STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 240-4-15 Rdcv

JOSHUA TRUDEAU,
Plaintiff

v.

FAIRPOINT COMMUNICATIONS, INC. and
TELEPHONE OPERATING COMPANY OF VERMONT LLC,
Defendants

DECISION & ORDER
Fairpoint Communications, Inc.'s Motion to Dismiss

Introduction

This is an employment dispute in which the Plaintiff, a former employee of Defendant Telephone Operating Company of Vermont LLC ("TOCVT"), alleges that the Defendants failed to provide reasonable accommodation for the Plaintiff's disability as they were required to do under the Fair Employment Practices Act, 21 V.S.A. § 495 *et seq.* ("FEPA"). The Plaintiff is represented by James G. Levins, Esq. and the Defendants are represented by Debra L. Bouffard, Esq.

Defendant Fairpoint Communications, Inc. ("FCI") moved on August 17, 2015 for dismissal as to itself for failure to state a claim on which relief could be granted, pursuant to V.R.C.P. 12(b)(6). The Plaintiff filed his opposition to this motion on August 27, 2015, and FCI filed its reply on September 14, 2015. For the reasons set forth herein, the Court denies the motion.

Legal Standard for Motion to Dismiss

"Motions to dismiss for failure to state a claim are disfavored and are rarely granted." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5 (citation omitted). In Vermont, "the threshold a plaintiff must cross in order to meet our notice-pleading standard is exceedingly low." *Moreau v. Sylvester*, 2014 VT 31, ¶ 83 (internal quotation and citation omitted). Vermont courts "should be especially reluctant to dismiss on the basis of pleadings when the asserted theory of liability is novel or extreme." *Association of Haystack Property Property Owners, Inc. v. Sprague*, 145 Vt. 443, 447

(1985) (citations omitted). 12(b)(6) motions "will not be granted unless it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Murray v. City of Burlington*, 2012 VT 11, ¶ 2.

In evaluating a motion to dismiss, the Court must "assume as true all facts as pleaded in the complaint, accept as true all reasonable inferences derived therefrom, and assume as false all contravening assertions in the defendant's pleadings." *Birchwood Land Co., Inc. v. Krizan*, 2015 VT 37, ¶ 6 (citation omitted).

Analysis

The Court notes as a preliminary matter that both FCI's motion and the Plaintiff's opposition were filed with exhibits that the parties propound as evidence on matters of fact. "The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the law of the claim, not the facts which support it." *Samis v. Samis*, 2011 VT 21, ¶ 9. In rendering a decision on the motion, the Court does not consider FCI's exhibit or the affidavit of Susan L. Sowell attached to the motion, nor does it consider any of the seventeen exhibits attached to the Plaintiff's opposition. There are all materials outside the pleadings, which have no bearing on the disposition of a motion to dismiss.

FCI argues that dismissal is appropriate because it has never been the Plaintiff's employer, and that TOCVT was in fact the Plaintiff's only employer at all relevant times. The Plaintiff argues in his opposition that the single employer doctrine and joint employer doctrine are potential grounds for finding FCI liable as an employer. FCI in reply characterizes the Plaintiff's theory of liability as "novel." Under *Haystack*, 145 Vt. at 447, novel theories of liability are entitled to consideration pending the development of facts. The lack of established Vermont precedent supporting the Plaintiff's theory is not grounds for dismissal where the issue has not been considered.

FCI argues that the single employer doctrine and joint employer doctrine are confined to cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., a context in which the doctrines have been used to aggregate employers in order to meet the jurisdictional threshold of fifteen employees. FCI correctly notes that the Vermont Supreme Court has never condoned the application of either doctrine in a FEPA case. However, examination of the federal case law indicates that the doctrines are not as limited in application as FCI contends. *See, e.g., Clinton's Ditch Cooperative Co., Inc, v. NLRB*, 778 F.2d 132 (2d. Cir. 1985) (discussing in detail the precedent establishing the single employer and joint employer doctrines in the context of a claim of a collective bargaining violation

under the National Labor Relations Act); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997) (imposing joint employer liability in a case arising out of violations of the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act, and state labor laws). Additionally, the Court notes that Vermont's FEPA "is patterned on Title VII." *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1239 (2d. Cir. 1995). This suggests that some principles of federal Title VII jurisprudence might properly inform an analysis of a Vermont FEPA case.

The Court is cognizant of the authorities establishing the principle that parent corporations are not liable for the wrongful acts of their subsidiaries, including *United States v. Bestfoods*, 524 U.S. 51 (1998), cited extensively by FCI. However, the Court cannot conclude at this early juncture that "it appears beyond doubt that there exist no facts or circumstances" under which the Plaintiff might be able to show that FCI exercised a degree of control over TOCVT beyond mere shareholder control that might subject it to liability under a single employer or joint employer theory. *Murray v. City of Burlington*, 2012 VT 11 at ¶ 2.

The Court acknowledges that FCI vigorously disputes that it was ever the Plaintiff's employer in any sense, but this question cannot be decided in FCI's favor at this early stage on a motion to dismiss. With the benefit of facts developed in discovery, FCI is free to raise the issue at the summary judgment stage.

FCI also challenges the sufficiency of the Plaintiff's allegations that FCI "failed to engage in good faith discussions and interactive process regarding accommodation" and "failed to make reasonable accommodations" for the Plaintiff's medical condition. FCI characterizes these allegations as "vague, conclusory legal assertions." Contrary to FCI's characterizations, the Plaintiff's allegations are sufficient to give FCI fair notice of the nature of the Plaintiff's claim, and that sufficient to satisfy V.R.C.P. 8(a). *Endres v. Endres*, 2006 VT 108, ¶ 4.

ORDER

For the reasons set forth above, Fairpoint Communications, Inc.'s Motion to Dismiss is *denied*.

Dated at Rutland this 25th day of November 2015.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge