direction of the Trustees as regards her employment. The Local 74 Pension Fund, Welfare Fund, Annuity Fund, Training and Scholarship Fund and Legal Services Fund are employee benefits plans established pursuant to a variety of federal laws. The Local 74 Pension Fund is the administrative paying entity for all Local 74 Benefits Fund Employees. Ms. Gamble, as an assistant to Administrator to all five funds received her salary and benefits from the Pension Fund, although these costs were allocated between the five funds.

Inasmuch a Gamble and Simonson were not employees of the defendant Local Union No. 74 and Ryan, they cannot maintain the within action against the union. Plaintiffs' request for leave to serve a third amended complaint is denied. The proposed pleading alleges that defendant Alladeen between April 1992 and October 1996 engaged in offensive conduct disrupting the work activities in the office, often in Gamble's presence; that this occurred on numerous occasions both before and March 11, 1996, and that she made complaints to defendant Ryan in January and February 1996. As regards Simonson the proposed pleading alleges that on numerous occasions both before and after March 11, 1996, she was forced to listen to, or overheard, Alladeen's abusive comments and behavior, and that she complained to Gamble in January or February 1996. Because the Statute of Limitations for plaintiffs' claims under the Executive Law and Administrative Code is three years, it is clear that the proposed action against the Benefit Funds is untimely unless the relation-back doctrine applies. Inasmuch as the defendants have established that the Statute of Limitations has run, the burden shifts to the plaintiff to establish the applicability of the relation-back doctrine (see, Austin v Interfaith Med. Ctr., 264 AD2d 702; Moller v Taliuaga, 255 AD2d 563). "[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are 'united in interest'" (Buran v Coupal, 87 NY2d 173, 177; see, Poulard v Papamihlopoulos, 254 AD2d 266). To establish the applicability of the relation-back doctrine, "a plaintiff is required to prove that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against that party as well" (Austin v Interfaith Med. Ctr., supra, at 703; see, Buran v Coupal, supra; Moller v Taliuaga, supra). Here, the evidence demonstrates that both Gamble and Simonson knew that they were employed by the Benefit Funds and not the Union. Therefore their failure to commence a timely action against the Benefits Fund was not due to any mistake as to the property identity of the defendants. Additionally, Union Local No. 74 and the Benefit Funds are clearly distinct and separate entities, which shared the office space in a building owned by the Benefit Funds. Their operations, however, are clear and distinct as required by law, and plaintiffs have failed to submit any evidence which establishes that the union controlled and directed the plaintiffs' work. The fact that Gamble and Simonson's duties included attending union functions and performing certain services for the benefit of union members did not create an employment relationship with Union Local 74. The

court, therefore, finds that Local Union No. 74 and the Benefit Funds are not united in interest since their respective interests in the subject matter are not such that "they stand or fall together and that judgment against one will similarly affect the other". (Mondello v New York Blood Ctr., 80 NY2d 219, 226).

In view of the foregoing defendants' motion to dismiss the within complaint as to plaintiffs' Gamble and Simonson is granted.

Dated: November 9, 2001

Justice John A. Milano