

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

Debra Molfese,                   :  
    Plaintiff,                   :  
                                  :  
v.                                :  
                                  :  
Fairfaxx Corp.,                :  
    Defendant.                 :

Civil No. 3:05cv317 (JBA)

**Ruling on Motion to Amend Complaint [Doc. # 38]**

Plaintiff Debra Molfese ("Molfese"), a former Executive Recruiter employed by defendant Fairfaxx Corporation ("Fairfaxx"), brought an eight-count complaint alleging sex harassment and retaliation in violation of both Title VII of the Civil Rights Act of 1964 and the Connecticut Fair Employment Practices Act, as well as state common law claims for breach of contract and fraud. See Complaint ("Compl.") [Doc. # 1]. She now seeks to amend her complaint to add claims for violation of the Connecticut Unfair Trade Practices Act and the Uniform Fraudulent Transfer Act against three new defendants: Fairtekk Corporation ("Fairtekk"), Joseph Tucci, and Justin Tomborello a/k/a Jeff Thomas. See Mot. to Amend [Doc. # 38], Ex. A. For the following reasons, plaintiff's motion will be granted to the extent that Fairtekk may be impleaded as a defendant on the existing Title VII and CFEPA claims, but denied as to the additional causes of action and the individual defendants.

**I. Factual Background**

Plaintiff's first complaint alleges the following facts.

Plaintiff worked as an Executive Recruiter at Fairfaxx from September 2002 to February 2004. Compl. ¶ 9. One month after her employment began, Jeff Thomas, the President of Fairfaxx, “started to make inappropriate comments to her about her breasts.” Id. at ¶ 12. “In December 2002, Jeff Thomas started making sexual comments to plaintiff on a regular basis.” Id. at ¶ 13. Thomas’s sexual comments, particularly about plaintiff’s breasts, continued throughout her employment at Fairfaxx, and Thomas also inappropriately touched plaintiff and made obscene gestures toward her on several occasions. Id. at ¶¶ 19, 25-26.

When plaintiff complained to Thomas, “[h]e said, ‘Hey I am who I am... if you don’t like it, you don’t have to stay’.” Id. Plaintiff complained on several occasions to the Fairfaxx office manager, who “told plaintiff ‘It’s just the way he [Thomas] is, he doesn’t care what anyone thinks. He’s never going to change’.” Id. at ¶¶ 18, 21. Fairfaxx “partner Joe Tucci would make comments to [plaintiff] such as ‘you know, it doesn’t matter what someone bills here, if someone just doesn’t fit in, and get along then they don’t belong here.’ Plaintiff viewed this as an underlying threat that if she didn’t back off when Jeff made sexual and lewd comments to her, she would be fired.” Id. at ¶ 20. Plaintiff, based on information from the bookkeeper, was afraid that if she left Fairfaxx, they would not pay her the substantial amount of money she was owed in commissions. Id. ¶

26.

By fall 2003, plaintiff was becoming physically ill, experienced chest pains, and was hospitalized at one point with stomach cramps. Id. ¶ 28. She alleges that in December 2003 she began to suffer depression due to the harassment she experienced from Thomas. Id. at ¶ 30.

Plaintiff's complaint contains further allegations that Fairfaxx concealed receipt of a fee from a client in order to diminish her share of the commission in December 2003-January 2004, and that Fairfaxx "lied to her about her contribution to the company in 2003." Id. ¶¶ 31-38.

Plaintiff resigned in February 2004, writing in her resignation letter that "she was quitting her job at Fairfaxx because she could no longer take the sexual harassment from Jeff Thomas." Id. ¶ 39.

Plaintiff's proposed amended complaint adds allegations that after plaintiff filed the present sexual harassment lawsuit, Fairfaxx fraudulently concealed its assets and ceased to do business (although it did not formally dissolve as a corporation), transferring all operations to Fairtekk Services Group, LLC ("Fairtekk"), which operates at the same address, utilizes the same telephone number, office equipment and computers, and employs many of the same people as previously employed by Fairfaxx, who are still in the business of corporate

recruiting. See Proposed Am. Compl. [Doc. # 39-2].

## **II. Standard**

Federal Rule of Civil Procedure 15(a) provides that leave of court to amend the party's pleading "shall be freely given when justice so requires."

If the underlying facts or circumstances relied on by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). It is the "rare" case in which such leave should be denied. See Ricciuti v. N.Y. City Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991).

However, leave to amend may be denied where the proposed allegations or legal claims are not based on the same nucleus of operative fact as alleged in the original complaint. Lopez v. Smiley, 375 F. Supp. 2d 19, 30 (D. Conn. 2005); Stiller v. Colangelo, 221 F.R.D. 316, 317 (D. Conn. 2004); 6 Wright & Miller, Federal Practice and Procedure § 1487 (2005) (leave to amend may be denied where "the issues raised by the amendment are remote from the other issues in the case....").

## **III. Discussion**

Plaintiff's proposed new causes of action for violations of

CUTPA and the Uniform Fraudulent Transfers Act, against new defendants Fairtekk, Tucci and Thomas, concern actions that took place long after the events that are the subject of the original complaint. The essence of plaintiff's new causes of action is that Fairtekk and the individuals defendants, who control both Fairtekk and Fairfaxx, fraudulently concealed Fairfaxx's assets to avoid liability on plaintiff's original complaint. However, these allegations are entirely distinct from the facts underlying the original complaint, which center on Thomas' harassment and failure to pay a commission due. Furthermore, plaintiff's new legal claims are premature. If plaintiff prevails on her sexual harassment/retaliation case, and one or more defendants has become judgment-proof due to the shifting of assets to Fairtekk, at that point plaintiff may bring a lawsuit alleging fraud or state statutory violations and asserting that the corporate veil should be pierced. However, the current lawsuit is not the appropriate forum for such claims, as they are not factually or legally related to the sexual harassment/retaliation and breach of contract allegations in the original complaint.

Therefore plaintiff's request to add claims for violations of CUTPA and the Uniform Fraudulent Transfers Act (Counts Nine and Ten of the proposed Amended Complaint), and to add Tucci and Thomas as individual defendants, are denied.

In her reply brief, plaintiff argues that Fairtekk is the

successor in interest to Fairfax and may be liable in that capacity for Thomas's violations of Title VII and CFEPA. Courts have held that successorship liability is a fact-specific inquiry. See EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981); Long v. AT & T Info. Sys., Inc., 733 F. Supp. 188, 208 (S.D.N.Y. 1990) (citing Am. Bell, Inc. v. Fed'n. of Tel. Workers of Pa., 736 F. 2d 879, 888 (3d Cir. 1984); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1092 (6th Cir. 1974)). Drawing from principles of labor law, the Sixth Circuit has established a frequently-cited test to determine whether a successor company is liable for its predecessor's discriminatory actions toward an employee:

- 1) whether the successor company had notice of the charge,
- 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.

McMillan, 503 F.2d at 1094. See also Stevens v. Coach U.S.A., 386 F. Supp. 2d 55, 65-66 (D. Conn. 2005).

Based on these factors, plaintiff's request to add Fairtekk as a defendant in the Title VII and CFEPA counts cannot be said to be futile. Plaintiff avers that discovery has shown substantial continuity of the business operations from Fairfax

to Fairtekk, with Fairtekk remaining in the same office at the same address, utilizing the same telephone number, computers and office equipment, and employing essentially the same staff. She further alleges that while Fairtekk previously did not undertake corporate recruiting (previously Fairtekk was limited to IT work), it has now taken over that function from Fairfaxx. Additionally, both corporations are controlled by the same individuals, Tucci and Thomas.

Plaintiff therefore will be permitted to amend her complaint to allege successorship liability on the part of Fairtekk for the sexual harassment and retaliation allegedly committed by Thomas while plaintiff was employed by Fairfaxx (Counts One through Six).

#### **IV. Conclusion**

Accordingly, plaintiff's motion to amend [Doc. # 38] is GRANTED IN PART AND DENIED IN PART as specified above. Plaintiff's amended complaint shall be filed within two weeks of the date of this order.

IT IS SO ORDERED.

/s/ \_\_\_\_\_  
JANET BOND ARTERTON  
United States District Judge

**Dated at New Haven, Connecticut, this 12th day of May, 2006.**